State Procedure and Union Rights
A Comparison of the European Union
and the United States
To Stina and Maximilian
State Procedure and Union Rights
A Comparison of the European Union and the United States

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Abstract


The overarching purpose of this doctoral thesis is to determine if the system of legal mechanisms in European Community law governing what procedural rules national courts shall apply to Community rights can be reformed to better balance involved interests. European Community law is often applied and enforced by ordinary national courts that, as a general rule, supplement substantive Community rules with national procedural rules. While the Community rights that individuals can rely upon before national courts are the same in all Member States, the procedural rules that national courts apply to those Community rights can and often does differ between the Member States. While this order is often acceptable, Community law contains a number of exceptions from the general rule that it is the Member States that decide what procedural rules national courts shall apply to Community rights. Such exceptions are primarily motivated by the need to ensure the effectiveness of Community.

In order to determine what interests should be taken into account when deciding what procedural rules national courts shall apply to Community rights and how a more balanced system could be constructed, the European legal system is herein compared to that of the United States. American State courts apply Federal law much like national European courts apply European Community law and, also similar to Community law, a system of legal mechanism governing what procedural rules State courts shall apply to Federal rights has developed.

While U.S. law and European Community law are in this respect similar, the two are not identical. A comparison between the two reveals that the European approach improperly overlooks several interests that are central in the American approach. Most importantly, the European approach emphasizes and promotes the effectiveness of union law at the expense of upholding a proper division of power between union and states. American law also provides European Community law with practical advices regarding how a better balanced approach can be constructed and points to solutions that should be avoided.
There are many who should be acknowledged for their contribution to the completion of this work. First and foremost I am grateful to the Umeå University Department of Law who has given me the opportunity, education, and resources necessary to complete this study. Recognition is due to all my colleagues who over the years have provided a stimulating and encouraging environment and taken time to engage in rewarding conversations. This applies especially to my colleagues that are active in the field of European law, foremost Dr. Staffan Ingmanson and my fellow doctoral candidate Mattias Derlén.

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Umeå, February 2007

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A.2d Atlantic Reporter, second series
Alb. L. Rev. Albany Law Review
Am. J. Comp. L. American Journal of Comparative Law
Amend. Amendment
App. Appelate Court
B.C. Int’l & Comp. L. Rev. Boston College International and Comparative Law Review
B.U. L. Rev. Boston University Law Review
Berkeley J. Int’l L. Berkeley Journal of International Law
Cambridge L.J. Cambridge Law Journal
Case W. Res. L. Rev. Case Western Reserve Law Review
CFI Court of First Instance
Chi.-Kent L. Rev. Chicago-Kent Law Review
Cir. Federal Circuit Court of Appeal
Colum. J. Eur. L. Columbia Journal of European Law
Colum. L. Rev. Columbia Law Review
COM Documents from the European Commission
Conn. L. Rev. Connecticut Law Review
Cornell L. Rev. Cornell Law Review
Cornell L.Q. Cornell Law Quarterly
Creighton L. Rev. Creighton Law Review
Curent Legal Probs. Current Legal Problems
Draft Constitution Draft Treaty establishing a Constitution for Europe
Duke L.J. Duke Law Journal
E.C.R. European Court Reports
EC Treaty Treaty establishing the European Community
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<td>European Court of Justice</td>
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<td>EU Treaty</td>
<td>Treaty on European Union</td>
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<td>Eur. L. Rev.</td>
<td>European Law Review</td>
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<tr>
<td>F.2d</td>
<td>Federal Reporter, second series</td>
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<tr>
<td>F.I.D.E.</td>
<td>Fédération Internationale de Droit Européen</td>
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<td>F.Supp.</td>
<td>Federal Supplement</td>
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<td>FELA</td>
<td>Federal Employers’ Liability Act</td>
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<td>N.E.</td>
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Official Journal of the European Union
Ohio State Law Journal
Oxford Journal of Legal Studies
Pepperdine Law Review
Public Utility Regulatory Policies Act
Southern District
South Eastern Reporter, second series
South Western Reporter
H E Sickels’s Reports of Cases decided in the Court of Appeals of the State of New York
Southern Reporter, second series
Stanford Law Review
United States Statutes at Large
Supreme Court Review
Texas Law Review
University of Chicago Law Review
University of Miami Law Review
University of Pennsylvania Law Review
U.S. Reports
The U.S. Constitution
United States Code
UCLA Law Review
Virginia Reports
Virginia Law Review
Vanderbilt Law Review
Washington University Journal of Law and Policy
Washington University Law Quarterly
Widener Law Journal
Villanova Law Review
Yearbook of European Law
Yale Journal of Law and the Humanities
Yale Law Journal
PART I.

INTRODUCTION
1 Introduction

1.1 The Study

1.1.1 Introduction

The relationship between the European Community and the Member States is a central issue in the on-going process of the European Community transforming from an international organization to a more federation-like entity. As will be demonstrated herein, a matter of importance to the relationship between the European Community and the Member States is how the effectiveness of Community law on the national level is ensured. It appears from the face of the EC Treaty as if Community law becomes effective by Member States taking necessary actions so that physical and legal persons can enjoy rights that Community law intends to confer upon them and that the Member State fulfills this duty is ensured by the Commission and other Member States through proceedings before the European Court of Justice.\(^1\) European Community law is however in reality often enforced in national courts. Community Regulations are directly applicable in national courts by merit of the EC Treaty\(^2\) and provisions in Treaty articles and Directives have direct effect assuming that they are sufficiently clear, unconditional, and not subject to further implementation.\(^3\)

The application of Community law in national courts can be quite complicated sometimes. The existence of two lawmakers, the Community and the Member States, allows for the existence of conflicting laws. Conflicts between state law and union law are resolved by determining

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1. See Articles 226–228 of the EC Treaty; see also further infra Part 2.3.
2. Article 249 (2) of the EC Treaty.
which lawmaker has competence over the regulated matter. It was initially assumed that the Member State, not the Community, controls what procedural rules national courts shall apply in cases concerning Community law but the notion of national procedural autonomy has been significantly weakened over the years. While the general rule is still that national courts apply national procedural rules to Community rights, it is now subject to many important exceptions. Although it clearly follows from the EC Treaty that the powers of the European Community are limited, it provides no firm “constitutionally protected nucleus” of Member State competence. Unlike entities originally created to be federations, the European Community has no constitutional document that divides power between union and states according to a federalist theory. The absence of clear limits on the power of the Community extends, as described further below, to matters of procedure as well as matters of substance.

This should be compared to the conditions under which State courts in the United States enforce Federal rights. Much like their European counterparts, American State courts are under a duty to apply and enforce Federal law and the general rule is that they do so applying ordinary State procedural rules. Also similar to the situation in the European Community, American States do not have absolute autonomy when it comes to what procedural rules State courts apply to Federal rights. Where American and European conditions in some regards differ is concerning how, when, and why union law requires state courts to not apply the procedural rules supplied by the state. The United States Supreme Court has through hundreds of decisions established a number of mechanisms governing what procedural rules State courts shall apply to Fed-

5 Case 45/76, Comet BV v. Produktachsp vor Siergewassen, 1976 E.C.R. 2043, para. 13 (“in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law …”), upheld in several subsequent cases, see, e.g. Cases C-430 & 431/93, van Schijndel & Cornelis v. Stichting Pensioenfonds voor Fysiotherapeuten, 1995 E.C.R. I–4705, para. 17.
6 See further infra Chapter 3.
7 Article 5 (1) of the EC Treaty.
9 See further infra Chapter 4.
eral law on a case-by-case basis weighing the effectiveness of Federal law against the interests of a fair judicial process, foreseeability, and maintaining the proper division of power between the Federal government and the States.\textsuperscript{10}

It will be argued herein that a European Community involved in the process of finding “its federalism” can learn from the United States and two centuries of American attempts to resolve what procedural rules State courts should apply to Federal law. American experiences point to important federalist considerations underlying the issue and to that focusing on the effectiveness of union law in resolving the issue is sometimes done at the expense of states and individuals. The case-law of the U.S. Supreme Court also provides Europe with both good and bad examples of how legal mechanisms governing what procedural rules state courts shall apply to union rights can constructed.\textsuperscript{11}

1.1.2 Aim and Questions

The aim of this study is to determine if what I call the European doctrine, the system of legal mechanisms in Community law governing what procedural rules national courts shall apply to Community rights,\textsuperscript{12} can be reformed to better balance involved interests. To achieve this aim, two questions must be answered.

First, what interests should be taken into consideration when formulating legal mechanisms governing what national procedural rules national courts shall apply to Community law? As hinted above, there are primarily three such interests: the effective realization of substantive Community law; the proper division of power between Community and Member States; and clear, foreseeable, and fundamentally fair procedures.\textsuperscript{13}

Second, how can the European doctrine be modified to better balance these at least partially competing interests? As we shall see further below, experience in American law provides the European Community with some suggestions of how the European doctrine could be modified so that the effective enforcement of Community law is protected while, at the same time, Member State influence over procedure in national courts is not unnecessarily limited and the foreseeability of national procedure is to a lesser degree impaired.

\textsuperscript{10} See further infra Chapter 6.
\textsuperscript{11} See further infra Chapters 7–9.
\textsuperscript{12} The term is discussed further infra Part 1.7.1.
\textsuperscript{13} See further infra Chapter 6.
1.1.3 Importance of the Study

A study is only important if the problem it seeks to resolve is relevant.\textsuperscript{14} Are the conditions for national enforcement of Community rights worth spending time and effort studying? The magnitude of the problems associated with national courts applying national procedure to Community rights depends on two factors: how often individuals seek to rely upon Community law in Member State courts and the extent by which national procedure affects the realization of Community law.

With regard to the first factor, it is fair to assume that the number of people relying on Community law will increase. Three factors point in that direction. First, the body of Community law is rapidly expanding, both within traditional areas of Community regulation and areas not previously governed by Community law. The more areas Community law regulates, the bigger issue enforcement of Community law becomes. Second, a growing population and inclusion of new Member States equates more persons being covered by Community law. On January 1, 1995, 371 million people lived in the fifteen Member States of the EU. Ten years later, January 1, 2005, almost 460 million lived in the then twenty-five Member States.\textsuperscript{15} More individuals being covered by Community law likely translates into more people relying on Community law. Third, people are becoming increasingly aware of the existence of Community law and the possibility of relying upon it directly. Thus, the number of situations in which Member State courts are faced with claims based on Community law are likely to increase even if no new Community laws are created and the number of people covered by Community law remains the same. The number of cases involving Community law is likely to grow and there is nowhere for those cases to end up but in ordinary national courts.\textsuperscript{16}

To what extent local procedure actually hinders Community law in these cases is more difficult to determine. One likely important factor is diversity of local procedure. The more different procedure is from one state to another, the more difficult it becomes to achieve a uniformly applicable union law. Interstate inconsistency in the application of Federal law due

\textsuperscript{14} Another thing that determines the relevance of a study is if it provides any new knowledge. This is addressed \textit{infra} Part 1.2.1.

\textsuperscript{15} \textsc{Europe in Figures – Eurostat Yearbook 2005; Eurostat News Release, EU25 population up by 0,5\% in 2004, 2005-10-25} (<< http://epp.eurostat.cec.eu.int/>> 2006-03-17).

to differences in State procedure has been a problem in the United States even though the US is significantly more homogenous than the EU.\textsuperscript{17}

Another thing that affects the size of the problem is how cooperative the Member States are. There are examples, both in the European doctrine and what I call the American doctrine,\textsuperscript{18} of states trying to escape obligations under union law that it does not agree with “under the guise of procedure”. Such behavior is rarely overt and often difficult to identify. It is hardly reckless to assume that the risk of such uncooperative behavior will increase rather than decrease as the quantity of Community law increases, the areas of Community law increases, the number of Member States increases, and the number of Community laws approved without Member State consensus increases.

\subsection{1.1.4 Rights, Remedies, Procedure, and Sanctions}

The terms “right”, “remedy”, “procedure”, and “sanction” are central to the European doctrine and, as such, play a central role in this study which, as explained above, studies the relationship between Community rights and national procedural rules. In its case-law, the European Court of Justice distinguishes between them.\textsuperscript{19} Similarly, commentators of Community law have discussed the relationship between these concepts.\textsuperscript{20}

\begin{footnotesize}
\begin{enumerate}
\item EU27 comprises legal systems belonging to the Romanistic Civil Law family, the Germanic Civil Law family, the Common Law family, the Nordic legal family and, the most recent addition, formerly socialist legal systems. The possible addition of Turkey would complicate the picture further.
\item See also infra Parts 1.2.2, 1.7.1.
\end{enumerate}
\end{footnotesize}
Although these terms are important, they are difficult to define and to separate and they are used differently in different contexts.

Many things can be meant by a “right”. Some may with the word con-note human rights and other internationally recognized rights all persons are considered to enjoy. In the context of European Community law, the term “right” is used in two ways. One usage is “Community rights” and refers to rights that primary and secondary Community legislation seek to confer upon natural and legal persons. This is the meaning given to the term “right” in this study. The other way the term is used in Community law is in the context of “fundamental rights”. That is, rights that individuals enjoy by merit of general principles recognized in Community law. These fundamental rights are also of relevance to this study, especially when discussing what constitutes a fundamentally fair judicial process and how it is protected. Another thing that may be worth addressing is that something’s definition as a “right” is sometimes conditional upon it being legally enforceable. While the inclusion of such a condition may be proper in certain contexts, a strict application of such a test would be detrimental in this study.

The term “remedy” also has different meanings and perhaps especially between common law and civil law legal systems. Some give “remedy” a broad meaning to include “means provided by the law to recover rights or to obtain redress”, “anything a court can do for a litigant who has been wronged or is about to be wronged”, or, simply, “a course of action before a court of law”. “Remedy” is however also used in a narrow sense to point to “remedial outcomes of litigation” such as damages, penalties, sanctions, relief, and compensation.

Similarly, “procedure” has many different meanings. “Procedure” can be used broadly to mean “any rules and principles of organizational or substantive nature which concern actions in law aiming at judicial pro-

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21 Cf. van Gerven, supra note 20, at 502 (describes the task of defining them as “mission impossible”).
23 See, e.g. BLACK’S LAW DICTIONARY 1347 (8th ed. 2004).
24 It is unreasonable to conclude that Member States do not need to enforce a Community right because it is not a right unless enforced.
25 Prechal, supra note 20, at 4 n.6.
26 BLACK’S LAW DICTIONARY, supra note 23, at 1320, quoting DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (3d ed. 2002).
27 van Gerven, supra note 20, at 503; cf. id. at 502 (remedies are “classes of action intended to make good infringements of rights through courts …”).
28 Prechal, supra note 20, at 4.
tect” and then includes both “remedies” and “sanctions”. “Procedure” is also used in a more narrow sense as “rules that prescribe the steps for having a right or duty judicially enforced”. In developing the European doctrine, the European Court of Justice has not clearly distinguished between “remedy” and “procedure” which has caused mixed usage in Community law literature, both terms at times broadly referring to rules governing the conditions under which national courts enforce Community rights.

While there is no clear, universal distinction between “remedies” and “procedure”, one matter can be excluded from consideration in the context of this study. Two categories are distinguishable in the case-law of the European Court of Justice. The first group, now comprising more than eighty decisions by the ECJ, discusses the adequacy of national court “jurisdiction” and “rules of procedure”. In this group of cases, the Court cites in support Rewe, Comet, or other cases that in turn cite one of those cases. The Rewe/Comet-line of cases is separated from decisions commenting on the adequacy of “sanctions” available under national law. These cases hail in a similar fashion from the von Colson-case. Sanctions should be excluded, not only because the European Community deals with it separately, but also because interests involved in these matters may be different from those underlying rules of a procedural nature in the broad sense of the term.

In conclusion, when “procedural rules” are discussed herein, I use the same definition as Prechal, “any rules and principles of organizational or substantive nature which concern actions in law aiming at judicial protection”, but exclude from consideration remedial outcomes such as sanctions and compensation. This most closely follows the structure established by the European Court of Justice.

29 Prechal, supra note 20, at 3 and n.1.
1.2 Choosing a Comparison with the United States

1.2.1 Choosing the Comparative Method and Novelty of the Study

It is possible to approach the aim of this study considering only sources and theories of European Community law. Such system-internal examinations promote system coherency and respect for the fundamentals of the legal system. An examination using that method is however also to a certain extent limited by the system. Was such a method employed in this study, it is doubtful if it would lead to the discovery of much new knowledge about the European doctrine. To study national court enforcement of Community rights is not novel. Many legal scholars have studied the problems associated with Member State court enforcement of Community law from a number of different aspects.35

Not even the idea that the legal mechanisms in Community law governing what national procedural rules national courts can apply to Community rights includes different, competing interests is truly novel. In an important article, Francis Jacobs drew attention to the fact that regulating such issues involves balancing, on one hand, the complete, proper, and uniform application of Community law and, on the other, the interest of preserving national procedural and organizational autonomy.36

What is novel and advantageous about this study is that it includes a comparison with another legal system. In order to find views and solutions that are new to the legal system, one may sometimes have to step outside of it.37 There are many alternatives to system-internal examination. One time-honored and well-established method is to compare the object of study with a comparable one in another legal system.

35 See, e.g. Torbjörn Andersson, Rättsskyddsprincipen (1997); Mark Brealey & Mark Hoskins, Remedies in EC Law, esp. Ch. 6 (2nd ed. 1998); Mauro Cappelletti, The Judicial Process in Comparative Perspective (1989); Paul Craig & Gráinne De Búrca, EU Law 178–274 (3rd ed. 2003); Michael Dougan, National Remedies Before the Court of Justice (2004); de Búrca, supra note 20.


37 E.g. Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 15 (3rd ed. Tony Weir trans. 1998) (“Comparative law is an ‘école de vérité’ which extends and enriches the ‘supply of solutions’ and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place.”) (citation omitted).
Much has been written about the value of comparative examination.\textsuperscript{38} The most convincing reason for conducting a comparison is, in my opinion, that it “can expose any over sophistication or imprecision of legal doctrine; it can confirm or confute doctrinal principles and postulates; it thus exercises a control function: ‘Comparative law sharpens the eye for defects and weaknesses in one’s national legal institutions.’”\textsuperscript{39} I do not believe that foreign experiences can provide the European Community with “a ‘solution’ which, like a new electrical appliance, can be fitted with an adapter and plugged into the system [but rather] a deepened understanding of the problem, and … a source of inspiration.”\textsuperscript{40}

One of the greatest advantages with the comparative method is that it allows one to scrutinize that which has been taken for granted.\textsuperscript{41} By comparing how a legal problem has been resolved in two legal systems, one will discover things not previously considered in one of the legal systems. Some of these differences will be irrelevant in the respect that they can be attributed to institutional, social, or cultural aspects of the specific legal system and which do not exist in the other legal system.\textsuperscript{42} Other differences will be relevant. In this study, American experiences will reveal things about the interests that should be balanced in the European doctrine not previously discussed. American experiences will also illustrate how the European doctrine can be reformed practically to better balance these competing interests.


\textsuperscript{39} Michael Bogdan, \textit{Komparativ rättskunskap} 28 (2nd ed. 2003); Bernhard Grossfeld, \textit{The Strength and Weakness of Comparative Law} 11 (Tony Weir trans. 1990) (quoted), \textit{quoting} Léontin-Jean Constantinesco, \textit{Rechtsvergleichung: Die rechtsvergleichende Methode} 335 (1972); \textit{see also id.} at 45–46 (“A legal idea has value in itself: it gives us a new coign of vantage, lets our imagination strike out on new paths.” \textit{ld.} at 46); \textit{cf.} Alan Watson, \textit{Legal Transplants: An Approach to Comparative Law} 16 (2nd ed. 1993) (the greatest advantage of comparative studies is what it can tell us about law itself).

\textsuperscript{40} Mary Ann Glendon et al., \textit{Comparative Legal Traditions in a Nutshell} 7 (2nd ed. 2004).


\textsuperscript{42} \textit{See further infra} Part 1.3.2.
1.2.2 Choice of Comparandum: The United States

As already explained, the comparison to be conducted herein is between European Community law and the legal system of the United States. There is no shortage of federations with which the European Community could be compared: how does one select the one most suitable for comparison? Many federations are so different from the European Community that they for that reason can be excluded from consideration.43

There have been many federations that no longer exist. Federations that no longer exist do not face the challenges of the contemporary world and this makes them unfit for comparison. Among federations currently in existence, there are important differences in size. Federations that consist of few states44 or comprise a small population45 are unsuitable for comparison with the European Community that has over 450 million persons living in its twenty-five Member States.46 There are also great differences in the nature and size of the federations’ economies that make some unsuitable for comparison with the European Community.47 Similarly, some federations have or until recently had political systems so unlike those in Europe that they are not well-suited for comparison.48 South America has four federations: Brazil, Argentina, Mexico, and Venezuela. The political and economical situation in these countries is quite different from that in the European Community and the challenges they face are not the same. One thing that is very distinctive about the European Community is that it has been initiated by the Member States; it is a project that is driven voluntarily by the participating states. Many of the federations currently in existence around the world were created by colonial powers.49 Finally, some federations are structured in such a way that state courts enforcement of federal law using state procedure is avoided, thereby lacking the basis for comparison.50

43 Cf. Harold Cooke Gutteridge, Comparative Law – An Introduction to the Comparative Method of Legal Study and Research 73 (1946) (“Like must be compared to like; the concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development.”).
44 E.g. Belgium, Bosnia and Herzegovina, Comoros, Federal States of Micronesia, and Pakistan.
45 E.g. Austria, Belgium, Bosnia and Herzegovina, Federal States of Micronesia, Saint Kitts and Nevis, Switzerland, and United Arab Emirates.
47 E.g. Ethiopia, India, Nigeria, Pakistan, Federal States of Micronesia, and Sudan.
48 E.g. Nigeria, Russia, and Sudan.
49 E.g. Canada, India, and Malaysia.
50 E.g. Germany.
Taking these considerations into account there are three federations that could be suitable for comparison with the European Community: Australia, Switzerland, and the United States. These are democratic states with a strong economy, time-tested federations with comparatively independent states, and that have state court enforcement of union law. Among these candidates, a comparison with the United States is the most rewarding for three reasons. First, there is a long tradition of comparing the European Community and the United States. This makes comparison easier and to some extent indicates comparability. Second, the United States has faced the same challenge as the European Community trying to make states with a strong feeling of independence accept central governance. Third, an immense amount of energy has been spent studying the subject of this study in the United States. American courts, most importantly the U.S. Supreme Court, has in hundreds of decisions rendered over a period of more than a century tackled the questions posed above in a wide variety of situations. Similarly, American scholars have spent much effort discussing these matters. Whereas some might argue that the American doctrine being more developed than the European makes them unsuitable for comparison, I believe it is the primary reason for conducting a comparison. An extensive amount of experience to draw conclusions from is a good foundation for productive comparison.

Thus, the European doctrine will herein be compared to equivalent mechanisms in the law of the United States. That is, the European doctrine will be compared to Federal legal mechanisms in the United States governing what procedural rules State courts shall apply to Federal rights. These mechanisms are herein collectively referred to as the American doctrine.52


52 Regarding the term, see further infra Part 1.7.1.
1.3 Completing the Comparison

1.3.1 Comparability, Functionalism, and the Tertium Comparationis

The European doctrine is the starting point of this study and the comparison with the American doctrine intends to serve it. This study draws on the ability of comparison to – in the metaphorical terms of one scholar – be a dialogue between new and old knowledge that provides the distance necessary to discover new things. The central problem, here as in other comparative studies, is to ensure that the things compared are comparable. How can one ensure that two things that are and should be different in some respects are suitable for comparison and that conclusions drawn in that comparison are correct?

There is no definite comparative method. A central element of comparative theory is however the concept of functionalism which has a central role throughout this comparison. According to the theory of functionalism, legal institutions that perform the same function can be compared. One of the most important usages for functionalism is when selecting what to compare: a functional definition of the object of study helps ensure comparability between the elements to be compared. The functionally defined object of this study is the legal mechanisms of union law governing what procedural rules state courts shall apply to union rights. That the elements studied have the same function makes them relevant to compare.

The shared problem is the tertium comparationis of the study, “the common point of departure for the comparison”. The European and American situations rest largely on the same three elements: the creation of substantive union law that is to have equal and uniform application in all states, this substantive law is enforced by the state courts using state procedural rules, and the state procedural system sometimes affects the substantive union law in a way that is unacceptable from a union

54 Zweigert & Kötz, supra note 37, at 34.
55 Peter de Cruz, *Comparative Law in a Changing World* 233 (2nd ed. 1999); Zweigert & Kötz, supra note 37, at 33.
56 Glendon et al., supra note 40, at 11; Zweigert & Kötz, supra note 37, at 34; see also de Cruz, supra note 55, at 230–33; Schlesinger et al., supra note 38, at 48–49.
58 Bogdan, supra note 39, at 57–58.
59 Reitz, supra note 57, at 622.
perspective. In both the European Community and the United States, the central question is whether a state court may apply the ordinary procedural rules of the state or whether such rules should be replaced, set aside, or modified to enhance union law’s effectiveness. The functionally defined starting point for comparison controls what mechanisms should be included in the comparison and ensures that objects compared are also comparable.60

1.3.2 The Process of Comparison

Introduction

While there is, as already stated, no generally accepted comparative method, it is common to divide the process of legal comparison into steps or stages. Comparative scholars differ somewhat in their presentation of the different stages.61 This is natural as it is neither easy nor necessary to strictly and clearly separate each stage from the other.62 However, most models of the comparative process include in some way four stages.

1. Description: Selecting and Stating the Relevant Law

The first stage of the comparison consists of identifying and presenting relevant elements of the systems to be compared.63 This activity is really preparatory; it precedes any comparison in the proper sense of the word.64 Kamba refers to this as the descriptive phase of comparison.65 There are

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60 Bogdan, supra note 39, at 60 (two legal rules are comparable as long as they intend to govern the same situations); Schmitthoff, supra note 38, at 96, quoting Max Salomon, Grundlegung zur Rechtsphilosophie 30 (2nd ed. 1925); cf. Schlesinger et al., supra note 38, at 21–29; Zweigert & Kötz, supra note 37, at 4–5. But cf. Watson, supra note 39, at 4–5 (problems are in reality rarely all that similar). As we shall discuss further below in this chapter, a functionally defined object of study does not however guarantee that comparison is easy.

61 See, e.g. Bogdan, supra note 39, at 56–75 (comparison, explanation, evaluation); de Cruz, supra note 55, at 233–39 (eight steps); Zweigert & Kötz, supra note 37, at 43–47 (identifying the law, identifying similarities and difference, comparative analysis in a functional manner, evaluation); Kamba, supra note 38, at 511–12 (descriptive, identification, explanatory).

62 Kamba, supra note 38, at 512; cf. Zweigert & Kötz, supra note 37, at 43.

63 Zweigert & Kötz, supra note 37, at 43; cf. Gutteridge, supra note 43, at 73 (“Like must be compared to like; the concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development.”).

64 Cf. Bogdan, supra note 39, at 56.

65 Kamba, supra note 38, at 511.
two central problems that the comparatist is confronted with during this stage.

The first problem is to determine what things are comparable. From a practical standpoint, the issue is how the comparatist can find two things which are relevantly comparable. The question is, as one author puts it, “[w]hat is of use to our own system…” The answer to that question can be found in the time-honored concept of functionalism whose application in this study was discussed above.

The second problem that the comparatist faces is to state the law correctly. This is difficult in any study but even more so in a comparison as what the law is and where and how it can be found often differ between legal systems. Consequently, methods used to identify and describe the law will differ somewhat between the legal systems to be compared. The importance of broad- and open-mindedness in the comparative process cannot be overstated. Unless the comparatist uses the same sources in the same way as lawyers in the compared systems, the comparison risks resulting in erroneous conclusions. Finding the law in different systems can require examining different sources of law, different areas of law, institutional or systematical traits, historical backgrounds, and even the cultural or social context in which the law functions.

The solution to this problem is said to be, simply, to know as much as possible about the systems to be compared. While it is difficult to contest that this is a wise advice, to know more about the systems to be compared is probably better than to know less, it is questionable to what extent one can rely upon it practically. It is quite a sufficient task for most lawyers to attain a thorough understanding of one area of one legal system and entirely unrealistic to expect that one will completely comprehend all aspects of several legal systems. There is no easy way out of this dilemma. I believe it proper for any comparatist, this one included, to

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66 It is sometimes argued that certain things are “attributively incomparable”, defined as when the objects of comparison “do not have even one essential characteristic in regard to which they are similar.” Jerzy Wróblewski, Problem of Incomparability in Comparative Law, 53 Rivista Internazionale de Filosofia di Diritto 92, 98–99 (1976). Wróblewski also defines two types of “object-incomparability”: objects that “have no common characteristics” and “do not belong to the same type of objects.” Id. at 98. Neither of these apply to the two systems of legal mechanisms studied here.

67 Grossfeld, supra note 39, at 71 (uses the phrase “sensibly comparable”).


69 E.g. Bernhard Grossfeld, Core Questions of Comparative Law 9; Zweigert & Kötz, supra note 37, at 35–40.

70 Gutteridge, supra note 43, at 75; Watson, supra note 39, at 10–11.
employ a certain degree of humility when making statements about the law in foreign systems whose inner functions we often know little about. One can simply try to understand as much as possible where law is found in the respective systems and proceed from there.\textsuperscript{71}

2. Identifying Similarities and Differences

The second phase of the comparative process is to identify similarities and differences between the systems compared. In doing so, one must be aware that the description of how the chosen problem is resolved is dependent on the context of the legal system. A correct comparison requires that we separate the elements studied from the specific context in which they function, looking only to its function. Konrad Zweigert and Hein Kötz give us the following advice on this subject.

\begin{quote}
The process of comparison at this stage involves adapting a new point of view from which to consider all the different solutions … [where] too we must follow the principle of functionality: the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of the function …\textsuperscript{72}
\end{quote}

In making this determination, there are three possible conclusions: the objects are similar, the objects are different, or in some regards similar and in other different.\textsuperscript{73} Whether one finds differences or similarities depends on what one is looking for: similarity is little more than the absence of difference and vice versa.\textsuperscript{74} Because this comparison with the American legal systems is conducted in search of new revelations about the legal system of the European Community, it is proper to focus on differences between the two systems rather than corresponding similarities.

3. Explaining Similarities and Differences

Having identified similarities and differences, the next natural step of the comparison is to explain why one legal system has chosen one approach and another system another approach.\textsuperscript{75} To explain differences between

\textsuperscript{71} See also discussion \textit{infra} Part 1.6 regarding selection and use of material; \textit{Cf.} Zweigert & Kötz, \textit{supra} note 37, at 47 (on the subject of evaluation).

\textsuperscript{72} Zweigert & Kötz, \textit{supra} note 37, at 43–44; \textit{cf.} Grossfeld, \textit{supra} note 39, at 46.

\textsuperscript{73} Wróblewski, \textit{supra} note 66, at 94–95.

\textsuperscript{74} Bogdan, \textit{supra} note 39, at 64.

\textsuperscript{75} Kamba, \textit{supra} note 38, at 512.
legal systems is an important general task for comparative law. It is also an indispensable part of the comparative process: one cannot understand how elements of a legal system function without understanding the context in which they function. Function and context are in this way closely linked.

While fundamentally sound, it is difficult to fully account for the complete context of a legal system, much less two. The object of study must be understood against the structural and institutional context of the legal system in which it functions. There is also a wider social or cultural context that can explain differences between two systems: economical, political, historical, geographical, religious, institutional, and demographical factors are a few examples of things the comparatist is encouraged to consider.

4. Evaluation

Although not an indispensable element of every comparison, a natural fourth step of a comparison is to evaluate the compared systems with regard to issues on which they differ. Evaluating the differences between the systems compared constitutes a central element of this study. Both questions that this study aims to answer involve evaluation: should interests considered in the American doctrine be taken into account in the European doctrine and can any of the things done differently in the American doctrine be applied in the European doctrine to achieve a better balance of interests?

76 Bogdan, supra note 39, at 64.
77 Glendon et al., supra note 40, at 11.
78 See generally Bogdan, supra note 39, at 64–72; Grossfeld, supra note 69.
79 A good example is the Cornell Common Core project which has as one of its goals to “unearth the common core of European private law. << http://www.jus.unitn.it/cardozo/Common.core/Insearch.html >> (2005-06-21) To accomplish this they make up a fact scenario which they analyse using different European legal systems and then compare the answers to uncover similarities and differences. See, e.g. The Enforceability of Promises in European Contract Law 105–17 (James Gordley ed. 2001) (reviewing under what circumstances a promise to go to dinner is enforceable in France, Belgium, the Netherlands, Spain, Portugal, Italy, Austria, Germany, Greece, Scotland, England, and Ireland).
80 Bogdan, supra note 39, at 73; cf. Zweigert & Kötz, supra note 37, at 47 (argue that the comparatist has a general obligation to critically evaluate).
81 See also supra Part 1.1.2.
1.4 Structure and Disposition of the Comparison

1.4.1 Introduction
There are primarily two ways to structure a comparative study. On one hand, Zweigert and Kötz tells us that the reader of a comparative study must be given complete, objective, and separate reports on the legal systems before any type of critical examination or comparison can be made.\(^{82}\) Reitz, however, promotes arranging the comparison “in a way that emphasizes explicit comparison” so that it has as few separate descriptive elements and as many directly comparative sections as possible.\(^{83}\) Trying to choose between these two positions, each with its advantages, I have, bearing in mind the complexity and magnitude of the material studied, decided to approach the aim of the study in the following manner.

1.4.2 Comparison of Interests Considered
The first question to be answered in this study is what interests should be taken into consideration when creating legal mechanisms governing what state procedural rules state courts can and should apply to union law. For the purpose of answering that question, the European doctrine and the American doctrine will be compared in chapter 6 discussing three questions.

- What interests have been considered in the American doctrine and how do these interests differ from those considered in the European doctrine? (identification)
- Why have different interests been considered in Europe and in the United States? (explanation)
- Should interests considered in the American doctrine be taken into account in the European doctrine? (evaluation)

1.4.3 Comparison of Mechanisms Used
A comparison with the American doctrine asking and answering the questions posed above will reveal that three interests ought to be taken into consideration in the European doctrine: the effective completion of substantive Community law; the proper division of power between Community and Member States; and clear, foreseeable, and fundamentally

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\(^{82}\) Zweigert & Kötz, supra note 37, at 43.
\(^{83}\) Reitz, supra note 57, at 633–34.
fair procedures. Comparison with the United States can also assist in answering the second question of the study: how can the European doctrine be modified to balance these competing interests? In chapters 7 through 9, the mechanisms used in the two doctrines will be compared also considering three questions.

- How do the mechanisms included in the American doctrine differ from those in the European doctrine? (*identification*)
- What explains those differences between the two systems? (*explanation*)
- Can any of the things done differently in the American doctrine be used in the European doctrine to achieve a better balance of interests? (*evaluation*)

Reitz advises us to divide the comparison into “natural units”.*84* The European and American doctrines are both complex and large which complicates comparison. All elements of the two doctrines cannot be compared at the same time. All the same, it is essential for a proper comparison that similar elements of the two systems are considered to each other: the same problem may be resolved in different parts of two legal systems and it is therefore necessary to consider the system as a whole. Adhering to Reitz’s advice, union regulation of state procedure in Europe and in the United States is compared in chapter 7. In chapter 8, principles of union law protecting individuals and union principle preventing states from discriminating against union law in the European Union and in the United States are compared. Remaining mechanisms in Community law and U.S. law governing what procedural rules state courts shall apply to union rights will be compared in Chapter 9. Chapter 10, finally, contains a brief summary of the findings of the study and some final conclusions.

### 1.4.4 Descriptive Part

Completing the comparison described above requires knowledge about the contents of the European and American doctrines respectively. It should be described how the doctrines are constructed, what mechanisms they include, the basis or rational underlying these mechanisms, and so on.*85* As addressed above, comparison requires that we understand how

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*84* Reitz, *supra* note 57, at 634.

*85* Zweigert & Kötz, *supra* note 37, at 43.
the two doctrines came into existence and the institutional, constitutional, and historical context in which they function.

In line with this, the comparison outlined above will be preceded by a descriptive part that presents the background to and contents of the European doctrine and the American doctrine respectively. *Chapters 2 and 3 are devoted to the European Community system, chapters 4 and 5 to the system of the United States. The two doctrines are presented in the same way. Chapters 2 and 4 present the setting and historical background of the underlying problem and of the birth of respective doctrine. Against that backdrop, chapters 3 and 5 respectively present the contents of the two doctrines as they stand today.*

1.5 Other Methodological Concerns

1.5.1 Two Types of Comparison: Constitutional and Procedural

This study is to some extent a work in comparative procedural law. It seeks to resolve the practical issue of what procedural rules the court and the litigants are to follow in an individual case. At the same time, many of the questions raised herein are not of the kind normally asked in procedural studies. In studying what procedural rules state courts should apply to union rights, it becomes clear that this matter involves constitutional issues such as the vertical separation of power between union and state and the fundamental rights of the individual right-holder. Such questions reveal that this study is at least partially a work in comparative constitutional law.86

Modern comparative study has its origin in private law and has to a lesser extent concerned issues of public law.87 Parallel to these more established branches of comparative law, there have also been those who have compared constitutional issues. The idea that constitutions can advantageously be compared has gained acceptance in recent years.88 For example, in several recent decisions, the U.S. Supreme Court has looked at non-American sources of law to determine the scope of the U.S. Consti-

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There are now several extensive textbooks comparing how different legal systems regulate such constitutional issues as separation of powers, democracy, rights of individuals, and the role of courts.

Opponents to comparative constitutional law argue that different legal systems’ solutions to constitutional issues are so different, so complex, and so culturally connected that comparison is impossible. I find the idea that constitutional issues are per se incomparable unpersuasive. Instead, I agree with one American scholar that constitutional comparison can provide a necessary, critical perspective on society’s most important issues.

Furthermore, comparative constitutional law is capable of relieving a false sense in many legal systems that their constitutional solution is the necessary and only way to achieve certain societal goals. Comparison can show that constitutional arguments used in one system also ought to be considered in another system facing a similar problem.

Finally, differences between different legal systems are sometimes exaggerated. While constitutional design may differ, most modern legal systems face the same constitutional problems. For these reasons, I believe that transatlantic constitutional comparison is not only possible but beneficial.

How such comparison is best conducted is another matter. Comparative constitutional law raises methodological concerns that are, at least to some extent, different from those for private law comparison. In my mind, it does not however call for anything more than a degree of caution that is healthy in the comparison of any subject. I think my position on the matter was best formulated by the U.S. Supreme Court in Printz: considering foreign constitutions is “inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.” How America has solved the central constitutional

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89 E.g. Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court’s Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 B.C. Int’l & Comp. L. Rev. 269 (2006); Teitel, *supra* note 87, at 2571.


91 Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. Marshall J. Prac. & Proc. 685, 688 (1976); see also Finer et al., *supra* note 90, at 6 (western countries with similar economic conditions has similar private law, but their public law may differ greatly).


93 Jackson & Tushnet, *supra* note 88, at 144–45.

94 Printz v. U.S., 521 U.S. 898, 921 n.11 (1997); see also Alford, *supra* note 88 (argues that constitutional comparison can only be used for interpretative purposes if it conforms with traditional constitutional theory).
problems raised by this study can tell us little about the current European position but it should be considered when discussing revisions. A functionalist approach does not allow a foreign solution to a constitutional problem to be imported but it ensures that arguments found in support of the foreign solution are relevant. What weight should be placed on those arguments must then be considered against the backdrop of the constitutional design and tradition as a whole.

1.5.2 Union Command and Local Reality

The European doctrine presented below consists of requirements placed on Member States and their courts by Community law but for most part declared by the European Court of Justice. Similarly, the presentation of the American doctrine builds primarily on the case-law of the U.S. Supreme Court. The comparison is in this sense conducted from the perspective of the two unions and their supreme courts. The E.C.J. and U.S. Supreme Court are the supreme interpreters of the constitutional principles governing their respective union and when the the primary sources of union law are unclear on an issue, as with regard to the object studied here, their case-law become central. Neither Member State courts in Europe nor State courts in the United States are formally capable of affecting the requirements that union law places on state procedure applied to union substantive law.

The key word here is “formally”. While difficult to quantify, it is possible that there is some discrepancy between what union courts want state courts to do and what state courts actually do. There is no doubt some differences between the European and American doctrines as presented here and what actually happens in state courts in actual cases. It is perhaps unfortunate that this study does not take into consideration what happens in local courts in individual cases but that does not in my mind affect the value of the study. It is possible to evaluate the European doctrine as such. I doubt that anyone would argue that if “flaws” can be found in the doctrine they should be preserved because they are mitigated by defiant national courts.

1.5.3 Special Methodological Consideration Pertaining to Community Law

Legal scientists have traditionally seen it as their task to analyze, organize, and systemize the law, to explain what the law says and why, to create order and foreseeability where this is lacking, and, perhaps most importantly, to predict how courts will decide future cases. Without stretching
it too far, those aims can be organized under the greater aim of defining
the law. The societal value of legal science would be drastically reduced
if it did not fulfill this important aim. To establish what the law states is
also a prerequisite for comparison, in this specific study most importantly
with regard to the European and American doctrines.95

The process of finding the law is however much less exact than one
might wish. Just like other scientists, the legal scientist uses his material
to formulate a hypothesis that may or may not be falsified in the future.
Of course, to a higher extent than with natural sciences, the legal scien-
tist’s pursuit of a correct hypothesis is affected by individual, political,
and societal elements that are difficult to measure and prone to change.
This makes it difficult to define or, as is perhaps more correct, predict the
law.

The inherent uncertainty of law is a problem that all legal scientists
have in common. I would argue, however, that it is more difficult to pre-
dict the law in some areas than others and that on a scale from easy to
difficult, European Community law places closer to the latter than the
former. My experiences with Community law have been that it is often
difficult to define or predict what it requires. Most importantly, at least
for the purposes of this study, the case law is more difficult to interpret
and less consistently upheld. I would like to think that my difficulties
with finding a firm and clear line are not entirely due to my own short-
comings. There are however examples of legal scientists that have stated
the position of Community law in a way that appeared sound at the time
but later proved to be wrong. Another related matter that adds to the
uncertainty of Community law is the framework character and the func-
tionalist approach to competence of the basic Treaties. The Treaties were
not designed to provide answers to every question but rather to be filled
in over time.

The illusiveness of Community law causes problems for the study. A
comparison between the European and American doctrines is difficult if
the European doctrine cannot be presented in an at least somewhat stable
and consistent fashion. There is no way to eliminate this problem. One
should be as careful as possible in drawing conclusions and clearly present
what sources has been used and how they have been interpreted. Doing
so will hopefully allow the reader to review the validity of findings and to
form an independent opinion.

A related issue is the “undevelopness” of Community law. Provisions
of the Treaties that grant the Community powers do so in quite broad

95 See supra Part 1.3.2.
Community law has developed over time and at an accelerated pace. Although the amount of secondary Community law has increased over time, it remains relatively undeveloped compared to what we can expect in the future. There is no reason to assume that the tendency for increased Community legislation will weaken and the Community is still far from using all powers granted to it by the Treaties to their fullest possible extent, not least in the field of procedural law.

The continuous growth of Community law translates into a methodological problem. Because of the dynamic development and in the interest of drawing conclusion of more persistent value, the study must be based upon the main lines of development and a projection of the future. For example, Community regulation of traditional procedural matters is becoming increasingly common but there are still few concrete examples. Were we simply to state the conditions of the European doctrine today, such regulations would be of limited importance as they have limited practical impact. However, if we seek to develop a more long-lasting understanding of the different mechanisms in play, existence of Community regulation becomes a central element. Similarly, a retrospective understanding of the European doctrine would tell us that it primarily concerns a limited number of issues, such as time limits and burden of proof, whereas a prospective approach requires us to take into consideration that other, thus far not considered aspects of national procedure will likely eventually come under scrutiny. The comparison with American law assists greatly in maintaining this prospective approach. Placing the two doctrines side-by-side illuminates the general principles and the broad lines of expected development. The American doctrine gives us clues as to what the future has in place for the European doctrine simply because it has been around for a longer time and has been tested in more situations.

The central object of examination, the European doctrine, has also developed rapidly. The development of the relationship between the Community and the Member States is sometimes divided into three phases which can also be said holds true for the European doctrine. During the first phase, Community law was relatively scarce and was rarely applied

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96 See further infra Part 2.2.2.
97 See further infra Part 3.4.
by national courts.\footnote{99} Even after it was clear that substantive Community law would be applied by national courts, much time passed before the ECJ addressed what procedural rules the national courts should apply\footnote{100} and at first appeared to give them quite extensive freedom in the matter.\footnote{101} It has been suggested that the ECJ during the first phase assumed that the national legal orders were “sufficiently developed” to enforce Community rights.\footnote{102} As it became apparent that Member States could use their procedural control to effectively limit the powers of the Community, a second phase followed where the Court reversed its position, emphasized the full effectiveness of Community law and “the effective supremacy of EC law.”\footnote{103} By the mid-1990’s it appeared as if nothing could stand in the way of the broadening omnipresence of Community effet utile over national procedure.\footnote{104} At that point, the third and current phase of development began as the Court of Justice retreated from the most extreme position of the second phase but not as far back as its position during the first phase.

This brief description of the development points to a methodological problem with describing the European doctrine. If one relies too heavily on the earliest case-law it will appear as if the Member States have more leeway than they really have. Similarly, studying one of the more extreme judgments rendered during the second phase will distort the image in the opposite direction. At the same time, such older decisions are irreplaceable sources for understanding the doctrine and cannot be ignored. Dealing with this development would be easier was it not for the fact that the European Court of Justice rarely, if ever, eludes to whether it has changed its position on a subject.

\footnote{99} The national courts of the Member States have of course always applied Regulations directly by virtue of Article 249 of the EC Treaty but this practice was not of such magnitude that the problems of the current system were revealed.\footnote{100} See, e.g. Van Gend, 1963 E.C.R. at 12–13; Costa v. E.N.E.L, 1964 E.C.R. at 593–94 (neither judgment addresses which procedural rules those national courts should apply).\footnote{101} E.g. Case 34/67, Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau, 1968 E.C.R. 245 (stated that national courts have the power to choose from “the various procedures available under national law” \textit{id.} at 251); Case 13/68, SpA Salgoil v. Italian Ministry for Foreign Trade, 1968 E.C.R. 453 (“It is for the national legal system to determine which court or tribunal has jurisdiction to give this protection [and] to classify those right with reference to the criteria of national law.” \textit{Id.} at 462–63).\footnote{102} See Rachael Craufurd Smith, \textit{Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection}, in \textit{The Evolution of EC Law} 288, 300 (Paul Craig & Gráinne de Búrca eds., 1999), citing Nicholas Green & Ami Barav, \textit{Damages in the National Courts for Breach of Community Law}, 6 Y.B. Eur. L. 55, 57 (1986).\footnote{103} Cf. de Búrca, \textit{supra} note 20, at 38 (referring to Simmenthal).\footnote{104} Craig & de Búrca, \textit{supra} note 35, at 242, 244.
1.6 Material

1.6.1 Choice of Material

There is little room for discretion in selecting where to look for information on the subject to be studied. The European doctrine and the American doctrine have almost exclusively been developed through the case-law of the supreme union courts of the two systems: the ECJ and the U.S. Supreme Court. Decisions coming out of those courts are consequently the primary source used in this study. Without having been object of comparison, the two doctrines have already been the subject of extensive review, debate, and application, both by other courts and by legal commentators. Their output clarifies the central case-law and is therefore an important secondary source for understanding the two doctrines.

Other written and unwritten expressions of the law serve three functions herein. First, acts of law are of ancillary importance in this study. Most acts of Community law do not by themselves constitute elements of the European doctrine but considering them is necessary to understand the substantive rights and obligations whose realization the European doctrine seeks to ensure. Second, acts of legislation intended to clarify the aforementioned case-law serve the same purpose as legal commentary. Finally, some sources of law form part of the doctrines more directly. This includes, as the reader will learn below, both general principles and legislative efforts aimed at the regulation of procedural matters.

Although it is thus more or less given what type of sources should be considered when searching for information about the subject matter of the study, the insurmountable amount of individual sources requires selection. It is not practically feasible to consider every source that has some bearing on the two doctrines.\(^{105}\) The necessary selection has been guided by the following criteria.\(^{106}\) First, some material has been ignored because it is written in a language unknown to me. This applies most importantly to secondary sources regarding Community law.\(^{107}\) There may, for example, exist articles written in Italian or Greek that contain relevant information. The exclusion of such material has however not adversely affected the validity of the study as central reasoning presented in such articles is often considered independently or by reference in sources available in other languages.

Among sources accessible to me, I have, as previously stated, with regard to case-law focused primarily on decisions rendered by the European

\(^{105}\) Even after some selection, about 400 different court decisions are cited herein.

\(^{106}\) The list is random and does not indicate a hierarchy among the reasons.

\(^{107}\) All relevant American material is available in English as is the case-law of the ECJ.
Court of Justice and the United States Supreme Court. Decisions by other courts are only considered when necessary to explain the first category of case-law. With regard to secondary sources, I have selected sources by frequency of citation and the standing of the source of publication. The underlying reasoning is that the more read and examined a source is, the more likely any errors have been discovered and commented. Finally, caution has been observed with regard to older material. Many issues intensively debated thirty years ago have been set aside by later development and been replaced by new and equally tricky ones. With the addition of new decisions, old case-law has been reinterpreted.

1.6.2 Using Case-law as a Source

The primary source for both the European doctrine and the American doctrine is, as stated above, case-law and more specifically the decisions of the supreme union court of the respective system. In light of the central importance of these decisions for this study, attention should be given to the specific methodological challenges of using case-law as a source for finding law.

A judgment is primarily binding on the parties or with regard to the individual subject matter.\(^{108}\) Still, it may have broader implications by its nature as “precedent”. A precedent is, in short, a decision by a court that stands as a model when settling similar questions of law in the future, a guide when trying to solve a similar legal problem in a different case.\(^{109}\) All precedents are by necessity laid down with regard to the specific circumstances of the individual case and rarely will the circumstances of a future case be identical.\(^{110}\)

To what extent inferior courts will follow the ruling of the superior court determines its value as a precedent. There is a wide range of possible degrees of “bindingness” of precedents and different legal systems take different approaches. In the United States, a decision by the U.S. Supreme Court is binding upon all inferior courts, State or Federal, by virtue of the doctrine of stare decisis.\(^{111}\) This well-established system pro-


\(^{111}\) Cf. Zweigert & Kötz, supra note 37, at 259–61 (unlike in England, superior courts in the U.S. have never been absolutely bound by their own prior decision).
vides reasonable assurances that the decisions of the U.S. Supreme Court will be adhered to by lower courts. The lack of a formal doctrine of stare decisis has traditionally been considered something characteristic to separating civil law and common law systems. The difference between civil and common law systems with regard to practical treatment of precedence have however in recent years become smaller: legal systems traditionally considered to belong to the common law family have become increasingly liberal when it comes to the duty of inferior courts to follow precedence and courts in civil law countries in reality abide by the decisions of superior courts even when this is not formally required.

The way in which the European Court of Justice develops Community law through precedence is to considerable extent reminiscent of how things are done in the American system. However, because of the peculiarities of the Community judiciary, the value of the case-law of European Court of Justice as precedence cannot be explained using the traditionally civil law/common law dichotomy. To understand the system, one must first keep in mind that the courts of the Member States may not themselves interpret Community law but shall defer this task to the European Court of Justice. As will be explained more fully here below, almost all decisions forming the European doctrine have been rendered by the Court of Justice in response to requests for preliminary rulings made by a national court and rendered under the Court’s exclusive jurisdiction to interpret Community law. The national court that posed the question for preliminary reference is naturally bound by the Court’s reply. However, a decision by the European Court of Justice also has a binding effect on other national courts besides the one posing the question. Ac-

112 The number of cases where State courts have reason to consider Federal case-law has however decreased after the U.S. Supreme Court declared in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) that Federal courts do not have the power to declare Federal common law as they had previously done. See also Robert S. Summers, Precedent in the United States (New York State), in Interpreting Precedents – A Comparative Study 355, 356 (1997).
116 Article 234 of the EC Treaty.
According to the ECJ, a Member State court may only refrain from making a preliminary reference when the proper interpretation of Community law is sufficiently clear from a previous decision by the Court of Justice. The effect of this arrangement is that national courts must either follow a prior decision of the ECJ or, in the absence of such precedence, make a request for preliminary reference. In this way, decisions by the ECJ have some binding effects on national courts. Finally, there are also examples of national courts explicitly recognizing prior decisions by the ECJ as binding precedence. That is not to say that national adherence to ECJ case-law is infallible in Europe. There are probably examples of national courts deciding issues of Community law in the absence of or even contrary to decisions by the European Court of Justice.

The discussion regarding precedents has thus far been from a backwards-looking perspective considering to what extent a court must consider prior case-law when adjudicating a case at-hand. The mechanism of precedent also has a forward-looking effect: when a court is about to decide a novel question it knows that its decision will be looked at and often followed in the future by other courts faced with similar situations. Because the judge is conscious of the institution of precedence, he or she does not only settle the case in front of him or her but also takes into consideration its broader implications.

Finally, it is important to keep in mind what the case-law is being used for in this study. The opinions of the European Court of Justice and the United States Supreme Court are important in and of themselves. The European Court of Justice and the U.S. Supreme Court act as supreme referees of an on-going development. Neither the American doctrine nor the European doctrine contains the permanent mechanisms that govern the adequacy of state procedure for purposes of enforcing union rights and obligations. The two courts have, as will be demonstrated below, changed their positions over the years and will no doubt continue to do so. The presentation of the doctrines as drawn from the case-law of the two courts can perhaps most properly be thought of as the current position in a continuing struggle between opposing interests.

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118 See further infra Part 2.4.2.
119 L. Neville Brown & Tom Kennedy, The Court of Justice of the European Communities 378 (5th ed. 2000); Barceló, supra note 117, at 422.
120 Glendon et al., supra note 40, at 307–08.
121 MacCormick & Summer, supra note 110, at 2.

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1.6.3 Citation and References

Finally, a note should be made on citation. The careful reader may have noticed that citation of some sources herein differ somewhat from how such sources are traditionally cited. The completion of this study requires references to a wide range of material produced on both sides of the Atlantic. Because of the amount of references made herein and also the fact that European and American materials will be extensively used side-by-side in the comparative parts, it is necessary for the sake of clarity that citations are made in a uniform way.

Clear and uniform citation is however not possible without violating how references are traditionally made. For example, reference to a Swedish court decision is not normally made in the same way as to a U.S. Supreme Court decision. Similarly, references to articles in European law reviews look different than references to American law reviews. Adherence to any consistent system of citation will thus result in violation of how some some sources are traditionally cited. After some consideration, I decided to follow the so-called Bluebook\(^{122}\), a widely used citation manual developed and used by the United States’s most prestigious law journals. There are three reasons for this decision. First, the Bluebook is more extensive than any alternative citation manual. The fact that it contains a citation rule for every conceivable situation promotes uniformity and clarity. Second, more than half of the sources used herein have their origin in the United States and almost all of those sources conform to the Bluebook. Third, the Bluebook contains specific rules for citing all types of sources used herein, even those originating in European Community law.

Finally, note that in order to make it easier for the reader to find the sources used herein, all sources are cited in full when first used in each chapter. Thus, the reader does not need to turn to another chapter to get the full citation of a source.

1.7 Terminology

1.7.1 The “European Doctrine” and the “American Doctrine”

It may appear strange to introduce two new terms, the “European doctrine” and the “American doctrine”, into an area of law with abundant terminology. As discussed above, the object of study, mechanisms in union law governing what procedural rules state courts shall apply to union

\(^{122}\) The Bluebook: A Uniform System of Citation (17th ed. 2000).
rights, is and must be defined functionally.\textsuperscript{123} This has consequences for what is studied. Because the functional definition dictates what is relevant to include in the study, some things traditionally included in discussions of these matters will be left out whereas, conversely, some matters normally not discussed will be included. Consequently, lawyers on both sides of the Atlantic may find the subject matter of this study or the presentation somewhat unorthodox. The functional definition also affects the terminology which must serve the practical purposes of the study.\textsuperscript{124} It is frequently necessary in this study to make references to all legal mechanisms in Community law governing what national procedural rules national courts can apply to Community rights. Because continuously repeating that sentence is both impractical and burdensome on the reader, it is necessary to find a term that can replace it.

It would be preferable to adhere to established Community law terminology but to limit the study to dominating terminology would be incompatible with the functionally defined object of study. European Community law has much terminology but none which means all legal mechanisms in Community law governing what national procedural rules national courts shall apply to Community rights. The term which comes closest is the principle of effective judicial protection.\textsuperscript{125}

In applying this principle of effective judicial protection, Member State courts may have to reconsider national procedural law. According to the ECJ, the principle of loyalty enshrined in Article 10 of the EC Treaty obligates Member States to take all measures necessary to ensure the full effect of Community law and to refrain from doing anything that could jeopardize the achievement of the Community’s objectives.\textsuperscript{126}

That principle, varying knowledge as the principle of loyalty, cooperation, or sincere cooperation, applies directly to national courts as well as to the Member States as such,\textsuperscript{127} and it is from that principle that the Court of Justice deduces that national courts are under a duty to effectively protect

\textsuperscript{123} See supra Part 1.3.1.
\textsuperscript{124} Zweigert & Kötz, supra note 37, at 44.
\textsuperscript{125} See, e.g. Dougan, supra note 35, at 1–68; Reich, supra note 108, at 227–29.
individual’s Community rights. Statements of this duty have appeared in different contexts.

The exact contents of the principle of effective judicial protections is however uncertain. The term is sometimes used narrowly to ensure individuals a judicial process that meets fundamental notions of procedural fairness and in such situations means the same thing as the right of access to a judicial process. The principle of effective judicial protection is sometimes given a broader meaning and then includes the principle of effectiveness. Using the term in the broader meaning, the principle of effective judicial protection could encompass many of the legal mechanisms in Community law governing what national procedural rules national courts can apply to Community rights.

Recent case-law from the European Court of Justice suggests that the narrower definition of effective judicial protection is the correct one. In Verholen, the Court of Justice distinguished between the requirements “that the national legislation does not undermine the right to effective judicial protection” and that it “cannot render virtually impossible the exercise of the rights conferred by Community law.” Similarly, in Unión de Pequeños Agricultores, the ECJ stated that the principle of effec-

128 See, e.g. Rewe, 1976 E.C.R. 1989, para. 5 (“Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.”); Case C-213/89, The Queen v. Secretary of State for Transport, ex parte Factortame et al. (No. 1), 1990 E.C.R. I–2466, para. 19 (“it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law …”).
129 E.g. Zwartzveld, 1990 ECR I–3365, para. 18 (“the judicial authorities of the Member States … are responsible for ensuring that Community law is applied and respected in the national legal system.”); Cases C-6/90 & C-9/90, Francovich et al. v. Italian Republic, 1991 E.C.R. I–5357, para. 32 (“national courts … must protect the right [Community law] confer on individuals …”); Case C-453/99, Courage Ltd. v. Crehan, 2001 E.C.R. I–6297, para. 25 (“the national courts … must ensure that [Community law] take full effect and must protect the rights which they confer on individuals …”).
130 Caranta, supra note 127, at 706.
131 Caranta, supra note 127, at 706; Lang, supra note 126, at 650 (“if Community law gives a right, whatever the nature of the right … national courts must provide an appropriate, complete and effective remedy – the fact that national law does not itself provide it, or says that it should not be provided, is irrelevant. Procedures and national remedies must be adapted as far as necessary to protect fully the right given by Community law”). The principle of effectiveness is described and discussed infra Part 3.6.
132 Caranta, supra note 127, at 706; Lang, supra note 126, at 650 ("if Community law gives a right, whatever the nature of the right ... national courts must provide an appropriate, complete and effective remedy – the fact that national law does not itself provide it, or says that it should not be provided, is irrelevant. Procedures and national remedies must be adapted as far as necessary to protect fully the right given by Community law"). The principle of effectiveness is described and discussed infra Part 3.6.
tive judicial protection stems from “the constitutional traditions common to the Member States” and that it “has also been enshrined in Article 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms …”.\textsuperscript{134} As will be evident in chapter 3, many of the mechanisms studied here do not fit this description. Consequently, the principle of effective judicial protection cannot be used as collective term.\textsuperscript{135}

In the absence of established terminology, I have chosen to use my own term to collectively refer to all legal mechanisms in Community law governing what national procedural rules national courts can apply to Community rights: the European doctrine. A number of words could be used to describe these mechanisms. The term “doctrine” was chosen for three reasons. First, it conforms well to American terminology.\textsuperscript{136} Second, much like the American doctrine, the European doctrine has been developed by the ECJ little by little through individual decisions that are connected in such a way that they form a judge-made doctrine.\textsuperscript{137} Third, the mechanisms discussed have become such a central part of Community law that they can be considered “widely adhered to”.\textsuperscript{138} It should here be emphasized that I am not trying to introduce “the European doctrine” as a general term in European Community law. It is, as explained above, a term used in this study for practical necessity.

The introduction of the term “American doctrine” is in a similar way necessary for the purpose of this study. Like with the European Community, there are established terms in American law that include some of the mechanisms discussed herein\textsuperscript{139} but they do not cover all things which are to be discussed. It is also valuable that the vocabulary used with regard to the systems to be compared is as consistent as possible to avoid unnecessarily confusing the reader.

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\textsuperscript{135} Because the term “effective judicial protection” is in this way ambiguous, it will not be used herein in the narrower sense either.
\textsuperscript{136} Many of the mechanisms of U.S. law discussed herein are by American commentators classified as forming part of the Erie doctrine and the Converse Erie doctrine. See further infra Part 4.5.
\textsuperscript{138} Black’s Law Dictionary, supra note 23, at 518.
\textsuperscript{139} See infra Part 4.5.3.
1.7.2 Comparative Terminology

Both the American system and the European system is complex and it is necessary to be very careful in the use of terminology to avoid confusion.

With regard to the European Community and the Member States, the following terminology will be used. The European Court of Justice will primarily be referred to by that name or “the Court of Justice” or “the E.C.J.”. The different Member States will be referred to simply as Member States or, when reference is only made to a specific Member State, by the proper name of that country. The institutions of the Member States will also be referred to as national institutions, e.g. “national courts”. Because many Community law instruments have names that also carry a general meaning and are difficult to avoid in the text, e.g. “decision” and “regulation”, all Community law instruments will be written with a capital first letter, e.g. “Directive” and “Regulation” as there would otherwise be considerable risk for confusion. Finally, to distinguish the traditional, more supranational part of the European organization focused upon herein from the expanded version established through the Treaty of Maastricht, the terms “Community” and “Community law” will be used herein rather than the comparable terms “Union” and “Union law”.

