1

Introduction: The Court of Justice, Constitutional Responsibility, and the Scope of EU Free Movement Law

1. Introduction

This book examines the judicial development of Treaty provisions that regulate the scope of EU free movement law from the perspective that sustaining case law coherence is a vital constitutional responsibility of the Court of Justice. It aims to measure case law coherence by applying a threshold lower than indicators of legal *certainty* that still takes seriously the Court's obligations as a high-level judicial institution bound by the rule of law. According to Article 19(1) of the Treaty on European Union (TEU), '[t]he Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts'. The Court of Justice—often referred to as the European Court of Justice or ECJ, and not the composite Court of Justice *of the European Union* (CJEU)—is the institution at the heart of this study. But two basic presumptions about the nature of the Court and what it does should be stated at the outset. First, the Court of Justice is an activist court. Second, when it interprets EU law, it often makes (new) law. The implications of these statements are widely debated and contested,[1] but they can be taken as a starting point for the arguments developed here.

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[1] Extensive scholarship questions the scale or propriety of judicial activism by the Court of Justice, sometimes linking the concern to court/legislature debates more generally but also raising EU-specific issues e.g. the consequential erosion of national regulatory competence. See generally: E Stein, 'Lawyers, judges and the making of a transnational constitution' (1981) 75 *American Journal of International Law* 1; H Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986); M Cappelletti, 'Is the European Court of Justice "running wild"?' (1987) 12:1 ELRev 3; G Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19:1 JEPP 76; JHH Weiler, 'The transformation of Europe' (1991) 100 *Yale Law Journal* 2403; T Tridimas, 'The Court of Justice and judicial activism' (1996) 21:3 ELRev 199; T Hartley, 'The European Court, judicial objectivity and the constitution of the European Union' (1996) 112 LQR 95; A Arnull, 'The European Court and judicial objectivity: A reply to Professor Hartley' (1996) 112 LQR 411; A Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004); M Everson and J Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Routledge, 2007); K Alter, *The European Court's Political Power: Selected Essays* (OUP, 2009); J Shaw and J Hunt, 'Fairy tale of Luxembourg? Reflections on law and legal scholarship in European integration' in D Phinnemore and A Warleigh (eds.), *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave, 2009) 93; P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal*

The Court of Justice, as a constituent court of the CJEU, is conferred with the authority to interpret the meaning and boundaries of EU law.[2] But when the Court is 'ensuring that the law is observed', it is also empowered to determine what that law actually is. In that context, Article 19 points the Court beyond the words of the Treaty where necessary. The English language has only the word 'law' but French, Italian, German, and Dutch (the original Treaty languages) have two words: *Loi*, *Legge*, *Gesetz*, or *Wet* for enacted law (constitution, code, statute, etc.) and *Droit*, *Diritto*, or *Recht* (German and Dutch) for law generally. When the Treaty asks that 'the law is observed', the French, Italian, German, and Dutch versions all use the latter word, meaning any relevant rule of law, from whatever source, that is applicable in the circumstances i.e. including general principles of law, international law, and so on. The development of the general principles *of EU law* in this way is a good example of how the Court made significant 'new' EU law to develop its application and interpretation of the Treaties.

Legislation provides much of the substance of free movement law, but the Court of Justice has always been a significant lawmaker in the same field. The relevant provisions of the Treaty on the Functioning of the European Union (TFEU) are typically concise and not very detailed. If we want to understand the scope of free movement law, we have to engage with a complex overlay of case law—whether there is relevant legislation on the particular issue or not. First, even definitions created by the legislature will require further refining and interpretation. Second, since the Treaty marks the boundaries within which the EU legislator can act in the first place, and again relying on Article 19 TEU, only the Court has the authority to interpret those broader limits too. Increasingly, EU legislation on free movement aims to consolidate and bring order to a patchwork of definitions and applicable principles sourced from years of incremental case law.[3] At one level, the Court has thus made a substantive contribution to law-making in a functional sense, providing definitions for core Treaty concepts such as 'worker' or 'capital movement' that are then codified in regulations and directives. Additionally, however, these definitions are required to be applied uniformly in all of the Member States when an issue connected to EU law arises, displacing the national definitions that would

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Market (CUP, 2012); F Wasserfallen, 'The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union' (2010) 17:8 *Journal of European Public Policy* 1128; A Arnull, 'Judicial activism and the Court of Justice: How should academics respond?' (2012) Maastricht Faculty of Law Working Paper No 2012-3, available at <http://ssrn.com/abstract=1986817>; M Adams, J Meeusen, G Straetmans, and H de Waele (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart Publishing, forthcoming 2013).

[2] The second sentence of Article 19(1) TEU provides that '[the Court of Justice of the European Union] shall ensure that in the interpretation and application of the Treaties the law is observed'. Before the Lisbon amendments, Article 220 EC had stated that '[t]he Court of Justice and the Court of First Instance, *each within its jurisdiction*, shall ensure that in the interpretation and application of this Treaty the law is observed' (emphasis added). Judicial panels (now 'specialised courts') were then 'attached' to the Court of First Instance (now the General Court).

[3] E.g. Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, 2011 OJ L88/45; Directive 2005/36/EC on the recognition of professional qualifications, 2005 OJ L255/22.

otherwise be relevant. This is another important way in which the Court 'makes' law—and, more clearly in this instance, higher law.[4]

Accepting the premise that the Court contributes to free movement law through law-*making*, it is suggested here that, on the whole, it performs this function well. Most of the case law is neither problematic nor controversial, in terms of either substantive content or how decisions fit with previous case law on the same or similar (or even different) questions. But then again, much of the Court's free movement case law is relatively formulaic, in a good way: it is often applying clear or technical legislative rules, and/or it reaches predictable outcomes that have been (or at least, can be) clearly extrapolated from established rules and principles. Its case law is subject to critique in two main forms, however, sometimes scathing. First, individual decisions can generate extensive comment and debate on their own. This might be because the case raised a genuinely novel question of EU law and the choices made by the Court on the direction of legal travel ignite controversy; or because of the significance of the outcome for the relevant area of law, or for the complex structures and balances that make up the EU polity more generally.

Second, case law also needs to be evaluated in a more composite or systemic sense, something that is inevitably done from different thematic priorities and perspectives. In this study, the responsibilities attaching to constitutional courts mark the starting point. It will be argued that ensuring case law coherence is a key element of that responsibility, based on the fundamental value of fairness. The constitutional role of the Court extends, of course, far beyond the confines of free movement law. However, the Court's determination of the *scope* of EU free movement law is the substantive area of law reviewed here, in order to test the extent to which the Court's case law is being developed coherently. This judicial work exemplifies the constitutional functions of the Court in several respects—but perhaps most importantly, because the scope or reach of EU free movement law is delimited by the Court through a series of framework principles i.e. concepts and tests developed and applied by the Court when it interprets and applies the foundational Treaty provisions. In free movement law, these principles include, for example, non-discrimination, market access, abuse of rights, and remoteness.

The shaping of scope through principles in this way is a remarkable source of judicial power and influence. But Avbelj rightly reminds us to reflect on why we are 'using constitutional language in the first place'.[5] To take an example, legislation introduced by the Scottish Parliament to establish a minimum pricing scheme for alcohol, with the purpose of tackling public health concerns, has recently been challenged in the Scottish courts.[6] The Commission, within the framework of the obligation on Member States to notify it of draft technical regulations affecting products before they are adopted in national law, is also

[4] On the degree to which national legal cultures can accommodate that assertion, see A Arnull, *The European Union and its Court of Justice*, 2nd edn (OUP, 2006) 625–7.

[5] M Avbelj, 'Questioning EU constitutionalisms' (2008) 9 *German Law Journal* 1 at 25.

[6] *Scotch Whisky Association and others*, petition for Judicial Review of the Alcohol (Minimum Pricing) (Scotland) Act 2012 and of related decisions, [2013] CSOH 70 (judgment of 3 May 2013).

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investigating the measure.[7] Whether directly—through a Commission enforcement action against the UK under Article 258 TFEU—or indirectly—through a reference under the Article 267 TFEU preliminary rulings procedure should the case continue on appeal in the domestic courts, as is expected at the time of writing—it is the Court of Justice, and not the Scottish, British, or European Parliaments, or the Commission,[8] that will decide ultimately whether the Scottish legislation can remain in place or must be abandoned as a restriction on the free movement of goods.[9] That decision will also mark the outer boundaries of alcohol pricing policy for any other Member States who have adopted or are contemplating adopting analogous measures. Similar assumptions are being made about the Court of Justice's role in eventually resolving the legal questions about EU membership that might arise in the instance of Scottish independence.[10] These examples underscore the fact that the Court is not some sort of alien or distant tribunal; its decisions have a legal effect that cannot be filtered away through national parliamentary action. It is an influential constitutional court, with the implication in turn that its performance should therefore be evaluated in those terms.

It is not, in other words, the fact of the Court's contribution to constitutional law-making that is being questioned here. Instead, whether the Court is performing its role fittingly (and how we can assess that) sets the analytical starting point. However, the methodological limitations of research focusing on the Court and its case law should also be acknowledged. First, case law is simply not 'the law'. It is just one of EU law's constituent elements and its analysis can only ever present a partial picture of legal evolution.[11] Second, case law research tends to ignore even most of the case law: mainly because, as noted above, most of the case law is neither legally problematic nor analytically significant—to put it another way, it is not particularly interesting for many beyond the parties directly involved. It is important to keep a sense of perspective in mind for this reason; to remember that the greatest volume of comment and analysis will often be generated by very few decisions in a much bigger and more stable bank of law, viewed more holistically.

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[7] Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations, 1998 OJ 204/37; see further, including the text of the Commission's opinion, <www.eurocare.org./library/updates/european_commission_asks_uk_to_abstain_from_introducing_minimum_pricing>.

