In Search of the Political Question Doctrine in EU Law

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There are situations in EU law where questions posed to the Court of Justice of the European Union can be considered political questions. Parties before the Court have made a number of attempts to claim that for such political questions, the Court ought to adopt the political question doctrine, and decline to provide a judgment. To date, the Court has refused to explicitly consent to such requests, and it would appear that there is no obvious political question doctrine in EU law. Yet, on closer inspection, there are hints of the doctrine shining through the Court’s case law. The breadth of the EU law means that political questions can arise in many different legal disputes. In particular, given that some matters come close to political developments and choices, it is conceivable that the Court could invoke the political question doctrine at some future juncture. This article goes in search of the doctrine in EU law, and highlights where the Court ought to invoke the doctrine within the constitutional design of the EU treaties in defined circumstances. The contribution embraces the view that if the doctrine is invoked, the Court should set down a specific test with determinable criteria for what constitutes a political question, which it has not done to date.

1 THE POLITICAL QUESTION DOCTRINE

1.1 THE DOCTRINE IN CONTEXT

The political question doctrine (‘the doctrine’) is the non-justiciability of questions arising before a court of law, which decides not to adjudicate an issue — to not settle the question(s) put to it — and instead to leave it to other entities to resolve. A court of law undertaking an evaluation of the doctrine entertains the idea that it is a self-conscious actor, identifying its own role within a given polity. Therefore, it can be used as a means to dismiss a case from a court’s docket. It is of significance for lawyers arising from the fact that it is ‘an ordinance of extraordinary judicial abstention’. ¹ Yet, it does not entail that there are areas of constitutional law that are beyond the scope of judicial review. Rather, the doctrine ensures that a court is aware of its limits as a

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single power branch, and is mindful of the question(s) being asked of it, querying if it would be more appropriate for another branch of government to resolve.

When executed, the doctrine acts as a self-imposed prohibition on a court from adjudicating the question(s) before it. Yet it is not only about deferring to political institutions, but can be in relation to providing political institutions relevant time and space to deliberate and clarify questions over a period of time, well before any form of judicial review is required. By application, it is ‘a technical legal basis for courts to refuse to consider the lawfulness of an action’, particularly pursuant to foreign affairs powers.\(^2\) Drawn more narrowly, the doctrine could be said to be a domain that has more political than legal elements, and is a prescribed area of US constitutional law. Judicial restraint is a well-researched field of law; however, the doctrine is a very particular form of judicial restraint. Reasons have been offered for why the concept of the doctrine exists,\(^3\) which range from the lack of a legal aspect for the question; that facts are disputed or certain; or more drastically, that a court ruling would not be followed if it was delivered. When it is invoked, it reduces a court’s involvement in ‘controversial or sensitive … issues’, and allows them to protect themselves from ‘potential political backlash’.\(^4\)

In order to determine the extent of the doctrine in EU law, attention must firstly turn to understanding the doctrine in a comparative perspective. This is due to the fact that there is no clear conception of what the doctrine is in EU law, which has primarily focused on economic integration. Before any doctrine becomes present and commonplace in the EU legal order, it is often the case that there are comparators from the US legal system. The doctrine has origins in US constitutional law, and so it is possible to ‘draw some analogies between the US inter-branch and the EU inter-pillar and inter-institutional conflicts’.\(^5\) The EU treaties are much more detailed and specific than the US Constitution; however, ‘in many respects [the Court’s role is] very similar to that performed by the Supreme Court of the United States’.\(^6\) The Court’s role and jurisdiction is ‘analogous to the federal jurisdiction of the [US] Supreme Court’,\(^7\) despite their separate histories and different levels of

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\(^5\) José Antonio Gutiérrez-Fons, *The Contribution of the United States Supreme Court and the European Court of Justice in the Vertical and Horizontal Allocation of Power* 111 (PhD thesis, Queen Mary, University of London 2009).


control. Thus, the US experience makes for a suitable comparison for how doctrines of EU law function.

1.2 The doctrine in US law

Summoning the doctrine would appear to go against the very premise of judicial review in the US. The famous *Marbury v. Madison* decision of the US Supreme Court (USSC) expanded on the very basis of judicial review, which implicitly acknowledged the doctrine, but without defining it. During its life, the USSC had different ways of using the doctrine, given its status as a judge-made phenomenon. It was *Luther v. Borden* where the concept of ‘judicial non-interference with political questions’ was first applied. A short number of years later in *Doe v. Braden*, the USSC rejected the possibility of conducting judicial review of an international treaty, unless it contravened the US constitution. Thus, the doctrine in US law was born. The USSC initially afforded the executive branch significant scope for manoeuvre and wide latitude in its conduct of foreign affairs and decision-making, as per *United States v. Curtiss-Wright Export Corp.*, a separation of powers case between federal institutions. Yet, with the growing indistinct nature between what is internal affairs compared to external relations, the two dimensions became increasingly indistinguishable, and the delineation of ‘foreign affairs’ matters from other spheres of policy began to appear arcane. This wide scope initially afforded by the USSC to the executive, through the doctrine, shielded effective judicial review. Bluntly put, ‘there [was] … a political question doctrine’ in US constitutional law. However, it has been ‘[o]ne of the most confusing doctrines’, and it has been disputed about how it should be construed, interpreted, and applied. Freely put, beyond an acknowledgment of its existence, ‘there is little agreement as to anything else about it’.

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17 Henkin, *supra* n. 1, at 144.
Baker v. Carr, a case centred on redistricting electoral constituencies, affords the best illustration of where the doctrine may apply.\(^{18}\) The USSC judgment attempted to define the possibilities for when the doctrine is to be invoked, which were extensive. They included:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or,
2. A lack of judicially discoverable and manageable standards for resolving it; or,
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or,
4. The impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or,
5. An unusual need for unquestioning adherence to a political decision already made; or,
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Much later in Vieth v. Jubelirer, the USSC said that the Baker v. Carr criteria were ‘probably listed in descending order of both importance and certainty’,\(^{19}\) and later in Zivotofsky v. Clinton,\(^{20}\) it again rejected the doctrine, albeit appearing to narrow Baker v. Carr to the first two considerations.\(^{21}\) Yet, the USSC did not deliver Baker v. Carr unanimously. In dissent, Justice Brennan noted that ‘sweeping statements to the effect that all questions touching foreign relations are political questions’, would be ‘[an] error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance’. Baker v. Carr’s strength was recognition that, for some questions, the political institutions, acting within the scope of their powers, are the most appropriate actors to execute executive prerogatives, free of judicial control. It changed the nature of the doctrine in US law,\(^{22}\) and the USSC later summarized the doctrine from Baker v. Carr as cases where ‘resolution would lead a court into conflict with one or more of the coordinate branches of government; [and] courts can decline to decide political questions out of deference to the separation of powers’.\(^{23}\) The O’Brien v. Brown judgment held that a court should not ‘interject itself into the deliberative processes of a national political convention’, thus acknowledging there are ‘relationships of great delicacy that are essentially political in nature’. It has been noted, however, that many lower instance courts in the US have not yet read Zivotofsky v. Clinton as a delimitation of Baker v. Carr yet;\(^{24}\) however, this may change over time.