The Federal government of the United States as a whole will be referred to as “the Federal government”. When only the legislative branch is indicated, “the United States Congress”, “the U.S. Congress” or, simply, “Congress” will be used. The United States Supreme Court will be referred to as that or “the U.S. Supreme Court”. In close reference to a complete citation, it may be referred to as “the Supreme Court”. Federal courts inferior to the U.S. Supreme Court will be referred to by their proper name. With regard to the different States of the American union, the fifty States included in the United States and the District of Colombia including all branches are collectively referred to herein as “the States” which consequently does not refer to the European Member States. Individual States will be referred to as “the State” or by its name, e.g. Alabama or New York. When reference is only made to the judiciary branch of a State, it will be referred to as “the State court”. At times herein references will be made to decisions by State supreme courts. To avoid confusion with the U.S. Supreme Court and local courts these will always be referred to as “the supreme court of…” followed by the name of the State in question.

Finally, at some points in this study reference will be made to European and American institutions collectively. For the sake of brevity and

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140 E.g. the first instance courts of the State of New York are called “Supreme Courts”.

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clarity, it is necessary to develop a terminology that meets that need. I will use “union” to denote the central institutions of the European Community and the United States, i.e. all branches of the Federal government of the United States and all institutions of the European Community.\textsuperscript{141} Similarly, the term “states” refers to all twenty-seven Member States of the European Community, the fifty States of the United States and the District of Colombia collectively.\textsuperscript{142}

\textsuperscript{141} Compare “Union” above.
\textsuperscript{142} Compare “States” above.
PART II.

THE EUROPEAN COMMUNITY
2 Overview of European Conditions

2.1 Introduction
Understanding the European doctrine requires a presentation of its contents and such a presentation will be provided in the next chapter. It also requires, however, a presentation of the causes underlying the European doctrine and of the context in which it functions. This is crucial if we are to understand the function and aim of the doctrine. In this chapter, why and under what conditions Member State courts enforce Community law will be discussed. In the next chapter, we examine the content, nature, and characteristics of the European doctrine relying on knowledge attained here.

The topic of this chapter is the basic elements of Community law as they pertain to the European doctrine. First, we address what Community law regulates, how, and for what purposes. Secondly, we address how Community law is intended to be enforced according to the EC Treaty, studying the system for centralized enforcement of Community law provided by the EC Treaty and the flaws of that system. From there we consider, thirdly, the private enforcement system that compensates for the shortcomings of the centralized enforcement system. Finally, a few considerations of importance for the subsequent presentation of the European doctrine will be addressed.

Depending on his or her prior knowledge of Community law, the reader may find the presentation in this chapter elementary. The fundamentals of Community law are however of central importance for the comprehension of the European doctrine and a correct comparison with American law. It must therefore be properly introduced.
2.2 Community Legislation

2.2.1 Introduction
An examination of enforcement of Community law in national courts should begin with the issues of what Community law is and how it is created. A rudimentary understanding of the powers of the European Community and the division of power between Community and Member States is necessary for subsequent parts of the examination.

2.2.2 Generally About the Community’s Legislative Competence
The European Community has only the powers which the Member States have conferred upon it. However, what powers the Member States has transferred to the European Community are not clearly defined in a constitutional document. The European Community was created for the attainment of certain aims to be realized primarily by the formation of the common market, a single market spanning all Member States characterized by the absence of transnational obstacles and by efficient competition. It is for the purpose of bringing about these changes that the Community has been given competence to regulate certain areas.

Some Treaty provisions give the institutions very broad legislative powers. For example, Article 95 (1) of the EC Treaty gives the Community power to “adopt the 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.” Other provisions are narrower in their scope. For example,

143 Article 5 (1) of the EC Treaty (“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” This is sometimes referred to as the principle of attributed powers); T.C. Hartley, The Foundations of European Community Law 105 (5th ed. 2003); Norbert Reich, Understanding EU Law 39 (2003).
144 Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, 593 (The Community has “real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community ...”).
145 Articles 2, 3 of the EC Treaty.
146 The term “competence” is here used to include all issues governing the Community’s actual ability to regulate matters and may go beyond what is included in a more formal sense of the term.
Article 40 of the EC Treaty allows the Community to issue secondary law necessary for the achievement of freedom of movement for workers.\footnote{The Article also declares specifically what legal instruments may be used, who may declare such laws and the details of the legislative procedure to be used.} Other Treaty provisions that confer powers on the Community are arranged in a similar manner. For example, Article 119 (3) of the EC Treaty provides the Community with power to take action “to ensure the application of principle of equal opportunities and equal treatment of men and women”. The Community has exercised this power for example by placing the burden of proof on the defendant to prove that the principle of equal treatment has not been breached, thereby displacing any national law to the contrary.\footnote{Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, 1998 O.J. (L 14) 6, art. 4. The Burden of Proof Directive is an illustration of how the Community can regulate procedural matters in connection with more substantive ones. See further infra Part 3.4.2.} A Treaty provision conferring competence on the Community that is of special interest in this study is Article 65 (c) which provides the European Community with competence to take measures for “eliminating obstacles to the good functioning of civil proceedings” including harmonizing national rules of civil procedure.\footnote{The cited Article, which itself limits such actions to “civil matters having cross border implications”, should be read in conjunction with Articles 61 and 67 (5), which provide that the objective of such measures must be the establishment of “an area of freedom, security and justice”, that matters of family law are exempted, and that such measures shall be taken in accordance with the so-called co-decision procedure laid out in Article 251. See infra Part 3.4.3.} This provision and the secondary Community law resulting from it will be studied more closely below.\footnote{See infra Part 3.4.3.}

The existence of Treaty provisions like the ones mentioned might lead one to assume that it is easy to determine if the Community is competent to regulate a specific matter. Unfortunately, this is seldom the case. The language of Treaty articles is often quite broad and it is not always clear what competence they grant the Community.\footnote{Part I, Title III of the rejected proposal for a Treaty Establishing a Constitution for Europe sought to clarify these matters.} A common construction in the EC Treaty is that Community institutions are allowed to enact various types of secondary acts for the attainment of vaguely defined rights and aims.\footnote{See, e.g. Articles 40, 42, 44, 52 of the EC Treaty.} Also, the Community does not have the powers in all areas where it is competent to act. The Community has exclusive competence in certain areas but more often shares competence with the Member States. In areas over which the Community lacks exclusive competence, Member States may continue to act until the Community...
decides to regulate at which time Community law replaces any national measure to the contrary.\textsuperscript{154} Finally, in some areas the Community has broad powers, e.g. with regard to the free movement of goods, whereas the powers of the Community in other areas are extensively restricted. An example of the latter can be found in Article 151 of the EC Treaty that allows the Community to adopt incentive measures for encouragement of cooperation between Member States in the area of culture.

The actual regulatory powers of the Community may also be greater than what individual articles in the EC Treaty first suggest. Article 308 of the EC Treaty grants the Community all legislative powers necessary for the attainment of the objectives of the EC Treaty and of the Community at large.\textsuperscript{155} Also, the doctrine of implied powers acts in a very similar way to enlarge the powers of the Community. The gist of the doctrine is that if the Community has been entrusted with a task, it has also implicitly been given all powers necessary to carry out that task.\textsuperscript{156}

The Community shall exercise its powers with respect for the constitutional principles of the Member States.\textsuperscript{157} One such constitutional principle is the principle of subsidiarity which restricts the Community’s ability to act in areas of shared competence to situations where the aims of the action could not be sufficiently achieved by the Member States themselves. This principle is expressed in the second paragraph of Article 5 of the EC Treaty. The principle, which is complex and much debated, requires the Community to look to the ability of the Member States before it acts. If the ability of the Member States to achieve the result is better or equal to the Community, the latter shall refrain from taking action.\textsuperscript{158}


\textsuperscript{155} The power is very broad but not unlimited. For example, it only applies when the Community acts “in the course of the operation of the common market.” Regarding the conditions for exercise, see further Hartley, supra note 143, at 107–11.


\textsuperscript{157} Pär Hallström, Institutionell balans i den Europeiska Unionen, 1997/98 Juridisk Tidskrift 334, 347–50. Another principle that has the same origin and that is of relevance in this study is the principle of loyalty. Id. at 349–50.

The community’s ability to act is also subject to another constitutional principle, the principle of proportionality. As has been established in a number of cases, the general principle of proportionality is a test that all community measures must pass to be valid. The principle requires that the means employed are “appropriate to achieve the objective pursued and not go beyond what is necessary to achieve it” and applies to all “measures implemented through Community provisions”. In some situations, the ECJ will add a third criterion in addition to appropriateness and necessity: proportionality sensu stricto. This means that the disadvantages caused by the measure must not be disproportionate to its aims. Moreover, the last paragraph of Article 5 of the EC Treaty expressly limits the community’s ability to act “to what is necessary to achieve the objectives” of the EC Treaty.

For the purpose of this study, it is interesting and important to note that the legislative powers of the community are not directly limited to matters of substance. As long as the community acts within the confines presented above, it is irrelevant whether the subject of regulation is traditionally considered substantive or procedural. That rules traditionally characterized as substantive have dominated community law does not subtract from this fact. Indeed, there are examples of provisions of community law that could be characterized as procedural. One such example is the aforementioned Burden of Proof Directive, another example the Regulation creating a European enforcement order for uncontested claims enacted under Article 65 (c) of the EC Treaty.

163 See note 149 supra and accompanying text.
165 The competence of the EC to regulate procedural matters will be examined further as an element of the European doctrine infra Part 3.4.
2.2.3 Who Determines the Community’s Competence?

An issue of central importance in this context is who it is that determines what falls inside respectively outside the Community’s area of competence. The powers of the Community are, as stated above, limited to those delegated to it by the Member States in accordance with the principle of attributed powers.\textsuperscript{166} It follows from this that the Community does not have the power to determine or extend its own competence.\textsuperscript{167} That is however not the end of inquiry. The fact that the powers of the Community are formally limited does not mean that it is clear what power it has. When the competence of the Community is challenged, for example when the validity of a Community act is questioned,\textsuperscript{168} someone must determine the limit of the Community’s competence.\textsuperscript{169}

It is quite clear that this function falls to the European Court of Justice. This conclusion is supported by Article 230 of the EC Treaty that provides the Court with jurisdiction to review the validity of Community acts (judicial review).\textsuperscript{170} It also follows from the fact that the European Court of Justice is responsible for interpreting the principle of subsidiarity and reviewing whether the institutions have abided by it.\textsuperscript{171} Finally, the ECJ has in its case-law made a claim for this function when it forbade national courts from setting aside or limiting the application of Community acts of law on the ground that the Community exceeded its powers when enacting it.\textsuperscript{172} Groussot notes that national courts have not accepted the position of the ECJ fully and without reservation but that they largely respect it.\textsuperscript{173}

\textsuperscript{166} See note 143 supra and accompanying text.

\textsuperscript{167} Xavier Groussot, The Role of the National Courts in the European Union: A Future Perspective 12–13 (2005) (refers to this as legislative or constitutional kompetenz-kompetenz).

\textsuperscript{168} Such an action may be brought before the European Court of Justice under Article 230 of the EC Treaty.

\textsuperscript{169} Groussot, supra note 167, at 13 (refers to this as judicial kompetenz-kompetenz).


\textsuperscript{173} Groussot, supra note 167, at 20–36.
2.2.4 Realizing Community Law

There are few clear limits to the legislative capacity of the Community. The powers of the Community are vast or at least vague. Although there are areas of law in which the Community has no power to legislate, its powers are broad in areas that has been delegated to it. What then does the Community do with its legislative competence? What does it seek to achieve and what can it accomplish? For lack of a more sophisticated way of expression, I believe it is fair to say that Community law intends to change society, the behavior and position of actual and legal persons in the Member States.\footnote{Cf. Christopher Hilson & T. Anthony Downes, Making Sense of Rights: Community Rights in E.C. Law, 24 Eur. L. Rev. 121, 121 (1999) (“Community law operating to the benefit of individuals”).}

Community law exists for the attainment of certain specific aims that are related to the real world. For example, measures relating to the right of free movement of workers have as their objective to increase the number of actual European citizens that pursue job opportunities in other Member States. Community law seeks to confer that right upon individuals. However, just because it has been expressed in an act does not ensure that individuals, corporations, and Member States respect that right and accept the corresponding obligations. The mere existence of Community rules makes little difference. As all substantive rights and obligations, those laid down in Community law must be enforced if the desired changes of society are to be realized.

The European Community has, as we shall see immediately below, few coercive powers. It can do little to ensure that Community law is actually applied and respected. The Community depends upon Member States enacting and adapting national law as needed for the realization of the former’s objectives.\footnote{Marco C.E.J. Bronckers, Private enforcement of 1992: Do Trade and Industry Stand a Chance against the Member States?, 26 Common Mkt. L. Rev. 513, 513 (1989).} This is problematic as the policies and interests of a Member State are not necessarily the same as those of the Community. At the same time, there are limits to how great differences of opinion can be tolerated between different Member States.\footnote{This can be understood in terms of a theory initially proposed by Albert O. Hirschman, an American economist, who argued that there are fundamentally two ways for disgruntled members of an organization to express dissent: “voice” when the member engages in a dialog with the organization to protest and achieve a change and “exit” when the member abandons the organization. Hirschman then adds “loyalty” as a factor that affects the members’ choice between “voice” and “exit”. Albert O. Hirschman, Exit, Voice, and Loyalty (1970). Although developed for somewhat different relationships in mind, Hirschman’s theory can be applied to the European Community. A Member State}
not surprising that Member States at times show reluctance to introduce or enforce the European legislation …”. 177 Although it is uncommon, the Member States are known to have made deliberate breaches of Community law on occasion. 178 More commonly, breach of Community law is the result of inefficiency or negligence on the national level. 179

2.3 Centralized Enforcement of Community Law

2.3.1 Introduction

Having concluded that Community law cannot achieve the objectives and aims of the Community by its mere existence, we shall now examine how Community law is enforced. As we shall see, Community law contains two systems that serve this purpose. First, the European Court of Justice is to a certain degree capable of enforcing Community law by merit of the Treaties. The EC Treaty contains mechanisms varyingly referred to as direct actions, 180 public enforcement, 181 and centralized enforcement 182. These mechanisms, here collectively referred to as the centralized enforcement system, are the subject of this section. A comprehension of the content, advantages, and disadvantages of the centralized enforcement system is paramount for understanding the reasons for and contents of the parallel system of national courts enforcing Community law, herein referred to as the private enforcement system. 183 As will be explained in the next section, the private enforcement system should be understood as a consequence of and supplement to the centralized enforcement system.

that disagrees with a course taken by the Community will initially try to affect the development by expressing its “voice” through the different channels available to it. Where it fails to make its voice heard it can choose to accept the outcome or chose “exit”, either through the extreme measure of actually leaving the Community or, in a more moderate way, defying the organization. What course of action the Member State chooses depends on the degree of “loyalty” it has towards the Community.

177 Bronckers, supra note 175, at 513.
178 GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 423 (2nd ed. 2002); HARTLEY, supra note 143, at 321.
179 BERMANN ET AL., supra note 178, at 423; Bronckers, supra note 175, at 514.
180 DAVID W.K. ANDERSON Q.C. & MARIE DEMETRIOU, REFERENCES TO THE EUROPEAN COURT 20–23 (2nd ed. 2002).
182 See, e.g. Ian Harden, WHAT FUTURE FOR THE CENTRALISED ENFORCEMENT OF COMMUNITY LAW?, 55 CURRENT LEGAL PROBS. 495 (2002).
2.3.2 Actions before the European Judiciary

The Treaties provide for the creation of Community courts headed by the European Court of Justice and have done so since the conception of the Community.\(^\text{184}\) The ECJ is now assisted by a Court of First Instance\(^\text{185}\) that hears some cases at first instance.\(^\text{186}\) The Treaty of Nice allowed the addition of a third tier of European courts in the shape of specialized judicial panels\(^\text{187}\) and the first one, the European Union Civil Service Tribunal, was established in December 2005.\(^\text{188}\) The European Court of Justice retains exclusive jurisdiction of all actions where the applicant is a Member State, the European Central Bank, or one of the Community’s institutions.\(^\text{189}\)

The Treaties also provide what functions the European judiciary shall have. The Court of Justice was initially intended to function mainly as a watchdog, ensuring that the High Authority did not overstep its powers\(^\text{190}\) and that the Member States respected their obligations. It has since evolved. The key function of the European judiciary today is to “ensure that in interpretation and application of [the EC] Treaty the law is observed.”\(^\text{191}\) In many cases, the ECJ performs a function similar to that of


\(^{185}\) Articles 4, 11 and 26 of the Single European Act modified the pre-existing Treaties to allow the Community to “attach to the Court of Justice a court with jurisdiction to hear and determine at first instance … certain classes of action”. The Court of First Instance became operational in October of 1989.

\(^{186}\) Article 225 (1) of the EC Treaty defines the jurisdiction of the CFI. Relieving the case-load of the Court of Justice was one of the primary reasons behind establishing the Court of First Instance. CRAIG & DE BÚRCA, supra note 181, at 90.

\(^{187}\) Article 225a of the EC Treaty.

\(^{188}\) Council Decision 2004/725/EC establishing the European Union Civil Service Tribunal, 2004 O.J. (L 333) 7; Decision of the President of the Court of Justice, 2005 O.J. (L 325) 1.

\(^{189}\) Protocol on the Statute of the Court of Justice, 2002 O.J. (C 325) 167 [hereinafter the Protocol], art. 51.

\(^{190}\) Martin Shapiro, The European Court of Justice, in The Evolution of EU Law 321, 329 (Paul Craig & Gráinne de Búrca eds. 1999).

\(^{191}\) Article 220 of the EC Treaty. That provision correlates with Article 292 of the EC Treaty, a forum selection clause of sort, under which the Member States undertake not to seek alternative forums on issues of Treaty interpretation and application. ERIK WERLAUFF, COMMON EUROPEAN PROCEDURAL LAW 15 (1999). This provision has remained largely unchanged since 1951, cf. Article 31 of the ECSC Treaty.

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a national supreme court as it clarifies questions of law previously unclear and sets a precedent, thereby ensuring uniform application of law in all Member States.  

Community courts are courts of limited jurisdiction and the Treaties regulate when they may exercise jurisdiction. The various grounds on which Community courts can exercise jurisdiction can be separated by whether the claim is brought against a Member State or against the Community or one of its institutions.

We begin with claims that can be brought in the European judiciary against the Community. From the viewpoint of the Member States, one of the most important functions of the European Court of Justice is to ensure the procedural and substantive legality of secondary Community law and to void any act that fails this requirement (judicial review or action for annulment). Another clearly distinguishable group of cases that can be brought before the European Court of Justice are those where the applicant seeks damages from the Community. As in most national legal orders, such claims can be based upon two alternative grounds: contractual liability and non-contractual (tort) liability. A Community employee can also bring claims against the Community as an employer (staff cases), but such cases rarely reaches the ECJ. Finally, the Euro-

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192 Lenaerts & Arts, supra note 184, at 9.
193 Article 7 (1) of the EC Treaty (“Each institution shall act within the limits of the powers conferred upon it by this Treaty”); Hartley, supra note 143, at 61–62.
194 Articles 230–31, 241 of the EC Treaty. For more information on the institute, see generally Arnull, supra note 184, at 31–49; Brown & Kennedy, supra note 184, at 135–69; Craig & de Búrca, supra note 181, at 482–520; Hartley, supra note 143, at 337–84, 407–10; Josephine Steiner et al., EU Law 244–77 (9th ed. 2006).
195 According to Article 238 of the EC Treaty the Court has jurisdiction over disputes to which the Community is a party if it includes an arbitration clause granting it such jurisdiction. For more information on such actions, see generally Ton Heukels, The Contractual Liability of the European Community Revisited, in The Action of Damages in Community Law 89 (Ton Heukels & Alison McDonnell eds. 1997).
196 Articles 288 (2), 235 of the EC Treaty.
197 Ton Heukels & Alison McDonnell, The Action for Damages in a Community Law Perspective: Introduction, in The Action of Damages in Community Law 1, 1–3, 5–7 (1997). Some commentators recognize that there is also a third type of action, restitution, but it is unclear to what extent it can be relied on as an independent ground for bringing a claim before the ECJ. Craig & de Búrca, supra note 181, at 577–78; Hartley, supra note 143, at 447–48.
198 According to Article 236 of the EC Treaty the Court of Justice functions as a labor court owing jurisdiction over “dispute[s] between the Community and its servants.” The term “servant” has later been interpreted broadly to include not only current employees of the Community’s institutions, but also prospective and retired employees. Brown & Kennedy, supra note 184, at 196.
199 The ECJ earlier heard staff cases directly but such cases are now first tried by the Civil
pean judiciary may be granted jurisdiction to *review penalties* imposed by the Commission and, after the Treaty of Nice, over disputes arising from secondary Community law in the legal area of *industrial property* law pursuant to legislative action. 200 The ECJ and the CFI also play a role in the application of Community trademarks. 201 These types of actions have little connection to the enforcement of Community law in a sense relevant to this study.

Of greater interest in this context are *enforcement actions against the Member States*. Articles 226 and 227 of the EC Treaty provide the European Court of Justice with jurisdiction to consider whether a “Member State has failed to fulfill an obligation under [the EC] Treaty …”. Such a claim can be brought either by the Commission or by another Member State. 202 If the Court finds that a Member State has in fact failed its obligations, it is authorized to require the infringing Member State to undertake “necessary measures” and ultimately, if the Member State fails to undertake such measures, impose pecuniary penalties. 203 These provisions are the essence of the central system for the enforcement of EC law.

The gist of such an enforcement action is, as stated, that the Member State in question has failed to fulfill a Treaty obligation. Despite the literal wording of the Treaty, a claim can also be brought against a Member State that has violated secondary Community law as that by extension is a violation of the Treaty. 204 “Failure” can arise under any provision of the Treaty that imposes a duty on the Member States including principles of fundamental rights, but certain types of enforcement actions are more common than others. One such type of action regards breach of the duty to cooperate, another failure to properly implement Community law, and a third failure to take necessary measures to ensure the effectiveness of Community law. 205 “Failure” can also come in different shapes. 206 It can be positive in the sense that the Member State has undertaken an

Service Tribunal. A decision by the Tribunal can on points of law be appealed to the Court of First Instance and then to Court of Justice. The Protocol, arts. 56–58; Annex, arts. 9–11.

200 Articles 229, 229a of the EC Treaty.

201 Decisions on applications for Community Trade Marks taken by the Office for Harmonization in the Internal Market (OHIM) can be appealed to the ECJ via the CFI. Council Regulation 40/94/EC on the Community trade mark, 1994 O.J. (L 11) 1, art. 63.


203 Article 228 of the EC Treaty.


206 It can pertain to any obligation under Community law whether it arises from Treaties, Regulations, Directives, or even general principles of law.
action that a Treaty provision forbids. It can also be negative in the sense that the Member State has failed to undertake an action that it was obligated to carry out.\textsuperscript{207} Finally, “failure” can lie with the central legislative or executive body of the Member State but also with a government agent or with a national court.\textsuperscript{208} Considering all of this, one would suspect that the centralized enforcement system is a broad and powerful mechanism for ensuring that Community law is fully and effectively enforced in the Member States. However, as we shall see next, the centralized enforcement system is in reality not very effective.

2.3.3 Limits of the Centralized Enforcement System

The examination above of causes of actions before Community courts reveals a large, gapping hole in the judicial system of the European Community. First, the judicial system is largely aimed towards the Community itself. Many of the grounds upon which an action can be brought before the Community judiciary require that the subject of the application is a Community institution. It is only in the limited setting of Articles 226 and 227 that an action can be initiated against a Member State. Furthermore, the standing of individuals before the European judiciary is severely restricted. The right to initiate action lies primarily with the institutions of the Community (and foremost the Commission), secondarily with the Member States, and only in exceptional cases with individuals.\textsuperscript{209} Neither Article 226 or 227 nor any other Treaty provision allows persons to initiate an action against a Member State or another person in the Community court system.

We have learned that Community law operates largely on a national and individual level as it intends to confer rights and obligations upon legal and physical persons in the several Member States. However, the realization of those rights and obligations requires the participation of the Member States and the intended recipients of Community rights

\textsuperscript{207} Steiner et al., suprat note 194, at 228. It is sometimes difficult to determine whether a specific case belongs to the former or the latter.

\textsuperscript{208} Case 77/69, Commission v. Belgium, 1970 E.C.R. 237; Hartley, supra note 143, at 307; cf. Craig & de Búrca, supra note 181, at 424. A recent example of this comes from Sweden. On October 13, 2004, the Commission issued a reasoned opinion (2003/2161) under Article 226 of the EC Treaty against Sweden regarding the failure of Swedish courts to request preliminary rulings from the ECJ.

\textsuperscript{209} Anderson & Demetriou, supra note 180, at 23; Renaud Dehousse, Comparing National and EC Law: The Problem of the Level of Analysis, 42 Am. J. Comp. L. 761, 776 (1994) (as a rule, the application of Community law to private person is generally taken care of by national administrations.”).
have little recourse against a Member State that fails to respect Community law. The only formal safeguard against Member States ignoring Community law is the centralized enforcement system through which the Commission or another Member State brings a claim against the failing Member State and the effectiveness of that system is, as will be demonstrated, severely limited.\(^\text{210}\)

To begin with, it is important to understand that Member States will rarely bring a claim against another Member State, most importantly because they want to avoid the costs and the political ramifications of such a confrontation.\(^\text{211}\) The Court of Justice has only thrice rendered a judgment against a Member State when the action was brought by another Member State.\(^\text{212}\) Having no standing themselves before the courts of the Community, the citizens of Europe are thus left with a system that, in the end, depends upon the willingness and ability of the Commission to ensure that Member States fulfill their Community obligations.\(^\text{213}\) Unfortunately, the centralized enforcement system has many weaknesses that significantly impairs its effectiveness.

First, policing the Member States is not the only task of the Commission. It is easy to see how vigorous prosecution of an infringing Member State can impair the Commission’s ability to perform its other functions, especially when doing so requires the participation of that same Member State. It is reasonable to assume that such political reasons may, from time to time, influence the Commission’s choice whether to bring an action against a Member State.\(^\text{214}\) The possibility of this occurring is aggravated by the fact that the Commission enjoys considerable discretion in making that decision.\(^\text{215}\) Rather than focusing upon individual rights

\(^{210}\) Michael Dougan, National Remedies Before the Court of Justice 2 (2004).


\(^{212}\) Case 141/78, France v. United Kingdom, 1979 E.C.R. 2923; Case C–388/95, Belgium v. Spain, 2000 E.C.R. I–3123; Case 145/04, Spain v. United Kingdom, 2006, not yet published.

\(^{213}\) Craig, supra note 211, at 454.

\(^{214}\) Craig & de Bürca, supra note 181, at 407 (note that it is a problem regardless of whether the Commission uses its discretion to overlook a clear violation, or in a way that is “unfair or oppressive”); Bronckers, supra note 175, at 532; Craig, supra note 211, at 455–56 (refers to this as “the conflict of interest problem”); Joseph Weiler, The Community System: the Dual Character of Supranationalism, 1 Y.B. Eur. L. 267, 299 (1981); Weiler, supra note 170, at 2420; see, e.g. Case 416/85, Commission v. United Kingdom, 1988 E.C.R. 3127, paras. 8–9.

\(^{215}\) For a fairly early examination of the Commissions discretion see A.C. Evans, The Enforcement Procedure of Article 169 EEC: Commission Discretion, 4 Eur. L. Rev. 442, 444–45, 455–56 (1979) (“the Commission’s discretion consists of a power to decide upon the
in individual cases, the Commission must have a long-term strategy. As the Court itself has noted, “proceedings by an individual are intended to protect individual rights in a specific case, whilst intervention by the Community authorities has as its objects the general and uniform observance of Community law.” 216 The Commission does not always take the actions that individuals would like it to take. 217 It has itself declared that while it “is perceived as capable of solving every individual situation … the object of the Article [226] procedure is to induce a Member State to come back into line with Community law.” 218 “This difference in aims may in some instances cause the Commission to act in ways other than those most beneficial to the concerned individual.” 219

Second, the resources of the Commission must be spread between all of its duties. As a result, the Commission may for example divert resources away from the enforcement mechanism when the need for resources for legislative or budgetary functions becomes more pressing. Thus, the Commission will often be unable to pursue violations even when it has the ambition. 220

Third, the centralized enforcement system presupposes that the Commission becomes aware of breaching Member States. There is however an abundance of Community law and the resources of the Commission are as mentioned limited. It is therefore unrealistic to expect the Commission to monitor whether each of the twenty-seven Member States abide by all elements of Community law in every individual case. A system has been created through which affected individuals may alert the Commission to possible breaches to alleviate this problem. This is an important part of the enforcement of Community law. Complaints by citizens now

most ‘appropriate’ means of ensuring the application of Community law”, id. at 455–56). For more recent opinions, see Francis Snyder, The Effectiveness of European Community Law, 56 Mod. L. Rev. 19, 30 (1993) (“The Commission has complete discretion in bringing proceedings against Member States”); cf. Craig & de Búrca, supra note 181, at 407. 216 Case 28/67, Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn, 1968 E.C.R. 143, 153; see also Weiler, supra note 170, at 2420 (the Commission may chose not to use its limited resources to pursue “small” infringements that “do not raise an important principle or create a major economic impact”). 217 See generally Richard Rawlings, Engaged Elites Citizens Action and Institutional Attitudes in Commission Enforcement, 6 Eur. L.J. 4 (2000). 218 Commission, 14th Annual Report on Monitoring the Application of Community Law 12, Com(97) 299 Final (1997). 219 Snyder, supra note 215, at 30–31 (“Instead of simply winning individual cases, it [the Commission] is able to concentrate on establishing basic principles, or playing for rules”). 220 Craig, supra note 211, at 454–54 (refers to this as the time problem); Weiler, supra note 214, at 299.
constitute the primary mean for detecting infringements of Community law. Even so, being dependent upon individuals alerting the Commission, the centralized enforcement system is burdened by a certain degree of inefficiency.

Fourth, the centralized enforcement system requires in the end that the Commission drags breaching Member States into public proceeding before the Court of Justice, something that contrasts starkly with the image of “an ever closer union among the peoples of Europe …”. While this factor likely rarely alone deters the Commission from pursuing a failing Member State, it does pose a major drawback with the centralized enforcement system.

Fifth and finally, remedies available under the centralized enforcement institute are insufficient. Prior to the Maastricht Treaty, a judgment establishing that a Member State had failed to meet its obligations under Community law would only result in a duty “to take the necessary measures to comply with the judgment” and little could be done against a Member State that refused to comply. The Maastricht Treaty supplemented this duty by giving the Court of Justice the ability to impose a fine on a Member State that refuses to comply with a judgment against it and these penalties are generally sufficient to ensure that the Member States in due time fulfill their obligations. Still, the problem remains that a national government is more likely to abide by a ruling from national courts than one from a Community court, who also enjoy more flexibility in finding an appropriate remedy.

In conclusion, the centralized enforcement mechanism of Community law is in many ways flawed and inefficiencies in enforcement risk become-

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222 Craig, supra note 211, at 455 (refers to this as the knowledge problem); Weiler, supra note 170, at 2420; cf. Dashwood & White, supra note 221, at 396 (“That some infringements will go undetected for years seems inevitable.”).
223 In reality, only about 20% of all cases where the Commission issues a formal complaint against a Member State will ultimate render in a judgment by the ECJ. The rest are settled along the way. Bermann et al., supra note 178, at 426.
224 Preamble of the EU Treaty.
225 Craig, supra note 211, at 457 (refers to this as a public relations problem).
226 Article 171 (now 228 (1)) of the EC Treaty.
227 Craig, supra note 211, at 456 (refers to this as a problem of remedies); Weiler, supra note 170, at 2420.
228 Article 228 (2) of the EC Treaty.
229 Steiner et al., supra note 194, at 236–39; Weiler, supra note 214, at 299.
230 Craig, supra note 211, at 456–57.
ing a legitimacy problem for the Community. If the Community cannot ensure that its law has real effects its claim of it being an independent legal order appears hollow. From a constitutional point of view, the centralized enforcement system is insufficient to make the Community system comparable to traditional federal systems where private parties may normally initiate complaints leading to a supreme federal court controlling the application of federal law.

2.4 Private Enforcement of Community Law

2.4.1 Background: Problem of Effective Enforcement of Community Law

It was explained in the preceding section that the system for centralized enforcement of Member State compliance with Community law provided by the EC Treaty may often prove insufficient and that that, in turn, may endanger the achievement of the aims underlying the creation of the Community. Thus, it would appear as if the European Community charges the Member States with the duty of realizing the aims of Community law but lacks means for enforcing that duty. That would certainly be true if the centralized enforcement system was the only mechanism available. There is, however, an alternative that has thus far been ignored in the examination and that shall now be considered: private enforcement.

Enabling private enforcement of Community law in Member State courts was necessary to compensate for the limitations of the centralized enforcement system and it has done much to alleviate what would otherwise be a judicial deficit in the Community. It is primarily through its role in the private enforcement system that national courts come to apply Community law and the private enforcement system is because of this closely connected to the European doctrine. Understanding the elements and basis for the private enforcement system is vital for understanding the European doctrine and, ultimately, the completion of this study. It shall therefore be studied further. The institution of preliminary reference is one of four fundamental elements of private enforcement of Community law. The other three are the principles of direct effect, supremacy, and loyalty. These four elements will now be examined in turn.

232 See, e.g., Weiler, supra note 214, at 299.
233 Cf. Anderson & Demetriou, supra note 180, at 4; Claire Kilpatrick, Turning Remedies Around: A Sectoral Analysis of the Court of Justice, in The European Court of
2.4.2 First Element: Preliminary Rulings

Article 234 EC

Article 234 of the EC Treaty provides the Court of Justice with the power to determine questions regarding either the interpretation of the Treaty or the interpretation or validity of a secondary Community act by means of a preliminary ruling. The right to defer such questions to the ECJ lies with the courts and tribunals of the Member States, but whereas national courts “against whose decision there is no judicial remedy under national law” (courts of final instance) are required to request a preliminary ruling when such questions are raised, inferior national courts are free to decide whether a preliminary ruling “is necessary to enable it to give judgment.” Preliminary reference is, in the words of the Court, an instrument for cooperation between the courts of the Community and the courts of the Member States for the purpose of achieving uniform application of Community law throughout the Community.

On its face, Article 234 appears only to ensure that all national courts understand Community law in the same way. The implications of the preliminary reference institute are however much broader than one might expect from reading only the Treaty text. Among the ECJ’s different grounds for jurisdiction, preliminary rulings are the “jewel in the crown” and have served as both basis and vehicle for many of the cornerstones of

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234 After being revised by the Treaty of Nice, Article 225 (3) of the EC Treaty opens up for this power to be transferred to the Court of First Instance in the future. “Preliminary rulings” is the term used in the EC Treaty. In the literature, however, the terms “preliminary ruling” and “preliminary reference” are used interchangeably.

235 These “courts and tribunals” are hereinafter collectively referred to simply as “courts”. It is not always easy to determine whether a specific institution is a court or a tribunal within the scope of Article 234 but that issue falls outside of the scope of this study. For more information See, e.g. Anderson & Demetriou, supra note 180, at 31–56; Craig & de Búrca, supra note 181, at 436–39; Hartley, supra note 143, at 278–89; Anthony Arnell, The Evolution of the Court’s Jurisdiction under Article 177 EEC, 18 EUR. L. REV. 129, 130–34 (1993).

236 Article 234 (3) of the EC Treaty. This distinction between supreme courts and other courts are, as we shall see below, of great importance.


238 Weiler, supra note 170, at 2420.
Community law. First, questions presented for a preliminary ruling do not arrive out of thin air. A national court will make a request because the question arose in an actual case before it, and the Court’s answer to the preliminary reference will in reality determine the outcome of the individual case. Second, Article 234 only allows the Court of Justice to answer questions on the interpretation of Community law, not regarding how it applies in a specific case. However, in the ECJ’s answers “questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.”

What should thus only be a clarification on the interpretation of Community law is in reality often a declaration whether a specific individual or Member State has breached Community law and, more specifically, whether national law is compatible with Community law. This use of preliminary rulings has in fact created a second mechanism for reviewing national law besides that provided in Articles 226 and 227, and preliminary rulings, unlike centralized enforcement, are open to individuals. This will be discussed further below.

Preliminary rulings were initially seen as a tool for judicial cooperation. The ECJ and the referring national court were on the same level, cooperating in rendering a judgment that conforms to Community law. The ECJ offered the national court help to determine questions of law governed by Community law, and the national court lent itself to the Community for the realization of Community law. Grateful for the cooperation of Member State courts, the ECJ did its best to answer questions posed and was careful not to infringe upon the capacity of the national judge to issue the final rulings. It is easy to see why the national courts participated. The system builds upon national courts making requests for preliminary rulings. In addition, the answer by the Court is limited to the interpretation and application of Community law, and the Community court did not

239 See, e.g. Craig & de Búrca, supra note 181, at 433 (preliminary ruling “has been of seminal importance for the development of Community law.”); Catherine Barnard & Eleanor Sharpston, The Changing Face of Article 177 References, 34 COMMON Mkt. L. Rev. 1113, 1113 (1997); Paul P. Craig, The Jurisdiction of the Community Courts Considered, in The European Court of Justice 177, 181 (Gráinne de Búrca & J.H.H. Weiler eds. 2001) (quoted).

240 In most cases, this party is the Member State.


243 Everling, supra note 242, at 222.
meddle with the right of the national court to decide the case finally. In this respect, the ECJ remained a court of an international organization distinct from a supreme court in a federation.

This description of the relationship between the Community courts and the national courts is no longer entirely correct. Over time, “[n]ational courts became part of a Community judicial hierarchy with the ECJ at the apex of the network.” In cases arising under Community law, national courts are no longer national courts bound by the command of the national government or supreme national courts but Community courts with the European Court of Justice as its master and the Member State as one of its subjects. The only major difference with a federal supreme court is that the individual litigant cannot directly appeal a judgment by a Member State court to the ECJ but the same result is to some degree achieved through the duty of national courts of final instance to make a preliminary reference upon request. The balance between efficiently allocating functions to national courts and the Court of Justice losing control is, indeed, a sensitive one.

Duty of National Courts to Request a Preliminary Ruling

How the preliminary reference institute divides functions between Community courts and national courts can be approached in two ways. First is the issue of when a national court shall request a preliminary ruling or, conversely, when a national court can apply Community law without consulting the ECJ. It is obvious from Article 234 of the EC Treaty that a distinction must be made between, on one hand, national courts of final instance that are required to refer questions on the interpretation or validity of EC law to the ECJ and, on the other, inferior national courts that have some discretion in the matter. A distinction should also be made between questions regarding the interpretation of Community law and questions regarding its validity.


245 Craig, supra note 239, at 178; see also Barnard & Sharpston, supra note 239; Dehousse, supra note 209, at 776; David O’Keeffe, Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility, 23 Eur. L. Rev. 509 (1998).

246 Article 234 (3) of the EC Treaty.

247 See Craig, supra note 239, at 198.
We begin with questions on the interpretation of Community law. Over the years, the Court has taken several measures to limit the seemingly inescapable duty of Member State courts of final instance to issue a request for a preliminary ruling. In *da Costa* the ECJ displaced that duty in situations where the question is “materially identical” to one previously answered by the Court. In its role as a Community court, the national court is empowered to make a ruling based on Community law on matters where there is a preexisting ECJ ruling. This is sometimes referred to as *acte éclairé*. In extension, that rule results in preliminary rulings having effects as precedents on courts in all Member States and not only the referring court.

The tendency in *da Costa* to limit the duty of national courts to refer questions for preliminary ruling was extended further. The European Court of Justice returned to the topic in the case of *CILFIT* and concluded that the reasoning of *da Costa* supported an exception from the duty to refer beyond cases that are “materially identical.” A national court of final jurisdiction may, post-*CILFIT*, decline to make a preliminary ruling when it deems that the question is irrelevant, the Court has previously answered the question even though on a question that was less than “strictly identical” to the present one, or “the correct application of Community law … [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question should be resolved.” This is now known as the *acte clair* doctrine.

According to the *acte clair* doctrine, a national court is excused from making a reference when the meaning of Community law is “clear”. The arguments are the following: that if there is no question, the national court should reasonably also be excused from making a reference; that the national court must always have a certain degree of discretionary power; that the Community would be unable to answer all preliminary references if

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250 Craig, supra note 239, at 178.


253 The term itself is borrowed from French law.

254 For a discussion of how *acte clair* should be classified, see Maurice Legrange, *The Theory of Acte Clair: A Bone of Contention or a Source of Unity?*, 8 COMMON Mkt. L. Rev. 313, 314–16 (1971) (argues that it is a “practice … to achieve a reasonable application of the system of preliminary questions”).

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they in fact always were made.\textsuperscript{255} When determining whether the matter is indeed “clear”, CILFIT requires the national court to bare in mind “the characteristic features of Community law”, the existence of several authentic languages, the particularity of legal terms and concepts under Community law, and, finally, the context and objective of the relevant Community provision.\textsuperscript{256}

These exceptions from making a reference has transformed the preliminary rulings of the ECJ from being a “mere” component in the cooperative partnership between the courts of the Community and the courts of the Member States to being precedents to be followed by inferior national courts.\textsuperscript{257} It does, however, also contain other aspects that are significantly more difficult to analyze. One thing that has caused extended scholarly debate is whether the change strengthens the position of the Community or that of the Member States. Limiting the circumstances under which national courts must refer under Article 234 of the EC Treaty will obviously limit the control that Community courts exerts over individual enforcement of Community law through national courts. This is largely undisputed.

What is however in dispute amongst legal scholars is whether or not the acte clair doctrine really gives Member State courts greater discretion. On one hand, there are those that argue that the change in policy grants national courts more discretion and independence when adjudicating matters under Community law and that this similarly weakens the Community courts. CILFIT obviously broadens da Costa in the sense that while the former will only allow a supreme national court to depart from a preliminary reference where the Court has already determined the material issue, the latter is more permissive in the sense that it discharges the duty of these courts for other, not previously decisively established reasons.\textsuperscript{258} Thus, CILFIT opens a window of opportunity for national judges who wish to limit the input of the Community; all he or she has to do is to declare that the matter is clear and the requirement posed in CILFIT that the national court should bare certain factors in mind is a much too weak countermeasure.\textsuperscript{259} The fear is that CILFIT will “encourage national courts to decide points of Community law for themselves …

\textsuperscript{255} Legrange, \textit{supra} note 254, at 316–21; \textit{cf.} Hartley, \textit{supra} note 143, at 295.
\textsuperscript{256} CILFIT, 1982 E.C.R. 3415, paras. 17–20.
\textsuperscript{257} Craig \& de Búrca, \textit{supra} note 181, at 442, 449–50; Rasmussen, \textit{supra} note 249, at 249–50.
\textsuperscript{259} Legrange, \textit{supra} note 254, at 322 (referring to this as “the abusive use of the acte clair …”).
[and thereby] jeopardize the uniform application of Community law.” 260
On the other hand, there are others who contrarily argue that acte clair strengthens the Court of Justice’s authority, Community centralism, and the European harmonization process. The doctrine appears to be strengthening the power of national courts, and thereby also their willingness to participate in the Community judicial enforcement cooperation project, but the ECJ has cleverly restricted “the condition for obviousness so narrowly that it would rarely, if ever, be satisfied”, thereby preserving and even consolidating “the nucleus of its own authority …”. 261

The acte clair doctrine deals only with questions on the interpretation of Community law. We turn now to questions on the validity of Community law. Such issues are, in the opinion of the European Court of Justice, different than questions on interpretation as Article 230 of the EC Treaty lays down a specific procedure for reviewing the legality of Community acts. The ECJ declared in Foto-Frost that it alone was competent to declare acts of Community law invalid, 262 at least permanently. 263 This has consequences for the preliminary reference institute. If national courts lack jurisdiction to declare Community laws invalid it means that they must refer all questions on the validity of Community law to the ECJ. This in turn means that national courts of final jurisdiction cannot apply the exception from the duty to seek a preliminary ruling opened by the acte clair doctrine to issues of validity. 264 It also means, however, that inferior national courts have a greater duty to refer questions on the validity of Community law to the ECJ than the language of Article 234 plainly suggests. 265

261 See, e.g. Mancini & Kelling, supra note 258, at 3–7 (3–4 quoted); Rasmussen, supra note 249.
Duty of ECJ to Give Preliminary Ruling

A second way to study how the institution of preliminary rulings divides functions between Community courts and national court is by asking whether the European Court of Justice must answer a reference made. This is essentially the reverse side of the first issue. The duty of national courts to request preliminary rulings should reasonably correspond with a duty for the ECJ to give one. A national court cannot refuse to give a judgment in a case even if doing so involves interpreting Community law and even if the Court of Justice has refused to give a preliminary ruling. Thus, if the ECJ does not answer a request the national court must in fact interpret Community law. The answer to this issue was initially simple. After presenting the reasoning recapped above, the da Costa Court proceeded by affirming that the decision whether a preliminary ruling is necessary always lies with the national court and that “the Court is, in principle, bound to give a ruling.” The role of the Court of Justice was, in the words of Professor O’Keeffe, “the passive one of oracle.” In subsequent decisions, it appeared as if the Court stood by this division of functions.

Although this position has never been formally reversed, the European Court of Justice has de facto retreated somewhat in subsequent case-law. The change began in 1980 when the Court for the first time declined to entertain a request for a preliminary ruling. In Foglia I, the ECJ refused to answer the question put before it by an Italian court because it appeared to the Court as if “the parties to the main action … are in agreement as to the result to be attained”, that this gave the case an “artificial nature”, and that it could not give a preliminary ruling without “jeopardiz[ing] the whole system of legal remedies.” Under these circumstances, the Court

267 Da Costa, 1963 E.C.R. at 38 (“Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again.”).
269 O’Keeffe, supra note 245, at 516–17.
270 See, e.g. CILFIT, 1982 E.C.R. 3415, para. 15 (“national courts and tribunals … remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so”); Case 232/82, Baccini v. ONEM, 1983 E.C.R. 483, para. 11; Case 83/78, Pigs Marketing Board v. Redmond, 1978 E.C.R. 2347, para. 25 (“the national court … is in the best position to appreciate … the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling”); da Costa quoted supra note 267.
272 Foglia I, 1980 E.C.R. 745, para. 11.
of Justice found that Article 234 of the EC Treaty did not apply and that it consequentially lacked jurisdiction to issue a preliminary ruling.\textsuperscript{273}

An objection to this ruling was immediately voiced by the Italian court who posed the question in \textit{Foglia I}. Upon receiving the ECJ’s answer the Italian court felt compelled to inquire whether the Court of Justice had considered the proper division of functions between national courts and itself in reaching its decision in \textit{Foglia I}.\textsuperscript{274} In the case that followed, \textit{Foglia II}, the European Court of Justice replied that although “Article 177 [now 234] is based on cooperation which entails a division of duties between the national courts and the Court of Justice”\textsuperscript{275} and “it is for the national court … to assess … the need to obtain a preliminary ruling,”\textsuperscript{276} the Court may and must still determine whether it has jurisdiction to answer the question posed or, conversely, whether it is a “general or hypothetical question” that falls outside the scheme of Article 234.\textsuperscript{277} \textit{Foglia I} and \textit{Foglia II} represent the ECJ exerting more power over the preliminary rulings procedure. The ECJ alone determines what questions fall within the procedure and it is not controlled by the determination of the referring national court.\textsuperscript{278}

It is uncertain what weight should be placed on the \textit{Foglia}-cases. There are many cases where a consequent application of the doctrine might require the Court to dismiss the reference but where it nevertheless declined to do so.\textsuperscript{279} Recent case law suggest that the Court of Justice continues to refuse to answer “general or hypothetical questions” but that it is only “where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings”

\textsuperscript{274} Case 244/80, Foglia v. Novello (No. 2), 1981 E.C.R. 3045, para. 11.
\textsuperscript{276} \textit{Foglia II}, 1981 E.C.R. 3045, para. 15; see also, \textit{e.g.} Meilicke, 1992 E.C.R. I–4871, para. 23; Case C-412/93, Leclerc-Siplec v. TFI, 1995 E.C.R. I–179, para. 10; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd, 2003 E.C.R. I–10155, para. 43.
\textsuperscript{277} \textit{Foglia II}, 1981 E.C.R. 3045, paras. 18–19; see also Bebr, \textit{supra} note 266, at 422–27.
\textsuperscript{278} Craig & de Búrca, \textit{supra} note 181, at 463–64.
that the ECJ lacks jurisdiction to give a preliminary ruling and is thereby relieved from its general duty to give answer questions posed by national courts. That the main dispute is fictitious, that it was created only for the purpose of attaining a preliminary ruling, appears to be of no consequence.\textsuperscript{280} Besides the absence of a real dispute, which is the most important and controversial ground, the ECJ can also decline to answer a preliminary question on the grounds that the referring body is not a court or tribunal in the sense of Article 234, that the question posed is not “relevant”,\textsuperscript{281} and that the referring court failed to adequately state the factual and legal context.\textsuperscript{282}

\textbf{2.4.3 Second Element: Application of Community Law in Member States}

\textit{Introduction}

Allowing national courts to refer questions to the Court of Justice is not by itself sufficient to bring about private enforcement of Community law. A functioning system presupposes that the national courts have cases before them in which these questions arise. That, in turn, depends upon individuals bringing those cases before the court. We will in this section examine under what circumstances an individual may bring a claim based upon Community law in a national court. Community law can become effective in a national legal order pursuant to three theories: direct applicability, direct effect, and indirect effect.

\textit{Status of Community Law in Member States Originally}

The Community is a creature of international law, created through the signing of international treaties by sovereign states. Prior to 1963, it was commonly held that the Treaties governing the European Economic Community should be treated just like any other international treaties. This meant, more specifically, that the signatory states were obligated towards each other to honor the Treaties but that it was for each to decide

\textsuperscript{280} Case C-144/04, Mangold v. Helm, 2005 E.C.R. I–9981, para. 37.

\textsuperscript{281} A requirement that will be failed if it is obvious to the Court of Justice that the questions asked is “manifestly incapable of applying” to the matter in question of if the national court has failed to give due consideration to its relevance.

\textsuperscript{282} See generally Anderson, \textit{supra} note 273 (also identifies three weaker or more uncertain grounds for refusal: the referring court is examining the validity of foreign law, the question is political, or the reference conflicts with Article 226 or 230 of the EC Treaty).
how to comply with this duty. The Treaties therefore only enjoyed the status that each national legal order granted it.

One of the earliest decisions by the European Court of Justice on the relationship between Community law and the law of the Member States was *Humblet*. In that case, the European Court of Justice was asked to determine whether a Belgian taxation rule that allowed tax authorities to take into consideration salary paid to a Community official, Mr. Humblet, when determining his Belgian tax rate was contrary to a Community rule according to which Community officials are exempted from tax. Although the Court found such a rule to be prohibited under Community law it declined to “annul the contested assessment and order the Belgian State to repay … the amounts” on the ground that “Community law does not grant to the institutions of the Community the right to annul legislative or administrative measures adopted by a Member State.” Instead, the Court continued, “that Member State is obliged … to rescind the measure in question and to make preparation for any unlawful consequences which may have ensued.”

The ruling in *Humblet* fits well with the description given above of the status of Community law in the Member States. Secondary law created with support in the Treaties was considered to have an effect in the Member States much like that of the Treaties. That is, however, with one bright exception. The only thing that on its face is difficult to reconcile with this description of the effect of Community law are Regulations. Article 249 of the EC Treaty explicitly provides that Regulations are “directly applicable in all Member States” which clearly implies that national courts should apply them directly when relevant. If there existed any doubt as to the correctness of this interpretation, it was forcefully removed when the European Court of Justice stated that Regulations, by their “very nature … has immediate effect and, consequently, operates to confer rights on private parties which the national courts must protect” and that

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284 CRAIG & DE BÚRCA, supra note 181, at 179; de Witte, *supra* note 244, at 178.


286 Article 11(b) of the Protocol on the Privileges and Immunities of the ECSC.


289 de Witte, *supra* note 244, at 179, 181.

290 Case 34/73, Variola SpA v. Amministrazione Italiana delle Finanze, 1973 E.C.R. 981, para. 8; see also Case 9/70, Grad v. Finanzamt Traunstein, 1970 E.C.R. 825, para. 5.
this immediate effect cannot be altered through measures under national
law. Regulations are therefore self-executing, self-contained, and self-
sufficient. It appears from the language of the EC Treaty that Com-
munity instruments other than Regulations do not have similar effects
and the absence of such language was seen to support the conclusion that
other Community acts did not apply directly.

Step 1. Vertical Direct Effect of Treaty Articles

This view of Community law may contrast with most persons’ under-
standing of law. As a former member of the Court of Justice explained it,
“legal rules, by their very nature, have a practical purpose” and “any legal
rule must be at first sight presumed to be operative in view of its object
and purpose.” According to this view, other provisions of Community
law than Regulations are either operational in the Member States or not
laws at all. The European Court of Justice extended the legal effects of
Community law in the seminal case of van Gend en Loos when it declared
that the Treaty has more far-reaching effects than other international
treaties; that the Community is not public international law but a new
legal order; that the Community has legislative powers in certain fields;
and that the subjects of Community law are not only the Member States
but also their citizens.

From these observations, the van Gend Court concluded that when a
Treaty provision clearly and unconditionally provides a right or an obli-
gation without requiring “legislative intervention on the part of the
states”, concerned individuals may rely upon that provision directly be-
fore its own national courts against a Member State or one of its agents.

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291 Case 50/76, Amsterdam Bulb BV v Produktschap voor Siergewassen, 1977 E.C.R. 137,
para. 4, citing Variola; see also, e.g. Case 39/72, Commission v. Italy, 1973 E.C.R. 101.
292 Pierre Pescatore, The Doctrine of “Direct Effect”: An Infant Disease of Community Law,
293 Although direct applicability and direct effect are in theory two distinct concepts, see
generally Jan A. Winter, Direct Applicability and Direct Effect – Two Distinct and Different
Concepts in Community Law, 9 COMMON MKT. L. REV. 425 (1972), the practical differ-
ence between the two is in reality small. Pescatore, supra note 292, at 164; de Witte, supra
294 Pescatore, supra note 292, at 155, 177.
E.C.R. 1, at 12.
296 Van Gend en Loos, 1963 E.C.R. at 12–13. Dashwood, supra note 293, at 232, argues
that the difference between direct effect and the legal effect that international provisions
ordinarily enjoy in signatory states lies in the level of “intensity” by which directly effec-
tive provisions are self-executing.
This characteristic of Community provisions, the possibility of being relied upon in national courts, is known as “direct effect”. A provision of Community law will enjoy direct effect whenever it is sufficiently clear and unambiguous, unconditional, and when its operation does not depend upon further actions being taken by the Community or by the Member States. If a Treaty article meets these requirements, it is suitable to form the basis for judicial adjudication.

Step 2. Horizontal Direct Effect of Treaty Articles

Van Gend en Loos was only the beginning of a long line of cases exploring the meaning and limits of direct effect. The facts of van Gend limit the application of the decision to vertical situations, that is, conflicts between a physical or legal person and a Member State or one of its agents. The ability of Community law to be relied upon in these types of situations has subsequently become known as vertical direct effect. However, substantive provisions of Community law are frequently applicable in other situations, i.e. in situations where the involved parties are legal or physical persons and no Member State is directly involved. These situations are referred to as horizontal situations and Community rules applicable in these are said to enjoy horizontal direct effect.

Two important black letter rules were established in the case of Defrenne. The first rule is that the fact that a Community rule lays down a positive obligation – a duty to perform something – does not by itself prevent it from creating directly effective rights as long as it meets the other criteria laid down in van Gend. Defrenne also extends the direct

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297 de Witte, supra note 244, at 177 (direct effect is “the capacity of a norm of Community law to be applied in domestic court proceedings …”).

298 In van Gend en Loos the Court placed some emphasis on the fact that the provision in question placed a negative obligation upon the Member States (a duty to refrain from taking action), and this can presumably be connected to the last criteria. It is now however clear that a provision of Community law posing positive obligations are not on that ground excluded from having direct effect. See, e.g. Case 43/75, Defrenne v. Sabenna (No. 2), 1976 E.C.R. 455; Cases 57/65, Lütticke v. HZA Sarrelouis, 1966 E.C.R. 205; see also Dashwood, supra note 293, at 231, 236.

299 See, e.g. Gerrit Betlem, Medium Hard Law – Still no Horizontal Direct Effect of European Community Directives after Faccini Dori, 1 Colum. J. Eur. L. 469, 472 (1995); Curtin, supra note 231, at 720; Dashwood, supra note 293, at 231; De Witte, supra note 244, at 187–88; Pescatore, supra note 292, at 174–76.

300 See, e.g. van Gerven, supra note 283, at 337.

301 1976 E.C.R. 455.

302 See note 298 supra and accompanying main text.
effect of Treaty articles to horizontal situations. In the case itself, the litigants were two private parties: an airline and one of its former employees. The European Court of Justice concluded that the provision in question confers a right upon all persons and that it would be irreconcilable with the mandatory nature of the provision if only the Member States would have to respect it. It is of course not entirely correct to compare the Community Treaties to the Constitution of the United States but after the introduction of vertical and horizontal direct effect, the Community Treaties have become increasingly similar to the U.S. Constitution in the respect that both the union, the states, and all individuals are bound by it.

**Step 3. Vertical Direct Effect of Directives and Decisions**

Also as an extension of the ruling in *van Gend*, the European Court of Justice was soon asked to determine whether other provisions of Community law besides Treaty provisions could enjoy direct effect and the Court responded favorably. In *Grad*, focus was on Decisions and whether they can enjoy direct effect, a question that the Court answered in the affirmative. While Article 249 of the EC Treaty does not explicitly provide that Decisions are directly applicable in the same way as it does with Regulations, it is clear that the provision assigns a binding effect to Decisions. The Court of Justice believed that the effectiveness of Decisions requires that individuals can rely upon them before national courts, i.e. that they have direct effect. Although the direct effect of Decisions was slightly more controversial than that of the Treaties and Regulations, it was nothing compared to Directives. Whereas Article 249 clearly states that Regulations are by nature directly applicable, it suggests the opposite when it comes to Directives. As the reader is perhaps aware of, Directives are binding as to the result to be achieved but leaves to the Member States to decide how to realize that result. Despite leaving the Member States a

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303 In *Defrenne* the right to receive equal pay for equal work regardless of gender.

304 *Defrenne*, 1976 E.C.R. 455, para. 39. The Court refused to place any importance on the fact that the relevant provision, Article 141 of the EC Treaty, specifically holds that the duty to ensure that the principle of equal pay lies with the Member State. *Id.* paras. 30–36. A decade later, however, the Court held that Directives cannot enjoy horizontal direct effect because Article 249 of the EC Treaty holds that they “shall be binding … upon each Member State to which it is addressed …”. Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority, 1986 E.C.R. 723, para. 48 (on this ruling see further the main text infra). It is difficult to reconcile these two rulings.

305 *Grad*, 1970 E.C.R. 825, para. 5.
great degree of independence, Directives play a crucial function in Community lawmaking and the harmonization of national law.  

Using almost the same reasoning as in *Grad*, the ECJ declared in *van Duyn* that to exclude the possibility of Directives having direct effect would be incompatible with both the binding effect associated with them and the existence of the preliminary reference institute as well as harmful to the effectiveness of Community law (*l’effet utile*). In later case-law, beginning with *Ratti*, the Court of Justice has added another reason for affording Directives direct effect besides those previously stated, namely that a Member State should not be able to rely upon its own failure to implement a Directive against an individual who would have benefited thereof. In conclusion, individuals can rely upon Directives directly in national courts against a Member State once the period allotted for implementation of the Directive has passed and the other requirements for direct effect are met.

### Step 4. Horizontal and Indirect Effect of Directives

This leaves one obvious question unanswered: do Directives also enjoy horizontal direct effect? These situations are in some respects more problematic than those previously discussed. First, no fault along the lines of failure to implement can be attributed to individual persons or corporations. This, in turn, clearly impairs the possibility of affording Directives and Decisions horizontal direct effect in the same way as Treaty articles.


310 The old ones were restated in *Ratti*, 1979 E.C.R. 1629, paras. 19–21.

311 *Ratti*, 1979 E.C.R. 1629, paras. 22–24; Curtin, *supra* note 231, at 719. This way of reasoning is an implementation of the legal concept of “estoppel” that is especially prominent in common law legal orders. Pescatore, *supra* note 292, at 169.


313 Dashwood, *supra* note 293, at 243 (statement made before the issue had been conclusively resolved by the Court); See, e.g. Marshall, 1986 E.C.R. 723, para. 48. In a later case, Case C-91/92, Dori v. Recreb, 1994 E.C.R. I–3325, much emphasis was placed on this when concluding that Directives cannot have vertical direct effect.
Another problem with attaching horizontal direct effect to secondary Community acts would be the resulting degree of legal uncertainty in society.\textsuperscript{314}

In *Marshall*, the Court of Justice emphasized that Article 249 of the EC Treaty provides that a Directive is only binding on “each Member State to which it is addressed” and concluded thereof that a Directive cannot by itself “impose obligations on an individual …”, thereby precluding vertical direct effect for Directives.\textsuperscript{315} This seemingly simple conclusion on the part of the European Court of Justice may have been surprising to individuals who had relied on the Court’s previous statements that the Community is an independent legal order with the capacity to confer rights and obligations directly upon its subject among whom are the citizens of the Member States.\textsuperscript{316} Indeed, denying Directives horizontal direct effect can even be seen as limiting the supremacy of Community law.\textsuperscript{317} On the other hand, if Directives could be used by the Community “to enact obligations for individuals with immediate effect” there would be no real difference between Directives and Regulations.\textsuperscript{318} That would hardly be consistent with the difference that Article 249 undeniably makes between the two instruments.

The judgment in *Von Colson*\textsuperscript{319} limited the effects of *Marshall* denying Directives “normal” horizontal direct effect as it created what has later become known as *indirect effect*. The concept of indirect effect is quite simple in theory. When national law allows national courts room for interpretation, Community law imposes a duty on those courts to “interpret their national law in the light of the wording and the purpose of” Directives whose period for implementation has expired,\textsuperscript{320} but only as

\textsuperscript{314} Dashwood, supra note 293, at 243; but see Paul P. Craig, Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, 22 Eur. L. Rev. 519, 523–24, 536–37 (1997) (argues that horizontal direct effect would not endanger the legal certainty of individuals and that the path of indirect effect, see further infra in the main text, is even more objectionable in this sense).


\textsuperscript{316} Cf. Dashwood, supra note 293, at 243.

\textsuperscript{317} Curtin, supra note 231, at 723. Regarding the principle of supremacy, see further in the main text *infra*.


long as doing so does not violate fundamental principles such as those of legal certainty and non-retroactivity. The duty of national courts to give national law an interpretation that is, as far as possible, “Community law consistent”, extends to cases where both parties are individual persons or corporations, and unlike direct effect the indirect effect of Directives thus applies both vertical and horizontal. While resting on somewhat different basis, the practical difference between direct effect and indirect effect is sometimes small.