[8] In a different context, AG Lenz observed in *Bosman* that '[m]erely for the sake of completeness, I observe that the fact that the current rules on foreign players may possibly have been worked out with, and perhaps even approved by, the Commission has no legal significance. The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the [TFEU] by its actions. It is for the Court of Justice alone to give binding interpretations of those provisions' (Case C-415/93 *Union royale belge des sociétés de football association ASBL v Bosman* [1995] ECR I-4921, para. 148 of the Opinion).

[9] Other arguments on EU law submitted in the case related to competition law and the Common Agricultural Policy.

[10] See e.g. <http://eutopialaw.com/2012/12/14/scotland-independence-and-the-eu-the-sturgeon-response/>.

[11] E.g. JHH Weiler, 'The constitution of the common market place: Text and context in the evolution of the free movement of goods' in P Craig and G de Búrca (eds.), *The Evolution of EU Law*, 1st edn (OUP, 1999) 349 at 351.

Third, it could be argued that research focused on case law delivers an unduly narrow or inward-looking perspective only. At one level, this is obviously true. The centre of gravity here is indisputably legal and the principal method is doctrinal. As a result, observations about the role of case law (or of the Court) from a more consciously external (e.g. socio-legal) perspective are necessarily incidental. But that is not the same thing as undertaking legal research in a way that is completely devoid of context. It is imperative that research on EU law and on the Court of Justice is both comprehensive and multifaceted.[12] Both the Court as an institution and its case law have been examined from, for example, political science perspectives.[13] There is also important scholarship that brings different disciplinary perspectives together.[14] But it does not follow that every academic output can attempt to cover all relevant disciplinary bases. Research approaches can and should be pooled, comprising complementary pieces of a bigger and richer whole. There is a very basic point to emphasize here too: if basic elements of the law are broken, then we should at least start with the law to try and improve them.

Finally, Bernard has highlighted another important limitation of research based on case law: '[t]he downside of such narratives is that they are written, necessarily, with the benefit of hindsight and may unconsciously read cases in the light of later developments and, in so doing, invest judgments with a meaning and significance that they did not necessarily possess or were meant to possess, when were first handed down'.[15] Bernard's observation reflects an argument that judges themselves have raised against charges of pursuing *une certaine idée de l'Europe*. For present purposes, it is important to distinguish between two different types of research question in that context. First, there is the intriguing but often futile quest to uncover *intent* i.e. to discern the motivations that guided the judges in reaching a particular decision or shaping a specific line of case law. But it is far from clear how or even whether judicial intent can be extracted given the single collegiate judgment delivered by the Court of Justice. This format masks the variety of views expressed in deliberations, the level of disagreement about those views, and the possibility of attributing particular stances to individual judges.[16] It is also seriously debatable whether an institution of the size of the Court of Justice at present,

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[12] See generally, A Arnull, 'The Americanization of EU legal scholarship' in A Arnull, P Eeckhout, and T Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP, 2008) 415.

[13] See e.g. Alter, n1 and A Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004).

[14] See e.g. (2012) 19:1 *Journal of European Public Policy* (Special Issue: 'Perpetual momentum? Reconsidering the power of the European Court of Justice').

[15] N Bernard, 'On the art of not mixing one's drinks: *Dassonville* and *Cassis de Dijon* revisited' in M Poiares Maduro and L Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) 457. Similarly, Weatherill, distinguishes between 'micro' and 'macro' case law analysis (S Weatherill, 'The Court's case law on the internal market: "A circumloquacious statement of the result, rather than a reason for arriving at it"?' in Adams, Meeusen, Straetmans, and de Waele (eds.), n1, forthcoming).

[16] Woods describes the Court's 'group form of judgment' as 'an expression of the form of the agreement rather than necessarily a record of logical argument' (L Woods, 'Consistency in the chambers of the ECJ: A case study on the free movement of goods' (2012) 31:3 *Civil Justice Quarterly* 340 at 345).

operating on a system of multiple judicial chambers, could have a sufficiently *singular* sense of purpose, goal, or intent anyway;[17] or be shown to be pushing an agreed philosophy.[18]

Trying to decipher judicial motivation in a personal sense is not, therefore, the intended focus here.[19] Instead, a second type of research approach is applied i.e. free movement case law will be examined at a more systemic level against objectively defined criteria: primarily, the value of legal coherence (as fleshed out in Chapter 2). Conclusions about broader trends that the case law suggests can of course be derived from that analysis, but such views have to be treated with the qualifier of speculation. More concretely, as successive judgments broaden and deepen the construct of free movement law, a composite framework emerges. Returning to Bernard's concern, whether the resulting shape of that mainframe—*not* each individual judgment within it—was deliberately intended is the material point. The International Law Commission has put it in this way: '[l]egal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators'.[20]

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[17] See further, S Wernicke, 'Au nom de qui? The European Court of Justice between Member States, civil society and Union citizens' (2007) 13:3 ELJ 380 at 381: 'judges do not seem to talk of their ideas of Europe, their mandate, of their role or the way ahead, let alone act according to some or other common aim. But they do something far more important: they decide individual cases—and by doing so they add another piece to a framework for which there is no overall design, but which is nevertheless constitutive of a union of law'. Relevant structural constraints stemming from the Court's organization are discussed in Chapter 2.

[18] G Davies, 'The Court's jurisprudence on free movement of goods: Pragmatic presumptions, not philosophical principles' (2012) 2 *European Journal of Consumer Law* 25 at 26–7: 'it is in general a mistake to understand the Court's decisions as choices between fundamental principles. To do so suggests that when it formulates the law it is seeking to state the econo-philosophical essence of trade freedom, and apply this essence in a direct and unmediated way. On the contrary . . . the Court has shown a consistent and entirely appropriate indifference to the grand philosophical scheme of things, about which there is not that much for a lawyer to say: [a] combination of textual, political, economic and constitutional factors means that there is very little realistic wiggle room for the Court on this issue'. The extent to which a *coherent* philosophy can be said to underpin the EU internal market in constitutional terms is discussed further in Chapter 2.

[19] See relatedly, recent empirical studies exploring the extent to which patterns can be discerned in the outputs of the Court's chambers: M Malecki, 'Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers' (2012) 19:1 *Journal of European Public Policy* 59; and Woods, n16.

[20] Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,* finalized by M Koskenniemi, UN General Assembly International Law Commission, A/CN.4/L.682, 13 April 2006, para. 35. Exemplifying the potential for academic/practitioner synergy, the ILC also flags the work of Neil MacCormick in this context; see esp. para. 36, referring to *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) and, in particular, his 'techniques of "second order justification" that enable the solution of hard cases (i.e. cases where no "automatic" decisions are possible) and that look either to the consequences of one's decision or to the systemic coherence and consistency of the decision with the legal system (seen as a purposive system)' (ILC Report, p. 25, n35). As a related point, the way in which the opinions of the Court's Advocates General are treated in this book should also be noted here: while the judgments of the Court are being evaluated against systemic coherence

Judges can properly be expected—and obliged—to be aware of the existing corpus of law and to add judgments to that framework in full consciousness of the public legal resource being unpacked, expanded, and sometimes profoundly changed in consequence. Added to that, the application of appropriate practices of engaging with *existing* authority is how the judges then show us their work. Part of the complementary function of academic research is precisely to step back from the individual decisions and to identify patterns in the overall shape of the Court's jurisprudence. We need to stop seeing that work purely as a negative form of judicial critique. It is also, more positively, a significant judicial resource.

In addition to general findings about the Court as a constitutional institution, it will be shown in the chapters that follow that four main drivers are distorting the coherence of free movement case law at present. These drivers are varied in both form and nature. They reflect 'good' impulses (*the protection of fundamental rights*); avoidable (*the proliferation of principles*) but also inherent (*the unsettled purpose(s) of the internal market and free movement*) ambiguities; and broader systemic conditions (*the structure of the Court and its decision-making processes*). It will be argued that these dynamics are causing problematic instances of case law *fragmentation* where the logic or even propriety of the Court's contribution to free movement law-making has broken down—which has substantive (for citizens, businesses, and States) as well as reputational (for the Court and for the EU more generally) consequences, and thus political, social, and economic as well as legal implications. The evaluative dichotomy of coherence and fragmentation is proposed as a paradigm that balances rigour and expectations in an appropriate but realistic way. Additionally, the combining of conceptual and practical drivers reveals as much about the Court as an institution as it does about case law trajectories: it will be argued that debates about the legitimacy of the Court go too far in this context; but that discourse on, for example, case law 'convergence' does not go far enough since it conveys a dissociated or organic momentum that fails to capture the Court's own indisputable responsibilities in the search for greater legal coherence.

Constitutions are necessarily open-textured. The application of interpretative imagination by constitutional courts is not just enabled but required, because of the ambiguity of the relevant provisions. What, for example, does a right to privacy actually mean? When does it apply and when can the State legitimately limit it? The parameters of the right to privacy are worked out in large part through consideration of the facts and circumstances that drive the disputes that lead to case law. The EU Treaties are no different—and this is certainly the case in the area of free movement law. The Court may not be able to control the constitutional text with which it is presented—but it can certainly take responsibility for its interpretation of it. A particular problem that will be highlighted, drawing examples from across the different sectors of free movement law, is the Court's tendency not to engage with or, where appropriate, reverse its own previous decisions when it seems to

criteria, the body of opinions that now exists is not being pushed through the same analytical filter. A duty of constitutional responsibility attaches to the Court as a whole, but it is the binding judgments that have to be absorbed by its constitutional subjects, as will be explained further below.

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depart from them. Instead, the Court often presents significantly different legal reasoning in a very detached or isolated way—it leaves conflicting lines of case law in play without any attempt to reconcile them with the changed or new approach now articulated instead. This responsibility to construct a coherent framework of authority rather than a focus on 'precedent' more narrowly is picked up again below.[21]

In this chapter, a blueprint for the idea of constitutional responsibility will first be outlined in Section 2. It will also be shown how and why the Court of Justice is a constitutional court that is subject to this standard of responsibility. In Section 3, the study's focus on and approach to the scope of free movement law will be explained in more detail. The meaning—and limits—of the central concept of case law coherence will then be addressed in more detail in Chapter 2.

