

**Pre-Emptying the Court: Member State Expectations, Political Oversight and the Nexus of Law and Politics in the EU**

*'ECJ rulings matter because they can create solutions that did not exist in prior debates on policy problems'*

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**ABSTRACT**

This paper seeks to understand the role of the ECJ as a focal point in the inter-relationship between law and politics in the EU system. By conceptualising the Court as a fiduciary, operating within a strategic space, rather than an agent, it shows how member states have tried to respond to the Court's ability to set the policy agenda. In particular, the paper focuses on attempts to curtail such agenda-setting by restricting potential ECJ interpretation of the treaties, which we call *ex ante* measures. These measures are intended to constrain the independence of the Court. Yet the constraints on a fiduciary, we further show, are not sufficient to forestall ECJ rulings that create spillover effects in policy areas beyond formal EU competences. Nevertheless, more *ex ante* restrictive clauses were adopted as the only means of making the insertion of the Charter of Fundamental Rights into the Constitution palatable to certain member states. However, an analysis of the effectiveness of such measures reveals they are highly unlikely to circumscribe the Court's interpretive discretion. Thus it appears that *ex ante* measures are not apt to constrain a fiduciary and prevent it from contributing to the policy agenda. Hence Court rulings will continue to highlight both competence questions and the difficulty states have in responding to the actions of supranational institutions.

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<sup>1</sup> Lisa Conant, Justice Contained: Law and Politics in the European Union (Ithaca: Cornell University Press, 2002), p. 11.

## Introduction

The political science literature in EU studies has sometimes claimed that 'the ECJ [has] escaped member state control',<sup>2</sup> an argument then used to explain why the Court unexpectedly became a vector of integration. To illustrate this supposed free rein, scholars refer to the establishment of constitutional supranationalism<sup>3</sup> as well as to how the Court indirectly has set the agenda of integration through landmark decisions on gender equality,<sup>4</sup> competition rules for telecommunications<sup>5</sup> and national airlines<sup>6</sup> and the doctrine of mutual recognition.<sup>7</sup> These arguments usually point to the formal absence of *ex post facto* political control over jurisprudence, besides treaty revision, to reinforce their claims.<sup>8</sup> Consequently, the integration story has often been characterised as one of "judicial activism"<sup>9</sup> breaching the legitimate interaction of law and politics in a democratic system. However, this court-centric, activist interpretation, as Conant argues, gives a somewhat distorted picture of the relations between law and politics in the EU by portraying the Court as a seemingly uncontrollable handmaiden of integration.<sup>10</sup>

To understand better the nexus of law and politics in the EU, therefore, this paper seeks to develop an interdisciplinary approach bridging legal scholarship and political science akin to that already pursued by several scholars in the field of EU studies.<sup>11</sup> It thus combines, on the one hand, a discussion of evolving member state expectations and preferences regarding integration as well as political reactions to Court rulings with, on the other, a close study of treaty obligations and case law. The object is to amend the characterisation of a court as an agent beyond the control of its principal by building on both Majone's and Helfer and Slaughter's notion of the ECJ as a fiduciary operating under "constrained independence".<sup>12</sup> Hence this paper also seeks to confirm Stone Sweet's and Conant's suggestion that there is a compelling need for a more nuanced understanding of the relationship between law and politics in the EU.<sup>13</sup>

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<sup>2</sup> Karen Alter (1998), 'Who Are the "Masters of the Treaties"? European Governments and the European Court of Justice', International Organization, 52 (1) pp. 121-47, at p. 122

<sup>3</sup> Joseph H. Weiler (1991), 'The Transformation of Europe', Yale Law Journal, 100 (8), pp. 2403-83.

<sup>4</sup> Alec Stone Sweet and James Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration', in Wayne Sandholtz and Alec Stone Sweet (eds), European Integration and Supranational Governance (Oxford: OUP, 1998), pp. 92-133.

<sup>5</sup> Conant, Justice Contained, pp. 95-121.

<sup>6</sup> Dolores O'Reilly and Alec Stone Sweet (1998), 'From National to Supranational Governance: The Liberalization and Reregulation of Air Transport', Journal of European Public Policy, 5, pp. 447-66.

<sup>7</sup> Stone Sweet and Caporaso, 'From Free Trade'.

<sup>8</sup> Alter, 'Who Are the Masters'; Alec Stone Sweet and Thomas Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', American Political Science Review, 92, 63-81.

<sup>9</sup> The classic work is, of course, Hjalte Rasmussen, On Law and Policy in the European Court of Justice (Dordrecht: Kluwer, 1986)

<sup>10</sup> Conant, Justice Contained.

<sup>11</sup> Conant, Justice Contained; Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (Oxford: OUP, 2000); Walter Mattli and Anne-Marie Slaughter (1998), 'Revisiting the European Court of Justice', International Organization, 52 (1), pp. 177-209.

<sup>12</sup> Laurence Helfer and Anne-Marie Slaughter (2005), 'Why States Create International Tribunals : A Response to Professors Posner and Yoo', California Law Review, 93 (3), pp. 899-956, at p. 63.

<sup>13</sup> Alec Stone Sweet, 'The Judicial Coup d'Etat and the Problem of Authority : CLIFIT and Foto-Frost', in Miguel Poiars Maduro and Loïc Azoulai (eds), The Past and Future of EU Law: The Classics of EU Law

Our first aim, therefore, is to show the extent to which the Court's role as a key actor in integration is constrained by what Helfer and Slaughter call the "strategic space" within which it operates. This strategic space reflects member states' expectations about the purposes and limits of integration as well as their attempts to both pre-empt and respond to ECJ rulings. Existing studies reveal the influence of certain *ex post* measures for responding to ECJ rulings, such as non-compliance or co-ordinated policy measures in the Council.<sup>14</sup> However, we also demonstrate the importance of *ex ante* measures – *whereby member states expect to be able to pre-empt Court rulings to limit its policy impact* – in shaping this strategic space. The member states have not redrawn the original institutional architecture to render the ECJ's political influence nugatory. Rather, during treaty renegotiation, they attempt to ring-fence certain areas of national prerogative against ECJ interference, even going so far as to deprive the Court of authority over the second and third pillars. By analysing the treaties, we show the importance of recognising that the member states try to anticipate how the Court could use the text of these documents against their own interests and contrary to what they consider a politically palatable level of integration.

Thus the paper's second aim is to analyse the benefits and risks that stem from the member states' reliance on constrained independence to circumscribe the Court's ability to render judgments with important political consequences for the member states. In order to do so, we examine the claim that the ECJ creates solutions 'that did not exist in prior debates on policy problems'.<sup>15</sup> Using an example from a recent ECJ ruling on education policy regarding member states' right to restrict the mobility of students, we argue that the Court's fiduciary role as an indirect agenda-setter cannot always facilitate finding solutions to policy problems. Integration is said to mean – or even justified by virtue of the claim – that 'states are losing autonomy but acquiring capacities'.<sup>16</sup> Yet the evidence presented here suggests that as a result of ECJ rulings there can be a loss of autonomy without the acquisition of competences. For instance, education is an area that cannot be subject to harmonisation under the Maastricht Treaty and yet the ECJ nevertheless rigorously enforces principles of free movement and non-discrimination in this policy area that greatly affect domestic discretion in this policy area.

Thus we further claim that pre-empting the court is part of a dilemma of judicial politics over competences and controlling a fiduciary that is unique to integration. This is because the strategic space offered the ECJ, often the result of changed member state expectations in response to its jurisprudence, is designed to minimise its ability to produce spillover effects in domestic and EU policy-making. However, even within this strategic space the Court retains the ability to rule that certain political decisions can no longer be made at the national level – what Mayer calls "abolished competences".<sup>17</sup> Member states, therefore, have less reason to fear a usurped transfer of their competences as a result of ECJ rulings than judgments that

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Revisited on the 50th Anniversary of the Rome Treaty (Oxford: Hart, *forthcoming*); Conant, Justice Contained, pp. 238-42.

<sup>14</sup> Conant, Justice Contained; Geoffrey Garrett *et al.* (1998), 'The European Court of Justice, National Governments and Legal Integration in the European Union', International Organization, 52 (1), pp. 149-76; Derek Beach, Between Law and Politics: The Relationship Between the European Court of Justice and EU Member States (Copenhagen: DJØF: 2001).

<sup>15</sup> Conant, Justice Contained, p. 11

<sup>16</sup> James Caporaso ??????????

<sup>17</sup> Franz Mayer (2005), 'Competences-Reloaded? The Vertical Division of Powers in the EU and the New European Constitution', ICON, 3, pp. 493-515, at p. 508.

affect certain national competences that, as in the education example, have politically important consequences difficult to resolve either individually or collectively.

In this sense of creating a void by prohibiting certain national practices in a context where alternative European-level policy options are limited and, because they raise the question of the scope and purpose of integration,<sup>18</sup> highly controversial, there remains an important difference between the EU regime and the relationship between law and politics in ordinary domestic politics.<sup>19</sup> Hence the paper concludes with an examination of the prospect of making respect for the Charter of Fundamental Rights a legal obligation when implementing EU law, as proposed by the un-ratified Constitutional Treaty. At the insistence of the least integrationist-minded states, a host of clauses of restrictive interpretation have been added to avoid unwelcome Court interpretations affecting domestic discretion and competences. Thus, depending on the effectiveness of such clauses, the Charter represents a potential turning point in the reliance on *ex ante* measures to pre-empt ECJ jurisprudence. However, both a close analysis of this part of the Constitution and a consideration of previous Court rulings leads us to argue that the introduction of the Charter is likely to strengthen the agenda-setting role of the Court to an extent that could become anathema to certain member states. More than ever, the Court is likely to stand at the nexus of politics and law as a lightning rod both for intractable conflicts over division of competences and for signalling the inherent difficulties of controlling a fiduciary *ex ante*

## 1. Understanding the Strategic Space of the Court

### *The Problem of Understanding the Role of the Court*

It is basically impossible to understand EU politics without appreciating the complex role that ECJ jurisprudence plays in the project of ever closer union. Hence the interweaving of law and politics in the novel European polity adds a further difficulty when it comes to understanding the functioning of the EU. Indeed, attempts to define the relationship between law and politics have also given rise to polemics, especially over the role played by the Court given that this institution is the focal point for this relationship. In particular, the question of whether the Court has a legitimate role in contributing to setting the policy agenda is the most vexing.