Summary: An Obligation to Apply and Enforce Community Law

How then does European Community law apply in the national legal orders? The reasoning of the Court in *van Gend en Loos* may at first sight seem plain and obvious: private parties are entitled to rely on a Community measure in national courts, at least when the counter-party is a Member State. Deciding that a provision of Community law enjoys direct effect carries with it many far-going implications however.

First, a directly effective provision of Community law enters all the Member States’ legal orders and, by virtue of the supremacy of Community law, replaces any conflicting national rule as the valid law on the subject. The very notion of direct effect thus implies that Community law can under the appropriate circumstances be used as a source of law in any national court and should if so be treated just like any national rule. Second, the fact that the Community rules are law just like rules under national law also implies that its creator, the European Community, can create laws much in the same way and with the same effect as a national legislative body. The power to do so is of course limited to subject matters over which the Member States have transferred compe-

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322 *Marleasing*, 1990 E.C.R. I–4135, paras. 6–9, *qualified by Case C-168/95, Criminal Proceedings against Arcaro*, 1996 E.C.R. I–4705, paras. 41–42 (the duty to interpret national law as far as possible “to achieve the result pursued by the directive … reaches a limit where such an interpretation leads to an imposition on an individual … or, more specifically, where it has the effect of determining or aggravating … the liability in criminal law …”), *citing Marleasing*, 1990 E.C.R. I–4135, para. 8; *Kolpinghuis Nijmegen*, 1987 E.C.R. 3969, paras. 13–14.

323 *See, e.g. Curtin, supra note 231, at 724–25; Craig, supra note 314, at 524–25; van Gerven, supra note 283, at 345–46 (“It is clear … [that indirect effect] is a substitute for giving horizontal direct effect to directives …” id. at 346).

324 *Betlem, supra note 299, at 489.*

325 *Brealey & Hoskins, supra note 221, at 58.*

326 *Brealey & Hoskins, supra note 221, at 59.*

327 *The Community act enjoys an even superior status as shall be discussed below.*
tence to the Community through the Treaties. Third, when a national court applies a Community law directly, that court forms part of the Community judiciary. The national court then functions as a Community court on the national level.328

Direct effect is at once both offensive and defensive. It is “a shield to ward off attempts by a Member State to increase restriction, and a sword to cut down any restrictions which may remain …”.329 It is also correctly recognized as the fundamental element sine qua non the private enforcement institute would not exist, the instrument by which individuals become enforcers of Community law.330

2.4.4 Third Element: Supremacy of Community Law

Before describing and analyzing the principle of supremacy331, it should be pointed out that within the framework of this study it is only necessary to consider the effects of supremacy on the activities of national courts, the internal primacy of Community law. Other aspects of the principle will thus be ignored herein.332

The supremacy of Community law is best understood against the direct effect of Community law. Prior to the ECJ’s decision in van Gend en Loos, the Treaty, like other international treaties, was believed to be primarily externally binding. After van Gend, however, Treaty provisions that meet the requirements posed in that decision were included among pre-existing national legislation. The doctrine of direct effect declares that Community law can occupy a position in the legal order of the Member States alongside with national legal sources but it does not dictate what position Community law shall have in the hierarchy of norms.333 The EC Treaty lacks provisions governing this question.334 As previously mentioned, it has always been clear from Article 249 of the EC Treaty that Regulations are binding and directly applicable, but the Treaty does not regulate the status of Regulations vis-à-vis other, national sources of

328 Brealey & Hoskins, supra note 221, at 59–60.
329 Dashwood, supra note 293, at 233.
330 See, e.g. Curtin, supra note 231, at 720 (direct effect is “a powerful countercheck to the non-implementation of Directives in the sense that individuals are thereby given a legal tool to assist them in the process of squeezing effects from unimplemented directives in the national legal context.”).
331 The terms “supremacy” and “primacy” are herein used interchangeably.
332 The term “internal primacy” is borrowed from de Witte, supra note 244, at 183. See also id. at 177 where a similar limitation is posed.
333 Craig & de Búrca, supra note 181, at 276–77.
334 Article I-6 of the rejected proposal for a Treaty Establishing a Constitution for Europe addressed this issue.
The internal status of Community law in the legal systems of the Member States not being decided naturally posed a problem for national courts whenever Community law and national law conflicted.

The burden to decide the status of Community law in the national legal orders thus fell on the European Court of Justice who responded by establishing the principle of supremacy.\textsuperscript{336} In 1964 and the case of \textit{Costa v. ENEL},\textsuperscript{337} the Court of Justice took the advice of Advocate General LaGrange and answered whether a Community rule or a national rule will prevail if the two conflict.\textsuperscript{338} In delivering its judgment, the ECJ began by reiterating its position in \textit{van Gend en Loos}: by signing the EEC Treaty, the Member States created a new legal system, separate from yet integrated with the legal systems of the Member States, and a Community to which it transferred its sovereign powers in certain areas.\textsuperscript{339} The ECJ believed that it would violate the obligations that all Member States undertook by signing the Treaty on the basis of reciprocity if a Member State would be able to take measures contrary to the applicable Community law. If national rules could override obligations deriving from the Treaties, the latter would become contingent and “the legal basis of the Community itself [would be] called into question”. Furthermore, attainment of the objectives of the Treaty demands that “[t]he executive force of Community law cannot vary from one State to another” and thus requires that Community law takes precedence over national law. National legal provisions can therefore not be allowed to override Community law.\textsuperscript{340}

Although the European Court of Justice explicitly held in \textit{Costa} that a domestic provision can not override a Community law “however framed” there was still a degree of uncertainty as to whether the status of the national provisions was relevant for the application of the principle of supremacy. The decision in \textit{Internationale Handelsgesellschaft}, which concerned a conflict between Community law on one hand and fundamen-

\textsuperscript{335} Cf. Betlem, \textit{supra} note 299, at 469–70 (making a comparison with the U.S. whose Constitution contains a clause that proclaims the supremacy of Federal law over State law).

\textsuperscript{336} The principle of supremacy is sometimes referred to as the principle of primacy or precedence of Community law.


\textsuperscript{340} \textit{Costa v. E.N.E.L.}, 1964 E.C.R. at 593–94. This is the core of the principle of supremacy. The Court also noted that Article 249 of EC Treaty provides that Regulations shall be binding and directly applicable. From that they concluded that Community law must be supreme since that provision would otherwise be quite meaningless; Regulations would never actually be binding if the Member States could legislate otherwise.
tal and constitutional principles of German law on the other, clarified the matter.\textsuperscript{341} The Court of Justice persistently stood by its opinion in \textit{Costa v. ENEL}. In three sentences, the Court unequivocally announced its complete indifference to the internal status of the competing national norm. National rules or principles has no relevance for the validity of Community acts since, first, the uniformity and efficiency of Community law would otherwise be adversely affected and, second, Community law by its very nature as an independent source of law cannot be overridden by national law, however framed, without being deprived of its very character and the Community losing its legal basis.\textsuperscript{342}

The European Court of Justice has had occasion to return to the topic of supremacy even after \textit{Internationale Handelsgesellschaft}. In another important decision, \textit{Simmenthal}, the ECJ declared that Community supremacy is so powerful that it requires and empowers national courts to set aside any national rules of procedure and jurisdiction that “might prevent Community rules from having full force and effect …”.\textsuperscript{343} This is commonly referred to as the duty of national courts to disapply national law whenever it conflicts with Community law.\textsuperscript{344} The Court of Justice has also rejected the argument that the unconditional and automatic application of the principle of supremacy undermines the principles of legal certainty and legitimate expectations.\textsuperscript{345}

\textsuperscript{341} \textit{Internationale Handelsgesellschaft}, 1970 E.C.R. 1125.
\textsuperscript{342} \textit{Internationale Handelsgesellschaft}, 1970 E.C.R. 1125, para. 3. After reaffirming the principle of supremacy, the Court examined whether a fundamental right comparable to the German principle was “an integral part of the general principle of law protected by the Court of Justice”, \textit{id.}, para. 4. The concept of fundamental rights is discussed further \textit{infra} Part 3.3. \textit{See also} de Witte, \textit{supra} note 244, at 190–91.
\textsuperscript{343} Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629, para. 22. The facts were as follows. Simmenthal had exported beef from France into Italy and in connection therewith paid for a health inspection as required by Italian law. Three years later the company brought an action for the repayment of the fee, arguing that the fees were obstacles to the free movement of goods. On preliminary reference, the ECJ agreed with Simmenthal holding that the fees were in effect equivalent to custom duties. Yet, the Italian government still refused repayment on the ground that the court handling the case lacked jurisdiction to declare national acts unconstitutional, only the Italian Constitutional Court had such jurisdiction. \textit{Simmenthal} and the cases that followed are discussed further \textit{infra} Part 3.6.2.
\textsuperscript{345} Case C-224/97, Ciolla v. Land Vorarlberg, 1999 E.C.R. I–2517; Craig & de Búrca, \textit{supra} note 181, at 280.
The principle of supremacy thus states that both primary or secondary Community law is superior to national law regardless of the status of the latter in the national legal order.\textsuperscript{346} In the beginning of this section it was stated that supremacy is best understood against the backdrop of direct effect. In the words of Professor Weiler, “supremacy is consequential of direct effect”\textsuperscript{347} and “[t]he combination of the two doctrines means that Community norms that produce direct effects are not merely the Law of the Land but the ‘Higher Law’ of the Land.”\textsuperscript{348} A principle of supremacy appears to be a fundamental element of any federal-like structure as it establishes the principal subordination of the state in relation to the federation to which it belongs but for which a union would be pointless.\textsuperscript{349} Any form of federalism depends upon the powers of government being divided between the federation and the states respectively.\textsuperscript{350}

It is, however, also important to understand what does not follow from the principle of supremacy. First, the principle of supremacy has no bearing when determining to what extent power has been transferred from the states to the federation. The principle of supremacy can be thought of as an instruction to national courts what law it should apply in the eventuality of a choice and conflict between national law and Community law.\textsuperscript{351} Second, a consequence of this is that the supremacy of Community law is only relevant in areas within the European Community’s competence. A Community measure that falls outside the Community’s competence is invalid and in such a situation it is unnecessary to consider the principle of supremacy. The principle of supremacy does not in itself displace all national laws hindering an individual from exercising a Community right.\textsuperscript{352} Third and finally, the principle of supremacy determines only what happens in the case of a conflict between national

\begin{itemize}
  \item \textsuperscript{346} Weiler, \textit{supra} note 214, at 274.
  \item \textsuperscript{347} Weiler, \textit{supra} note 214, at 276.
  \item \textsuperscript{348} Weiler, \textit{supra} note 170, at 2415.
  \item \textsuperscript{350} Cappelletti & Golay, \textit{supra} note 349, at 264.
  \item \textsuperscript{351} de Búrca, \textit{supra} note 344, at 451 (then goes on to consider if the declaration of the principle of supremacy also entails a claim of sovereignty).
  \item \textsuperscript{352} See, \textit{e.g.} Case 45/76, Comet BV v. Produktienzaam Siergewassen, 1976 E.C.R. 2043 where the Court of Justice refused to accept the plaintiff’s argument that “[t]he general legal principle that Community law prevails over national law is one which implies that … [a] Member State ought not to be able to rely on procedural requirements if this means that the legal position of a party is not wholly and unreservedly consistent with the objectives of Community law.” \textit{Id.} at 2046, paras. 9–13.
\end{itemize}
and Community law, it does not determine if there is such a conflict. Whether national law and Community law govern the same subject matter is determined by another concept: preemption. Different commentators attach different meanings to the concept of “preemption”, which has been borrowed from American law. In its most narrow construction, the term represents the idea that once Community law governs a subject matter it occupies that area of law over which the Member States are no longer competent to regulate. Preemption in this narrow sense is sometimes referred to as an effect of the principle of supremacy. The two concepts are in such situations closely related but should in my mind not be confused. This is obvious as preemption also has more extensive meanings. We shall see further below that preemption theory allows Community law to prevent national regulation on other matters than those actually and directly regulated in Community law.

2.4.5 Fourth Element: Member State Loyalty and Judicial Cooperation

The private enforcement system depends upon the cooperation of national courts. As previously discussed, the individual litigant does not have access to the Community judiciary. He or she instead relies upon national courts honoring Community rights, ensuring their realization. National courts are, as discussed, expected to allow claims under directly effective or directly applicable Community law, to give Community law supremacy over conflicting national law, and to ask the European Court of Justice for guidance on questions of law where these pertain to the interpretation of Community law. This system, consisting of preliminary reference, direct effect, and the principle of supremacy, would be very ineffective without the cooperation of national courts. In the words of one commentator, “everything depends on the good faith and goodwill of the national courts.” Another scholar has accurately stated that “the imple-

353 Although the European Court of Justice has applied the preemption theory as explained by legal commentators in many cases, it has never used the term. This can perhaps be explained by the fact that it wants to avoid a term that carries central federalist meaning.
355 See infra Part 7.2.3.
356 Mancini & Keeling, supra note 258, at 1–2.
357 Legrange, supra note 254, at 322 (statement made with regard to the possibility that national courts abuse the acte clair doctrine).
mentation of Community law is largely done by national authorities and courts ... [t]here is no other way it could be done.  

The Community legal order thus depends upon the cooperation of Member States and Member State courts for its proper function. But how does one get from the Community's need for cooperation to the duty of national courts to cooperate? Why are national governments and national courts obligated to participate in the realization of Community law and how is compliance with such a duty ensured?

The European Court of Justice has in connection with the subject of direct effect repeatedly stated that a provision that has direct effect carries with it an obligation for national courts to protect the individual rights that it creates; that the fact that individuals may rely upon rights derived from Community law translates into a corresponding obligation for national courts to honor those rights.  

Similar reasoning has been used with regard to indirect effect. Even when a provision of Community law fails one of the criteria for direct effect, Community law requires national courts to interpret national law as far as possible in accordance with relevant Community provisions.

On what ground does the Court of Justice make these demands of national courts? Of fundamental importance in this respect and to the European doctrine as a whole is Article 10 of the EC Treaty which is said to express a principle of loyalty. The provision merits to be quoted in its entirety.

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

360 See, e.g., Von Colson, 1984 E.C.R. 1891, paras. 26, 28; see further Derlén & Lindholm, *supra* note 312.
This provision, which despite its wording applies to all national authorities including courts, contains two distinguishable duties: one is to undertake actions supporting the fulfillment of Community law, the other to abstain from all actions that may jeopardize the same. Under Article 10, national courts are under a duty to give full effect to Community law including the judgments of the European courts and to abstain from taking actions that endanger the full effect of Community law. Due to the sweeping language of Article 10 of the EC Treaty, it is difficult to enumerate the obligations that it imposes on national courts. The European Court of Justice frequently refers to Article 10 and the principle of loyalty in the context of the European doctrine. For example, as will be studied below, the duty of national courts to cooperate with the Community has in the European doctrine been used to impose a duty on national courts to aside national procedural law when applying it would impair the full effectiveness of Community law.

2.4.6 Conclusion: Four Elements as One Construction

The sum of the four elements described in this section cannot be more succinctly recapitulated than in the words of Mancini and Keeling:

> If the doctrines of direct effect and supremacy are ... the 'twin pillars of the Community's legal system', the reference procedure laid down in Article [234] must surely be the keystone in the edifice; without it the roof would collapse and the pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion – beautiful but not of much practical utility.

If one of the elements of the private enforcement system was removed, the entire structure would collapse. Private enforcement in national courts is the primary remedy for individuals when their Community

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363 Hinton, supra note 361, at 319–20; Lang, supra note 358, at 111.
365 Cf. Lang, supra note 358, at 125. A possible limitation to the duty to cooperate lies in what jurisdiction the competent national authority has assigned to the national court. The Court of Justice has repeatedly stated that the duty to cooperate applies “within their [the Courts] jurisdiction ...”. E.g. Von Colson, 1984 E.C.R. 1891, para. 26; Harz, 1984 E.C.R. 1921, para. 26; Marleasing, 1990 E.C.R. I–4135, para. 8.
366 Groussot, supra note 167, at 48–50; Lang, supra note 361, at 650–54; Curtin, supra note 231, at 738.
rights are violated but it is also a primary mechanism for ensuring Member States compliance with Community law. Indeed, the Community legal order depends so fundamentally upon private enforcement that a return to a state where centralized enforcement is the only system for enforcement of Community law is inconceivable.

2.5 From Private Enforcement to the European Doctrine

It was indicated at the beginning of this chapter that the European Community judiciary consists of three courts: the European Court of Justice, the Court of First Instance, and the European Union Civil Service Tribunal. In light of the examination in the previous section, it is proper to add a fourth Community court to that list: the national courts of the Member States. One effect of the private enforcement system is that national courts have become Community courts. The preliminary rulings institute has had a binding effect between the various national courts of the Member States and the courts of the Community. The principles of direct effect, supremacy, and loyalty combine to in a sense make national courts into Community courts endowed with Community powers that extend even over their original creators, the governments of the Member States. National courts remain national courts fulfilling the function assigned to them by the national legislator in the national legal order in some situations but are at other times Community courts in the service of the Community and then the national governments that created them are often those against which Community law is enforced. The granting of extended power has probably made national courts more receptive to the ECJ’s “invitation” to partake in the enforcement of Community law.

The private enforcement system driven by motivated, well-informed, and politically independent individuals has made up for many of the

368 See supra Part 2.3.2.
369 Craig, supra note 239, at 178.
370 See, e.g., Barnard & Sharpston, supra note 239, at 1113–14.
371 A complete presentation of the structure is quite complicated. In one way, the Community and its institutions are superior to the Member States. However, at the same time, the Community is ultimately limited by the Treaties and the willingness of the Member States to confer powers to it.
372 de Witte, supra note 244, at 207–08.
centralized enforcement system’s flaws.373 It is however not uncomplicated that the union shares forum with the states of which it comprises. The situation raises a range of considerations. For the sake of this study it is most important to note that although the private enforcement system relieves the Community’s judicial deficit, the private enforcement system, and by extension Community law, relies ultimately upon national courts applying national procedure.374 As we shall see in the next chapter, Community law is not always willing to accept national procedural law. In response to perceived inadequacies in national procedure, the European Court of Justice has created a number of legal mechanisms that govern what procedural rules national courts shall apply when enforcing Community rights. These mechanisms, herein collectively referred to as the European doctrine, are the topic of the next chapter.

373 Craig, supra note 211, at 455–57; Weiler, supra note 170, at 2420–21 (“The implications of this doctrine [of direct effect] were and are far reaching … Effectively, individuals in real cases and controversies … became the principal ‘guardians’ of the legal integrity of Community law within Europe.” Id. at 2413–14).

374 That the ECJ’s solution to the deficiencies in the centralized enforcement system created new problems the solution of which, in turn, created the European doctrine is discussed further infra Part 6.3.2.
3 The European Doctrine

3.1 Introduction

The central object of study herein is the European doctrine, the system of legal mechanisms in Community law governing what procedural rules national courts shall apply to Community rights.\textsuperscript{375} The European doctrine will be presented in this chapter which serves as a foundation for comparison with American law in subsequent chapters.\textsuperscript{376} The presentation of the European doctrine below follows a statement made by the European Court of Justice in \textit{Rewe}\textsuperscript{377} and \textit{Comet}\textsuperscript{378} and since often repeated more-or-less verbatim, a statement herein referred to as the \textit{Rewe/Comet-formula}.

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.\textsuperscript{379}

The quoted paragraph includes five elements: a general rule and four exceptions. These five elements are central to this study as they constitute the framework of the system of mechanisms governing what procedural rules national courts shall apply to Community rights.\textsuperscript{380} The five elements of the European doctrine are presented in more detail below but a short introduction is in order.

\textsuperscript{375} See also supra Part 1.1.
\textsuperscript{376} The comparison in chapters 6–9 builds on this presentation.
First, it follows from the quoted paragraph that the general rule is that “it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules …”. The presumption that it is the governments of the Member States that lay down the procedural rules applicable in their national courts, a notion referred to as the principle of national procedural autonomy, is also the starting point for this examination.\footnote{See infra Part 3.2.} 

Second, the Rewe/Comet-formula makes the Member States’ freedom to regulate procedural conditional upon “the absence of Community rules governing the matter …”. Thus, conversely, Community law takes precedence over any conflicting national procedural rules. Community law displacing national procedural law can come in the shape of general principles. General principles of Community law constitute an important exception from the presumption that national courts apply rules provided by the national government.\footnote{See infra Part 3.3.} 

Third, Community law also governs procedural matters through Community regulation. There are several examples of Community acts governing procedural matters, either in connection with regulation of substantive matters or independently of any specific substantive matter. By regulating such matters, the Community sets aside the national procedural rules the national court would otherwise apply.\footnote{See infra Part 3.4.} 

Fourth, it also follows from the quoted paragraph that procedural rules that national courts apply to actions under Community law “must not be less favourable than those governing similar domestic actions …”. This exception from the principle of national procedural autonomy, also known as the principle of equivalence, is the third exception discussed below.\footnote{See infra Part 3.5.} 

The fifth and final element of the Rewe/Comet-formula, commonly referred to as the principle of effectiveness, provides that national procedural rules may not “render virtually impossible or excessively difficult the exercise of rights conferred by Community law.” The procedural rules that a national government has instructed a national court to apply can thus be set aside when applying them would to an unacceptable extent detract from the effectiveness of Community law.\footnote{See infra Part 3.6.}
3.2 General Rule: National Procedural Autonomy

As is evident from the Rewe/Comet-formula, the starting point for analysis is that “it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions …”. The presumption is thus that it is the Member States that provide the procedural rules that national courts apply to substantive Community law. It has been suggested that there is an assumption underlying the Treaty that the national systems are sufficient for the enforcement of Community law. In the absence of procedural Community rules there are at any rate few alternatives to applying national procedural law.

The idea that national law as a general rule provides the procedural rules applicable when national courts adjudicate matters of Community law is in scholarly debate often referred to as the principle of national procedural autonomy. The term, which the Court of Justice has adopted in its recent case-law, is however somewhat misleading. First, different commentators include different things in this principle of national procedural autonomy. For example, one way the term “procedural autonomy” is sometimes used, but not in this study, is to refer to a court’s right to be free to apply its procedural rules without influence. This is an extension of the fundamental right to a fair hearing by an independent court expressed in Article 6 of the European Convention of Human

388 Mark Brealey & Mark Hoskins, Remedies in EC Law 99 (2nd ed. 1998).
390 Case C-201/02, The Queen, ex parte Wells v. Secretary of State for Transport, Local Government and the Regions, 2004 E.C.R. I–723, paras. 65, 67, 70 (the ECJ explicitly stated that if follows from the principle of procedural autonomy that is for the Member States to lay down “[t]he detailed procedural rules applicable …”).
391 Sacha Prechal, Community Law in National Courts: The Lessons from van Schijndel, 35 Common Mkt. L. Rev. 681, 682 & n.3 (1998). See, e.g. Brealey & Hoskins, supra note 388, at 99 (there is national procedural autonomy but it is subject to two overriding principles).
As Advocate General Cosmas explains, this principle of procedural autonomy is different than the one referred to in the Rewe/Comet-formula; one connected to the fundamental right to independent courts and therefore a freedom that the court, not the nation that created it, enjoys. Second, the term “principle of national procedural autonomy” may lead the reader to falsely think that Member States have exclusive legislative competence over all procedural matters. It has been clear for quite some time now that this is not the case. As will be demonstrated in this chapter, Community law contains many significant exceptions to the general rule of national procedural autonomy.

Considering these reservations against the terminology, it is perhaps more appropriate to speak of Member States having procedural competence. This has been suggested by several commentators. This too may be misleading, however. That the Member States are competent to act in the procedural area does not mean that the Member States have retained their sovereignty in the procedural area. On the contrary, the Community clearly also has some competence in this area, and national procedural law is, as we shall see below, subject to significant limitations by Community law.

The most

393 AG Cosmas’ opinion in van der Wal, 2000 E.C.R. I–1, para. 53.
394 C.N. Kakouris, Do the Member States Possess Judicial Procedural ‘Autonomy’?, 34 Common Mkt. L. Rev. 1389 (1997) (“there does seem to exist in academic writings an underlying answer based on the fundamental notion of the existence of a ‘procedural autonomy’, id. at 1395, and “the expression ‘judicial procedural autonomy’ does not accord with legal reality, because it suggests the idea of a competence reserved to the Member States signifying that they are empowered to oppose intervention by the Community in that field.” Id. at 1406).
395 See also Delicostopoulos, supra note 387, at 601–06 (there are many reasons for why a national procedural rule can be set aside).
396 van Gerven, supra note 388, at 502 (“It might therefore be better to abandon the term procedural autonomy and to speak of procedural competence of Member States.”); cf. Dougan, supra note 380, at 14–20 (referring to it as a “[p]resumption of national competence”, id. at 14, and a “rebuttable presumption of national autonomy”, id. at 65); Delicostopoulos, supra note 387, at 601–06 (referring to “national procedural competence”).
397 See supra Part 2.2.2, infra Part 3.4.
398 The object of examination herein brings attention to the blurriness of the traditional dichotomy between substantive law and procedural law. See further the discussion infra Part 9.5.2.
correct description is perhaps simply that Member States decide what procedural rules national courts shall apply, like before they joined the Community, as long as Community law does not require otherwise.

In conclusion, considering how well-established the term is and the absence of a better alternative it is still proper to use the term “principle of national procedural autonomy”. This term means, simply, that national courts as a general rule apply national procedural rules even when adjudicating matters based on Community law. One should however be aware that there are many significant exceptions to that “autonomy”.

3.3 Exception I: General Principles of Community Law

3.3.1 Introduction

One ground on which Community law can require national procedural law to be set aside – one exception to the principle of national procedural autonomy – is that national law violates a general principle of Community law.\(^4\) It follows from the Rewe/Comet-formula that the existence of conflicting Community rules is an exception from the presumption that the Member States may decide what procedural rules national courts apply to Community rights. Community rules are found in written acts, typically secondary acts of Community law.\(^5\) Community law also includes general principles that occupy a strong position among Community norms.\(^6\) The function of these general principles is to fill gaps in Community law and to review the actions of the Community and

\(^4\) In this chapter and hereinafter, “general principles” are distinguished from the principles of national procedural autonomy, equivalence, and effectiveness. The term “general principles” has different meanings in Community law and can be used broadly to refer “to signify fundamental unwritten principles of law which underlie the Community law edifice”. Takis Tridimas, The General Principles of EC Law 3 (2000). Under this definition, the principles of national procedural autonomy, equivalence, and effectiveness could be considered general principles. However, the European Court of Justice has through the Rewe/Comet-formula quoted above singled out these three principles and given them very specific meaning with regard to the issue of what procedural rules national courts shall apply to Community rights. It is valuable in light of this to separate them for the purpose of examination.

\(^5\) See infra Part 3.4.

of the Member States. 403 The general principles of Community law are sometimes extracted from the Treaties, 404 but more commonly derive from the laws of the Member States, either from the national legal orders in a narrow sense or from acts of international law to which the Member States are party. 405

Early ECJ case-law regarding general principles focused on the issue of whether the Community was bound by the “principles common to the Member States”, a question that was answered in the affirmative. 406 More recently, it has been established, essentially through deductive reasoning, that also the Member States are bound by these principles: as the general principles are part of Community law and Member States must comply with all elements of Community law, Member States are bound to comply with the general principles. 407

A number of constitutional principles, for example the principle of supremacy, the principle of direct effect, and the principle of loyalty, were

403 Xavier Groussot, Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum? 25–27 (2005). In addition to being the basis for review of national provisions, which is the function most relevant to this study, general principles can be the basis for review of Community measures, to determine the meaning of Community law, to fill in gaps in Community law, to give rise to liability, and to determine who has competence over a certain matter. KPE Lasok QC & Timothy Millett, Judicial Control in the EU: procedures and principles, at 313–14; Tridimas, supra note 400, at 19–23.

404 See, e.g. Article 6 of the Treaty on European Union, Part One of the EC Treaty and Title one of the Euratom Treaty, commented by Lasok & Millett, supra note 403, at 31; Henry G. Schermers & Denis F. Waelbroeck, Judicial Protection in the European Communities 30–31 (6th ed. 2001). Other Treaty articles makes explicit reference to the general principles found in the legal orders of the Member States, see, e.g. Article 288 of the EC Treaty.

405 Lasok & Millett, supra note 403, at 315–16; Tridimas, supra note 400, at 4–6; John A. Usher, General Principles of EC Law 12 (1998); Schermers & Waelbroeck, supra note 404, at 28–30.


407 Case C-260/89, Elliniki Radiophonia Tiléorassi (ERT) v. DEP et al., 1991 E.C.R. I–2925, paras. 41–45 (“Where such [national] rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures …”. Id. para. 42). But see Schermers & Waelbroeck, supra note 404, at 28–30 (distinguishes between the effects on national law of different kinds of general principles). This duty has only been limited when motivated by the need to protect national security or public safety and the measures taken were proportional to their purpose. Lasok & Millett, supra note 403, at 314, 322.
addressed in the previous chapter.\textsuperscript{408} Community law however also includes principles capable of controlling what procedural rules national courts apply to issues concerning Community law. Many of these general principles belong to a category of general principles commonly referred to as “fundamental rights”. Fundamental rights were recognized in Community law in the early 1970’s as the European Court of Justice proclaimed that Community law contains general principles of law that bind both Community and Member States; that these general principles contain fundamental rights; and that those fundamental rights derive from the constitutional traditions common to the Member States, a primary source being the Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{409} The ECJ has over the years recognized several fundamental rights.\textsuperscript{410} There are now also written traces in Community law of the fundamental rights, for example the Treaty on European Union contains references to fundamental rights.\textsuperscript{411} The Charter of Fundamental Rights of the European Union is a central document in this context.\textsuperscript{412} The Charter is largely a codification of case-law for the purpose of making it more visible to the individuals affected but also to give fundamental rights a stronger position and to function as a platform for future development in this field.\textsuperscript{413} The position of the Charter would have been (and may still be) strengthened as it was included in the pro-

\textsuperscript{408} See supra Parts 2.4.3–2.4.5. Tridimas, supra note 400, at 3; cf. Groussot, supra note 403, at 27–38.


\textsuperscript{411} See, e.g. Articles 6–7 of the Treaty on European Union.

\textsuperscript{412} 2000 O.J. (C 364) 1 (hereinafter “the Charter”).

posal for a Constitution for Europe. A recent decision by the ECJ also suggests that the Court attaches legal importance to the Charter even though the document is not per se binding on the Member States.

The relationship between general principles and fundamental rights is complex but a common position is that the protection of fundamental rights, rather than the fundamental rights per se, is a general principle of Community law. A formulation that the Court of Justice often uses is that “fundamental rights form an integral part of the general principles …”

Fundamental rights were initially used to strike down Community law but it later became clear that within its area of competence, Community law also requires the Member States to abide by the fundamental rights. Something that may confuse is how general principles and fundamental rights frequently overlap to form new legal concepts. For example, the principle of equality, embodied in Article 14 of the European Convention and protected in the Community legal order as a fundamental right, provides protection of equality in Community law, Community law however also protects equality as a general principle and the two concepts are not necessarily identical.

416 Arnull, supra note 402, at 1; Tridimas, supra note 400, at 4–6; cf. Lasok & Millett, supra note 403, at 318.
419 Cf. Tridimas, supra note 400, at 40–44. The situation is further confused as the somewhat similar principle of equivalence both here and in the case-law of ECJ refers to specifically formulated exception to the principle of national procedural autonomy. See infra Part 3.5.

105
3.3.2 Right of Access to a Judicial Process: Introduction

An important fundamental right of central importance in the European doctrine is each individual’s right to be heard by a fair and impartial court. Article 6 (1) of the European Convention on Human Rights states that every one is guaranteed “a fair and public hearing within a reasonable time by an independent and impartial tribunal” in cases concerning civil rights and criminal liability. The language of the European Conventions is largely mirrored in the Charter of Fundamental Rights of the European Union and in the Draft Constitution but then applies to all situations. As will be explained here below, the European Court of Justice has in its case-law recognized that it is a general principle of Community law that each person has a right to a day in court and that that right is supplemented by various requirements on the quality of the judicial process afforded. The terminology used to refer to this body of rights varies. References can be found in the literature to a right of judicial control, a right to a (fair) hearing, right to access to a court, a right to be heard, rules of natural justice, a right to a fair trial, and a right to defense. The difference in terminology is sometimes warranted as it shifts focus to specific aspects. A, in my mind, pedagogical way of systematizing the case-law is offered by Dougan who present an overarching right of access to a judicial process comprising both the most fundamental elements of a right to be heard and other, “corollary” or “flanking” rights. His presentation is advantageous as it follows the development in ECJ’s case-law to which we now turn our attention.

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420 Article 47.
421 Article II-107.
422 E.g. Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, paras. 18–19 (“It is for the Member States to ensure effective judicial control …”. Id. para. 19); BREALEY & HOSKINS, supra note 388, at 101.
423 E.g. ARNUL, supra note 402, e.g. at 4.
424 E.g. GROUSSOT, supra note 403, at 311–35.
425 E.g. LASKO & MILLET, supra note 403, at 322.
426 E.g. BREALEY & HOSKINS, supra note 388, at 101.
427 E.g. TRIDIMAS, supra note 400, at 244.
428 To illustrate the chaos revolving this issue, consider the question whether this right is “fundamental” or not. On one hand a right to fair trial follows to a large extent from Article 6 (1) of the Eur. Conv. on H.R., on the other the protection granted by Community law goes beyond what the convention requires. Compare, e.g. DOUGAN, supra note 380, at 4–14 with LASOK & MILLET, supra note 403, at 318–28.
429 GROUSSOT, supra note 403, at 318.
430 DOUGAN, supra note 380, at 12.
431 DOUGAN, supra note 380, at 4–20 (divides his presentation into the right of access to judicial process and “flanking protection”).
3.3.3 Central Element of the Right of Access to a Judicial Process: A Right to a Hearing

The European Court of Justice recognized early that Community law contains a general right to a hearing, initially with regard to disputes between the institutions of the Community and its employees.\(^{432}\) During the 1970’s it became clear that the right to a hearing extended to other cases, more specifically administrative proceedings.\(^{433}\) The real breakthrough, however, came in 1986 with the case of *Johnston*.\(^{434}\)

The central issue in *Johnston* was whether a Member State could deny individuals all possibilities for review of the compatibility of a national measure with Community law. Marguerite Johnston was a female police officer in Northern Ireland who, like her female colleagues, was not allowed to carry a firearm.\(^{435}\) Mrs. Johnston’s employment contract was not renewed because she did not carry a weapon.\(^{436}\) Although the main issue was whether Ms. Johnston had been discriminated against on account of her gender,\(^{437}\) the Court of Justice also had to consider the validity of a national evidentiary rule according to which a certificate from the Secretary of State constituted conclusive evidence that a discriminatory action was undertaken for valid reasons.\(^{438}\) The Court declared that the applicable Directive\(^{439}\), according to which the Member States are required to provide “such measures as needed to enable all persons … to pursue

\(^{432}\) Case 32/62, Alvis v. Council, 1963 E.C.R. 49, at 55 (“According to a generally accepted principle of administrative law in force in the Member States … the administrations of these states must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. This rule, which meets the requirements of sound justice and good administration, must be followed by Community institutions.”).


\(^{434}\) *Johnston*, 1986 E.C.R 1651.

\(^{435}\) The arguments for this policy was that carrying a firearm would make the female police officers more likely to be attacked and their weapons stolen, to maintain “the ideal of an unarmed police force”, and that armed “women officers would be less effective in certain areas for which women are better suited …”. *Johnston*, 1986 E.C.R. at 1654–65.

\(^{436}\) *Johnston*, 1986 E.C.R. at 1664.


their claims by judicial process’”, was an expression of a fundamental Community right that all individuals shall have “an effective remedy in a competent court.” The European Court of Justice then turned to the specific national rule in question and declared that it, a rule characterized by the Member States as an ordinary rule of evidence, in violation of that fundamental right removed all power of review from the national court and that national courts should refrain from applying it.

Many commentators interpret Johnston as establishing a right to or a requirement of judicial control. The term “judicial control” makes sense if viewed as a requirement that the judiciary can ensure that the Member State complies with Community law. Thus, the requirement of judicial control requires that the actions of the Member States can be subject to review by a court. Understood from an individual perspective, the principle requires that those who want to challenge national action or inaction on grounds of Community law shall have access to a forum to do so in. Schermers and Waelbroeck attaches the right to judicial control to the maxim *ubi jus, ibi remedium* which expresses that each right must be accompanied by a judicial mean for realizing the right.

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440 Art. 6.
442 *Johnston*, 1986 E.C.R 1651, paras. 19–21. Note that AG Darmon was willing to allow Member States to limit the right to judicial review for purposes of “public order” and “the survival of the State” but not so far as to “override the actual right to obtain a judicial determination.” AG Damon’s opinion, *id.*, paras. 3–4 (para. 4 quoted).
443 *Dougan*, supra note 380, at 5–6 (Article 6 (1) of the Eur. Conv. on H.R. is an expression of the same requirement of judicial control protected by Community law); *Usher*, supra note 405, at 86; *Schermers & Waelbroeck*, supra note 404, at 47; cf. *Tridimas*, supra note 400, at 209–210 (*Johnston* established a fundamental right to an effective legal remedy).
444 *Johnston*, 1986 E.C.R. 1651; *Heylens*, 1987 E.C.R. 4097, para. 14 (the requirement of “the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [free access to employment] reflects a general principle of Community law …); *Dougan*, supra note 380, at 5; *Schermers & Waelbroeck*, supra note 404, at 47.
445 *Schermers & Waelbroeck*, supra note 404, at 46.
446 *Ashby v. White et al.* (1703) 1 Sm LC (13th Edn) 253, 273, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it …”) (CJ Holt) quoted e.g. *Devinat v. Canada* (Immigration and Refugee Board) [2000] 2 F.C. 212; *Watkins v. Sec. of State for the Home Department* [2004] EWCA (Civ) 966, para. 29. *See also Reports of Cases determined by Sir John Holt*, 524– (“If a statute gives a right, the common law will give remedy to maintain it; and wherever there is injury, it imports a damage …”) accessed through HARPER’S HISTORICAL SERIES – SOURCES OF ENGLISH CONSTITUTIONAL HISTORY <http://www.constitution.org/sech/sech_124.txt>, 2005-05-25.
Several decisions by the Court of Justice has concerned whether Member States afford individuals an adequate opportunity to have the validity of a national measure or administrative decision reviewed. An illustrative example is Borelli which concerned whether a litigant had a right under Community law to submit a claim against the lawfulness of an administrative decision to a national court. The decision, an opinion formulated by a national authority regarding the payment of aid from a Community fund, was under national law considered a “preparatory measure” against which there was no review. The ECJ concluded that national courts are obligated to review the lawfulness of such a national measure as if it was a “definitive measure” and, if necessary, set aside national procedural rules to the contrary.\(^{447}\)

The right of access to a judicial process originally derives from the right to a fair trial contained in Article 6 (1) of the Human Rights Convention.\(^{448}\) There is still a close connection between, on one hand, the Community right and, on the other, the Convention and the case-law of the European Court of Human Rights.\(^{449}\) The Community version of the right does however go further than that under the European Convention in the respect that it applies to all who wants to exert a Community right.\(^{450}\)

### 3.3.4 Extended Protection of the Right of Access to a Judicial Process: Rights of the Defense

A formal opportunity for adjudication does not by itself constitute a fair hearing. To ensure access to a fair hearing, the formal right of access to a court must be supplemented by other, qualitative requirements. National rules that taken as a whole and under the factual and legal circumstances of a specific case effectively deny the litigant an “adequate opportunity to participate in the proceedings” will fail the requirement of a fair hear-


\(^{448}\) Schermers & Waelbroeck, supra note 404, at 46–47.


\(^{450}\) E.g. Krombach, 2000 E.C.R. I–1935, para. 42 (“the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed …”); Dougan, supra note 380, at 5; compare Article 6 (1) of the Eur. Conv. on H.R. (applies in criminal and civil rights cases) with Article 47 of the Charter, Article II–107 of the Draft Constitution (quoted supra Part 3.3.2, its application is not limited to certain cases).
As the European Court of Justice explained in *Krombach*, the Court has “expressly recognized the general principle of Community law that everyone is entitled to fair legal process ...”. The right of access to a judicial process includes, for example, that the hearing is “fair and public” and that the court is “independent and impartial”. Such qualitative requirements are often addressed separately from the basic requirement of judicial control. To ensure that everyone receives a fair judicial process Community law includes a number of so-called rights of the defense (*droits de la defense*).

First, the ECJ has made it clear that Community law requires that every person should have access to a court that is both independent and impartial (*nemo judex in causa sua*). In order to meet this requirement, courts and tribunals “must be free to apply their rules of procedure” and be “independent of the executive power in particular ...”. For example, the ECJ in one case reviewed a national system that provided that an administrative decision could be reviewed by a team of technical experts hired by the same government entity that made the initial decision. Such a review board, which also only could make recommendations, did not meet the Community law requirement of judicial review.

Second, an independent and impartial court is not by itself sufficient under Community law. Community law also requires that the parties have an *opportunity to be heard*. A central requirement of the judicial process is that the concerned individual has an adequate opportunity to be heard (*audi alteram partem*). It is a fundamental principle of Com-

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453 Article 47(1), (2) of the Charter; Article II–107(1), (2) of the Draft Constitution.
454 See *Dougan*, *supra* note 380, at 5–15; *Schermers & Waelbroeck*, *supra* note 404, at 50–64. Note that the authors differ somewhat as to which rights fall within the nucleus of the fundamental right to judicial control and what rights make out, as Dougan puts it, “flanking protection”.
455 See generally *Lasok & Millett*, *supra* note 403, at 322–26 (provides a catalogue of rights and examples of their application in case-law); see also *Groussot*, *supra* note 403, at 311–35 (referring to these as procedural due process principles); C.S. Kerse, *General Principles of Community Law: Procedural Guarantees – A Note*, in *General Principles of European Community Law* 205 (Ulf Bernitz & Joakim Nergelius eds., 2000).
457 *van der Wal*, 2000 E.C.R. I–1, paras. 14, 17, *citing* the CFI’s decision in the same case favourably.
459 *Groussot*, *supra* note 403, at 61; *Tridimas*, *supra* note 400, at 246 (notes that this idea is inspired by Common law concepts of natural justice and procedural due process).
Community law that all persons have a right to make their view known before any measure adversely affecting him or she is taken.\textsuperscript{460} Third, the right to be heard becomes empty if there is not a corollary right to information. By withholding or denying a person certain information, his or her access to a judicial process can become illusory. Community law therefore recognizes several rights to information.\textsuperscript{461} One right to information is that the individual shall be given the reasons for a decision. This is one of the truly “classical” procedural rights of Community law. In \textit{Heylens}, the Court of Justice explained that Community law requires national authorities to state the ground for their decisions. This is required to allow for “[e]ffective judicial review”, the right to appeal is secured with a right to sufficient information to determine if an appeal could be fruitful.\textsuperscript{462} Another right to information requires that the defendant is notified about the process and can take part of the material used against him or her.\textsuperscript{463} In addition, in the case of an investigation the responsible authority must inform the subject of the investigation of “the presumed facts which it intends to investigate.”\textsuperscript{464} Finally, parties have a right to be informed of the hearing in such time that they have an opportunity to adequately prepare.\textsuperscript{465}

Fourth, the right to a legal counsel is an essential element of a fair judicial process in most legal systems and is also protected by the general principles of Community law. In fact, Community law recognizes three distinguishable rights to legal representation. First, Community law recognizes a general right for litigants to be advised, defended, and represented by a qualified jurist.\textsuperscript{466} Second, the right to representation also includes a right to financial assistance to afford such legal counsel when

\textsuperscript{460} \textit{E.g.} Article 41(2) of the Charter; Article II–101(2) of the Draft Constitution; \textit{Transocean Marine Paint}, 1974 \textit{E.C.R.} 1063, para. 15; \textit{Hoffmann-La Roche}, 1979 \textit{E.C.R.} 225, paras. 9–11.

\textsuperscript{461} \textit{Groussot}, \textit{supra} note 403, at 61 n.246; \textit{Tridimas}, \textit{supra} note 400, at 246.

\textsuperscript{462} \textit{Heylens}, 1987 \textit{E.C.R.} 4097, para. 15; \textit{cf.} \textit{Rutili}, 1975 \textit{E.C.R.} 1219, paras. 33–39 (expressing the same thing although connecting it to the specific secondary Community law in question).

\textsuperscript{463} Case C-115/80, Demont v. Commission (No. 2), 1981 \textit{E.C.R.} 3147, paras. 7–13 (recognizing that both the litigant and the counsel must have opportunity to review the material underlying the claim); \textit{Schermers & Waelbroeck}, \textit{supra} note 404, at 57.

\textsuperscript{464} \textit{Hoechst III}, 1989 \textit{E.C.R.} 2859, para. 41.

\textsuperscript{465} Case C-443/03, Leffler v. Berlin Chemie AG, 2005 \textit{E.C.R.} I–9611, para. 52; \textit{Schermers & Waelbroeck}, \textit{supra} note 404, at 63.

\textsuperscript{466} Article 47 (2) of the Charter; \textit{Demont II}, 1981 \textit{E.C.R.} 3147, paras. 11–12 (the Court deemed that the provision was based upon “the fundamental requirement that respect for the right of the defence, including the right of the official concerned to be assisted by counsel …”); \textit{Hoechst III}, 1989 \textit{E.C.R.} 2859, para. 16; \textit{Krombach}, 2000 \textit{E.C.R.} I–1935, para. 39.
lack of resources would be an obstacle to the access to justice.\textsuperscript{467} A third, closely related right is that of professional privilege. The Court of Justice established in \textit{AM \& S} that attorney-client privilege is protected as a general principle of Community law when the counsel is independent from the client\textsuperscript{468} and the communication has been for the purpose of the client’s defense.\textsuperscript{469}

Fifth and finally, Community law also includes several rights of defense that apply in cases when the parties risk being affected by sanctions, foremost sanctions of a criminal nature. These include the principles of double jeopardy (\textit{ne res ibidem}),\textsuperscript{470} presumption of innocence,\textsuperscript{471} prohibition against retroactive criminal law (\textit{nulla poena sine lege}),\textsuperscript{472} retroactive application of more lenient penalties,\textsuperscript{473} and prohibition of disproportionate penalties\textsuperscript{474}. Another right of relevance in this context is the privilege against self-incrimination (\textit{nemo tenetur prodere seipsum}).\textsuperscript{475} An important decision regarding the right not to incriminate oneself is \textit{Orkem}.\textsuperscript{476} In that case, a company was under inquiry by the Commission for having engaged in concerted practice contrary to Article 82 of the EC Treaty. In

\textsuperscript{467} Article 47(3) of the Charter; Article II–107(3) of the Draft Constitution.
\textsuperscript{468} Thus, privilege does not extend to communications with so-called in-house counsel.
\textsuperscript{470} Article II–110 of the Draft Constitution.
\textsuperscript{471} See Green Paper on the Presumption of Innocence, COM(2006) 174 final; Schermers \& Waelbroeck, \textit{supra} note 404, at 50.
\textsuperscript{473} Cases C-387/02, 391/02 \& 403/02, Criminal Proceedings against Berlusconi et al., 2005 E.C.R. I–3565, paras. 66–68.
\textsuperscript{474} Article II–109(3) of the Draft Constitution.
\textsuperscript{475} It is a part of the Green Paper on the Presumption of Innocence, COM(2006) 174 final.
the course of that investigation, the Commission issued a decision against the company requiring it to provide certain information. The company challenged that decision arguing that it aimed to force the company to provide evidence against itself, something that in its opinion violated the rights of defense. The Court of Justice held that the Commission “may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove” as that would “undermine the rights of defence of the undertaking ….” Orkem has been interpreted by commentators as establishing a privilege against self-incrimination as a right of defense.

3.3.5 Principle of Equality

Another general principle of Community law that can have bearing on what procedural rules a national court can apply in cases involving Community law is the principle of equality. The abolition of discriminatory treatment is a fundamental interest of Community law that has been expressed in a number of Community acts. There are many provisions of Community law that seek to abolish discrimination between individuals. These prohibitions of discrimination should be understood as specific expression of a broader, general principle of equality that requires “that similar situations shall not be treated differently unless differentiation is objectively justified” and, conversely, that different situations

479 E.g. Schermers & Waelbroeck, supra note 404, at 62; Tridimas, supra note 400, at 247–49.
480 See, e.g. Articles 12–13 (provides general protection against discrimination on the ground of nationality), 39, 43, 49 (specifically with regard to the free movement of workers and services and the freedom of establishment), 141 (gender) of the EC Treaty.
482 Ruchdeschel, 1977 E.C.R. 1753, para. 7 (quoted); Case C-334/03, Commission v. Portugal, 2005 E.C.R. I–8911, para. 24 (“comparable situations should not be treated in a different manner unless such a distinction can be objectively justified.”).
are treated differently unless there is objective justification for treating them the same.\textsuperscript{483} Unequal treatment can be defended if called for by an objective justification and it is proportional. Financial or safety reasons have for example been found to justify unequal treatment.\textsuperscript{484}

The principle of equality has a strong position in the Charter of Fundamental Rights in which one of six sections deals exclusively with the matter.\textsuperscript{485} The principle of equality has broad application. It prohibits laws that apply equally but nevertheless favors one category over another.\textsuperscript{486} It also prohibits requirements that in practice are more easily met by some categories than others.\textsuperscript{487} Equality and non-discrimination lie at the very core of Community law and have had great impact, for example, with regard to the right to equal pay between men and women and the right to free movement of workers.

The principle of equality applies equally to substantive\textsuperscript{488} and procedural matters.\textsuperscript{489} For example, in \textit{Data Delecta} the ECJ considered the adequacy of a Swedish law requiring foreign nationals that wanted to bring a claim in Swedish courts to place a security as a guarantee for the payment of the opposing party’s cost for the judicial process.\textsuperscript{490} According to the Court of Justice, such a rule violated Community law’s requirement of “perfect equality of treatment” of nationals and nationals of other Member States.\textsuperscript{491} It follows from \textit{Data Delecta} and subsequent case-law\textsuperscript{492} that national procedural rules must meet the principle of

\textsuperscript{483} Case 106/83, Sermide SpA v. Cassa Conguaglio Zucchero et al., 1984 E.C.R. 4209, para. 28.
\textsuperscript{484} Brealey & Hoskins, \textit{supra} note 388, at 44–46.
\textsuperscript{485} Articles 20–35; also Articles II–80–86 of the Draft Constitution.
\textsuperscript{487} Case C-243/01, Criminal Proceedings against Gambelli et al., 2003 E.C.R. I–13031, paras. 70–71.
\textsuperscript{488} See for example the general prohibition against discriminatory treatment on the ground of nationality contained in Article 12 of the EC Treaty.
\textsuperscript{489} E.g. Case 186/87, Cowan v. Trésor Public, 1989 E.C.R. 195, para. 19 (criminal procedure); Case C-43/95, Data Delecta AB & Forsberg v. MSL Dynamics Ltd., 1996 E.C.R. I–4661, paras. 12–15 (civil procedure, the presumption of national procedural competence is subject to the principle of equal treatment/non-discrimination); Case C-29/95, Pastoors & Trans Cap GmbH v. Belgium, 1997 E.C.R. I–285 (criminal procedure). Some commentators make a distinction between substantive and formal equality, \textit{e.g.} Groussot, \textit{supra} note 403, at 249; Tridimas, \textit{supra} note 400, at 40.
\textsuperscript{490} \textit{Data Delecta}, 1996 E.C.R. I–4661, para. 4.
\textsuperscript{491} \textit{Data Delecta}, 1996 E.C.R. I–4661, para. 16.
\textsuperscript{492} E.g. Case C-323/95, Hayes & Hayes v. Kronenberger GmbH, 1997 E.C.R. I–1711 (a provision in the German “Zivilprozessordnung”); Case C-122/96, Saldanha & MTS
equality. The principle of equality thus prevents Member States from imposing different procedural requirements on citizens of other Member States than on nationals.

3.4 Exception II: Community Regulation

3.4.1 Introduction

As previously mentioned, it follows from the Rewe/Comet-formula that “the absence of Community rules governing the matter” is a requisite for Member States to be able to regulate procedural issues. It follows, conversely, from this statement that the Community can regulate procedural matters and that when it chooses to do so Community law takes precedence over conflicting national law. Thus, a second exception to the principle of national procedural autonomy is the existence of procedural Community law.

That Community law takes precedence over conflicting national law is hardly surprising. It may be more unexpected that the Community is competent to regulate procedural matters considering the discussion above regarding national procedural autonomy. However, as we shall see here below, there are several examples of Community measures that affect the procedural rules national courts apply when enforcing Community law. Community regulation of procedural matters can be divided into two categories: regulation of procedure in connection with regulation of substantive matters and regulation of procedural matters independently of any regulation of substantive matters.

3.4.2 Procedural Regulation Supporting Community Policies

There are several examples of the Community regulating procedural matters when this was considered necessary to realize one of the Community’s policies. The Community has acted on “an ad hoc basis” when controlling national procedure was considered necessary to realize a Community policy. In such cases, the Community bases its procedural legislative com-


493 ‘TRIDIMAS, supra note 400, at 85.
494 See supra Part 2.4.4.
495 See discussion supra Part 3.2.
496 DOUGAN, supra note 380, at 15.
petence on provision in the Treaty giving it power to act for the achievement of certain policies.

One example of this type of regulation is the so-called Burden of Proof Directive\(^{497}\) that was enacted to ensure that the principle of equal treatment of men and women, expressed for example in Article 141 of the EC Treaty, could be enforced. Article 4 of the Burden of Proof Directive supported the Community’s policy of abolishing discrimination on the ground of sex by requiring that “Member States shall take such measures as are necessary … to ensure that … it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.” As is clear from the quoted section, the Burden of Proof Directive dictates where national courts should initially place the burden of proof in cases where the principle of equal treatment is claimed to have been breached. Another example of Community regulation that strengthens the principle of equal treatment of men and women by making requirements of the national procedure is Directive 76/207.\(^{498}\) The Directive contained a general statement regarding the duty of the Member States to make a judicial process available\(^{499}\) which the European Court of Justice used to impose a number of requirements on national procedures.\(^{500}\)

Article 95 of the EC Treaty on the approximation of laws for the establishment and functioning of the internal market has been the foundation of several Community acts regulating various aspects of procedure in national courts. For example, Directives 89/665\(^{501}\) and 92/13\(^{502}\) regulated


\(^{498}\) Council Directive 76/207/EEC on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion and working conditions, 1976 O.J. (L 39) 40, art. 6 (“Member States shall introduce … such measures as are necessary to enable all persons … to pursue their claims by judicial process”).

\(^{499}\) Article 6 of Directive 76/207 provides that “Member States shall introduce … such measures as are necessary to enable all persons … to pursue their claims by judicial process”.


\(^{502}\) Council Directive 92/13/EEC coordinating the laws, regulations and administrative
the existence of a review procedure when contracts are awarded and the availability of remedies in such procedures. Another example is Directive 93/13 which regulate such issues as burden of proof and standing in cases concerning consumer contracts and Directive 99/44 which regulate period of limitations for claims by consumers against sellers. Specific time-limits within which claims must be brought were for example also presented in Directive 85/374 regarding product liability enacted on the legal basis of Article 94 of the EC Treaty and Directive 2004/35 on environmental damages that is based on Article 175 of the EC Treaty.

A provision similar to the one in the Burden of Proof Directive can be found in the so-called Modernization Regulation that provides how national authorities are to enforce Articles 81 and 82 of the EC Treaty. Article 2 of the Modernization Regulation allocates the burden of proof in proceedings before national courts to “the party or the authority alleging the infringement.” A final example is Directive 84/450 which set out quite extensive rules regarding where and how claims regarding misleading advertisement can be brought in the Member States, the composition of the adjudicating national authority, the form of its decisions, the availability of interim relief etc.

The examples given illustrate that the European Community is competent, capable, and at times willing to harmonize the regulation of procedural matters when this is deemed necessary to realize a Community policy.

provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, 1992 O.J. (L 76) 14, arts. 1, 2.
507 Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.
3.4.3 Independent Procedural Regulation

The Community does however also regulate procedural matters independently of regulation of substantive matters. Potentially important Community regulations are acts enacted for the achievement of an area of freedom, security and justice. As amended by the Treaty of Amsterdam, the EC Treaty entrusts the Council with the task of adopting measures “in the field of judicial cooperation in civil matters having cross-border implications.”509 Such measures can be of four types. The first type concerns actions for judicial cooperation in an administrative sense, more specifically the improvement and simplification of service of documents and taking of evidence between Member States.510 The second type aims to ensure that a decision rendered in one Member State will be recognized and enforced in all other Member States.511 Third, Community regulation may be enacted to harmonize the law on conflict of laws in the Member States.512 Finally, and for our purposes most interestingly, Article 65 (c) of the EC Treaty provides that Community measures shall be adopted for “eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.” The quoted section confers power to the Community to harmonize national procedure, albeit subject to certain limitations.

The European Council has been a driving force behind this area of freedom, security and justice. Even before the Treaty of Amsterdam had entered into force, the Cardiff European Council requested that the Council and the Commission draw up an action plan for the realization of the area. In what has become known as the Vienna Action Plan, those institutions emphasized primarily the importance that general Community principles, e.g. legal certainty and equal access to justice, are given full force and effect in national procedure,513 but they also entertained the idea that supplementary Community measures “in areas of transnational relevance and common concern (e.g. interpretation)” could become necessary.514 They therefore went on to suggest that a process for

509 Articles 61 (c) and 65 of the EC Treaty. The area of freedom, justice and security includes other things as well, most importantly cooperation on criminal matters and the improvement of the immigration process.
510 Article 65 (a) of the EC Treaty.
511 Article 65 (a) of the EC Treaty.
512 Article 65 (b) of the EC Treaty.
513 Council and Commission Action Plan on how to best implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom security and justice, 1999 O.J. (C 19) 1, paras. 16, 19.
514 Id. para. 19.
the identification of rules on civil procedure in urgent need of harmonization should be initiated and that it should be examined what other measures can be taken to “improve compatibility of civil procedures.”

The process really began with the Tampere European Council. There, the Member States agreed that harmonization and simplification of the different national systems, which was seen as a necessary element of “a genuine European area of justice”, is necessary if individuals are to be encouraged to exercise their Community rights. Among other things, the Tampere meeting called for secondary legislation on such matters as legal aid, recognition of decisions, the creation of multilingual forms, and simplified procedures on certain matters, e.g. consumer claims and uncontested claims. For the subject matter of this study, the most important result was perhaps that the Council and the Commission were invited to prepare procedural legislation on other matters for cases with cross-border implications as needed “to smooth judicial co-operation and to enhance access to law …”. At the end of 2004, the European Council replaced the Tampere programme, which had expired, with the Hague programme. Measures to be taken under the Hague programme include creating common “minimum procedural standards and ensuring high standards of quality of judicial systems”, especially emphasizing the respect of the general principles of Community law that pertains to procedure. The European Court of Justice has stated that the creation and development of this area of freedom, security and justice has given the Community a new dimension and testifies “to the will of the Member States to establish [measures in the field of judicial cooperation in civil matters] firmly in the Community legal order …”.

The Tampere and Hague programmes have resulted in a number Community measures. Several of those measures concern the recognition and enforcement of judgments issued in other Member States. Similarly, many measures concern judicial administrative cooperation between

515 Id. para. 41 (d).
517 Id. para. 38.
518 13/12/2004, 16054/04, JAI 559.
519 Com(2005) 184, part 2.3 (9).
Member States, the establishment of networks across the Union. Finally, access to justice and legal aid have been important issues. Beyond the regulation of these subjects, there are a few other Community measures that deserve closer attention. One example of a Community regulation of national procedure taken for the achievement of the area of freedom, security and justice is the Community's Regulation of Insolvency Proceedings. This act focuses largely on issues normally dealt with in international conventions in the area of private international law: choice of forum, choice of law, and recognition and enforcement of judgments.

Secondary Community acts in this area have become increasingly detailed. An example of procedural regulation of more comprehensive nature is the European Enforcement Order for Uncontested Claims which for example contains rather detailed rules on what the complaint must contain, how it shall be served on the defendant, and what information the defendant should be given in connection with the service. The proposed Regulation establishing a European Small Claims Procedure goes yet one step further and will, if adopted, regulate when and how proceedings regarding claims of € 2,000 or less are commenced, the exact contents of the complaint, the time-limits within which the plaintiff and the defendant shall submit their positions on the matter, to what extent the procedure shall be oral and written, the representation of the parties by council, the taking of evidence, the division of the costs of the proceedings between the parties etc. The European Small Claims Procedure is an example of the competence, ability, and willingness of the Commu-

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527 Id. arts. 13–17.

nity to regulate procedure in national courts extensively and with much
detail.\textsuperscript{529} In light of the broad language of Article 65 of the EC Treaty and
the prevailing trend, it is reasonable to expect similar Community legisla-
tion of other areas of national procedure as well.\textsuperscript{530}

Finally, one can mention the ECJ’s recent ruling in \textit{Leffler}. In that
case, the Court considered whether failure to provide a document that
was translated in accordance with the Regulation on service of judicial
documents\textsuperscript{531} could be remedied by sending a translation afterwards or
not.\textsuperscript{532} The Regulation was entirely silent on the question but the Court
of Justice concluded that it nevertheless included a consequence that was
the same in all Member States\textsuperscript{533} and that is that it is possible to remedy
the failure by later sending a proper translation.\textsuperscript{534} The judgment in \textit{Leff-
ler} suggests that Community regulation in the field of procedure can be
interpreted extensively, thereby in effect governing more and leaving less
to the Member States.

3.5 Exception III: Equivalence

3.5.1 Introduction

The Rewe/Comet-formula contains the locution that national procedural
rules used to adjudicate Community claims “must not be less favourable
than those governing similar domestic actions”.\textsuperscript{535} The European Court
of Justice has in subsequent decisions referred to this as the principle of
equivalence.\textsuperscript{536} From the perspective of national courts, the principle of
equivalence means that they shall disregard national procedural law when
it provides Community claims with a worse treatment than equivalent

\textsuperscript{529} See also Johan Lindholm, \textit{Harmonisering av processrätten – utvecklingslinjer}, in \textit{Svensk rätt i EU 151} (Örjan Edström ed., 2007).
\textsuperscript{530} An attempt to broadly harmonize national procedure was made in the middle of the
1990’s, \textit{Rapprochement du Droit Judiciaire de l’Union européenne – Approxima-
\textsuperscript{531} Regulation 1348/2000, \textit{supra} note 522.
\textsuperscript{532} \textit{Leffler}, 2005 E.C.R. I–9611, para. 31.
\textsuperscript{533} A conclusion drawn from the Member States intent to provide uniform and autono-
mous systems under the area of freedom, security and justice. \textit{Leffler}, 2005 E.C.R.
I–9611, para. 45.
(the national rules applied “cannot be less favourable than those relating to similar actions
of a domestic nature.”). The Rewe/Comet-formula was quoted in its entirety \textit{supra} Part
3.1.
\textsuperscript{536} E.g. Wells, 2004 E.C.R. I–723, para. 67; cf. Brealey & Hoskins, \textit{supra} note 388, at
109–11 (refers to it as requiring “equivalent protection”).
claims under national law.\textsuperscript{537} The principle of equivalence promotes internal consistency in the treatment of claims founded on Community law and “traditional” national law.\textsuperscript{538}

In this respect, the principle of equivalence functions much in the same way as the principle of equality.\textsuperscript{539} Whether a certain national procedural rule is acceptable according to the principles of equality and equivalence depends ultimately on national law. For example, a provision of national law laying down a short period of limitation for claims based on Community law is acceptable under the principle of equivalence as long as comparable national claims are subjected to the same period of limitation.\textsuperscript{540} Although the principle of equality and the principle of equivalence thus function in similar way, they are not identical. Whereas the principle of equality seeks to assure that all individuals are treated the same irrespectively of nationality, the principle of equivalence promotes that claims are treated the same regardless of whether they stem from Community law or national law.\textsuperscript{541}

3.5.2 Identifying Comparable National Claims

While the principle of equivalence has existed on paper since the presentation of the Rewe/Comet-formula in 1976, the ECJ has only applied it more extensively since the middle of the 1990’s.\textsuperscript{542} In those decisions,\textsuperscript{537} Brealey & Hoskins, supra note 388, at 99, 109–10.