2. The Court of Justice and constitutional responsibility

To set down preliminary points of reference, the characteristics of 'constitutional responsibility' as it applies to constitutional courts will first be outlined in subsection (a). In subsection (b), that framework will be applied to the Court of Justice, leading to a more contextualized understanding of its institutional responsibilities as, it is claimed here, the constitutional court of the European Union.

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(a) The responsibilities of constitutional courts

The special position that constitutional courts occupy is a vast research field in itself. The intention here is simply to outline a workable template of constitutional responsibility that can be applied to the Court of Justice, so that the duty to ensure and sustain case law coherence is more broadly framed. Towards that objective, it is submitted that the responsibilities associated with constitutional courts can be summarized as having three distinct strands. First, a constitutional court has a responsibility to protect and to further the objectives and values enshrined in 'its' *constitution*—essentially, to ensure that the rights and protection that a constitution promises are realized, but also to respect the checks and limits built into it. Second, it has a responsibility to discharge these tasks on behalf and for the benefit of the *constitutional subjects*—fundamentally, what we understand as constitutional citizens—'we the people'—but it is important to emphasize that the political, judicial, and other institutions created and profiled by the constitution are included here too. The third strand of responsibility—and one that is not necessarily placed on or within the control of the court itself—is that a constitutional court must be *structured and organized* in a way that enables it actually to discharge these functions in an appropriate and effective way.

[21] See generally, J Komárek, 'Reasoning with previous decisions: Beyond the doctrine of precedent', LSE Law, Society and Economy Working Papers 8/2012, available at <http://www.lse.ac.uk/collections/law/wps/WPS2012-08_Komarek.pdf>.

It is also important to acknowledge that essential, interlinked principles will influence how we evaluate the realization of constitutional responsibility. The foundational principle reflected in this study is that constitutional courts have a responsibility to animate constitutional values, rights, and limits *fairly*. However we express or describe the value of fairness—as the achievement of justice, for example, or striving for equal treatment—it is the pulse of the rule of law, on the basis of respect for which Article 2 TEU confirms that the Union is founded. A constitutional court should also reflect the value of *integrity*. It should play its institutional part in bringing about systemic integrity—it can do this through its application and development of the law in a substantive sense, but it should also reflect the value of integrity through the quality of its judgments, something that can be achieved in large part by the articulation and insightfulness of its reasoning.[22]

Constitutional courts should also have due space for the application of *imagination*. Expressing this as a value may be more controversial than appeals to fairness and integrity; but constitutional courts are not ordinary courts. Their judgments should inspire us. Constitutional responsibility is not about constitutional stagnation. Looking at this value more pragmatically than idealistically, constitutional courts are simply more likely to be operating at the fringes of existing law. They have to be imaginative to make new law. Recognizing this as a value reflects the reality of the judicial function at the constitutional level. It also raises particular questions—and concerns—around the application of judicial *intuition*. The notion of a 'lawless science of law'[23] captures part of the essence of court-made law very well, especially (though not only) when speaking about court-made constitutional law i.e. when determining the meaning of the law, courts are not resolving legal questions only. For example, when applying a proportionality test, courts do not just establish a legal framework within which the necessity of a public act can be tested—they also take a substantive position on its *actual* necessity (or otherwise). To ensure that law made in this way is indeed more 'science' than art, the tenets of constitutional responsibility and the values that they reflect should be considered and respected collectively—for example, intuition and imagination cannot be determinative to the extent that clear markers in the constitutional text are irresponsibly displaced.

The value of case law coherence used here, which is developed further in Chapter 2, brings together the three main elements of constitutional responsibility outlined above as well as the values of fairness, integrity, and imagination.

[22] These points are picked up again in Chapter 2; but see generally, G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, 2013); G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP, 2012); J Bengoetxea, N MacCormick, and L Moral Soriano, 'Integration and integrity in the legal reasoning of the European Court of Justice' in G de Búrca and J Weiler (eds.), *The European Court of Justice* (OUP, 2001) 44; and J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press, 1993).

[23] The 'lawless science of law' comes from Tennyson's *Aylmer's Field* ('Mastering the lawless science of our law,—That codeless myriad of precedent, That wilderness of single instances'). See further, D Edward, 'What are judges for?', 2010 Macfadyen Lecture, Scottish Council of Law Reporting, available at <http://www.scottishlawreports.org.uk/publications/macfadyen-2010.html>.

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It is based on respect for the principle of legal certainty, but it is suggested that 'certainty' is not the most helpful term to apply in the context of case law. Coherence is not about striving for an unrealistic degree of perfection or rigidity. It allows for the recognition and management of necessary differences, and also for the extent to which court-made law is inherently messy to some degree at least. What coherence does demand is that differences must be explained and rationalized—and that requirement is connected to the manifestation of fairness and integrity. It is also important to emphasize that achieving coherent case law is, in broader terms, necessary but not sufficient—in other words, case law can be consistently problematic. For example, decisions can fit very well together, meeting a narrow or technical understanding of coherence, while consistently trampling across the EU/Member State competence boundaries established at a constitutional level by the Treaties. Or case law can consistently ignore or fail to adapt to more persuasive alternatives or critiques. For these reasons, instances of problematic coherence—when measured against broader Treaty objectives, for example—will be flagged where relevant. Relatedly, coherence can generate internal conflict: this occurs when case law is coherent when measured against one constitutional value (e.g. advancing the protection of fundamental rights), but fragmentary when judged against another (e.g. the centrality of a requirement to move across a Member State border). The value of fairness becomes important again here; as does the Court's position as a constitutional court—which inclines in favour of achieving systemic rather than individual fairness where choices have to be made.

Spaventa rightly cautions that 'when the cases are closely scrutinised one might be excused for feeling a slight sense of desperation as to the chaotic picture arising from the Court's jurisprudence'.[24] Reflecting further on '[t]he number of variables influencing the outcome of a case … one should accept that it will never be possible to provide an umbrella under which *all* cases can sit comfortably'.[25] In other words, case law is an uneven method of law-making. First, it is necessarily responsive, in that courts can only address the disputes that come before them. Courts cannot contrive to inspire the 'right' questions i.e. questions the answers to which might clarify or progress the law more fluidly. The dynamics of free movement disputes reflect the reactive character of legal evolution through case law very acutely: mainly through the happenstance of the questions that arrive at the Court (and when they arrive) through the preliminary rulings procedure, but thinking also of the discretion retained by the Commission for the initiation of enforcement proceedings against the Member States. But the uneven articulation of clear rules because of sporadic opportunities for refinement through case law channels is one thing; persistently shifting or unsettled principles, expressed in variable ways and departing from the case law mainframe without rationalized explanations, is something else.

[24] E Spaventa, 'The outer limits of the Treaty free movement provisions: Some reflections on the significance of *Keck*, remoteness and *Deliège*' in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009) 245.

[25] Spaventa, n24, 245 (emphasis in original).

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Second, the case law of the Court of Justice must be applied in all courts and tribunals across 28 Member States. This means that its decisions must (1) provide appropriate specificity for the effective resolution of the dispute in front of it; and (2) articulate workable principles for massively widespread subsequent application. Especially in preliminary rulings, this dual function reveals an important paradox about the unusual jurisdiction of the Court of Justice: it acts as *both* a dispute resolution tribunal and a supreme or constitutional court—at the same time. Some of the problems that result from this duality are discussed further in Chapter 2. For now, the challenge of presenting widely transposable principles through staggered case law steps is highlighted as a consideration to take into account when framing realistic expectations of coherent case law.

Building on the points above, a final factor to consider in respect of the responsibilities of constitutional courts in general is that they are not only lawmakers; they are also policymakers.[26] When constitutional courts resolve questions that political institutions either have not yet addressed or simply will not touch, they signal a suggested policy direction. The relevant constitutional subjects may decide to alter the steer given by the court, in accordance with the different mechanisms and procedures that their legal orders establish (for example, the decision of the court may be changed through the adoption of legislation; or the constitution may require the holding of a referendum for that purpose). But most constitutional court decisions are not challenged or reversed; and even if they are, that fact still does not detract from the contribution that the court has already made to the wider policy debate.

The function of constitutional courts as policymakers is again linked to the critical importance of adequate reasoning. Exploration of the reasoning of the Court in the chapters that follow is driven in particular by a requirement that constitutional courts should explain how new judgments either fit with existing case law or are deliberately intended to signal a departure from it—and why. As noted briefly above, this requirement is related to but just one aspect of broader debates about whether or not the Court of Justice operates a system of precedent, or the different civil law and common law understandings of such a system in the first place.[27] In the context of free movement law specifically, an empirical study by Woods, reviewing the outputs of different chambers of the Court of Justice in case law on Articles 34–36 TFEU (free movement of goods), confirms the fragmentary effect of the *variable* use of legal authority in particular. Moreover, she positions the significance of this finding in the 'role of precedent in maintaining the *coherence and integrity* of the development of the law'.[28] Looking at the Court's treatment of its own judgments—but from its different formations—her study established that the '[s]tatus of the formation generally seems not to be a relevant factor in terms

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[26] See e.g. M Dougan, 'Judicial activism or constitutional interaction? Policymaking by the ECJ in the field of Union citizenship' in H Micklitz and B de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 113.

[27] For an overview of these issues and related literature, see Komárek, n21.