Perhaps the best-known polemic against the Court's contribution to agenda-setting is the theory of "judicial activism" developed by Rasmussen, who contends that the ECJ pursues a federalist agenda which has led it to usurp powers not accorded it under the treaty. Rather than ensuring the interpretation and application of the *acquis*, the Court has, Rasmussen argues, presumed norm-setting powers.<sup>20</sup> Nevertheless, this viewpoint has been widely

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<sup>18</sup> *Ibid.*, pp. 514-5.

<sup>19</sup> Conant argues persuasively that the compliance problem is no reason to distinguish international from domestic Courts, however, she does not mention how international courts raise issues of the legitimate scope and purpose of collective action that are normally uncontroversial in domestic, even federal, settings. *Justice Contained*, pp. 218-9.

<sup>20</sup> It is noteworthy that the author comes from a country with a strongly positivist legal tradition in which the High Court exercises great self-restraint in questions with a political connotation, especially when undertaking constitutional review. The Extra-legal considerations influencing the ECJ have received substantial attention in the literature. See e.g. David Keeling, 'In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?', in Curti Gialdino (ed.), in *Scritti in onore di Giuseppe Federico*

disputed as some authors point towards the evolutionary nature of constitutional law emphasising that no court exists in a political vacuum, whilst others simply recall that legal indeterminacy constitutes a general characteristic of law, which necessitates some interpretative discretion.<sup>21</sup>

Furthermore, from a strictly legal perspective, it is problematic to argue that the Court manifestly applies the broadest possible interpretation of treaties and secondary legislation<sup>22</sup> and even more to assume an unlawful transgression of its powers. A number of judgments, and in particular the rulings establishing supremacy<sup>23</sup> and direct effect,<sup>24</sup> are of undisputed constitutional significance to the Community.<sup>25</sup> However, there is ample room for arguing in support of the legality of these judgments.<sup>26</sup> Although the EEC was established by an international treaty, it is organized to a great degree according to the principle of supranationalism. Therefore, both conventional monist and dualist dichotomies that regard domestic and international law as either integrated or separate systems framed around traditional international law treaty-designs are not adequate frameworks for settling questions concerning the hierarchy of Community and domestic norms, which are central to the notion of the relationship between law and politics in the EU.

Indeed, the very choice of a supranationalist "third way" in part served to preclude the unreflective invocation of established international law doctrines.<sup>27</sup> In his legal analysis of supranationalism from 1955, Kunz appraised the peculiar traits of supranationalism as a *tertium quid* between international law and national law. It differs, he noted, from traditional

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Mancini (Milan: A Giuffrè, 1998); Hjalte Rasmussen, Memorandum, The UK Parliament House of Lords, Select Committee on European Union, 5 October 2003; Hjalte Rasmussen (2000), 'Remedying the Crumbling EC Judicial System', Common Market Law Review, 37 (5), pp. 1071-1112; Hjalte Rasmussen (1988), 'Between Self-Restraint and Activism: A Judicial Policy for the European Court', European Law Review, 13 (1), pp. 28-38; Takis Tridimas (1996), 'The Court of Justice and Judicial Activism', European Law Review 21, pp. 199-210; Joseph H. H. Weiler (1981), 'The Court of Justice on Trial', Common Market Law Review 24, Sir Patrick Neill (1995), Renaud Dehousse, The European Court of Justice: The Politics of Judicial Integration (New York: St. Martin's Press, 1998) Eric Stein (1981), 'Lawyers, Judges and the Making of a Transnational Constitution', American Journal of International Law 75, pp. 1-27.

<sup>21</sup> See, e.g., Mauro Cappelletti (1987), 'Is the European Court of Justice Running Wild?', European Law Review 12:3, pp. 3-17, Joxerramon Bengoetxea, The Legal Reasoning of the European Court of Justice (Oxford: Clarendon Press, 1993). Former ECJ judge Sir Edward, 'European Integration and the Single Market: The Role of the European Court of Justice', European Policy Centre, Briefing <http://www.theepc.be/en/default.asp?TYP=ER&LV=437&see=&PG=ER/EN/directa&AI=380&CAT=58>.

Former ECJ judge Edward maintains that the ECJ's *constantly evolving job* is to interpret faithfully the treaties.

<sup>22</sup> See, e.g., the jurisprudence refuting the existence of horizontal direct effect. For a critique, see Editorial Comment (2006), 'Horizontal direct effect - A law of diminishing coherence?', Common Market Law Review, 43, pp. 1-8, Takis Tridimas (1994), 'Horizontal effect of Directives: A Missed Opportunity', Environmental Law Review, 19, pp. 621-636, E. Turnbull (1994), 'The ECJ Rejects Horizontal Direct Effect of Directives', European Business Law Review, p. 230 et seq.

<sup>23</sup> C-6/64 *Costa v E.N.E.L.* [1964] ECR 585.

<sup>24</sup> C-26/62 *van Gend en Loos* [1963] ECR 1.

<sup>25</sup> The Court has gone as far as to identify the EC Treaty as a constitutional charter. Opinion 1/91 [1991] ECR I-6079.

<sup>26</sup> Indeed Hjalte Rasmussen's argument was not based on these judgments, but rather the judiciary's establishment of norms where the Council fails to act in keeping with the Treaty, i.e. *lacunae*-filling. See Rasmussen, On Law and Policy in the European Court of Justice, p. 519.

<sup>27</sup> In C-26/62 *van Gend en Loos* [1963] ECR 1 concerning direct effect, the three states intervening before the Court, i.e. the Netherlands, Belgium and Germany, proceeded from the argument that the EEC Treaty qualified as a 'standard international treaty' and the Netherlands went on to examine the intent of the partners. See Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', pp. 6-7.

international intergovernmental organizations in various distinct aspects, notably because the latter are without direct executive force within the members' territory as well as 'based on the "sovereign equality" of their members'.<sup>28</sup> Kunz thus explicitly assumes that supranational legal regimes must possess certain sovereign powers. Implicitly, this analysis recognizes direct effect and supremacy as features of supranational treaties being self-executive.<sup>29</sup> Moreover, if interpretive questions concerning the treaties could be resolved by asking the member states substantive questions retrospectively, there would be no reason to have organised a judicial institution in the first place. The Court was created precisely to provide the juridical expertise for making informed interpretations of the system's legal consequence; invariably, such interpretations occasionally have considerable policy or even constitutional implications.

The impact of ECJ jurisprudence on domestic and European politics is demonstrated by the periodic criticism, in response to concrete rulings or clusters of policy-related case-loads, voiced by member state governments that the Court pursues an activist agenda. Often, such complaints are phrased in terms of a general appraisal of the Court.<sup>30</sup> It was this type of lament that motivated the UK's attempt to table the introduction of comprehensive legal control mechanisms in the period leading up to the Amsterdam IGC. One proposed mechanism addressed the issue that Community law may be unclear as a result of negotiations and re-drafting during the legislative process. It was argued that the Commission's right of initiative makes it difficult to amend legislation in the light of erroneous interpretations. Thus, the UK argued, 'exceptionally the Council could be given the right to decide by a simple majority to discuss the adoption of an appropriate amendment to an existing legislative act, where the purpose of the amendment is to clarify the text so as to ensure that it is interpreted and applied in accordance with the Council's original policy.'<sup>31</sup> The policy paper did not result in any amendment of the rules governing the Court.<sup>32</sup>

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<sup>28</sup> Kunz, J. L., 'Supra-National Organs' (Editorial Comments) 1952 *American Journal of International Law* 46:4, pp. 690-698, p. 696.

<sup>29</sup> Henry L. Mason, *The European Coal and Steel Community* (The Hague: Martinus Nijhoff, 1955). See also Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', p. 5 and 24 on direct effect as a variation of the IL concept of self-executing treaties and Opinion of Mr Advocate General Roemer delivered on 12 December 1962 in *C-26/62 van Gend en Loos*.

<sup>30</sup> J.W.R. Reed, 'Political Review of the European Court of Justice and its Jurisprudence', *Jean Monnet Working Paper* 95/13: 'There is growing recognition, even in Britain, that political debate and review of the Court's role is both legitimate and constructive. Sir Patrick Neill, formerly Vice-Chancellor of Oxford University, recently warned us of the 'creeping intention of the power of the European Court' and is reported to have urged that this problem be tackled at the Intergovernmental Conference (IGC) of 1996. It is reported by the same source [The Times, European Court 'strangling our liberties', September 19th, 1994] that the Home Secretary, Michael Howard, claimed 'a great deal of sympathy' for Neill's call for a reversal of the growing powers of the Court. Curiously, Sir Patrick supposes that the judicial activism of the ECJ has established it as a 'legislative body over which there is no control of higher authority'. <http://www.jeanmonnetprogram.org/papers/95/9513ind.html#II>. Ole Due (1999), 'The Impact of the Amsterdam Treaty upon the Court of Justice', *Fordham International Law Journal*, 22 pp. 48-71.

<sup>31</sup> Memorandum by the UK, July 1996. The paper, in addition, proposes measures limiting the retrospective effect of judgments and limiting Member State liability to cases of manifest and grave breaches, etc. See also the Report of the Court of Justice on Certain Aspects of the Application of the Treaty of the European Union (Luxembourg, May 1995) on the rule of law as a defining principle of the Community. [http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj\\_rep.html](http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html).

<sup>32</sup> As frequently pointed out in literature, such treaty amendment would necessitate a treaty by unanimity which significantly weakens the threat. See, e.g., Karen Alter, Agents or Trustees? International Courts in their Political Context, Available at SSRN: <http://ssrn.com/abstract=622222>, p. 4.