\textsuperscript{539} See supra Part 3.3.5.

\textsuperscript{540} To determine the duty of the Member States by reference to what it does on the national level is not unique to the principles of equality and equivalence. A declaration on the implementation of Community law was attached to Treaty on European Union. Rather than attaching the duty of the Member States to implement Community law to a more objective standard, the declaration holds that “the measures taken … should result in Community law being applied with the same effectiveness and rigour as in the application of their national law.”

\textsuperscript{541} Some commentators mix these two principles into one, larger principle of non-discrimination. Brealey & Hoskins, supra note 388, at 109 (presents protection against discrimination of both claims and individuals under the common heading of “equivalent protection”); see also Schermers & Waelbroeck, supra note 404, at 87–97, 200–01 (recognizes an independent general principles of equality but then uses cases where national law treated individuals differently depending upon their nationality as examples of the application of the principle of equivalence). While they are free to include what they want in the principle of equivalence I believe that the frequently repeated locution in the Rewe/Comet-formula, now recognized by the ECJ as the “principle of equivalence”, is something different than the principle of equality and that it is beneficial to keep the two separated.

\textsuperscript{542} Paul Craig & Gráinne De Búrca, EU Law 253 (3rd ed. 2003); cf. Dougan, supra note 380, at 24.
which will now be examined, the Court of Justice has elaborated on how national courts are to apply the principle of equivalence. One thing the ECJ has established is that the principle of equivalence does not require that claims under Community law are given the best treatment possible under national law. In *Edis*, the Court of Justice stated that the Member States are not required “to extend its most favourable rules” to Community law as long as the national rule “applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law …”.  

The principle of equivalence thus do not hinder Member States from laying down separate procedural rules governing different claims as long as the same rules apply to national claims and Community claims of a comparable nature. It follows from this that the first step in applying the principle of equivalence is to identify national claims that are sufficiently similar to the Community claim in question.

A practical problem in connection herewith is the ability of the European Court of Justice to identify claims under national laws that are comparable to those under Community law. The ECJ has made it clear that it is “in principle” for Member State courts to determine whether a national provision violates the principle of equivalence or not, albeit with some guidance from the Court. The Court of Justice has however taken it upon itself to formulate general rules that can guide the national courts in their search for comparable national claims.

Whether a claim under national law is sufficiently similar to a claim under Community law for the purposes of the principle of equivalence is to be determined with regard to two factors: the objective and “essential

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546 Case C-261/95, Palmisiani v. Istuto Nazionale della Prevenienza Sociale (INPS), 1997 E.C.R. I–4025, para. 33; *Levez*, 1998 E.C.R. I–7835, paras. 39, 43 (“the national court … alone has direct knowledge of the procedural rules governing [such] actions …” Para. 43); *Steffensen*, 2003 E.C.R. I–3735, para. 65 (although nothing indicated that national law violated the principle of equivalence, “the national court must consider that point in the light of all the factual and legal evidence available to it in order to guarantee observance of that principle.”).
characteristics” of the two laws. What this means in an individual case is sometimes difficult to determine and because the ECJ has left much of the finding of comparable national claims to the national courts, the Court's case-law offers limited guidance on how this search is to be performed. The only type of Community claim for which the ECJ has tried to define what constitutes a comparable national claim is claims for repayment of unlawfully levied fees. In the aforementioned Edis, a Community claim for repayment of a registration fee levied contrary to Community law was comparable to claims under national law for repayment of indirect taxes. Similarly, in Prisco, the Court of Justice concluded that repayment of taxes that are to be repaid because they conflict with Community law is to be carried out under the same conditions as taxes are otherwise repaid.

The case-law of the European Court of Justice also contains two other guidelines for the application of the principle of equivalence that have often been repeated in recent case-law. First, an act of national law that is founded on essentially the same Community right cannot serve as the basis for comparison. The comparable national law must be “pure” national law. Second, if the national court is incapable of finding a comparable national claim, national law is deemed to meet the requirements of the principle of equivalence. This constitutes a significant limitation on the frequency by which national procedural rules will be found to have violated the principle of equivalence.


548 This issue has also been the object of much discussion with regard to the fourth exception to the principle of national procedural autonomy, effectiveness. See further infra Part 3.6.3.


3.5.3 Determining Equivalence

Assuming that a national claim comparable to the claim under Community law can be identified, the second step in applying the principle of equivalence is to compare the treatment that claims under Community law receive in national courts compared to the treatment given to the comparable claims under national law. In this regard, it is important to remember that the principle of equivalence does not prohibit Member States from treating comparable national and Community claims differently. Rather, the test is “whether a procedural rule of national law [governing Community actions] is less favourable than those governing similar domestic actions …”.

The term “less favourable” begs the question of to whom it is that the applicable national procedural law may not be less favorable. The Rewe/Comet-formula suggests that it is the Community action as such that should not be treated unfavorably. If this is a correct interpretation, it is natural to ask, next, how one determines what is favorable to a claim. This question does not have to be answered if there are no comparable national claims or if the same procedural rules apply to both the Community claim and all comparable national claims. It must however be addressed if different procedural rules apply to comparable national and Community claims. Is the position of Community law simply that national procedural rules are “favorable” if their application leads to the successful adjudication of a claim based on Community law and that national procedural rules are conversely “unfavorable” if their application leads to a claim under Community law being defeated? If in this manner focusing on the outcome of litigation is the essence of the requirement that the principle of equivalence makes of national procedural law, which at first sight may appear natural, American experiences suggest that it should be reconsidered.

The ECJ’s decisions in Levez and Preston clarified somewhat how to determine which of the treatments that two claims receive is more favorable. It follows from these decisions that the national court shall “take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts …”. According to the ECJ, it follows from this that the national court shall make the comparison of the actions

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554 See further infra Part 9.5.3.
555 Levez, 1998 E.C.R. I–7835, para. 44, citing van Schijndel; Preston, 2000 E.C.R. I–3201, para. 61, citing Levez. This reasoning is similar to that used in the contextual approach to the principle of effectiveness, see further infra Part 3.6.4.
generally, objectively, and in the abstract, without regard to their impact in the specific case, “taking into account the role played by those rules in the procedure as a whole ….”

It also follows from Levez and Preston that the complexity, cost, and time of litigation is relevant when applying the principle of equivalence. These factors should be examined from the perspective of the claimant, considering if it would be easier, cheaper, or faster if he or she had brought the comparable national claim. Finally, it is interesting to note that the Court of Justice found in Weber’s Wine World that national law violated the principle of equivalence when it made the repayment of an unlawfully levied tax to a person conditional upon him or her proving that the tax had not been passed on but only when it was the ECJ that had declared it unlawful, not when a national court had done so.

3.6 Exception IV: Effectiveness

3.6.1 Introduction

That Community law should be “effective” is a reoccurring theme in Community law. The European Court of Justice stressed the uniform and effective application of Community law in such seminal cases as Internationale Handelsgesellschaft and Simmenthal. Of central important to the effectiveness of Community law is that there are sufficient means for its enforcement. Indeed, “effectiveness” of Community law is for practical purposes often synonymous with the “effective enforcement” of Community law. The effectiveness of the central enforcement system is, as previously discussed, limited. As also discussed, national courts enforcing Community rights can and should be viewed as a response to limitations of the central enforcement system, as a mean to ensure the effective enforcement of Community law. Considering the importance that the ECJ has attached to the effectiveness of Community law generally and to the effective enforcement of Community law more specifically, it is hardly surprising that national procedural autonomy can be limited for the

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559 Internationale Handelsgesellschaft, 1970 E.C.R. 4537, para. 3.
561 See supra Part 2.3.3.
562 See supra Parts 2.3–2.4.
interest of promoting the effectiveness of Community law.\footnote{Cf. Dougan, supra note 380, at 26–52 (discusses different manifestations of the notion of “effectiveness” in the ECJ’s case-law).} The interest of ensuring the effectiveness of Community law is in the Rewe/Comet-formula manifested in a locution that the Court of Justice has referred to as the \textit{principle of effectiveness}: \footnote{See, e.g. Levez, 1998 E.C.R. 1–7835, para. 18; C-168/05, Claro v. Centro Móvil Milenium SL, 2006, not yet published, para. 24.} “[national procedural] rules must not … render virtually impossible or excessively difficult the exercise of rights conferred by Community law.” \footnote{van Schijndel, 1995 E.C.R. 1–4705, para. 17.}

It follows from the quoted section of the Rewe/Comet-formula that national courts shall not apply national procedural rules to claims under Community law when they to an unacceptable extent impair the effectiveness of Community law. But what does that mean practically for what procedural rules national courts shall apply to Community rights? How does one measure to what extent a national procedural rule impairs the effectiveness of Community law and how does one distinguish between acceptable and unacceptable “impairment”? What the principle of effectiveness requires of national procedural law according to the case-law of the European Court of Justice is the topic of this section.

The presentation of the ECJ’s case-law is divided in three parts as the Court addresses the question of whether national procedural rules adequately contribute to the effectiveness of Community law using three at least partially distinguishable lines of reasoning. The first line of reasoning provides that any national rule that deters from the full effectiveness of Community law must be set aside. This line of reasoning, which is the most extensive of the three in its requirements of national law, is herein referred to as the \textit{full effectiveness-approach}. In many decisions, the ECJ has followed more closely the wording used in \textit{Rewe} and \textit{Comet} requiring national courts to not apply a national procedural rule when doing so would make the exercise of a Community right excessively difficult.\footnote{As will be explained \textit{infra} Part 3.6.3, the European Court of Justice uses a number different locutions in its description of the principle of effectiveness and the requirement “excessively difficult” can be understood as the smallest, common denominator of the different locutions.} This is below referred to as the \textit{excessively difficult-approach}. The third line of reasoning used by the ECJ suggests that determining whether a national procedural rule to an unacceptable extent impairs the effectiveness of Community law must be made taking into consideration of a wide variety of factors. On its face, this third line of reasoning – herein referred to as the \textit{contextual approach} – appears to be a clarification and develop-
ment of the excessively difficult-approach. However, since the establish-
ment of the contextual approach, the Court has only sometimes referred
to it and even more seldom applied it in the same way as in the cases
where it was introduced, leaving it uncertain what impact the introduc-
tion of the contextual approach has on the question of what procedural
rules national courts shall apply to Community claims.567

3.6.2 The Full Effectiveness-Approach

The Court of Justice sometimes uses the term “full effectiveness” to de-
scribe what Community law requires of the national procedural rules that
national courts apply when adjudicating claims based on Community law.
In the seminal case on this issue, Simmenthal568, the main issue was wheth-
er a low-tier national court adjudicating a matter under Community law
can by itself set aside a provision of national law being contrary to Com-
munity law569 or whether the national court should defer that task to the
national constitutional court as mandated by national law. In its reply, the
ECJ declared that national courts can and must set aside national law that
is contrary to Community law. According to the Court, the principle of
supremacy requires Community law to prevail over national law as any
other alternative solution would impair “the effectiveness of obligations
undertaken unconditionally and irrevocably” by the Member States. Since
national courts are under a duty to give full effect to directly effective
provisions of Community law it follows that a national court must apply
Community law in its entirety and protect rights that Community law
confers upon individuals.570 According to the Simmenthal Court, this duty
extends to not applying national provisions that conflict with Commu-
nity law: national courts are under a duty to set aside any national provi-
sion that “might prevent Community rules from having full force and
effect” and any rule that prevents the national court from doing “every-
thing necessary” is incompatible with Community law.571

567 See further infra Part 3.6.4.
569 The ECJ had previously declared that national law was in fact contrary to Commu-
nity law.
571 Simmenthal, 1978 E.C.R. 629, paras. 21–22. According to the Court of Justice, this
is supported by the right and duty of national courts and tribunals to request a prelimi-
nary ruling: the effectiveness of the institution of preliminary rulings would be impaired
if national courts were prevented from applying a Community rule and that would be the
result if a national court was required to apply a contrary domestic provision. Simmen-

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The gist of the *Simmenthal* judgment is that Member States may not enact legislation that impairs the effectiveness of Community law and that if they nevertheless enact such legislation their courts should disregard it. The European Court of Justice would however not explicitly rely on that decision for twelve years until a similar line of reasoning was presented in *Factortame*\(^{572}\), an illustrative example of a situation where the effectiveness of Community law required the modification of national procedural law.\(^{573}\)

The *Factortame*-series of cases in the ECJ\(^{574}\) concerned the right of a Spanish owned corporation to fish in British waters. *Factortame*, the first case in the series, concerned the right of the corporation to continue its activities while awaiting the Court of Justice’s ruling on the main issue.\(^{575}\) According to English law, an English court could not grant interim relief against the government and the European Court of Justice was asked to decide whether English courts nevertheless had the power to grant such interim relief when applying Community law. Relying on its decision in *Simmenthal*, the Court of Justice began its answer by reaffirming that national courts are under a duty to protect individuals that seek to realize their Community rights and that provisions of national law that hinder national courts from doing so are incompatible with Community law.\(^{576}\) The Court of Justice then added that if the full effectiveness of Community law requires a national court to grant interim relief, it also requires the national court to set aside any national rule that precludes it from doing so.\(^{577}\) Finally, the Court noted that the effectiveness of preliminary rulings would be significantly impaired if national law could preclude national courts from granting interim relief while waiting for the Court’s answer and that Article 234 of the EC Treaty thus supported the Court’s


\(^{573}\) Note that the *Factortame* Court cited the *Simmenthal* judgment twice. The ruling in *Simmenthal* reflected a willingness of the ECJ to render national procedural rules inapplicable to a much greater extent than other cases from that time-period suggests, but until *San Giorgio* the ruling in *Simmenthal* had been considered an “aberration”. Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 Am. J. Comp. L. 295, 330 (1994).


conclusion.\textsuperscript{578} The Court of Justice referred to the situation in \textit{Factortame} as one where “a rule of national law” was an obstacle that should be disposed.\textsuperscript{579} It was presented as if national law lacked remedies and that their absence endangered the full effectiveness of the substantive Community law that the national court was obligated to enforce.\textsuperscript{580}

For some time, \textit{Simmenthal} and \textit{Factortame} appeared to be two isolated cases, both concerning the duty of national courts to not apply national law in situations when doing so would detract from the full effectiveness of Community law. It appeared as if the effects of the interest of preserving the full effectiveness of Community law was limited to the specific matters of setting aside national law contrary to Community law and granting interim relief. Several recent decisions citing \textit{Simmenthal} and \textit{Factortame} and relying on the need to uphold the full effectiveness of Community law does however suggest that the full effectiveness-approach is to be applied more extensively.

In a number of recent decisions, the European Court of Justice uses the argument that national courts must ensure the full effectiveness of Community law when discussing whether remedies available under national law are adequate for the purpose of enforcing Community law. In \textit{Courage}\textsuperscript{581}, a contract had been found to be unlawful because if violated Community competition law. One of the parties to the contract argued that he was entitled to compensation but national law provided that a party to an unlawful contract is not entitled to compensation. When the case reached the European Court of Justice it reminded the national court that it is under a duty to ensure that Community law “take full effect and must protect the rights which they confer on individuals …”.\textsuperscript{582} The ECJ then went on to conclude that the lack of compensation under national law endangered the full effectiveness of Community competition law and that “[t]here should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.”\textsuperscript{583} \textit{Courage} was followed by other decisions discussing

\begin{itemize}
  \item \textit{Factortame}, 1990 E.C.R. I–2466, para. 22.
  \item \textit{Factortame}, 1990 E.C.R. I–2466, para. 23.
  \item It can be discussed whether this description is completely accurate. The difference between Community law removing a national law not granting the national court the right to give interim relief and Community law granting the national court the right to give interim relief is marginal.
  \item \textit{Courage}, 2001 E.C.R. I–6297, paras. 26–28. It then proceeded to considering if the national law could nevertheless be upheld using the third standard of effectiveness, discussed immediately below. \textit{Id.}, paras. 29–31.
\end{itemize}
what remedies national law must provide to ensure the full effectiveness of Community law. The ECJ stated in Köbler that the full effectiveness of Community rules giving rise to rights for individuals requires that individuals have a possibility of obtaining reparation in national courts for damages suffered when their rights are violated.\footnote{Case C-224/01, Köbler v. Austria, 2003 E.C.R. I–10239, paras. 33–36. It should be noted, however, that Köbler concerned state liability.} Similarly, in Manfredi, the Court held that the full effectiveness of Article 81 EC, which national courts must ensure, “would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”\footnote{Cases C-295-298/04, Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al., 2006, not yet published, paras. 89–91, \textit{citing} Courage.}

These decisions all concerned the issues of damages and compensations. The Court of Justice has however also used the full effectiveness line of reasoning in other contexts. In Pafitis\footnote{Case C-441/93, Panagis Pafitis et al. v. Trapeza Kentrikis Ellados A.E. et al., 1996 E.C.R. I–1347.} the European Court of Justice was faced with a rule under Greek law that allowed Greek courts to deny individuals their Community rights when doing so “exceeds the bounds of good faith or morality or the economic or social purpose of that right”. In its response, the ECJ reminded the national court that it could not apply that rule if it “detract[s] from the full effect and uniform application of Community law in the Member States.”\footnote{Pafitis, 1996 E.C.R. I–1347, paras. 67–68.} Similarly, the ECJ concluded in Muñoz that the full effectiveness of a Community Regulation required national law to allow a company to bring a civil tort claim in a national court against its competitor for the latter having marketed its goods under another classification than the one provided by a Community Regulation even though national law does not allow them to bring such a claim.\footnote{Case C-253/00, Antonio Muñoz y Cia SA & Superior Fructicola SA v. Frumar Ltd. & Redbridge Produce Marketing Ltd., 2002 E.C.R. I–7289, paras. 27–30, \textit{citing} Simmenthal, Factortame, Courage.} Finally, in Leffler\footnote{2005 E.C.R. I–9611.}, a writ had been served in Germany but it was not written in the official language or a language which the addressee understood and under such conditions the addressee may refuse service according to the Regulation of Service of Documents\footnote{Council Regulation 1348/2000/EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 2000 O.J. (L 160) 37, art. 8.}. The Regulation was however silent regarding the consequences of a refusal to accept. On this point the Court of Justice, restating the Rewe/Comet-formula, explained that in the absence of Community law it is in prin-
ciple for the Member States to lay down detailed procedural rules subject to the principle of equivalence of equivalence and effectiveness.\(^{591}\) The Court then continued, stating that the principle of effectiveness requires “the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d’
\(^{\text{etre}}\) and objective of the Regulation”\(^{592}\) and that “[i]t follows that” a national court shall “ensure the full effectiveness of Community law, a task which may lead it to refrain from applying … a national rule preventing that …”.\(^{593}\) The judgment in *Leffler* can be interpreted to provide that national courts should disapply national procedural rules when doing so is necessary to ensure the full effectiveness of Community law. This appears to be how the Court of First Instance has interpreted *Leffler*. In *Hassan* and *Ayadi*, the Court of First Instance cited the quoted portion of *Leffler* in support for the conclusion that the duty to ensure the full effectiveness of Community can require a national court to review a decision even if doing so is not supported by national law.\(^{594}\)

In conclusion, the European Court of Justice has since the late 1970’s argued that national courts are under a duty to ensure the full effectiveness of Community law, if necessary by applying other rules than those provided by the national government. Recent case-law suggests that the full effectiveness-approach may have wider application than previously anticipated but exactly to what extent the interest of the full effectiveness of Community law affects what procedural rules national courts shall apply to claims under Community law is uncertain. Does “full effectiveness” really mean “full effectiveness” and how then can that be reconciled with, on one hand, the long line of cases providing that only national rules that make the exercise of Community rights excessively difficult must be set aside\(^{595}\) and, on the other, recent case-law providing that the effectiveness of Community law when motivated by “basic principles of the domestic judicial system”?\(^{596}\) It remains to be seen how far the ECJ will extend the full effectiveness line of reasoning.


\(^{593}\) *Leffler*, 2005 E.C.R. I–9611, para. 51, citing *Simmenthal, Factortame, Courage, Muñoz*. The ECJ also added that an alternative way for a national court to fulfil this duty by interpreting a national rule differently.


\(^{595}\) *See infra* Part 3.6.3.

\(^{596}\) *See infra* Part 3.6.4.
3.6.3 The Excessively Difficult-Approach

Introduction: The Principle of Effectiveness Introduced

The line of reasoning that national courts should not apply national law to ensure the full effectiveness of Community law has in the case-law of the ECJ been separated from the line of reasoning that national courts should not apply national procedural law when it would make the exercise of Community rights “virtually impossible or excessively difficult”. In what situations, how, and to what effect the European Court of Justice has applied this requirement in its case-law will be presented below.

A brief reflection on the terminology used by the ECJ in these decisions should however be made initially. The Court of Justice phrases what Community law requires of national procedural law differently from case to case. “Virtually impossible or excessively difficult” is the locution most commonly used by the ECJ to describe the principle of effectiveness but the Court also uses other locutions, including “virtually impossible”, “impossible in practice”, “impossible or excessively difficult in practice”, and “practically impossible or excessively difficult”. Although it at first seems counter-intuitive, the Court of Justice’s case-law suggests that the same thing is meant by these locutions as the Court uses them seemingly interchangeably. Also, it can be questioned whether it is necessary to forbid national procedural law from making the exercise of Community rights both virtual impossibility and excessive difficulty. It would appear, in the ordinary use of the terms, as if “virtually impossible” includes “excessively difficult”. Does not all things that make an act virtually impossible also make the performance of the act excessively difficult? It would have sufficed for the ECJ to state only that national law must not make the exercise of Community rights “excessively difficult”. Such an interpretation would however make the wording redundant which caution against making it. Perhaps the Court wished to clarify the principle of effectiveness by adding the “excessively difficult” element but found it

unsuitable to remove the early established “impossibility” elements as that could have been interpreted as the Court changing the requirement.\textsuperscript{602} It was evident from the decisions of \textit{Rewe} and \textit{Comet} that Community law will not accept national procedural rules that make the exercise of Community rights “impossible in practice”.\textsuperscript{603} In those cases, which concerned national rules prescribing time-limits within which decisions by national authorities must be challenged, the national rules in question were however found to comply with the requirements of Community law. It was concluded that laying down reasonable time-limits was justified by the principle of legal certainty and did not violate the principle of effectiveness.\textsuperscript{604}

In the years following \textit{Rewe} and \textit{Comet}, the European Court of Justice discussed the principle of effectiveness primarily in connection with the issue of under what conditions Member States were under a duty to repay fees levied contrary to Community law and, conversely, in which situations the Member States were allowed to keep the fees, primarily on the ground that repayment would lead to unjust enrichment. Much like the Court of Justice had concluded in \textit{Rewe} and \textit{Comet} that reasonable time-limits limiting the effectiveness of Community law could be acceptable as they were warranted by the need to uphold legal certainty, the Court later declared in \textit{Denkavit}, \textit{Express Dairy Foods}, \textit{Ariete}, and \textit{Mireco} that national law may allow national courts to deny repayment of such unlawfully levied fees or part thereof in the interest of preventing unjust enrichment.\textsuperscript{605} Repayment was also the issue in \textit{Hans Just}\textsuperscript{606} where the Court determined that a Danish law prescribing different import duties for different kinds of spirits was contrary to Community law\textsuperscript{607} and then turned to the issue of whether the plaintiff, a Danish company engaged in pro-


duction and import of spirits, was entitled to repayment of previously levied sales taxes.\textsuperscript{608} According to Danish law, a Danish court could refuse to repay an unlawfully levied tax to avoid unjust enrichment when the cost could “be presumed to have been passed on to the consumer”. Moreover, Danish law contained a presumption that the cost had indeed been passed on and placed the burden on the claimant to prove the contrary.\textsuperscript{609} The plaintiff in \textit{Hans Just} argued that the Danish law made the exercise of Community rights so difficult that it violated the principle of effectiveness.\textsuperscript{610} In its judgment, the ECJ concluded that Community law allows the application of a national rule that results in a Member State not repaying unlawfully collected taxes when it is motivated by the need to avoid unjust enrichment.\textsuperscript{611} \textit{Hans Just} and the other decisions mentioned appeared to allow Member States to regulate the issue of burden of proof in matters regarding the repayment of unlawfully levied fees and taxes as long as it is done in the interest of preventing unjust enrichment.\textsuperscript{612}

\textbf{A More Stringent Application}

The ECJ changed its position distinctly with the decision in \textit{San Giorgio} and demonstrated that Community law does not always accept that national courts apply a national procedural rule to claims under Community law even if the rule can be motivated by the interest of preventing unjust enrichment.\textsuperscript{613} \textit{San Giorgio} is the first case where the European Court of Justice explicitly found that a national procedural rule violated the principle of effectiveness. Like cases previously discussed, \textit{San Giorgio} concerned under what conditions a Member State must repay fees levied contrary to Community law. Italy had enacted a rule providing that those who sought repayment of unduly levied import duties had to prove that the fee had not been passed on to the consumer through presentation of documentary evidence and that the fee was presumed to have been passed


\textsuperscript{610} \textit{Hans Just}, 1980 E.C.R. 501, at 509 (“… a claim for recovery has little chance of success if the charge which has been wrongfully levied may be presumed to have been passed on to the consumer.”); see also AG Reichel’s opinion, \textit{id.} at 529.


\textsuperscript{612} Dubinsky, \textit{supra} note 573, at 327. The author also argues that the judgment in \textit{Hans Just} goes beyond “implement[ation of] traditional procedural objectives” and “enables national authorities to modify the scope of the right itself.” \textit{id.} at 328.

\textsuperscript{613} \textit{San Giorgio}, 1983 E.C.R. 3595.
on to the consumer in the absence of such proof. The European Court of Justice maintained its position from earlier case-law that Member States may withhold repayment of unlawful charges where it would lead to unjust enrichment but would still not accept the national rule in question. The ECJ found that the Italian evidentiary rule rendered the exercise of the substantive Community right “virtually impossible or excessively difficult” and that it was therefore in violation of Community law. If a national court finds that a fee was collected in violation of Community law, the ECJ continued, it “must be free to decide whether or not the burden of the charges has been passed on …”. It has been suggested that the reason for the outcome in San Giorgio was that Italy was viewed as purposefully using its influence over the procedural rules that its national courts applied to limit its obligations under Community law. Perhaps that can explain the difference in outcome in Hans Just and San Giorgio who stand on very similar facts. Regardless, the decision of San Giorgio replaced that of Hans Just as it was upheld in Bianco where the Court affirmed that “a member state is not entitled to adopt provisions which make the repayment of charges levied contrary to community law conditional upon the production of proof that those charges have not been passed on to the purchasers of the products that were subject to the charges and to place the burden of adducing such negative proof entirely on the natural or legal persons claiming repayment.”

Like many earlier cases, Barra concerned the repayment of fees but unlike for example San Giorgio and Bianco, Barra concerned time-limits set in national law within which an action for the recovery of the fee must be initiated, much like in Rewe and Comet. Barra concerned a French national that contrary to Community law had paid fees to attend a Belgian college, fees that Belgian nationals were not required to pay. Barra was subsequently precluded from recovering the fees because of a Belgian act ordering its courts “in no event” to reimburse them unless the applicant had filed a claim for repayment prior to a certain day. The ECJ declared that the national time-limit was an example of rules that “de-

615 San Giorgio, 1983 E.C.R. 3595, paras. 13–14. That a similar presumption had passed review in Hans Just did not appear to enter into consideration.
616 Dubinsky, supra note 573, at 329.
618 The ECJ had previously determined that the fee constituted unlawful discrimination. Case 293/83, Gravier v. City of Liége, 1985 E.C.R. 593.
prive individuals … of the right to obtain repayment of amounts unduly paid …”, that make recovery impossible, and that violate the principle of effectiveness.\textsuperscript{620} \textit{Barra} was followed by \textit{Deville} where the Court of Justice regarding a national time-limit on the recovery of taxes levied contrary to Community law stated similarly that it follows from the principle of effectiveness that “a national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation.”\textsuperscript{621} However, the Court only the year after ruled somewhat contrarily and without further explanation in \textit{Bessin} that a national rule providing a firm three-year period of limitation for actions of recovery of unlawfully levied import duties “does not have the effect of undermining the [principle of effectiveness].”\textsuperscript{622} That decision appears closer in line with the previous case-law.

A decision that the Court of Justice has discussed much in its subsequent case-law was \textit{Emmott} where adherence to a time-limit under Irish law would have completely bared an application for judicial review.\textsuperscript{623} While the Court of Justice did not find that the time-limit as such violated the principle of effectiveness,\textsuperscript{624} it instructed the national court to apply it in such a way that the period of limitation would not begin to run until the Member State had properly implemented the Directive on which Mrs. Emmott sought to rely.\textsuperscript{625} The decision in \textit{Emmott} was by

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\item \textsuperscript{620} \textit{Barra}, 1988 E.C.R. 355, paras. 18–21, \textit{citing San Giorgio}.
\item \textsuperscript{621} Case 240/87, \textit{Deville} v. Administration des impôts, 1988 E.C.R. 3513, paras. 12–13, \textit{citing Rewe, Comet, Denkavit, San Giorgio} (emphasis added).
\item \textsuperscript{622} Case 386/87, \textit{Société Bessin et Salsou} v. Administration des douanes et droits indirects, 1989 E.C.R. 3551, paras. 15–18, \textit{citing Express Dairy Foods}.
\item \textsuperscript{624} The Court stated, more or less explicitly, that the time-limit was neither less favorable than those applied to similar domestic claims (it was in fact exactly the same) nor that it rendered exercise of the right virtually impossible, \textit{Emmott}, 1991 E.C.R. I–4269, paras. 16–17.
\item \textsuperscript{625} \textit{Emmott}, 1991 E.C.R. I–4269, paras. 17–23; \textit{commented} Hoskins, \textit{supra} note 389, at 368. The language of the judgment suggests that the ruling in \textit{Emmott} did not overturn \textit{Rewe} and \textit{Comet} and that it was to be viewed as \textit{lex specialis} due to the “particular nature of directives”, \textit{id.} para. 17. In order for this reasoning to be true it must have been more obvious to Rewe and Comet that the charges they paid were contrary to the EEC Treaty. The judgment itself does not address this issue directly or indirectly, however Advocate-General Mischo states in para. 26 of his opinion that Directives are not addressed to individuals and that they can therefore not be presumed to know their contents, \textit{id.} at I–4289.
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commentators received as far-reaching and some expressed fear over its consequences.626

The ECJ has had opportunity to comment its ruling in Emmott in subsequent decisions. First, the Court declared in Haahr Petroleum, Texaco, and Fantask that the outcome in Emmott depended on the circumstances in that specific case and that it had not overturned the many previous cases establishing that Member States may set up reasonable time-limits within which claims for the repayment of unlawfully levied fees must be filed in the interest of preserving legal certainty. The Court then went on to explain that the national rule in Emmott violated the principle of effectiveness as it, unlike ordinary statutes of limitation, “depriv[ed] the applicant of any opportunity whatever to rely on her [Community] right ...”.627 A similar statement was made in Palmisiani as the Court accepted a national rule imposing a one-year limitation period on claims for damage as reasonable and acceptable under the principle of effectiveness.628 In Grundig Italiana II, the Court of Justice addressed the issue of whether a Member State may shorten the time period within which claims for reimbursement of unlawfully levied taxes must be initiated from five to three years.629 The Court concluded that while neither a three year period of limitation nor changing the period of limitations is a violation of the principle of effectiveness, the principle does require the Member State to give individuals a reasonable period of transition to assert their right. The ECJ found the period of transition in question, ninety days, “clearly insufficient” considering the length of the previous period of limitation and declared with uncharacteristic specificity that a transitional period of six months is “the minimum period required to ensure that exercise of rights of recovery is not rendered excessively difficult.”630

These decisions should be distinguished from that of Levez where the facts were a little different. In the U.K., the national act on equal pay of men and women included a rule stating that damages would not be awarded for time earlier than two years before an action under the act was initiated. Mrs. Levez had been hired to replace a male worker, to perform the same work as him, and was told by her employer that she was paid the same wages. In reality, however, Mrs. Levez was paid significantly less than her male predecessor. Mrs. Levez eventually became aware of this fact and brought an action for damages against her employer but more than two-years had passed between her taking up employment and the time when she initiated the action. When the case reached the ECJ it established that although a national two-year statute of limitation is not “in itself” a violation of the principle of effectiveness, the principle does forbid a national court from applying it in cases like this as an employer by withholding information from the employee that the latter is unable to attain otherwise can “deprive his employee of the means provided for by the Directive of enforcing the principle of equal pay before the courts …”.

Second, the Court established in Steenhorst-Neerings and Johnson that the ruling in Emmott does not prevent Member States from limiting through national legislation to what extent claims for damages based on Community law can include time prior to when the claim was brought. These cases were soon in turn distinguished with regard to the specific national rules in question. In Magorrian and Preston, the ECJ was faced with women having been discriminated against regarding their retirement benefits in violation of Article 141 of the EC Treaty. According to the national rules in question, what additional retirement benefits they would be awarded was calculated considering only the last two years prior to the filing of the claim. The Court of Justice distinguished such

procedural rules from the rules in Steenhorst-Neerings and Johnson as not merely limiting the retroactivity of the claim in the interest of legal certainty but striking at “the very essence” of the right making it “impossible in practice” to rely upon it.\(^{639}\) Emmott and the case-law following it illustrates to some extent the distinction between national rules that limit the effectiveness of Community law but are acceptable under the principle of effectiveness from those that are not, at least with regard to the specific subject matter of time-limits.

Application of the Principle to Other Matters than Time-Limits and Rules of Evidence

The case-law thus far presented has primarily concerned national rules limiting either individuals’ possibility of recovering fees, taxes, and duties levied by a Member State or individuals’ possibility of recovering damages from a State infringing Community law, most importantly by setting time-limits for bringing such claims or by requiring the individual claimant to prove that the cost has not been passed on. The application of the principle of effectiveness is not limited to such situations however. On the contrary, it follows from the language used in the Rewe/Comet-formula that the principle of effectiveness applies to all national procedural rules. There are also examples in the case-law of the European Court of Justice applying the principle of effectiveness to national rules concerning other issues than those mentioned.

One issue that has been discussed in recent case-law is that of res judicata: are national rules on the finality of decisions allowed to limit the effectiveness of Community law? In Eco Swiss, the ECJ appeared willing to accept that a national procedural rule governing the finality of decision impaired the effectiveness of Community rights.\(^{640}\) This position was supported in Köbler\(^{641}\) as the ECJ declared that the finality of judicial decisions is motivated “to ensure both stability of the law and legal relations and the sound administration of justice …”.\(^{642}\) Two recent decisions confuse the situation however. In Kühne & Heitz\(^{643}\), the Court of Justice

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\(^{642}\) Köbler, 2003 E.C.R. I–10239, para. 38, citing Eco Swiss.

stated that, in principle, the finality of decisions can be motivated by the general principle of legal certainty which Community law recognizes and that Community law therefore does not require national authorities to reopen final decisions.\(^{644}\) An exception would be if national law gives the national court power to review a final but erroneous decision, the decision had become final as a result of a judgment of a national court of final instance, that court had not requested a preliminary reference, and the person concerned complained immediately after becoming aware of the error. At least in such a situation, the principles of loyalty\(^{645}\) requires the national authority to reopen the decision.\(^{646}\) Finally, in *Kapferer*, the Court of Justice stated that the effectiveness of Community law does not require the review of a judgment of a national court that has become final and that a national authority is never under an obligation to review a final decision unless national law allows the national authority to do so.\(^{647}\) However, the *Kapferer* Court also restated the Rewe/Comet-formula as if to indicate that the formula, including the principle of effectiveness, should be applied to national rules governing res judicata.\(^{648}\) It is difficult to fully reconcile the decisions in *Eco Swiss, Köbler, Kühne & Heitz*, and *Kapferer*. They all indicate that national rules regarding res judicata will rarely have to be set aside to promote the effectiveness of Community law but under what circumstances they could be set aside – if any – remains unsettled.

Finally, the Court of Justice has also referred to the principle of effectiveness in cases concerning national administration of Community programs – both with regard to the duty of individuals to repay funds given to them by a Member State contrary to EC law\(^{649}\) and to the adequacy of national systems for collection of Community fees\(^{650}\) – but these decision reveal little about how the principle of effectiveness affect what procedural rules national courts apply to Community claims.

\(^{645}\) *See further supra* Part 2.4.5.
\(^{648}\) *Kapferer*, 2006 E.C.R. I–2585, para. 22. Even more surprisingly, the *Kapferer* Court indicates that whether or not the adequacy of national procedural law under the Rewe/Comet-formula was “called into question in the dispute in the main proceedings” is relevant to whether the requirement can be applied. *Id.*
3.6.4  The Contextual Approach

Beginning with the twin cases of Peterbroeck\(^{651}\) and van Schijndel\(^{652}\), both rendered in 1995, the European Court of Justice introduced a seemingly novel way to approach the question of whether a national procedural rule to such an extent impairs the effectiveness of Community law that national courts cannot apply it to Community claims. The new approach has been given many different names.\(^{653}\) Herein it will be referred to as a contextual approach. Peterbroeck and van Schijndel contain an explanation of what the principle of effectiveness requires and how it should be applied not previously presented by the ECJ. Especially important is one paragraph in these judgments that has subsequently been repeated.\(^{654}\)

> Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.\(^{655}\)

The cases of van Schijndel and Peterbroeck concerned whether Community law requires national courts to consider pertinent provision of Community law of its own command.\(^{656}\) The Court of Justice began by addressing situations where national law allows or requires national courts to apply domestic law of its own motion. In such circumstances, national courts are, according to the Court, required to also consider Community

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\(^{653}\) A “contextual approach”, an “objective justification’ model” (Dougan, supra note 380, at 30–31), a “purposive approach” (Hoskins, supra note 389, at 370–77; Szyszczak & Delicostopoulos, supra note 399, at 142), a “maximalist approach” (Jonas Malmberg et al., Effective Enforcement of EC Labour Law 56 (2003)), and a “procedural rule of reason” (Prechal, supra note 391, at 690–93; Thomas Eilmansberger, The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link, 41 Common Mkt. L. Rev. 1199, 2111 (2004)).


However, in *van Schijndel* and *Peterbroeck*, national law prohibited the national courts from considering the issue of its own motion and the question placed before the ECJ was whether national courts should apply that law in cases concerning Community law.

In *Peterbroeck*, the European Court of Justice stated explicitly that the Belgian rule was not “objectionable per se” but that other “features of the procedure” made it so. Instrumental in the Court’s conclusions was that the national rule was not “reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure.”

The Court of Justice skipped the first step of the analysis in *van Schijndel*. The nature of the Dutch rule or other “features of the procedure” were not explicitly addressed. Instead, the Court concluded that the purposes of the rule, safeguarding the rights of the defense and ensuring proper “conduct of proceedings”, are treasured by most Member States and that “[i]n those circumstances” the effective application of Community law will not prevent the national court from applying the Dutch rule.

It appears from *van Schijndel* and *Peterbroeck* that the purpose and objective of a national rule is significant when determining if it makes the exercise of a Community right “excessively difficult” and thus must be set aside.

The contextual approach requires that the adverse effect that a national provision has on the effectiveness of Community law, whether

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660 *Peterbroeck*, 1995 E.C.R. I–4599, para. 20. One proposed explanation why the outcome was different in the two seemingly similar cases was that *Peterbroeck* concerned a vertical situation where no competing individual right was endangered by the court applying Community law of its own motion whereas *van Schijndel* concerned a horizontal situation. Jörgen Hettne & Ida Otken Eriksson (eds.), EU-rättslig metod 126 (2005).


662 *van Schijndel*, 1995 E.C.R. I–4705, para. 22. But see Hoskins, *supra* note 389, at 375 (argues that there are no relevant factual differences between the two cases that supports the different outcome).

663 *Cf.* Hoskins, *supra* note 389, at 373 (“when considering whether a national procedural rule render[] the exercise of Community law right impossible or excessively difficult, … following *van Schijndel*, a national court must consider … the role or purpose which it serves …”).
national law makes the exercise of Community rights “excessively difficult”, shall be determined using a broad view, considering the effects of application of the rule both in itself and in the particular case, taking into consideration all aspects and elements of the national legal system as a whole, similar regulation in other Member States, and the objectives underlying the national rule. 664 Avoidance of unjust enrichment, legal certainty, and the proper functioning of procedure are objectives for the purpose of which the European Court of Justice appears willing to accept that the effectiveness of Community law is impaired but that list is most likely non-exhaustive. In Steffensen, the Court of Justice acknowledged the existence of “certain basic principles of German law … relating to ex officio investigations and the free evaluation of evidence” that a national court should keep in mind when determining if national procedural law violates the principle of effectiveness. 665 Note that these principles are not included, at least not directly, in those mentioned in van Schijndel and Peterbroeck which would suggest that the list in the quoted paragraph of those judgments is non-exhaustive.

Advocate General Jacobs stated in his opinion in van Schijndel that “[t]he interest in full application [of Community law] may need to be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by the courts.” 666 It is reasonable to assume that the Court of Justice agreed with Jacobs’s suggestion and that they therefore “redefined the balance between … procedural autonomy … and the required effective protection of Community rights in the national courts” in a way that entails case-by-case weighing of the interests of the Community and the Member State when a conflict emerges between their laws. 667

The contextual approach is prone to impair predictability as it requires weighing different factors on a case-by-case basis. 668 It is however more difficult to say if the contextual approach enlarges or limits national procedural autonomy. Some commentators argue that the contextual approach furthers “the intrusion of Community law into national procedural autonomy” and that national law will in reality only be upheld if it is consistent with Community law. 669 The contextual approach can

664 See also A.G. Cosmas’ opinion in Palmisani, 1997 E.C.R. I–4025, paras. 16–22 (describes the result of Peterbroeck and van Schijndel).
668 Craig & de Búrca, supra note 542, at 315–16.
669 Szyszczak & Delicostopoulos, supra note 399; Kakouris, supra note 394, at 1404.
be used set aside national procedural rules. One example of this is *Cofidis* which concerned a French rule requiring consumers to raise a claim that a contract term is unfair within two years.\(^{670}\) The Court of Justice acknowledged that it had previously found shorter limitation period acceptable but that any national time-limit restricting the national court’s power to set aside unfair consumer terms did, in this case, “render application of the protection intended to be conferred upon them by the Directive excessively difficult.”\(^{671}\)

It has however also been argued that the European Court of Justice restored national procedural autonomy through the contextual approach.\(^{672}\) Application of the contextual approach has resulted in national procedural rules that impaired the effectiveness of Community law being found acceptable. For example, in *Eco Swiss*, the ECJ considered the consistency of the limiting effect that a national rule of res judicata has on a Community claim, making the exercise of the Community right very difficult in the individual case, with the principle of effectiveness. In doing so, the Court of Justice concluded that the rule was “justified by the basic principles of the national judicial system” and that Community law therefore did not require its disapplication.\(^{673}\) The basic principle in question in *Eco Swiss* was legal certainty. As indicated by these examples, the contextual approach can both strengthen and weaken national procedural autonomy depending on the circumstances.

*Van Schijndel* and *Peterbroeck* appeared to introduce a new way to apply the principle of effectiveness. The effect of these decisions on the case-law of the European Court of Justice has however been limited. In the ten years following *van Schijndel* and *Peterbroeck*, the European Court of Justice has referred to the principle of effectiveness in seventy decisions.\(^{674}\) In those decisions, the Court cited *van Schijndel* or *Peterbroeck* directly in twenty-nine decisions and indirectly\(^{675}\) in another twelve decisions. However, in twenty-nine of the Court’s post-*van Schijndel/Peterbroeck* decisions mentioning the principle of effectiveness no reference is made


\(^{672}\) Prechal, *supra* note 391, at 682–83.

\(^{673}\) Eco Swiss, 1999 E.C.R. I–3055, paras. 46–47.


\(^{675}\) By citing a case that cited one of those decisions or yet another case that, in turn, cited one of those decisions.
to the contextual approach, directly or indirectly. In those decisions, the Court of Justice instead commonly cites its pre-van Schijndel/Peterbroeck case-law, mostly Rewe and San Giorgio.\(^{676}\) Perhaps more importantly, reasoning similar to that used in van Schijndel and Peterbroeck\(^{677}\) can only be found in a handful of decisions and has even more rarely been used to uphold a national rule that would have failed the principle of effectiveness using the traditional excessively difficult-approach. For example, a case could be made that the Court of Justice by using a contextual approach found national law acceptable in Fantask, Levez, and Spac but the conclusion in all of these cases was that national time-limits limiting the effectiveness of Community law are warranted to uphold legal certainty,\(^{678}\) a conclusion well-supported by the Court’s earlier case-law.\(^{679}\) Similarly, in Eco Swiss the Court of Justice found a national rule regarding res judicata justified by the principle of legal certainty.\(^{680}\)

This is not to suggest that the contextual approach has been abandoned or even that its application is limited to certain situations or types of national rules. A shift towards the contextual approach may very well affect the balance between national procedural autonomy and the exception from that autonomy for the increased effectiveness of Community law. There is however little evidence in the case-law of the European Court of Justice that the Court has redefined the balance between national procedural autonomy and the effectiveness of Community law as previously argued.\(^{681}\) If the European Court of Justice intends to make a transition from the traditional excessively difficult-approach to one where the effectiveness of each national procedural rule is “analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances” and taking into consideration “the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure”.


\(^{677}\) Cases where whether a national rule complied with the principle of effectiveness was determined “by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances” taking into consideration “the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure”.


\(^{679}\) See supra Part 3.6.3.


\(^{681}\) See supra n. 667 and accompanying main text.
legal certainty and the proper conduct of procedure”

That transition does not appear to have been completed in the decade that has passed since Peterbroeck and van Schijndel.

3.6.5 Summary and Conclusions: When Does National Procedure Unacceptably Impair Community Law’s Effectiveness?

Two questions were stated initially in this section: how does one measure to what extent a national procedural rule impairs the effectiveness of Community law and how does one distinguish between acceptable and unacceptable “impairment”? The case-law of the ECJ does not conclusively answer these questions. There are still many questions left for the Court of Justice to answer regarding national procedural rules and the effectiveness of Community law. Some conclusions can however be extracted from the Court’s decisions. We begin with the first question: how does one determine how a national procedural rule affects the effectiveness of Community law?

First, the objective of the Community law in question is instrumental for the analysis. The Court of Justice stated in Leffler that the principle of effectiveness binds national courts in such a way that they can “apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d’etre and objective of the Regulation.”

National procedural rules that thwart the objective or purpose of a Community law impair its effectiveness.

Second, many decisions by the ECJ suggest that the examination should be made on a case-by-case basis. Hoskins described Emmott as an example of a case where the interest of protecting an individual in an individual case lead to the modification of national law.

This may appear to be a comparatively straightforward and workable approach. However, as will be discussed further infra Chapter 9, this approach raises many questions.

One should however perhaps also consider Preston where the Court stated that the examination of a national procedural rule “may not be carried subjectively by references to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules in question.” Preston, 2000 E.C.R. I–3201, para. 62. This somewhat cryptic statement appears to suggest that the determination with regard to specific case cannot involve all aspects of the specific case.

Hoskins, supra note 389, at 369–70.

684 This may appear to be a comparatively straightforward and workable approach. However, as will be discussed further infra Chapter 9, this approach raises many questions.
685 One should however perhaps also consider Preston where the Court stated that the examination of a national procedural rule “may not be carried subjectively by references to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules in question.” Preston, 2000 E.C.R. I–3201, para. 62. This somewhat cryptic statement appears to suggest that the determination with regard to specific case cannot involve all aspects of the specific case.
686 Hoskins, supra note 389, at 369–70.
been found acceptable was not relevant and that the determination of if a national rule makes the exercise of a Community right excessively difficult must be made “on a case-by-case basis, taking account of each case’s own factual and legal context as a whole …”. 687 That the examination should be made on a case-by-case basis does however not detract from the possibility that there may exist national procedural rules that in itself, without it being necessary to consider its violation in a specific case, violate the requirement of effectiveness. This is illustrated by the decision in Santex which concerned a national law barring the introduction of claims after a time-limit of sixty days had passed. The Court of Justice stated in Santex that a rule can in itself violate the principle of effectiveness if it is generally “likely to render virtually impossible or excessively difficult the exercise” of a Community right but even if a national rule does not in this sense independently violate the principle of effectiveness it can still violate it in an individual case. 688

Third, under the contextual approach, the national procedural rule must be examined considering “the role played by that provision in the procedure as a whole, as well as the operation and any specific features of that procedure before the different national courts …”. 689 It is however difficult to understand exactly what that means practically in an individual situation and there are, as noted above, few examples in the Court’s case-law of how such a determination should be made.

The second question to be answered is how one distinguishes a national rule that violates the requirement of effectiveness from one that is acceptable. In three situations, making that determination is comparatively easy.

The most obvious examples of national procedural rules that violate Community law’s requirement of effectiveness are those whose application removes all opportunity to realize a Community right. To this category belong national rules which cannot be complied with, in theory or in practice. A possible example of this is the national rule in San Giorgio, which posed a requirement that could rarely, if ever, be complied with. 690 In this category does however also belong national rules that are not generally impossible to comply with but whose application in the specific case

would make the enforcement of a Community right or a part of that right impossible. This is exemplified by *Magorrian* and *Preston* where the national law limited the scope of the right itself rather than just the time within which a claim must be filed.\(^{691}\)

Other national rules whose adequacy is comparatively easily determined are those governing areas where Community law demands full effectiveness. If the full effectiveness of Community law requires that a national court can declare national law invalid, as in *Simmenthal*,\(^ {692}\) that a person may bring a civil action, like in *Muñoz*,\(^ {693}\) or that a plaintiff can remedy improper service, as in *Leffler*,\(^ {694}\) no further consideration is necessary. What may be difficult is to identify such situations which are vaguely defined in the Court’s case-law.

Finally, when national law grants national courts discretion on a matter, Community law requires the court to exercise that discretion such that it furthers the effectiveness of Community law. In *van Schijndel*, the European Court of Justice stated that if national law gives national courts discretion to apply national law of its own motion, Community law, via the principle of loyalty as enshrined in Article 10 of the EC Treaty, requires the national court to raise points of Community law of its own motion.\(^ {695}\) Similarly, the Court of Justice suggested in *Kühne & Heitz* that Community law can require a national authority to reopen a decision that has become final and which was contrary to Community law when national law allows it to do so.\(^ {696}\)

Outside these situations, it is more difficult to determine what national procedural rules are acceptable and which are unacceptable for application to Community claims. The case-law of the ECJ does not provide clear guidance how to determine if a national procedural rule that makes the enforcement of a Community right difficult but not impossible meets the requirement of effectiveness. The Court of Justice has not provided national courts with any clear guidelines how to determine if such a national procedural rule violates the requirement of effectiveness. Unless the European Court of Justice presents a clearer, more easily applied test of effectiveness, it will probably have to do much of the deter-

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\(^{692}\) *Simmenthal*, 1978 E.C.R. 629.


\(^{696}\) *Kühne & Heitz*, 2004 E.C.R. I–837, paras. 25–27. Because the ECJ in the same instance also takes notice of other circumstances, it is however difficult to determine if the existence of a discretion would by itself be sufficient to require the national court to take action. See further supra Part 3.6.3.
mining itself on a case-by-case basis delivered to the ECJ from confused national courts through the preliminary reference institute.

For lack of a better description, Community law appears willing to accept “ordinary” procedural rules if they are supported by an acceptable purpose. For example, Community law has in decision after decision, both before and after the introduction of the contextual approach, declared that it is willing to accept ordinary statutes of limitations when they are supported by the need to preserve legal certainty although even such rules may have to be set aside in individual cases. Recent case law indicates that it may be relevant to compare the national procedural rule in question with those in other Member States when determining if it violates the principle of effectiveness. In applying the principle of effectiveness in *Eco Swiss*, the European Court of Justice stated that the time-period in question did not “seem excessively short compared with those prescribed in the legal systems of the other Member States …”.\(^{697}\) In *Recheio*, the Court of Justice expressed similar reasoning as it stated that the national rule in question, a time-limit, was “reasonable, in comparison with the periods of similar duration fixed in the legal systems of several other Member States.”\(^{698}\) The decision in *Recheio* also suggests that the determination should be made in a practical manner as the Court compared the time-limit under national law with what the individual litigant had to do within that time-frame to determine if national law made the exercise of a Community right excessively difficult.\(^{699}\) One should note, however, that a national law imposing a time-limit that is too short to provide a litigant with adequate opportunity to prepare could constitute a violation of the rights of defense,\(^ {700}\) making a determination of if the rule unacceptable detracts from the effectiveness of Community law unnecessarily.

### 3.7 Summary and Conclusions

The general rule in Community law may be that it is the Member States that decide what procedural rules national courts apply. However, as demonstrated in this chapter, there are many significant exceptions to that general rule in situations where national courts apply Community law. First, general principles of Community law require Member States

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\(^{697}\) *Eco Swiss*, 1999 E.C.R. I–3055, para. 45.

\(^{698}\) *Recheio*, 2004 E.C.R. I–6051, paras. 17–22. *See also supra* n. 661 and accompanying main text.


\(^ {700}\) *See Leffler*, 2005 E.C.R. I–9611, para. 52; *see also supra* Part 3.3.4.

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to afford access to a fair and adequate judicial process, to respect the rights of defence contained in Community law, and to treat all litigants equally without regard to origin. Second, while there is no comprehensive Community regulation of procedural matter, there are many examples of individual procedural matters being regulated in secondary law. Third, Community law also prohibits national courts from applying procedural rules to Community claims which are less advantageous than those they apply to comparable claims under national law. Fourth and finally, even if a national procedural rule meets the first three requirements, national courts may be prevented from applying national procedural rules when adjudicating matters under Community law when doing so would to an unacceptable extent impair the effectiveness of Community law.

The situation in the European Community is not entirely different from that in the United States as we shall see in the following two chapters. In the next chapter we shall, similar to what was done in chapter 2 above, examine the context in which the American doctrine functions and the conditions under which it was developed. Chapter 5 contains a presentation of the American doctrine similar to that provided of the European doctrine in this chapter. In chapters 6 through 9, finally, the European doctrine presented here will be compared to the American doctrine.
PART III.

THE UNITED STATES
4 Overview of American Conditions

4.1 Introduction
Why Member State courts enforce Community law and the conditions under which the European doctrine operates were introduced in chapter 2. That presentation was the basis for the subsequent presentation of the European doctrine. As previously stated, the European doctrine will be compared with similar legal institutions in the United States, mechanisms in Federal law governing what procedural rules State courts shall apply to Federal rights, herein referred to as “the American doctrine”. A presentation of the American doctrine, similar to the one given above of the European doctrine, follows in the next chapter. However, just like the European doctrine, the American doctrine must be placed in context.

In this chapter, the legal systems of the United States and the several American States will be introduced to the extent it pertains to the subject matter of this study. In doing so, focus will lie on the relationship between Federal and State law, between Federal and State legislators, and between Federal and State courts. A basic understanding of these matters is necessary for understanding the American doctrine and to compare the American doctrine to the European doctrine. This chapter begins with an examination of the general elements of U.S. law and the structure and role of the Federal judiciary. After this, we turn more specifically to the issue of State courts enforcing Federal law and in the final section relate the findings in the previous sections to the American doctrine and the related Erie doctrine. This examination touches upon many complex issues of which a complete examination is neither feasible nor necessary for the purpose of this study. The presentation below is limited to such matters that are necessary to understand State court enforcement of Federal law and the American doctrine.

701 See supra Part 1.2.2.
4.2 Historical Background of the State Judiciary

There are fifty-two court systems in the United States: one for each of the fifty States, one for the District of Colombia\(^{702}\) and one Federal. Each of those court systems contains, in turn, several individual courts organized by tiers and areas of law.\(^{703}\) Contrary to popular belief, the Federal court system is not superior to the other fifty-one.\(^{704}\) Rather, they exist parallel to but independently of each other, for the most part performing different functions.\(^{705}\)

This has not always been the case. Prior to the American Revolution, the colonies established colonial courts that had strong connections to the English legal system. For example, rulings by colonial trial courts could be appealed to the English Privy Council, which also had jurisdiction to overturn colonial legislation (although it seldom exercised either of these powers). Colonial chancery courts were, where present, similarly linked to the English government. Finally, England established vice-admiralty courts in the colonies to enforce the English trade policy.\(^{706}\) The law and procedure applied in these colonial courts differed but displayed

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\(^{702}\) The judiciary in D.C. is a somewhat special matter. On one hand it has a set of local courts but which are established by the U.S. Congress. This consists primarily of the Superior Court of the District of Columbia which is a trial court of general jurisdiction and the District of Columbia Court of Appeals which is the highest court of the District. There are however also Federal courts in the general sense in the District of Columbia, including a District Court, a Bankruptcy Court and a Circuit Court of Appeal<<http://www.dccourts.gov/; http://www.uscourts.gov/, 2006-08-02>>.

\(^{703}\) For example, in the State of South Carolina there are both Federal and State courts, both organized in three tiers. In the State judiciary, the top two tiers consist of a Supreme Court and below it a Court of Appeals. There are however several third tier courts, also known as Trial Courts. The two main ones are Circuit Courts (general jurisdiction) and Family Courts (domestic matters and most criminal cases involving juvenile offenders). A Circuit Court is divided into two divisions: one for civil matters (Court of Common Pleas) and one for criminal matters (Court of General Session). In addition, there are a number of smaller Trial Courts who have jurisdiction over more specific areas. These are the Administrative Law Judge Division (matters relating to state agencies), Magistrate’s Courts (small claims and minor criminal cases), Probate Courts (wills, estates etc.), Municipal Courts (applying local ordinances) and Masters-in-Equity (jurisdiction by deferral from Circuit Courts). Parallel to these State courts there are Federal courts, most notably the United States Bankruptcy Court for the District of South Carolina (bankruptcies), the United States District Court for the District Court of South Carolina (remaining cases under Federal jurisdiction) and the United States Court of Appeals for the Fourth Circuit (second tier). <<http://www.judicial.state.sc.us/), http://www.uscourts.gov/, 2005-10-14>>.


\(^{705}\) Exactly which functions the courts have will be addressed in the next sections.

\(^{706}\) DAVID S. CLARK & TUĞRUL ANSAY (eds.), INTRODUCTION TO THE LAW OF THE UNITED STATES 374–75 (2nd ed. 2002).
similarities to those of England and contained most procedural concepts of Anglo-Saxon common law.\textsuperscript{707} Two things contributed greatly to making the American legal system increasingly different from the English. First, colonial courts were formally to apply English common law but they were allowed to modify the common law to conform to the unique conditions of the New World.\textsuperscript{708} Second, colonial America lacked both settlers with a legal education and universities capable of training lawyers. As a result, judges in early colonial America were laymen exercising "judicial discretion" rather than the common law of England as the latter required thorough knowledge of vast amounts of case-law. The applicable substantive and procedural rules were eventually developed and refined, resulting in increased codification and more stringent rules governing civil procedure.\textsuperscript{709}

Even after the United States become independent of England, many American States retained the procedural system they had inherited from England, most notably the dual system of equity and law.\textsuperscript{710} Overtime,

\textsuperscript{707} Clark & Ansay, supra note 706, at 374–75. The description of law in colonial America given here is general and not equally applicable to all States. For example, the model for the legal system of Louisiana has until recently primarily been the French legal system.\textsuperscript{708} This was settled in the ruling of Calvin v. Smith, 7 Co. 1, 17b, 77 Eng. Rep. 377 (K.B. 1608), commonly known as \textit{Calvin's Case}. In \textit{Calvin's Case} the King's Bench, including amongst others the famous Sir Edward Coke, declared that all persons born within a territory controlled by the King of England were also subjects of the King and the laws of England (on a side note, Sir Francis Bacon represented the Crown and aided Calvin in his plea). Although Robert Calvin was a Scottish born resident of England seeking protection under English law against Smith who by force had taken an estate from Calvin, the case which carries his name was subsequently used to support the conclusion that British colonists brought the laws of England with them when they settled in the New World and is has also been suggested as the origin of the concept of citizenship through birth. Polly J. Price, \textit{Natural Law and Birthright Citizenship in Calvin's Case} (1608), 9 YALE J.L. & HUMAN. 73 (1997); René David & John E.C. Brierley, \textit{Major Legal System in the World Today} 398 (3rd ed. 1985).\textsuperscript{709} David & Brierley, supra note 708, at 398–400; Clark & Ansay, supra note 706, at 16, 374–75.\textsuperscript{710} David & Brierley, supra note 708, at 339–41; Flemming James, Jr. et al., \textit{Civil Procedure} 21–22 (5th ed. Foundation Press 2002). In medieval England, equity remedies were developed as a supplement to the Common law in situations where the latter was unable to render justice. The litigant could then request that the king intervened and saw that justice was made. In England, Chancery courts eventually assumed this function, whereas equity cases in post-revolution America could be handled either by separate equity courts or by general trial courts that also handled Common law claims. Equity and law has however for most purposes merged in the United States, on the State level primarily through local adoption of the Field Code of Civil Procedure and on the Federal level in 1938 through the adoption of the Federal Rules of Civil Procedure. Richard H. Fallon, Jr. et al., Hart & Wechsler's \textit{The Federal Courts and the Federal System} 602–03 (5th ed. 2003) (hereinafter Hart & Wechsler); James et al., supra, at 22–23.
the States gradually created court systems that better suited their own situation and since this was done by each State independently of the other, the State judiciary is organized differently from State to State. However, the State judiciaries have two things in common. First, there is at least one trial court of general jurisdiction in each State; a court that will hear claims in first instance unless jurisdiction over such claims has explicitly been awarded to another court. Second, the decision of that court can be appealed to at least one other court. In addition, most States have both an intermediary appellate court and a supreme court and many States have created specialized courts of first instance with limited jurisdiction over certain types of claims.