[28] Woods, n16, 351 (emphasis added).

of choice of authority'.[29] In her conclusions, Woods highlights the '*unprincipled* way in which the ECJ refers to its own decisions' and 'the failure to recognise any difference between the respective values of different judgments'—the dominant factor seemed, in fact, to be recentness: which is neither here nor there in a substantive legal sense.[30]

Policymakers who act through legislation have to reveal their thinking and their positions through legislative proposals and they have to respond to multi-faceted debates on those proposals. Constitutional courts can instead seem to be concealing or suppressing, or at least toning down, the policy-making dimension of their judgments. Writing about the German Federal Constitutional Court, Kumm has observed that 'the decisions themselves explicitly omitted all the information that would help to ground the case and its resolution in a specific political context... Concurring and dissenting opinions exist, but are relatively rare. For the most part the court presents itself as a monolithic whole—a corporate entity speaking in the name of the law as an objective force'.[31] For present purposes, acknowledgement of the policy-making function of constitutional courts, whether or not it is articulated in their judgments per se, adds a further layer to their responsibility to act coherently.

(b) Constitutional responsibility and the Court of Justice

The Court of Justice is not a conventional or textbook constitutional court, which is something that we usually associate with a state. It is a transnational court, serving all of the EU Member States as well as multiple EU institutions, bodies, and agencies. And it must have the capacity to work through, at present, 24 languages.[32] In accordance with Article 19(2) TEU, the Court is composed of 28 judges, with one judge from each Member State. The judges thus bring invaluable insight into their own legal systems and legal traditions. But the way in which cases are assigned at the Court does not, in contrast to procedures at the European Court of Human Rights (ECtHR),[33] operate on the basis that a judge will be involved in cases concerning his or her own Member State. Relatedly, Woods identifies some of the challenges that the Court's 'multinational nature' generates as a result of the 'variety of legal systems represented' since '[e]ach such system may incorporate different expectations as to the role of the judge, the value

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[29] Woods, n16, 365. [30] Woods, n16, 366 (emphasis added).

[31] M Kumm, 'On the past and future of European constitutional scholarship' (2009) 7:3 *International Journal of Constitutional Law* 401 at 414.

[32] The 24 EU Treaty languages are listed in Article 55 TEU. See also, Article 342 TFEU and, for the language rules applicable to the Court of Justice more specifically, Article 64 of the Statute of the Court of Justice (available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/staut_cons_en.pdf>) and Articles 36–42, 57, 85, 98, 204, and 210 of the Rules of Procedure of the Court of Justice (2012 OJ L265/1).

[33] See e.g. Rules 24(2)(b) and 26(1)(a) of the ECtHR Rules of Court, available at: <www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

of precedent and the extent to which judgments are explanatory or declaratory in form and nature'.[34]

The multiplicity of courts involved in applying and interpreting EU law and the non-linear relationships between them in certain respects present another set of challenges to consider here. For example, the Court does have a formal relationship of appellate priority with respect to the General Court (and thus indirectly with the specialised courts too).[35] At a more conceptual level, Article 19 TEU suggests that all of the courts that make up the CJEU have apparently equal authority to ensure that 'the law is observed' when applying and interpreting the EU Treaties. Additionally, most case law in the field of free movement comes to Luxembourg through the Article 267 TFEU preliminary rulings procedure—where the final decision in all cases lies with the referring national court or tribunal, which may be a court or tribunal at *any* level in the context of domestic judicial architecture—rather than through standard (for constitutional courts) appeal or special/reserved jurisdiction pathways. Nevertheless, for present purposes, the Court of Justice *is* considered to be the constitutional court of the European Union. That assessment could be rooted in three different senses of EU constitutionalism: (1) the nature of the EU legal order; (2) different normative perspectives on EU constitutionalism; and (3) recognition and impact of the Court's case law in functional terms. The persuasiveness of each of these three premises will now be examined in turn; it will be seen, however, that it is the dynamic that connects them that proves ultimately decisive.

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(i) The nature of the EU legal order

As a starting point, the Court of Justice has itself repeatedly asserted that the EU legal order is constitutional in nature. Its decisions in *van Gend en Loos* and *Costa* first articulated the distinctiveness of the European Economic Community (EEC) as a polity and the related special nature of its law.[36] Since the internal market was 'of direct concern to interested parties in the Community', the Court stated in *van Gend en Loos* that the EEC Treaty was 'more than an agreement which merely creates mutual obligations between the contracting states', a view supported by (1) the reference to 'peoples' as well as 'governments' in the Treaty's preamble; (2) the 'establishment of institutions endowed with sovereign rights'; (3) channels of cooperation created by the European Parliament and the Economic and Social Committee; and (4) the indication, through the creation of the preliminary rulings mechanism, that 'the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals'.[37] The Court thus concluded that 'the Community constitutes a new legal

[34] Woods, n16, 341. [35] See Articles 256(1) and 257 TFEU.

[36] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585. These cases are discussed in several of the contributions to Poiares Maduro and Azoulai (eds.), n15.

[37] *Van Gend en Loos*, 12.

order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[38]

In *Costa*, the Court went further, stating that '[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a *permanent* limitation of their sovereign rights, against which *a subsequent unilateral act* incompatible with the concept of the Community cannot prevail'.[39] It continued that Treaty law was an 'independent source of law' with a 'special and original nature', which could not 'be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.[40] This is the classic constitutional language of hierarchy among sources of applicable law. That angle was later expressed explicitly in *Les Verts*, where the Court held that '[t]he Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the *basic constitutional charter*, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions'.[41] In *Kadi*, the Court controversially mapped the implications of the distinctive and constitutional character of EU law vis-à-vis assessing obligations entered into by the EU institutions in accordance with international law. The higher EU standards applied in that case related to the protection of fundamental rights—the development of which was itself a significant step in the modelling of EU constitutional law.[42]

This synopsis of the way in which the Court rationalized the constitutional nature of the EU and its legal order is necessarily brief. It outlines some of the pivotal case law steps in a much broader and more complex process, but what can be noted is that the Court has pulled a firm thread of reasoning from the decisions in *van Gend en Loos* and *Costa* through to the contemporary cases. The narrative outlined does not, however, address the widely debated questions that the actions of the Court have generated.[43] Moreover, alongside the Court's constitutional vision, we have to acknowledge the failure of the political effort to implant the language of constitutionalism overtly through ratification of the Constitutional Treaty.[44] Acceptance of the Court's constitutional understanding of the EU legal order needs a more solid base than the Court's own say-so.

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[38] *Van Gend en Loos*, 12. [39] *Costa*, 594 (emphasis added). [40] *Costa*, 594.
[41] Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23 (emphasis added).
[42] Joined Cases C-402/05 P and C-415/02 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 281–285.
[43] See generally, the contributions in G de Búrca and JHH Weiler (eds.), *The Worlds of European Constitutionalism* (CUP, 2012).
[44] Treaty establishing a Constitution for Europe, OJ 2003 C169/1.

(ii) Normative perspectives

A normative claim to EU constitutionalism must overcome political and popular disagreement about the basic nature and purposes of that polity; it must source adequate polity legitimacy in the Union's atypical and multilayered institutional structure; and it must manage a permanent existential crisis that seems impossible to shake off, whether or not the future of the EU is directly in question—can a polity whose very foundations seem doomed to reside in quicksand be conceptualized as genuinely 'constitutional'? There is another, and prior, concern in this context too i.e. disagreement about the nature of transnational constitutionalism per se. Discourse on the meaning and features of constitutionalism beyond the state, or on the degree to which those markers are exhibited by the EU, marks another huge and contested field of scholarship.[45] The definition of a 'constitution' adopted here, reflecting the case study's emphasis on the scope of relevant primary law, is from MacCormick's *Questioning Sovereignty*, building on his view that:

> Law has positivity. We look to law for answers to questions about *what is obligatory or not, permissible or not*, within some determinate and institutional sphere of decision-making. Inside that sphere of decision-making, the *given rules and principles indicate what ought to be done*, indeed what has to be done to satisfy the institutionalised system. The norms of a system of law lay down what is obligatory or permissible in the perspective of the system, not what from some ideal point of view ought to be obligatory or permissible.[46]

He then states that '[c]onstitutions can best be defined in terms of the establishment and empowerment of the agencies ("institutions" in one sense) that perform the roles of enunciating, executing, administering or judging about the norms whose institutional character is established by the very exercise of those powers'.[47]

It may seem odd to revert to the classical apparatus of legal hierarchy in light of the prevalence in current scholarship of the paradigm of constitutional pluralism—work that, ironically, developed in many respects from MacCormick's groundbreaking ideas about constitutionalism beyond the state.[48] But what is needed for present purposes is a working definition of a constitution to set a baseline or threshold boundary for the *feasible* use of that term—especially because the nature of EU constitutionalism is so unsettled from all angles. The extent to which you can or perhaps might prefer not to go along a spectrum of thicker constitutional

[45] For a comprehensive overview of related debates and scholarship, see C Mac Amhlaigh 'The European Union's constitutional mosaic: Big "c" or small "c", is that the question?' in N Walker, J Shaw, S Tierney (eds.), *Europe's Constitutional Mosaic* (Hart Publishing, 2011) 21; Avbelj, n5; and P Craig, 'Constitutions, constitutionalism and the European Union' (2001) 7:2 ELJ 125. See also, O Gerstenberg, 'Expanding the constitution beyond the Court: The case of Euro-constitutionalism' (2002) 8:1 ELJ 175.

[46] N MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (OUP, 2002) 13 (emphasis added).

[47] MacCormick, n46, 102. On constitutional *legal* orders specifically, see also F Amtenbrink, 'The European Court of Justice's approach to primacy and European constitutionalism' in Micklitz and de Witte (eds.), n26, 35 at 39.

[48] For an overview of current thinking, see e.g. the essays in M Avbelj and J Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012).

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meaning than the definition adopted here raises legitimate but separate questions. Moreover, irrespective of specific debates about which institution has the 'final say' in determining legal disputes, the ideas associated with constitutional pluralism offer broader perspectives on how courts operating in multilevel legal spaces derive their legal responses—perspectives that are still relevant even in a more traditional construct of the hierarchy of legal sources.