However, when trying to understand the role of the Court as an agenda-setter in the EU political arena, some scholars point to more subtle responses in ECJ jurisprudence to argue that political criticism and the mere threat of amending the Court's prerogatives prompted a period of judicial self-restraint in the late 1990's.<sup>33</sup> Nevertheless, national politicians continue to express doubts about the legitimacy of the Court's role. For instance, Danish prime minister Fogh Rasmussen has ratcheted up his critique of the Court, implying that its mandate should be reconsidered,<sup>34</sup> whilst Wolfgang Schüssel, the former Austrian chancellor, has singled out perceived examples of the Court's norm-setting tendencies, stating that 'in recent years the Court has been systematically widening European competences, even in areas where Community law really does not exist.'<sup>35</sup> These tantrums, however, can also be seen as part of a continual policy dialogue with the Court rather than as expressions of genuine and concerted action towards a limitation of the institution's powers.<sup>36</sup>

This review of current understandings of the role of the Court in the political project of integration has emphasised the normative debate over its proper function. However, the normative approach is far from being the only way to appraise the role of the court. Political science has attempted to eschew purely normative claims by conceptualising the Court according to the logic of political delegation in order to define better the function of this juridical institution. This type of conceptualisation is undertaken as a necessary prelude to discussing whether the Court has adequately fulfilled its allotted role. Yet defining the apposite parameters for the operation of this judicial institution is not a straightforward task.

#### *A Fiduciary Rather than an Agent*

According to the standard account, the ECJ has played a very active – if not heroic – role in the integration story. Indeed, the existence of the Court and its innovative case law, particularly its doctrine of direct effect, are typically put forward as the reason why the EU regime differs from that of ordinary international organizations.<sup>37</sup> Building on the framework used to understand relations between the Commission and the member states, political

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<sup>33</sup> Hjalte Rasmussen, *EU-Ret i Kontekst* (København: GadJura, 2003), p. 696 and more strongly p. 709. See also Oreste Pollicino (2004), 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', *German Law Journal*, 3:1. See [http://www.germanlawjournal.com/article.php?id=402#\\_edn11](http://www.germanlawjournal.com/article.php?id=402#_edn11). As Stone Sweet and Caporaso, 'From Free Trade', point out it is difficult to provide empirical evidence to verify such claims. See also Carlo Curti Gialdino (1995), 'Some Reflections on the *Acquis Communautaire*', *Common Market law review* 32, pp. 1089-1121, p., p. 1118.

<sup>34</sup> Fogh: EF-Domstolens Rolle Bør Overvejes, DR Nyheder, 11 January 2006, <http://www.dr.dk/Nyheder/Indland/2006/01/11/160057.htm?rss=true>.

<sup>35</sup> The citation is translated from German and stems from Sueddeutsche, '300 Sprachen und 500 Dialekte - das ist mein Europa', Interview with Austrian chancellor Schüssel, 31 December 2005. Can be found at <http://www.sueddeutsche.de/ausland/artikel/256/67189/3/>.

<sup>36</sup> In his answer to a question posed by a government coalition party, the Danish PM stated that '[i]n a cooperation based upon the rule of law, which we benefit from in the EU, it is necessary with a court that can interpret and apply the EU's treaty-base and legislation. It is not least to the advantage of small states as Denmark that the European cooperation is based on law before power. It is naturally up to the member state governments and the Council legislators to ensure that the treaties and legislation do not leave too much ambiguity and room for interpretation. At the same time I do agree that we now and again see rulings which can give—and certainly do give—reason for public debate about what is the right division of roles between the legislators elected by the people, on the one hand, and the ECJ on the other.' 2005-06: Svar på § 20-spørgsmål: Om EF-Domstolen (/S1779/), 12/1 2006.

<sup>37</sup> Joseph H. Weiler, 'The Transformation of Europe'.

scientists have typically discussed the relationship between the member states and the Court as a Principal-Agent (P-A) management problem.<sup>38</sup> However, recent scholarship has revealed several conceptual drawbacks when applying agency theory to this relationship, which suggests that the political impact of the Court should not necessarily be read as a problem of controlling an agent. As Stone Sweet and Caporaso put it: 'the impact of the Court's rule-making is to effectively constrain member-state governments, both individually and collectively. The P-A framework is ill-equipped to capture these dynamics.'<sup>39</sup>

Majone has powerfully challenged the appropriateness of using traditional P-A theory to understand delegation in the EU context and put forward the rival theory of a fiduciary entrustment. In this latter type of relationship, a 'trustee is an agent and something more. The trustee's fiduciary duty is not simply a personal obligation but is attached to a piece of property – the trust assets.'<sup>40</sup> The purpose of delegating to a trustee, Majone argues persuasively, is to increase the credibility of the commitments made by the member states. This incomplete contract argument is particularly attractive given the nature of the EC Treaty as a "*traité-cadre*" rather than a "*traité-loi*". The desire to enhance the credibility of policy commitments entails, therefore, choosing 'a delegate whose policy preferences differ systematically from the preferences of the delegating principal'.<sup>41</sup>

The logic of enhancing credibility via delegation to a fiduciary can be illustrated by the United Kingdom's attitude towards the Court. Although the UK is obviously one of the least integrationist member states – in 1996 the UK government proposed an institutional reform that would have enabled the overruling of ECJ judgments – it has expressed strong support in favour of the Court as the guarantor of the single market economic order.<sup>42</sup> The UK's dissatisfaction with the Court, therefore, typically stems from rulings that impinge on social policy, which the UK considers off-limits to European construction. Yet it was precisely this commitment to the single market – and to ensure the credibility of other member states' participation – that led the UK to suggest that the Court be empowered in the Maastricht Treaty to award member state sanctions.<sup>43</sup>

Thus this fiduciary type of delegation contrasts markedly with delegation to an agent to reduce decision-making costs. In the latter case, to prevent problems of bureaucratic drift that can vitiate original policy intent, delegation requires that 'the preference of the principal and of the agent should be aligned as much as possible'.<sup>44</sup> But shared preferences do nothing to resolve the credibility problem, which is why this is not the logic of delegation that pertains in the EU political system.

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<sup>38</sup> Mark Pollack (1997), 'Delegation, Agency and Agenda Setting in the European Community', *International Organization*, pp. 99-134; Bernadette Kilroy, 'Member State Control or Judicial Independence: The Integrative Role of the Court of Justice', *APSA Annual Conference Paper*, San Diego, 1995.

<sup>39</sup> Stone Sweet and Caporaso, 'From Free Trade', p. 129.

<sup>40</sup> Giandomenico Majone (2001), 'Two Logics of Delegation: Agency and Fiduciary Relations in the EU Governance', *European Union Politics*, 2 (1), pp. 103-22, at p. 113.

<sup>41</sup> Majone, 'Two Logics of Delegation', p. 104.

<sup>42</sup> 1996 Memorandum, opening statement in which it is stated that 'independence and authority of the Court need to be confirmed and strengthened'.

<sup>43</sup> For a comprehensive study of the EU sanctions mechanism see Stine Andersen, 'The Commission's Role in Ensuring Member State Compliance with Community Law', PhD Thesis, European University Institute.

<sup>44</sup> Majone, 'Two Logics of Delegation', p. 104.

Hence according to Majone's fiduciary theory of delegation, it is no mystery that EU institutions, particularly the Commission, have proved such strong agenda-setters in the course of integration. In stimulating integration beyond the original preferences of the member states, European institutions are, according to this model, merely correctly exercising the political property rights they have been delegated, not acting as servants beyond the control of their masters. However, Majone's theory seems much better tailored for explaining the role of the Commission than that of the Court precisely because the former has been unambiguously granted political property rights that the second does not possess. Whereas the Commission has the monopoly of legislative initiative and monitors member state compliance with EU law, the ECJ has been delegated tasks that do not warrant the label of political property rights.

The primary functions of the ECJ are twofold: 'direct application of EC law in certain cases, as in disputes among EC institutions; and interpreting the provisions of EC law for application in national legal systems'.<sup>45</sup> Neither of these functions equates to what Majone calls "political property rights", namely 'the right to exercise public authority in a given policy area',<sup>46</sup> powers the Commission evidently has. Nevertheless, legal and political scholarship continues to point to the way in which ECJ jurisprudence affects the distribution of political property rights between the Commission and the member states.<sup>47</sup> Thus understanding the fiduciary rather than agency role of the Court requires an exploration of the nexus of law and politics and their mutual interaction. It is precisely the concept of constrained independence within a strategic space, we argue, that renders the Court's agenda-setting role meaningful. In order to determine the way in which the Court's strategic space is constituted, it is imperative to examine how the member states have not only reacted to jurisprudence but also tried to pre-empt it.

#### *A Constrained Court: Pre-Emptive Treaty Rules and Member State Expectations*

Scholars in both law and political science have tried to understand the extent to which the ECJ, like courts everywhere, internalise norms of behaviour when making judgments and how these are affected by the political climate in which these courts operate. Hence the empty chair crisis, the Luxembourg compromise crisis and the legislative stalemate prevailing up until the SEA were put forward as a reason why the Court at some point had to be affirmative if not innovative in its jurisprudence.<sup>48</sup> In this contextual account, reliance on Article 95 EC leading to the increased use of majority voting and the return to 'normal' voting in the Council in the early 1980s implies a lessened role for the ECJ. Thus Arnall notes that '[t]o some extent the Court may be said to have responded to the new climate'<sup>49</sup> and refers to C-152/84 *Marshall* in support of this claim.<sup>50</sup> The author considers this particular case a

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<sup>45</sup> Mark Pollack (1997), 'Delegation, Agency and Agenda-Setting in the European Community', *International Organization*, 51 (1), pp. 99-134, at p. 105.

<sup>46</sup> Majone, 'Two Logics of Delegation', p. 106.

<sup>47</sup> Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: OUP, 2004); Garrett *et al.*, 'The European Court of Justice'; Conant, *Justice Contained*.

<sup>48</sup> Compare Anthony Arnall, *The European Union and its Court of Justice* (Oxford: OUP, 2006), p. 645. A similar contextual account, pointing to 'the sluggishness of the legislative branch in addressing urgent needs for reform', exists for the activism of Supreme Court jurisprudence under Chief Justice Warren (1953-69). Fisher, quoted in Conant, *Justice Contained*, p. 223.

<sup>49</sup> Anthony Arnall, *The European Union and its Court of Justice* (Oxford: OUP, 2006), p. 645.

<sup>50</sup> C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

'leading example of the Court's capacity for restraint'.<sup>51</sup> In addition, it has also been claimed that ECJ rulings are consistent with the preferences of the Franco-German tandem that has served as the locomotive of integration.<sup>52</sup> Yet the veracity of this claim by Garrett has been comprehensively disproved by Caporaso and Stone Sweet with extensive empirical evidence.<sup>53</sup>

However, the notion of a constrained court operating within a strategic space is not, we argue, simply a function of overt yet informal political pressure since this space is also constituted and demarcated by treaty articles intended to impose formal legal constraints on the court. These *ex ante* mechanisms for restraining purported judicial activism nevertheless often have their origins in member states' expectations, which change in reaction to ECJ jurisprudence. These treaty articles are designed to prevent the Court from setting the agenda of integration by constraining the ability of the Court to render judgments that interfere with national prerogatives, which is why we argue that such rules attempt to pre-empt the justices' rulings.