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Whilst the doctrine experienced a rise, it also has experienced a fall, and its decline has fit into broader changes in adjudication in US law. What followed Baker v. Carr was ‘increased judicial intervention in areas that previously were regarded as strictly political’. There has also been a more-recent tendency in US law to view that the principle of separation of powers is not necessarily a political question only, and that the judiciary may be called upon to determine whether or not the constitutional powers afforded to different branches are utilized intra vires, and not beyond their designated authority.

In addition to the US understanding of what the doctrine is, there has also been an attempt at an understanding of the doctrine in international law. The International Court of Justice (ICJ) has said that ‘[w]hatever [a case’s] political aspects, the [ICJ] cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task’. This was an outright dismissal of the doctrine. It has been restated often, most notably in its Israeli Wall Opinion that ‘the [ICJ] cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed’. Yet, as seen in the US, a political resolution to a political problem is the way in which a court can invoke the doctrine. Correspondingly, its critics view that the doctrine is ‘an unnecessary, deceptive packaging of several established doctrines’. It is thus not surprising that there are differences between how the USSC and the EU Court have interpreted the doctrine.

2 EUROPEAN UNION LAW

2.1 THE DOCTRINE IN EU LAW

The confusing nature of the doctrine in US law spills over into EU law, and the doctrine in US law had been predicted to become an issue in EU law. Comparatively speaking,

27 Franck, supra n. 3, at 126.
29 Advisory Opinion of the International Court of Justice, Legality of the Use by a State of Nuclear Weapons in Armed Conflict (8 July 1996).
31 Advisory Opinion of the International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004).
it is much less discussed in EU legal scholarship, and evidence of it in practice is uncommon, as it has not (yet) manifested itself into a clear doctrine. This can be partially explained by the fact that historically, EU law developed around economic integration, and not broader matters of constitutional law. However, in an era when the two are highly intertwined and in many instances indistinguishable, the doctrine has the potential to manifest itself in different ways. Judicial review is a key component of how EU law is to function, and effective judicial protection is to be afforded in EU law.34 Judicial powers of the Court extend, in theory, baring minor exceptions,35 to all areas of the treaties, and early in the Court’s life, it claimed that ‘judicial review … must … confine itself to an examination of the relevance of the facts and of the legal consequences’.36 Thus, it accepted in a forthright manner that there was the possibility for the Court to look beyond matters of legal consequences, which hinged upon non-legal matters, such as political questions.

In contrast to the US, the doctrine in the EU closely follows the outer limits of the reach of EU law and the exemptions and derogations that apply. Thus, there are different contexts in EU law where the possibility of the doctrine may arise. The Court’s role is not one that examines a singular set of questions, but rather, acts in different capacities depending on the type of case and questions being asked. For example, it can act as a court providing national courts with an interpretation of EU law; a first instance court for certain direct actions; an appellate court on cases coming from the General Court, and a court providing an Opinion on a draft international agreement;37 amongst other roles. Depending on the type of case, this can in turn affect the way it provides judgments. Thus, legal questions before the Court can concern anything from issues involving the exercise of policy choices by the EU legislature, to issues seeking judicial resolution that have stark political implications. Guaranteeing judicial review for the Court is a prerogative that has been jealously guarded. Applying legal standards to non-legal questions, such as political questions, makes some issues disposed for the Court to invoke the doctrine. Since its inception, it has considered the variation of questions before it, determining whether they are of a legal or political character.38 It has had to ‘be careful to distinguish

34 What the Court has called ‘effective judicial control’ stemming from, Case C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, ECLI:EU:C:1986:206. Also called a ‘right to an effective judicial remedy’ in, Anthony Arnull, The Beat Goes On, 12 Eur. L. Rev. 56, 57 (1987).
35 Such as certain aspects of CFSP. See s. 2.3.
38 D. G. Valentine, The Court of Justice of the European Communities: Volume One: Jurisdiction and Procedure 388 (Stevens and Sons 1965).
between legal and political considerations’, given that political considerations, strictly speaking, fall outside its purview. And yet, the Court has not yet adopted an explicit doctrine in EU law, and instead, sees itself as carrying out a constitutional function, by delivering judgments asked of it.

The EU institutions, that are more political in nature, are given the competence to act within their given mandate for the consideration of economic, social, and political life in the Union, and are subject to judicial review. How far the Court, as the judicial actor, wades into such decisions is a debatable function for a non-political institution. It has been claimed that where the Court would be asked to interpret a matter that amounts to a political question, that it ‘would act under the premise of judicial restraint’. Yet, practice suggests otherwise. Over time, the Court has supplied a number of judicial revelations, which have been at odds with the unanimous position of the political institutions. This was demonstrated in recent years with the delivery of Opinion 2/13, which saw all the institutions and a vast majority of Member States intervening in support of EU accession to the European Convention of Human Rights (ECHR), for which the Court put up a number of different hurdles to prevent accession occurring under existing treaty arrangements, despite the fact that accession was mandated by Article 6(2) TEU.