Here, it is simply asserted that the EU Treaties *do* fulfil the criteria set out in MacCormick's definition in an empirical sense; that the Union can therefore be *credibly* presented as a polity that has a constitution; and that the Court of Justice is, in consequence, that polity's constitutional court. In EU free movement law, in other words, the Court of Justice does have the final say (bar Treaty amendment) on the scope of the relevant Treaty provisions. But this approach will only hold weight if it can also be shown that the EU actually functions as a constitutional legal order and that due recognition is given by the relevant constitutional subjects to the Court's role at the apex of free movement law in practice.

(iii) Functional constitutionalism

Building on the definition of a constitution adopted above, the extent to which the case law of the Court is acknowledged to be constitutional through *practice* will now be considered, adding functional ballast to the declaratory and normative dimensions already assessed—indeed, as noted at the outset, it is the combined force of the three dimensions that strengthens the feasibility of describing the Treaty bases of free movement law, and the Court's espousal of their scope, as genuinely constitutional law. The idea of functional constitutionalism is used here as an empirical yardstick:[49] do the Court's functions and practices align with the functions and practices that we associate with constitutional courts? It would be naïve to gloss over the fact of academic, political, and judicial resistance, expressed to greater or lesser extents at different times, to conceiving of the Court of Justice as the Union's supreme court or to respecting the degree of legal authority that comes with it.[50] Nevertheless, it is also a fact that the basic constitutional authority attributed to the Court's foundational judgments has persisted for five decades now: something that brings different shading to the 'because the Court says so' problem indicated above. We also saw that while, under Article 19 TEU, all of the courts that comprise the CJEU have authority to interpret and apply EU law, the Court of Justice is the final link in the appellate chain organizing those three (at present) institutions in hierarchical terms. The Court has also established that, owing to the objective of ensuring the uniform application of Union law in all of

[49] Functional constitutionalism has also been explored from normative perspectives e.g. M Dani, 'Constitutionalism and dissonances: Has Europe paid off its debt to functionalism?' (2009) 15:3 ELJ 324.

[50] For discussion of the qualifiers to the primacy of EU law attached by national constitutional courts, see Amtenbrink, n47, 42–52; tracing responses to one judgment in particular, see e.g. S Garben, 'Sky-high controversy and high-flying claims? The *Sturgeon* case law in light of judicial activism, euroscepticism and eurolegalism' (2013) 50:1 CMLRev 15.

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the Member States, its judgments in individual cases have *erga omnes* effect.[51] A stamp of hierarchy is further imposed on that finding by the fact that the Commission's enforcement powers can, and did,[52] encompass failures by national courts to manage the obligations that stem from EU law.

It is also extremely difficult for any institution but the Court of Justice itself to recalibrate or reverse its decisions—and this is, again, something that the Member States have felt comfortable enough to live with since the Court's establishment in 1952. The so-called *Barber* protocol attached to the Maastricht Treaty comes closest to political reversal of a judicial decision, but that measure altered the temporal scope of the *Barber* judgment only and not its legal substance.[53] Moreover, while the Court was kept at arm's length from both the second and third pillars of the EU structure created at Maastricht, the changes effected by the Lisbon Treaty open up the Court's role—and, crucially, the standard operation of the preliminary rulings procedure[54]—in the Area of Freedom, Security and Justice i.e. the former third pillar at least.

The Court of Justice has empowered national courts and tribunals to give effect to the primacy of EU law established in *Costa*—irrespective of their constitutional functions (or, more typically, their constitutional impotence) in their national judicial systems.[55] In other words, while the majority of national courts and tribunals have no power to disapply relevant national law in the general exercise of their jurisdiction, they obtain precisely that power in order to give effect to the primacy of EU law in situations of legal source conflict. The Court underscored the extent of that autonomy through the creation[56] and development[57] of the doctrine of interpretative obligation. In these ways, the Court bypassed established routes of national systemic hierarchy and created its own constitutional web of judicial authority—placing itself firmly at the apex. Importantly, for example, it retains sole jurisdiction to pronounce on the validity of Union legal acts.[58] Also, from the perspective of functional constitutionalism, the existence and workings of the Article 267 procedure exemplify the significance of hierarchy—not least in the requirement that questions of both validity and interpretation of EU law

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[51] Case 66/80 *SpA International Chemical Corporation (ICI) v Amministrazione delle finanze dello Stato* [1981] ECR 1191, para. 13.

[52] Case C-129/00 *Commission v Italy* [2003] ECR I-14637.

[53] Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1189; the text of the Protocol states that '[f]or the purposes of [Article 157 TFEU], benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law'.

[54] See esp. Article 10 of the Protocol on Transitional Provisions, 2007 OJ C306/159.

[55] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629. Additionally, in *CILFIT*, the Court outlined the extent and limits of national court discretion under the Article 267 mechanism (Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Minestero della Sanità* [1982] ECR 3415).

[56] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

[57] E.g. Case C-555/07 *Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

[58] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paras 15–16.

must be referred to the Court of Justice where 'a case [is] pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law'. As argued by Komárek, '[the] preliminary ruling procedure, reflects an understanding of the ECJ as a superior authority on the interpretation of EU law that is distinct from national courts—despite all talk of "judicial cooperation and dialogue"'.[59]

The relationship between the Court of Justice and national courts is particularly critical in the context of responsibilities owed to constitutional subjects, since these are the forums in which EU free movement law happens in reality—after all, the vast majority of relevant cases will never make it anywhere near the Court of Justice.[60] As provided for in Article 267, a reference need only be sent from most national courts and tribunals when it is 'necessary' to enable that court to give its judgment—and that determination is itself part of the national court's responsibility. The input of the Court of Justice will normally be 'necessary' when a legal question arising in national proceedings cannot be resolved on the basis of existing EU law because, for example, the relevant area of EU law is unclear or because a genuinely new question about the interpretation or application of EU law has arisen. As Weatherill has emphasized, 'the Court of Justice must ensure the persuasive quality of its judgments for . . . the legitimacy of the Court is in part to be assessed with reference to the reaction of national courts who are by no means simply unthinking agents of the Court of Justice'.[61]

But a cautionary note must also be raised: there is a difference between a national judge *knowing* the requirements imposed by EU law, including its primacy over conflicting national law, and *feeling* them. A national court may seem to accept its obligations under EU law in a formal sense; but, for example, the elasticity of the proportionality test may enable a deeper-seated reluctance to displace the validity of national measures (especially legislative measures) and the political choices that underpin them to prevail.[62] A judge who does not encounter EU law very often—i.e. most national judges—will understandably find it difficult to act in ways that are simply anathema to national judicial limits more generally.

The practice and development of EU law in national courts and tribunals is one of the biggest empirical research gaps in the discipline. Even where a preliminary reference *has* been sent to Luxembourg, the final decision lies, as noted earlier, with

[59] Komárek, n21, 16.

[60] The stringent limits on standing before the Court for direct judicial review actions under Article 263 TFEU are relevant here too (e.g. Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677); moreover, the amendments to Article 263 effected by the Lisbon Treaty appear to be more marginal than was initially thought: see the Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, pending (Opinion delivered on 17 January 2013).

[61] Weatherill, n15.

[62] E.g. compare the different discussions of proportionality in both of the majority judgments as well as the dissent in *The Queen on the Application of Sinclair Collis Limited v The Secretary of State for Health*, High Court of Justice Court of Appeal (Civil Division) [2011] EWCA Civ 437; it is particularly interesting to observe how the judges' framing and assessment of the applicable proportionality test keeps coming back to national constructs.

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the referring national court—and there is no centralized follow-up or supervisory mechanism to find out and report on what actually happened. The scale of application of EU law in a Union of the current size, considering the volume of national courts and tribunals potentially called upon to consider disputes with Treaty relevance, also presents a significant challenge to one of the values constantly reaffirmed by the Court and referred to above i.e. ensuring uniform application of EU law in all of the Member States. The quantitative challenge in that respect is compounded by the fact that national courts are 'understanding the rulings of the ECJ from the perspective of their respective legal cultures and systems'.[63]

When delivering its preliminary rulings, the Court of Justice tends to answer the referring court in three different ways: first, the judgment appears to decide the case concretely, notwithstanding the jurisdictional boundaries built into the preliminary rulings system; second, the Court does not prescribe the outcome of the case but does provide clear guidance on the legal issues raised; third, the Court neither decides the case nor provides particularly clear or helpful guidance for the referring court. On the first type of response—where the Court effectively applies as well as interprets EU law to resolve the national dispute—scholars disagree about whether such a prescriptive judgment properly assists or unhelpfully emasculates national courts.[64] It is also important to acknowledge that since preliminary references can come from any national court or tribunal, including at first instance, the Court often has no judgment from the national proceedings to examine—the legal issues and the facts thus remain bundled together since no prior judicial analysis has already distinguished them. But the concern highlighted here is a practical one: in such cases, a constitutional court, whose task is to provide guidance on the law, is making determinations of fact as if it were the first instance tribunal—when it has worked on a second-hand presentation and review of the *evidence* submitted to the national court.[65] A prescriptive approach also leads to further references from national courts that are not necessarily distinguishable from each other on any points other than different facts: distorting the purpose of the Court of Justice as a constitutional court and reducing national courts—who should be able to interpret and apply EU law for the most part by themselves (for how else could a 28 State legal order possibly work?)—to acting like Court of Justice registries.

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[63] Woods, n16, 341.

[64] Reaffirming the existence of the spirit of cooperation on which the preliminary rulings procedure is premised, see e.g. X Groussot, 'Spirit, are you there? Reinforced judicial dialogue and the preliminary ruling procedure', Eric Stein Working Papers No 4/2008, available at <http://www.ericsteinpapers.eu/images/doc/eswp-2008-04-groussot.pdf>. Arguing for greater leeway for national courts, see e.g. G Davies, 'Abstractness and concreteness in the preliminary reference procedure' in N Nic Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar Publishing, 2006) 210. See also, J Komárek, '"In the Court(s) we trust?" On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32:4 ELRev 467; and O Pollicino, 'The new relationship between national and the European Courts after the enlargement of Europe: Towards a unitary theory of jurisprudential supranational law?' (2010) 29:1 YEL 65.