Three such treaty measures illustrate this pre-emptive approach towards constraining the fiduciary institution that is the Court. The first type of measure, concerning limiting direct effect, can be found in the Single European Act of 1986. There the member states added a declaration regarding the date fixed for completing the single internal market: 'setting the date of 31 December does not create an automatic legal effect.'<sup>54</sup> Needless to say, the purpose of such a text was precisely to circumscribe the Court's potential willingness to interpret the treaty as giving direct effect to the internal market in the eventuality that requisite legislation was not in place by the given date. Given that the previous two decades had witnessed truly unexpected developments in the establishment of direct effect, the member states were acutely aware of the risks entailed by specifying a date for completing the single market. Thus by inserting this declaration the member states wanted to insure themselves against the possibility that the Court could overtake the Council as agenda-setter for constructing the single market.<sup>55</sup>

However, it is by no means clear where declarations annexed to Community treaties in general fit within the hierarchy of Community norms – if at all. Moreover whereas some were merely attributed political significance others may entail legal effects.<sup>56</sup> With regards to the SEA declaration, Toth has rightly drawn attention to the fact that it is annexed to the Final Act

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<sup>51</sup> Arnall, The European Union, p. 645. However, Arnall argues, this restraint came at a price. Namely, the Court's action in this regard 'came to be overshadowed by the Court's attempts to attenuate the damaging effects the decision had for the uniform application of the law and the rights of individuals'. *Ibid.*

<sup>52</sup> 'The principles governing decisions of the European Court ... are consistent with the preferences of France and Germany'. Geoffrey Garrett (1992) 'International Cooperation and Institutional Choice: The European Community's Internal Market', International Organization 46 (2): 533-60, at 558.

<sup>53</sup> Caporaso and Stone Sweet, 'From Free Trade'.

<sup>54</sup> Declaration on Article 8a of the EEC Treaty, *Single European Act*.

<sup>55</sup> As Stone Sweet puts it: 'the member states sought to ensure, in the event of failure to meet the deadline, that the ECJ was not to assume responsibility for filling in the gaps.' Alec Stone Sweet, 'The Constitutionalization of the EU', in Sergio Fabbrini (ed.) Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance (London: Routledge, 2005), pp. 44-56, at 54.

<sup>56</sup> T. C. Hartley, The Foundations of European Community Law – An Introduction to the Constitutional Administrative Law of the European Community (Oxford, OUP, 2003), p. 94. Toth likewise concludes in his examination of the declarations annexed to the SEA that they 'are not susceptible of precise legal characterisation'. A. G. Toth (1986), 'The Legal Status of the Declarations Annexed to the Single European Act', Common Market Law Review 23, pp. 803-812, p. 812.

and not directly to the SEA. Hence the declaration has not been ratified by the Member States. Toth maintains, therefore, that it 'can in no way restrict, exclude or modify the legal effects of the Single European Act' and neither can it 'have an effect on the interpretation of the Act by the European Court'.<sup>57</sup> Specifically, with reference to the clarification that the date set in Article 14 EC shall not automatically create legal effect, Toth reasons that

'[w]hatever the meaning of this statement, it is submitted that it itself can have no legal effect. It cannot in any way restrict, exclude, qualify or amend the clear provisions of Article 8A; it cannot even be taken into account by the Court in interpreting those provisions. Therefore, if all the measures necessary for establishing the internal market have not been adopted by ..., the European Court will be absolutely free to determine the legal consequences that should follow from this, purely on the basis of the Single European Act and regardless of the Declaration.'<sup>58</sup>

Nevertheless, when examining the possible legal effects of Article 14 EC and the December 1992 deadline, Craig and de Búrca conclude that it is important to distinguish between 'legal effects against the Community itself' and 'legal consequences for the Member States'.<sup>59</sup> With regard to the latter scenario the authors comment 'it would ... be bold for the Court to hold that Article 14 is directly effective. This is especially so given that the Article does contemplate further Community action ... Moreover, even though the [SEA] Declaration may not formally preclude direct effect, it does clearly signal Member State intent in this respect.'<sup>60</sup> It is certainly of paramount significance whether private and legal individuals can derive rights concerning the internal market directly from Article 14 as it stands after the deadline expires and have them enforced before domestic courts or whether the Council and thus the Council member states maintain the power to frame such rights on a piecemeal basis through secondary legislation. As regards to possible obligations against the Community as such, the authors have doubts that the Commission or the Council, for instance, could be held liable for failure to act under Article 232 EC by not having established the entire legislative package by the deadline. This is due to the wording of the obligation and the policy choices inherent to it. Similar reservations are expressed with regards to the possibility that individuals could hold these institutions liable, i.e. claim damages for such failure to comply with the fairly vague letter of intent articulated in article 14 EC. It may however prove different in cases where the Council dispensed with a Commission proposal in its entirety.<sup>61</sup> The same authors point out that the ECJ has made reference to the declaration in its jurisprudence, albeit without spelling out its legal nature or to what extent it binds the ECJ if it does so at all. Hence the declaration on the legal effect of the SEA deadline typifies both the lack of absolute certainty regarding the strategic space afforded the Court and the member states' willingness to signal their expectations before being confronted by ECJ jurisprudence.

The Maastricht treaty (1992) was the setting for the introduction of two other measures designed to constrain ECJ activity. Perhaps the best known is the protocol on abortion legislation in Ireland, which states that 'nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the

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<sup>57</sup> Toth, 'The Legal Status', p. 812.

<sup>58</sup> *Ibid.*

<sup>59</sup> Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials* (Oxford: OUP, 2003), pp. 1181-2.

<sup>60</sup> Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials*, p. 1182.

<sup>61</sup> See Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials*, p. 1181-2 for a systematic analysis and supporting jurisprudence of the possible legal effects of Article 14 EC in view of the SEA proviso.

Constitution of Ireland'.<sup>62</sup> Of course, this protocol was a reaction to the notorious *S.P.U.C v. Grogan*<sup>63</sup> decision. In this 1991 case, the Court was confronted with the problem of whether abortion was a service, in which case the Irish authorities were breaking European law in prohibiting the distribution of information concerning termination in other countries. Although the Court ruled that abortion constituted a service under EC law, it deftly avoided a major political conflagration by ruling that the students' associations that were distributing the information had "too tenuous" a connection with the actual providers of such services to constitute a breach of EC law. Yet in doing so, the Court also 'implied that foreign abortion clinics could not be prohibited from advertising their services directly in Ireland.'<sup>64</sup>

Although this protocol, therefore, had its origins in ECJ jurisprudence, it would be incorrect to interpret it as an *ex post* revision of a Court ruling. This is because the case itself evidently did not actually jeopardise the Irish constitution's outlawing of abortion. Rather, the introduction of this protocol was intended to guarantee that in the future the ECJ would play no part in the question of Irish policy on the right to life of the unborn.<sup>65</sup> The fact that Malta negotiated an identical protocol upon its accession in 2004 serves to confirm this interpretation.<sup>66</sup> Indeed, the importance of defining abortion legislation *ex ante* as beyond the pale of ECJ competence can be seen from the polemic on this subject that arose in the course of the 2005 French referendum on the Constitution. Sections of the French left, concerned by the wording of the "right to life" in the Charter of Fundamental Rights and Freedoms (Article II-21-1) argued that this could be read as a threat to French pro-choice legislation.<sup>67</sup> Although this argument was largely based on a misconstrued reading of the Constitution, it demonstrated the fact that the strategic space of the Court is of paramount concern to citizens as well as to the member states.

A more novel step was also taken at Maastricht by excluding the ECJ from the newly-created second and third pillars, Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) respectively. This move illustrates Beach's point that 'it is much easier for the Member States to restrict ECJ competences when transferring new powers to the EC, as there is no status quo to fall back on in the event of non-agreement.'<sup>68</sup> Similarly, at the Amsterdam IGC, the member states indirectly curtailed the influence of the Court by limiting referrals under Title IV of the treaty (visa, asylum and immigration) to those emanating from courts of last instance. Finally, the EU Treaty explicitly deprives certain EU decisions of direct effect. According to Article 34 TEU the Council shall take measures and promote cooperation to combat crime. It is explicitly stated, however, that any decisions adopted by the Council for such purposes – even though already adopted by unanimity – *shall not entail direct effect*. The

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<sup>62</sup> Protocol no. 17.

<sup>63</sup> Case C-159/90, *Society for the Protection of Unborn Children Ireland LTD. (S.P.U.C.) v. Stephen Grogan and Others* (1991), Common Mkt. L. Rep. 849.

<sup>64</sup> Stone Sweet, 'The Constitutionalization of the EU', p. 52.

<sup>65</sup> This ring-fencing is exactly what worried Curtin who claimed the protocol raised 'the spectre of a Pandora's box ... profoundly disintegrative and strik[ing] at the heart of the very uniqueness of Community law'. Deirdre Curtin (1993), 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review*, 30 (1), pp. 17-70, at 49.

<sup>66</sup> Under protocol 7 of the 2004 accession treaty 'Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion.'

<sup>67</sup> Stefan Seidendorf (2006), 'Constructing Political Europe in Practice: The French Referendum Campaign', Paper presented at 3<sup>rd</sup> Pan-European Conference on EU Politics, Istanbul, 21-23 September.

<sup>68</sup> Beach, *Between Law and Politics*, p. 118.

clause is intended to prevent the Court from applying the Community doctrine of direct effect as first established by itself in this policy area.

Before examining the likelihood that pre-emption will be successful in constraining the Court's interpretation of the legal effects of the Charter, it is also necessary to understand how the Court ordinarily functions as a fiduciary and the impact this has on policy-making. It is precisely this impact that has led the more recalcitrant member states to insist that further integration requires greater pre-emption to avoid unwanted spillover effects.