The treaties’ occasional ambiguity leaves much room for judicial interpretation and discretion, and certain articles in the treaties have a strong political personality, with some provisions having ‘political character … [that] overshadows its legal character’. There has certainly been a fear amongst the EU judiciary that its judgments may lead it to decide ‘political “hot potatoes”’ that would be ‘too close to the political arena’. The Court considered in Opinion 1/60 that the proposed amendment to the European Coal and Steel Community (ECSC) Treaty, which could have resulted in increased levels of taxation due to additional spending, was ‘a political and not a legal matter’. Thus, the Court was aware of the dangers of having political disputes being diverted to the judicial arena, when it was unnecessary. Much later, in its contribution to the 1995 Intergovernmental Conference, the Court stated it would be preferable to have disputes which are just as capable of being satisfactorily

39 Ibid.
40 Gutierrez-Fons, supra n. 5 at 125.
45 Opinion 1/60, Procedure for the amendment of the Treaty pursuant to the third and fourth paragraphs of Art. 95 of the ECSC Treaty, ECLI:EU:C:1960:8, at 51.
resolved at political level to remain there, and not be diverted to the Court.\textsuperscript{46} In the modern era, Article 19 TEU provides that the Court ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. This provision is ‘very widely defined’,\textsuperscript{47} giving the Court a broad discretionary basis as its starting point for interpretation, allowing it to hold extensive powers to determine its own jurisdiction. This discretion afforded to the Court, given it has not been properly confined, has been criticized for being too broad.\textsuperscript{48}

If the doctrine is to exist in EU law, some consideration must be given to identify the consequences of judicial action. Matters touching upon political issues are elemental of how the Court approaches questions of institutional competence and exercise of powers. In EU law, the doctrine is relevant for ensuring that the Court is not bringing about judicial legislation. Nevertheless, when the Court comes up against criticism for delivering judgments that amount to judicial legislation, detractors ‘rarely base [their arguments] on a developed theory of where the limits of the judicial function’.\textsuperscript{49} Unlike the US practice of the doctrine, where, previously, US courts could free themselves from adjudicating inter-branch disputes, the EU Court has no such discretion. The limits of competence have been patrolled and determined by the Court for a long time,\textsuperscript{50} and the work of the Court routinely sees it providing an adjudicatory function of resolving disputes between institutions on the allocations of power, as well as bitter inter-state disputes between Member States.\textsuperscript{51}

Few cases have arisen where the Court has implicitly recognized the doctrine. In an earlier case, \textit{Mattheus v. Doego},\textsuperscript{52} the Advocate General contemplated the genuineness of the case, and recognized that in order for the Court to answer the question asked of it, it was conditional upon an amendment to EU primary law, which is ‘the subject of hard bargaining of a mainly political nature’,\textsuperscript{53} thus recommending the

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\item Christiaan Timmermans, Judicial Activism and Judicial Restraint, in The Role of International Courts 245 (Carl Baudenbacher & Erhard Busek eds, German Law Publishers 2008).
\item ‘The Court of Justice cannot have control of its own jurisdiction’. Opinion of Advocate General Ruiz-Jarabo Colomer, François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort, ECLI:EU:C:2001:366, para. 61.
\item Anthony Arnull, Judicial Activism and the European Court of Justice: How Should Academics Respond?, in Judicial Activism at the European Court of Justice 217 (Mark Dawson, Bruno De Witte & Elise Muir eds, Edward Elgar 2013).
\item E.g., Case C-9/56, Menoni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community, ECLI:EU:C:1958:7.
\item Case C-93/78, Mattheus v. Doego, ECLI:EU:C:1978:296.
\item Opinion of Advocate General Mayras in Case C-93/78, Mattheus v. Doego, ECLI:EU:C:1978:193, at 2214.
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Court reject the question on jurisdictional grounds. The Court followed, stating it lacked jurisdiction as ‘the question raised was not of a judicial nature’ \(^{54}\), implying the existence of some form of the doctrine. However, in order for further substance of the doctrine to be seen, attention must turn to EU external relations law.

### 2.2 The Doctrine in EU External Relations

Standards for when judicial review applies can vary according to the field of policy. The rise of the EU’s external relations as an increasingly important global actor and the growth in competence of the Union has contributed to policy-related questions arriving on the docket of the Court. The Union’s political institutions are afforded wide discretion in political areas, which extends to external relations, \(^{55}\) and governs the manner in which choices of external relations are formulated and executed. There are extremities for when courts choose to answer, or choose not to answer questions, and external relations appears to fall between such extremities. \(^{56}\) As a result, judicial review in matters of EU external relations are now more common than ever before. Whilst competency battles between the institutions have long been a feature of the external relations landscape that has provided eminent doctrines of EU law, the breadth of judicial review and the limits of justiciability come into focus, given the potential scope for the doctrine to emerge. This is particularly true, given the array of legal contexts in which matters of EU external relations arise.

EU external relations law is a mixture of ‘high political discretion[,] to the simple and mechanical application of rules’, \(^{57}\) but yet ‘the highly sensitive nature of a case does not necessarily determine whether the Court is to exercise its jurisdiction’. \(^{58}\) The area is not short of legal questions related to legal bases, competence of different horizontal institutional actors, competence shared between vertical actors between the Union and Member States, and procedural matters. The earlier days of the EU’s external relations were principally focused on the treaty-making powers held by the Union as provided for by the treaties, however, with the growth of Europe’s influence in the world, building upon

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\(^{55}\) The legislature are entitled to ‘broad discretion in areas which involve political, economic and social choices’. Case C-440/14 P, *National Iranian Oil Company v. Council*, ECLI:EU:C:2016:128, para. 77.


its internal competencies, the ‘distribution of powers remain[ed] unsolved and constitute for that reason a source of continuous conflicts’.59

A sceptical eye has been cast on how to construe the doctrine on a number of occasions in EU external relations. Economic integration in Europe has meant the Court has assumed a role in dispute settlement in matters that are ‘political interests’.60 The ERTA doctrine made clear that acts, including ‘political consultations’,61 may come before the Court. Later in Maclaine Watson, as part of the International Tin Council cases, the Opinion of the Advocate General was that he would ‘not recommend that the Court adopt a concept analogous to ‘act of the government’ which would render inadmissible in principle … acts of the institutions in the field of external relations’, stating that such a construal would ‘prove difficult to reconcile with the Court’s case-law’.62 The ‘act of the government’ term has strong links in its original acte de gouvernement from French administrative law. Evidently, this term is a close understanding of what constituted a political question, even if it was not purposely said. The Advocate General went on to state that the ‘existence of legal criteria of assessment constitutes one of the determinant factors as regards the court’s jurisdiction’.63 Thus, it would be a ‘manifest overstatement to suggest that the inadmissibility of actions … in respect of acts by the State in the field of international relations’—rejecting the doctrine,64 but recognizing the ‘extremely narrow confines of judicial control in this area’.65 Therefore, it appears a national understanding of the doctrine, in some way, had attempted to be transposed into EU law.