[65] See further, N Nic Shuibhne and M Maci, 'Proving public interest: The growing impact of evidence in EU free movement case law' (2013) 50:4 CMLRev, forthcoming.

Under option three, the Court of Justice noticeably holds back, sometimes even at the level of explaining the applicable legal principles and for reasons we can only guess. Here, it leaves considerably more discretion to the referring court—but this is not necessarily an appropriate discharge of constitutional responsibility if the judgment issued is so vague or cryptic as to be essentially useless to the national court that requested it. Unsurprisingly, then, the second option is the Goldilocks outcome in terms of constitutional responsibility. In *Genc*, the Court outlined its own role and responsibilities, and those of referring courts, under Article 267 as follows:

> Article [267] establishes a relationship of close cooperation between the national courts and the Court of Justice, based on the assignment to each of *different functions*, and constitutes an instrument by means of which the Court provides the national court with the criteria for the interpretation of [EU] law which they require in order to dispose of disputes which they are called upon to resolve . . . It is one of the essential characteristics of the system of judicial cooperation established under Article [267] that the Court replies in rather *abstract and general terms* to a question on the interpretation of [EU] law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court's reply . . . The national court *alone* has *direct knowledge of the facts* giving rise to the dispute and is, consequently, *best placed* to make the necessary determinations.[66]

In subsequent chapters, fragmentary consequences that can result when this 'ideal' division of functions has in some way broken down will be flagged. As a final point in the present discussion, however, the argument in Section 2(a) that case law coherence must not be conflated with case law perfection should be restated. As Koutrakos has argued, 'a degree of uncertainty is inherent in the preliminary reference procedure. In fact, it is the direct corollary of the central position which national courts enjoy in the constitutional architecture of the Union's legal order in general and the decentralised system of enforcement set out in Article 267 TFEU'.[67] This may not fit with more rigid understandings of the uniformity of law; but more rigid understandings of the uniformity of EU law simply do not fit with the reality of adjudication as a process. The criterion of coherence helps us to establish a gauge that is properly legally meaningful but also achievable in practice.

The fusion of declaratory, normative, and functional perspectives on EU constitutionalism produces a sum of persuasiveness greater than the individual parts. Moreover, all three sources continue to persist and to develop, and through that process they harden. Joerges cautions that '[t]his tenacity of the European polity is reassuring, but no more than that. It does not, after all, guarantee that the incremental searching and learning process whereby Europe has "constituted" itself can successfully continue'.[68] To some degree, the fact that all constitutional

[66] Case C-14/09 *Genc v Land Berlin* [2010] ECR I-931, paras 29–32 (emphasis added).

[67] P Koutrakos, 'The *Emsland-Stärke* abuse of law test in the law of agriculture and free movement of goods' in R de la Feria and S Vogenauer (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011) 203 at 215.

[68] C Joerges, 'The law in the process of constitutionalizing Europe', EUI Working Paper, Law, No. 2002/4, available at <http://cadmus.eui.eu/dspace/handle/1814/182>, 34.

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polities, including states, can be unmade places the fragility of the EU in broader perspective. But the *extent* of polity challenge levelled at the EU, depicted above in the language of existential crisis, brings sharper edges to the scythe in the transnational context. This is the challenging environment in which the Court of Justice must resolve constitutional disputes; whether related traces of defiance or timidity can be detected in free movement case law is something that can be borne in mind when reflecting on the substantive discussions in subsequent chapters; as can the relative propriety of either response.

3. The significance and scope of free movement law

Three particular aspects of free movement law will be briefly outlined in this final section: first, its significance within EU law more generally; second, the three stages of analysis—restriction, justification, and proportionality—applied by the Court in free movement case law; and, third, an overview of this project's approach to the first of those stages i.e. determining the question of scope.

(a) Significance: why free movement law?

Article 3(3) TEU provides that the EU 'shall establish an internal market'. Article 4 (2) TFEU confirms that the competence to regulate it is shared between the EU and the Member States. The internal market is then defined in Article 26(2) TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. The threshold conditions for triggering EU competence to adopt measures 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' are set out in Articles 114 and 115 TFEU. From the perspective of 'negative' market integration, however, free movement rights are conferred by Articles 28–37 (goods), 45–48 (workers), 49–55 (establishment), 56–62 (services) and 63–66 (capital) TFEU. For natural persons holding the nationality of an EU Member State, the 'right to move and reside freely within the territory of the Member States' is protected autonomously as an element of EU citizenship (Articles 20(2) and 21 TFEU) and by Article 45(1) of the Charter of Fundamental Rights. Finally, related Treaty provisions set out the permitted derogations from (almost all of) the Treaty-based free movement rights.[69]

[69] The exception is Article 30 TFEU, which prohibits customs duties (and charges having equivalent effect) on imports and exports between Member States and from which there are no Treaty-based derogations. More generally, for quantitative restrictions on the free movement of goods, see Article 36 TFEU; for the free movement of workers, Article 45(3) TFEU; for restrictions on freedom of establishment, Articles 51 and 52 TFEU; for services, Article 62 TFEU; and for capital, Article 65 TFEU. For citizenship rights, see the general statement in Article 21 TFEU that '[t]hese rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

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Through its interpretation of these rights-establishing *and* rights-limiting provisions of the TFEU, the Court of Justice fixes the legal parameters of the internal market. These are the boundaries that frame the regulatory space within which both the EU legislature and the Member States can act, and that is why determination of the scope of free movement law is one of the key ways in which the Court executes a significant constitutional function. The foundational Treaty statements on free movement rights and permitted derogations have remained largely unchanged since the original Treaty of Rome: the key exceptions being, through amendments introduced by the Maastricht Treaty, the creation of EU citizenship rights and the recasting of the provisions on capital movements. Notwithstanding the stability of that Treaty basis, however, free movement law still begets a surprising volume of unsettled questions about its reach or scope. The EEC common market was established in the 1950s; it was a compact regional trading space, in terms of geographical size and frontier range. The contemporary market is a radically different place in terms of scale—both literally (comparing a Community of six States with a Union of 28) and operationally, highlighting the impact of developments such as the Internet and affordable air travel on transforming our capacity for transnational market activity. Some market sectors and market actors are considerably more mobile than others. For example, it is much easier to participate in the virtual market (e.g. to provide or receive cross-border services or make a capital transfer online) than to uproot and move more permanently to another Member State as a worker. But the fact that cross-border activity *can* be transacted without any of the parties involved actually leaving their own State does mean that more companies and persons than ever are internal market actors.[70] Questions about the law underpinning the exercise of free movement rights thus continue to be asked of the Court of Justice. For example, annual statistics from the Court confirm that such questions still constitute a significant proportion of all preliminary references sent by national courts and tribunals (and preliminary rulings account in turn for more than half of the Court's entire caseload).[71]

As the European Parliament has emphasized, 'the quantitative aspect alone of cross-border movements cannot justify the attention paid to the phenomenon,

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[70] The Commission has summarized key benefits of the EU internal market at <http://ec.europa.eu/internal_market/benefits_en.htm>.

[71] For example, it can be seen from the 2011 Annual Report of the Court of Justice (available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf>) that 423 of the 688 cases (i.e. just under 62 per cent) lodged at the Court in that year were references for a preliminary ruling. On a (very) conservative reading of the 'nature of the subject matter' statistics for preliminary rulings (i.e. including EU citizenship and social security for migrant workers, but excluding e.g. consumer protection, taxation, and other sectoral policy headings), 16 per cent of those references related to free movement law—however, a considerable majority of the cases classed separately under the sectoral headings actually related to the operation of the free movement rules too. The 2010 Annual Report confirms similarly that 385 (of 631) new cases in that year were references for a preliminary ruling, with 18 per cent of those references relating directly to free movement law, using the same narrow parameters applied above (the 2010 Report is available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf>).

which is more significant in terms of indicating the progress and limitations of European integration'.[72] However, while the internal market pushes on in real terms, the fundamental rationale for European integration—political *and* economic—is challenged, contested, and re-imagined. The intimate link between realizing a market without internal frontiers and wider ambitions of Union integration has been reinforced extensively, in both institutional[73] and academic[74] contexts. At the time of writing, however, the ongoing resolution of the Eurozone crisis and the ramifications of the prospect of an in/out EU membership referendum in the United Kingdom in the relatively near future have tinged that presumption with existential uncertainty even more strongly than usual—and with respect to the market as well as the EU itself.[75] Neither the purposes nor the benefits of the market are proving to be mechanically determinative as a response: for States, for businesses, or for consumers.[76] And neither the consensus nor the verve of the 1992 single market programme has since been recaptured at the level of policy- or agenda-making. By contrast, current political as well as economic instability heightens instead the lingering vulnerability of the EU market to resurgences of national protectionism. It has also been pointed out that there is now a greater awareness of controversies within free movement law, especially since widely reported decisions of the Court have presented acute challenges to prized national economic and social models.[77] All of these complexities contribute additional impetus to a palpably growing interest in evaluating both the Court's performance as an influential institution in this field and the substantive law it is developing through its judgments.[78]

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[72] *Frontier Workers in the European Union*, Directorate General for Research Working Paper, Social Affairs Series, W 16A, section 2.2, available at <www.europarl.europa.eu/workingpapers/soci/w16/summary_en.htm>.

[73] See e.g. M Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*, 9 May 2010, prepared at the request of the European Commission President, available at <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf>.

[74] See e.g. D Chalmers, 'The single market: From prima donna to journeyman' in J Shaw and G More (eds.), *New Legal Dynamics of European Union* (Clarendon Press, 1995) 55 at 60; N Reich, 'A European constitution for citizens: Reflections on the rethinking of Union and Community law' (1997) 3:1 ELJ 131 at 142; M Poiares Maduro, *We, The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998) 8; and Weiler, n11, 350.