4.3 Structure and Jurisdiction of the Federal Judiciary

4.3.1 Introduction

The States remain free, at least in principle, to set up their court systems as they please. Similarly, the U.S. Constitution provides the Federal government with a Supreme Court and also with the power to set up “such inferior Courts as the Congress may from time to time ordain and establish.” The Federal judiciary, comprising the U.S. Supreme Court and these “inferior courts”, is the topic of this section: what are Federal courts; how, when and why were they created; what laws do they apply and enforce; and, for the purposes of this study perhaps most importantly, what is the relationship between the Federal judiciary and the State judiciary? These questions are to be answered below.

4.3.2 Creation and Development of a Federal System of Courts

The U.S. Constitution has since its enactment in 1787 provided for the existence of a Federal Supreme Court and the possible existence of inferior Federal courts. Congress quickly took advantage of the latter opportunity as it only two years later adopted the Judiciary Act of 1789 which

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711 In the case of South Carolina, see supra note 703, that court is the Circuit Court.
712 In the case of South Carolina, see supra note 703, the judgment of the Circuit Court can be appealed to the Court of Appeals, the Supreme Court, and sometimes both.
713 James et al., supra note 710, at 40–41; David & Brierley, supra note 708, at 427–28; see also the example supra note 703.
714 U.S. Const., art III, § 1.
contains the original design of the Federal judiciary. Through this Act, Congress established thirteen judicial districts: one for each of the eleven States of the Union, one for Kentucky, and one for Maine.\footnote{715} Congress established one Federal District Court in each such district and appointed one Federal District Judge to each Federal District Court.\footnote{716} The jurisdiction of these District Courts was severely limited and they mainly heard admiralty cases.\footnote{717} Each district belonged to one of three circuits\footnote{718} and for each circuit Congress established an ambulatory Circuit Court that held sessions in the different districts. These Circuit Courts heard appeals from District Courts but also adjudicated some cases in first instance, including cases concerning certain severe crimes and cases where the parties came from different States.\footnote{719} Despite their important function, no judges were specifically appointed to the Circuit Courts. They were instead composed of the Federal District Judge of the district where the case was heard and two Justices from the United States Supreme Court.\footnote{720}

The system established in 1789 underwent some modification in the first half of the nineteenth century\footnote{721} but it was not until the later half that Congress, with one act in 1869\footnote{722} and another in 1891\footnote{723}, created the modern structure with permanent Circuit Courts of Appeals\footnote{724} staffed

\footnote{715} Act of Sept. 24, 1789, 1 Stat. 73, § 2. Commonly referred to as “Judiciary Act of 1789”. Kentucky and Maine became independent States in 1792 and 1820 respectively.\footnote{716} Act of Sept. 24, 1789, 1 Stat. 73, § 3.\footnote{717} Act of Sept. 24, 1789, 1 Stat. 73, § 9.\footnote{718} The east, middle, and south circuit.\footnote{719} That is, they exercised diversity jurisdiction. \textit{See further infra} Part 4.3.3.\footnote{720} Act of Sept. 24, 1789, 1 Stat. 73, §§ 4, 11. Congress approved of the circuit riding system, primarily because it promoted the nation building process and allowed the justices to familiarize themselves with State law but the Justices themselves were of the opinion that the traveling brought about judgments of lower quality and objected that the system led to situations where they would reconsider a judgment they themselves had rendered on appeal. \textsc{Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System} 7 (2nd ed. 1994); \textsc{Charles Alan Wright & Mary Kay Kane, Law of Federal Courts} 5 (6th ed. 2002).\footnote{721} Act of Feb. 13, 1801, 2 Stat. 89 (entitled “An Act to provide for the more convenient organization of the Courts of the United States” but more commonly referred to as “Judiciary Act of 1801”); Act of March 8, 1802, 2 Stat. 132 (act repealing the Judiciary Act of 1801); Act of April 29, 1802, 2 Stat. 156 (commonly referred to as “Judiciary Act of 1802”).\footnote{722} Act of April 10, 1869, 16 Stat. 44.\footnote{723} Act of March 3, 1891, 26 Stat. 826 (actually entitled “An Act to establish circuit courts of appeals and define and regulate in certain cases the jurisdiction of the courts of United States, and for other purposes” but also known as “the Evarts Act” or “the Circuit Court of Appeals Act of 1891”).\footnote{724} Those courts are now known as e.g. the United States Court of Appeals for the Third Circuit, \textit{see supra} note 703.
by specifically appointed Circuit Judges. Since the beginning of the 20th century, the Federal court system has been three-tiered. Today, if a case falls under Federal jurisdiction, it should be brought to a Federal court of first instance in one of 94 districts. This is normally the United States District Court covering the geographical area in question. If unhappy with the ruling of that court, either party can try to appeal to the United States Court of Appeal of the circuit to which the District Court in question belongs.

4.3.3 Jurisdiction of Federal Courts

The Federal government is a government of limited powers: it may only act within the areas enumerated in the U.S. Constitution. Consequently, Federal courts are courts of limited jurisdiction. A Federal court can only hear a case if the party seeking its assistance can show that the court has jurisdiction to render a judgment.

A first question that should be answered when determining if a Federal court has jurisdiction is the courts of what State should be able to pass a judgment over the litigants. This question turns on the answer of another question: which courts have personal jurisdiction over the parties involved? American courts adopted the English rule that not all courts have jurisdiction over all persons. In general, the physical presence of the defendant or of property in dispute in the court’s territory was necessary

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725 See infra Part 4.3.3.
726 28 U.S.C., ch. 5. Obviously there is no longer just one district court per state or one judge per district. The district courts are spread across the United States, at least one per State, but in larger States there are several.
727 There is also a United States Bankruptcy Court that handles claims of bankruptcy in every district.
728 For example, an appeal of a judgment by the United States District Court for the Northern District of Mississippi should properly be directed to the United States Court of Appeals for the Fifth Circuit. Today there are thirteen circuits, each with its own Court of Appeals, 28 U.S.C., ch. 3. Eleven of these circuits, e.g. the First Circuit or the Ninth Circuit, handle only cases brought from general districts courts. Thus, every state belongs to one of those eleven circuits. In addition there is one U.S. Court of Appeals for the District of Colombia Circuit and one U.S. Court of Appeals for the Federal Circuit which has jurisdiction of the U.S. Court of Customs and Patent Appeals and the appellate jurisdiction of the U.S. Court of Claims, Act of April 2, 1982, 96 Stat. 25.
729 U.S. Const., amend. X (“powers not delegated to the United States … are reserved to the States respectively, or to the people.”).
731 Kane, supra note 704, at 31.
for it to exercise jurisdiction. The U.S. Supreme Court first established that the Constitution will only allow a court to exercise personal jurisdiction when the person concerned could be served within its territory. The Court eventually relaxed the strict requirement of physical presence and the key issue when determining the existence of personal jurisdiction instead became whether the person is considered to have had “certain minimum contacts with … [a State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’.” If the judge concludes that the courts of a State has personal jurisdiction over the parties, the next issue to consider is which court in that State is most suitable to adjudicate the matter. That is the issue of venue. It should be decided considering, among other things, the location of witnesses that will be heard and where conditions are best suited for a fair trial. Of more direct interest to this study is the issue subject matter jurisdiction, that is, the issue of whether the matter concerned in an individual case is one over which that Federal courts have jurisdiction.

For example, suppose a claim has been filed in the United States District Court for the Northern District of Mississippi, Western Division, located in Oxford, Mississippi. Even if the District Judge assigned to the case concludes that courts located in Mississippi have personal jurisdiction over all parties and that venue is proper in his court, he must still determine whether he should send the case down Jackson Avenue to the competing State court, the Mississippi Circuit Court for the third circuit district. Unless there is showing of Federal subject matter jurisdiction, the presumption is that the case should be turned over to the State judiciary.

733 Pennoyer v. Neff, 95 U.S. 714 (1877). The possibility to use property as a ground for jurisdiction, in-rem or quasi-in-rem jurisdiction, was considered separately.
735 It is important to note that matters of jurisdiction, such as personal jurisdiction supra and subject matter jurisdiction infra, determines the powers of a court whereas venue determines where, geographically, that judicial power should be exercised. Thus, venue is not a jurisdictional issue in the proper sense of the word even though a court of improper venue is hindered from adjudicating a claim similar to if it had wanted jurisdiction. James et al., supra note 710, at 56–57; Wright, supra note 720, at 257.
736 Yeazell, supra note 730, at 203.
737 As mentioned above, a State court can generally adjudicate any claim whereas a Federal court can only hear a case if it falls under Federal jurisdiction.
case heard in the Federal court that must show that his claim falls “within the judicial power of the United States, as defined in the Constitution, and [which] have been entrusted to … [the Federal courts] by a jurisdictional grant by Congress.” \(^{738}\)

As the quoted sentence indicates, any examination of Federal subject matter jurisdiction must begin with the U.S. Constitution that contains an exhaustive list of situations over which Federal courts may exert judicial power. \(^{739}\) The Constitution defines the outer limits of Federal jurisdiction but Congress decides to what extent the Federal judiciary assumes that jurisdiction and how it is distributed among the different individual Federal courts. \(^{740}\) A claim of Federal subject matter jurisdiction must therefore be based in a “jurisdictional grant by Congress”, an instruction from Congress to Federal courts, stating which cases they should adjudicate and which they should leave for State courts to decide. \(^{741}\) The “jurisdictional grant” can currently be found in Part IV of Title 28 of the United States Code. \(^{742}\) It follows from that text that Federal courts have subject matter jurisdiction over cases to which the United States is a party; \(^{743}\) that arise under the Constitution, laws, and treaties of the United States; \(^{744}\) that concern citizens of different states; \(^{745}\) and where the Federal court has jurisdiction over certain claims under one of the three previously mentioned categories and other claims “form part of the same case or controversy”. \(^{746}\) These alternative grounds for Federal subject matter jurisdiction shall now be described further.

The first ground for Federal subject matter jurisdiction, cases to which the United States is a party, is of little importance for this study. The second ground, also known as Federal question jurisdiction, is more rele-

\(^{738}\) Wright, supra note 720, at 27. This is true regardless of whether or not the other party objects to the jurisdiction of the court, Fed. R. Civ. P. 12(h)(3).

\(^{739}\) U.S. Const. art. III, § 2.

\(^{740}\) About the controversy over this issue, see Wright, supra note 720, at 40–47 (especially regarding the Supreme Court’s ruling in Cary v. Curtis, 44 U.S. 236 (1845), id. at 46). Congress has always exercised this right to decline jurisdiction although the degree thereof has varied over time, see, e.g. the amount-in-controversy requirement discussed infra.

\(^{741}\) Clark & Ansay, supra note 706, at 380–81. Ever since 1789, Congress has issued such instructions, see, e.g. Act of Sept. 24, 1789, 1 Stat. 73, §§ 9–12; Act of Feb. 13, 1801, 2 Stat. 89, §§ 10–12.


\(^{744}\) Mainly, the general provision 28 U.S.C. § 1331 but see also the specific provisions §§ 1333–34, 1337–44. Commonly referred to as “Federal question jurisdiction”.

\(^{745}\) 28 U.S.C. § 1332. Commonly referred to as “diversity jurisdiction”.

\(^{746}\) 28 U.S.C. § 1367. Commonly referred to as “supplemental jurisdiction”.

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vant. The U.S. Code contains one general provision giving District Courts jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States”\textsuperscript{747} and several other provisions granting those courts jurisdiction over certain specific actions that arise under Federal law.\textsuperscript{748} The Supreme Court has determined that Federal question jurisdiction exists when “the plaintiff’s statement of own cause of action shows that it is based upon [Federal law]”.\textsuperscript{749} An anticipated defense is not enough to confer subject matter jurisdiction on the Federal court; a Federal element must be the basis of the claim, not just a peripheral circumstance.\textsuperscript{750}

The third ground for Federal subject matter jurisdiction, \textit{diversity jurisdiction}, is in a sense the opposite of Federal question jurisdiction. If a claim does not “arise under” Federal law, that is, it arises under State law, it can still be brought in a Federal court if the matter-of-controversy exceeds a total value of $75,000\textsuperscript{751} and there is complete diversity of citizenship amongst the parties of the suit.\textsuperscript{752} The U.S. Code lays down four alternative situations when such diversity exists. The parties to the suit must be either (a) citizens of different States, (b) a citizen of a State and a subject of a foreign nation, (c) a citizen of a State and a foreign nation, or (d) a combination of these.\textsuperscript{753} There is no conclusive answer as to why the drafters of the U.S. Constitution created diversity jurisdiction but

\textsuperscript{747} 28 U.S.C. § 1331 is almost identical to the first line of U.S. Const. art. III, § 2 and reads: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”.

\textsuperscript{748} E.g. Admiralty and maritime cases (§ 1333), bankruptcy cases (§ 1334), anti-trust and competition cases (§ 1337), and patent cases (§ 1338).

\textsuperscript{749} Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152 (1908).

\textsuperscript{750} Kane, supra note 704, at 10. Many situations can be indirectly connected to Federal rules. E.g. most land were originally distributed through a Federal land-grant and most checks goes through a Federal bank at some point, but it is hardly reasonable to construe “arising under” so that Federal courts have jurisdiction over all cases involving land or checks. Examples borrowed from Yeazell, supra note 730, at 219–20.

\textsuperscript{751} 28 U.S.C. § 1332(a). In 1997, the amount was raised from $50,000, a limit set in 1988. Before that the limit was $10,000. Until 1980, the amount controversy requirement applied to Federal question jurisdiction as well. Kane, supra note 704, at 15; Yeazell, supra note 730, at 242. This is a method used by Congress to limit the caseload of Federal courts while ensuring that cases of great financial value retain access to those courts. As James, Hazard and Leubsdorf point out, the rule is somewhat flawed as many very important cases may fail to meet the amount requirement, supra note 710, at 129.

\textsuperscript{752} That diversity must be complete means that all plaintiffs must have different citizenship than all defendants, see, e.g. Mas v. Perry, 489 F.2d. 1396 (5th Cir. 1974); James et al., supra note 710, at 129.

\textsuperscript{753} 28 U.S.C. § 1332(a)(1)–(4). The basis for these situations can be found in U.S. Const. art. III, § 2.
several theories.\textsuperscript{754} The most well-established theory is that the founding fathers wanted to protect foreign litigants from the real or perceived bias of State courts towards citizens of the same State.\textsuperscript{755} Whatever the reason for the creation of diversity jurisdiction may be, the fact remains that Federal courts sitting under diversity jurisdiction yearly adjudicate tens of thousands of cases concerning issues of State law.\textsuperscript{756}

\textit{Supplemental jurisdiction}, the last type of Federal subject matter jurisdiction, creates a similar effect. The core of supplemental jurisdiction is that when a Federal court has acquired subject matter jurisdiction over a claim, it also has jurisdiction over all other claims that “form part of the same case or controversy”\textsuperscript{757} and that requirement is met if the claims derive from “a common nucleus of operative facts”\textsuperscript{758} and Federal adjudication is justified with regard to “judicial economy, convenience and fairness to litigants”.\textsuperscript{759} Because of the nature of the underlying claims, a Federal court exercising supplemental jurisdiction will apply both Federal law and State law. Federal courts applying Federal substantive law and Federal procedural law is of limited relevance to this study. More interesting are, as will become evident below, situations where Federal courts sitting under diversity jurisdiction apply substantive State law and procedural Federal law.

\subsection*{4.3.4 Choice of Law under Diversity Jurisdiction}

\textit{Introduction}

Thus far, we have examined the structure of the Federal judiciary and under what circumstances Federal courts may exercise jurisdiction over a claim. We now turn to the choice-of-law question: which legal rules


\textsuperscript{755} E.g. Bank of the United States v. Deveaux, 9 U.S. 61, 87 (1809) (“However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and citizens, or between citizens of different states.”).

\textsuperscript{756} In 2000, 51,396 claims were adjudicated by District Courts sitting under diversity jurisdiction. That is equivalent to 35 \% of all civil cases heard by Federal courts. Clark & Ansay, \textit{supra} note 706, at 384.

\textsuperscript{757} 28 U.S.C. § 1367(a).


\textsuperscript{759} Gibbs, 383 U.S. at 725–26.
should a Federal court apply when sitting under diversity jurisdiction?\footnote{Cf. Robert C. Casad et al., Civil Procedure 343 (2nd ed. 1989). Casad divides this question into three separate problems. First, the \textit{choice of law} problem: what substantive law applies when the cause of the action did not arise in the forum state? Second, the \textit{Erie} Problem: what substantive law must a Federal court apply when sitting under diversity jurisdiction? Third, the \textit{Federal Rules} problem: to what extent does the Fed. R. Civ. P. apply in diversity cases? This division is not used here as the first question is largely irrelevant for this study and the latter two can be adequately dealt with as one as formulated in the main text.} Answering this question is more complicated than it may first appear because Federal enforcement of State law involves, as we shall see, complex federalist considerations. Much of the forthcoming comparison is devoted to such matters and a general introduction is therefore in order. We begin with the provisions of Federal law that set the boundaries for choice-of-law in diversity jurisdiction cases. Regardless of whether a Federal court incurs jurisdiction over a case under diversity jurisdiction or supplemental jurisdiction, it will, at least to some extent, apply and enforce State law. Moreover, because Congress has, as discussed further below, adopted Federal Rules of Civil Procedure to be used by all Federal courts in all cases, a Federal court sitting under diversity jurisdiction will normally enforce substantive State law using Federal procedural law.

The Rules of Decision Act declares that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the court of the United States.”\footnote{28 U.S.C. § 1652.} The Rules of Decision Act clearly focuses on the issue of choice-of-law but contains two elements that have proven problematic. First, the meaning of the term “laws” under the Act is unclear. The ambiguity of this term makes it unclear exactly which State rules a Federal court sitting under diversity or supplemental jurisdiction shall apply and which it can disregard, instead applying Federal law governing the same issues. Second, while few doubt that “rules of decision” include substantive provisions it is unclear to what extent the Rules of Decision Act requires Federal courts to apply State procedural rules. As we shall see below, the margin for interpretation that the Rules of Decision Act leaves on this issue has created problems.

In 1934, Congress adopted an act generally known as the Rules Enabling Act.\footnote{Now 28 U.S.C. § 2072.} The Rules Enabling Act states that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts” but that these rules “shall not abridge, enlarge, or modify any substantive
right”. From the wording of the Rules Enabling Act it appears as if the Federal judiciary has the power to lay down rules of procedure and evidence but not substantive rules. However, just like the Rules of Decision Act, it is unclear exactly what the wording used in the Rules Enabling Act actually mean.

First, also like the Rules of Decision Act, the Rules Enabling Act uses the terms “procedure” and “substantive” without clarifying their meaning. This is a problem since there is no clear and unambiguous definition of procedural law. Second, what interpretation one gives to the wording “general rules of practice and procedure” will affect the allocation of power between the States and the Federal government. A broad interpretation will allow the Federal judiciary to create rules in areas that would otherwise be controlled by the State legislator. Similarly, a narrow interpretation will give the State legislator power to control the procedure of Federal courts. Third, the true meaning of the Rules Enabling Act cannot be discovered by examining the text alone. The Act must be interpreted taking into consideration other relevant provisions dealing with the same subject matter, primarily the Rules of Decision Act. After decades of debate, the proper meaning of these provisions remains unclear.

Laws Applicable under Diversity Jurisdiction Prior to 1938

The U.S. Constitution declares that the Federal government may only exercise power in areas where the Constitution explicitly provides so and that all other powers belong to the several States and the American citizens. In addition, States are considered to have residual jurisdiction to act in areas over which power has been conferred upon the Federal government but where there is no Federal law. Like other legal systems that hail from the English common law system, the American legal system contains few written statutes compared to civil law systems and judge-made rules can be found in their place. This complicates the choice-of-law question.

The Rules of Decision Act was the primary source for determining which substantive laws a Federal court sitting under diversity jurisdiction


764 U.S. Const. amend. X.

765 David & Brierley, supra note 708, at 410.

766 David & Brierley, supra note 708, at 408.
or supplemental jurisdiction should apply prior to 1938.\textsuperscript{767} Despite the preference for State law regulation in the U.S. Constitution, the U.S. Supreme Court established in 1842 in \textit{Swift}\textsuperscript{768} that Federal courts of first instance should disregard certain substantive provisions of State law when adjudicating matters under diversity jurisdiction. In \textit{Swift}, the Supreme Court tried to define “laws” for the purpose of the Rules of Decision Act and held that “[i]n the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws” and that “[t]hey are, at most, only evidence of what the laws are, and are not, of themselves, laws”.\textsuperscript{769} Applying this definition of “laws”, the U.S. Supreme Court concluded that Federal courts are only bound to apply “the positive statutes of the state.”\textsuperscript{770} Thus, when sitting under diversity jurisdiction, a Federal judge should apply the written legislative acts of the State in which the court is sitting, the Federal procedural code, and the Federal common law, the “general law” of the United States, in areas not governed by the first two. This “general law” was the view generally, although not necessarily universally, held by American courts.\textsuperscript{771} Until explicitly overturned in \textit{Erie}\textsuperscript{772}, the holding of \textit{Swift} was considered the law.

Not everyone agreed that it was good law however.\textsuperscript{773} One of the most vicious opponents to the ruling in \textit{Swift} was Supreme Court Justice Oliver Wendell Holmes. From the beginning to the end of his career, Justice Holmes argued the inappropriateness of \textit{Swift}. In his dissenting opinions in \textit{Kuhn} and \textit{Taxicab}, Justice Holmes expressed arguments that would later be used to overturn \textit{Swift}.\textsuperscript{774} In \textit{Kuhn}, Holmes recognized that State courts through their decisions not simply declare the law but establish it, that nothing supports the conclusion that Federal courts have the power

\textsuperscript{767} \textit{William M. Richman \\& William L. Reynolds, Understanding Conflict of Laws 254 (1984).}

\textsuperscript{768} \textit{Swift v. Tyson}, 41 U.S. 1 (1842).

\textsuperscript{769} \textit{Swift}, 41 U.S. at 19.

\textsuperscript{770} \textit{Swift}, 41 U.S. at 19.

\textsuperscript{771} \textit{Swift}, 41 U.S. at 22. For more on \textit{Swift} v. Tyson see generally \textit{David \\& Brierley, supra note 708, at 413; James et al., supra note 710, at 165–66; Yeazell, supra note 730, at 262–63; Wright, supra note 720, at 369–74.}

\textsuperscript{772} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938).

\textsuperscript{773} \textit{See, e.g. Baltimore \\& O.R. Co. v. Baugh}, 149 U.S. 368, 403 (1893) (Field, J. dissenting) (expressed his “faith that [the rule in \textit{Swift}], like other errors, will, in the end ‘die among its worshippers.’”).

to substitute Federal general law for State case-law, and that doing so would be contrary to the interest of uniformity even if it was not unconstitutional. In *Taxicab*, a decision rendered eighteen years after *Kuhn*, Holmes was of the same opinion and took his reasoning one step further as he stated that there is no common law outside of any particular State that is binding within it. Further, Holmes stated that a Federal court would be obligated by the U.S. Constitution to respect State case-law if the State Constitution recognizes it as a source of law, that when a State through its constitution establish a State supreme court it implicitly does the same, and that Federal courts sitting under diversity jurisdiction are thus obligated to observe State case-law. Despite the criticism, the decision in *Swift v. Tyson* would control the choice of substantive law in diversity cases for almost a century.

Choosing the applicable procedural rules was easier for Federal courts as they had few alternatives. Until 1938, there were no Federal procedural rules governing actions in Federal courts inferior to the U.S. Supreme Court. In 1789, Congress prescribed that District Courts and Circuit Courts (while these existed) were to apply the procedural rules of the State in which they were located. Although subject to certain revisions in 1792, 1828, and 1872, Congress appeared content with this solution for almost 150 years. Federal courts applying local procedural rules would have the benefit of leading to intrastate procedural conformity. There was one set of procedural rules applicable in each State and those rules were applied by Federal and State courts alike. Unfortunately, true procedural intrastate uniformity was never achieved and the approach settled by Congress complicated litigation rather than simplifying it. One reason for this were the numerous exceptions made from the general rule that Federal courts apply State procedural law for certain actions and issues. Another reason was that the choice of State law

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775 *Kuhn*, 215 U.S. at 349 (Holmes, J., dissenting).
776 *Taxicab*, 276 U.S. at 518 (Holmes, J., dissenting, with whom Justices Brandeis and Stone concurred). A decade later, the same Justice Brandeis delivered the majority opinion in *Erie*. It should be noted that Holmes, despite the compelling arguments he himself delivered, did not wish to overturn *Swift*, merely limit it from spreading into “new fields.”
777 Act of Sept. 29, 1789, c. 21, § 2, 1 Stat. 93.
778 Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276.
779 Act of May 19, 1828, c. 68, 4 Stat. 278.
780 Act of June 1, 1872, ch. 255, 17 Stat. 196, 197, § 5.
781 David & Brierley, supra note 708, at 410; James et al., supra note 710, at 23.
782 Richman & Reynolds, supra note 767, at 254.
784 Richman & Reynolds, supra note 767, at 254; Wright, supra note 720, at 424.
over Federal law did not cover actions of the judge, issues regarding the jury, or appellate procedure.\footnote{Wright, supra note 720, at 425.} Most damaging, however, was the wording used in the aforementioned Federal acts that Federal practice should conform to State practice “as near as may be”. This was by many Federal judges interpreted as supporting them to a lesser or greater extent disregarding State law.\footnote{Wright, supra note 720, at 425.}

Another, parallel development during the 1800’s was increased interstate procedural uniformity on the State level. Even after the American Revolution, most States modeled their court systems and procedural rules after the English system, which included the complicated system of writs, a system that often caused unfair outcomes, and which was subject to increasingly strong criticism by lawyers and non-lawyers alike during the nineteenth century. In response to such criticism, David Dudley Field led the development of what would upon its completion in 1848 become known as the Field Code of Civil Procedure. In general, the Field Code abolished the separate equity system and simplified pleadings. This model code was welcomed in many States and by 1873 more than half of all States had modified their systems to conform to the code.\footnote{Clark & Ansay, supra note 706, at 376; Yeazell, supra note 730, at 396−99.}

\textbf{The Great Flip-Flop of 1938}\footnote{This most explanatory heading was borrowed from Richman & Reynolds, supra note 767, at 254.}

The situation described above was almost completely reversed in 1938. To summarize the results of a complicated process, Federal courts went essentially from applying State procedural law and Federal substantive law to applying Federal procedural law and State substantive law.\footnote{James et al., supra note 710, at 168.} This change was primarily the result of two major events.

The first event was the adoption of the Federal Rules of Civil Procedure on September 16, 1938. For several years, intrastate procedural disparity between Federal and State courts had been a major problem and rectifying this deficiency was the primary aim of the suggested Federal Rules of Civil Procedure.\footnote{Merio John Pusey, Charles Evans Hughes 709–10 (1952) (this was a problem that had bothered the Supreme Court as well); Wright, supra note 720, at 423–26; Charles E. Clark & James WM. Moore, A New Federal Civil Procedure, 44 Yale L.J. 387, 387–94 (1935). But cf. 302 U.S. 783 (Justice Brandeis, the author of the judgment in Erie, dissenting from the adoption of the Federal Rules of Civil Procedure).} This solution was consistent with the develop-
opment that started ninety years earlier with the aforementioned Field Code of Civil Procedure.\textsuperscript{791} The U.S. Constitution has, as mentioned above, always provided Congress with the power to establish rules of procedure but prior to 1938 the Federal government had largely refrained from exercising that power.\textsuperscript{792} Even in 1938, Congress did not directly participate in the development of a Federal procedural code. That task was instead given to the U.S. Supreme Court\textsuperscript{793} who headed the development of what would become the Federal Rules of Civil Procedure.\textsuperscript{794} The Court, in turn, appointed an Advisory Committee lead by Charles E. Clark and placed it in charge of drafting the actual code.\textsuperscript{795}

The most important attribute of the Federal Rules was its uniform application. The rules were to apply to all civil cases regardless of the underlying substantive issue and to both actions of law and equity.\textsuperscript{796} The Federal Rules of Civil Procedure was a great success,\textsuperscript{797} not only on the Federal level but also on a State level. Since its adoption, every State has

\textsuperscript{791} Yeazell, supra note 730, at 396.

\textsuperscript{792} As previously mentioned, Congress has the power to create inferior Federal courts and to take all measures necessary to complete their creation including adopting procedural rules, U.S. Const. art. III, § 1, art. I, § 8 supplemented by the so-called “Necessary and Proper Clause”, also U.S. Const. art 1, § 8. See also Sibbach v. Wilson, 312 U.S. 1 (1941) and Hanna v. Plumer, 380 U.S. 460 (1965) where the Supreme Court stated that “Congress has undoubted power to regulate the practice and procedure of federal courts” even if these differ from State rules which would otherwise be applied (Sibbach, 312 U.S. at 9 quoted).

\textsuperscript{793} Through the adoption of the aforementioned Rules Enabling Act, 28 U.S.C. § 2072.

\textsuperscript{794} Clark & Ansay, supra note 706, at 376; James et al., supra note 710, at 24–25; Wright, supra note 720, at 426–29. Congress did not give the Supreme Court complete freedom. First, Congress retained the power to veto any procedural rule but it did not exercise that power with regard to Fed. R. Civ. P. Second, subparagraph (b) of the Rules Enabling Act provides that any procedural rule adopted by the Supreme Court “shall not abridge, enlarge, or modify any substantive right”. The Advisory Committee Notes to adoption of the Fed.R.Civ.P. states that the “rules are drawn under the authority of the Act of June 19, 1934, U.S.C., Title 28, § 723b … and § 723c and also other grants of rule making power to the Court.” The two cited sections are now merged into 28 U.S.C. §2072.

\textsuperscript{795} Casad et al., supra note 760, at 428–29; Wright, supra note 720, at 428–29.


\textsuperscript{797} One commentator described the rules as “one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law.” See 4 Charles Alan Wright et al., Federal Practise and Procedure § 1008 n.6 (3rd ed.).
implemented some parts of the Federal Rules of Civil Procedure into their own procedural codes and more than half of the States have adopted the rules with only a few modifications.\textsuperscript{798}

Through the creation of the Federal Rules of Civil Procedure, Federal courts were given their own set of procedural rules. These rules apply, as previously mentioned, in all cases placed before Federal courts, even claims based on substantive State law. The Conformity Act was subsequently repealed and since 1938 the general rule has been that Federal courts apply the Federal Rules of Civil Procedure.\textsuperscript{799}

That concludes the first half of the 1938 flip-flop. The other major event in 1938 was that Federal courts sitting under diversity jurisdiction began to apply substantive State law of all kinds rather than only written State law. This is known as the Erie doctrine and will be discussed further below.\textsuperscript{800}

4.4 State Courts Applying Federal Law

4.4.1 Introduction

The issue of when Federal courts have jurisdiction and when Federal courts enforce substantive State law was examined in the preceding section. This section addresses the comparable issue with regard to State courts. This section is devoted to examining the conditions under which State courts apply Federal law, a situation comparable to the courts of the Member States enforcing European Community law. This examination comprises two issues.

The first issue is under what circumstances State courts are allowed to apply Federal law or, conversely, to what extent the Federal government can prevent State courts from adjudicating Federal claims. As we shall see below, this issue was primarily relevant during the early years of the American republic. The second issue is under what circumstances the States may refuse jurisdiction over Federal claims or, differently phrased, to what extent State courts are required to enforce Federal law. By examining these two issues, the extent and limitations of State court jurisdiction over Federal law will be presented. The closely related issue of which procedural rules State courts shall apply under such circumstances, Fed-

\textsuperscript{798} \textit{Wright, supra} note 720, at 430.

\textsuperscript{799} \textit{James et al.}, supra note 710, at 163. The same principle applies vice-versa when a State court decides a case based on substantial Federal law. \textit{Id.}, at 164.

\textsuperscript{800} See infra Part 4.5.2.
eral or State, involves an examination comparable to that made in the preceding chapter with regard to Community law. That issue is not addressed in this chapter but the next which is devoted to the legal mechanisms that regulate this issue, herein collectively referred to as the American doctrine.  

4.4.2 Status and Content of Federal Law in State Courts

We begin the examination by considering what implications the fact that Federal law is “the supreme law of the land” has on the issue of what laws State courts apply; Federal or State, substantive or procedural. Conflicts between laws created by States and laws created by the Federal government must be resolved where they arise. As Professor Hart concluded, “[t]he law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately authoritative voice.” In resolving such conflicts, the U.S. Constitution leaves no room to doubt that States must follow the Constitution itself and other Federal acts created under it. In line with this, the U.S. Supreme Court established in *Testa* that the supremacy of Federal law obligates the States and their courts to set aside State law whenever it conflicts with Federal law.

Although *Testa* convincingly declares the basis for the supremacy of Federal law, it also contains a significant loophole. Since the Federal government lacks power to set up State courts or to confer jurisdiction upon existing State courts, there is a small – in reality only theoretical – pos-

801 See infra Chapter 5. There is also another reason why it is necessary to separate the description of State courts applying Federal law into two parts. As will be obvious later on, State court jurisdiction over Federal claims is influenced by the *Erie* doctrine described infra Part 4.5.2 and the former can thus not be fully described before the latter. 

802 See supra Part 4.4.2. 


804 “Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws ‘the supreme Law of the Land,’ and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.” Howlett by Howlett v. Rose, 496 U.S. 356, 367 (1990).


806 All States have courts of general jurisdiction, see supra Part 4.2.
sibility that a State could lack a court where a Federal claim can be raised: the State must have conferred jurisdiction upon a State court for Federal law to be applied by the State judiciary.\textsuperscript{807} This loophole, which at first glance appears small, has developed into a significantly larger one. First by the establishment of “[t]he general rule … that federal law takes the state courts as it finds them”,\textsuperscript{808} and then, from there, to the conclusion that States do not have to enforce Federal law if they have an “otherwise valid excuse”.\textsuperscript{809}

The U.S. Supreme Court addressed the implications of Federal law being supreme for the activities of the State courts in \textit{Howlett}. The Court stated that Federal supremacy carries with it three principles that are “fundamental to a system of federalism in which state courts share responsibility for the application and enforcement of federal law.” These are that State courts cannot refuse to enforce Federal law unless they have a valid excuse; that any excuse that is inconsistent with Federal law is not valid; and that the Federal government should be careful about forcing States to enforce Federal law where a “neutral” procedural rule suggests otherwise.\textsuperscript{810} \textit{Howlett} may at first sight appear to describe more or less completely the conditions under which State courts adjudicate Federal claims. The forthcoming examination of the American doctrine reveals however that the situation is not as simple as \textit{Howlett} suggests.

Before examining to what extent a State court can apply ordinary State procedural rules when faced with substantive Federal law, a few remarks regarding the Federal government’s influence over State procedure generally should be made. Only a few Supreme Court decisions address this question. There are however a few cases that support the conclusion that the States are entitled to set up its judiciary as it sees fit and “to adminis-

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{808} Hart, \textit{supra} note 803, at 508 (cited in \textit{Howlett}, 496 U.S. at 372); Martin H. Redish \& John E. Muench, \textit{Adjudication of Federal Causes of in State Court}, 75 Mich. L. Rev. 311, 342 (1977); Weinberg, \textit{supra} note 807, at 1774.
    \item \textsuperscript{809} The phrase “otherwise valid excuse” and what it has been held to mean is examined \textit{infra} Part 5.5.4.
    \item \textsuperscript{810} \textit{Howlett}, 496 U.S. at 367–73. It seems questionable whether there is any real room for an “excuse” if it has to be consistent with Federal law. If the excuse is consistent with Federal law, the State would hardly need an excuse.
\end{itemize}
\end{footnotesize}
ter that system in its own way.” When it comes to State courts enforcing Federal law, the general rule is that State law controls “the time when, and the mode by which, federal claims must be asserted in the state courts.” This general rule is however, as will be evident below, subject to several exception.

4.4.3 State Courts’ Right to Apply Federal Law

We turn now to the first of the two issues identified above: the right of State courts to apply Federal law. An examination of this issue should begin with the Constitution. When drafting the U.S. Constitution and the Judiciary Act of 1789, it was argued that State courts could be entrusted to enforce all substantive Federal law and that it was unnecessary to establish inferior Federal courts. The existence today of a vast Federal judiciary indicates that not all agreed with this proposition. In the early nineteenth century, the Supreme Court even indicated that State courts could never hear claims based on Federal law, not even if Congress expressly intended for this.

811 Staub v. City of Baxley, 355 U.S. 313, 329 (1958) (Frankfurter, J., dissenting). See, e.g. Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190 (1925) (upholding the validity of a State rule under which a constitutional question is waived unless appealed to the State supreme court directly); Pennsylvania R.R. v. Illinois Brick Co., 297 U.S. 447 (1936) (the Supreme Court “lacks jurisdiction to consider constitutional questions which the highest court of the State declined to consider because not raised in the trial court or presented in accordance with a well established and reasonable practice”); Edelman v. California, 344 U.S. 357 (1953) (failure to meet state procedural rule bars the Supreme Court from reviewing whether petitioner’s rights under the Fourteenth Amendment had been breached); Beck v. Washington, 369 U.S. 541 (1962) (failure to raise argument in the timely manner required under state law bars the Supreme Court from reviewing a federal question). See also Hart & Wechsler, supra note 710, at 551.


813 See generally Sandalow, supra note 812, at 229; cases cited id. at 229 n.173. This can be compared to the European principle of national procedural autonomy discussed supra Part 3.2.

814 Wright, supra note 720, at 288. Had this come true the judiciary structure of the United States would be almost identical to that of the European Union or the German federal republic.

815 The history of the Federal judiciary was described supra Part 4.3.

816 Martin v. Hunter’s Lessee, 14 U.S. 304, 337 (1816) (the issue was actually whether the U.S. Supreme Court has jurisdiction to review a ruling on a Federal question when it has been issued by a State court); Redish & Muench, supra note 808, at 311–12; Note, supra note 807, at 1551–52; see also Jackson v. Rose, 2 Va. 34 (1815).
The United States Supreme Court later revisited the issue and has since had a more generous position regarding State courts adjudicating Federal claims. Not only has the Supreme Court declared that it is possible for State courts to have jurisdiction over claims based on Federal law, but in *Claflin* it established that State courts and Federal courts are presumed to have concurrent jurisdiction over all Federal actions: “the state court has jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.”

Concurrent State jurisdiction means that a claim that falls under the jurisdiction of Federal courts can also be brought in a State court unless Congress has exercised its power to confer jurisdiction over the matter exclusive to Federal courts or if State court adjudication would be clearly incompatible with Federal interests. If neither of these two exceptions apply, the plaintiff can choose whether to file the complaint in a State court or in a Federal court. In such a situation, the plaintiff is likely to choose the court in which he or she is most likely to be successful.

### 4.4.4 State Courts’ Duty to Apply Federal Law

It is thus established that State courts can have jurisdiction over Federal claims. Whether a claim actually ends before a State court depends, besides the actions of the individual litigants, largely upon Congress that can choose between concurrent State court and Federal court jurisdiction and exclusive Federal court jurisdiction. This raises the question

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818 *Claflin*, 93 U.S. at 136 (“the general principle is that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself, but, if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.”); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 477–78 (1981) (“state courts may assume subject matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication”); *Redish & Muench*, supra note 808, at 313–14.
820 *David Crump et al., Cases and Materials on Civil Procedure* 154 (4th ed. 1998) (notes that the same things goes for claims that fall under diversity jurisdiction). Note that that does not necessarily mean that the chosen court is the one that in the end settles the claim. There is always the possibility that the defendant is successful in transferring the case to another court.
821 *Wright*, supra note 720, at 288; *Redish & Muench*, supra note 808, at 340.
822 Hart, supra note 803, at 507.
of whether the States have no influence over the matter. The issue of whether State courts must exercise jurisdiction over Federal matters when Congress allows it or whether the State can decline jurisdiction will now be considered. Can Congress force State courts to adjudicate Federal claims?

States have fought for the right to decline concurrent jurisdiction over Federal law since the beginning of the nineteenth century.\textsuperscript{823} As a reason for their unwillingness to exercise such jurisdiction, States have claimed, among other things, that they should not be forced to enforce a Federal law if it is contradictory to the policy of the State and that it would be unnecessarily confusing, both to judges and to the public, if the same State court applied two conflicting standards to claims that are different only in the respect that one arose under Federal law and the other under State law. States have for example argued that the standard of care expected of a person that wishes to avoid tort liability should be the same in all situations as the effect that law has on societal behavior will otherwise be limited.\textsuperscript{824} Another reason for the States’ reluctance to enforce Federal law is the time and resources they must spend to properly adjudicate and enforce substantive rights and obligations that are sometimes novel and foreign in the State.\textsuperscript{825}

The Supreme Court nevertheless established that the U.S. Constitution obligates State courts to enforce Federal substantive law. Drawing upon the Supremacy Clause and its own reasoning in \textit{Claflin}, the Supreme Court concluded in \textit{Mondou} that Federal law automatically becomes applicable in all States when enacted.

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in a legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the Courts of the State.\textsuperscript{826}

\textsuperscript{823} \textit{Wright, supra} note 720, at 288.
\textsuperscript{824} \textit{Mondou} v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 55–56 (1912).
\textsuperscript{825} Gordon & Gross, \textit{supra} note 807, at 1147–48.
\textsuperscript{826} \textit{Mondou}, 223 U.S. at 57, quoting \textit{Claflin}, 93 U.S. at 136–37 (“The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are … The fact that a state court derives its existence and functions from the state has is no reason why it should not afford relief …”).

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Whereas *Claflin* supported that a State court *may* enforce a Federal right, the ruling in *Mondou* converted that right into an obligation. State courts *must* enforce Federal rights.

This duty is subject to an important exception: that State courts enforce analogous State rights. That Congress lacks the power to grant State courts jurisdiction would suggest that there are limitations to its ability to compel State courts to hear Federal claims. As the Supreme Court has ruled on many occasions, only the State legislature is competent to create State courts and to confer jurisdiction upon them. It also follows from the aforementioned decision in *Claflin* that State courts do not have to hear a Federal claim when they “by their own constitution” are not competent to do so.

The Supreme Court elaborated upon its decision in *Mondou* in *McKnett*. In *McKnett*, the courts of Alabama had refused to hear a Federal tort claim where the cause of action had wholly arisen in Tennessee. The State courts referred to a State statute making State court jurisdiction dependant upon the cause of action having arisen under the law of another State. The State court concluded that the language of the State statute excluded actions arising under Federal law which is not the law of another State. On review, the United States Supreme Court noted that although Congress lacks power to determine the jurisdiction of State courts, the U.S. Constitution forbids State courts from refusing to hear a claim solely on the ground that it arose from Federal law.

The holding of *Mondou* was also upheld and strengthened in *Testa v. Katt*. In *Testa*, the supreme court of Rhode Island had refused to apply a Federal law according to which a plaintiff was entitled to three times the actual damages. As the reason for its refusal, the State court stated that the rule in question was a “penal statute in the international sense” and that the courts of Rhode Island were not obligated to enforce rules of such nature. In reviewing the State court’s decision, the U.S. Supreme Court:

827 Note, supra note 807, at 1553–54. See further infra Part 5.5.
828 Huntington v. Attrill, 146 U.S. 657, 672 (1892); *Mondou*, 223 U.S. at 56–57; Brown v. Gerdes, 321 U.S. 178, 188 (1944); Redish & Muench, supra note 808, at 340–41. State court jurisdiction and how the matter of jurisdiction has been treated in the American doctrine will be discussed infra Part 5.3.
829 93 U.S. at 136.
831 *McKnett*, 292 U.S. at 230–32.
833 330 U.S. 386.
court emphatically denied that the Federal statute’s status as “penal” or “international” was relevant to whether the State court should apply it. According to the Supreme Court, while a State is not always required to apply the substantive law of a foreign state or a sister State, it may not refuse to enforce Federal law that is superior in relation to State law by virtue of the U.S. Constitution.835

Even Testa contains a small exception to the general rule that State courts must apply and enforce Federal law. In the last paragraph of its decision, the Testa Court noted that “Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action.”836 This statement has been interpreted e contrario to support that a State does not have to enforce a Federal claim if there is no court with jurisdiction to adjudicate an analogous claim under State law.837 That exception is consistent with the Federal government’s admitted constitutional inability to confer jurisdiction upon State courts.838 Although all States have de facto established courts of general jurisdiction,839 this line of reasoning has led the Supreme Court to accept that “[t]he general rule … is that federal law takes the state courts as it finds them.”840 This conclusion, in turn, has led the Supreme Court to formulate an exception to the general obligation to enforce Federal law where the State has an “otherwise valid excuse”. This can be observed, for example, in Testa where the Court noted that Rhode Island’s policy on the matter “cannot be accepted as a valid excuse.”841 The existence of “valid excuses” is of great interest to this study and will be examined in depth further below.842

A distinguished American scholar, Henry Hart, summarized most elegantly the point that this section intends to illustrate.

[S]tate courts are regularly employed for the enforcement of federally-created rights having no necessary connection with state substantive law, while federal courts are employed for the enforcement of state-created rights having no necessary connection with federal substantive law … In so enforcing

835 Testa, 330 U.S. at 389–94.
836 Testa, 330 U.S. at 394.
837 Note, supra note 807, at 1555–56; see also Gordon & Gross, supra note 807, at 1159–60.
838 Weinberg, supra note 807, at 1773.
839 See supra Part 4.2.
840 Hart, supra note 803, at 508 (cited in Howlett, 496 U.S. at 372); Redish & Muench, supra note 808, at 342; Weinberg, supra note 807, at 1774.
841 Testa, 330 U.S. at 392, citing Douglas, 279 U.S. at 388. The connection between the two cases is, however, rather weak. Gordon & Gross, supra note 807, at 1158 n.55.
842 See infra Part 5.5.
substantive rights and duties created by the other system, each of the two systems of courts employs its own rules of procedure and to some extent its own remedial concepts. To the problems of disentangling federal substantive law from state substantive laws are thus added problems of disentangling substantive law, state or federal as the case may be, from federal or state procedural and remedial law.843

4.5 Understanding the American Doctrine

4.5.1 Introduction

In the preceding sections we have examined the conditions that have caused the American doctrine and which continue to govern it. A few general issues regarding the American doctrine should however be addressed before commencing the examination of its contents.844 Most importantly, we should address what the relationship is between the American doctrine and, what is known in the legal literature as the Erie doctrine and the Converse Erie doctrine respectively. The Erie doctrine is also relevant for understanding the American doctrine and references will be made to the Erie doctrine further below. In light of this, we begin with an introduction to the Erie doctrine.

4.5.2 The Erie doctrine

The Erie doctrine is among the most feared subjects amongst American law students.845 The Erie doctrine addresses issues that mirror those in the American doctrine. Instead of addressing State courts enforcing Federal law and the relationship between State procedural law and Federal substantive law, the Erie doctrine addresses Federal courts enforcing State law and the relationship between Federal procedural law and State substantive law. The Erie doctrine is relevant for this study as the American doctrine has developed alongside the Erie doctrine and some of its elements can only be properly understood against the backdrop of the Erie doctrine.

As addressed above, Federal courts adjudicate matters of substantive State law when sitting under diversity jurisdiction or supplemental juris-

843 Hart, supra note 803, at 498.
844 This is comparable to the discussion in a previous section regarding the European doctrine supra Part 2.5.
As also previously mentioned, the Federal judiciary changed in two respects in 1938. One cause of change was the introduction of the Federal Rules of Civil Procedure, the other was the United States Supreme Court’s ruling in Erie Railroad Co. v. Tompkins. \(^{848}\) *Erie* attracted little attention when it was announced\(^ {849}\) but would later be referred to as “one of the most important cases at law in American legal history”\(^ {850}\) and “the decision that all lawyers acknowledge to be one of the most remarkable in the Supreme Court’s history”\(^ {851}\). One commentator has stated, “[a]nyone remotely connected with the practice or study of law is familiar with the opinion in *Erie R.R. v. Tompkins*”\(^ {852}\) and another that “there has hardly been a civil case since Erie was decided that has not felt the effect of that decision.”\(^ {853}\)

To understand the importance of *Erie* one should begin with the U.S. Supreme Court’s previously mentioned decision in *Swift*\(^ {854}\) where it interpreted the term “laws” in the Rules of Decision Act to include only written, legislative State acts. Because of *Swift*, Federal courts were free to apply Federal common law on all matters not controlled by written State law.\(^ {855}\) Because the relevant State common law and the Federal common law conflicted and *Swift* allowed the Federal courts that handled Harry Tompkins’s case\(^ {856}\) to apply the Federal rule, they granted Tompkins damages that a State court would not have granted.\(^ {857}\) On appeal, the
U.S. Supreme Court overturned its decision in *Swift* on the ground that it was unconstitutional. The Court concluded that its interpretation of the Rules of Decision Act in *Swift* constituted “an unconstitutional assumption of powers by the Courts of the United States” since “Congress has no power to declare substantive rules of common law applicable in a state … [a]nd no clause in the Constitution purports to confer such a power upon the federal court …” 858

*Erie* is often cited for the declaration that “there is no federal general common law”859 but the Court also established another, for the purposes of this study more interesting rule in *Erie*. The decision in *Erie* was important by itself but it would eventually grow to a point where it was more reminiscent of a religion than a source of law.860 Besides the constitutional ground for *Erie*, the decision brought attention to the problems associated with courts established by one lawmaker enforcing substantive law enacted by another lawmaker. The *Erie* doctrine, *Erie* and the decisions that followed it, addresses an issue that essentially mirrors the one governed by the European doctrine. The *Erie* doctrine governs to what extent Federal courts adjudicating matters under substantive State law shall apply Federal procedural rules. The *Erie* Court found that when Federal general law differed from State law, the *Swift*-rule impaired intra-state uniformity and thereby caused discriminatory effects and induced forum shopping, both of which should be avoided according to the Supreme Court.861

858 *Erie*, 304 U.S. at 78–80, quoting *Taxicab*, 276 U.S. at 533 (J. Holmes, dissenting); see also Harry Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336, 1337 (1938); “I certainly didn’t expect to live to see the day when the Court would announce … that it itself has usurped power for nearly a hundred years.” Letter from Frank Frankfurter (former Supreme Court Justice) to President Roosevelt (April 27, 1938); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278–80 (1946). In making this conclusion, the Supreme Court relied heavily upon an interpretation of the Rules Enabling Act, the validity of which was later called into question. Hart & Wechsler, *supra* note 710, at 634; Arthur John Keeffe et al., *Weary Erie*, 34 COrnell L.Q. 494, 495–96 (1949).


It follows from *Erie* that Federal courts shall apply State law but the decision did not conclusively state that Federal courts must apply State law on *all* matters.862 When *Erie* was decided, the Federal Rules of Civil Procedure had been enacted only four months earlier. The combined result of the decision in *Erie* and the adoption of the Federal rules was that the Federal judiciary shifted from applying State procedural law and Federal substantive law to applying Federal procedural law and State substantive law.863 This brought attention to the division of matters of substance and matters of procedure which would be a debated aspect of the decision in *Erie*.864 It was clear after *Erie* that a party that want a Federal court to apply State law on a matter should argue that it is substantive rather than procedural and vice versa argue that the issue is procedural if it is more beneficial to apply Federal law. The distinction between substantive and procedural law was essential according to *Erie* but the decision did not clarify on what grounds the distinction should be made.865

This issue was however addressed in *Sibbach* where the applicant challenged that a Federal court could subject her to a physical examination in accordance with the Federal Rules of Civil Procedure, arguing that the issue is substantive and thus controlled by State law and that that law of the State in question did not allow a court to issue such an order.866 The U.S. Supreme Court reaffirmed that the distinction between substantive and procedural law was instrumental for determining what laws a Federal court should apply but declared that “really” procedural are only those rules that regulated “the judicial process for enforcing rights and duties …”.867 The substance/procedure dichotomy was essential in *Erie* and *Sibbach* and both cases included reservations on this point. It was stated that

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862 The majority concluded that “Congress has no power to declare substantive rules of common law applicable in a State”, *Erie*, 304 U.S. at 78, but made no mention of procedural law. However, in his concurring opinion, Justice Reed stated that “no one doubts federal power over procedure.” *Erie*, 304 U.S. at 92 (Reed, J., concurring).

863 Clark, supra note 858, at 288.

864 Clark, supra note 858, at 288. It did not seem to have interested early commentators though, see, e.g. Shulman, supra note 858, a fifteen page review of *Erie* written in the same year as the case itself which does not even mention the substance-procedure distinction.


866 *Sibbach*, 312 U.S. at 2–3, 6–7.

867 *Sibbach*, 312 U.S. at 10–14. In determining that Congress was within its powers, the Court made an extensive interpretation of the Rules Enabling Act against a constitutional backdrop.
“[t]he line between procedural and substantial law is hazy” and several Justices doubted whether substance and procedure really “are mutually exclusive categories with easily ascertainable contents …”. In *York*, the U.S. Supreme Court openly confronted the ambiguity of the substance/procedure dichotomy.

Matters of ‘substance’ and matters of ‘procedure’ are much talked about in the books as though they defined a great divide across the whole domain of law … [they] are the same keywords to very different problems. Neither ‘substance’ nor ‘procedure’ represents the same variants. Each implies different variables depending upon the particular problem for which it is used.

*York* established that rather than relying on whether a matter of controversy is typically characterized as “substantive” or “procedural” the distinction between the two should be made taking into consideration the two aims of *Erie*: promotion of uniformity and a proper division of power between the Federal government and the States. According to *York*, “the proper distribution of judicial power between State and federal courts” requires that “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a state court … a block away.” Thus, when determining whether a matter is procedural or substantive for purposes of the *Erie* doctrine, the Federal judge should consider whether replacing the State rule with the Federal rule would significantly affect the outcome of litigation. If this inquiry results in an affirmative answer, the twin aims of *Erie* require the Federal court to apply the State rule. Conversely, if the answer is negative the issue in question is of “a mere remedial character” and the dual aims of *Erie* do

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868 *Erie*, 304 U.S. at 91–92 (Reed, J., concurring).
869 *Sibbach*, 312 U.S. at 17 (Frankfurter, J., dissenting with whom joined Black, J., Douglas, J., and Murphy, J.).
872 One of the more well-established models for separating substance from procedure under *Erie* was the one developed in the area of conflict-of-laws. Note, *The Erie Case and the Federal Rules – A Prediction*, 39 GEO. L.J. 600, 601 (1951).
873 *York*, 326 U.S. at 109–11; Merrigan, *supra* note 852, at 711. Ironically, the test laid out in *York* would later be discarded because it made the distinction between substance and procedure “without reference to the twin aims of the *Erie* rule.” *Hanna*, 380 U.S. at 466–68.
not require Federal law to be set aside.\textsuperscript{876} This modification of the \textit{Erie}-test has become known as the outcome-determinative test.\textsuperscript{877}

The Erie doctrine did not end with the decision in \textit{York}. On the contrary, the Erie doctrine is still developing. While it is not necessary to address all parts of the doctrine here, it is important to emphasize its constitutional dimension. The Erie doctrine is caused by the Federal government having the power to create Federal courts and regulate procedure therein while those courts owe certain duties towards the State legislator who created the substantive rights and obligations that are the subject of adjudication. The issues governed by the Erie doctrine are federalist by nature,\textsuperscript{878} the question of whether Federal courts shall apply Federal or State law is not only of legal-technical importance but affects the division of power between the Federal government and the several States. This can explain why the Supreme Court overturned \textit{Swift} in \textit{Erie}. When \textit{Swift} was decided, people still believed to some extent in true common law, but when the time came for \textit{Erie}, the view of the law had changed. The common law was no longer seen as “a brooding omnipresence in the sky, but the articulate voice of some sovereign.”\textsuperscript{879}

4.5.3 Erie, Converse Erie, and the American Doctrine

Although the Erie doctrine is interesting, it is the mirror-image of the European doctrine. At the same time as the Erie doctrine developed, another situation, one more directly comparable to the European, caught the attention of judges and legal scholars: State courts enforcing Federal rights. The case-law regulating this matter is independent from the Erie doctrine but the two doctrines are related as the U.S. Supreme Court developed them alongside each other.

It was the Erie doctrine that caught most of the attention. The Erie doctrine brought attention to the problems associated with one lawmaker’s courts enforcing rights established by another lawmaker. Because of this, situations where conflict arose between State law and Federal law as State courts enforced Federal rights were commonly referred to as “con-
verse Erie” or “reverse-Erie” situations. The American doctrine studied next has much in common with what is referred to as the Converse Erie doctrine. However, to match the functional definition of the object of examination it is necessary to have a broader scope of examination than a more traditional examination of the Converse Erie doctrine would entail. Moreover, in the interest of clarity it is valuable to use a vocabulary that is as comparable as possible between the elements to be compared. Thus, the American legal mechanisms and strategies governing State courts using State procedure to enforce Federal claims will herein be referred to as the American doctrine. It is the contents of this American doctrine that is the subject of the next chapter.

882 See supra Part 1.3.
5 The American Doctrine

5.1 Introduction
The system of legal mechanisms in Community law governing what pro-
cedural rules national courts shall apply to Community rights, herein
referred to as the European doctrine, was studied in chapter 3 above. As
previously described, the European doctrine will in the next part of the
study be compared to its American equivalent: the legal mechanisms in
Federal law governing what procedural rules State courts shall apply to
Federal rights.883 The purpose of this chapter is to describe these legal
mechanisms, herein referred to as the American doctrine. The United
States Supreme Court has recognized five more or less independent tracks
of reasoning that together govern what procedural rules State courts shall
apply to Federal rights.

First, the U.S. Constitution places limits on State procedural law. State
procedural rules must be set aside if they violate the Constitution. The in
this regard most significant elements of the Constitution has been the
Due Process and Equal Protection Clauses of the Fourteenth Amend-
ment.884

Second, the U.S. Constitution also places boundaries on the Federal
government and its power over the State. The U.S. Supreme Court has in
its case-law addressed to what extent the Federal government can force
States to realize Federal aims, something commonly described as Federal
commandeering.885

Third, another issue controlled by the U.S. Constitution is to what
extent the Federal government can regulate what procedural rules State
courts shall apply to Federal rights. A first and most obvious example of
Federal regulation of State procedure is the Federal government enacting
laws directly regulating procedural matters. However, as will be demon-
strated below, Federal law can also displace State procedural law under

883 See supra Part 1.2.2.
884 See infra Part 5.2.
885 See infra Part 5.3.
the theory of preemption or under the theory that a specific procedural matter is “part and parcel” of a Federal right.\textsuperscript{886}

Fourth, an issue that the U.S. Supreme Court has discussed in several decisions is if State courts are under a duty to hear Federal claims and, if so, how far that duty extends. The Court has established that although the Federal government lacks power over State court jurisdiction, a State court must adjudicate a case concerning a Federal right if it has jurisdiction over analogous State rights and it cannot present an “otherwise valid excuse” for not hearing the claim.\textsuperscript{887}

Fifth and finally, as a general rule, the Federal judiciary does not review decisions by State courts according to which a litigant was barred from exerting a Federal right for failure to comply with State procedural law. Differently stated, that a State court finds that a litigant has failed to comply with a State procedural rule is normally sufficient to bar the same from exerting a claim under Federal law. A requirement for this to be the case is however that the State ground is “adequate and independent”. The Supreme Court has found that State rules that are novel, that are applied inconsistently, or that unnecessarily burdens the exertion of a Federal right are not “adequate and independent”.\textsuperscript{888}

5.2 Track I: Constitutional Requirements of State Procedure

5.2.1 Introduction

The first track of the American doctrine focuses on the constitutionality of State procedural law. A first question that should be considered is whether the state procedural rule in question is unconstitutional which, if so, would render it invalid. All State laws, including rules of procedure, must meet the requirements of the U.S. Constitution. This follows from the Constitution itself, perhaps most importantly from the Supremacy Clause\textsuperscript{889} and the Privileges and Immunities Clause.\textsuperscript{890} Moreover, when the Constitution grants individuals a right, no distinction is made between when State procedural law is applied to a Federal right and when it is applied to a right created by State law. For example, the duty of States

\textsuperscript{886} See infra Part 5.4.
\textsuperscript{887} See infra Part 5.5.
\textsuperscript{888} See infra Part 5.6.
\textsuperscript{889} U.S. Const. art VI, § 2.
\textsuperscript{890} U.S. Const. art IV, § 2, cl. 1 (“the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”).
to extend due process to litigants applies equally to cases resting on Federal and State law ground.

Whether the first ten amendments to the Constitution, the so-called Bill of Rights, also bind the States has been a controversial subject. What makes it doubtful is primarily that the first eight Amendments are directed towards the Federal government. One example is the First Amendment that explicitly only prohibits the Federal government from limiting the freedom of speech. Does the fact that the First Amendment only talks of Congress conversely mean that States may limit the freedom of speech? It was decided almost 200 years ago that the Bill of Rights is not directly applicable to the States but the answer to the question is still no. It has been established that the Bill of Rights is at least partially incorporated in the Fourteenth Amendment. Today, virtually the entire Bill of Rights is thought to have been incorporated through the Fourteenth Amendment, the first section of which should be quoted in full considering its importance for the subject of this study.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court’s interpretation of the Fourteenth Amendment has effectively meant that State governments are for the most part bound by the requirements that the Bill of Rights places on the Federal government. It is obvious from the plain language of the Four-

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892 William B. Lockhart et al., Constitutional Law 391 (7th ed. 1991); e.g., Palko v. Connecticut, 302 U.S. 319, 322 (1937) (concerning the Fifth Amendment which provides protection against double jeopardy in criminal cases).
894 Whether this incorporation is “total” or “selective” has been a subject of much debate. See generally Lockhart et al., supra note 892, at 391–99; Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). The U.S. Supreme Court has from time to time advocated both positions. For example, compare Palko, 302 U.S. 319 (selective incorporation only of “fundamental rights”) with Adamson v. California, 332 U.S. 46 (1947) (total incorporation).
895 Lockhart et al., supra note 892, at 391; Henry Paul Monaghan, Of “Liberty” and “Property”, 62 Cornell L. Rev. 405, 405 (1977); see, e.g., Chicago, Burlington & Quicy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (Fifth Amendment); Powell v. Alabama, 287 U.S. 45 (1932) (Sixth Amendment); Grosjean v. American Press Co., 297 U.S. 233 (1936) (First Amendment); Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (“The Court
teenth Amendment that it places a number of important requirements on States and State law. We shall now briefly consider what these requirements mean for what procedural rules State courts shall apply to Federal rights.

5.2.2 Right to Due Process

The for our purposes most important element of the Fourteenth Amendment is the so-called Due Process Clause that requires that persons are given due process of law. The primary objective of due process is the procedure, “the mode of proceeding that must be pursued by government agencies.” The requirements of the Fourteenth Amendment are however limited to situations where a State seeks to deprive a person of “life, liberty, or property.” As such, the constitutional requirement of due process is important in criminal cases. It is for example valuable to note that the principle of *nulla poena sine lege* is considered an element of criminal due process. The application of the Due Process Clause is however not limited to criminal matters. It applies in any proceedings where life, liberty, or property is at stake whether criminal, procedural, or administrative by nature. Life is (hopefully) rarely at risk in civil and administrative proceedings, but liberty and property more frequently so. When that is the case is sometimes difficult to determine.