Later, Commission v. Greece, a case centring on an embargo established by the Member State against the Former Yugoslav Republic of Macedonia (FYROM), provided a judicial extract from the EU legal order of the doctrine, with it coming close ‘to establishing some kind of political question doctrine’.66 The Opinion of the Advocate General noted that parts of the issue brought before it may constitute a political question, but made short argument of how to distinguish the political dimension of a legal act.67 However, he did argue for a ‘lite’ doctrine,68 given how difficult it was to surmount a sound basis for applying legal standards to a

63 Ibid., para. 78.
64 Ibid., para. 95.
65 Ibid., para. 96.
situation that hindered upon non-legal matters. The Opinion was a clear example of how a judicial actor might balance interests in external relations when there are hints that it may be encroaching into the political territory, and straying from providing a legal answer. It demonstrated, on the one hand, how the Court should not be viewed as 'entirely subordinate to the political power of the Member States', 69 whilst simultaneously ensuring that discretion for Member States on certain security matters is not inadvertently used. The same Advocate General had form in dealing with a potential doctrine as he, in Werner, a dual-use goods case, stated that 'it is difficult … to draw a hard and fast distinction between foreign policy and security policy considerations', 70 emphasizing how difficult a definite criteria-based doctrine would be to formulate.

There are ways where the political institutions go to great lengths to avoid actions of the institutions being attributed to institutions at all. Legal actors are cognisant of the fact that the Court has not fully drawn the doctrine, and thus, will act with the rigor of judicial review it applies in the EU legal order more generally. This was illustrated in Bangladesh, 71 whereby the Court rejected the reviewability of actions by Member States acting collectively, outside the Council. In the same vein, the General Court has more recently attempted to give meaning to the doctrine, without explicitly endorsing any form of broader test. In NF and Others v. Council, 72 the General Court refused to exercise judicial review over the 'EU-Turkey statement', 73 citing that 'a political statement … a measure capable of producing binding legal effects, the EU-Turkey statement, as published … cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union', 74 thus implying the existence of some form of doctrine.

In relation to national armed forces within the context of the Union’s external security, the doctrine can also be considered. In Sirdar; a gender, equal treatment, and military case, the Court carefully delineated the balance between providing clarity on the scope of EU law, whilst recognizing the breadth of a justiciable matter before the

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73 EU-Turkey Statement (18 Mar. 2016).
Court. It said that it is for Member States to ‘adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces’. At the same time, it said that ‘[i]t does not follow, however, that such decisions must fall entirely outside the scope of [EU] law’. This was upheld later in Kreil and again in Dory, two similar gender, equal treatment and military cases which saw the Court recognize that it was not the place of EU law to govern Member States ‘choices of military organisation for the defence of their territory or of their essential interests’, as long as such actions did not violate EU law.

As noted in the Opinion of the Advocate General in Alfredo Albore, ‘although Member States may have a very wide degree of discretion with regard to the protection of their military interests, that discretion is not uncontrolled’, rejecting the idea that entire areas of policy fall outside the purview of judicial review. However, he accepted that Member States ‘may have a wide degree of discretion’, as long as they comply with EU law. Collectively in the Sirdar, Kreil, and Dory cases, the Court did not specify further criteria for where the dividing line would be between a justiciable and non-justiciable matter. Accordingly, there is no clear indicator of what exactly constitutes the doctrine in EU external relations law, despite inclinations of it arising. To investigate further, analysis of the EU’s Common Foreign and Security Policy (CFSP) must be undertaken.

2.3 THE DOCTRINE IN CFSP

Whereas the doctrine may be considered for multiple strands of EU law, some fields stand out, in that it is ‘most obvious in the cases touching upon foreign relations’. Judiciaries usually show a significant amount of restraint when faced with acts of government relating to foreign affairs matters, particularly when there are dynamics that represent political choice. Foreign affairs of any description are normally formulated and executed by political actors, be they executives, or to a lesser extent, legislators. Yet, foreign affairs matters come before judicial actors too. Applying the doctrine might allow a court of law the ‘discretion to “sit out” major foreign affairs cases’, and it has been argued extensively that courts are constrained in foreign

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75 Case C-273/97, Angela Maria Sirdar v. The Army Board and Secretary of State for Defence, ECLI:EU:C:1999:523, para. 15.
76 Ibid., para. 15.
77 Case C-285/98, Tanja Kreil v. Germany, ECLI:EU:C:2000:2, para. 15.
78 Case C-186/01, Dory v. Germany, ECLI:EU:C:2003:146, para. 35.
80 Ibid., para. 72.
82 Louis Henkin, Foreign Affairs and the Constitution 215 (Foundation Press 1972).
affairs cases more than they are in other types of cases. In foreign relations cases in particular, US courts have ‘not been clear on exactly when a foreign relations issue is political and when it is not’. In the EU to date, the Court has discounted an explicit doctrine in EU foreign affairs, much as it has in other fields, but CFSP is a field where it is more implicit. Notwithstanding the exclusion of CFSP from judicial review, prima facie, the Court has been delivering judgments on the margins of its jurisdiction, with the treaties catering for an explicit circumstance where the doctrine be adopted. In contrast to the US, therefore, the doctrine is treaty-mandated, but only tenuously adopted by the judiciary.

The very making of international treaties has an effect on the internal rule-making and decision-making structures within the Union. Foreign affairs are a formative part of the contemporary EU constitution, and lend themselves to a particularly special position in the EU constitutional order. The EU’s CFSP allows it to act ‘in world affairs, without overstraining the system beyond its capacities’. A number of opportunities have arisen post-Lisbon, where the doctrine could have been developed for CFSP, and it therefore appears to be a field of law where the doctrine may appear, due to the fact that it can be seen as being more political than legal in nature. Such a hypothesis could render CFSP, as a policy field, unsuitable for judicial review to take place. Thus, the use of the doctrine in CFSP may be easier to see compared to other fields of EU law, due to the fact that there is ‘no question of any measures to enforce compliance’, through the political process, or Court direction.