[75] The debate has attracted editorial comment in prominent academic journals; see e.g. P Koutrakos, 'To look without understanding was their lot' (2011) 36:5 ELRev 613; and JHH Weiler, 'Integration through fear' (2012) 23:1 EJIL 1.

[76] The Executive Summary of the 2011 Report on Special Eurobarometer Survey 363, *Internal Market: Awareness, Perceptions and Impacts*, makes for stark reading in this context; the Report is available at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf>.

[77] See J Snell, 'The legitimacy of free movement case law: process and substance' in Adams, Meeusen, Straetmans, and de Waele (eds.), n1, forthcoming. See also, M Everson, 'Is the European Court of Justice a legal or political institution now?', *The Guardian*, 10 August 2010, at <http://www.guardian.co.uk/law/2010/aug/10/european-court-justice-legal-political>.

[78] See e.g. D Chalmers, 'The European Court of Justice is now little more than a rubber stamp for the EU. It should be replaced with better alternative arrangements for central judicial guidance', 8 March 2012, at <http://blogs.lse.ac.uk/europpblog/>.

(b) Stages: restriction, justification, and proportionality

To resolve disputes engaging the Treaty's free movement provisions, the Court of Justice follows an established template consisting of three distinct questions:

1. Does the challenged measure or action constitute a *restriction* on free movement rights conferred by the Treaty?
2. If it does, can the measure or action be *justified*?
3. If it can, is the measure or action nevertheless *proportionate*?

This three-step methodology is one of the most predictable and formulaic features of free movement case law. That does not mean that it is uncontroversial. For example, in the context of the right to take collective action, academics have questioned whether that fundamental social right can ever be conceived as having the capacity to displace free movement rights given that '[t]he moment collective action is found to be a "restriction" . . . the "social" interests are on the back-foot, having to defend themselves from the economic'.[79] The extent to which national courts follow the logic of the Court's template is also questionable. For example, in a case about the banning of cigarette vending machines, both the first instance and appeal courts in Scotland proceeded to focus on proportionality even though both judgments recorded explicit doubts about whether Article 34 TFEU prohibited the measure in the first place.[80] In other words, the courts proceeded to resolve stages two and three without first determining stage one. Is such an approach unwise, a bit like being unsure about whether the elements of a criminal offence are present but going on to consider the evidential questions anyway, since if the accused can be exonerated on that basis, whether or not they committed a crime in the first place won't matter? Or is it simply an expedient way for national courts to determine whether or not, ultimately, a preliminary ruling is truly 'necessary' to enable them to resolve the case? This example, which is part of a wider trend also being tracked in other Member States,[81] underscores the need for EU lawyers to engage further with the empirical research gap on national court practice highlighted in Section 2 and raises broader questions about the frailty of functional constitutionalism at the level of *form* at least.

In any event, the first stage of the Court's methodology reflects the way in which the *scope* of free movement law is understood and explored here, returned to in Section 3(c). As a general point, it can be noted for now that restrictions on free movement rights can be (1) directly discriminatory on grounds of nationality

[79] C Barnard 'Social dumping or dumping socialism' (2008) 67 CLJ 262 at 264. This point is picked up again in Chapter 2, in the discussion on protecting fundamental rights.

[80] *Sinclair Collis Ltd v Lord Advocate*, Court of Session (Outer House) [2012] Eu. L.R. 23, para. 23; and, on appeal, *Sinclair Collis Ltd v Lord Advocate*, Court of Session (Inner House, Extra Division) [2012] CSIH 80, para. 53.

[81] See H van Harten, 'National judicial autonomy: The example of national European law precedents in the Dutch case-law on the free movement of services and the freedom of establishment' (2009) 2:2 *Review of European Administrative Law* 135.

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(i.e. discriminatory in law); (2) indirectly discriminatory (i.e. not discriminatory in law, but discriminatory in result or effect); or (3) non-discriminatory (i.e. not discriminatory in law or in effect, but still restrictive of Treaty free movement rights).

An important challenge for the Court is to achieve effective internal market integration while still allowing for more localized regulatory diversity in keeping with the constitutional mandate of shared EU/Member State competence. This objective is captured by the fact that the Treaty's market-opening rights are accompanied by express exceptions enabling Member States to restrict those rights legitimately, in order to protect their public interest priorities in certain circumstances.[82] If it is established that the measure being challenged amounts to a restriction of free movement rights, the arguments submitted to establish that the measure is nonetheless justifiable will then be considered i.e. the Court moves on to stage two. Free movement rights can never be conceptualized as absolute, therefore, because the Treaty framework has always acknowledged that even a blatantly discriminatory restriction of free movement can be permitted if there is a good—i.e. within the limits of EU law—reason for it. The potential for justification is thus an inherent feature of the construct of EU internal market rules.

While there is some variation across the freedoms,[83] the Treaty-permitted grounds for derogation from free movement rights essentially coalesce around objectives in the interests of protecting public health and public security, and the potentially more pliable (though tightly drawn by the Court[84]) category of 'public policy' exceptions. Priorities within established derogation grounds will shift over time; the contemporary focus on alcohol, sugar, and tobacco in public health policy, for example, was hardly predictable in the 1950s. But the grounds expressly articulated in the Treaty have long been supplemented by a much more expansive approach in the case law. The basic rule is that directly discriminatory restrictions of free movement can be evaluated only by recourse to the grounds provided for in the Treaty. For indirectly discriminatory and non-discriminatory restrictions, however, States can raise virtually any policy argument that they wish, without being confined to the policy objectives predetermined in the derogation provisions.[85] In this way, the Court has accommodated policy concerns that were not relevant or prominent when the Treaty of Rome was drafted, such as the protection of the

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[82] The extent to which the internal market must reflect or take account of a whole series of other EU and/or Member State objectives is discussed separately in Chapter 2.

[83] 'Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property' (Article 36 TFEU for quantitative restrictions on the free movement of goods); 'public policy, public security or public health' (Articles 45(3), 52, and 62 TFEU for workers, establishment and services). For restrictions on the free movement of capital, see the specific limits set out in Article 65 TFEU.

[84] See e.g. AG Verloren van Themaat in Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305 at 312–14.

[85] Although hints of the Court's openness to justification arguments beyond the grounds expressed in the Treaty can be found in earlier case law, the decision in *Cassis de Dijon* is generally accepted as the more developed 'first' authority for this proposition (Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649).

environment or of consumers, without the need for Treaty amendment or the definitive resolution of broader debates about the relative value of either an updated but fixed list of permissible public interest grounds or codification of a more open-ended approach across the board. The Court's ingenuity also enables relatively specific or esoteric but nonetheless valid public interest arguments to be accepted without the need to shoehorn them artificially into the grounds available in the Treaty.[86] It creates, in other words, a genuinely merits-based system. It is also, of course, a striking example of the Court's law-making *and* policy-making powers in the field of free movement law: the Court has blatantly added significantly more public interest arguments to the public interest arguments specified in the Treaty. On the other hand, the Member States have never stepped in to regain constitutional ownership of the issue post-*Cassis*, and so the development is also a good example of functional constitutionalism taking root through practice—garnering implicit but, critically, legitimizing political acceptance in the process.

Recalling the point about achieving integration while enabling a concurrent degree of localized regulatory diversity, the Court's management of the justification framework can be pared down to the search for the elusive optimal point of balance in the scales of the internal market: which rules need to be the same in all of the Member States, and which rules can happily be different? In *Commission v Germany*, AG Bot confirmed the legal approach to justification as a facet of shared competence: '[t]he rules surrounding the exercise of [a Member State's] reserved powers mean that if its legislation causes a restriction of one of the fundamental freedoms of movement it must be in a position to provide a legitimate reason, given in the Treaty or recognised as an overriding reason of public interest, to justify this'.[87] But there is a searing tension at the heart of how we conceptualize justification in free movement law. On the one hand, as shown above, the Treaty expresses justification arguments as derogations from primary rights. And so, in keeping with standard interpretative canons, those rights *must* be interpreted widely and the exceptions to them must be defined as narrowly as possible. On the other hand, however, the justification framework has evolved over time to become the prime space within which public interest arguments are aired. It is where the multifaceted construction of the internal market, considered in more detail in Chapter 2, is explored and contested. It is where we pitch the market 'against' other values. Justification is, in this way, transformed to being more of a policy-engineering tool; the language is about balancing and weighing, not derogating.

We are trying, in other words, to make the justification framework operate for us in a way that its legal construction in the Treaty cannot achieve. The development

[86] The Court has accepted the possibility that free movement restrictions could be justified in principle by e.g. 'the need to guarantee the stability and security of the assets administered by an undertaking for collective investment created by a severance fund' (Case C-39/11 *VBV—Vorsorgekasse AG v Finanzmarktaufsichtsbehörde (FMA)*, judgment of 7 June 2012, para. 31).

[87] AG Bot in Case C-141/07 *Commission v Germany (Pharmacies)* [2008] ECR I-6935, para. 83 of the Opinion. An additional prerequisite is that 'there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests' (Case C-112/05 *Commission v Germany* [2007] ECR I-8995, para. 72).

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of justification arguments outside the Treaty derogation framework might thus be conceived as a pressure release valve. But even if that development can be thought about, and excused, as law reflecting reality, the breakdown of the relevance of discrimination for the distinction between derogation and justification shifts the discussion to another plane. Public interest arguments not specified in the Treaty are now sometimes considered in the context of justifying even directly discriminatory measures. On some occasions, the Court at least tries, if not always convincingly, to make a case for the existence of discrimination; but, in other cases, it omits that discussion altogether and speaks of restrictions in neutral terms.[88] This development produces a deeper degree of judicial creativity altogether, providing an example of the fact that rules that *converge* do not necessarily result in a coherent legal framework from the perspective of adjudicatory constitutional responsibility.