## **2. Facilitating Policy-Making as a Fiduciary: The Lack of Congruence between Strategic Space and Conferred Competences**

As a fiduciary, member states expect that the trustee, the Court, 'will make decisions based on [its] best professional judgment, and in the best interest of the beneficiary of the trust'.<sup>69</sup> In doing so, the Court 'increases the likelihood that states will comply with their obligations in situations where compliance generates short term political losses but long term political gains.'<sup>70</sup> In addition, the Court's fiduciary duty is not solely restricted to enforcing member state compliance; jurisprudence sometimes has spillover effects in the realm of EU policy-making. Through its rulings on compliance, as Conant argues, the Court can prompt policy change by transforming certain individual cases into problems of pan-European governance, often as the result of the mobilisation of interest and civil society groups.<sup>71</sup> Yet there are situations, we aim to demonstrate, where the fiduciary role of the ECJ is complicated by the fact that the Court sometimes has to rule in cases where the policy implications are beyond the realm of actual EU competences.

A telling illustration of how jurisprudence affects policy-making in areas beyond the realm of EU legislative competences can be found in the 2005 case *Commission v. Austria*,<sup>72</sup> concerning the Austrian government's decision to impose quota restrictions on the admission of students in dental and medical faculties. This recent conflict between the Commission and Austria was sparked off by the influx of German students taking advantage of the fact that, unlike Germany, Austria does not use a *numerus clausus* entry system<sup>73</sup> to restrict admission in dentistry and medicine. In response, the Austrian government has sought to restrict the number of EU students in these courses to 20% of total admissions by reserving 75% of places for students with a secondary education diploma obtained in Austria. There is a similar situation in Belgium, where the parliament of the French community (competent in matters of education) recently passed a law (*le décret Simonet*) requiring that 70% of students in certain health-related degree programmes be Belgian residents.<sup>74</sup> This legislation was adopted as a response to the numbers of students from France electing to study in French-speaking Belgian universities because of lower fees and less harsh entrance examinations.

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<sup>69</sup> Alter, 'Agents or Trustees?', p. 7

<sup>70</sup> Helfer and Slaughter, 'Why States Create International Tribunals', p. 35.

<sup>71</sup> Conant, *Justice Contained*.

<sup>72</sup> <sup>72</sup> C-147/03 *Commission v Austria* [2005] ECR I-5969.

<sup>73</sup> *Numerus clausus* systems fix a limit on admissions and are thus associated with stringent entry examinations.

<sup>74</sup> 'Brussels Warns EU States Against Shutting Out Foreign Students', EU Observer, 24 January 2007. According to official statistics, the current percentage of non-Belgian students in these areas varies from 40 to 86%. <http://www.marie-do.be/ministrecommuniqués2006-03-22.html>

In the 2005 case involving Austria, the Court invoked treaty provisions on the freedom of movement of students to rule in favour of the Commission. In its opinion:

'by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as holders of secondary education diplomas awarded in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC.'<sup>75</sup>

On 24 January 2007 the Commission sent a letter of formal notice to both Austria and Belgium under the Article 226 EC enforcement procedure regarding alleged non-compliance with a treaty.<sup>76</sup> This dispute raises fundamental questions regarding what Majone calls the distribution of political property rights in a system of delegation. The result of the ECJ ruling and the Commission's eagerness to overturn these national restrictions on student admissions has been to render a question of education policy something other than a purely domestic affair. In the parlance of delegation, EU member states thus do not have exclusive political property rights over education policy. However, this is a somewhat curious state of affairs since Article 149 EC specifically excludes the possibility of harmonizing national laws and regulations in the field of education. Instead, the powers conferred by the member states are restricted to 'incentive measures, excluding any harmonization of the laws and regulations of the Member States'. In the Constitution, this category of power is known as a complementary competence, the lowest-ranking behind exclusive and shared competences. Inserted at Maastricht, these restrictive clauses, which also cover vocational training, culture and public health, were designed to forestall attempts by the Commission to introduce harmonization legislation in sensitive areas of public policy. Indeed, this attempt to restrict EU competences led to a full-fledged competence dispute in 2000<sup>77</sup> in the case of a proposed European ban on tobacco advertising. The ECJ ruled that the Council employed an unlawfully broad interpretation of Community competences under Article 95 EC transgressing the vertical separation of powers between the state and Community levels, thereby encroaching upon domestic competences, to legislate on certain matters concerning public health.<sup>78</sup>

The combined result of these anti-harmonization clauses and the ECJ ruling on the free movement of students, therefore, is that whilst member states no longer have exclusive political property rights over education policy it is not the case that these have been delegated to another level of decision-making. Thus even in the absence of competence conferral in education, "ownership" of this policy area is unclear because of the Court's application of general rules of non-discrimination to this policy field. In practice, this means that although member states are no longer competent to adopt a policy of restricting access to costly higher education programmes to non-resident EU students, a substitute EU-wide policy for re-

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<sup>75</sup> C-147/03 *Commission v Austria* [2005] ECR I-5969.

<sup>76</sup> Commission Press Release, 24 January 2007.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/76&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>77</sup> C-376/98 *Germany v EP and Council* [2000] ECR I-8419

<sup>78</sup> However the ECJ cannot be said to pursue a minimalist understanding of that legal basis generally. Grainne de Burca comments in that regard that the 'evolving and dynamic nature of the EU and the functionally rather than sectorally defined powers which have characterised its evolution to date suggests that the attempt to articulate a clearly defined list of the relative competences of states and EU is misguided.' Gráinne de Búrca, *The Constitutional Limits to EU Action*, Faculdade de Direito da Universidade Nova de Lisboa, [Francisco Lucas Pires Working Papers Series on European Constitutionalism](#), Working Paper 2001/02.

regulating student admissions<sup>79</sup> is by definition a non-starter. The 2005 Constitution, which granted no additional competences in this area, cemented the fact that member states do not deem it politically palatable to transfer such powers to the EU.

In this sense the effect of the ECJ ruling on the freedom of movement of students resembles what Franz Mayer calls an "abolished competence", because whilst it is no longer possible for member states to discriminate on the grounds of nationality the EU cannot 'establish positive rules' for discrimination either.<sup>80</sup> In fact, these effects were mirrored by the earlier *Bosman* ruling (1995),<sup>81</sup> which concerned both the freedom of movement of an out of contract professional footballer and national sporting federations' restrictions on the participation of EU citizens. By ruling that 'Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are citizens of other Member States',<sup>82</sup> the Court revolutionised professional football in the EU. From a situation in which non-nationals were typically restricted to three per squad, it is now no longer unusual for fielded teams in many European leagues to consist of eight or more non-nationals. Yet this again was a policy area, culture, which is purely complementary and devoid of the possibility of harmonization thanks to Article 151 EC. It is this paradox of an ECJ ruling that affects national policy-making in an area where there is no alternative EU-level of decision-making that led de Búrca to conclude that 'the notion of functionally limited [EU] sovereignty [is] becom[ing] more difficult to comprehend.'<sup>83</sup>

The result of this interaction between law and politics is a true policy impasse created by the Court as member states wish to re-impose restrictions on non-nationals owing to fears that this is detrimental to the nurturing of domestic sporting talent yet they cannot collectively as the EU lacks the necessary competences. Furthermore, such an impasse also raises the normative point of why member states should have to seek collective solutions in policy areas they have explicitly sought to maintain within the realm of national prerogatives. Indeed, in the case of education, rulings on non-discrimination could be interpreted as creating an insidious pressure to introduce tuition fees for all – contrary to many countries' tradition of free higher education – as this is one of the few policy options left for member states who seek to avoid subsidizing the education of non-taxpayers. This seems a particularly perverse outcome for a polity supposedly "united in diversity", for even in the far more integrated United States public universities charge higher tuition fees to non-state residents.<sup>84</sup>

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<sup>79</sup> For instance, harmonising the *numerus clausus* system for health-related studies to reduce the number of German applicants in Austria or homogenising fees for medical studies to prevent French students preferring a cheaper Belgian alternative.

<sup>80</sup> Mayer, 'Competences-Reloaded?', p. 508.

<sup>81</sup> C-415/93, *Union Royale Belge des Sociétés de Football Association and others v. Bosman* [1995], ECR I-4921.

<sup>82</sup> *Ibid.*

<sup>83</sup> Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the ECJ', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), pp. 449-60, at p. 459.

<sup>84</sup> Various plaintiffs have unsuccessfully tried to claim that the charging of higher tuition fees for non-state residents by public universities is a breach of the fourteenth amendment's equal protection clause and thus unconstitutional. *Carke v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966); *Johns v. Redeker*, 406 F.2d 878 (8. Cir. 1969); *Kirk v. Board of the Regents of the University of California*, 78 Cal. Rptr. 260, 269 (Ct. App. 1969); *Starns v. Malkerson*, 326 F. Supp. 234 (1970). Although the constitutionality of discriminating against non-state students is not in dispute, the one-year residency criterion is still sometimes considered a weak basis for doing

This policy impasse, therefore, points to a more fundamental problem concerning the distribution of competences in the EU system and the ring-fencing of national prerogatives in particular. As demonstrated above, Court jurisprudence can have immense implications for national policy-making in areas where member states have tried to remain autonomous. Thus the analysis presented here confirms Mayer's argument that problems of competence in a supranational regime are not necessarily simply those arising from the debate over whether or not to confer competences in the first place. Equally important – perhaps more so as member state expectations change to take into account the fluidity of sovereignty – is the ability of member states to control the agenda of integration and respond to the actions of supranational institutions.<sup>85</sup> This explains why, when confronted with the proposition of inserting the Charter into the Constitution, certain member states insisted that this would only be done on the basis of restrictively pre-empting the Court's room for legal interpretation. Given member states' increasing reliance on *ex ante* methods for defining the strategic space of the supranational Court to limit the policy implications its judgments can have, it is vital to understand how such methods might fare in the future. Hence the next section analyses the extent to which *ex ante* measures regarding the insertion of the Charter of Fundamental Rights into the Constitution will constrain the Court when exercising its fiduciary duty.