The wide scope of the Court’s judicial review powers make for curious intertwinement with CFSP. The term itself, CFSP, can be an ‘umbrella term’, given that it covers a variety of actions, and its scope of ‘all areas of foreign policy’. It is governed by particular intricacies that are spelled out in Articles 21–46 TEU, and is entirely dependent on the political will of Member States as to choices of what CFSP

84 Arts 24 and 40 TEU, and Art. 275 TFEU.
87 Eileen Denza, The Intergovernmental Pillars of the European Union 312 (Oxford University Press 2002).
90 Art. 24(1) TEU. However, this has been limited by a strong line of jurisprudence. See Graham Butler, Constitutional Law of the EU’s Common Foreign and Security Policy: Competence and Institutions in External Relations (Hart Publishing 2019).

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actions should be. In Opinion 2/13, the Court acknowledged that ‘certain [CFSP] acts fall outside the ambit of judicial review by the Court’, 91 but despite the extensive ruling, the Court did not define what it meant by ‘certain acts’ falling outside of judicial review. This could mean that the Court viewed its jurisdiction in CFSP not being conferred upon it explicitly, or, by contrast, that if its jurisdiction was not curtailed, that some matters would call for the need of the doctrine.

Judicial actors casting review over foreign affairs decisions have long been a point of contention in national frameworks, which has been transposed upwards to an equally applicable question at EU level. However, while executive and judicial actors might be hesitant in situating specific circumstances for courts in foreign affairs, it is rare to find scenarios where there is prescribed jurisdiction for courts in foreign affairs from within state systems. This makes the EU and its own judicial system an anomaly. Specific external actions of the EU that have legal effects are within the remit of the Court’s scope of judicial review, 92 and EU primary law excludes the Court’s jurisdiction in the CFSP, with limited exceptions. 93 In practice, the embedded nature of the Court’s tenancy to grant itself jurisdiction, 94 even in tenuous cases, sits uncomfortably with the eventual-ity that it may decline to provide judgment in a field where it has been active in expanding its own jurisdiction.

Separating the political from the legal has never been an easy feat. After all, EU foreign affairs was to be established ‘through … political and legal procedures’. 95 Traditional views of foreign affairs see it as an ‘expression and realisation of … wills and interests’, 96 and given the legal nature of CFSP, the legal instruments that give effect to foreign affairs wishes do much more than merely express wills and interests, as they are legal acts, with legal effect. EU foreign affairs and its coherence are not ‘vague political guideline[s]’. 97 Rather, they are guided by foreign affairs objectives, which can feed into how the Court conducts its review. The scope of specific

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92 Case C-22/70, Commission v. Council, ECLI:EU:C:1971:32 (‘European Agreement on Road Transport’).
93 The ‘exceptions to the exceptions’, or ‘claw back provisions’. Collectively, see Art. 24 TEU, Art. 40 TEU, and Art. 275 TFEU.
objectives set down in the treaties may be perceived as political questions. Article 21 TEU, with its scope stretching across both CFSP and other external relations.

How the EU reacts to international events varies depending on the prevailing political winds. Certain foreign affairs actions require decisive action in a prompt fashion, with prevailing political situations potentially warranting swift action. Judicial review in CFSP is a mixture of both substantive and procedural law. Conducting extensive review in substantive CFSP matters is certainly more difficult than in procedural matters. The former, being challenging at best, would extend the Court into a domain where policy choices exist and, thus, circumstances may warrant the invocation of the doctrine. The procedural grounds review, on the other hand, is much less likely to encounter the same conundrums of the divisions of legal and political questions. Yet the trickiest matter that the Court might face is determining whether a question before it is either substantive or procedural. It is conceivably possible that separating a substantive from a procedural issue would be an insurmountable challenge.

One of the issues that arises in CFSP is the question of jurisdiction, which has lain at the heart of a number of CFSP cases in the post-Lisbon era. A straightforward reading of the treaties would leave the reader with the impression that the drafters wished to exclude the Court’s role in certain aspects of EU law – a treaty-mandated doctrine. Actions taken on a CFSP legal basis are within ‘the scope of political discretion’, and it has been articulated that the Court determining its jurisdiction in post-Lisbon CFSP cases has so far found itself going beyond its mandate to answer questions. Article 40 TEU provides for a non-encroachment clause, or in other words, an explicit monitoring role for the Court when it is called upon. One interpretation is that Article 40 TEU implies that the doctrine is provided for in CFSP through EU primary law, detailing the drafters

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102 Art. 40 TEU: The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Arts 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

103 Pieter Jan Kuypers, *The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers: Whither the Traditional Role of the Executive in EU Foreign Relations?*, in *The European Court of
understanding of areas of EU policy that are off-limits to the Court. Having CFSP de facto outside the remit of judicial review, barring the limited exceptions, may make it easy for the Court to decline jurisdiction on CFSP cases on the mere basis of Article 24 TEU, as well as Article 275 TFEU.

From the earliest days of considering European defence cooperation through the failed European Defence Community (EDC) formulated in the 1950s, matters of military and defence matters had ‘deeply political underpinnings’. Thus, the contemporary Common Security and Defence Policy (CSDP) would be an area that is ripe for the use of the doctrine, as would matters of national security, and the formation of national armed forces. CSDP missions, be they civilian or military, are a vast applied undertaking. As put, ‘[t]he planning and execution … must meet so many legal, political and practical challenges’. In H v. Council, the Court provided an understanding that staffing of a CSDP mission can be equated with that of a permanent EU agency such as the EDA. This has been criticized given that CSDP missions are ‘specific initiatives undertaken ad hoc pursuant to the political will of the Council’. Equating them with more permanent bodies could be read as extending the Court into political territory, where the doctrine might have been suitable. However, the Court avoided invoking the doctrine, and by asserting jurisdiction, sent the case back to the General Court for adjudication on its merits. A pending case on staffing matters in KF v. SatCen will undoubtedly have to follow the H v. Council interpretation, rejecting the view that CFSP, for now, can be a policy field for the invocation of the doctrine.

Restrictive measures, such as economic sanctions, are partly concluded through CFSP, and are subject to intense judicial review by the Court. Like other fields, there has been no explicit doctrine seen to date in this field, yet there appears to be traces. In OMPI, the Court annulled a Common Position founded upon a CFSP legal basis when Common Positions might have been considered political in nature.