It is also important to remember, and it has been shown empirically, that even where justification arguments are accepted in principle, national measures are very often defeated by the requirements of proportionality:[89] the third step in the Court's free movement methodology. It is generally accepted that the proportionality standard applied in EU free movement law involves two tests: first, assessing the *suitability* (or *appropriateness*) of the contested measure for achieving the stated policy objectives; and, second, evaluating its *necessity* for that purpose.[90] Assessing the proportionality of a national measure in the latter sense will also involve consideration of whether alternative measures could be *equally* effective in terms of achieving the public interest objective accepted in principle, but *less* restrictive having regard to their effect on intra-EU trade.[91]

Proportionality is a significant policy tool for any court, but its assessment carries strong potential for constitutional overreach on the part of the Court of Justice: here, the view of the Court on the suitability and necessity of national regulatory choices will possibly supplant that of national legislatures. In cases being considered

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[88] For an overview of this issue and relevant case law, see AG Trstenjak in Case C-28/09 *Commission v Austria (Air Quality)*, judgment of 21 December 2011, paras 79–91 of the Opinion; cf. the silence of the Court on the nature of the restriction in that case (paras 113–117). This issue is discussed further in Chapter 6; see generally, S Weatherill, 'Free movement of goods' (2012) 61:2 ICLQ 541 at 544 (who describes the approach of the Court in *Commission v Austria* as 'extend[ing] its narrative of evasion').

[89] C Barnard, 'Derogations, justifications and the four freedoms: Is State interest really protected?' in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009) 273.

[90] It is more debated whether the concept of proportionality *stricto sensu* (i.e. the greater the impact on free movement, the greater the importance attached to satisfying the public interest objective on which the Member State relies) is a distinct third test or absorbed by the test of necessity. In either event, a Member State 'must demonstrate that the level of protection it decides to afford to its legitimate interests is commensurate with the degree of interference this causes in intra [Union] trade' (AG Poiares Maduro in Case C-434/04 *Criminal proceedings against Ahokainen and Leppik* [2006] ECR I-9171, para. 26 of the Opinion).

[91] See e.g. Case C-205/07 *Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para. 53 (on the proportionality of export restrictions under Article 35 TFEU, discussed further in Chapter 6). See also e.g. AG Trstenjak in Case C-10/10 *Commission v Austria* [2011] ECR I-5389, paras 67–68 of the Opinion, who conceptualizes the less restrictive measure limb as a test of 'reasonableness' (addressing the free movement of capital).

under the preliminary rulings procedure, the facts-based assessment involved in making such determinations adds, as argued in Section 2, an additionally acute layer of concern. In the context of human rights law, Kumm has suggested that 'there is nothing specifically law-like about the proportionality test', arguing as follows:

> The test provides little more than a structure for reasoned policy-assessment . . . Proportionality has become the lawyers' framework to engage in policy analysis in a way that is neither directly guided or constrained by legal authority. Courts engaged in this type of rights reasoning are no longer enforcers of a political will that has previously created and defined a set of legal rights. Such a court has transformed itself into a veto-holding junior-partner in the joint legal-political enterprise of developing and enforcing rational policies that reflect equal respect and concern for each individual.[92]

It is true that there is 'nothing specifically law-like' about proportionality, since it queries, as we have seen, the suitability and necessity of policy choices. But 'developing' and especially 'enforcing rational policies that reflect equal respect and concern for each individual' are tasks that do fall properly within the remit of a constitutional court. It also goes too far to suggest that the application of proportionality cannot be 'directly guided or constrained by legal authority'. Recalling the point made earlier the proper division of functions between the Court of Justice and national courts, it is precisely the responsibility of the Court of Justice to provide and reinforce a coherent guiding structure for the application of proportionality for cases with an EU legal dimension. It was emphasized that the actual application of that structure to concrete facts-sets should be part of the task of the referring court in Article 267 cases—since that is the body closest to the dispute itself, to the detail and discussion of the evidence submitted, and to the gradations of the public interest conceptions at stake. Woods expresses the point as follows: '[t]he assessment of proportionality is heavily fact dependent in terms of outcome in the case but the questions the ECJ should ask itself in dealing with those facts are not'.[93] National courts also have responsibilities in this regard: in their judgments, they must demonstrate through clear reasoning and engagement with authority that they have reached their conclusions on proportionality in accordance with the guidance established by the Court of Justice, which they are legally obliged to follow, even if different tests are applicable under national law.

The justification and proportionality stages of free movement case law raise numerous questions that challenge the coherence of the Court's jurisprudence. Despite the rule (of the Court's own making) that justification of directly discriminatory restrictions is confined to the public interest grounds stipulated in the Treaty, there are clear instances of such restrictions being evaluated on the basis of arguments outwith those boundaries—for example, as noted above, directly discriminatory restrictions have been considered against arguments about protection

[92] M Kumm, '*Internationale Handelsgesellschaft*, *Nold* and the new human rights paradigm' in Poiares Maduro and Azoulai (eds.), n15, 106 at 110.

[93] Woods, n16, 360. See similarly, AG Poiares Maduro in *Criminal proceedings against Ahokainen and Leppik*, para. 32 of the Opinion.

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of the environment. Similarly, how does the Court's stretching of the scope of Treaty obligations to catch private actors as well as States in certain circumstances, discussed in Chapter 3, fit with the way in which the justification grounds are articulated in the majority of relevant Treaty provisions i.e. clearly directed at those who have responsibility for the shaping of the *public* interest? It has been emphasized that, primarily for reasons of scale, this book examines the scope of *restrictions* and the principles that the Court has developed in that context; but coherence questions raised by their justification and/or proportionality will be flagged where relevant in the chapters that follow.

(c) Scope: general approach and chapter map

The chapters in this book are organized thematically rather than freedom-by-freedom. The focus on understanding the underpinning framework principles drives this structure; for example, questions about the exclusion of a *de minimis* threshold from free movement law emerge in recent case law on both citizenship rights and the free movement of goods. The analysis does not purport to deliver *even* coverage across all of the different sectors of free movement law. First, as will be argued in Chapter 2, the standard of coherence does not require that different sectors need to be treated in the same way in law: free movement rights will be presented as establishing a mixed legal framework, in which certain rules and principles work well across all of the freedoms but others do not. For example, the regulation of situations involving natural and legal persons might be best developed similarly in some circumstances but distinctively in others, bearing in mind that only the former hold EU citizenship rights. Second, the Treaty rules on some free movement sectors are themselves differently configured when compared to the others, and these constitutional instructions should be respected. Finally, the balance of coverage across different freedoms will also vary because the extent to which the relevant questions have arisen or been pursued or become especially acute in different areas of law necessarily varies too. For example, the complexities of situations that are wholly internal to one Member State are more apparent in the case law on free movement of persons and so that context dominates the discussion in Chapter 4, even though the basic rule requiring the presence of a cross-border connection is found in the rest of the Treaty free movement provisions too.

The way in which the scope of free movement law is understood here is based on the first question in the free movement case law template—does the contested measure or action constitute a restriction of free movement rights? Analysis of this question is divided into two parts over the chapters that follow: negative scope and positive scope. *Negative scope* covers the principles that are applied in free movement law to exclude something (or someone) from the scope of the Treaty—i.e. there is no Treaty-relevant restriction on free movement rights at all and, in such cases, any examination of justification and proportionality becomes redundant. In Chapter 3, the principles examined relate to 'who' is involved and include discussion of the extent to which the Treaty freedoms are addressed to private as well as State actors. Chapter 4 then focuses on a crucial 'what' question in the context of

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restrictions: the shape-shifting nature of the wholly internal rule. In Chapter 5, the principles of remoteness and *de minimis* are introduced, and argued to sit at present somewhere between what-based exclusions (negative scope) and the elements that do make up a Treaty-relevant restriction (positive scope). Some shared characteristics link the principles considered in these three chapters: first, their contribution is often negatively decisive, thus constricting the scope of free movement law when invoked; second, they emerge in cases concerning all of the Treaty freedoms, but they are not always expressed through the same phrasing; and, third, while they do impose limitations of scope, this is not happening consistently, leading to damaging suspicions of convenience rather than suggesting a properly worked out, coherent framework.

The *positive scope* of free movement law is then addressed in Chapters 6 and 7. We tend to take the meaning and scope of discriminatory restrictions for granted, but definitional questions at the edges of discrimination are explored in Chapter 6—questioning, for example, the continuing value of its division into directly and indirectly discriminatory restrictions given the breakdown of that distinction at the stage of justification alluded to above. The central purpose of Chapter 7 is to explore why and the extent to which *non*-discriminatory measures have the potential to infringe EU free movement rights. In the preceding chapters, it will have become clear that the Court's use of tests such as deterrence and disadvantage as the basis for Treaty-caught restrictions has been problematic in many respects, since such concepts both expand the scope of the Treaty yet arguably lack sufficient normative weight to defend the related displacement of State regulatory competence. In Chapter 7, it will be argued that free movement rights can be reconceptualized around stronger principles of law. A principle that is based not, in line with the dominant emphasis in current case law, on access to the market, but *access to the exercise of free movement rights* will be developed. But limits that should be placed on the scope of that principle will also be articulated.

Overall, it will be argued that the complex and poorly explained framework being applied to determine the scope of free movement law at present is masking challenging fault-lines and fragmentary ruptures in judicial reasoning—especially in the use of and engagement with relevant authority—that must be resolved by the Court of Justice in order to (re-)generate a stronger degree of case law coherence: a duty that the Court owes to its constitutional subjects, especially in light of its responsibility to guide the courts and tribunals of the Member States towards their own resolution of questions on the scope of free movement law. It will be asserted that improving the quality of its judgments is necessary for a renewal of confidence in the Court as an effective constitutional institution. However, it will also be argued that the Member States need to take ultimate responsibility for ensuring that the Court is an effective institution that can actually deliver those functions.

Before the substantive analysis of free movement law is presented, the reasons behind the choice of coherence as the criterion of assessment, the way in which coherence is understood and applied for that purpose, and a preliminary sketch of the most significant fragmentation problems in the free movement case law will first be explained in more detail in Chapter 2.

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