Three-quarters of a century ago, the U.S. Supreme Court established in *Brinkerhoff* the seemingly basic idea that State procedure used to adjudicate claims based on Federal law must conform to the U.S. Constitution. *Brinkerhoff* concerned the Fourteenth Amendment right of due process. The petitioner in *Brinkerhoff* had filed a claim in a State court seeking injunctive relief from a tax assessment under Federal law.

thus has rejected the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights …’”). But cf. *Palko*, 302 U.S. at 323 (holding that there is no general rule that the Fourteenth Amendment embodies every right contained in the First through the Eight Amendment, in every respect).

**Bernard Schwartz, Constitutional Law** 165 (1972). As we shall see further below, due process also has a substantive side as well as a procedural one.

Because of this requirement, the due process clause has primarily been applied against State law. It is however equally applicable when there is a Federal law at the basis of the dispute. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).


The argument was that the assessment was discriminatory under Federal law. Alfred Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 960 (1965).
Brinkerhoff did so without first asking the tax official for such relief, relying on a ruling by the State supreme court according to which petitioning the tax official was both unnecessary and improper. When faced with the case at hand, the same State supreme court overturned its prior decision, stating that Brinkerhoff should have petitioned the tax official before seeking relief from a court and that failure to follow this procedure barred his claim under the doctrine of laches. Upon appeal, the United States Supreme Court found that the State supreme court by changing its practice had effectively "deprived … [the petitioner] of all existing remedies for the enforcement of a [Federal] right, which the State has no power to destroy" and that State law provided Brinkerhoff with no "real opportunity to protect it." As a result, petitioner had been deprived of due process in the "primary sense" which is to have "an opportunity to present its case and be heard in its support."

The U.S. Supreme Court has stated that the right to be heard as a matter of due process "before being condemned to suffer grievous loss of any kind … is a principle basic to our society." It has been established that the right to due process applies in a wide-range of cases including procedures regarding welfare, disability benefits, taking children from their parents, commitment for mental illness, and criminal proceedings.

While the principle of due process applies in all these situations, what it requires more specifically varies upon the nature of the case. For example, in Bell, which concerned proceedings for the revocation of a driver's license, the principle of due process required a proper hearing but not necessarily one with all elements that would be required in a criminal proceeding where the accused risked imprisonment. According to the decision in Bell, the importance of the individual interest concerned is the

901 Laclede Land & Improvement Co. v. State Tax Comm’n, 243 S.W. 887 (Mo. 1922).
902 Brinkerhoff, 281 U.S. at 674–77. Laches is a doctrine under equity according to which relief may be denied when the claimant unreasonably delayed in bringing the claim. Black’s Law Dictionary 891 (8th ed. 2004).
903 Brinkerhoff, 281 U.S. at 681–82.
904 Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (emphasis added) (the complainant organizations had been designated as communist by McGrath, the Attorney General of the United States, without reason or prior hearing).
905 Goldberg, 397 U.S. 254.
only factor relevant for determining if due process has to be extended. Bell has been described as the “high-water mark” of the Supreme Court’s “latitudinarian approach to ‘liberty’ and ‘property’”. The Court has since taken a more restrictive approach, interpreting the words “life, liberty, and property” in the Due Process Clause more narrowly.

The decision in Brinkerhoff is connected to the so-called State Grounds doctrine and is the only Supreme Court decision where a State procedural rule being unconstitutionally burdensome was also considered a ground for “inadequacy” under this doctrine. That State procedural law is set aside when it does not meet the Constitution’s requirement of due process is however not a curiosity. The element of due process discussed in Brinkerhoff was the right to be heard. Procedural due process seeks to ensure that the individual has an opportunity to be heard at a hearing that is “meaningful” and “appropriate to the nature of the case.”

Due process also includes other things. Other State procedures found to violate the Due Process Clause have, among other things, concerned sufficiency of evidence, access to counsel, adequacy of counsel, adequate notice, access to information, and opportunity to cross-examine witnesses. There are also limits to what is covered by the principle of due process. For example, actions taken by a State against an individual only sometimes needs to be preceded by a complete trial.

Bell, 402 U.S. at 539 (concluding that the possession of a driver’s license can be “essential in the pursuit of a livelihood”).

Monaghan, supra note 895, at 407–08.


Discussed infra Part 5.6.


E.g. Bouie v. City of Columbia, 378 U.S. 347, 350 (1964) (supporting that the amount of evidence required by a State court can be unconstitutionally low); Santosky, 455 U.S. 745.


E.g. Greene v. McElroy, 360 U.S. 474, 496–97 (1959); Goldberg, 397 U.S. at 267–68 (due process “require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.”).

E.g. Goldberg, 397 U.S. at 269.

Bell, 402 U.S. at 539–40 (procedural due process does not require “full adjudication”); Eldridge, 424 U.S. 319.
An illustrative example of how the Due Process Clause applies to State procedure is Gonzalez v. Wilmot. These were the facts. Gonzales had objected to the testimony given by one of two arresting officers but not to the testimony of other officers in the State court of first instance even though the objection applied equally to all. Gonzales did so in reliance upon a settled State law rule which stated that one objection is sufficient, the single objection doctrine. The appellate division of the State judiciary nevertheless held that Gonzales had waived his right to object by failing to object to the second officer’s testimony in the trial in first instance. The U.S. District Court in Gonzalez decided that the sudden reversal of well-established State law upon which an individual litigant had relied to his detriment could be unconstitutional. Another example that illustrates the extent of the requirement of due process concerns matters of irrebuttable presumptions. The U.S. Supreme Court has in several decisions emphasized that the requirement of due process has not been meet when an individual litigant has no opportunity to rebut a presumption by submitting evidence to the contrary.

One can finally note that the principle of due process governs not only procedures but also substantive law. In the substantive context, due

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1927 Gonzalez v. Wilmot, 1986 WL 8854, at 6–7 (S.D.N.Y.), citing Brinkerhoff; see also Bouie, 378 U.S. at 354 (“[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law …”), citing Brinkerhoff, 281 U.S. at 678. This reasoning is quite similar to the novelty ground under the State grounds doctrine discussed infra.

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Bell, 402 U.S. 535 (a State law that suspended a person’s driver’s licence if he or she was involved in an accident and did not post security of the claimed damages was found to violate due process under the Fourteenth Amendment as it did not allow the person to show absence of fault); Stanley v. Illinois, 405 U.S. 645 (1972) (a State law that presumed that unwed fathers were unfit to have custody of children without the possibility of a hearing violated both due process and equal protection); Vlandis v. Kline, 412 U.S. 441 (1973) (a State statute establishing a statutory presumption that a person is not residing in the State for purposes of college tuition violated due process).

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Slaughterhouse Cases, 83 U.S. 36 (1873) (the Due Process clause protects only against procedural unfairness), overturned Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (a Louisiana law hindering non-Louisiana companies from obtaining insurance.
process bars the government from undertaking arbitrary actions but it also goes much further. For most purposes, however, substantive due process lies outside the scope of this examination.

5.2.3 Right to Equal Protection

It is clear from the language of the Fourteenth Amendment that State procedure is subject to other constitutional requirements besides due process. One such right is equal protection of law that all State courts must afford all persons according to the U.S. Constitution. Consequently, State law can be set aside if it fails to provide persons with equal protection and this applies to procedural rules as well as substantive rules. It is often difficult to separate equal protection from due process in their practical application: there is significant overlap between the two.

The right to equal protection has primarily been used to protect ethnic minorities. However, it has also been used to protect those who are disadvantaged by, for example, gender, social status, or medical status. For example, the Supreme Court has established broadly that if a person’s access to the legal system depends upon the amount of money he or she has, that constitutes unequal protection in violation of the Constitution: “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Fees that State judiciaries require to hear a claim have thereby come under Federal scrutiny.

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930 Schwartz, supra note 896, at 165–68.
931 For example, the often discussed case on right to abortion, Roe v. Wade, 410 U.S. 113 (1973), was decided using a substantive due process approach under the Fourteenth Amendment.
932 U.S. Const., amend. XIV, § 1 (“No State shall … deny to any person within its jurisdiction the equal protection of the laws.”).
937 Griffin, 351 U.S. at 19.
5.2.4 Right to a Jury Trial

Another important constitutional right in the American legal system is the right to a jury trial. The jury trial is, as the reader probably knows, a traditional trademark of legal systems belonging to the common law family.\(^{938}\) The U.S. Constitution contains two provisions that guarantee individuals a jury trial. The Sixth Amendment ensures that all charged with a crime has a right to trial “by an impartial jury of the State and district wherein the crime shall have been committed …”.\(^{939}\) The Seventh Amendment supplements the Sixth by “preserving” the right of trial by jury for all “Suits at common law, where the value in controversy shall exceed twenty dollars …”.\(^{940}\) The term “at common law” is perhaps not immediately comprehensible. The Seventh Amendment has been interpreted to extend the right to a jury trial to all civil cases where the claim is one of law rather then of equity.\(^{941}\) These Amendments are, as mentioned above, not directly binding on the State government. The Supreme Court has however determined that the right to a jury trial is a “fundamental right” that also States must respect by virtue of the Fourteenth Amendment.\(^{942}\)

While the Sixth, Seventh, and Fourteenth Amendments to the U.S. Constitution protect the existence of a jury trial in State courts, they do not regulate other aspects thereof, for example, the composition of the jury\(^{943}\) or to what extent the jury must be unanimous to render a verdict.\(^{944}\) Regarding such issues, the States are generally free to do as

\(^{938}\) Mary Ann Glendon et al. Comparative Legal Traditions 250 (2nd ed. 2004).
\(^{939}\) The requirement applies to all cases where criminal liability is in question, excluding only so-called “petty crimes”. E.g. Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); Ballew v. Georgia, 435 U.S. 223, 229 (1978).
\(^{940}\) U.S. Const. amend VII.
\(^{941}\) Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 446–47 (1830) (the phrase “common law” in the Seventh Amendment means “suits in which legal rights were to be ascertained and determined …”. Id. at 447); Ross v. Bernhard, 396 U.S. 531, 533 (1970); Williams v. Florida, 399 U.S. 78, 97 (1970) (“the Seventh Amendment, providing for jury trial in civil cases”). To determine what constitutes “law” and “equity” respectively is of course not entirely without difficulty.
\(^{942}\) Duncan, 391 U.S. 145.
\(^{943}\) Williams, 399 U.S. at 98–108 (a State law prescribing a jury consisting of six persons was deemed constitutionally acceptable), overturning Thompson v. Utah, 170 U.S. 343 (1898); see also Duncan, 391 U.S. at 182 (“there is no significance except to mystics in the number 12.”) (Harlan, J., dissenting).
they please. There are limits to that freedom however as State law may in extreme situations violate due process.945

5.2.5 Duty for States to Provide Courts

A constitutional question of special nature is whether the States are under a duty to provide individuals with a court. It is easy to see how such a duty might be construed from the right to due process. The question is interesting because if it is answered in the affirmative it could be a venue for the Federal judiciary to control the composition of the States’ judiciaries. Remember, the right to due process is enshrined in the United States Constitution and the United States Supreme Court, a Federal court, is entrusted to interpret the document and to ensure its uniform application in all States. It is therefore the U.S. Supreme Court that determines whether the individuals’ constitutional right to a forum translates into a duty for the States to provide such a forum.

The answer to the question posed above is both yes and no. On one hand, it is settled law that the duty of the States to afford litigants due process includes a duty to provide them with a forum under certain circumstances. States are by virtue of the Due Process Clause under a Constitutional duty to provide a court and a fair trial before it “deprive any person of life, liberty, or property”.946 The right to due process does however not mean that the State in all instances must provide a court for the enforcement of Federal rights. Furthermore, even when the right to due process applies it does not extend to provide litigants with an opportunity for appeal.947 Then again, when a State grants appeal, all constitutional safeguards applicable to the litigation in first instance are equally applicable to the appellate process.948

The States are also under another constitutional duty, not entirely unlike the European principle of equality. The so-called Privileges and Immunities Clause of the U.S. Constitution949 requires State courts to extend litigants from other States the same judicial protection it affords

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945 E.g. Ballew, 435 U.S. at 239–243 (recognizing that the function of the jury can be impaired to “a constitutional degree” by a serious reduction in the number of jurors).
946 U.S. Const. amend. XIV.
948 Griffin, 351 U.S. at 18–20 (the appeal must be made “adequate and effective” id. at 20).
949 U.S. Const. art. IV, § 2, cl. 1.
its own citizens. Thus, if a State court would have jurisdiction to adjudicate a matter had the litigant been from the same State, it must also do so when he or she is from another State.\textsuperscript{950} 

### 5.2.6 Summary and Conclusion

When examining whether State procedure violates constitutional requirements, the Supreme Court has looked to the specific circumstances in which the State law was used. For example, in cases discussed above it was not held that the State could not change its rule. What violated due process was the manner by which the law was changed and the effects the change had in the specific case. Similarly, court fees found to be unconstitutional would generally be quite acceptable but not with regard to the individual litigants in question.

On the subject of due process, the U.S. Supreme Court has stated that it “is not a technical conception with a fixed content unrelated to time, place and circumstances”\textsuperscript{951} but “flexible and calls for such procedural protection as the particular situation demands.”\textsuperscript{952} That does not mean however that the Supreme Court makes its determination on a case-by-case basis. On the contrary, in Santosky v. Kramer\textsuperscript{953}, the Court considered whether a standard of proof required by State law was constitutional and stressed that rules governing such issues must be known in advance, shaped by the “generality of cases, not the rare exceptions”, and that “retrospective case-by-case review cannot preserve fundamental fairness” which rather “must be calibrated in advance.”\textsuperscript{954} In line with this, the Supreme Court has established that what procedural due process requires in a specific situation depends on the private interest affected; “the risk of erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitution safeguards”; and the State’s interests that support the procedure and that are affected by such “additional or substitution safeguards”.\textsuperscript{955}

\textsuperscript{951} McGrath, 341 U.S. at 162–63 (Frankfurter, J., concurring); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).
\textsuperscript{952} Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
\textsuperscript{953} 455 U.S. 745 (1982).
\textsuperscript{954} Santosky, 455 U.S. at 757, quoting Eldridge, 424 U.S. at 344.
\textsuperscript{955} Eldridge, 424 U.S. at 334–35.
5.3 Track II: Constitutional Limits of Federal Power over States

5.3.1 Introduction
The first of the American doctrine track dealt with the limits that the United States Constitution places on States in their lawmaking capacity and on State courts in their adjudicating capacity. We shall now consider that issue in reverse and consider whether the U.S. Constitution also limits the Federal government’s power over States and State courts. This issue is relevant when determining what procedural rules State courts shall apply to Federal rights. If the U.S. Constitution prevents the Federal government from meddling with State procedure, State courts can apply State procedural law to Federal substantive law. Such general, constitutional limitations would apply even to matters over which the Federal government has general competence.\(^{956}\)

5.3.2 Generally About Federal Commandeering
The Federal government’s use of State institutions for the enactment, enforcement, or administration of Federal law is known as Federal “commandeering”. Constitutional limits on Federal commandeering, which includes the issue of Congress’s power over the State judiciaries, has been a matter for examination by the United States Supreme Court for almost two centuries.\(^{957}\) The line of Supreme Court decisions dealing with commandeering concern the ability of the Federal government to command unwilling States or, as the case often is, State institutions. On this matter, the Supreme Court has in a number of cases emphasized that the Federal government cannot force States to enact, enforce, or administer Federal programs.\(^{958}\) It is, however, not always easy to make the distinction between valid and generally applicable Federal regulation of matters within the Federal government’s competence and constitutionally unacceptable commandeering.

The extent of the Federal government’s power to commandeer State resources depends largely upon whom or what it is that the Federal government is trying to command. The Supreme Court has established that the


\(^{957}\) One of the earliest cases involving such an issue was Martin v. Hunter’s Lessee, 14 U.S. 304 (1816) which concerned appellate power of Federal courts over State judgments.

Federal government cannot command State legislators.959 According to the Supreme Court, the U.S. Constitution divides authority over areas between the Federal government and the States.960 “The division of legislative competence between States and Federal government would be pointless if Congress could force States to enact legislation in areas beyond Federal control. When Congress wishes for specific legislation to be enacted it should enact that law itself if it is competent to do so961 or give the States “incentives” to enact the law Congress desires.962 The Constitution does not however “authorize Congress to command state legislatures to legislate.”963 On the contrary, it guarantees State legislators the option of not taking the action Congress desires. It is perhaps easiest to understand the relationship between the Federal government and the States established in the commandeering line as analogous to the relationship between two sovereign nations. The principles of federalism governing these situation act as substitutes for the fact that States are not independent nations.964

The anti-commandeering principle965 extends beyond protecting State legislators against being forced by Congress to enact specific laws. According to the U.S. Supreme Court, the Federal government is constitutionally forbidden from exercising its powers in a way “that impairs the States’ integrity or their ability to function effectively in a federal system.”966

959 E.g. New York, 505 U.S. 144. New York turned on whether Congress, who admittedly is competent to regulate the handling of radioactive waste, could order the States to regulate it as it had done through the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et seq. Id. at 156. It is interesting to note similarities between the Act and many Community Directives.

960 The powers of the Federation are enumerated in the Constitution and “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.

961 New York, 505 U.S. at 178 (“Where a federal interest is sufficiently strong to cause Congress to legislate it must do so directly; it may not conscript state governments as its agents.”).


963 New York, 505 U.S. at 179.

964 Cf. Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (“federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”); Matthew D. Adler, State Sovereignty and the Anti-Commandeering Cases, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 160 (2001) (“Just as state sovereignty means more than the sheer existence of states, so it means less than sovereignty in the intentional-law sense.”) (Citation omitted).

965 The term appears settled among legal commentators, see, e.g. Adler, supra note 964; Peter Jeremy Smith, The Anticommandeer Principle and Congress’s Power to Direct State Judicial Action: Congress’s Power to Compel State Courts to Answer Certified Questions of State Law, 31 CONN. L. REV. 649 (1999).

966 Fry v. United States, 421 U.S. 542, 547 n.7 (1975).
In later case-law, this rule has been interpreted to prohibit the Federal government from using its legislative powers in such a way as to “displace the States’ freedom to structure integral operations in areas of traditional government functions”. Whenever a Federal law would rob the States of “state sovereignty … essential to [a] separate and independent existence”\(^{967}\) it is considered to “impair the States’ ability to function effectively in a federal system”\(^ {968}\) and thus violates the Constitution.

However, what about the Federal government exercising more direct control over State agents? There are few Supreme Court decisions concerning this issue before the 1970’s but several after. The first cases addressing this issue concerned regulations by the Federal Environmental Protection Agency (E.P.A.) under which States were to enforce certain environmental traffic standards. Upon challenge, those regulations were rescinded.\(^ {969}\) The first time the U.S. Supreme Court elaborated on its position regarding Federal commandeering of State agents was in \textit{F.E.R.C.}\(^ {970}\) where the State of Mississippi challenged the constitutionality of the Public Utility Regulatory Policies Act\(^ {971}\) (a.k.a. PURPA) and more specifically a provision thereof that directed State agencies to consider the appropriateness of adopting certain regulatory standards. Whether the Federal government may constitutionally use the “state regulatory machinery to advance federal goals”\(^ {972}\) was the issue to be decided by the United States Supreme Court. Drawing heavily upon the supremacy of Federal law and its prior decision in \textit{Testa}\(^ {973}, 974\) a narrow majority of the Court found that PURPA did not constitute unlawful commandeering of State officials.\(^ {975}\) A minority of the Justices objected that the States are


\(^{971}\) Act of Nov. 9, 1978, 92 Stat. 3117.

\(^{972}\) \textit{F.E.R.C.}, 456 U.S. at 759.


free to organize their agents as they see fit and that PURPA impairs the States' ability to function as States which according to previous case-law was to be protected.\footnote{\textit{F.E.R.C.}, 456 U.S. at 776–97, esp. 781–82 (O'Connor, J., concurring in part, dissenting in part), citing \textit{Fry}, 421 U.S. 542, \textit{National League of Cities}, 426 U.S. 833.}

The minority opinion in \textit{F.E.R.C.} is reminiscent of the more recent decision by the Court in \textit{Printz}.\footnote{\textit{Printz}, 521 U.S. 898.} Jay Printz, a Montana sheriff, was forced by a Federal act\footnote{\textit{Printz}, 521 U.S. at 910–11, 925–33 (Federal lawmaking appears to have “rest[ed] on the natural assumption that the States would consent to allowing their officials to assist the Federal Government . . .” \textit{id. at 910–11}, citing \textit{F.E.R.C.}, 456 U.S. at 796 (O'Connor, J., concurring in part and dissenting in part), \textit{New York}, 505 U.S. at 187.} to conduct background checks on everyone who bought a handgun in the county where he worked. Printz challenged the constitutionality of the Federal act. The U.S. Supreme Court stated that while the Commerce Clause\footnote{\textit{Printz}, 521 U.S. at 932.} empowers Congress to regulate handgun sales, neither it nor the Necessary and Proper Clause\footnote{\textit{E.g., National League of Cities}, 426 U.S. at 854; \textit{Hodel}, 452 U.S. at 286–87; Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 537 (1985); \textit{New York}, 505 U.S. at 206.} gives the Federal government control over State officers. The \textit{Printz} majority found no historical support for the conclusion that Congress can impose a responsibility on a State official without the State’s consent.\footnote{\textit{Printz}, 521 U.S. at 930.}

As the case with the State legislature, the Federal government may give “incentives” for States to lend their officials for the attainment of Federal aims\footnote{\textit{New York}, 505 U.S. at 166 (“the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).} but it cannot require it. To do so offends “the very principle of state sovereignty” according to the \textit{Printz} Court.\footnote{\textit{National League of Cities}, 426 U.S. 833.}

Whether a Federal regulation constitutes acceptable Federal lawmaking or unacceptable Federal commandeering depends on whether the Federal regulation regulates “the States as States”\footnote{\textit{E.g. National League of Cities}, 426 U.S. at 854; \textit{Hodel}, 452 U.S. at 286–87; Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 537 (1985); \textit{New York}, 505 U.S. at 206.} or “state officers … as the agents of the States”\footnote{\textit{Printz}, 521 U.S. at 917–18.} and not merely the individuals living in the States.\footnote{\textit{Printz}, 521 U.S. at 923.} For example, Federal regulation of minimum wages and maximum hours of State employees was found to constitute unlawful control over the States in \textit{National League of Cities}.

Five years later, in
*Hodel*, the Supreme Court distinguished a Federal act limiting the use of land as simply regulating “individual business necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside …”. This type of Federal regulation did not violate the Tenth Amendment.\(^{988}\)

### 5.3.3 Commandeering State Judiciaries and Federal Supremacy

It is relatively easy to distinguish between Congress regulating aspects of ordinary persons’ everyday life and ordering State officials to undertake a specific task. It becomes a little more difficult to apply the anti-commandeering principle outside the realm of the State legislator and its administrative or executive agents and in that of the State judicature. There are certain differences between judges and other State officials which complicate the issue of commandeering. Most importantly, the State judge must uphold the law and the law is sometimes Federal by nature. Federal commandeering of State courts thus involves the supremacy of Federal law in a different way than with Federal commandeering of other State institutions.

Federal law is “the Law of the Land” in the United States by virtue of the U.S. Constitution and the Supremacy Clause included therein.\(^{989}\) As long as Federal law is valid, any contrary State law must be ignored regardless of whether it was enacted before or after the Federal law. The States are also under a broader obligation to follow Federal law. “[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials”\(^{990}\) and this includes a duty for State courts to apply Federal law over contrary State law.\(^{991}\) The general duty of State courts to apply Federal law follows from the Supremacy Clause which regulates any choice-of-law between Federal and State law. This conforms to what was previously stated: the Federal government may govern individuals living in the States within areas over which the U.S. Constitution grants it power and neither the State legislator nor the State judiciary can excuse failure to abide by Federal law.

At the same time, the Supreme Court emphasized in *Testa* that the Federal government lacks power to set up State courts or to confer jurisdiction upon existing State courts.\(^{992}\) Consequentially, it is possible for a

\(^{988}\) *Hodel*, 452 U.S. at 293.

\(^{989}\) U.S. Const. art VI, § 2. The supremacy of Federal law was also discussed *supra* Part 4.4.2.

\(^{990}\) *New York*, 505 U.S. at 179.

\(^{991}\) *New York*, 505 U.S. at 178–79.

\(^{992}\) See also discussion *supra* Part 4.4.4.
State to not provide the Federal government with a forum where a particular Federal claim can be raised.\textsuperscript{993} This apparently small loophole has developed into a significantly larger one. First, by the establishment of “[t]he general rule … that federal law takes the state courts as it finds them”\textsuperscript{994} and then, from there, to the conclusion that States do not have to enforce Federal law if they have an “otherwise valid excuse”.\textsuperscript{995}

When it comes to determining to what extent the Federal government can exercise power over State judiciaries, a strict line divides the Supremacy Clause that empowers the Federal government and the commandeering doctrine that limits it. The Federal government is constitutionally forbidden from forcing State courts to adjudicate matters. It cannot even empower the State court to hear a case; only the State government can confer jurisdiction upon State courts. When a State court does adjudicate a case it is however required to apply all valid Federal laws. The limits of the Federal government’s power over the State judge is thus on one side set by what the U.S. Supreme Court has defined as commandeering and, on the other, by articles of the Constitution regulating its legislative competence. In between these two, the Supremacy Clause protects Congress’s power over State courts.

5.4 Track III: Federal Regulation of State Procedure

5.4.1 Introduction

Just as the principle of supremacy is a cornerstone of the European Community legal order, the supremacy of Federal law over State law in the United States is beyond question. As noted in the previous section, the U.S. Constitution contains several references to the fact that Federal law takes precedence over State law, most importantly the Supremacy


\textsuperscript{995} The meaning given to the phrase “otherwise valid excuse” will be examined infra Part 5.5.
Clause. It is equally uncontroversial that Federal law cannot be displaced by State law whether the latter is older or newer than the former. In light of this, it is natural to consider, as the third track of the American doctrine, to what extent State procedural law can be displaced by conflicting Federal regulation.

5.4.2 The Federal Government Regulating State Procedure

The powers of the U.S. Federal government are, as those of the European Community, limited. The Federal government only enjoys the powers granted to it by the Constitution; all other powers remain with the States or with the people. The Federal government’s powers are enumerated in the Constitution. A condition for a Federal regulation’s validity is that Congress has been granted power over the regulated matter through the U.S. Constitution.

An issue of importance for the realization of Federal regulation is the duty of State courts to respect and apply Federal law. In Claflin, the Supreme Court reminded the States that by virtue of the Constitution Federal law is the supreme law of the land and is binding upon the States, their agents, their courts, and their citizens, “[l]aws of any State to the contrary notwithstanding.” The holding of Claflin was extended in Mondou as the Supreme Court declared that State courts are required to enforce rights arising under the US Constitution. In Testa, the U.S. Supreme Court emphasized that the State judge’s duty to apply Federal law by merit of the Supremacy Clause goes beyond any similar duty

996 U.S. Const. art. VI, § 2 (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.”); see also U.S. Const. art. IV, § 2, cl. 1 (“the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”); U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States …”).

997 See supra Part 2.2.2.

998 U.S. Const. amend. X.

999 Gibbons v. Ogden, 22 U.S. 1, 10–11 (1824).

1000 Marbury v. Madison, 5 U.S. 137, 180 (1803).

1001 These issues were discussed supra Part 4.4.

1002 Claflin v. Houseman, 93 U.S. 130 (1876).

1003 Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1 (1912) (but only when “its ordinary jurisdiction … is appropriate to the occasion …”). Id. at 56–57.

1004 330 U.S. 386.
owed to a foreign legislator or a sister state.1005 Although the supremacy of Federal law in this way includes a duty for State courts to apply Federal law, that duty is subject to “[t]he general rule … that federal law takes the state courts as it finds them”.1006 This was in line with what the Supreme Court had stated in previous judgments.1007

While the powers of the U.S. Federal government are limited, what power it has in the procedural field is, also as in the European Community, not clearly and definitely defined. There is constitutional support that Congress may create Federal courts and may regulate procedure in those courts.1009 There is however nothing in the U.S. Constitution that suggests that Congress may regulate the procedure in State courts. Thus, when the Federal government seeks to regulate State procedure it must instead find support for doing so in provisions in the U.S. Constitution granting it power over other areas.

A provision in the U.S. Constitution that is frequently used as basis for legislation is the so-called Commerce Clause which gives Congress power to regulate commerce “among the several States”.1010 The U.S. Supreme Court has, at least traditionally, interpreted this generously.1011 From the the time of the creation of the United States until recent years, the Supreme Court only once found a Federal law that exceeded Congress’s commerce powers1012 and the decision was subsequently overturned1013. However, a federalist movement in the U.S. Supreme Court has resulted in Federal acts being declared void for reason of falling outside the scope of the Commerce Clause in the last couple of years.1014 Even if the scope of the Commerce Clause has thus become narrower in recent years, it still

1005 Testa, 330 U.S. at 389–90.
1006 Howlett, 496 U.S. at 372, quoting Hart, supra note 994, at 508; see also Redish & Muench, supra note 994, at 342; Weinberg, supra note 993, at 1774.
1007 Mondou, 223 U.S. at 57 (State courts should adjudicate claims under Federal law “according to the prevailing rules of procedures.”).
1008 See supra Part 3.4.
1009 U.S. Const. art. III.
1010 U.S. Const. art. I, § 8, cl. 3 (also allows the Federal government to regulate trade with foreign states and Indian tribes).
1012 National League of Cities, 426 U.S. 833.
1013 Garcia, 469 U.S. 528.
1014 E.g. New York, 505 U.S. 144 (Low-Level Radioactive Waste Policy Amendments Act); Lopez, 514 U.S. 549 (Gun-Free School Zones Act); Printz, 521 U.S. 898 (Brady Handgun Violence Prevention Act).
gives Congress broad regulatory powers. These powers have on occasion been used by the Federal government to regulate arguably procedural matters, a practice that appears to become more frequent over time. Several Federal acts have regulated procedure quite extensively in the name of interstate commerce. Federal regulation of State court procedure was initially limited to situations where the State court adjudicated Federal claims but has more recently been extended to cases where the cause of action comes from State law. For example, Congress believed that so-called Y2K-problems with computers could be so extensive that they would disrupt interstate commerce. On that ground, Congress saw it fit to introduce a requirement of pre-litigation notice before a prospective plaintiff could file a Y2K-related claim in a State court and to require State courts to apply Federal evidentiary rules in the adjudication of Y2K-related claims.

Such acts stirred much controversy and several American legal scholars questioned their constitutionality. In the words of one American scholar, “Federal laws regulating state court procedures stand at the next frontier of federalism.” The position of the U.S. Supreme Court regarding the constitutional validity of such Federal acts is all but clear. While the Court does not deny that “States may establish the rules of procedure governing litigation in their own courts” it found in F.E.R.C. “nothing unconstitutional about Congress requiring certain procedural minima …”

1015 See also JOHN E. NOWAK & DONALD D. ROTUNDA, CONSTITUTIONAL LAW 157–225 (7th ed. 2004) (provides a comprehensive overview of the history and uses of the Commerce clause).
1018 Parmet, supra note 1016, at 7.
1021 Bellia, supra note 1020, at 950.
1022 Felder v. Casey et al., 487 U.S. 131, 138 (1988); cf. Johnson v. Fankell, 520 U.S. 911, 922 n.13 (“We have made it quite clear that it is a matter for each State to decide how to structure its judicial system.”).
1023 F.E.R.C., 456 U.S. at 771.
A Congressional act that has caused some controversy over the years is the Federal Arbitration Act\(^\text{1024}\). Congress enacted the FAA to come to terms with a perceived general refusal of State courts to enforce arbitration agreements in contracts.\(^\text{1025}\) Rather than surrender jurisdiction over a contractual dispute, State courts simply refused to recognize an arbitration clause.\(^\text{1026}\) In response to such practice, of which Congress disapproved, the FAA was enacted which required that an arbitration provision in a contract governing maritime or intrastate commercial matters is “valid, irrevocable, and enforceable”\(^\text{1027}\) in both Federal courts\(^\text{1028}\) and State courts\(^\text{1029}\). By doing so, Congress replaced any preexisting State law on the enforceability of arbitration clauses and broadly prevented States from enacting new ones.\(^\text{1030}\)

In conclusion, the Federal government’s ability to regulate or harmonize State procedure is formally narrower than the European Community’s legislative power over Member State procedure.\(^\text{1031}\) There is also a strong political tradition against Federal regulation of State procedure. There are examples of the U.S. government regulating aspects of State court procedure but they remain limited and doing so remains controversial.

5.4.3 Beyond Regulation I: Preemptive Effect of Federal Regulation

It is not only through direct and specific instructions regarding the legal regulation of a subject matter that Federal law takes precedence over State law. Another mean is through preemption.\(^\text{1032}\) Preemption is not as such a complex concept. In the broadest sense, preemption simply means that the States have lost authority to legislate in a specific area for the ad-

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\(^{1030}\) Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) (the FAA causes wide obstacle preemption).

\(^{1031}\) See also supra Part 3.4. The comparison of the two legal systems is continued infra Chapter 7.

\(^{1032}\) The role of preemption theory in the European doctrine was discussed in relation to the principle of supremacy, supra Part 2.4.4, and will be described in-depth infra Part 7.2.3.
vantage of Federal regulation. The issue of preemption is inseparable from the issue of concurrent legislative authority. The existence of preemption presumes at least two lawmakers having concurrent authority and the existence of concurrent authority inevitably raises questions of preemption. That the Federal government can preempt State law is beyond dispute and whether or not preemption actually occurs is a question of Congressional intent. Before examining the doctrine of preemption further, it should be noted that what the doctrine includes is not beyond dispute. The U.S. Supreme Court has been criticized for its inability to establish a clear and consistent line of jurisprudence.

The theory of preemption was born in American law when the U.S. Supreme Court determined that not only State law that is “contrary” to Federal law is prohibited but also any State law that interferes with Federal law. In McCulloch, an act by the State legislature of Maryland imposing tax on Federal banks within that State was found to be an interference with Congress’s right to establish such banks. McCulloch was a few years later followed by Gibbons where the U.S. Supreme Court found that Congressional authority to regulate commerce preempts States from granting exclusive transport licenses within their territory.


1036 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“The question in each case is what the purpose of Congress was.”); Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone”); Gardbaum, supra note 1033, at 784 (“If the federal statute clearly exhibits congressional intent to pre-empt state law (expressly or impliedly), then that is the end of the matter.”); Paul E. Mcgreal, Some Rice with your Chevron?: Presumption and Deference in Regulatory Preemption, 45 Case W. Res. L. Rev. 823, 831 (1995).

1037 Mcgreal, supra note 1036 (arguing that the Supreme Court’s holding in two preemption cases are inconsistent with each other); Grey, supra note 1035, at 559–88; Rothschild, supra note 1033, at 838–40; Paul Wolfson, Preemption and Federalism: The Missing Link, 16 Hastings Const. L.Q. 69, 69–70 (1988).


1039 22 U.S. 1. It is interesting to note that both McCulloch and Gibbons were delivered by the same judge, Chief Justice John Marshall. Marshall is generally credited with establishing the U.S. Supreme Court’s important position in the American federation.
The ruling in *Gibbons* indicated that State laws that “interfere” with Federal law must yield to the latter by virtue of its supremacy.\(^{1040}\) Subsequent development paints a slightly different picture, however.\(^{1041}\) One should distinguish between preemption and supremacy. The supremacy of Federal law governs the choice between Federal and State law when both cannot be applied at the same time. Preemption, by comparison, effectively deprives the States of power to legislate on a matter regardless of whether State regulation would directly conflict with existing Federal law.\(^{1042}\) Another important development after *Gibbons* is that the U.S. Supreme Court has since become more restrictive in finding preemption. General interference is no longer sufficient. The Court has noted the sensitivity of “the federal-state balance”\(^{1043}\) and proclaimed that it will not preempt State legislation, especially not in areas where the States have traditionally been competent to act, unless preemption “was the clear and manifest purpose of Congress.”\(^{1044}\) Many commentators welcomed this presumption against preemption since it prevents Congress from removing power from the States without open and explicit consideration.\(^{1045}\)

The U.S. Supreme Court has in its case-law recognized three theories for determining Congressional intent to preempt. The simplest way for Congress to express such intention is to do so expressively, creating an *expressed preemption*. Expressed preemption normally occurs by the U.S. Congress attaching a preemption clause to a piece of Federal legisla-

\(^{1040}\) *Gibbons*, 22 U.S. at 210–11.

\(^{1041}\) Grey, *supra* note 1035, at 567–70.

\(^{1042}\) Gardbaum, *supra* note 1033, at 770–73. While the author’s position is perhaps correct when it comes to express and field preemption it appears to this one as if the presence of a conflict between Federal and State law is to some extent an indispensable ingredient when it comes to conflict preemption. See also Weinberg, *supra* note 993, at 1744–46.


\(^{1045}\) Grey, *supra* note 1035; Mcgreal, *supra* note 1036, at 838–41; Rothschild, *supra* note 1033. But see Nelson, *supra* note 1034 (arguing that the Supreme Courts application of obstacle preemption presented below stands in contradiction to this principle, which however in turn is inconsistent with the supremacy of Federal law).
There are many examples of Congress including such clauses in acts of legislation. Expressed preemption seems relatively uncontroversial. Most judges and commentators appear willing to accept the preemptive effects of Federal law on State law when Congress has included a preemption clause in its legislation as long as it did not overstep its Constitutional powers when adopting the act.

Despite the clear-and-manifest-intent rule, intent to preempt does not have to be expressed. In the absence of expressed preemption, the Supreme Court has found implicit Congressional intent to preempt State legislation. There are two types of implicit preemption: field preemption and conflict preemption.

Field preemption occurs when Federal regulation of a topic is "so pervasive ... that Congress left no room for the States to supplement it." An alternative ground for field preemption is if "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." One critique against field preemption is that it rests entirely on the comprehensiveness of Federal legislation, which only implicitly says something about Congress's intent. If there truly is no room for State legislation, if every matter is covered by Federal regulation, the reason that a State cannot regulate a specific issue depends on it being directly occupied by Federal law rather than preemption in the narrower sense of the word. Another ground for critique is that the comprehensiveness of the regulation and the dominance of the Federal interest are inherently ambiguous standards.

Conflict preemption is the last but also the most interesting type of preemption. The underlying reasoning is deceptively simple: State law

1046 Jones, 430 U.S. at 525.
1047 For example, the Fair Packaging and Labelling Act, Act of Nov. 3, 1966, 80 Stat. 1296, provides that State law cannot be “less stringent than or require information different from” that required by Federal law and the Federal Meat Inspection Act, Act of June 30, 1906, 34 Stat. 768.
1049 Gardbaum, supra note 1033, at 808.
1051 Rice, 331 U.S. at 230; see also Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941); Hillsborough County, 471 U.S. at 713.
1052 Gardbaum, supra note 1033, at 811–12; Wolfson, supra note 1037, at 74.
1053 Mcgreal, supra note 1036, at 835.
1054 But cf. Gardbaum, supra note 1033, at 809 (arguing that conflict preemption is not a instance of true preemption but rather supremacy).
is preempted to the extent it actually conflicts with Federal law.1055 When conflict is deemed to occur is however far from obvious and the case-law is not entirely consistent.

The field for conflict preemption can be construed narrowly as the U.S. Supreme Court did for example in Florida Lime.1056 In that case, the Supreme Court decided that conflict preemption occurs when dual compliance with both Federal and State law is impossible.1057 It is relatively easy to conclude a Congressional intent to preempt in these types of situations that are sometimes referred to as direct conflict preemption.1058

Conflict preemption can and has also been construed broadly. For example, the U.S. Supreme Court declared in Hines that State law constitutes an unconstitutional impairment of Congress’s ability to exercise its power if it “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress …”.1059 Another example is International Paper where the Supreme Court stated that State law violates the Hines-standard not only when it stands in the way of the ultimate goal of the Federal regulation, but also “if it interferes with the methods by which the federal statute was designed to reach this goal.”1060

The application of this broader standard of conflict preemption, also known as obstacle preemption, requires inquiry into both the policy underlying the Federal legislation and the methods used to realize it.

Obstacle preemption is different from other types of preemption as the central issue is not whether State law and Federal law is in conflict with each other or not. Instead, obstacle preemption measures the degree by which State law impairs the attainment of a Federal aim. This can make it difficult to apply the theory of obstacle preemption.1061 Obstacle preemption also has a relatively weak connection to Congress’s intent and, as such, can lead to the impairment of the States’ power without this being openly considered.1062 The prevailing doctrine on preemption has re-

1055 E.g. Pacific Gas, 461 U.S. at 204; Cipollone, 505 U.S. at 516 (“In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law ...” Citing Pacific Gas).
1057 Florida Lime, 373 U.S. at 142–43. Note that Florida Lime was a narrow 4-5 decision and that the minority advocated the broader approach used in Hines, presented next. Id. at 165.
1058 Mcgreal, supra note 1036, at 832.
1060 International Paper, 479 U.S. at 494.
1061 Mcgreal, supra note 1036, at 832–34.
1062 Mcgreal, supra note 1036, at 834 (argues, however, that field preemption has an even weaker link to congressional intent. Id. at 836–37); see also supra n. 1045 and accompanying main text.
ceived much criticism. It is argued that findings of preemption are made too easy, thereby weakening the position of the States in relation to that of the Federal government.\textsuperscript{1063}

Although most Federal cases on preemption have dealt with issues traditionally categorized as substantive, there is nothing in the doctrine of preemption that prevents applying it to procedural issues as well. On the contrary, States are preempted from allowing procedures that conflict with Federal law.\textsuperscript{1064} The application of preemption theory to displace or modify State procedure will be discussed further in the comparison below.\textsuperscript{1065} Protection of State procedure comes instead from the constitutional division of competence between Federal government and States. If a State can show that Congress acted outside its powers when it enacted a rule that preempts State procedural law the latter will prevail, otherwise the former. Consequently, a narrow definition of conflict preemption effectively leads to less Federal influence over State procedure whereas a broad definition conversely leads to less State independence in the procedural field.

5.4.4 Beyond Regulation II: “Part and Parcel”

Another way by which Federal law governs State procedure besides direct occupation and preemption is illustrated in case-law addressing procedural rules considered to be “part and parcel” of a Federal right. That State law can be set aside because it conflicts with the U.S. Constitution is because the latter has primacy over the former. The primacy of Federal law is, however, not limited to the U.S. Constitution. All Federal laws take precedence over State law. This assumes, of course, that the Federal law is valid, which, in turn, primarily depends upon if the subject matter lies within Federal competence. Based upon this line of reasoning, it has been recognized that it is possible for State procedure to conflict with a Federal procedure that is “part and parcel” of a substantive Federal right.

One case where the U.S. Supreme Court addressed what procedural rules State courts shall apply when adjudicating Federal claims was \textit{Central Vermont}\textsuperscript{1066}. That case addressed, more specifically, rules regulating burden of proof. The plaintiff in this FELA-suit was the family of a late

\textsuperscript{1063} \textit{E.g.} \textit{Jones}, 430 U.S. at 544 (Rhenquist, J., concurring in part, dissenting in part).

\textsuperscript{1064} \textit{E.g.} \textit{Garner v. Teamsters Union}, 346 U.S. 485, 490–91 (1953) (“A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.”) (commenting on the preemptive effects of the Labor Management Relations Act).

\textsuperscript{1065} \textit{See infra} Part 7.2.3.

\textsuperscript{1066} \textit{Central Vermont Ry. v. White}, 238 U.S. 507 (1915).
railroad worker who had been killed because of the claimed negligence of his employer, the defendant railroad company. The jury in the initial trial returned a verdict for the plaintiff. The defendant protested against that judgment, arguing that the judge had erred in instructing the jury. Instead of instructing the jury that the plaintiff had to prove that he had not been contributory negligent, which would have been in accordance with State law, the State judge applied a Federal rule that placed the burden of proof of contributory negligence on the defendant. The defendant argued that the State court should have applied the general principles in conflict of laws according to which issues regarding evidence and burden of proof are determined by the *lex fori*. The United States Supreme Court confirmed that the principle that a court should apply the procedural rules of the *lex fori* is generally applicable even when State courts adjudicate Federal claims, that State courts should follow State law on a “mere matter of procedure”, and that this included rules regulating how and when evidence is presented.

The *Central Vermont* Court continued beyond this point, however, and distinguished the issue at hand from procedural matters governed by said principle. Since proving the absence of contributory negligence was a required element of a negligence action in Vermont, it was “a part of the very substance of his case” and it was therefore proper for the State court to apply Federal law on this issue. *Central Vermont* recognizes that certain aspects of the procedure have such immediate connection with the substantive claim that power to regulate the former must follow power to regulate the latter.

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1067 *Central Vermont*, 238 U.S. at 508–10. As the reader will notice, railroad companies are by far the most frequent defendants in the cases covered herein.

1068 *Central Vermont*, 238 U.S. at 510–11 (“This case, however, is brought upon an act of Congress … [that] supersedes the laws of the state in so far as the latter cover the same field … Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employee is to be determined according to the provisions of that act.”).


1070 *Central Vermont*, 238 U.S. at 511–12.

1071 *Central Vermont*, 238 U.S. at 511–13. The ruling in *Central Vermont* raises many questions. Is it really proper to determine the reach of Federal law, via solving the procedure-substance dichotomy, by looking at State law? Does *Central Vermont* allow or require State courts to apply the Federal standard? Although the Court had already laid down the basis for State obligation to enforce Federal law in *Mondou*, it does not plainly state so in the judgment.
Two years after Central Vermont, the Supreme Court had opportunity to examine the application of the ruling to matters of presumption and adequacy of proof. In Harris, a State statute provided that injury caused by a steam engine by itself constituted prima facia evidence of negligence. When faced with Harris, a FELA-case where that State law had been applied, the U.S. Supreme Court concluded that in light of the ruling in Central Vermont and the fact that “negligence is essential to recovery”, it is “clear that the question of burden of proof is a matter of substance” and therefore governed by Federal law rather than State law.

The rulings in Central Vermont and Harris share many of the characteristics of the early cases under the Erie doctrine. The Court uses the substance/procedure dichotomy to determine to what extent a court should apply foreign law but it is unclear on what ground it classifies a matter as the one or the other. The decision in Central Vermont has been the subject of critique as a finding of contributory negligence would have the same effect under State and Federal law. Thus, once the actual facts were presented, the State court would come to the same conclusion regardless of whether it applied Federal law or State law. Critics therefore consider the Supreme Court’s conclusion that the rule in question was “a part of the very substance” of the case as doubtful. Other cases studied hereinafter do not use the argument that the matter should be classified as substantive as explicitly as in Central Vermont and Harris but they are based on the same line of reasoning.

After Central Vermont, the Supreme Court was in Bombolis asked to declare to what extent the application of Federal substantive law affected the role of the jury in State courts. The defendant argued that a State rule under which the jury can reach a decision without being unanimous violated the Seventh Amendment.

1074 Harris, 247 U.S. at 371–72. Here, the Federal common law rule was that “negligence is an affirmative fact which plaintiff must establish.” Id. at 371.
1075 See further supra Part 4.5.2.
1078 One reason for this is probably that it would be confusing to refer to the matter of those cases, primarily the composition and functions of the jury, as “substantive”.
1080 The rule in Minnesota was that the jury could issue a verdict if five-sixths supported it and a unanimous decision could not be reached within twelve hours.
quired a unanimous jury was not in question, but its application in State courts was. The defendant argued that the adjudicating State court must conform to such Federal rules as the Seventh Amendment since his claim was “Federal in character”. The U.S. Supreme Court not only refused to accept the defendant’s argument but considered it such a “grave misconception of the very fundamentals of our constitutional system of government” that it felt compelled to clarify the nature of State court enforcement of Federal rights. The Bombolis Court stated that a court’s character as State or Federal depends upon “the character and source of authority with which they were endowed by the government creating them … [and not] the mere subject-matter of controversy” and that the relationship of State and Federal government is one of mutual cooperation.

[T]he governments and courts of both the nation and the several states [are] not to be strange or foreign to each other in the broad sense of the word, but to be all courts of a common country, all within the orbits of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen.

In the light of the strong language in Bombolis, it is somewhat surprising that the Court later, in Bailey, stated that the right to a jury trial “is part and parcel of the remedy afforded railroad workers under the Employers Liability Act” and that States must provide claimants with a jury in “close or doubtful” cases. It is difficult to reconcile the conclusion in Bailey with that of Bombolis, especially since the Supreme Court later upheld both decisions in Brady. That case was almost identical to Bailey except reverse: the State court had allowed a jury to determine the issue of

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1081 See regarding subsequent development on this matter, supra Part 5.2.4.
1082 Bombolis, 241 U.S. at 215–16. Bombolis claim was based on FELA.
1083 Bombolis, 241 U.S. at 219.
1084 Bombolis, 241 U.S. at 221.
1085 Bombolis, 241 U.S. at 222. This section of Bombolis has been quoted in several of the cases studied further on. In other cases, the Supreme Court has accepted jury verdicts supported by less than all jurors, e.g. St. Louis & San Francisco R.R. v. Brown, 241 U.S. 223 (1916) (three-fourths), and decisions by juries consisting of less twelve jurors, e.g. Chesapeake & Ohio Ry. v. Carnahan, 241 U.S. 241 (1916) (seven).
1086 Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943) (emphasis added). Bernard Bailey had died while working for the defendant. In the first instance court, a jury found in favor of the plaintiff, Bailey’s administratrix, but on appeal the Supreme Court of Vermont granted a contrary directed verdict on the ground that negligence on the part of the defendant had not been shown.
negligence\textsuperscript{1088} even though there was nothing in the opinion of the U.S. Supreme Court to support that the defendant had been negligent.\textsuperscript{1089} After having determined that the twelve jury members had mistakenly found factual support of negligence, the \textit{Brady} Supreme Court reversed the decision of the State court. It acknowledged its decision in \textit{Bombolis}, but distinguished it from \textit{Brady} by saying that “when a state’s jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question” and that the question of “whether sufficient evidence of negligence is furnished … to justify the submission of the case to the jury … must be determined by this [the Supreme] Court finally.”\textsuperscript{1090}

So where does all of this leave us? Both \textit{Bailey} and \textit{Brady} turn on the question of whether the State courts had properly divided functions between the judge and the jury\textsuperscript{1091} and the answer was in both cases that Federal law, more specifically FELA, mandated another division. At the same time, the Supreme Court argued passionately in \textit{Bombolis} that it is not the place of the Federal government to decide the nature of a State jury even when State courts adjudicate Federal claims. Are the two issues really so different as to warrant apparently opposite rules of law? It hardly seems that way.\textsuperscript{1092} One striking thing in \textit{Bailey} is the weight of importance attached to the jury in the Federal system: “[t]he right to trial by jury is ‘a basic and fundamental feature.’”\textsuperscript{1093} This seems to indicate that the weight of the Federal interest in having its rule applied is important in one respect or another.\textsuperscript{1094} On the other hand, \textit{Brady} mentions neither the importance of the jury decision nor the ruling in \textit{Bailey} but addresses \textit{Bombolis} where the Court indicated that the importance of a Federal rule does not affect to what extent it applies in State

\begin{enumerate}
\item \textsuperscript{1088} It thereafter issued a judgment consistent with their finding that the defendant had indeed been negligent.
\item \textsuperscript{1089} \textit{Brady}, 320 U.S. at 480–84.
\item \textsuperscript{1090} \textit{Brady}, 320 U.S. at 479.
\item \textsuperscript{1091} It may come as a surprise to the European reader that virtually all American jurisdictions allow the judge to enter a different judgment than the one suggested by the jury verdict, in the US sometimes referred to as “judgment notwithstanding verdict” or “JNOV”, \textit{see, e.g.} Fed. R. Civ. P. 50(b).
\item \textsuperscript{1092} Hill suggests that the Court simply did not realize that “earlier decisions had gone far to establish the autonomy of the states in the matter of jury trial.” Hill, supra note 1076, at 396.
\item \textsuperscript{1093} \textit{Bailey}, 319 U.S. at 354, \textit{citing} Jacob v. New York City, 315 U.S. 752 (1942) (the connection made by the Court between those two cases has been criticized by Hill, supra note 1076, at 395).
\item \textsuperscript{1094} The Supreme Court would later state this more plainly. \textit{See, e.g.} Henry v. Mississippi, 379 U.S. 443 (1965); \textit{Felder}, 487 U.S. 131; \textit{Howlett}, 496 U.S. 356.
\end{enumerate}
This is hardly consistent with the theory that it is the importance of a Federal rule that is the decisive factor when determining if State courts must apply it.

Perhaps the difference between the two cases lies not with the aspect of the jury system but with what question the jury handles. Both Bailey and Brady concerned the element of negligence in FELA-actions, an issue that the Court had determined in Central Vermont and Harris to be “essential to recovery” and thus of “substantive” nature. If this really is the proper interpretation, it opens up for a very extensive construction of Federal jurisdiction. Whenever a State court is adjudicating a claim under Federal law, its duty to apply substantive Federal rules is not limited to the rules upon which the claim is based, but extends to every aspect of litigation that affects one of the elements set out in those laws. This definition of substantive law is so broad that it could arguably include a State rule requiring the complaint to be written in a specific form. Under this definition, every case studied here is substantive rather than procedural.

The Supreme Court’s decision in Dice is at once both the most confusing and the most clarifying decision in the part-and-parcel line of cases. In Dice, the Supreme Court addressed the standard for and the effects of a valid settlement of an FELA-claim. When John F. Dice, a railroad fireman, filed a complaint against his employer relying on FELA, the defendant railroad argued as a defense that Dice had signed a document releasing it from liability. Dice admitted having signed the document but claimed that the defendant had fraudulently induced him to sign by saying that it was just a receipt for the payment of back wages. The jury found in favor of Dice, but the judge entered a judgment notwithstanding verdict. Under Ohio law, a claim of fraud could not be supported if, in a case like Dice, the true meaning of the document was plain from its text. The supreme court of Ohio upheld the judge’s decision regarding both the law applied and his authority to apply it.

The United States Supreme Court struck down this State practice using two arguments. First, all issues that are sufficiently interrelated to a Federal right that they can defeat it, for example the defenses that can be used, must be controlled by Federal law as a different conclusion would cause Congress to lose control over rights it creates and impair

1095 Bombolis, 241 U.S. at 219.
1096 Assuming, of course, that there are differences between State law and Federal law. Cf. Hill, supra note 1076, at 397.
1098 See supra note 1091.
1099 Dice, 342 U.S. at 360.
the interstate uniformity “essential to effectuate its purposes.” Second, the unfashionable contents of the Ohio rule on fraud cannot be allowed to defeat the general policy of the FELA and “the fundamental feature of our system of federal jurisprudence” that is the jury trial. Thus, the Supreme Court concluded that the right to a jury trial is “too substantial” to be classified as a mere “local rule of procedure.” On those grounds, the Court ruled that the State rule on the subject was displaced for the advantage of the Federal rule.

The U.S. Supreme Court then turned to the argument that Bombolis granted States autonomy over their jury system. The Court denied that Bombolis applied to the case at hand, stating that the State autonomy declared in that case “might be more in point” had Ohio abolished jury trials all together. The reasoning of the Dice Court appears flawed: a State that has juries may not limit their functions compared to juries in Federal courts because the jury is “part and parcel” of the rights granted by FELA but States are allowed to abolish juries altogether? The Dice Court was obviously reluctant to apply Bombolis. However, as it did not repeal its validity and the reasons given for not applying it simply do not hold up to scrutiny, it remains unclear in what situations the rule in Bombolis can be applied.

The content, standing, and value of the part-and-parcel doctrine are today uncertain. There are several things that place doubt upon the doctrine. First, even from the start it was unclear exactly what makes a Federal procedural rule “part and parcel” of a Federal claim in the absence of Congress expressly stating this. Moreover, the U.S. Supreme Court applied the doctrine primarily only to the right to a jury trial and has not applied it after Dice which was rendered over fifty years ago. Finally, the part-and-parcel doctrine builds upon the distinction between “the very substance” and “mere procedure”, a distinction very similar to the one used by the Supreme Court as a foundation for the Erie doctrine but was there abandoned in 1945. In light of these things, it is questionable

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1100 Dice, 342 U.S. at 361–62.
1102 Although seemingly upholding the general validity of the rule.
1103 Dice, 342 U.S. at 363.
1104 Hill, supra note 1076, at 395–96.
1105 When Congress expresses intent to regulate or preempt an issue, explicitly or implicitly, the question becomes primarily one of competence. See supra Parts 5.4.2–5.4.3.
1106 Guaranty Trust v. York, 326 U.S. 99 (1945) (traditional notions of which matters are substantive and procedural respectively should not be allowed to determine the division of power between Federation and States); see further infra Part 9.5.2.
what weight can be placed on the part-and-parcel doctrine. The idea that certain Federal procedural rules more or less automatically follow with a Federal claim because they are “part of its very substance”\(^{1107}\) or “too substantial a part of the right”\(^{1108}\) appears untenable and outdated.

5.5 Track IV: “Analogous Rights” and “Otherwise Valid Excuses”

5.5.1 Introduction

It is conceivable that a State would intentionally organize its judiciary in such a way that State courts do not apply and enforce Federal law of which the State disapproves. The State could try to prevent the application of Federal law in its State courts using seemingly neutral rules of procedure. The fourth track of reasoning concerns if and how far a State court’s duty to hear Federal claims extends. Over the years, the U.S. Supreme Court has developed two tests that are intended to govern this matter: the otherwise-valid-excuse test and the analogous-rights test. The contents of these tests will be examined in this section.

5.5.2 Limits on the Regulation of State Court Jurisdiction

In order to understand why the existence of “otherwise valid excuses” and “analogous rights” affects State court procedure, we return to the previously discussed issue of the right and duty of State courts to apply Federal law.\(^{1109}\) This issue is the starting point of analysis when separating “valid” excuses for a State court to not hear Federal claims from excuses that are invalid.

The otherwise-valid-excuse test controls the duty of States to contribute to the enforcement of Federal law in the most basic way by opening its courts to Federal claims. The foundations for the otherwise-valid-excuse test were laid in \textit{Mondou}.\(^{1110}\) The United States Supreme Court concluded in that case that although Federal law did not regulate the power or operation of State courts, State courts are under a general duty to enter-

\(^{1107}\) \textit{Central Vermont}, 238 U.S. at 512.
\(^{1108}\) \textit{Dice}, 342 U.S. at 363.
\(^{1109}\) \textit{See supra} Parts 4.4.3–4.4.4.
\(^{1110}\) 223 U.S. 1.
tain Federal claims “when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion …”. 1111

A similar conclusion was reached in *McKnett* 1112 where the Supreme Court admitted that the States are not under a constitutional duty to generally provide individuals with an opportunity to present Federal claims in State courts. The existence of a Federal judiciary is the only reason why individuals cannot end up without an opportunity to be heard concerning Federal claims. 1113 However, the *McKnett* Court continued by stating that the power of the States to declare State courts’ jurisdiction is subject to an important constitutional limitation: a State court must hear claims under Federal law when jurisdiction conferred by the State upon the State court is “appropriate”. 1114 The holding in *McKnett* has since been upheld. The U.S. Supreme Court has established that State courts are constitutionally prevented from refusing to hear Federal claims or, conversely, are under a constitutional duty to hear Federal claims by virtue of the Supremacy Clause whenever jurisdiction is “adequate for the purpose”. 1115

These decisions support that State courts are obligated to apply Federal law and cannot refuse to hear Federal claims. They are however equally clear on the point that the Federal government cannot confer jurisdiction upon State courts. Although all States have de facto established courts of general jurisdiction, the absence of Federal power over State court jurisdiction has led the U.S. Supreme Court to accept that “[t]he general rule … is that federal law takes the state courts as it finds them.” 1116 This is important. In its most extreme application, this rule could mean that a State could limit the effectiveness of a Federal law by not giving any State court jurisdiction over claims deriving from the Federal law. It is in the interest of the Federal government to prevent States from using this influence over the jurisdiction of State courts to circumvent the supremacy of Federal law.

1111 *Mondou*, 223 U.S. at 56–57 (Congress did not “enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure …”). *Id.* at 56. State courts should adjudicate claims under Federal law “according to the prevailing rules of procedures.” *Id.* at 57).


1113 *Hill*, supra note 900, at 962.

1114 *McKnett*, 292 U.S. at 233.

1115 See, e.g. *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 704 (1942); *Testa*, 330 U.S. at 389–94 (explaining and clarifying previous decisions); *Howlett*, 496 U.S. at 369–70, citing *Mondou*, *Testa*.


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5.5.3 The Analogous-Rights Test

A first solution to the perceived problem of State courts not having jurisdiction to hear Federal cases was the analogous-rights test. It had been established in *Mondou* and *McKnett* that a requisite for a State court to be required to hear a Federal claim is the existence of “appropriate” or “adequate” jurisdiction under State law. By withholding State courts “adequate” jurisdiction, States can prevent Federal claims from being adjudicated in State courts. The requirement of “adequate” jurisdiction can however also prevent States from intentionally or unintentionally closing their courts to Federal claims.

This was the case in *McKnett* where the Supreme Court declared that the “appropriateness” of a State court’s jurisdiction under State law was the central element when determining whether the State court had to entertain a claim under Federal law. Appropriateness was not to be determined by simply looking to the language of the State act regulating court jurisdiction. In *McKnett*, doing so would have barred the Federal claim in question. The Supreme Court instead declared that a “state may not discriminate against rights arising under federal laws.”1117 The reasoning used to determine the “appropriateness” of the State court jurisdiction is in many ways similar to the principle of equivalence included in the European doctrine.1118 According to the ruling in *McKnett*, the jurisdiction of a State court is appropriate such that it must hear a Federal claim if the State court would have had jurisdiction if the parties were from that State or if the underlying factual circumstances had taken place in that State.1119

The decision in *Testa* left a similar opening to the requirement of State application and enforcement of Federal law. In the last paragraph of the judgment, the Supreme Court noted that “Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action.”1120 This statement was interpreted as meaning that State courts do not have to enforce Federal claims if they do not have jurisdiction to adjudicate analogous State claims.1121 Having formulated this general rule, the *Testa* Court then turned to the question of adequate jurisdiction and answered that question in the affirmative since “this same type of claim arising under Rhode Island law would be enforced by that

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1117 *McKnett*, 292 U.S. at 234.
1118 See supra Part 3.5.
1119 *McKnett*, 292 U.S. at 232–33.
1120 *Testa*, 330 U.S. at 394.
1121 Note, supra note 993, at 1555–56; see also Gordon & Gross, supra note 993, 1159–60.
Thus, jurisdiction is adequate and appropriate when the State court would have jurisdiction over the Federal claim had it arisen under State law. A State court that enforces a certain type of cases under State law is estopped from claiming that it lacks jurisdiction over Federal cases of the same type.\textsuperscript{1123}

5.5.4 The Otherwise-Valid-Excuse Test

It was concluded above that Federal law is the supreme law in all States but that State courts must only entertain Federal claims if it adjudicates analogous claims under State law.\textsuperscript{1124} There is however another line of legal reasoning parallel to the analogous-rights test that also affects whether a State court must hear a Federal claim. This line of reasoning states, somewhat simplified, that State courts can refuse to hear a Federal claim if it has an “otherwise valid excuse”.\textsuperscript{1125}

The U.S. Supreme Court first hinted to the existence of “otherwise valid excuses” in \textit{Douglas}.\textsuperscript{1126} Douglas, the plaintiff and resident of Connecticut, filed a FELA-action in a New York State court. The defendant, a Connecticut corporation, did business in New York. Under New York law, the defendants connection with New York was sufficiently strong to allow New York courts to hear cases against it but not sufficiently strong to require it. Exercising his discretion under State law, the State judge decided to dismiss the case under the doctrine of forum non conveniens.\textsuperscript{1127} Douglas appealed the decision to dismiss to the U.S. Supreme Court arguing that a State court cannot decline to hear a case involving a Federal claim if the State legislator allows it to hear the case.\textsuperscript{1128} The Supreme Court examined the Federal act in question and its previous case-law

\textsuperscript{1122} \textit{Testa}, 330 U.S. at 394. The similar claim that the Court found in \textit{Testa} was that Rhode Island courts had “enforced claims for double damages growing out of the Fair Labor Standards Act”, 330 U.S. at 396.