### **3. Strategic Space, Agenda-Setting and EU Competences: The Charter of Fundamental Rights**

This final section provides a short explanation of the ECJ's role in the initial establishing and framing of fundamental rights as general principles of EU law, describes the reasons for including the Charter in the Constitution rather than, for instance, annexing it as a legally-binding protocol or merely maintaining the *status quo*, and, finally, discusses the significance of the generally applicable clauses of restrictive interpretation established in Articles II-111 and 112. The focus is on the scope of the Charter in isolation and also in relation to the Area of Freedom, Security and Justice (AFSJ), to which the Charter is positively linked. It will be demonstrated how the Charter leaves the Court, as a fiduciary, in an agenda-setting position in three specific situations, namely a) in relation to the AFSJ, b) when rights might be interpreted as requiring positive action, and finally c) in cases of potential conflict between national and ECJ understandings of human rights. It is argued that despite the extensive *ex ante* clarification on how the ECJ shall interpret the Charter, inserted at the desire of certain member states, the Court will still be left to answer questions with policy implications in areas where EU competences are supposedly strictly limited. In this sense the Court's potential scope for indirect agenda-setting through jurisprudence is likely to conflict with member states' expectations of where the EU is and is not competent thereby begging further questions about how member states can exercise oversight over their supranational fiduciaries.

#### *Minimising the Effects of the Charter Ex Ante*

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so. Douglas Chartier (2005), 'The Toll for Travelling Students: Durational-Residency Requirements for In-State Tuition After *Saenz v. Roe*', *Michigan Law Review*, 104 (3), pp. 573-98.

<sup>85</sup> Mayer, 'Competences-Relocated?', pp. 512-5

The Charter of Fundamental Rights of the European Union was drawn up at the European Council in Cologne in June 1999.<sup>86</sup> In the Presidency Conclusions it was agreed that the EU and its institutions would be placed under a legal obligation to ensure that in all its areas of activity fundamental rights were not only respected but also actively promoted. At the subsequent Nice Council in December 2000, the member states also pledged to have 'the Charter disseminated as widely as possible amongst the Union's citizens'.<sup>87</sup> At present the Charter is not legally binding.<sup>88</sup> However, the Court has established that 'respect for fundamental rights forms part of the general principles of law protected by the Court of Justice' ... and consequently they 'must be ensured within the framework of the structure and objectives of the Community'.<sup>89</sup> The Maastricht Treaty states that the Union shall respect fundamental rights and freedoms. Yet by inserting the provision under the common provisions,<sup>90</sup> the governments managed to keep the matter outside the Court's jurisdiction. Already member states occasionally make reference to the Charter during proceedings before the ECJ and advocate generals have made reference to the Charter in their non-binding legal opinions.<sup>91</sup> Finally, a number of individual pieces of secondary legislation explicitly state that they 'respect the fundamental rights and observes the principles recognised in particular in ... the Charter of Fundamental Rights of the European Union'.<sup>92</sup> The Constitution lists the rights and principles established under the Charter in Part II and the Charter has thereby been granted status as legally binding, primary law upon ratification of the Constitution by the member states.

Until now, the ECJ has effectively been delegated, by default, the task of asserting and defining the scope of fundamental rights in the EU context. The Commission was originally of the opinion that the ECJ was better equipped to deal with fundamental rights as a general principle of Community law than the legislator due to the fact that such rights necessarily exist in the context of a legal and political community in flux.<sup>93</sup> It is notable in this regard that already in a Joint Declaration of 1977 the Council, and thus after the first judgments on fundamental rights had been laid down, expressed a commitment to fundamental rights.<sup>94</sup> This amounted to *ex post* political approval of the Court's activism in addition to the legal endorsement the member states already expressed through compliance. In the same vein, the joint declaration can be understood as an *ex ante* political commitment to future developments in jurisprudence. However, legally it was a non-binding commitment and the member states

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<sup>86</sup> Cologne European Council, 3 and 4 June 1999, Section IV, [http://europa.eu.int/council/off/conclu/june99/annexe\\_en.htm#a4](http://europa.eu.int/council/off/conclu/june99/annexe_en.htm#a4).

<sup>87</sup> OJ 2000 C 364, p. 1. See also European Council declaration 23 on the Future of the Union, para. 5.

<sup>88</sup> T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] nyr, para. 71. Agustín José Menéndez argues in 'Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union', *Arena Working Paper*, 2/7, that the Charter indeed has legal value, 'despite the fact that it has not been incorporated into Community law'.

<sup>89</sup> C-29/69 *Stauder* [1969] ECR 419, para. 7, C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

<sup>90</sup> Article F.

<sup>91</sup> Advocate General Mischo qualifies the Charter as an 'expression, at the highest level, of a democratically established political consensus'. Opinion of AG Mischo delivered on 20 September 2001 in Cases C-20/00 *Booker Aquacultur Ltd* and C-64/00 *Hydro Seafood GSP Ltd* [2003] ECR I-7411, para. 126.

<sup>92</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251, pp. 12-18, preambular recital two.

<sup>93</sup> See EC Bulletin Supp. 5/76.

<sup>94</sup> See, e.g., Joint Declaration by the European Parliament, The Council and the Commission, 5 April 1977, OJ C 103/1, 1977. See generally Hartley, *The Foundations of European Community Law*, pp. 142 ff.

attempted to clarify this commitment in the Constitution. Significantly, the least integrationist state(s) played a key role in the very restrictive final formulation.

While the ECJ has at times appeared to yearn for stronger political leadership in its actions establishing an incremental Constitutional framework, the Charter at first glance answers one of these *lacunae*.<sup>95</sup> More generally, the placing of fundamental rights in the Constitution appears consistent with the nature of the value-laden Treaty. However, it was also in part the incremental broadening of EU competences to include criminal procedures with potentially far-reaching consequences on individuals, such as the introduction of arrest warrants and the surrender of persons in potential breach of a criminal act, that made it pertinent to include the Charter in the constitutional text.<sup>96</sup> Thus the Constitution attempts to assert individual safeguards as a corollary to the end of the traditional member state prerogative of using force against its citizens.

Similar to the *ex ante* mechanisms considered previously in this paper, the clauses established under section II of the Convention, and in particular Articles II-111 and 112, stand out because they aim at restraining the possible effects of the Charter generally.

#### *Article II-111*

##### **Field of application**

1. The provisions of this Charter are addressed to the *institutions, bodies, offices and agencies of the Union* with due regard for the principle of subsidiarity and to the *Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and *respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution*.
2. *This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.*

The first paragraph clarifies the subjects of the obligations established by the Charter and delimits the “field of application”, spelling out that it is restricted to the implementation of EU law. The commitment to promote the application of the Charter is thus confined to situations of implementation and can only take place within the conferral of EU competences specified in the other parts of the Constitution. The second paragraph precludes any alterations in the

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<sup>95</sup> Miguel Poiars Maduro, ‘The Constitutional Treaty and the Nature of European Constitutionalism: The Tensions between Intergovernmentalism and Constitutionalism in the European Union’ in Deirdre Curtin, Alfred E. Kellermann and Steven Blockmans (Eds), The EU Constitution: The Best Way Forward (The Hague: T.M.C. Asser Press, 2005), p. 90. In his opinion in C-5/94 *Hedley Lomas* [1996] ECR I-2553, para. 52, Advocate General Léger directly addressed the fact that the governments occasionally dispense with questions with unmistakable policy implications, thus leaving it to the ECJ to resolve the matter. In relation to questions pertaining to the scope and effects of the Community principle of member state liability he noted: ‘the stir created by that judgment [joined cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357] – no other decision of the Court has ever generated so much comment – is a measure of the magnitude of the step forward which the Court is now being asked to take. The question is all the more delicate because it was submitted to the negotiators of the Maastricht Treaty without receiving any answer.’

<sup>96</sup> Compare Regan (2005), p. 3.

distribution of competences between the Union and the Member States as a consequence of the Charter.

*Article II-112*

**Scope and interpretation of rights and principles**

1. Any limitation on the exercise of the *rights* and freedoms recognised by this Charter must be provided for by law and *respect* the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. *Rights* recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The *provisions* of this Charter *which contain principles may be implemented* by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. *They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. *The explanations drawn up as a way of providing guidance in the interpretation* of the Charter of Fundamental Rights *shall be given due regard by the courts of the Union and of the Member States.*

It is noteworthy that Article II-112(7) establishes an obligation to exert self-restraint in accordance with the horizontal clauses not only on the part of the Court, but also on the part of domestic courts, which have played a crucial role in relation to the establishment of EC doctrines by phrasing questions under the prejudicial procedure.<sup>97</sup> This last paragraph was inserted at the 2004 July Summit, when the UK had to renounce its demand to have a specification made 'that the Charter of Fundamental Rights could not be allowed to overturn national legislation in areas such as labour market policy' due to French and German opposition.<sup>98</sup> However, the effectiveness of all these restrictions is open to doubt – even more so given that the notion of implementation itself is not devoid of ambiguity.

Eeckhout, for instance, makes a comparison between Article 12 EC (the general principle of equal treatment) and the Common Market. Through a review of case law, he demonstrates that the scope of Article 12 EC is wider than that of merely implementing Community

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<sup>97</sup> Article 234 EC.

<sup>98</sup> Financial Times, 18 June 2004, p. 6 as quoted in Brian Bercusson (2005), 'The Trade Union Movement and the European Constitution – The outcome of the Intergovernmental Conference; 17-18 June 2004'. A revised version of the latter can be found at <http://www.tuc.org.uk/international/tuc-9814-f0.cfm>.

legislation or specific Treaty provisions.<sup>99</sup> He then goes on to examine the notion of implementation in the light of fundamental rights and notes that 'the limited-powers arguments appear to have some defects. They critically depend on how the scope of EU law is defined. Thus, the extension of the Charter to the moving European citizen can easily be brought within this scope, if one accepts the argument that the Member States are by definition implementing EU law in cases involving such a person.'<sup>100</sup> Similarly, derogations from the *acquis* may be brought within the scope of the notion of implementation.<sup>101</sup>

The decision to endow the Charter with Constitutional status was initially anathema to the UK, which was concerned that doing so would potentially bring about an expansion of competences on the back of Court rulings. Among the legal consequences that the UK government specifically attempted to preclude were changes in individuals' right to strike, the creation of individually justiciable rights generally (new remedies) and obligations on the side of the Community to undertake legislative action or the establishment of new law-making powers.<sup>102</sup> The UK's worries were considered, albeit in general terms, by the Constitutional Convention Working Group, which was notable for containing a host of high-level legal experts from the EU institutions as well as the Ombudsman and a judge from the European Court of Human Rights.