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107 Koutrakos, Judicial Review in the EU’s Common Foreign and Security Policy, supra n. 101, at 12.
108 Case T-228/10 RENV, H v. Council, pending.
Subsequently in *Kadi*, the Commission and the Council contended the Court could not determine the validity of the implementing measures in EU law flowing from a UN Security Council Resolution. The Opinion of the Advocate General acknowledged it was ‘never an easy task’ for the Court to determine when it was ‘reaffirming the limits that the law imposes on certain political decisions’ versus that of ‘trespassing into the domain of politics’. Furthermore, he stated that ‘the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of [EU] law and deprive individuals of their fundamental rights’. However, the Court did not make any such reference to any form of doctrine, either affirming it may exist or determining that a political question did not apply in that specific case.

The *Rosneft* case brought the Court close to the doctrine and was a case of restrictive measures being levied against a Russian oil and gas firm, which was partly state-owned by the Russian State. The Commission in oral argument attempted to sway the Court into invoking the doctrine, ultimately trying to prevent it from exercising jurisdiction over the Decision adopted upon a CFSP legal basis through the preliminary reference procedure. The Opinion of the Advocate General said ‘the reason for the limitation of the Court’s jurisdiction in CFSP matters … in principle … [are] solely intended to translate decisions of a purely political nature connected with implementation of the CFSP’. He furthermore stated ‘it is difficult to reconcile judicial review with the separation of powers’, and said he saw no need to define or delineate what constituted actions or objectives require a CFSP legal basis as opposed to those needing an alternative external relations legal basis. The Court took a teleological approach, toning-down the active policy choice – a political choice – by the drafters of the treaties, in excluding restrictive measures from the scope of questions that can be submitted to the Court through the preliminary reference procedure. The Court thus rejected invoking the doctrine, but unlike the USSC in *Baker v. Carr*, it did not define what the doctrine might have been, since the circumstances of the case did not warrant it.

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116 Ibid.
Nonetheless, with the Court de facto overriding an explicit choice of the political actors,\textsuperscript{118} Rosneft could be construed as coming closer to what could have been a suitable scenario for invoking the doctrine. The Court refusing to invoke the doctrine is in contrast to a previous finding of an Advocate General in a different case, which found that Article 275 TFEU has ‘clear wording’,\textsuperscript{119} demonstrating how completely varied approaches from within the Court about how CFSP and the justiciability of questions are handled. The Court, broadening its powers with respect to its own jurisdiction in Rosneft, can be seen as taking inspiration from the political institutions,\textsuperscript{120} which have expanded their own fields of competence.

There is another important case where the silhouette of the doctrine emerges. In the Kala Naft judgment, an appeal of a General Court judgment,\textsuperscript{121} the Court said it ‘does not have jurisdiction to take cognisance of an action seeking to assess the lawfulness of Article 4 of Decision 2010/413’\textsuperscript{122}. Given that Article 4 of Decision 2010/413\textsuperscript{123} was said to be ‘of a general nature’,\textsuperscript{124} and not referring to natural or legal persons that were identifiable, it was not a restrictive measure, meaning that the Court does not have jurisdiction to take cognisance of an action seeking to assess the legality of Article 4 of [the] Decision’.\textsuperscript{125} This interpretative method approach is rather reverential to the Council, and thus, is a de facto recognition that there is some form of the doctrine in restrictive measures imposed on a CFSP legal basis. Again, however, the criteria that the Court used were not clear or prescribed.

3 \textbf{WEIGHING THE POLITICAL QUESTION DOCTRINE}

3.1 \textbf{For the doctrine}

The doctrine can be created by courts in different legal orders. With courts of law being in a position to draw their own singular interpretation of what constitutes a political question, the limits of the doctrine remain an ambiguous concept, without

\begin{itemize}
  \item\textsuperscript{118} By allowing a CFSP case to arrive before the Court through an Art. 267 TFEU preliminary reference, rather than an Art. 263 TFEU direct action, taking into account Art. 275 TFEU.
  \item\textsuperscript{120} Anthony Arnell, \textit{Does the Court of Justice Have Inherent Jurisdiction?}, 27 Common Mkt. L. Rev. 683, 707 (1999).
  \item\textsuperscript{121} Case T-509/10, \textit{Manufacturing Support & Procurement Kala Naft v. Council}, ECLI:EU:T:2012:201.
  \item\textsuperscript{125} \textit{Ibid.}, para. 38.
\end{itemize}
explicit contours. To adopt the doctrine would be to assume constitutional validity of executive actions. With such tenuous limits, there is also the danger of other institutions within the Union being the judge, jury, and executioner of its own actions without proper oversight. The use of the doctrine in constitutional law of any description is contestable for the reason of it being eminently opaque, and its innate flexibility being too broad. At the same time, by having the mere option of the doctrine in the Court’s arsenal ensures that the EU judiciary does not overreach.

Even though questions before the Court may have political character, it does not mean that they escape judicial review. The judiciary giving a pass to the political institutions is ‘frequently advocated based on prudential reasons’. Invoking the doctrine creates additional political space that is removed from the vacuum of law, and yet, there are no absolute determining factors that distinguish law and politics. Curbing the powers of the political institutions, or limiting the scope of their choice when the law afforded them a wide course of action, is not what a court may wish to do. The doctrine is thus predicated upon the notion of a court of law exercising self-restraint, which it can do in a voluntary manner. As a result, dissatisfaction with the doctrine can take hold.

How conferred institutional powers are used are political matters. Critics of the Court have argued in the past that it has had a tendency to not have the ability to exercise judicial review in line with those conferred upon the institution by the treaties. Giving political institutions in the EU complete free reign in respect of acting inside or outside of their powers would run contrary to the basic premise of the Union, which the Court has stressed is based on the rule of law. However, there is no straightforward answer as to whether the Union ‘as a whole’ is submitted to the rule of law, given the nature of how the treaties are established.

It is settled case law that the EU’s judicial arm allows the political institutions ‘broad discretion where its action involves political, economic, and social choices and where it is called on to undertake complex assessments and evaluations’. Yet how widely to construe such discretion is a judicial challenge that the Court alone is to determine. The doctrine in EU law would not extend so far that the Court would not be able act at all. If Member States were free to forge international agreements with third parties, it would be ‘impossible to have a properly functioning internal

market\textsuperscript{131} and thus, undermine the nature of EU law altogether. The breadth of discretion given to the institutions is not surprising in itself, given that the history of EU law was economic law, and economic management has historically meant that institutions have been entrusted to take appropriate measures for given circumstances.\textsuperscript{132}

The nature of CFSP being different and separate from other aspects of EU external relations, and EU law more generally, recalling that CFSP is subject to ‘specific rules and procedures’,\textsuperscript{133} means that there are not just legal questions in all cases that come before it. As a result, parameters may to be drawn. The introduction of criteria for the doctrine in EU law would ensure that the Court does not find itself holding powers of political choice. It would also be an elevation of judicial abstention to that of a frustration instrument. Having a criteria-based doctrine could be a tool in the Court’s kit, but by no means should it be seen as a weakness upon the Court. To say courts should not be involved in matters of a sensitive nature is unreasonable, given that what constitutes a question that is sensitive is impossible to fully define and determine.