\textsuperscript{1123} Martin H. Redish & Suzanna Sherry, Federal Courts 286 (4th ed. 1998); Gordon & Gross, supra note 993, at 1170; further discussed supra Part 8.2.2.

\textsuperscript{1124} Terrance Sandalow, \textit{Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine}, 1965 Sup. Ct. Rev. 187, 205 (stating that this is the typical interpretation of Mondou and McKnett); Weinberg, supra note 993, at 1774.

\textsuperscript{1125} Not surprisingly, many commentators have questioned the soundness of an “otherwise valid excuse” from Federal supremacy. Sandalow, supra note 1124, at 205; Weinberg, supra note 993, at 1775.


\textsuperscript{1128} Douglas, 279 U.S. at 355–56.
regarding Congress’s lack of power in conferring jurisdiction upon State courts. Being unable to find anything in the Federal statute requiring State courts to hear claims arising under it, the U.S. Supreme Court concluded that “there is nothing in the Act of Congress that purports to force a duty upon such [state] Courts as against an otherwise valid excuse.”\footnote{Douglas, 279 U.S. at 357–58, citing Mondou, 223 U.S. at 56–57 (emphasis added).}

The otherwise-valid-excuse test thus established would soon be tested and refined in \textit{McKnett}.\footnote{McKnett, 292 U.S. 230.} The policy of the State of Alabama had previously been that State courts never entertained lawsuits against foreign corporations but this policy had recently been reversed when McKnett filed his FELA-claim in an Alabama court. McKnett was told, however, that the change in policy was limited to claims arising under the laws of other States and did not apply to Federal claims. The courts of Alabama therefore refused to hear his claim. The U.S. Supreme Court reversed on appeal. It distinguished \textit{McKnett} from \textit{Douglas} as the Alabama rule discriminated against Federal law, a circumstance that prevented the existence of “a valid excuse”.\footnote{McKnett, 292 U.S. at 233–34.}

Subsequent case-law confirmed that discrimination of Federal claims is an essential characteristic of an “invalid excuse”\footnote{Missouri \textit{ex rel.} Southern Ry. v. Mayfield, 340 U.S. 1, 3–5 (1950).} but also that the decision in \textit{McKnett} was correct. The Supreme Court was faced with a similar situation in \textit{Herb}\footnote{Herb v. Pitcairn \textit{et al.}, receivers for Wabash Ry. Co., 324 U.S. 117 (1944).} where the plaintiff had filed a FELA-claim in the City Court in Madison County, Illinois although the injury occurred in Mason County, Illinois, the reason being that City Courts handled all FELA-cases regardless of where the action took place.\footnote{Herb, 324 U.S. at 129 (Black, J., dissenting).} While the case was pending, the Supreme Court of Illinois made a novel interpretation of the Illinois Constitution and found that City Courts only have jurisdiction over causes of actions that arise within the city where it is located.\footnote{Werner v. Illinois Central R. Co., 42 N.E.2d 82 (Ill. 1942); Mitchell v. L. & N. R. Co., 42 N.E.2d 86 (Ill. 1942).} In light of this decision, the Madison County City Court dismissed Herb’s case for lack of jurisdiction. However, Herb was also unable to file his claim in the appropriate court as FELA’s period of limitation by this time had run out.\footnote{Herb, 324 U.S. at 118–19.}

On appeal, the U.S. Supreme Court found that Herb’s inability to assert his Federal claim was “not due to any failure of the State of Illinois to provide forums adequate” and that the Illinois Supreme Court’s inter-
pretation of the jurisdiction of City Courts did not, unlike in McKnett, discriminate against the cause of action because of its Federal nature.\textsuperscript{1137} The reason for the different outcome in Herb and in McKnett is not entirely clear. There are primarily two differences between the two cases. One is that the Illinois statute excluded cases from other States whereas Alabama’s did not.\textsuperscript{1138} Another and perhaps more important difference is the existence of alternative courts with jurisdiction over FELA-claims in Herb.\textsuperscript{1139}

One can finally note that the existence of an “otherwise valid excuse” was also considered in the previously discussed decision in Testa. In Testa, the Supreme Court determined that a State policy, however strong, can never override a Federal law where the collision between the two is undoubted. A policy consideration, the Supreme Court stated, “cannot be accepted as a ‘valid excuse’ … [f]or the policy of the federal Act is the prevailing policy in every state.”\textsuperscript{1140}

### 5.5.5 Summary and Conclusion

That State courts cannot apply conflicting State law over Federal law is largely uncomplicated and uncontroversial. It is equally natural that the Federal government cannot set up State court and therefore cannot decide their jurisdiction. Problems arise however when one tries to reconcile these two concepts in a practical situation. How can the Federal government have the power to decide what laws State courts shall apply but at the same time lack power over the courts as such? This is where the tests of “analogous rights” and “otherwise valid excuses” come into play. Fundamentally, they protect the supremacy of Federal law while at the same time ensuring that State courts do not become Federal courts. These two tests combine to prevent States from using their power over the court organization to discriminate against Federal law.

\textsuperscript{1137} Herb, 324 U.S. at 120, 123.
\textsuperscript{1138} The U.S. Supreme Court paid no attention to the fact that the Illinois rule was found in the State’s constitution whereas the Alabama rule was a “mere” law.
\textsuperscript{1139} Herb, 324 U.S. at 120–21.
\textsuperscript{1140} Testa, 330 U.S. at 392–93, citing Douglas, 279 U.S. at 358. Commentators point out, however, that the connection between the two cases is rather weak. Gordon & Gross, supra note 993, at 1158 n.55.
5.6  Track V: The State Grounds Doctrine

5.6.1  Introduction

There is a line of decisions by the U.S. Supreme Court that support that Federal courts must stay clear of State law. This case-law, which is sometimes referred to as the “procedural adequate and independent State grounds doctrine”, is herein referred to as the State Grounds doctrine for short and constitutes the fifth track of the American doctrine. The State Grounds doctrine controls when the Federal judiciary can review how a State court interpret and apply Federal law. In practice, the State Grounds doctrine also affects if a State court can apply State procedural law to Federal rights. If a State procedural rule meets the requirements of the State Grounds doctrine, a party’s failure to comply with that rule can result in a claim under Federal law being barred. Conversely, when State procedure is deemed inadequate under the State Grounds doctrine, an individual’s failure to comply with State law cannot be used to bar him or her from exerting a Federal claim. In this sense, the State Grounds doctrine is reminiscent of the European doctrine’s principle of effectiveness.\(^{1141}\) When the State Grounds doctrine applies and what it requires will be examined in this section, starting with a description of how the doctrine began as a limitation on Federal review of State court decisions and then developed into a test of the adequacy of State procedural law.

5.6.2  Constitutional Limits on Federal Review of State Decisions

The State Grounds doctrine has its roots in the U.S. Supreme Court’s 1875 decision in *Murdock*.\(^{1142}\) The Judiciary Act of 1867\(^{1143}\) contained a list of “Federal questions” which fell under the jurisdiction of the Federal courts. In the wake of that act, uncertainty arose as to under what circumstances decisions by State courts could be appealed to Federal courts. The U.S. Supreme Court declared in *Murdock* that the appellate jurisdiction of Federal courts over State court judgments are “limited to the correction of efforts relating solely to Federal law”\(^{1144}\) and that when a Federal court reviews a State court’s ruling on such a Federal question, the Federal court may not review rulings made by that State court on matters

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\(^{1141}\) The two will be compared side-by-side *infra* Chapter 9.

\(^{1142}\) *Murdock* v. City of Memphis, 87 U.S. 590 (1875).

\(^{1143}\) 14 Stat. 385.

\(^{1144}\) *Murdock*, 87 U.S. at 630.
Thus, according to the Murdock Court, the coexistence of State and Federal governments requires that State courts apply State law and Federal courts Federal law. The Supreme Court then continued and explained that Federal courts should not even review a decision by a State court on a Federal question where “there exist other matters … which are sufficient to maintain the judgment of that court …”.\textsuperscript{1146} This conclusion makes sense. In the words of the Murdock Court, “why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points of the case?”\textsuperscript{1147} If the Federal court is unable to reverse the judgment of the State court it is for practical matters irrelevant that the State court incorrectly decided a Federal question.\textsuperscript{1148} Murdock and its progeny have by commentators been interpreted as expressing a fundamental principle that States control their own laws, both procedural and substantive.\textsuperscript{1149}

The ruling in Murdock was later supported by the decision in Erie\textsuperscript{1150} where the U.S. Supreme Court on constitutional grounds limited the Federal judiciary from interfering with State law.\textsuperscript{1151} In 1944, six years after Erie, the Supreme Court stated explicitly that the reason for the then well-established State Grounds doctrine is “the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction.”\textsuperscript{1152}

In Murdock it was clear that the State court had reached the ruling in question on State law grounds. However, not long after Murdock, the U.S. Supreme Court faced cases where it was less clear whether the State court had made its decision under State law or Federal law. This posed a problem. On one hand, the Supreme Court was prevented under Murdock from reviewing conclusions made by State courts based on State law even if those conclusions were wrong. It is at the same time untenable

\textsuperscript{1145} Murdock, 87 U.S. at 618–34; Hart, supra note 994, at 503; Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 920 (1986); Sandalow, supra note 1124, at 188.
\textsuperscript{1146} Murdock, 87 U.S. at 635.
\textsuperscript{1147} Murdock, 87 U.S. at 634–35.
\textsuperscript{1148} Kermit Roosevelt III, Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered, 103 Colum. L. Rev. 1888, 1898 (2003).
\textsuperscript{1149} Meltzer, supra note 915; see also Field, supra note 1145, at 920–22; cf. Hart, supra note 994, at 503–04.
\textsuperscript{1150} Erie Railroad Co v. Tompkins, 304 U.S. 64 (1938).
\textsuperscript{1151} Erie was discussed supra Part 4.5.2.
\textsuperscript{1152} Herb, 324 U.S. at 125. Between Murdock and Herb, the Court had applied the doctrine on numerous occasions. See, e.g. Klinger v. Missouri, 80 U.S. 257 (1872); De Saussure v. Gaillard, 127 U.S. 216 (1888); Patterson v. Alabama, 294 U.S. 600 (1935); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).
that Federal courts should altogether refrain from reviewing State court decisions. If a State court can declare that it decided a case on State law ground and Federal courts were forbidden from examining that assertion, the ability of the Federal judiciary to ensure the correct application of Federal law would be substantially impaired.¹¹⁵³

The approach adopted by the Supreme Court to tackle this problem in *Fox Film* was to modify the rule established in *Murdock* so that Federal courts will not review State court decisions “if the non-federal ground is independent of the federal ground and adequate to support the judgment.”¹¹⁵⁴ For the reasons stated above, it could not be left to State courts to determine if the State law ground was “independent and adequate” in the sense of *Fox Film*. To summarize, Federal courts cannot review a case where a State court has applied State law, not even if the case also involves erroneous application of Federal law, but the adequacy and independence of the State ground “is itself a federal question” that Federal courts may review.¹¹⁵⁵ On this ground, the Federal judiciary, with the U.S. Supreme Court at the helm, has in subsequent case-law tried to define when a State ground is “adequate and independent”.

### 5.6.3 The State Grounds Doctrine as a Test of the Adequacy of State Procedure

**Introduction**

The State Grounds doctrine is relevant for comparison with the European doctrine as it governs if an individual will be barred from exerting a Federal right because he or she has failed to meet a State procedural requirement.¹¹⁵⁶ The State Grounds doctrine is “routinely” used in cases where the independent and adequate State ground has its basis in procedural State law.¹¹⁵⁷ It is acceptable that a Federal claim is barred through the application of a State procedural rule when State law is considered “adequate and independent” to support the State court’s judgment.¹¹⁵⁸

¹¹⁵³ Meltzer, *supra* note 915, at 1137.
¹¹⁵⁷ Meltzer, *supra* note 915, at 1134.
¹¹⁵⁸ Meltzer, *supra* note 915, at 1135.
eral courts have, on the whole, accepted substantive State law as adequate and independent without a more stringent scrutiny but been noticeably tougher in accepting State procedural law.\textsuperscript{1159} One illustrative case regarding the application of the State Grounds doctrine to State procedural law is \textit{Harris}.\textsuperscript{1160} Warren Lee Harris had lost a case both in the first-instance State court and in the appellate State court. Harris then applied for relief on the ground that his legal counsel had given him inadequate assistance. The appellate court dismissed the motion on the ground that according to State law all issues not raised on direct appeal and which could have been raised were considered waived.\textsuperscript{1161} The case then ended up in the Federal court system where confusion arose as to on what ground the State appellate court had dismissed the case. When the case reached the U.S. Supreme Court it stated that the fact that the litigant had not complied with State procedure was not in and of itself sufficient to bar Federal courts from reviewing it. For that to happen, the State court must state “clearly and expressly” that their judgment is based upon the litigants’ failure to meet State procedure.\textsuperscript{1162} The decision in \textit{Harris} illustrates how the State Grounds doctrine can be used to set aside State procedural law when it is applied in cases involving Federal substantive law. In light of this conclusion it becomes relevant to consider what it means that a State ground is “adequate and independent” and how State law’s compliance with these requirements is determined. The case-law of the United States Supreme Court reveals that there are three types of “inadequacies” that State procedural law can suffer from: novelty or inconsistent application, refusal to exercise discretion, and being unnecessarily burdensome to Federal law.\textsuperscript{1163}

\textit{Inconsistency or Novelty}

Age, ordinariness, and consistency of application are factors that are to be considered when determining if a State rule is adequate under the State Grounds doctrine. The first ground on which a State procedure can be set aside under the State grounds doctrine is that it is \textit{novel or inconsistently applied}. Inconsistency and novelty can to some extent be viewed as separate standards of adequacy. The requirement of consistency provides that a State procedural rule can be considered “inadequate” for purposes of

\textsuperscript{1159} Roosevelt, \textit{supra} note 1148, at 1890.
\textsuperscript{1160} 489 U.S. 255.
\textsuperscript{1161} \textit{Harris}, 486 U.S. at 258.
\textsuperscript{1163} Meltzer, \textit{supra} note 915, 1137–38 (identifies “four overlapping themes” of which “novel” and “inconsistent” are here presented under the same heading).
the State Grounds doctrine if how it is applied deviates from prior practice. The requirement of novelty entails that a State procedural law can be considered inadequate simply for being too new. While inconsistent practice is not the same as novel practice, the line between the two is not always clear and it therefore makes sense to analyse the two requirements together.\footnote{See, e.g., Bouie, 378 U.S. at 354–55 (1964); NAACP v. Alabama, ex rel. Flowers, 377 U.S. 288, 297 (1964); James v. Kentucky, 466 U.S. 341, 348–49 (1984).}

The reasons why inconsistency and novelty constitute basis for inadequacy are also the same. A firmly established and regularly followed State rule will often be found “adequate” and thereby foreclose Federal review of a Federal question.\footnote{E.g., Wright v. Georgia, 373 U.S. 284, 291 (1963); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); Hathorn v. Lovorn, 457 U.S. 255, 262–63 (1982); James, 466 U.S. at 348–49; Johnson v. Mississippi, 486 U.S. 578, 587 (1988). One commentator even suggests that consistency is not only a necessary characteristic of an adequate State ground, but also a sufficient one “[w]hen the state ground is unrelated to the asserted federal right.” Sandalow, supra note 1124, at 227.}

Novelty or inconsistency, on the other hand, is objectionable on two grounds. First, it raises suspicion that the State has adopted or applied its procedural rules to intentionally escape Federal law.\footnote{Sandalow, supra note 1124, at 221.} Second, it is burdensome for a litigant to comply with a rule whose application is surprising, regardless of whether it is surprising because it is new or because it has previously been applied in a different manner. Although States are allowed to change its laws, doing so should not place a person wishing to raise a Federal claim in an untenable situation.\footnote{Brinkerhoff, 281 U.S. at 681–82. The Brinkerhoff court found that the novel state rule would be permissible had there been a venue for those who relied upon the previous rule. Id. at 682 n.9.} On these grounds, a novel or inconsistent State procedural practice is deemed inadequate for the purposes of enforcing Federal law.

There are several U.S. Supreme Court decisions where the Court used novelty or inconsistent application as a ground for concluding that a person’s failure to comply with State procedure does not prevent him or her from exerting a Federal right.\footnote{See Hill, supra note 900, at 966–68; Sandalow, supra note 1124, at 220–26.}

Illustrative examples of this are two cases involving NAACP and the State of Alabama.\footnote{NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449 (1958); Flowers, 377 U.S. 288.} The basic facts were the same in both cases. Alabama tried to prevent NAACP from establishing in the State during the civil rights era. The State sought and was by a State court granted an order restraining NAACP from conduct-

\footnote{The National Association for the Advancement of Colored People.}
ing business in the State. The association fought the order. In the first case, *Patterson*, NAACP had been held in contempt by a State court for refusing to submit its membership records and fined $100,000. The NAACP appealed the judgment to the supreme court of Alabama on the ground that the decision was unconstitutional. The State supreme court refused to consider the merits of the claim since the association had chosen the wrong type of action. On appeal, the U.S. Supreme Court found that the State court had not previously required compliance with this practice and therefore ruled that failure to comply was not reason for dismissal. Similarly, in the second case between NAACP and Alabama, *Flowers*, the U.S. Supreme Court declared that because State courts had not previously applied strict requirements in State law regulating the contents of briefs, a party's failure to comply with these rules could not act as a bar for Federal review of a State action.

**Refusal to Exercise Discretion**

A second ground on which State procedure can be found inadequate under the State Grounds doctrine is that the State court has failed to exercise discretion. Where State law allows State courts discretion as to what constitutes failure to comply with procedural requirements, the State Grounds doctrine will not allow State courts finding of such failure to bar Federal review of the Federal question. Thus, a State court must use its procedural discretion in favour of an exerted Federal right, not against it. This is in some ways the flip-side of the inconsistency ground discussed above. The U.S. Supreme Court's ruling in *Sullivan* illustrates the connection between the two. In *Sullivan*, a State court had dismissed a claim under Federal law because the defendant had not been given such notice as to give them reasonable opportunity to examine the matter. The U.S. Supreme Court responded that while the notice requirement was by no means novel, it had not been adhered to so consistently as to deprive

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1171 Whereas the association had sought review by certiorari of the contempt judgment it ought "by way of mandamus to quash the discovery order prior to a contempt judgment.”
1172 *Ex rel. Patterson*, 357 U.S. at 454–58.
1173 *Ex rel. Flowers*, 377 U.S. at 295–02.
1176 *Sullivan*, 396 U.S. at 231.
State courts their discretionary power to allow the claim if they so choose. Under such circumstance, the plaintiff’s failure to comply with the State notice requirement did not bar him from raising the Federal claim.\textsuperscript{1177}

\textbf{Unnecessarily Burdening the Federal Right}

The third ground on which State procedural law can be held inadequate for the purpose of enforcing Federal rights under the State Grounds doctrine is that a State procedural requirement “is unduly burdensome” when applied to Federal claims.\textsuperscript{1178} Whether State courts may apply burdensome State procedural rules to Federal law has been determined using a two-tiered test. First, is the procedural rule so burdensome that it violates the litigant’s right to due process under the Fourteenth Amendment to the United States Constitution?\textsuperscript{1179} A second (and for this section more relevant) question is whether the rule, although not unconstitutionally burdensome, is nevertheless unnecessarily burdensome such that it must be ignored when State courts enforce Federal claims?

That State procedural law can be set aside for being too burdensome to Federal law is not uncontroversial. There are cases and scholarly works that discuss whether the burden of complying with a State procedural requirement is relevant when determining if State courts can apply State procedural law.\textsuperscript{1180} Most, if not all, procedural rules place some kind of burden on the litigants. For example, a rule stating that the complaint must be submitted in writing carries with it a larger burden than if the plaintiff was free to present his claim in any manner he preferred. Thus, the relevant question is not whether a particular procedural rule constitutes an obstacle – which it obviously does – but whether that obstacle is unacceptably large. The State Grounds doctrine focuses on whether the obstacle is necessary when determining if it is acceptable.

The starting point of this debate was the U.S. Supreme Court’s decision in \textit{Davis}.\textsuperscript{1181} The facts underlying \textit{Davis} are quite straightforward: Mr. Wechsler had been injured on a railroad controlled by the Federal government and subsequently filed a complaint in a Missouri State court. The procedural history in \textit{Davis} is, however, a lot more complicated. When receiving the complaint, the Director General of Railroads,\textsuperscript{1182} at

\begin{itemize}
  \item \textbf{Sullivan}, 396 U.S. at 233–34.
  \item Hill, supra note 900, at 951–52.
  \item See supra Part 5.2.2.
  \item See generally Hart & Wechsler, supra note 1174, at 554–56; Hill, supra note 900; Meltzer, supra note 915.
  \item Davis v. Wechsler, 263 U.S. 22 (1923); Meltzer, supra note 915, at 1142.
  \item Appointed agent of the Federal government.
\end{itemize}
that point Mr. Hines, made a special appearance before the court\textsuperscript{1183} to contest its jurisdiction and argued that the Federal law placed jurisdiction over the claim in another court.\textsuperscript{1184} Mr. Hines was subsequently replaced by Mr. Payne as the Director General of Railroads, who also took Hines's place as the defendant in \textit{Davis}. When Payne made his first appearance in the case, the Missouri courts deemed that it constituted a general appearance\textsuperscript{1185} and that he had thereby waived the jurisdictional objection made by Mr. Hines.\textsuperscript{1186} The ruling was upheld by State courts but subsequently overturned by the U.S. Supreme Court. The interesting thing about \textit{Davis} is the ground that the Court states for its decision.

Whatever springes the States may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice … \textsuperscript{1187}

The implications of \textit{Davis} are disputed. On one hand, \textit{Davis} can be read as establishing a new basis for setting aside State procedural rules whenever they unjustifiably burden the assertion of Federal rights “without significantly advancing any important state policy”.\textsuperscript{1188} This conclusion is supported by a later Supreme Court decision, \textit{Brown}\textsuperscript{1189}. A State court had dismissed Brown’s FELA-based claim for damages without considering its merits as the complaint lacked the specific language required of a negligence claim under State law.\textsuperscript{1190} On appeal, the U.S. Supreme Court found the State rule to be an “over-exacting local requirement for meticulous pleadings” that threatened the uniform enforcement of Federal rights, and that the allegations set out in the complaint was “certainly sufficient” to permit introduction of evidence. In light of this, the \textit{Brown} Court found that when adjudicating matters under Federal substantive law, State courts are not allowed to use such “strict local rules of pleading

\begin{itemize}
  \item \textsuperscript{1183} A defendant appearing before a court for the sole purpose of contesting the court’s jurisdiction over the claim. \textit{Black's Law Dictionary, supra} note 902, at 107.
  \item \textsuperscript{1184} \textit{Davis}, 263 U.S. at 23, \textit{citing} \textit{Alabama & Vicksburg Ry. Co. v. Journey}, 257 U.S. 111 (1921).
  \item \textsuperscript{1185} A defendant appearing before a court to defend himself on general terms. Is also considered a wavier of any objection to the jurisdiction of the court. \textit{Black's Law Dictionary, supra} note 902, at 107.
  \item \textsuperscript{1186} \textit{Davis}, 263 U.S. at 24.
  \item \textsuperscript{1187} \textit{Davis}, 263 U.S. at 24–25.
  \item \textsuperscript{1188} Meltzer, \textit{supra} note 915, at 1142.
  \item \textsuperscript{1189} \textit{Brown}, 338 U.S. 294.
  \item \textsuperscript{1190} \textit{Brown}, 338 U.S. at 295.
\end{itemize}
… [which] impose unnecessary burdens upon rights of recovery authorized by federal laws.”

The outcome in Davis could, on the other hand, be explained by pointing to the fact that the procedural rule in question had not been unequivocally stated in State law, and that its vague and ambiguous nature had made it inadequate under the State Grounds doctrine. This would be supported by the aforementioned ruling in Patterson where the Supreme Court considered only the degree of consistency by which the rule had been applied previously in other, similar cases and ignored entirely the burden of complying with the rule as such. What contradicts such an interpretation is Brown which can only be explained by an “unreasonable obstacle” theory and which explicitly cites Davies in support. There are also other decisions that similarly cite the decision in Davis as a ground for setting aside State procedural requirements.

A broader, almost radical approach to the State Grounds doctrine was entered with Henry, a controversial case that suggests that State procedural law can be set aside in wide number of situations when the preservation of a strong Federal policy so requires. Henry and its progeny stands for the proposition that failure to comply with “arid ritual of meaningless form” under State procedural law cannot act as a bar to the exertion of a Federal right. The determination of whether a specific State procedure is such an “arid ritual” depends on whether it can be justified by an acceptable State interest. While the Henry Court found that the procedural question served valid State interests, it concluded that an alternative rule would have allowed the State to pursue those interests without effectively removing the individual’s possibility to exert his Federal claim and that it therefore could be deemed inadequate.

1192 Hill, supra note 900, at 968.
1193 Ex rel. Patterson, 357 U.S. at 456.
1194 Hill, supra note 900, at 968–69 (also notes that Patterson replaced Davis as the ruling referred to in later cases involving similar issues, id. at 969).
1197 Henry, 379 U.S. 443.
1198 Henry, 379 U.S. at 447–48; James, 466 U.S. at 348–49, citing Henry; Osborne, 495 U.S. at 124–25, citing James. There are some similarities between the reasoning in Henry and the contextual approach to the principle of effectiveness in the European doctrine. These are compared further infra Part 9.2.2.
1200 Henry, 379 U.S. at 448–49.
It is doubtful what importance should be attached to *Henry* and the line of cases following it.\(^{1201}\) There are several reasons why one should be careful about relying to heavily on *Henry*: *Henry* had very little impact on the case-law as a whole;\(^{1202}\) the majority in *Henry* claimed it adheres to “settled principles”\(^{1203}\) which is difficult to reconcile;\(^{1204}\) the final holding in *Henry* is an extremely narrow one;\(^{1205}\) the portion of the ruling pertaining to adequacy could be considered obiter dicta;\(^{1206}\) the majority opinion was supported by the narrowest possible majority of justices;\(^{1207}\) *Henry* was heavily influenced by another ruling, Fay v. Noia\(^ {1208}\), which in turn was weakened by subsequent decisions;\(^{1209}\) and, finally, the Supreme Court distanced itself from *Henry* in one recent decision.\(^{1210}\)

\(^{1201}\) See, e.g. Meltzer, *supra* note 915, at 1144–45 (believes that *Henry* could be understood as a case where the State procedure was found to be too burdensome).

\(^{1202}\) Hart & Wechsler, *supra* note 1174, at 561.

\(^{1203}\) *Henry*, 379 U.S. at 447–49.

\(^{1204}\) Hill, *supra* note 900, at 944.

\(^{1205}\) Being that the State court must determine the factual issue of whether the waiver was valid.


\(^{1207}\) Only five of the nine justices supported the majority opinion. Justice Black, who wrote his own dissenting opinion, believed the Mississippi rule to be inadequate *per se*.

\(^{1208}\) 372 U.S. 391 (1963). These were the facts. Noia, Caminito, and Bonino were suspected of a murder to which they confessed after twenty-seven hours of “satanic practices” by the police. They were subsequently sentenced based solely upon those confessions. Caminito and Bonino unsuccessfully appealed their convictions whereas Noia did not appeal. Eventually, Caminito and Bonino were granted habeas corpus on the ground that the coerced confessions violated due process under the Fourteenth Amendment and subsequently released. Noia appealed on the same grounds but was denied habeas corpus on the ground that he had failed to exhaust all other remedies as he did not appeal the initial judgment. The State argued this requirement was “an adequate and independent state ground” that bars Federal courts from reviewing the judgment. The Supreme Court disagreed, and declared that “the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas corpus statute.” *Noia*, 372 U.S. at 394–99; United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955); People v. Bonino, 135 N.E.2d 51 (N.Y. 1956).

\(^{1209}\) Coleman, 501 U.S. 722 (holding that the State Grounds doctrine applies to Federal habeas corpus); Hart & Wechsler, *supra* note 1174, at 560–64.

\(^{1210}\) Lee, 534 U.S. at 386.
Three is also a racial element in *Henry* that should be taken into account.\(^{1211}\) The State Grounds doctrine contains other decisions that pertain to civil rights and which are almost as controversial as *Henry*. In *Felder*,\(^{1212}\) the U.S. Supreme Court ruled that Felder, a black man who claimed having been assaulted by police officers on account of his race, was allowed to exert his claim for damages under Federal law even though he had failed to comply with a State notice-of-claim statute.\(^{1213}\) The Supreme Court concluded that because the State notice of claim requirement affected a Federal right it is inadequate under the State Grounds doctrine and can be set aside.\(^{1214}\) The *Felder* Court concluded that Federal law only tolerates State rules that do “not stand as an obstacle to the accomplishment of Congress’ goals.”\(^{1215}\)

One cannot with precision declare when compliance with a State procedural rule becomes so burdensome for the exercise of a Federal right that it becomes unreasonable under the State Grounds doctrine. One important reason for the lack of clarity is that the Supreme Court has had few occasions to explain itself and develop this element of the State Grounds doctrine. There are few Supreme Court cases that strictly apply the unreasonably-burdensome-standard of *Davis* and *Brown*.\(^{1216}\) The fact that there are only a handful of cases in the American doctrine where local procedure was deemed inadequate for enforcement of union law on the ground that it unjustifiably burdened the union law is interesting in itself. The principle of effectiveness, which has a similar function in the European doctrine, is by comparison quite often relied upon. What is it

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\(^{1211}\) One commentator believes, in my opinion correctly, that it is relevant that the defendant was a black man, president of one branch of the NAACP, and that the action took place in Mississippi in 1962. Sandalow, *supra* note 1124, at 190. One can imagine that the U.S. Supreme Court had severe problems with Aaron Henry being sent to a Mississippi jail and made its decision accordingly. Cf. Bob Gordon et al., *Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 Am. U. L. Rev. 747, 752 (1998).


\(^{1213}\) According to Wis. Stat. § 893.80(1)(a) (1983) anyone having a claim against the Wisconsin government or its agent must notify the defendant about it within 120 days of the events on which it is based. *Felder*, 487 U.S. at 135–37.

\(^{1214}\) *Felder*, 487 U.S. at 141–146.

\(^{1215}\) *Felder*, 487 U.S. at 151; see also *Hart & Wechsler*, *supra* note 1174, at 450 (criticizing *Felder*). The quoted portion of the *Felder* judgment brings to mind the concept of obstacle preemption discussed *supra* Part 5.4.3.

\(^{1216}\) *Hart & Wechsler*, *supra* note 1174, at 556; cf. *Hill*, *supra* note 900, at 951–53; Meltzer, *supra* note 915, at 1144–45 (Meltzer, unlike Hill, believes that *Henry* could be understood as a case where State procedure was found to be too burdensome).
about American circumstances or the American doctrine that limits the need for a “burdensome procedure” approach to so few situations? We shall return to this question further below.\textsuperscript{1217}

5.6.4 Summary and Conclusions

This concludes our examination of the State Grounds doctrine. It has been explained how the doctrine evolved from governing when Federal questions decided by State courts can be subject to review by Federal courts to determining what procedural rules State courts can apply to Federal rights. It was also concluded that State courts should exercise discretion given to it by the State legislator in a way that is loyal with the Federal government and that the novelty and consistency of application can be relevant when considering the adequacy of State procedure for the purposes of enforcing Federal law.

5.7 Concluding Remarks

The American doctrine can be difficult to grasp. First, because the American doctrine has developed over a long time\textsuperscript{1218} it carries with it a lot “theoretical baggage”. As we have seen here above, the different “tracks” governing the adequacy of State procedure for the purpose of enforcing Federal law in the 21st century ultimately date back to decisions rendered at the beginning of the 19th century. Also, the American doctrine is the combined result of incremental development of several legal theories, many originally developed for other purposes.

The U.S. Constitution plays a central role for what State procedural rules State courts shall apply to Federal law. First, the basic constitutional requirements of due process and equal protection intend to guarantee that prospective litigants will be afforded a fundamentally fair process in State courts. The U.S. Constitution at the same time limits what the Federal government can require of State courts. Only exceptionally is the Federal government allowed to directly regulate State procedure and “commandeering” State resources to realize Federal aims is generally frowned upon. In this, the U.S. Constitution places much importance on the fact that the duty of State courts to apply the supreme Federal law shall not result in the disturbance of the proper division of power be-

\textsuperscript{1217} See infra Parts 9.2–9.3.
\textsuperscript{1218} Something that is also a primary reason why a comparison between the European and American doctrines is valuable.
tween the Federal government and the several States in accordance with federalist principles, something that is feared might happen. We then studied what is largely the flip-side of the same principle. Case-law building upon the concepts of “otherwise valid excuses”, “analogous rights”, and “adequate and independent State grounds” seek to ensure that States do not use their constitutional power over State courts and State court procedure to escape the Federal law that, by virtue of the U.S. Constitution, is the “law of the land”.

Taken as a whole, the American doctrine represents the idea that State court enforcement of Federal law is a sensitive federalist issue and that legal mechanisms regulating what procedural rules State courts shall apply when enforcing Federal law must take into consideration not only the interests of the Federal government and of the individuals concerned but also the interests of the several States and carefully strike a balance between these partially conflicting interests.
PART IV.

COMPARISON
6 Comparison of Interests Considered in the European and American Doctrines

6.1 Introduction
The first step towards achieving the overall aim of this study is to determine what different interests ought to be considered and balanced in the European doctrine. This will be achieved in this chapter by comparing the European doctrine to the American doctrine in three respects: how do interests considered in the American doctrine differ from those considered in the European doctrine, why are there such differences, and should interests considered in the American doctrine also be considered in the European doctrine?¹²¹⁹

As will be demonstrated in this chapter, the American doctrine distinguishes itself from the European doctrine in how it balances the interest of the effectiveness of union law against the proper division of power between union and state and the ability of states to function as separate entities. The American doctrine’s approach to individuals’ interests is also different from that of the European doctrine in two respects. First, consistent with this focus on constitutional and federalist aspects of State court enforcement of Federal law, the individual’s interest of access to an adequate judicial process is to a greater extent than in the European doctrine separated from the interest of realizing union rights in the American doctrine. Second, in the American doctrine, neither states’ right to govern state procedure nor the union’s right to regulate substantive matters should impair the clarity and foreseeability of the judicial process. It will be argued below that it would be sensible to shape the European doctrine after the American doctrine in these respects.

¹²¹⁹ See supra Parts 1.1.2, 1.4.2.
6.2 Identifying and Comparing Interests Considered: Union, States, and Individuals

6.2.1 Introduction

Situations where national courts enforce Community rights involve three parties: the Community, the Member States, and individuals. The comparable situation in the United States with State courts enforcing Federal rights involves three comparable parties: the Federal government, the States, and individuals. These three parties – union, states, and individuals – have different and sometimes conflicting interests in relation to each other. Consequently, in comparing which interests underlie the European doctrine and the American doctrine respectively it is valuable to consider the interest of each party in relation to the other.

6.2.2 Interests of the Union Contra Interests of States

We begin with the interests of the union and of the states in relation to each other. As explained in chapter 3 above, an analysis of a situation under the European doctrine begins with the presumption that it is the Member States that lay down the procedural rules that national courts apply to Community rights. However, as we also saw in chapter 3, the presumption of national procedural competence is subject to so many exceptions that the Member States’ interest in self-governance in the procedural area occupies a weaker position in the European doctrine than one might initially assume. General rights and principles of Community law along with the principle of equivalence constitute important exceptions to the Member States’ right to regulate national court procedure although their effect on the Member States is both limited and foreseeable. The principles of equality and equivalence does not limit Member States ability to regulate procedural matters as long as the rules apply without distinction to, first, nationals and persons from other Member States and, second, to claims under national law and Community law. The right of access to a judicial process limits how Member States may set up their judicial system and the contents of process in that system but its requirements are limited and reasonably foreseeable. These exceptions to national competence in the procedural area are not completely unlike those imposed on States in the American doctrine. The ideas that States must respect fundamental procedural rights, treat out-of-state litigant in

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1220 See supra Parts 3.3, 3.5.
1221 See further infra Part 8.2.
the same manner that they treat their citizens, and enforce Federal claims in the same way that they enforce State claims can all be found in the American doctrine.\textsuperscript{1222}

What stands out in a comparison with the American doctrine are the more open-ended exceptions to national procedural competence included in the European doctrine. First, even if it has been sparsely exercised, the Community has broad powers to regulate procedural matters, especially after revisions made to Article 65 of the EC Treaty through the Treaty of Amsterdam.\textsuperscript{1223} The powers of the European Community over procedure in Member State courts are broader than the Federal government’s power over State procedure in the United States.\textsuperscript{1224} Second, the requirement under Community law that national procedural law may not to an unacceptable degree impair the effectiveness of Community law is more open-ended and more frequently applied than any comparable mechanism in the American doctrine.\textsuperscript{1225}

Many of the mechanisms included in the European doctrine have their basis in the principle of loyalty.\textsuperscript{1226} The language of Article 10 of the EC Treaty, where this principle is embodied, is broad and so are its consequences.\textsuperscript{1227} The European Court of Justice has construed Article 10 of the EC Treaty as imposing duties on Member States\textsuperscript{1228} and on national courts\textsuperscript{1229}, including the duty of Member State courts to provide effective

\textsuperscript{1222} See supra Parts 5.2.2–5.2.3, 5.5.
\textsuperscript{1223} See supra Part 3.4.
\textsuperscript{1224} See further infra Part 7.2.2. Even before these changes the Treaty did not set any firm limits to the Community’s ability to regulate procedural matters, especially not considering the broad language of Article 308 of the EC Treaty.
\textsuperscript{1225} See further infra Part 9.2.2. The contextual approach can appear to include taking national interests into consideration and a limit to the Community’s influence over national procedure. As we shall see further below, this is not what the contextual approach has meant.
judicial protection, the requirement of interim relief, and the possibility to challenge validity of Community acts. As the Court of Justice has stated on numerous occasions, it follows from the principle of loyalty that “it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law.” The principle of loyalty has been a cornerstone of the ECJ’s development of the European doctrine.

Considering that the principle of loyalty has such a central role in the European doctrine, one would expect the American doctrine to contain a similar institute. There is however nothing in the American doctrine that directly parallels the principle of loyalty. The American doctrine is instead dominated by the question of proper division of power between union and states. This is one of the most significant differences between the American doctrine and the European doctrine and it can explain many of the other differences between the two doctrines.

In the case-law studied herein, the U.S. Supreme Court has given much attention to the importance of federalism and the need to protect the States against undue Federal influence. This has been especially clear during the last thirty years, something commentators have identified as a “federalist revival.” The Supreme Court’s federalist approach is evi-

dent in several areas of law, many of which fall outside the scope of this study.\textsuperscript{1236} An illustrative example of the application of this federalist approach in the American doctrine is the so-called anti-commandeering doctrine.\textsuperscript{1237} The doctrine, which has been described more fully above,\textsuperscript{1238} holds, in essence, that the Federal government cannot enlist State officials to administer Federal programs. The difference with the European doctrine is obvious. Whereas the principle of loyalty requires national authorities to assist the Community in the realization of its aims, the American doctrine forbids the Federal government from enrolling State authorities for the realization of its aims.\textsuperscript{1239} The position of the United States Supreme Court that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program”\textsuperscript{1240} stands in stark contrast to the European principle of loyalty.\textsuperscript{1241}

The effects of federalism on the American doctrine goes beyond the anti-commandeering doctrine. The Supreme Court has on numerous occasions stated that the States are under no duty, constitutional or otherwise, to adjust their judicial systems to further enforcement of Federal law.\textsuperscript{1242} The States are under no general duty to change, modify, or adapt any aspect of their judicial systems so that they fit the enforcement of Federal law.\textsuperscript{1243} The Supreme Court was perhaps clearest on this point in

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\item For example, the issue of State immunity, whether States can shield themselves from liability in State and Federal courts after having violated Federal law, has been an important subject in the development of this “new federalism”. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999).
\item See supra Part 5.3.
\item See also Michael S. Greve, Against Cooperative Federalism, 70 Miss. L.J. 557 (2000) (argues that the anti-commandeering doctrine promotes a dual or competitive federalism that is advantageous compared to a cooperative federalism).
\item Note, however, that that does not act as an absolute bar to the creation of concrete, Federal procedural rules or the duty of State courts to apply such rules. See, e.g. Southland Corp. et al. v. Keating et al., 465 U.S. 1 (1984); Felder, 487 U.S. at 138.
\end{enumerate}
Howlett where it explained that while the Supremacy Clause of the U.S. Constitution requires State courts to apply Federal law, “federal law takes the state courts as it finds them.”1244 Conflicts between Federal and State law, including conflicts between substantive Federal law and procedural State law, must be resolved by looking not only at what powers the union has but also at what powers the States have retained.1245 The approaches used in the American and European doctrines differ in this respect. Where the European doctrine focuses strongly on the effective and uniform application of Community law,1246 the American doctrine also sees a need to limit the Federal government from expanding its influence into the State sphere.

It can be questioned whether the interest of the Member States to control what procedural rules national courts apply enjoys a stronger position in the European doctrine after the introduction of the contextual approach to effectiveness.1247 In van Schijndel, the Court of Justice stated that “the basic principles of the domestic judicial system … must, where appropriate, be taken into consideration” in applying the principle of effectiveness.1248 The quoted language would indicate that national interests should be taken into consideration and balanced against the interest of the effectiveness of Community law in settling if national courts can apply national procedural rules to Community rights, as does the non-exhaustive list of such basic principles found in van Schijndel which includes the “proper conduct of procedure”.1249

Subsequent case-law indicates however that shielding Member States against undue influence from the Community is not a priority even after the introduction of the contextual approach. First, the contextual ap-

1245 See, e.g. Brown v. Gerdes, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring) (“Neither Congress nor the British Parliament nor the Vermont legislature has power to confer jurisdiction upon the New York courts … [E]ach State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their proceeding, … as free from control by Congress in establishing a federal system for litigation as is Congress free from state control in establishing a federal system for litigation.” The only exception Frankfurter saw was the duty for State courts to treat foreign and domestic litigants alike under the Privileges and Immunities clause of the U.S. Constitution).
1247 See further supra Part 3.6.4.
approach has been used modestly after *van Schijndel* and *Peterbroeck*.\(^\text{1250}\)
Moreover, the Court of Justice has not applied the test as explicitly after *van Schijndel* and *Peterbroeck* as it did in those cases and in the few cases where the ECJ implicitly applied the contextual approach, the reason for which the national procedural rule could be upheld was legal certainty.\(^\text{1251}\)
Case-law addressing the principle of effectiveness post-*van Schijndel/Peterbroeck* has overall been dominated by cases regarding whether a national rule limiting the repayment of fees violated the principle of effectiveness or whether it was acceptable “as it constitutes an application of the fundamental principle of legal certainty”.\(^\text{1252}\)
A few decisions diverge from this general trend but they do not support that the interest of the Member States to retain control over national court procedure is given much weight in the development of the European doctrine. In *Cofidis*, the ECJ found without explicitly presenting its reasoning that a contextual approach would not uphold a national procedural rule although similar national rules in other cases had been deemed acceptable.\(^\text{1253}\)
A similar result was reached in *Santex* where the application of national procedural law would make it excessively difficult for an individual to exercise his Community rights considering circumstances in the specific case.\(^\text{1254}\)
Finally, the ECJ indicated in *Steffensen* that the national court could “in the light of all the factual and legal evidence” find that a German rule regarding the taking of evidence did not violate the principle of effectiveness, probably because “ex officio investigations and the free evaluation of evidence … make it possible to challenge that evidence effectively.”\(^\text{1255}\)
These decisions suggest that determining if a na-

\(^{1250}\) *See supra* Part 3.6.4.
\(^{1254}\) Case C-327/00, Santex SpA v. Unità Socio Sanitaria Local n. 42 di Pavia et al., 2003 E.C.R. I–1877, paras. 56–61.
\(^{1255}\) Case C-276/01, Steffensen, 2003 E.C.R. I–3735, paras. 66–68.
tional procedural rule violates the principle of effectiveness shall be done on a case-by-case basis taking into consideration all aspects of the national legal system. They do not, however, offer strong support that interests of the Member States are to be weighed against the effectiveness of Community law in the application of the principle of effectiveness.

6.2.3 Interests of Individuals Contra Interests of States

Having compared the interests of union and states in relation to each other, we now turn to the interests of the third party involved in the application of union law, individuals, and to the relationship between their interests and those of the states and the union respectively.

First, that union law can require state procedural law to be the modified if the latter violates fundamental notions of procedural justice and fairness is true in both the European doctrine and the American doctrine. Thus, that the individual receives a fundamentally acceptable treatment in state court is an interest included in both doctrines. Moreover, neither European Community law nor American Federal law considers the proper division of power or the states’ interest in independence to be directly relevant defenses against violations of such fundamental procedural rights.

One area where the European and American doctrines differ is with regard to the individual’s interest of access to a clear and foreseeable judicial process. Both doctrines require the existence of adequate notice under national procedure but the American doctrine has gone further than the European doctrine to ensure that procedure in state courts remain as clear and foreseeable as possible. First, the U.S. Supreme Court has ruled that State procedure that is unforeseeable can violate the so-called Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Second, that a State procedural rule is novel or that state courts have applied it inconsistently is a ground for excusing an individual’s

1256 See supra Part 3.6.
1257 See further supra Parts 3.3.2–3.3.4, 5.2.2–5.2.3, see also infra Part 8.2.1.
1258 One should note, however, that unlike the U.S. Constitution, which the States are always bound by, the general principles of Community law only operate in areas covered by Community law. See further infra Part 8.2.1.
failure to comply with it under the State Grounds doctrine. The individual’s interest of access to a clear and foreseeable procedure in State courts has at least thus far not been upheld in the European doctrine in the same way.

Finally, some may argue that effective protection of individuals’ rights is an important general value that the European doctrine tries to ensure. This is in line with rhetoric sometimes used by the European Court of Justice. This is another area where the European and American doctrines differ. The American doctrine does not contain such rhetoric. In accordance with what was stated above, the American doctrine focuses on the constitutional issues underlying state enforcement of union rights. The difference between the European doctrine and the American doctrine in this respect can perhaps best be understood as one of perspective. Faced with a question of whether a national court can apply a national procedural rule to a Community right, the central question often appears to be whether either the interest of the Community to exercise its powers under the Treaty or the interest of the individual to exercise a right conferred upon him or she by the Community warrants making an exception from the principle of national procedural autonomy. Under the American doctrine, by comparison, the key issue is often whether it is the Federal government or the State that has the power to decide what rights the individual enjoys and under what conditions they can be enforced.

6.2.4 Interests of Individuals Contra Interests of the Union

It is not only in relation to the state and its courts that individuals have interests. In a process regarding the application of Community law, the interests of concerned individuals sometimes coincide, sometimes conflict with those of the Community. To the extent that protection of the

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1262 See, e.g. Case 33/76, Rewe-Zentralfinanz eG & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, 1976 E.C.R. 1989, para. 5 (“Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.”); Factortame, 1990 E.C.R. I–2466, para. 19 (“it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law …”).
individual’s interests coincides with promotion of the effectiveness of Community law, the European doctrine supports it. There is however little indication that the interests of the individuals are allowed to override the interests of Community under the European doctrine. Where the interests of individuals and the interest of the Community were perceived as conflicting, the ECJ indicated that the Community’s interests should take precedence over those of the individual.\footnote{See, e.g. Case 5/89, Commission v. Germany, 1990 E.C.R. I–3437, para. 19; Case C-368/04, Transalpine Ölleitung in Österreich GmbH et al. v. Finanzlandesdirektion für Tirol et al., 2006, not yet published, paras. 45–49.} The approach used under the American doctrine is somewhat different than that under the European doctrine but the result is largely the same. As discussed above, in most situations where the American doctrine is applied focus lies on the federalist dimension: the proper division of power between union and states. In deciding whether Federal law requires State procedure to be modified, the interests of individual litigants in the specific case are of secondary concern.

There is one important exception. It was stated above that ensuring that procedure in state courts remains clear and foreseeable to the individual litigants is of interest in the American doctrine. This is in effect true in relation to the union as well. The American doctrine is set up in such a way that its application to a lesser degree than the European doctrine impairs the foreseeability of State court adjudication. Application of the European doctrine or the American doctrine may lead to the modification of state procedural law even after individuals have taken actions assuming it applies. When state procedural law is modified during a process, for example on the ground that it discriminates between union and state claim, procedural foreseeability is impaired. The effects of the European doctrine on the foreseeability of state procedure is however greater than the comparable effects the American doctrine through the requirement of effectiveness as the consequences of its application are more unforeseeable than the application of the comparable mechanisms in the American doctrine. This is especially true after the introduction of the contextual approach.\footnote{\textit{Josephine Steiner et al., EU Law} 176–77 (9th ed. 2006).} As we shall conclude further below, the American doctrine contains a mechanism similar to the principle of effectiveness\footnote{That State procedure can be set aside under the State Grounds doctrine on the ground that it unnecessarily burdens a Federal right was discussed \textit{supra} Part 5.6.3.} but it has been very sparsely used.\footnote{See \textit{infra} Part 9.2.2.} The American doctrine...
instead resolves conflicts between State and Federal law using other mechanisms whose application is more foreseeable and therefore to a lesser degree impairs the foreseeability of the judicial process to the detriment of the concerned individuals.\textsuperscript{1267}

6.2.5 Summary and Conclusion

It is recognized in both the European doctrine and in the American doctrine that the union’s ability to regulate matters within its power and the supremacy of valid union law over conflicting state law should be protected. What the American doctrine includes and the European doctrine largely lacks is a discussion about the constitutional dimension involved in deciding what procedural rules state courts shall apply to union law. What power the U.S. Constitution grants the Federal government over the State judiciary and what power it does not grant is a central question throughout the American doctrine.\textsuperscript{1268} Similar federalist considerations are rarely raised in the European doctrine which by comparison focuses rather narrowly on the effectiveness of Community law. This difference between the two doctrines has consequences. Whereas protecting the union’s ability to regulate matters within its area of competence is an essential interest in both doctrines, the American doctrine balances this against the need to protect states against the union infringing on the states’ competence.

A second difference between the European and American doctrines is that maintaining a clear and foreseeable procedure has been held more important in the latter than in the former. This is the case in relation to the interests of the union but more significantly in relation to the interests of the states. Third and finally, the interest of individuals having access to an adequate judicial process is more clearly separated from the Community’s interest of realizing union rights on a local level in the American doctrine than in the European doctrine. The individual’s possible interest in realizing union law is not used as an alternative to constitutional analysis in the American doctrine.

\textsuperscript{1267} See also discussion infra Part 9.4.2.
\textsuperscript{1268} This is also true for the Erie doctrine.
6.3 Explaining Differences in Interests Considered

6.3.1 Introduction: Who Owns the Problem?

To understand how and why the European doctrine balances involved interests it is necessary to take into consideration how and why the doctrine came into existence. It can appear as if the absence of adequate judicial protection in the Member States is the essential problem underlying the European doctrine and, by consequence, as if it is the Member States that “own” the problem. This view is however not entirely correct and may have contributed to the focus on the effectiveness of Community law in the development of the European doctrine.

6.3.2 Development of the European Doctrine

The development of the American doctrine in the United States became necessary first after the United States Supreme Court had addressed the issue regarding the right and duty of State courts to apply Federal law.\textsuperscript{1269} An examination of the conditions underlying the European doctrine reveals that it has a similar background. That Member States fail to provide adequate judicial protection is not primarily the problem that requires the existence of a European doctrine but rather only a consequential problem.

The primary problem underlying the creation of the European doctrine is the institutional deficit of the European Community. The European Community creates substantive rights and obligations but lacks institutions capable of effectively enforcing them. The Community could not enforce its laws against the Member States because the public enforcement system is not sufficiently effective. It could not enforce its laws against individuals because it does not have the necessary institutions. Consequently, the Community is largely dependant on the participation of Member States for the realization of its laws and they are not always forthcoming. The solution to the primary problem was to defer the task of enforcement of Community law primarily to national courts. By opening national courts to individual litigants, there are institutions capable of enforcing Community law.\textsuperscript{1270}

While the creation of private enforcement alleviated the primary problem facing the enforcement of Community law, the institutional deficit, it brought attention to another, secondary problem: the procedural deficit of Community law. Community law consists primarily of rules governing substantive issues and contains few rules governing procedural and

\textsuperscript{1269} See supra Part 4.4.
\textsuperscript{1270} See supra Part 2.4.
remedial issues. Thus, when national courts began applying substantive Community law, those substantive rules were not accompanied by the necessary procedural rules. Rather than enacting procedural rules, the Community once again borrowed national resources. The solution to the secondary problem is that national courts shall, as a general rule, supplement substantive Community law with the procedural and remedial rules the national legislator provides it with.

Thus, the perceived inadequacies of national procedure law can be understood as a tertiary problem. It is the last in a line of three problems, caused by the solutions chosen to eliviate the primary and secondary problems. It exists because the Community has chosen to resolve its own institutional and procedural deficit by “borrowing” institutions and procedural law from the Member States. Thus, the problem that national procedural law is inadequate for enforcing Community law should properly be understood as an effect of the institutional and procedural deficit of Community law. This development was possible because of the European Community’s historical background and its origin in international law. Under international law, the realization of the international obligation is customarily left to the signatory states to achieve in good faith. When the Treaties of the Community were drafted, the European Community was comparatively weak and the principle of loyalty strengthened it.

6.3.3 Conclusions and Explanations

Several conclusions can be drawn about the European doctrine against this background. The historical background of the European doctrine explains at least partially why focus has been on the effectiveness of Community law in the development of the doctrine. The European doctrine was created for the purposes of making Community law more effective in a system that when created did not contain adequate means for achieving this. This is different from the United States where Federal law was from start intended to be supreme and applied directly in the several States. The issue of the status of Federal law in the States was addressed when the United States was created. The U.S. Constitution does not provide a complete solution to how Federal law is to be effectively realized but it addresses such matters and the interests involved, thereby providing some basis for the development of the American doctrine.

1271 This is beginning to change, see supra Part 3.4.
1272 Halberstam, supra note 1241, at 218.
1273 Lang, supra note 1228, at 86.
The historical background of the European doctrine also suggests that the perceived problems with inadequacies of national procedural rules could be resolved or, perhaps more appropriately formulated, circumvented through the creation of stronger, more efficient Community institutions. The adequacy of national procedural law would not be an issue if Community claims were handled by Community courts applying Community procedural rules. The creation of local Community courts capable of enforcing Community rights on the national level is however an unlikely solution to the problem underlying the European doctrine. Even if Community law continues to be applied and enforced by regular national courts, the perceived inadequacies of national procedure could be resolved by enacting Community law governing procedural matters. As we have seen, the Community is capable of enacting procedural rules as well as substantive ones.\textsuperscript{1275} If Community law specified not only what rights and obligations individuals have but also where, when, and under what circumstances those rights and obligations are to be enforced, national courts would not have to supplement Community law with national procedural rules and the inadequacy of the latter would become a non-issue.

The historical development of the European doctrine also clarifies within what boundaries a solution to the underlying problem(s) must be found. That the function of ensuring the effective enforcement of Community law has been transferred to Member States may be undesirable from the latter’s perspective but it is unlikely that it can be altogether avoided. There are no Community courts capable of enforcing Community law directly on the national level and even if such courts were created the Community would also have to lay down the procedural rules these courts should apply. It appears unlikely that both of these things will be resolved any time soon and this is supported by the fact that the United States finds itself in a similar situation, struggling with similar issues despite having both a powerful Federal judiciary and a complete set of Federal rules of procedure. Moreover, as many cases would concern both issues of national law and issues of Community law, such a solution would lead to Community courts enforcing national law using Community procedural rules and the issue of whether procedural Community rules are adequate for enforcing national law would no doubt soon be raised.\textsuperscript{1276} A solution must thus most likely be found within the confines that it is often national courts that enforce Community rights and that they as a general rule do so applying ordinary national procedural rules.

\textsuperscript{1275} See supra Part 3.4.

\textsuperscript{1276} Compare the American Erie doctrine, discussed supra Part 4.5.2.
6.4 Comparative Evaluation and Suggestions for a More Balanced European Doctrine

6.4.1 Introduction

It was concluded above that the American doctrine suggests that a system of union law mechanisms governing what procedural rules state courts shall apply to union rights should be developed bearing in mind the interests of protecting the union’s ability to regulate matters within its area of competence, protecting states against the union regulating matters within the states’ area of competence, and protecting individuals’ access to a judicial process that meets established notions of procedural fairness and that is both clear and foreseeable. Comparable interests can to some extent be identified in the European doctrine. Upholding the Community’s ability to regulate matters over which it has power is also considered important in the European doctrine, as is the right of access to a judicial process. What shall now be considered is whether it is sensible that the other interests considered and protected in the development of the American doctrine are also considered in the development of the European doctrine.

6.4.2 Proper Division of Power

There are compelling reasons why the interest of protecting the Member States against intrusions by the Community should be included in the European doctrine in a way analogous to the American doctrine.

That the powers of the European Community vis-à-vis the Member States are limited is a fundamental concept in Community law. Moreover, the notion expressed in the American doctrine that states’ power should be protected against union intrusion is really the flip-side of protecting union power against state intrusion which is considered relevant under the European doctrine. Whereas an analysis based upon either perspective should in theory lead to the same conclusion, it may in practice be important with regard to the question of whom, the union or the state, that should decide what procedural rules state courts shall apply when applying union law. This question has no clear answer in the U.S. Constitution and even less so in the Treaties of the Community and because of that it is especially important that one considers it

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from all aspects. The American doctrine illustrates that when answering the question, one should consider not only what lies within the union's competence but also what lies outside. Primarily the first perspective and less the latter appears to be considered in the European doctrine when it is compared to the American doctrine, an approach that seems constitutionally untenable.

That the European doctrine considers the division of power between Community and Member States primarily from the perspective of the former can, as previously noted, perhaps be traced to the fact that the American doctrine is founded on federalism and the European doctrine on Member State loyalty. This, in turn, is primarily attributable to the fact that the European Community was not designed to be a federation whereas the United States was. The Community is in many respects not as powerful as the U.S. Federal government and may consequently need more support. One can however question whether the European Community at its present stage of development is so different from the United States that it warrants the European doctrine being based on a position that is so different from that underlying the American doctrine.

The European Community may have started out as a comparatively weak institution under international law. As such, it needed the protection that the European doctrine has provided. At that time, it may have been proper that such elements as the principle of loyalty protected the Community against the Member States. It is however likely, both from the historical development in Europe and from the American example, that the Community will become more powerful over time and at some point be so powerful that it no longer needs protection from the Member States. At that point, it is instead the Member States that need protection from the Community to prevent the latter from making unacceptable infringements on the powers of the former.

At what point this tipping of the scales occurs is a matter of personal and political opinion. Some believe that it has already occurred. For example, Davies notes in a recent article that “there is a pressing need to have a system that defines and contains the legitimate scope of Community power and legislation” in the light of Community law’s quick expansion. Other may believe that tipping point is still far away. Regardless of one’s view of how far this development has currently progressed, a comparison with the American doctrine indicates that the European doctrine at some point should change its perspective from one of loyalty

1278 Lang, supra note 1226, at 110.
1279 Gareth Davies, Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time, 43 COMMON MKT. L. REV. 63, 63 (2006).
to one of federalism in order to maintain a division of power. If this is accepted, there is little reason to continue to refrain from looking only at what is needed for the European Community to exert its powers under the Treaties. A balanced European doctrine that conforms to the proper division of power between Community and Member States should not, in my opinion, look only at what lies within the Community’s competence but also at what lies outside. As we shall see in the following chapters, accepting this proposal has consequences for how the European doctrine should be constructed.

### 6.4.3 Clear and Foreseeable Procedure

That the European doctrine, like the American doctrine, should seek to ensure that the judicial process in state courts is as clear and predictable as possible is consistent with Community law. First, upholding legal certainty so as to enable individuals to plan their actions is a general principle of Community law and should reasonably apply equally to substantive and procedural matters.

Second, much effort has been spent in the European doctrine using the principle of effectiveness to eliminate burdensome procedural rules. What makes a procedural rule burdensome is a complex question that can be answered in different ways, but compliance with any rule becomes burdensome if it is unclear or changes. Similarly, litigants can often with little effort comply with procedural requirements as long as it is clear in advance what they are expected to do. For example, a rule requiring the plaintiff to enter the court room with his back to the judge and providing that failure to comply with this requirement results in dismissal of the claim may be a strange and unmotivated rule but compliance with it is hardly burdensome as long as it is known to the plaintiff what is expected of him or her. Conversely, if it is difficult for the plaintiff to know what the law requires, compliance with the easiest requirement will become burdensome. Consequently, national procedural rules can on good ground be deemed unacceptable under the European doctrine if they are not clear and foreseeable.

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1280 The matter of how great the burden of a procedural rule is will be discussed further infra Chapter 9.

1281 How this could be achieved practically is illustrated by the standard of novelty or inconsistent application introduced in the American doctrine and discussed further infra Part 9.4.3. One should however observe that to the extent that the European doctrine requires modification of national procedural law in cases between the Member State and an individual to the advantage of the former, as has historically often been the case, the fact that procedural foreseeability is impaired is seldom problematic.
6.4.4 Individual Right Protection

Finally, that the American doctrine in resolving individual situations only indirectly considers the individual’s interest in having his or her rights enforced is in my opinion well-founded. The idea that individual’s have rights that must be protected is no doubt valuable in certain contexts but its consideration in a federal setting should not be allowed to disturb the division of power between union and states. To say that union law grants rights to individuals and that state procedure must be modified to ensure the protection of those rights ignores a more fundamental question: does the union have power to control state procedure? If the union *has* power over state procedure, the command of the union is the reason why state procedural law should be modified. Conversely, if the union *does not have* power over state procedure, the union should not be able to use the individual as an excuse to expand its power over the states. To conclude that the Community is competent to regulate a matter and from there conclude that a concerned individual has a right to have the Community law effectively enforced, if need be through the modification of national procedure, is a one-sided constitutional analysis very similar to the one criticized.