Explicitly addressing these concerns, the Working Group emphasised that the scope of application is limited and applies to the subjects '*only* when they are implementing Union law (emphasis in original text).'<sup>103</sup> The preamble of the Charter itself instructs that it 'will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention'.<sup>104</sup> As opposed to some of the domestic legal systems within the EU, the ECJ does not consider *travaux préparatoires*, preparatory legislative documents, to be authoritative in its interpretive practice.<sup>105</sup> In relation to primary law, this is in part due to the fact that treaty amendments have traditionally been negotiated *in camera*. At the same time it would be problematic for the legislator to specify the scope of Community law exhaustively or even in much detail given that treaty-law often is the result of lengthy negotiations and

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<sup>99</sup> Piet Eeckhout (2002), 'The EU Charter of Fundamental Rights and the Federal Question', Common Market Law Review, 39 (5), pp. 945-94, at pp. 959-962.

<sup>100</sup> *Ibid.*, p. 975.

<sup>101</sup> Erich Vranes (2003), 'The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention', European Integration Online Papers, vol. 7, <http://eiop.or.at/eiop/texte/2003-007a.htm>. Compare C-260/98 *ERT* [1991] ECR I-2925, paras 42-42 CHECK. For a critique that this matter is not clarified in the Article II-111, see Eeckhout, 'The EU Charter', p. 978.

<sup>102</sup> For an overview of the UK Government's views see Vaughne Miller, 'The Treaty Establishing a Constitution for Europe: Part II (The Charter of Fundamental Rights)', House of Commons, Library Research Paper, 04/85, 25 November 2004.

<sup>103</sup> Final Report by Working Group II, Brussels 22 October 2002, CONV 354/02, p. 5. <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>.

<sup>104</sup> Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004, p. 1-474, Part II, The Charter of Fundamental Rights of the Union, Preamble.

<sup>105</sup> In the context of secondary law the Court has reasoned that 'where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision'. C-402/03 *Skov Æg v Bilka Lavprisvarehus A/S* [2006] ECR I-199, para. 42.

particularly since agreements often cover over multiple technical and especially political compromises.<sup>106</sup>

The transparency characterising the Convention-method to some degree allows for reference to be made to the preparatory legal work and the specification in the Charter preamble appears functionally comparable to *travaux préparatoires* by tying the Court's scope for interpretation to the intent of the legislator. However, the final treaty-version reflects attempts to accommodate, in particular, the UK government that sought the least consequential version, and this version is intended to strengthen the message contained in the horizontal clauses established in the section on general provisions governing the interpretation and application of the Charter.<sup>107</sup> Hence it cannot fully be seen as sending a signal about the pre-eminence of the governments' cumulative preferences. Whereas the UK Government itself has referred to the explanatory memorandum as a guarantee of some of its legal – essentially political – standpoints,<sup>108</sup> the Convention Working group on the Charter acknowledges that although it constitutes 'one important tool of interpretation ensuring a correct understanding ... they have no legal value'.<sup>109</sup> The updated version annexed to the Constitution states that 'although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.'<sup>110</sup> It is thus for the Court to establish what weight can appropriately be attributed to the explanations.

### *Anticipating the Effects of the Charter*

The Charter distinguishes between rights and principles. This approach is deliberate. The UK Attorney General thus maintains that 'while rights must be "respected", principles must be "observed" – but they cannot be enforced like basic human rights. Nor, despite their aspirational character, is there any obligation to take legislative or executive action just because they are in the Charter. Principles become significant for the courts only when acts implementing the principles are interpreted or reviewed.'<sup>111</sup> According to this interpretation, therefore, the Charter does not represent a catalogue of generally justiciable rights. This distinction between principles and rights contained in the Constitution was vital for the UK in the negotiations leading to the inclusion of the Charter to ensure, more specifically, that social and economic rights 'are not justiciable as such until implemented by detailed legislation.'<sup>112</sup>

The main elements of the AFSJ as found in the current treaties are reproduced in Article III-257 of the Constitution, albeit with certain changes. Firstly, mutual recognition has been established as a keystone of judicial co-operation in civil and penal matters and European

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<sup>106</sup> Although without authoritative significance, member states nevertheless invoke Council minutes occasionally in an attempt to establish the intention prevailing in the Council when the legislation was adopted. See, e.g., the (unsuccessful) argumentation and the proof presented by Denmark in C-402/03, *Skov Æg v Bilka Lavprisvarehus A/S* [2006] ECR I-199.

<sup>107</sup> Part II, Title VII, Articles II-111-114.

<sup>108</sup> Mr Straw, Written Ministerial Statement of 9 September 2004 as quoted in House of Commons, Library Research Paper 04/85, 25 November 2004, p. 39: 'As with all the charter provisions, and by virtue of Article II-52(7), it is important to read Article II-28 alongside the official explanation'.

<sup>109</sup> Final Report of Working group II, 354/02

<sup>110</sup> Declaration 12 Concerning the Explanations relating to the Charter of Fundamental Rights.

<sup>111</sup> Attorney General's Speech, 'The Charter of Rights – A Brake not an Accelerator', 25 June 2004, Justice Conference on Human Rights in EU. <http://www.dca.gov.uk/hract/dcahumanrights.htm>. For a comprehensive appraisal of the Charter see Miller, 'The Treaty Establishing a Constitution for Europe'.

<sup>112</sup> Attorney General's Speech, 'The Charter of Rights – A Brake not an Accelerator'.

framework laws may establish measures (III-269, civil matters) and minimum rules (III-270, criminal matters) to that effect. Secondly, there is an express reference to the need to respect fundamental rights.<sup>113</sup> It is in this regard important to consider Eeckhout, who notes

'The question how far "implementation" extends in areas where the EU is not attempting to regulate in detail, such as agriculture, but aims only to harmonize ... some basic elements of national laws, will be vital. Such an approach generally applies in relation to the internal market, where human rights issues are not prevalent, but is also increasingly adopted for the establishment of the area of freedom, security and justice. For example, the legislative programme on asylum aims to harmonise the basic components of Member States' asylum laws. Once that process is completed, it may become arguable that all asylum applications have a *sufficient connection with implementing Union law* so as to trigger the application of the Charter, meaning that all fundamental rights issues in asylum cases would be Charter issues (emphasis added)'.<sup>114</sup>

Such broad interpretation would have legal and economic ramifications. For instance, the UK has taken measures to remove social security benefits from asylum seekers in certain circumstances, mainly if they fail to apply for asylum within a specific delay after entry. Where the Constitution sets uniform standards for asylum, Article II-94 on rights to social and housing assistance may be extended to third country nationals.<sup>115</sup> In accordance with the horizontal clause, the Charter itself does not establish new legal obligations. Rather, the potential issue for certain member states may be the legal consequences of linking fundamental rights and legislative action within the AFSJ as this is likely to produce legal consequences that do not conform to the policy preferences of those governments. Since immigration is currently a particularly sensitive policy area in most EU countries<sup>116</sup> – with some governments even "venue-shopping" in order to use the EU to bypass domestic checks and balances to increase policy discretion<sup>117</sup> – the risk of major political fallout is high.

Legal scholars have also pointed out that the distinction between rights and principles supposedly established in the Constitution is not consistent with the EC Treaty.<sup>118</sup> Walker further comments that 'it would be wrong ... to view the Charter as set out in Part II of the DCT exclusively as a check on AFSJ action in the name of individual rights.' As II-5 makes explicit, 'security of [the] person' is also a right, and to that extent affords an example of the Charter legitimating as opposed to constraining legislative and executive action under the AFSJ.<sup>119</sup> The EP Committee on Civil Liberties, Justice and Home Affairs for its part has advocated a broad interpretation of the Charter in the Constitution. In the Bourlanges Report it thus emphasises, by reference to the Charter Preamble, that the 'individual justifies a positive

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<sup>113</sup> Article III-257 EC..

<sup>114</sup> Piet Eeckhout, 'The EU Charter', p. 976.

<sup>115</sup> Compare Martin Howe on currently applicable legislation on minimum standards for reception of asylum seekers. Note, first, that the author's comments on asylum are made with reference to secondary asylum legislation under the current treaty framework and not specifically the Constitution and, secondly, the change from 'harmonisation' to 'uniform status' in III-266. Martin Howe, QC, Opinion on UK Asylum Policy and the EU Constitution, 19 May 2004.

<sup>116</sup> See, for instance, Claes de Vreese (2004), 'Why European Citizens will Reject the EU Constitution', Harvard University, [Centre for European Studies Working Paper no. 116](#).

<sup>117</sup> Virginie Guiraudon (2005), 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping', [Journal of Common Market Studies](#), 38 (2), pp. 251-71.

<sup>118</sup> See, e.g., Gráinne de Búrca (2004), 'Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union', [Fordham International Journal](#), 27 (2), pp. 679-714 and Bercusson, 'The Trade Union Movement'.

<sup>119</sup> Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed.), [Europe's Area of Freedom, Security and Justice](#) (Oxford: OUP, 2004), pp. 3-40, at p. 32, fn. 56.

policy of promoting fundamental rights and not simply a restrictive one of protecting the Member States from the potential excess of the EU'.<sup>120</sup> At first sight this is a political choice to be taken by the legislator and the member states thus retain some control over the question in the Council.

For some member states, however, a pertinent legal clarification will concern the possibility of, in Weiler and Fries' terms, a *move from norms to institutional duties* as established by the ECJ within policy areas falling under the current EC Treaty. An analogous reading of C-265/95 *Commission v France* concerning free movement of goods, para 28 makes an interesting case for illustration. Article 28 EC 'requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with [ex] Article 5 [the fidelity clause], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected in their territory'.<sup>121</sup> Hence the very difference between the fundamental freedom when it concerns free movement and the fundamental freedom as a human right needs to be spelled out. However, the authors argue, refraining from taking action may be perceived as causing an obstruction also to fundamental rights.<sup>122</sup> In the judgment C-68/95, *T. Port v Bundesanstalt für Landwirtschaft und Ernährung* the 'ECJ derived from a genitive prohibition on obstacles to free movement a *positive institutional duty effectively to ensure such freedom ... and to act as to ensure that fundamental principles are respected even when, arguably, the measure itself does not create a violation (emphasis added)*'.<sup>123</sup> Thus making a fundamental right effective may indeed necessitate *positive action*.