In that vein, incorrect application of the doctrine is not a desirable outcome. Case-by-case examinations of individual questions put to the Court can lead to existing principles to be erroneously utilized, with either broadened or narrowed applications of the doctrine, leaving an incomprehensible jurisprudential trail. This case-by-case approach, without defined standards or criteria, can thus be unattractive to a judicial actor because of the importance of a determination on what constitutes a political question. The treaties continue to require further interpretation to determine the boundaries of different EU legal acts, particularly regarding questions of institutional competence and balance, and how far the Court is willing to exercise judicial review.

It can be claimed that judicial control cannot solely be about the legality of the EU legal act, and to consider that some court of law has ‘full jurisdiction’ to provide a ruling.\textsuperscript{134} Even if the doctrine was adopted by the Court, it is likely it would be narrowed to a particular circumstance of a given case. Even a general test to be set down for the doctrine would have to be applied on a case-by-case basis. However,

\textsuperscript{131} Geert De Baere & Panos Koutrakos, The Interactions between the Legislature and the Judiciary in EU External Relations, in The Judiciary, the Legislature and the EU Internal Market 246 (Philip Syrpis ed., Cambridge University Press 2012).


\textsuperscript{133} Art. 24(1) TEU, second paragraph: ‘The common foreign and security policy is subject to specific rules and procedures’.

the lack of any standards or criteria, at it presently stands in EU law, implies there is no working framework for a clear determination of a political question.

If the Court invokes the doctrine, rejecting the possibility to answer questions that are not legal questions, there is thus the possibility for other courts to proceed and interpret such questions. Given that the Union is a decentralised system of judicial review, therein lays the possibility for national courts to become more creative, to the detriment of the EU legal order. National courts are perceived by the Court as ‘ordinary courts within the [EU] legal order’, but if national courts in EU Member States have their own interpretations, a lack of uniformity of matters related to EU law could arise. It is recognised that the Union can have difficulties in ensuring that Member States act in full compliance with CFSP acts. In such situations, the role of national courts is relied upon, for what might be considered a political question for the Court. That itself is not satisfactory. As pointed to in the dual-use goods case, Werner, some questions that hinge upon EU law are not rectifiable by the Court, or a national court, thus accentuating the fact that the doctrine is not unique in the EU legal order. Thus, there can be situations where they may be political questions requiring national judiciaries, at their respective levels on the vertical division of competences, to determine their own threshold for invoking the doctrine.

3.2 Against the doctrine

Even though the Court has not formally accepted the doctrine, thereby arguably bringing everything under its remit, that will not resolve all problems. The need for the doctrine in EU law might not be warranted. Fears that the Court would assert its own views instead of those of the Council could be considered a ‘fantasy problem’, given that the Court ‘would exercise very low intensity review over [CFSP] and [such] would review with [be] very, very light touch’. The Court ruled previously that ‘the courts cannot substitute their own evaluation … for that of the competent authority’, adding that the Court ‘must restrict [itself] to

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136 Opinion 1/09 of the Court, Creation of a unified patent litigation system, ECLI:EU:C:2011:123, para. 80.
137 Geert De Baere, European Integration and the Rule of Law in Foreign Policy, in Philosophical Foundations of European Union Law 370 (Julie Dickson & Pavlos Eleftheriadis eds, Oxford University Press 2012).
examining whether the evaluation of the competent authority ... constitutes a misuse of power'. It has been endorsed post-9/11 in the context of counter-terrorism measures in international relations. It has even been claimed that the Union’s political institutions cannot have a ‘no political questions’ doctrine, if the Union is to be a values-orientated organization. This implies that the Court should never adopt the doctrine. This can be cemented by the view that since the Court’s role is to enlighten the rights of individuals and legal entities, this puts the Court in such a position that it cannot abdicate its role entrusted to it by the treaties.

The Court has not felt the necessity to develop its own theory of the doctrine. Given the difficulty of establishing what a political question is in US law, that the same holds true for EU law is not surprising, despite the different types of cases in which the doctrine may arise across the two legal orders. For example, what constitutes a political question at EU level can differentiate from what is considered a political question at various national levels. The doctrine is not the only circumstance where the Court may defer to the political branches to resolve issues and, at times, the Court can be ‘deferential to solutions put forward by the political branches of the Union’. The exact delineation between political and legal questions is thin, but ultimately, the Court’s delivery of judgments is dependent on judicial intervention being appropriate. The doctrine does not have to exist in EU law, as instead, reduced standards of scrutiny might suffice. The EU’s external relations can have internal effect. Thus, syphoning-off any area of external relations of any description could have the unintended consequence of shielding internal EU matters that would ordinarily fall outside of what constitutes a political question. EU external relations, in most cases, is not immune from judicial review.

The fact that there isn’t a need for the doctrine in EU external relations can be attributable to a number of theories. It can be said that EU law has seen an element of democratization, and so judicial review in itself has not been overly problematic. A clever way in which the Court may wish to deal with a political question may be through the premise of engaging in judicial minimalism. The act of judicial

minimalism at the Court has grown, and demonstrates that the Court has to restrain itself to interpreting the EU legal provisions alone. This was acknowledged within the Court itself in the 1980s when it was said ‘[t]he Court tries, more than it did, to identify areas in which … it … applies strict minimum standards’.