The first position is at odds with a narrow interpretation of Article II-111(1) stating that the Charter is addressed to the member states only when they are implementing Union law as is the second position where the subject is the Community institutions and not just the member states. Weiler and Fries consider several types of situation that might give rise to such issues, two of which shall be mentioned briefly here. Firstly, they draw attention to cases where Community action coincides with Community fundamental rights such as, for instance, equal pay.<sup>124</sup> All the fundamental rights listed in the Charter can be considered in this regard. Because of the Charter's apparent attempt to turn what have traditionally been Community fundamental rights into principles, the Court may come to the conclusion that also some of the 'principles' in the Constitution will be of legal relevance here. Thus to recap, it may tentatively be suggested that the Community and in particular the legislator could be faced with an obligation to advance in secondary law fundamental rights as they are established throughout the Constitution and not merely to observe them upon implementing EU law.

Secondly, Weiler and Fries point out, there are policy-areas where there is a specific mention of fundamental rights.<sup>125</sup> The example they offer is Article 177 EC on co-operation and

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<sup>120</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working document on the measures required to enhance the legitimacy of the area of freedom, security and justice, 18 August 2004 (Rapporteur: Jean-Louis Bourlanges).  
[http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dt/539/539362/539362en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/539/539362/539362en.pdf).

<sup>121</sup> C-265/95 *Commission v France* [1997] ECR I-6959, para. 32.

<sup>122</sup> J. H. H. Weiler and Sybilla C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', Harvard University, *Jean Monnet Working Paper 4/99*, p. 12.

<sup>123</sup> *Ibid.*, p. 13.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, p. 16.

development. Although their working paper predates the Constitution, when looking at the text of the Constitution the same reasoning can fruitfully be applied to the AFSJ. In a Ministerial Statement setting out the UK Government's views on the Charter of Fundamental Rights, it is stated that 'there is no *obligation* to legislate, and the Charter itself generates no additional powers to do so (emphasis added).' However the question is whether the Court is indeed in the process of establishing such an obligation and whether the horizontal clause would have any bearing on this.

Whereas some member states have attempted to restrain the potential reach of the Charter and set up guarantees that it will not come to imply, for instance, a new set of justiciable rights or obligations to legislate or to take action, other member states have sought guarantees that their national standards of human rights will not come under the Court's jurisdiction and be interpreted as autonomous Community rights and principles. As the circumstances surrounding the Irish Grogan protocol on the right to life of the unborn shows, nationally-recognized fundamental rights have so far been liable to potential external pressure. The Court has clarified that 'whilst inspired by the constitutional traditions common to the Member States, [fundamental rights] must be insured within the framework of the structure and objectives of the Community.'<sup>126</sup> The ECJ has established an intricate set of interpretative guidelines ranging from purpose, treaty context, historical context, etc. In the light of the principle of supremacy and given the nature of fundamental rights, the member states are sensitive to activism in so far as it would imply a harmonisation of current standards or affect the ability to uphold national fundamental rights that are stronger than those present under other domestic jurisdictions or even absent. Mancini, a judge at the ECJ, has noted out of court that 'the Court does not have to go looking for maximum, minimum or average standards. The yardstick by which it measures the approaches adopted by the various legal systems derives from the spirit of the Treaty and from the requirements of a Community which is in the process of being built up.'<sup>127</sup> The statement suggests that the notion of fundamental rights is potentially detached from that of individual domestic jurisdictions and that the Court may apply a dynamic interpretation in the light of the development of the Community. Article II-112(4) now explicitly prescribes that 'insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.' However the Court may nevertheless end up in a situation where it will have to solve a conflict between different and perhaps not immediately compatible rights.<sup>128</sup>

### *The Insufficiency of Ex Ante Measures*

This section has sketched out the horizontal clauses in the Constitution aimed at restraining the potential scope and legal implications of the Charter of Fundamental Rights and which would also allow member states to uphold their own standards of fundamental rights. It was explained how some member states, in particular the UK, used their bargaining power during

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<sup>126</sup> C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 at 1134 CHECK.

<sup>127</sup> Mancini, quoted in Hartley, *The Foundations of European Community Law*, p. 139. See the latter also for a historical account of EC fundamental rights in EC jurisprudence and a discussion of the Irish constitution's right to life of the unborn in potential conflict with the, albeit not constitutionally secured, rights of abortion in other member states.

<sup>128</sup> See Hartley, *The Foundations of European Community Law*, p. 139 and generally for a historical account of EC fundamental rights in EC jurisprudence and a discussion of the Irish right to life of the unborn in potential conflict with the, albeit not constitutionally secured, rights of abortion in other member states.

the negotiations leading up to the adoption of the Charter to safeguard domestic policy preferences and to limit the Charter's potential reach. Conversely, other member states have been in favour of attributing a stronger role to certain fundamental rights than can generally be agreed upon and they have been accommodated thanks to a range of specific charter provisions and the accompanying explanations – one such example being Article II-88 concerning right of collective bargaining and action 'in accordance with Union law and national laws and practices'.

Thus, as scholars have already suggested, there is a fundamental tension on the one hand between the resulting Charter with its objective of promoting fundamental rights and in particular the linking of specific policy areas and fundamental rights and, on the other, the horizontal clauses aiming at judicial self-restraint both in the domestic and the Community courts.<sup>129</sup> This in part reflects the fact that the 'Principal' is composite and that the member states each attempt to safeguard rather specific national preferences, whilst at the same time securing room for the Court to work as an ally in certain cases where it might enhance certain member state interests. In the case of the Charter, the result is a set of horizontal provisions that seemingly oblige the Court to exercise strict judicial self-restraint. Yet by asking the Court to interpret both the Charter in isolation and in relation to other policy areas and thus to make sense of the Constitution's objective of actively promoting the Charter, it remains the fiduciary duty of the Court to solve legal, interpretive queries with significant policy implications.<sup>130</sup>

This was well illustrated when the House of Commons sought clarification from former ECJ Judge Professor Sir David Edward on the legal and practical significance of both the objectives and the Charter established in the Constitution.<sup>131</sup> He advanced two possibilities: 'one is that the Court uses the objectives as a point of reference. The other is that they use the objectives – *and the same applies to the Charter of Rights* – as a basis for creating rights or creating obligations (emphasis added).'<sup>132</sup> Thus, although the horizontal clauses to some length tackle concerns as to creeping competences and attempt to keep a tight rein on the question of justiciability, the Charter is still likely to have an impact on the ECJ's interpretation of the Constitution.<sup>133</sup> Thus the member states' attempt to define the strategic space of the Court by introducing horizontal *ex ante* clauses restricting its scope of interpretation is liable to fail as a fetter of cast-iron. Indeed, since all three types of clashes with member states identified above boil down eventually to competence clashes, rather than enabling the resolution of policy problems, the court is more likely to serve to highlight both competence questions and the vexing intricacies of responding to the actions of supranational institutions. In that sense the ECJ stands at the nexus of politics and law as a lightning rod not

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<sup>129</sup> de Búrca, 'Beyond the Charter'.

<sup>130</sup> The policy choices are fundamental and reflect a divide between the UK and the 11 other then member states that began in 1989 when the Commission first tabled proposals concerning various social aspects of the common market. The same question threatened the adoption of the Maastricht Treaty, however in that case the question was solved somewhat creatively by a protocol on social policy. See Poul Skytte Christoffersen, *Traktaten om den Europæiske Union* (Copenhagen : Jurist- og Økonomforbundets Forlag, 1992), pp. 119-129.

<sup>131</sup> The UK Select Parliament, Select Committee on European Scrutiny, Wednesday 17 November 2004. Reference <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmeuleg/38-xiv/4111704.htm>

<sup>132</sup> House of Commons, Minutes of Evidence: Evidence heard in Public Questions 27 – 74, Wednesday 17 November 2004. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/uc1064-ii/uc106402.htm>

<sup>133</sup> See de Búrca, 'Beyond the Charter', generally and in particular p. 680.

only for intractable conflicts over the division of competences but also for signalling the inherent difficulties of controlling a fiduciary *ex ante*.

## Conclusions

This paper has sought to understand the Court's role as a fiduciary, how member states have tried to constrain it *ex ante* for the sake of national prerogatives and, notwithstanding such constraints, to limit the repercussions its judgments can have on the politics of integration. In doing so, we have put forward two major arguments concerning the nexus of law and politics in the EU system. Firstly, that judicial politics can, as in the education example, lead to a policy void where both individual and palatable collective options in response to a Court decision are lacking.<sup>134</sup> Secondly, by analysing the likely legal implications of the Charter, we demonstrate that *ex ante* methods of curtailing Court discretion with a view to minimising the impact both on policy-making and member state prerogatives are unlikely to succeed. As a fiduciary established to render commitments more credible by virtue of not being a knave to member state preferences, it seems impossible to pre-empt the Court so as to eliminate all chance of its contributing to setting the policy agenda of integration. Hence in the dynamic relationship between law and politics it appears that purely *ex ante* procedures for retaining domestic autonomy are not sufficient.

Consequently, this analysis suggests that in the current EU system subsidiarity or the preservation of certain national competences will ultimately be upheld by *ad hoc ex post* measures such as the Barber protocol or the Kalanke-inspired revision of Article 141.4.<sup>135</sup> In these circumstances, the Court inevitably finds itself at the nexus of various conflicts over competences and policy-making discretion. If the Charter eventually comes to be given legal effect when implementing EU law a growth in such conflicts seems inexorable, in which case the stillborn 1996 Amsterdam IGC discussions over redesigning institutional relations with the Court may very well resurface. Yet instead of marking a change in the Court's fiduciary responsibilities, any such reform would rather signify a further constraint on its strategic space as part of the evolving inter-relationship between law and politics in the EU.

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<sup>134</sup> Walker points out that a similar 'decision-making gap' can arise when EU regulatory practices undermine 'the economic or legal capacity of states to undertake their own distributive policies'. Neil Walker (2007), 'Europe at 50 – A Mid-Life Crisis?', National University of Ireland, Galway, Faculty of Law Annual Distinguished Lecture.

<sup>135</sup> The infamous *Kalanke* decision (1995) cast doubt on the legality of affirmative action for gender equality and required a treaty amendment to re-establish the legality of national positive action measures addressing gender imbalance. Beach, *Between Law and Politics*, pp. 139-54.