The Court holds respect for its conferred jurisdiction, but simultaneously holds itself back from veering into fields that it ought not to, such as substantive policy proclamations. As EU law stands today, there is no apparent doctrine per se, but a set of conditions may arise in the future in EU law where a judicial resolution may not be necessary, for it lacks a sufficiently legal dimension. To date, whilst exercising jurisdiction in contentious cases, such as in CFSP cases, the Court has not delved too far into the political choices that have been made by the Council. In other external relations cases as well, the Court has not fully addressed the extent to which mixity in international agreements, usually of an economic nature, should be permitted when it is not needed, as it may be a matter of political choice. The Court’s venture into fundamental choices of certain matters in EU law may be ‘tantamount to assuming an impossible role’. Thus, the Court has to constantly decide whether the doctrine is present, but without any determining criteria. If the doctrine is in principle to be rejected for invocation in cases before the Court, the alternative is that it must only be invoked in truly exceptional situations. The case–by–case approach ensures ‘there are sufficient reasons to reduce the intensity of judicial scrutiny’, and ‘pay adequate respect to the particularities of foreign affairs and interpret [EU] law’.

4 CONCLUSION

The Union requires ‘courageous political decisions’ of its political institutions, and not merely judgments of the Court alone. A grounded test, firmly based on specific criteria for the Court to determine what touches upon a political question is long overdue, given that the Court is slowly adapting to acknowledging the doctrine, but is doing so in an unsatisfactory or reasoned manner. This would ensure some level of

145 Daniel Sarmiento, Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice, in Constitutional Conversations in Europe: Actors, Topics and Procedures 14 (Monica Claes et al. eds, Intersentia 2012).
legal certainty across an array of different legal contexts. As things stand, there are no determinable factors for what makes CFSP legal acts not subject to review.

Doctrines in law can often overlap with one another. Accordingly, such overlays and the invocation of the doctrine can become conflated, such as a question before a court failing a ‘ripeness’ test. This can cause difficulties for understanding the true manner the doctrine is to apply or not apply. Without properly defined standards, the invocation of the doctrine in EU law can give rise to legal uncertainty. There appears to be no explicit doctrine in EU law, and the EU Court does not have its own equivalent point-of-reference like the USSC’s Baker v. Carr. Yet, for judiciable questions in EU, there ought to be ‘judicially discoverable criteria’, which are not always readily available.

Given the predicament of where the doctrine lies in EU law, it can be deduced that questions of competence and institutional balance are not within the scope of political questions. However, there will be cases in which certain matters arise, such as in external relations and international agreements, where there is no inter-institutional conflict, but the institution(s) may nonetheless have exceeded their powers conferred upon them by primary law. The EU Court may not wish to share many of the associations that come with the current manner in which the USSC exercises its authority, which could be regarded, fundamentally, as a political institution. Yet, this can be difficult for the EU Court given the lack of writ of certiorari, and thus it must deal with, in some form, every case that arrives on its docket.

The intensity of judicial review is subject to different standards. Intertwining the judiciary into the field of political questions is a matter that any constitutional entity views with a great deal of caution. Judicial review by the Court in EU law ought to differ in its latitude and intensity, depending on the issue that has been brought before it. As a result, there has to be some form of the doctrine in EU law, be it in internal market questions, or broader constitutional questions. In external relations, and perhaps even in other area touching upon economic integration, the Court ought to strike the appropriate balance between questions of a constitutional nature, and those of a political nature. This requires the Court to have finely-tuned insight, wisdom, and acumen. EU external relations law, or more specifically CFSP, may once have been viewed as reactionary, short-term, and dealing with matters with limited cooperation between Member States. The reality in the contemporary era is much different, with strategic vision for a long-term EU foreign policy, and the wide-ranging and deep commitment of Member States in strides towards common goals, regulated by law. Ultimately, the fact that CFSP brings about more political


questions before the Court has implications for the doctrine across the EU legal order.

It could be contended that the very existence of the Court in the Union’s framework meant that limitations upon the Court’s jurisdiction ‘have been disposed of’, given the tasks which have been assigned to the Court, and thus, there has been no need for the doctrine. It could also be put forward that it is only a matter of time, given the Court’s expanding jurisdiction in CFSP, before questions will be asked of the Court that will go well beyond legal questions. Political questions are for the political process, but yet courts of law should not be afraid of answering delicate questions of law with political significance. The days when Courts may have been ‘overzealous’ and got ‘too far out in front’ of acceptable judicial review have been left behind. However, there are some parameters which it could delineate. In light of the development of EU law to date, particularly post-Lisbon, future questions asked of the Court may begin to veer into policy and political questions. As a result, the Court may need to create and invoke an explicit doctrine to deny answering unsuitable questions that lack a specific connection to the law.

The justiciability of cases that the Court answers as part of its routine are important for retention of the Court’s legitimacy. Such cases are where there are recognised standards of judicial review. The Court itself is attached to the principle of conferral in the way it operates, and future cases will lead to constitutional doctrines being developed. The inherent weakness of future cases, particularly those with political choices, is that the Court may be asked to make value judgments. Without set standards of judicial review, the Court is not in a position to answer them. By not bringing the doctrine into EU law, the Court could thus exceed the powers that have been conferred upon it by the treaties.

The Court has unquestionably been a key contributor to the shaping of how legal relations between the EU and the wider legal community are to function. By comparison, it can be argued that US court have not had the same eminence, but perhaps to just a ‘significant but not large’ extent. The differential manner in which the two judiciaries have contributed to their respective jurisdiction’s international outlook implies that there is a role for judiciaries in political questions, but there lacks a firm definition for what is or sought to be the role. Most cases that become before the Court are run-of-the-mill. Yet the Court needs to remain sensitive to the manner in which it conducts judicial review, and that means knowing which cases to, and which not, to adjudicate. Since Les Vert, when the Court first

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154 Henkin, supra n. 1, at 148.
declared it was based on the rule of law, the essence of judicial review was relaunched with new vigour. This Les Vert doctrine, if it is to be truly applied, demands judicial review in nearly all circumstances where questions of EU law arise. Thus, only rarely will the doctrine be invoked by the Court. Yet it ‘has succeeded in rendering the most far-reaching rulings in relatively trivial controversies’.  

There is a common theme of the doctrine between the USSC and the EU Court however – not granting absolute political manoeuvre in the realms of their respective jurisdictions. There are those in US scholarship that believe the doctrine was a ‘mistake’, which may partly explain why an explicit doctrine has not yet been adopted into the EU legal order. Some matters are so contentious in the EU, however, such as long-drawn-out inter-state disputes that are devoid of legal issues, that a judicial ruling through a court of law of any description should not be made. Creating a distinctive test for the correct application of the doctrine could be the path forward in the EU. Highly contested cases without legal questions can arise; thus a political question doctrine in EU law has to be given serious consideration.

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157 Eric Stein, Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism 155 (University of Michigan Press 2000).