Such reasoning also ignores that individuals involved in a specific case have different interests. To the extent that the individual concerned is trying to rely on a union right, his or her interests may coincide with the interest of the union that union law is as effectively enforced as possible. However, to the individual on the opposite side of someone trying to exert a union right or the one upon which union law places an obligation, the interest of the individual is reversed to that of the union. Again, it appears better to, as is done under the American doctrine, approach the issue of what procedural rules state courts shall apply to Community rights primarily as a constitutional issue focusing on the proper division of power between union and states.

6.4.5 Relevance of Differences between the Legal Systems for the Comparability

Before continuing with the comparison it is proper to address likely objections against the conclusions drawn in this section stemming from two important differences between the European Community and the United States. The first difference is institutional: the Community lacks local Community courts comparable to inferior Federal courts in the United States. The way that the European Community is set up, which in turn can be explained by its roots in international law, presupposes that Com-
Community programs are enforced by the Member States and by Member State authorities. Unlike the United States, there is no alternative venue in which a claimant can file a suit if he or she declines or is denied process in Member State courts.\textsuperscript{1282} Unlike courts in the United States, the courts of Europe cannot be clearly divided into state and union courts.\textsuperscript{1283} Instead, national courts are in a sense both state courts and courts of “ordinary Community jurisdiction”.\textsuperscript{1284}

A question that naturally follows is if this institutional difference between the two legal systems affects the ability to draw the presented comparative conclusions. For example, does the Community’s lack of a local judiciary warrant the Community having greater influence over national courts compared to the U.S. Federal government’s influence over State courts? To answer this question in the positive may instinctively seem right. There is after all little use having Community laws if they are never realized. It is however equally true that what procedural rules state courts shall apply to union rights must be made with respect for constitutional principles, an idea that makes as much sense in the Europe Community as in the United States. It can be argued that the powers granted to the Community are insufficient but one cannot from that conclude that the division of power should be ignored. Moreover, as we shall see in the continued comparison, in some respects the European Community actually has more power over Member State courts than the U.S. Federal government has over State courts.

The other difference between the legal system of the United States and that of the European Community is the absence of a true constitutional document in the latter. As discussed in the previous section, difference in the constitutional basis is an important explanation why the two doctrines to different degree promote different interests. Considering that the two doctrines in this respect stand on different ground, can a comparison with the American doctrine reveal anything valuable about how a better balanced European doctrine should be constructed? The absence of a constitutional document governing the resolution of the situations studied in the European Community is in my opinion a reason for com-

\textsuperscript{1282} Lang, \textit{supra} note 1226, at 110.
\textsuperscript{1283} Francis G. Jacobs & Kenneth L. Karst, \textit{The “Federal” Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective, in} \textit{Integration Through Law – Europe and the American Federal Experience,} bk. I, 169, 191 (Mauro Cappelletti et al. eds., Walter de Gruyter, Berlin 1986) (“There is no true reflection, in the Community judicial system, of the distinction between state courts and federal courts …”).
paring the European Community to a legal system that has such a docu-
ment, not a reason to refrain from doing so. Constitutional differences
between the two legal systems are important and should continuously be
kept in mind in the comparison but do not detract from the American
system’s ability to point the European Community to things thus far not
consider in Europe for further consideration as to whether they warrant
modifying the European doctrine. Furthermore, having above concluded
that certain valid interests have thus far received insufficient attention in
the European doctrine, the existence of a constitutional document does
not prevent using the American legal system to find practical examples of
how the European doctrine could become more balanced.

6.5 Summary and Conclusions

The comparison with the United States in this chapter has illustrated
relevant interests that have received insufficient attention in the European
document. It was concluded in this chapter that the American doctrine
weighs the interest of the union to be able to effectively exercise its pow-
ers and the interest of the states that the enhanced effectiveness of union
law does not lead to the expansion of union power into the domain of
states and that approaching the issue of state court enforcement of union
law in this way is also sound in a European context. Moreover, the Amer-
ican example points to problems with departing from a constitutional
analysis of the issue of what procedural rules state courts shall apply to
Community rights for the sake of protecting individual rights. Finally,
the comparison has shown that it would be wise to incorporate means to
protect individuals from unclear or unforeseeable procedural rules in the
European doctrine. On the basis of the conclusions drawn in this chap-
ter, it is now possible and proper to in subsequent chapters turn to the
more practical issue of how one can modify the European doctrine to
achieve a better balance between these partially competing interests.
7 Comparison of Mechanisms:
Union Regulation of Procedure

7.1 Introduction
It was concluded in the preceding chapter that the legal mechanisms of European Community law that govern what procedural rules national courts shall apply to Community rights should as far as possible balance four interests. These are the interest of the Community to be able to effectively exercise its powers, the interest of the Member States that the Community does not usurp Member State powers, the interest of individuals for the judicial process to meet fundamental notions of procedural fairness, and the interest of individuals that the procedure is as clear and foreseeable as possible. Having established this, we now turn to the second question of this study: how can the European doctrine be modified to better balance these at least partially competing interests?  

Comparing the European doctrine to the American doctrine can assist in answering also this question. In this and the following two chapters, the mechanisms that form the European and American doctrines will be compared asking three questions: how do mechanisms included in the American doctrine differ from those in the European doctrine, how can those differences between the two systems be explained, and can any of the things done differently in the American doctrine be learned from as to achieve a better balance of interests in the European doctrine?  

The comparison of mechanisms begins in this chapter with a comparison of union regulation of state procedure in the European Community and in the United States and proceeds with comparison of remaining mechanisms in subsequent chapters. It will be argued below that there are compelling reasons for increased Community regulation of Member State procedure and for applying the theory of preemption, a theory generally recognized in Community law but thus far not applied in the European doctrine, when deciding what procedural rules national courts should apply to Community rights.

1285 See supra Part 1.1.2.
1286 See supra Parts 1.3.2, 1.4.3.
7.2 Identification: How Do the Mechanisms Differ?

7.2.1 Introduction
We begin by examining how union regulation of state procedure differs in the American and European doctrines. In doing so, three things will be discovered. First, although examples of Community regulation of procedural matters are relatively sparse compared to Community regulation of substantive matters, the formal powers of the European Community to regulate state procedure are greater than those of the U.S. Federal government. Second, although the concept that union law can preempt state law forms part of both the American legal system and the Community legal system, only the former and not the latter has applied the theory of preemption to the question of what procedural rules state courts shall apply to union rights. Third, in applying the theory of preemption, the American legal system addresses the questions of why, when, and how union law preempts state law to a greater extent than has been done in Community law.1287

7.2.2 Union Regulation of State Procedure
The Rewe/Comet-formula has always indicated that national procedural rules can be displaced by Community regulation.1288 It was nevertheless for a long time assumed that the Member States had retained exclusive competence in the procedural area.1289 That assumption eventually became untenable: the Community’s broad use of equally broad Treaty provisions in the lawmaking process made it clear that the powers of the Community are not “enumerated” in any meaningful way.1290 A current

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1287 Note that it was concluded in the presentation of the American doctrine that there are compelling reasons for not placing too much weight on the part-and-parcel doctrine, see supra Part 5.4.4. Because its relevance is so uncertain the part-and-parcel doctrine will not be included in the comparison here, as would otherwise be natural.
1289 Kakouris, supra note 1288, at 1395; Claire Kilpatrick, Turning Remedies Around: A Sectoral Analysis of the Court of Justice, in The European Court of Justice 143, 144 (Gráinne de Búrca & J.H.H. Weiler eds. 2001).
member of the European Court of Justice has observed the absence of a “nucleus of sovereignty that the Member States could invoke, as such, against the Community.”

Gráinne de Búrca has in a similar manner noted that the activities of the Community has expanded to such an extent that it is questionable if there is any area of law at all over which the Member States has retained their sovereignty. The competence of the Community is not formally limited to non-procedural issues and expanded significantly with the introduction of the area of freedom, security and justice. The Council has implicitly accepted the Commission’s argument that the Community can regulate national procedure, even procedure applicable in wholly national situations, directly if procedural differences among the Member States would disturb the common market.

While the Community’s formal competence has few boundaries, regulation of procedural matters has expanded quite slowly. There are examples of the Community regulating procedure in Member State courts but they remain relatively few. In the European doctrine, Community law affects Member State procedural law primarily indirectly, most notably through the principles of equivalence and effectiveness, and to a lesser degree through direct regulation. The focus on such things as the principles of equivalence and effectiveness has distracted from the fact that Community regulation of procedural matters, rare as it may be, is not a novel element of the European doctrine.

1293 See supra Part 3.4.
1294 Com(2005) 87, p. 5–6; the Council confirmed its support for the proposal at a meeting in Luxemburg October 5–6, 2006, Press Release 13068/06, p. 29.
1295 See further supra Part 3.4; Johan Lindholm, Harmonisering av processrätten – utvecklingslinjer, in Svensk rätt i EU (Forthcoming, Örjan Edström ed. 2007).
Examples of union regulation of state procedure are also rare in the United States but, unlike in Europe, the lack of regulation is in the United States to a greater extent attributable to lack of formal competence. The powers of the American Federal government are limited\textsuperscript{1298} and the U.S. Supreme Court has been quite restrictive in allowing the Federal government to exert power over State judiciaries. Although the issue has not been definitively determined, the Federal government appears to have very limited power over State procedure. Supporting this conclusion is that many American scholars are of the opinion that Congress lacks power to regulate State court litigation,\textsuperscript{1299} some attempts by Congress to regulate State court procedure have ultimately failed,\textsuperscript{1300} and the Supreme Court has implicitly held that Congress has no power to regulate State procedure\textsuperscript{1301}.

The U.S. government has however, in a way similar to the European Community,\textsuperscript{1302} in some instances used the legislative powers conferred upon it under the Constitution over areas not directly connected to procedure to regulate elements of State procedure. There are examples of Federal regulation of State court procedure adopted on the basis of the

\textsuperscript{1298} U.S. Const. amend. X (“powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).


\textsuperscript{1301} Felder v. Casey et al., 487 U.S. 131, 138 (1988) (“No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts.”); Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 372 (1990) (“federal law takes the state courts as it finds them.”); Johnson et al. v. Fankell, 520 U.S. 911, 918–22 (1997) (“we must respect the ‘principles [that] are fundamental to a system of federalism … this respect is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.’”).

\textsuperscript{1302} See supra Part 3.4.2.
so-called Commerce Clause but also these are relatively few. The Supreme Court has been especially restrictive against Congress using its power over commerce extensively during the last couple of decades. As the scope of the Commerce Clause narrows, so does the Federal government’s power to regulate State court procedure.

In conclusion, two things can be observed in a comparison of union regulation of state procedure in the European Community and in the United States. First, although it is difficult to make precise statements about the European Community’s competence over state court procedure it is plain in a comparison with the United States that acts comparable to some Community acts governing procedural matters could not be enacted by the U.S. Federal government, one example being the proposed Regulation establishing a European Small Claims Procedure. In this regard, the European Community appears to have broader power to regulate state procedure than the U.S. Federal government. Second, it is interesting to note that although the European Community has significant capacity to regulate state procedure it rarely does so. Whereas the United States Federal government has been prevented from regulating State procedure, the European Community does not exercise its power to do so to its fullest extent.

7.2.3 Preemption Theory

As discussed in the presentation of the American doctrine, Federal law can displace State law even on matters not explicitly addressed by Federal law. It is recognized under the theory of preemption that State law can unacceptably conflict with Federal law even though the latter does not directly regulate the issue governed by the former. European Com-

1303 U.S. Const. art. I, § 8, cl. 3.
1306 COM(2005) 87; see further supra Part 3.4.3; Lindholm, supra note 1295.
1307 See supra Part 5.4.3.
1308 E.g. McCulloch v. Maryland, 17 U.S. 316 (1819) (the operation of a bank established through an act of Congress cannot be “impeded by acts of state legislation.” Id. at 300); Hines v. Davidowitz, 312 U.S. 52 (1941); see also supra Part 5.4.3.
Community law has for quite some time also included a theory on the preemptive effects of union law, a theory that originates from the American theory of preemption.

Preemption theory, which governs the question if state law conflicts with union law, should be kept separate from the notion that union law is supreme, which governs the question of what law prevails over another in case of conflict, but the two are closely related. Both are relevant in areas over which union and states share competence and only in such areas. In the case of concurrent or shared competence, the union through the absence or presence of union regulation can decide when the states can regulate the subject matter. Just like direct union regulation of a subject matter, preemption leads to the transfer of power from states to union and thus affects the division of power.

Both legal systems recognize that union law can prevent state regulation by expressly stating that states may not regulate a certain issue (expressed preemption). Both systems also accept that union law can preempt.

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1314 Cross, supra note 1313, at 455–59; see, e.g. Case 195/84, Denkavit Futtermittel GmbH v. Land Nordrhein-Westfalen, 1984 E.C.R. 3181, paras. 21–24 (establishing that Article 13 of Directive 70/524 is a provision of express preemption). There are also examples of Community law that conversely expressly preserve the right for Member States to regulate specific matters, see, e.g. Article 137 of the EC Treaty (deals with the imple-
state regulation even in the absence of such an explicit statement in union law (implicit preemption). Preemption of the latter type occurs, both in Europe\textsuperscript{1315} and in the United States\textsuperscript{1316}, when the union has regulated an area so extensively that it can be inferred that the union intended for state law not to supplement union law (field preemption). Implicit preemption can however also occur if state regulation would effectively prevent union regulation from achieving its aims (obstacle preemption). This has been recognized in both European Community law\textsuperscript{1317} and American law\textsuperscript{1318}.

The European and American approaches to preemption theory differ however in two respects that are relevant in this study. First, “black letter rules” governing preemption have developed in American law.\textsuperscript{1319} The first black letter rule is that there must be a Federal intent to preempt. Congressional intent is, in the words of the U.S. Supreme Court, the “ultimate touchstone” of preemption theory.\textsuperscript{1320} Just as legislative intent is an indispensable element of positive regulation, Federal intent is a prerequisite to State law being preempted. The second black letter rule is

\textsuperscript{1315} Cross, supra note 1313, at 459 (field preemption occurs when the Community has regulated “a field or sector of the market so exhaustively that the Community has allowed no room for additional Member State law.”); see, e.g. Case 159/73, Hannoversche Zucker AG Retten-Weerzen v. Hauptzollamt Hannover, 1974 E.C.R. 121, para. 4; Case 16/83, Criminal proceedings against Prantl, 1984 E.C.R. 1299, paras. 13–14; Case 195/84, Denkavit Futtermittel, 1984 E.C.R. 3181, para. 16; Case 218/85, CERAFEL v. Le Campion, 1986 E.C.R. 3513, paras. 12–16 (holding that “the rules on the common organization of the market in fruit and vegetables provide for an exhaustive system of quality standards [and that] Member States … are therefore prevented from imposing unilateral provisions concerning the quality of the fruit marketed by growers.”); Case 255/86, Commission v. Belgium, 1988 E.C.R. 693, paras. 8–11.

\textsuperscript{1316} See, e.g. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (preemption can also arise if it is “implicitly contained in [the Federal statute’s] structure and purpose.”).

\textsuperscript{1317} Cross, supra note 1313, at 465; Waelbroeck, supra note 1309, at 550; see, e.g. Wilhelm, 1969 E.C.R. 1, paras. 4–9; Cases 37 & 38/73, Social fonds voor de diamantarbeiders v. NV Indiamex & Association de fait de Belder, 1973 E.C.R. 1609, para. 13; Case 31/74, Criminal Proceedings against Galli, 1975 E.C.R. 47; Case C-129/96, Inter-Environnement Wallonie ASBL v. Région Wallonie, 1997 E.C.R. I–7411, para. 45.

\textsuperscript{1318} Hines, 312 U.S. at 66–67.

\textsuperscript{1319} Robert R. Gasaway, The Problem of Federal Preemption: Reformulating the Black Letter Rules, 33 PEPP. L. REV. 25 (2005). Besides the two rules addressed below, Gasaway considers the different categories of preemption, implied and expressed preemption, conflict and field preemption, to be such a “black letter rule”. Id. at 31–35.

\textsuperscript{1320} Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963), citing Rice, 331 U.S. at 234–36.
closely related to the first. It is, in effect, an evidentiary rule regulating
when Congressional intent to preempt has been sufficiently shown. Be-
cause congressional intent is important to preemption theory, there is a
presumption against preemption. Preemption is again treated in the same
way as positive regulation. Just like the case with positive regulation, the
U.S. Supreme Court has determined that Federal law will only preempt
State law when it was the “clear and manifest” intent of the Federal
government to do so.\footnote{Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 283 (1995).} This clear-and-manifest rule mirrors the clear-
statement rule governing the effects of positive regulation and stands on
the same ground.\footnote{David S. Schwartz, \textit{State Judges as Guardians of Federalism: Resisting the Federal Arbitra-


\footnote{E.g. \textit{CERAFEL}, 1986 E.C.R. 3513, paras. 12–15.}

\footnote{Bermann, \textit{supra} note 1290, at 359.}

\footnote{\textit{E.g. Inter-Environnement Wallonie}, 1997 E.C.R. I–7411, para. 45; \textit{see also} Cross, \textit{supra} note 1313, at 465.}

\footnote{Furrer, \textit{supra} note 1310.}

\footnote{\textit{See also} Waelbroeck, \textit{supra} note 1309, at 550–71 (provides an overview of case-law in
the areas of agriculture, transport, competition, and foreign commerce).}

Principles comparable to the American black letter rules cannot be
found in European Community law. The European Court of Justice has
hinted that the Community’s intent is central when determining if a mat-
ter is subject to field preemption\footnote{E.g. \textit{Inter-Environnement Wallonie}, 1997 E.C.R. I–7411, para. 45; \textit{see also} Cross, \textit{supra} note 1313, at 465.} but has sometimes found such intent
on loose grounds.\footnote{Furrer, \textit{supra} note 1310.} With regard to obstacle preemption, the European
Court of Justice has inferred the Member States’ duty to not hinder the
attainment of the aimed results of Community law from the principle of
loyalty, expressed in Article 10 of the EC Treaty, and the preliminary
reference institute.\footnote{\textit{See also} Waelbroeck, \textit{supra} note 1309, at 550–71 (provides an overview of case-law in
the areas of agriculture, transport, competition, and foreign commerce).}

A second difference can be observed with regard to how preemption
theory has been applied to the issue of what procedural rules state court
shall apply to union rights. The European Court of Justice has thus far
only applied the theory of preemption to matters traditionally consid-
ered substantive.\footnote{\textit{See also} Waelbroeck, \textit{supra} note 1309, at 550–71 (provides an overview of case-law in
the areas of agriculture, transport, competition, and foreign commerce).} Although one should be careful not to overestimate
the use and importance of preemption theory in the American doctrine,
there are examples of its application. The U.S. Supreme Court has in
several cases concerning the preemptive effects of the Federal Arbitra-

1322 David S. Schwartz, \textit{State Judges as Guardians of Federalism: Resisting the Federal Arbitra-


1324 Bermann, \textit{supra} note 1290, at 359.

1325 \textit{E.g. Inter-Environnement Wallonie}, 1997 E.C.R. I–7411, para. 45; \textit{see also} Cross, \textit{supra} note 1313, at 465.

1326 Furrer, \textit{supra} note 1310.

1327 \textit{See also} Waelbroeck, \textit{supra} note 1309, at 550–71 (provides an overview of case-law in
the areas of agriculture, transport, competition, and foreign commerce).
tion Act established that the act can preempt State procedural law even on subjects not explicitly addressed in the FAA. Similar preemptive effects on State procedure have been attached to other Federal acts.

It is from a European perspective interesting to note that even primarily substantive Federal acts can preempt largely procedural State laws. For example, the U.S. Supreme Court concluded in *Felder* that the objectives underlying Federal civil rights law preempted a procedural State law that required prospective plaintiffs to notify the prospective defendant of intent to file a complaint and allowed the defendant 120 days to respond before the claim could be filed in a State court. In doing so, the U.S. Supreme Court effectively overruled the position of the Supreme Court of Wisconsin that “State courts and legislatures … retain the right under the Tenth Amendment to the U.S. Constitution ‘to prescribe the procedural scheme under which the claims may be heard in state court.’”

Another illustrative example of how preemption theory can be used to determine what procedural rules state courts shall apply to union rights is *American Dredging*. The plaintiff, Miller, had been employed by the defendant, American Dredging Co., as a seaman and had in the course of that employment been injured. Miller filed an action for damages against

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1328 *E.g.* Moses H. Cone Memorial Hospital v. Mercury Construction, 460 U.S. 1 (1983) (FAA preempted a State law allowing arbitration between parties A and B to be stayed awaiting the outcome of a related but separate dispute between parties A and C); Southland Corp. et al. v. Keating et al., 465 U.S. 1, 10 (1984) (FAA preempted a State law that required contractual claims to be resolved in a judicial forum); Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476–77 (1989) (a State law allowing State courts to stay arbitration, a subject not address by the FAA, was subject for review against expressed preemption, field preemption and obstacle preemption).

1329 Parmet, *supra* note 1299, at 3–10 (argues that Congress has through several acts engaged in “stealth preemption” that leads to federalization of State court procedure).


1331 *Felder*, 487 U.S. at 153. The relevant portions of the Federal rule in question, 42 U.S.C. §1983, stated that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured …”.

1332 *Felder* v. Casey, 408 N.W.2d 19, 23 (Wis. 1987), *quoting* Kramer v. Horton, 383 N.W.2d 54, 59 (Wis. 1986) (*cert. denied*, 479 U.S. 918 (1986)).

American Dredging in a State court relying on a Federal act referred to as the Jones Act. The State court dismissed Miller's claim under the Federal common law doctrine of forum non conveniens. The highest State court reversed that decision, declaring that a section of the State procedural code made the doctrine of forum non convenience “unavailable in a Jones Act or maritime law case” and that the Jones Act did not preempt the State from regulating this matter. The U.S. Supreme Court concurred on review. Considering that a rule on forum non convenience will not hinder the aims of the Federal act and therefore is not a “characteristic feature” of the Federal right, the American Dredging Court concluded that the Federal act did not preempt the procedural State rule in question. While the outcome of American Dredging was that Federal law did not in that case preempt the State procedural law in question, the reasoning supports that Federal regulation of substantive matters under other circumstance can preempt State procedural law.

7.2.4 Summary and Conclusions

It was observed in the comparison above that the European Community has greater formal powers to regulate the procedural rules used by national courts than the Federal U.S. government has over State court adjudication but that that difference has not resulted in extensive union regulation of state procedure in Europe. It was also concluded that there are two, in this context important differences between Community law and American law with regard to preemption theory. First, preemption theory has been applied in the American doctrine but not in the European doctrine. Second, it is comparatively unclear when and why states are preempted from regulating in European preemption theory compared to the American theory where union intent to preempt and a showing of proof of such intent are central elements of preemption analysis.

1334 Act of June 5, 1920, 41 Stat. 1007. The Jones Act gives sailors a right to damages caused “in the course of employment” that can be asserted in either Federal or State courts. 46 U.S.C. §668(a).
1335 The doctrine states that a court may decline to hear a case when another court also has jurisdiction over it and when it would be more appropriate for the case to be heard in the alternative court, considering e.g. the interest of the litigant, access to evidence and access to witness. See, e.g. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
1338 In this case the aim was to create a right for all seamen to recover damages.
1339 American Dredging, 510 U.S. at 447–57.
7.3 Explanation: Why These Differences?

7.3.1 Union Regulation of State Procedure

Having above established in what respects the European and American doctrines differ regarding union regulation of state procedure it is now proper to try and explain those differences. It was concluded in the comparison that the European Community has some competence to regulate procedural matters but that it uses it sparsely. In this context it is not primarily a difference between the two doctrines that should be explained but a similarity: the similar absence of procedural union regulation despite differences in formal competence.

An explanation for the scarcity of procedural Community regulation can reasonably be sought in the principles of subsidiarity and proportionality which limit when the Community can exercise its formal legislative competence. Commentators have however suggested that these principles only marginally limit the Community’s ability to regulate. Moreover, the Community has thus far been able to regulate procedural matters despite these principles. When the Community has regulated a substantive matter within its control, neither subsidiarity or proportionality has posed an obstacle to also regulate procedural matters deemed relevant for the effective regulation of the matter.

Recent examples of regulation adopted under Article 65 of the EC Treaty indicate that these principles do not constitute great obstacles to Community regulation of Member State court procedure. The Regulation creating a European enforcement order for uncontested claims meets the principles of subsidiarity and proportionality as does the proposed Regulation establishing a European small claims procedure appear to.

That the principles of subsidiarity and proportionality have limited restraining effects on the Community’s power over Member State court

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1340 See supra Part 2.2.
1342 See supra Part 3.4.2.
1344 Com(2005) 87, p. 6–7; the Council confirmed its support for the proposal at a meeting in Luxemburg October 5-6, 2006, Press Release 13068/06, p. 29.
procedure is also supported by the European doctrine as a whole. For example, it appears reasonable that if the principle of subsidiarity or the principle of proportionality prevents the Community for regulating procedural matters, it should similarly limit the Community’s ability to indirectly control national law through the principle of effectiveness. If subsidiarity or proportionality prevents the Community from setting aside a national statute of limitations through regulation, the national law should also not be set aside using the principle of effectiveness. If this reasoning is correct, the limiting effects that the principles of subsidiarity and proportionality have on the Community’s ability to regulate national appear to be limited: the principle of effectiveness has been applied in many different situations and to a number of different procedural rules.\textsuperscript{1345}

More plausible explanations for the relative absence of Community regulation of procedural matters can be found in the political process. First, scarcity of procedural regulation can perhaps be attributed to the Community lacking sufficient support among the Member States to adopt such measures. As in other areas, failure to reach sufficient consensus in the institutions may have contributed to legislative actions not being taken in the procedural field. The Member States might be especially reluctant to harmonize procedural law which has been believed to have a strong connection with national and local values and interests.\textsuperscript{1346} A second possible explanation for the relative absence of procedural Community law could be that it is difficult to identify what matters should be regulated and in what way. Procedural rules are often technically complex and the effects of a procedural rule is difficult to determine independently of its application in an individual case. Furthermore, the effects of a procedural rule is highly dependant upon other procedural, remedial, or substantive rules, behavior of legal actors, and the institutional framework. This makes it difficult to foresee what effects a procedural rule will have on Community law which, in turn, complicates taking legislative action. Third and finally, because the effects of procedural rules are difficult to foresee, it is conceivable that the problems associated with applying a national procedural rule to a Community right are seldom anticipated when the latter is created.

\textsuperscript{1345} See supra Part 3.6.
7.3.2 Preemption Theory

Whereas it is possible to propose explanations for differences and similarities between the European doctrine and the American doctrine with regard to union regulation, the difference in the two doctrines’ position regarding preemption is more difficult to explain. The distinctly federalist character of preemption theory can explain why the drafters of the Treaties did not include it in the text.\textsuperscript{1347} It does not however explain why the theory of preemption, once recognized in Community law, was not applied equally to matters of substance and matters of procedure.

It may at first sight appear as if the difference between substantive and procedural law would prevent the application of preemption theory in the European doctrine. One could argue that implicit union intent to preempt state action is difficult to infer across the substance/procedure-line. A case could be made that it is more complex to determine whether a substantive Community rule preempts national procedural regulation than if the latter is also substantive. It intuitively appears reasonable that the more removed a subject matter is from the issue actually regulated, the more difficult it becomes to conclude that the union intended state regulation of the former to be preempted. However, contrary to what thus may appear common sense, American experiences demonstrate that preemption theory can be applied to both substantive and procedural state rules. The examples from the American doctrine presented above indicate that preemption theory can be used to determine what procedural rules state courts shall apply to union rights.

Another explanation for the difference between the two doctrines that also at first sight appears reasonable is that a suitable situation, a situation where a Community intention to preempt national procedural regulation could be inferred from substantive provisions of Community acts, has yet to come before the European Court of Justice. This explanation is however also unconvincing upon closer scrutiny. Is not the reasoning that state procedure too an unacceptable degree impairs the effectiveness of union law, the reasoning underlying the principle of effectiveness, essentially one of preemption?\textsuperscript{1348} There are plenty of examples of cases decided under the principle of effectiveness to which preemption theory reasonably could have been applied.

Nor is there an obvious explanation why general principles governing preemption theory, such as those observed in American law, have not to the same extent developed in European Community law. What appears

\textsuperscript{1347} Bermann, \textit{supra} note 1290, at 357–58; \textit{cf.} Schütze, \textit{supra} note 1311, at 1032.
\textsuperscript{1348} This is discussed further \textit{infra} Parts 7.4.2, 9.6.
most reasonable is that it is foremost a question of development over time. Although there are several decisions by the European Court of Justice that commentators explain as application of the theory of preemption, the Court itself has not elaborated on the theory of preemption as such. Thus, while application of preemption theory can be observed in the ECJ’s practice, the Court’s failure to address the theory as such and the foundation on which it stands prevents the formulation of principles governing its application such as those observed in American law. It is however conceivable, even likely, that the Court of Justice will, incrementally develop its position on preemption, as it has previously done in other areas, explaining how, when, and why national governments are forbidden from regulating matters not directly occupied by Community law.

7.4 Evaluation: How Do the Mechanisms Balance Involved Interests?

7.4.1 Union Regulation of State Procedure

Having identified and explained differences between union regulation of state procedure in the European and American doctrines, we shall now evaluate the two doctrines’ approach to regulation of state procedure. As previously explained, the basis of this evaluation is how well the mechanism balances interests affected by state court enforcement of union rights identified in chapter 6 above.

The absence of procedural Community regulation is unfortunate if one wishes to achieve a better balance between interests affected by state court enforcement of union rights. As a mechanism governing the procedural rules applied by state courts to union rights, union regulation of state procedure has many advantages.

First, although it is not always clear what union regulation requires of state law or if state law violates union law, union regulation is clearer and more foreseeable than many alternative mechanisms used to determine what procedural rules state courts shall apply to union rights. For example, Community regulation protects individuals’ interests of access to a clear and foreseeable judicial process to a greater extent than the principle of effectiveness which has thus far been the “dominant mechanism” in the European doctrine.

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1349 See supra Part 7.2.3.
1350 Schütze, supra note 1311, at 1032 and n. 41.
1351 Theories on implied preemption addressed herein is a good example of this.
1352 See further supra Part 6.2.
Second, once a conflict between a union regulation and state law has been established it can be resolved easily and in a largely uncontroversial manner: state law shall simply conform to union law. That Member State law must comply with valid Community law is one of the oldest and most well-established principles in Community law.\textsuperscript{1353}

Third, finally, and most importantly, to a greater extent than alternative mechanisms, union regulation of state procedure maintains the proper division of power between union and state. Community regulation of procedural matters obviously promotes the Community’s ability to exercise its powers under the Treaties: if national procedural law hinders the effectiveness of Community law the Community can regulate such matters as it deems necessary to the extent of its competence. However, at the same time, Community regulation in a way protects the interests of the Member States by preventing the Community from stripping them of power. Although the Member States’ ability to legislate in areas of shared competence becomes smaller with extended Community regulation, it is less likely that the Community extends its power beyond what has been allocated to it in the Treaties through regulation than through other mechanisms. Unlike vague standards such as the principle of effectiveness that are used to set aside national procedural rules applied on a case-by-case, the constitutionality of requirements that Community law places on national procedural law through regulation is more easily reviewed. There is scholarly support for this position. More than two decades ago, John Bridge made “a plea for legislative intervention”\textsuperscript{1354} and Josephine Steiner has more recently similarly noted that Community legislation would be a more effective, less hazardous way of promoting the effective enforcement of Community law.\textsuperscript{1355}

There are many foreseeable objections to this suggestion. Some may argue that increased Community regulation would have too great impact on the national legal orders. I fail to see however how the European doctrine as it currently stands is preferable in this respect. Using for example the principle of effectiveness instead of regulation does not mean that Community law does not govern Member State procedure, only that it does so with less transparency and foreseeability.

Another likely argument against regulation as a mechanism is that it requires determining whether union or state has competence over the issue concerned, something that is rarely clear in the European Community. However, this is in my opinion not an argument against the appro-

\textsuperscript{1353} See also supra Part 2.4.4.
\textsuperscript{1354} Bridge, supra note 1297, at 31–42.
\textsuperscript{1355} Josephine Steiner, Enforcing EC Law 60 (1995).
priateness of Community regulation as a mechanism in the European doctrine but for it. Extensive Community regulation would promote an open, productive, and much needed discussion about the proper division of power between Member States and the Community in the procedural area. It is untenable to argue that the division of competence is too unclear to support a solution through regulation and for that reason support the current order.

Finally, it can be questioned why the European doctrine should protect the interests of the Member States if they themselves appear to accept the current order. The argument can be made that by being passive in the lawmaking process, the Member States have indirectly accepted the principle of equivalence, the principle of effectiveness, and the other mechanisms constituting the European doctrine. While the absence of regulation can in this manner be interpreted as Member State acceptance of the European doctrine as it currently stands, it can just as well be interpreted as the Community accepting national procedure. Moreover, there is a democratic problem with using the absence of regulation as support for other mechanisms. If the Community fails to find support for Community regulation of state procedure in the political system, should it then be allowed to govern such matters indirectly through other mechanisms? This appears unreasonable.

In conclusion, Community regulation of procedural matters is a preferable way to govern what procedural rules national courts shall apply to Community rights. It would be both advantageous and reasonable if the Community to a larger extent regulated procedural matters and thereby avoided having to resort to other mechanisms that have greater disadvantages than regulation. The European Community and Community law have come a long way since Rewe and Comet but the European doctrine still stands upon the foundation laid in those cases. As the Community becomes stronger it can take greater responsibility. As noted above, it is sometimes difficult to foresee which procedural matters should be regulated and how. I would not object however if the European Court of Justice in its forthcoming development of the European doctrine refused to set aside national procedural law using the principle of effectiveness when the limiting effect that the national law in question has on Community law was visible in advance and the Community was competent to regulate the subject matter. Conversely, if it is concluded that the Community was not competent to regulate the procedural issue that seems like a valid reason for also not setting aside the national rule governing the matter under the principle of effectiveness.
7.4.2 Preemption Theory

It is rarely easy to determine what the union implicitly intended when it passed an act or if state law conflicts with that intent. It is reasonably easier to determine if union law preempts state law the more similar the object that the two govern is but American experiences indicate that it is not impossible to apply preemption theory just because the state rule can be categorized as procedural. Having failed to find a reasonable explanation for why preemption theory has to some extent been applied to both substantive and procedural matters in American law but only to substantive matters in Community law, it is difficult to defend the position of the latter.

On the contrary, there are potential problems with, as in Europe, only applying preemption theory to substantive matters. By applying preemption theory to national rules categorized as substantive but not to rules categorized as procedural, the requirements that national law must comply with depend on what is defined as substantive and procedural respectively. Such a difference in requirements is perhaps acceptable if the distinction is clear and there are policy considerations supporting it. However, that is hardly the case. The substance/procedure dichotomy is vague and especially difficult to apply in a multicultural setting such as the European Community. To avoid different requirements being posed depending on an arbitrary and unworkable separation of substance and procedure, preemption theory should be applied equally to all matters of national law. As will be discussed further below, American experiences caution the European Community against using the division of substantive and procedural matters in the European doctrine.\footnote{See further infra Part 9.5.2.}

It was also concluded above that American preemption theory has for the last sixty years adhered to the principles that the presumption is that Federal law does not preempt State law\footnote{At least in “fields which the States have traditionally occupied.” Rice, 331 U.S. at 230. To what extent this “arbitrary” concept of tradition really constitutes a limit is however questionable. Cf. Michael S. Greve, Federal Preemption: James Madison, Call Your Office, 33 Pepp. L. Rev. 77, 84–85 (2005).} and that the presumption can only be rebutted by a showing of “clear and manifest” Congressional intent to preempt.\footnote{Rice, 331 U.S. at 230, upheld in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963); Jones, 430 U.S. at 525; Milwaukee v. Illinois, 451 U.S. 304, 316 (1981); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992), all citing Rice. According to Professor Chemerinsky, a narrow majority of the Rehnquist Supreme Court has applied a more liberal standard of preemption in three recent cases. Erwin Chemer-}
law should only be replaced by Federal law when Congress has clearly articulated the law of the land. The reason for this cautionary approach is that a decision on preemption will change the balance of power between States and Federal government, a delicate matter that should not be disturbed unintentionally.

The American position is in my opinion sensible and should inspire the approach in European Community law. The reasoning underlying American preemption theory applies equally to the European Community. If the Community wants to take control of a subject matter over which it shares competence with the Member States, it is important from a democratic standpoint that it does so clearly and openly. There is otherwise a real risk that preemption is used to extend the Community’s competence beyond that granted to it through the Treaties or to circumvent institutional limitations or the principles of proportionality and subsidiarity. Moreover, I find few arguments against introducing a requirement of showing of union intent and a presumption against preemption in Community law. What reasons could there be for displacing national law when that does not even implicitly follow from Community law? It is hardly unreasonable that Member State law applies until it is clear that Community law intends for it to be set aside. There are no doubt problems with the American solution. It is plain to see that it will not always be clear how the so-called “black letter rules” should be applied. The American approach is however at any rate an improvement over the current European.

It would be advantageous to apply preemption theory in a similar manner in the European doctrine. Like direct occupation of a matter through positive regulation, preemption requires that the union has competence over the subject matter in question and that it intends to exercise that competence. It would be odd, to say the least, if the Community’s

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1359 E.g. Florida Lime, 373 U.S. at 142; Jones, 430 U.S. at 525; Milwaukee, 451 U.S. at 316.
1361 Cf. Parmet, supra note 1299 (similarly protesting against what she calls Federal “stealth preemption”).
1362 An even more stringent standard is conceivable, see Gardbaum, supra note 1313; Chemerinsky, supra note 1358, at 74–75 (argues that obstacle preemption should be limited or abandoned altogether thereby forcing the Federal government to act explicitly).
power to regulate matters through positive regulation was smaller or
greater than its power to preempt. Also, the principle of subsidiarity
should reasonably apply equally to preemption and regulation so that
Community law can only preempt national law if the same result could
not be achieved through national action.\footnote{Bermann, supranote 1290, at 361.} The same principles applying,
the same advantages can be expected from preemption as from regu-
lation.\footnote{See immediately supra Part 7.4.1.}

Before leaving the topic of preemption we should finally note that
there are reasons to suspect that application of preemption theory could
lessen the negative effects of the principle of effectiveness without impair-
ing its usefulness as a mechanism in the European doctrine. Obstacle
preemption is similar to the principle of effectiveness: the central element
of both is that state law can be set aside where it constitutes an obstacle
to union law. According to Waelbroeck, “[p]re-emption problems arise in
cases where there is no outright conflict between federal (or Community)
and state law but where a state measure is alleged to be incompatible with
the general policy objectives which federal (or Community) law seeks to
achieve.”\footnote{Waelbroeck, supranote 1309, at 550. Note that what Waelbroeck refers to simply as
“pre-emption” appears to be what is herein referred to as obstacle preemption.} The latter part of this statement is essentially a description of
the principle of effectiveness. Similarly, it was argued that preemption
was necessary to ensure that Federal law would have “full and complete
effects” when the theory of preemption was first accepted in American
law.\footnote{McCulloch, 17 U.S. at 330.} The resemblance with the European concept of \textit{effet utile} is
uncanny. Because the principle of effectiveness is functionally similar to
obstacle preemption it would be wasteful not to consider them side-by-
side.\footnote{The comparison is made \textit{infra} Part 9.6.}

\section*{7.5 Summary and Conclusion}
Through a comparison of the European doctrine and the American doc-
trine, it has been concluded in this chapter that the European Commu-
nity has some power to regulate national procedural rules and that exer-
cising that power could be beneficial for achieving a better balance
between the interests involved in the European doctrine. It has also been
concluded that it would be advantageous to the European doctrine if
preemption theory was applied equally to matters of substance and mat-
ters of procedure in Community law and that in applying preemption
theory notice should be made of the principles governing its application
in American law.
8 Comparison of Mechanisms: General Principles

8.1 Introduction

How union regulation is, can, and should be used to determine what procedural rules state courts shall apply to union rights was the subject of the preceding chapter. The comparison of mechanisms contained in the European and American doctrines continues in this chapter where general principles of union law will be compared. The examination in this chapter will include, with regard to the European doctrine, the unwritten principles that underlie Community law excluding the principle of effectiveness which will be addressed in the next chapter and, with regard to the American doctrine, the requirements that the U.S. Constitution places on State procedure.1368 As the examination below will show, these mechanisms fill essentially the same function in both legal orders and are suitable for comparison.

The comparison will follow the format established initially in this study1369 and applied in previous chapters. We begin by identifying differences between the two doctrines, then explain those differences, and finally evaluate how well the two doctrines’ approach balance interests affected by what procedural rules state courts apply to union rights. In doing so, it will be established that general principles as a means for determining what procedural rules state courts apply to union law balances well the different interests underlying the issue. The comparison will demonstrate that differences regarding how these principles apply on a structural level are comparatively small between American law and European Community law and that differences that do exist are primarily attributable to institutional differences and differences in the degree of diversity between the two legal systems which, in turn, can prevent modification of the European doctrine after the American example.

1368 The mechanisms discussed in this chapter were also described supra Parts 3.3, 3.5, 5.2.
1369 See supra Part 1.4.
In the previous chapter, the overall issue of union regulation of state procedure was divided into two in the comparison: direct union regulation was separated from the preemptive effects of union regulation. To simplify the process of comparison, a similar division will be made in this chapter. Principles protecting individuals will below be considered separately from principles preventing discrimination of union law.

8.2 Identification: How Do the Mechanisms Differ?

8.2.1 Principles Protecting Individuals

The U.S. Constitution contains a number of requirements that all States and State judges must observe but it is primarily two requirements that are relevant with regard to this study. The historically most important element is the so-called Due Process Clause of the Fourteenth Amendment. Due process requires a number of different things of the State judicial systems. Most fundamental is that each individual has a real opportunity to defend his or her rights before a court.1370 Besides this, procedural due process ensures the individual adequate notice,1371 a procedure “appropriate to the nature of the case”,1372 and an opportunity to be heard “at a meaningful time and in a meaningful manner”.1373 Due process also requires that evidence used to support verdicts is sufficiently strong1374 and that litigants have adequate counsel1375.

General principles of Community law provide individuals with similar protection. They ensure individuals access to a court. To avoid that that right becomes superficial, the formal right of access to a court is supplemented by qualitative requirements such as the right to judicial control and the right of access to a fair and independent tribunal. Furthermore, Community principles improve the treatment that individuals receive in national courts by protecting, among other things, the right to be heard.

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the right to information, right to legal representation, attorney-client privilege, and the right of silence and of non-incrimination.\textsuperscript{1376}

The type of protection that general principles in the European doctrine and in the American doctrine afford individuals is not very different. The principles of the European doctrine are similar in both function and purpose to those in the American doctrine. The principles of both systems ensure that individuals have access to a court and that they receive a treatment that conforms to fundamental notions of procedural fairness when in front of the state court. In both systems, these general principles apply regardless of whether the individual seeks to enforce union or state law, if he or she is the plaintiff or the defendant, and if he or she is the party relying upon union law or the opposing party. Also, both American and European principles focus on protecting largely the same things, for example access to an impartial court, right to counsel, and opportunity to be heard.

The protection afforded in the two systems is however not identical in all respects. There are differences between the two systems on a more detailed level. Under what circumstances the union principles protect individuals and to what extent they can be relied upon by the individual may differ somewhat. One obvious example is right to trial by jury which in the American system is considered an indispensable element of a proper proceeding in many cases\textsuperscript{1377} but which Community law is unlikely to require of proceedings in Member State courts. There are also seemingly large differences in the general principles’ scope of application in the two systems. American principles have broader application as they apply in all types of cases. The general principles of Community law apply strictly only in situations involving an issue of Community law.\textsuperscript{1378} In situations void of a connection to Community law, Member State courts are not bound by Community law to honor fundamental Community principles. In practice, however, the difference between the situation in Europe and in the United States is smaller than it first appears. Unlike the constitutional principles of American law, the general principles of European Community law were not established on the union level but have been adopted by the Community from the Member States and from the European Convention on Human Rights.\textsuperscript{1379}

Consequently, general principles

\textsuperscript{1376} See further supra Part 3.3.
\textsuperscript{1377} See supra Part 5.2.4.
\textsuperscript{1378} Note however that the Eur. Conv. on H.R., which is the source of many Community rights, applies in other situations.
\textsuperscript{1379} Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getriede und Futtermittel, 1970 E.C.R. 4537, para. 4 (“the general principles of law protected by the Court of Justice … [is] inspired by the constitutional traditions common
included in Community law enjoy a strong position in the national legal orders independently of Community law. This means that they frequently apply even in cases that lack a Community dimension.

The American principles in another respect have narrower application than the European ones as the U.S. Constitution limits the application of the important requirement of due process to situations where a person risks being deprived of life, liberty, or property. Conversely, the U.S. Constitution does not require State courts to afford individuals due process when neither life, liberty, nor property is at stake. The general principles of Community law, by comparison, have wider application. For example, the right to a fair hearing applies in all proceedings that can end with a person being adversely affected.1380 A broad interpretation of the terms “life”, “liberty”, and “property”, which the U.S. Supreme Court has at times given them,1381 alleviates the restriction but it still remains a limitation. In this regard, the general principles of the European doctrine provide individuals with protection in more situations than their American equivalents.

The basis for affording individuals protection under general union principles is to some extent the same in the two legal systems. In the American doctrine, the duty of a State to give an individual litigant his or her day in court before depriving him or her of life, liberty, or property is considered a basic requirement of a fundamentally adequate judicial system to which each individual is entitled under the Constitution. The Due Process Clause lays down a minimum acceptable standard that every judicial process must meet. In this sense, due process is extended for the interest of the individual, not the Federal government.1382 Considering the heritage of the European principles, foremost the constitutional traditions of the Member States and the European Convention on Human Rights, general principles in Community law stand on a similar basis.
Where the legal systems foremost distinguish themselves from each other is to what extent individuals’ interest to an effective judicial process is protected through other mechanisms in the two doctrines respectively. Under the American doctrine, requirements of a fundamentally fair judicial process, as afforded by the Due Process Clause, are separated from other requirements that Federal law may make of State courts relating to their enforcement of Federal rights. Whereas the former is approached as something that the individual can demand of the State controlling the court, the latter are considered matters controlled by the principles of federalism and in settling such matters the primary concern is to balance the interests of the Federal government and the States. By comparison, on what ground the different mechanisms of the European doctrine stand is not as clearly distinguished. In applying the principle of effectiveness, which has arguably been the most significant of the mechanisms in the European doctrine, it is not always clear from the language of the European Court of Justice whether national procedural rules should be set aside for the protection of the Community’s power to govern matters within its area of competence or for the protection of the individual claimant.  

One form of protection that union principles on both sides of the Atlantic provide to individuals and that is clearly connected to fundamental notions of procedural justice but at the same time deserve separate attention is that of equal treatment. Besides due process, the Fourteenth Amendment of the U.S. Constitution ensures all individuals equal protection under the law. According to the U.S. Supreme Court, all procedural rules must apply equally in theory and practice to all persons. In a similar fashion, the Community principle of equality requires Member States to treat nationals and nationals of other Member States equally and that includes how they are treated in a judicial process before a national court.  

The American principle has primarily been used to protect ethnic minorities and the socially disadvantaged and the European to combat discrimination on the ground of nationality. While these differences are important, both systems essentially seek to ensure that state governments and state courts treat all individuals in the same manner. The absence of

\^{1384} E.g. Wright v. Georgia, 373 U.S. 284 (1963); *see also supra* Part 5.2.3.
\^{1385} E.g. Case C-43/95, Data Delecta AB & Forsberg v. MSL Dynamics Ltd., 1996 E.C.R. I–466, paras. 16–22; *see also supra* Part 3.3.5.
\^{1386} *See supra* Part 5.2.3.
\^{1387} *See also further supra* Part 3.3.4.
dual standards is a fundamental element of a fair judicial process. The requirement of equal treatment does however also indirectly protect the union’s ability to effectively exercise powers delegated to it by preventing states from escaping union law under the guise of procedure. That a state would impose exorbitant procedural requirements for the enforcement of a union right becomes significantly less likely if that state is required to apply the exact same requirement to its own nationals.1388

8.2.2 Principles Preventing Discrimination of Union Law

General principles of union law protect not only individuals. A second observable category of union principles are those preventing discrimination of union law vis-à-vis state law. Principles with this function exist both in the European doctrine and in the American doctrine. In the European doctrine, the primary mechanism for preventing Member States from discriminating against Community law is the principle of equivalence. According to this principle, national procedural rules applied to Community law “must not be less favorable than those governing similar domestic actions”.1389 The principle of equivalence does not prevent Member States from imposing harsh procedural requirements and thereby make the exercise of Community rights in national courts difficult. For example, national rules laying down excessively short time-limits or posing evidentiary requirements that are practically impossible to meet will not fail the principle of equivalence if they are applied to equivalent claims under national law and Community law.

The principle of equivalence nevertheless limits the ability of the Member States to escape Community law under the guise of procedure in a way similar to the principle of equality1390 by requiring Member States to subject national law to the same procedural conditions that it imposes on Community law. The principle of equivalence can thus deter a Member State from imposing disadvantageous procedural rules. In the American doctrine, the so-called analogous rights doctrine has a function similar to that of the principle of equivalence in the European doctrine. According to the analogous rights doctrine, a State court is constitutionally required to adjudicate a Federal claim if it would have been able to adjudicate the same claim had it arisen from State law.1391 Conversely, State courts are

1388 A similar argument could be made with regard to the principle of equivalence and will be discussed further immediately infra.
1390 See discussion immediately supra.
“allowed” to lack jurisdiction over a Federal claim as long as the lack of jurisdiction emanates from a policy that is applied “impartially” to State and Federal law.\textsuperscript{1392}

Although the Community’s principle of equivalence and the American analogous rights doctrine are in this sense similar, there are also important differences between the two. One important difference between the two is that the American doctrine focuses quite narrowly on state court jurisdiction. If the matter concerns the duty of a State court to hear a Federal claim, the American doctrine will provide Federal law with roughly the same protection that the principle of equivalence provides to Community law. The European principle of equivalence goes further however. It requires that Member State courts adjudicate actions under Community law under the same procedural conditions as those under which it would adjudicate comparable claims under national law.\textsuperscript{1393} No issues appear to fall outside the scope of the principle of equivalence.\textsuperscript{1394} The analogous rights doctrine is in this sense narrower and in effect provides Federal law with less protection than its European counterpart gives European Community law.

Another difference between the two mechanisms lies in who is in charge of its application. Application of the European principle is in most cases left to national courts. The European Court of Justice has insufficient knowledge about the national legal systems and consequently leaves it to national courts to find national claims comparable to those under Community law.\textsuperscript{1395} The American analogous right doctrine, by comparison, is applied by Federal courts as an exception to the general rule that States decide what claims can be brought in State courts and to force State courts to hear Federal claims.

Finally, claims based on state law are more easily found “equivalent” to claims based on union law under the American analogous right doctrine than under the European principle of equivalence. The American doctrine requires in a comparatively simple and straightforward manner that State courts treat claims under Federal law in the same manner they

\textsuperscript{1392} Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950).
\textsuperscript{1393} See, e.g. Case C-90/94, Haahr Petroleum Ltd. v. Åbenrå Havn et al., 1997 E.C.R. I–4085, para. 46 (“the detailed procedural rules governing actions [under Community law] for recovery of sums unduly paid … may not be less favourable than those governing similar domestic actions …”).
\textsuperscript{1394} Josephine Steiner et al., EU Law 178 (9th ed. 2006).
would treat the claim had it been based on State law. This process appears significantly less complicated than the process of finding “sufficiently similar claims” under the European doctrine. According to the case-law of the ECJ, a claim under national law is sufficiently similar to one under Community law only if both the objectives and “essential characteristics” of the two claims are the same. This two-pronged test is stricter and limits the application of the principle of equivalence compared to the American analogous rights doctrine.

8.2.3 Summary

The following conclusions have been made regarding how general principles are used as mechanisms in the European and American doctrines respectively. First, general principles of union law ensure that all individuals receive a trial that meets fundamental notions of procedural fairness in both American and Community law. Both systems also contain principles that prohibit unequal treatment of individuals. The most important difference between two legal systems is that whereas the interest of ensuring individuals an effective judicial process can be observed in different contexts in the European doctrine, in the American doctrine it is almost exclusively allowed to affect the issue of what procedural rules state courts shall apply to union rights in the context of general principles and the proper division of power between union and states lies at the root of other mechanisms. Regarding principles preventing states from using their power over state court procedure to discriminate against union law, it has been found that the American analogous rights doctrine has a similar function as the European principle of equivalence but that it differs in that it is primarily applied to jurisdictional matters and by the supreme union court and that the test used to identify comparable state claims is more liberal under the American doctrine.

1396 E.g. McKnett, 292 U.S. at 232–33; Herb v. Pitcairn et al., receivers for Wabash Ry. Co., 324 U.S. 117, 122–23 (1944); Testa v. Karr, 330 U.S. 386, 394 (1947); cf. Miles v. Illinois Central Railroad Co., 315 U.S. 698, 703 (1942) (“By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source.”)

8.3 Explanation: Why These Differences?

How the European doctrine and the American doctrine developed may explain the differences observed above. The European doctrine has been developed by the European Court of Justice on a case-by-case basis in response to the Treaties not addressing many central issues underlying the standing and application of Community law on the national level. The Court of Justice developed principles governing the standing and application of Community law on a national level along with the mechanisms herein presented as composing the European doctrine. That Community law is able to confer rights directly upon individuals, foremost through the principle of direct effect, is a concept essential to the formation of the modern Community legal system, a system to which the European doctrine gives necessary support. The United States, by comparison, has from start been based on the parallel existence of Federal government and State governments, Federal courts and State courts, and there has been a continuous debate over the constitutional division of power between the two.

The difference in historical background can explain why the American doctrine to a greater extent than the European doctrine separates individuals’ interest in an effective judicial process and federalist issues regarding the division of power between union and states. In the development of the European doctrine, the Community’s ability to exercise its powers under the Treaties became closely associated with the individual’s ability to realize Community acts on a local level through judicial means. In the American doctrine, by comparison, State court enforcement of Federal law has been analyzed in terms of federalism and the obligations that States have towards individuals by merit of Federal law follow, albeit subject to interpretation, from provisions in the U.S. Constitution.

The roots of the European and American doctrines have probably also affected how state discrimination of union law has been prevented in the two systems. In the United States, the presumption has been that the Federal government does not have power over State courts and the analogous rights doctrine is an exception from that general rule used to defeat more or less blatant attempts by States to use their power over State courts to circumvent that Federal law is “the law of the land”. The European principle of equivalence, by comparison, was created in a quite different environment, a setting of international law without local union courts and where union law is enforced by ordinary national courts. In this setting, the union cannot afford to be as generous towards the states; there

\[^{1398}\text{See supra Parts 2, 6.3.2.}\]
is no real alternative venue for the enforcement of Community law besides national courts. Moreover, the legal systems of the American States are significantly more homogenous than those of the European Member States. This may explain why the European Court of Justice, unlike the U.S. Supreme Court, has left the application of the principle of equivalence to state courts. The latter are simply more knowledgeable of state law than the former. The legal diversity among Member States can also explain why the principle of equivalence is applied more cautiously in the sense that it to a lesser degree than the American analogous rights doctrine assumes the existence of claims under state law comparable to claims under union law.

8.4 Evaluation: How Do the Mechanisms Balance Involved Interests?

8.4.1 Principles Protecting Individuals

The reasoning underlying the American and European doctrines’ position regarding using general union principles to determine what procedural rules state courts shall apply to union rights is similar in at least one respect. Besides ensuring the union’s ability to govern matters within its area of competence, union law should guarantee that individuals are subjected to a judicial process that meets fundamental notions of procedural fairness and that state court compliance with such notions should be ensured through general union principles.

As a mechanism for deciding what procedural rules state courts shall apply to union law, principles of the kind discussed in this chapter provide a good balance between interests involved in such situations. The interests of the individuals can be and is protected through general principles, most obviously by guarantying individual’s fundamental procedural rights. Furthermore, although the exact extent of those procedural rights may vary over time, they are relatively stable and it is relatively clear when they apply and what they require, at least compared to other, alternative mechanisms. Thus, these principles enhance the clarity and foreseeability of the judicial process or at least do not impair it. They also enhance the union’s ability to exercise its legislative powers by ensuring that the local judicial process meets certain basic requirements even if state procedure

\[1399\] See also discussion infra Part 9.3.

\[1400\] This was also established supra Chapter 6.
is not harmonized and by requiring states to apply the same procedural rules to foreign and domestic litigants. Finally, although increased union requirements by necessity limits the opportunity for state action, requirements made through general principles are easily applicable and resolving conflicts between union principles and state regulation is uncomplicated. While there is no procedure comparable to that of legislative action for the adoption of general principles, requirements made on national procedure in general principles are more overt than some of the alternative mechanisms, something which must be considered advantageous if one seeks to prevent the union from usurping states’ power. 1401

A difference was observed between the European and American approaches regarding whether individuals’ interest in the quality of the judicial process should be considered only with regard to general principles of union law or to other mechanisms as well. It is a matter of common concern that all national judicial systems meet certain basic qualitative requirements. To ensure a fair judicial process primarily through general principles, like in the American system, appears sound. A more extensive protection would effectively allow the interest of an individual to disrupt the vertical division of power between union and states. The protection of the individual should as far as possibly be separated from state courts’ constitutional duty to apply union law as mixing the two risks leading to the union extending its power over states contrary to federalist principles. If national procedure meets all requirements posed by general Community principles, the only remaining question is whether the Member States have transferred power over the subject matter to the Community or alternatively retained it. If Community law controls the matter, Member States must follow its command where there is one. Conversely, if Community law does not control or does not regulate the matter, Member States should enjoy significant freedom to regulate it as they see fit. Such an approach also makes sense from an individual perspective: the individual is bound by union law on matters that the union government has control over and is otherwise bound by the state law.

8.4.2 Principles Preventing Discrimination of Union Law
Mechanisms of union law that prevent states from discriminating against union law vis-à-vis state law, the principle of equivalence and the analogous right doctrine, have many advantages and few disadvantages as mechanisms for deciding what procedural rules state courts should apply

1401 General union principles are advantageous mechanisms much in the same way as union regulation, see discussion supra Part 7.4.1.
to union law. Like the principle of equality, the European principle of equivalence only requires Member States to exercise their powers in a consistent and non-discriminatory manner. Comparative lessons can be drawn from American experiences in this field where the analogous rights doctrine has prevented States from using their influence over State court jurisdiction to erode powers that the Federal government has been granted under the U.S. Constitution. The principle of equivalence can in this manner be used to prevent states from undermining union law “under the guise of procedure”. Such principles are also advantageous from an individual perspective as their application makes procedure in state courts more foreseeable. In the interest of maintaining a proper balance of power in the relationship between Community and Member States it is hardly unreasonable to forbid Member States from applying one set of procedural rules to claims under national claims and another to claims under Community law. Even if there are acceptable reasons for such a system, something that is difficult to envision, it should in most situations be possible to avoid it.

The American approach points to ways by which the principle of equivalence could be improved, most importantly by giving the task of applying the principle to Community courts rather than national courts and by relaxing the requirements for finding national claims equivalent to Community claims. Such changes would most likely enhance the advantageous effects of the principle of equivalence. However, explanations for the differences between the two doctrines identified above suggest that conditions in the European Community are too different for it to borrow from the American solution in this regard.

The process of finding analogous State rights under the American doctrine is less complicated than the process of finding sufficiently similar national claims under the European doctrine and, as noted above, a simpler approach appears at first sight advantageous to a more complicated one. That national authorities can circumvent the principle of equivalence by concluding that no national claims exhibit the same “essential characteristics” as the Community claim is not desirable from a Community perspective. However, the process of finding comparable claims quite naturally becomes less complicated the more similar state and union claims actually are. It is not surprising that it is difficult to find comparable claims in the laws of the Member States, whose legal systems in some respects are quite dissimilar, and those of the European Community, a

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1402 Palmisani, 1997 E.C.R. I–4025, para. 39 (if no comparable national claim can be found, national law is considered to have meet the requirements of the principle of equivalence).
legal order “sui generis”. In the United States, Federal law and State law are more similar, originating primarily from English law and having developed side-by-side over centuries. It is reasonable that state law is more often comparable to union law in the United States and more rarely so in the European Community. Because of these differences in legal diversity, it appears equally sensible that the U.S. Supreme Court is engaged in the search for state law claims comparable to those under union law but not the European Court of Justice. To conduct such a search requires knowledge of the system in which one is looking which becomes more difficult with increased diversity among the legal system considered.

Another factor that makes the process of finding comparable claims more difficult in the European Community than in the United States is that, unlike the analogous rights doctrine, the principle of equivalence applies not only to matters of jurisdiction but to all conditions of the judicial process. The more elements that are to be considered, the more difficult the search for a comparable claim becomes. This problem could be eliminated if the principle of equivalence applied primarily to matters of jurisdiction but there is little to be gained with such a change. On the contrary, it would violate such fundamental concepts of Community law as loyalty and non-discrimination if Member States were allowed to apply different procedural conditions to claims under national law and under Community law.

In conclusion, the principle of equivalence as it stands today is an advantageous mechanism for deciding what procedural rules Member State courts apply to Community rights. A comparison with the American doctrine indicates that the principle could be improved if it was applied by Community courts and in more situations but such changes require institutional development and increased legal harmonization in the European Community, both of which are unlikely to occur within a foreseeable future.

8.5 Summary and Conclusion

It has been concluded in this chapter that general principles of union law, both when used to ensure individuals access to a fundamentally fair judicial process and when preventing states from discriminating against union law, promote a proper balance between involved interest. Comparison between the European principle of equivalence on one hand and the American analogous right doctrine on the other has shown that the two fill similar functions but that their contents deviate somewhat due to institutional differences and differences in intra-union legal diversity,
differences that currently appear insurmountable. Finally, one revelation attained through comparison in this chapter is that while protecting individuals’ interest in the quality of the judicial process makes sense with regard to general principles, American experiences indicate that the inclusion of such considerations in other mechanisms may be inappropriate. This conclusion will be considered further in the next chapter as we compare remaining mechanisms in the European and American doctrines.
9 Comparison of Mechanisms: Beyond Regulation and Principles

9.1 Introduction

9.1.1 Subject and Contents of This Chapter

We have in the two previous chapters analyzed and compared how union regulation and general principles of union law are used to determine what procedural rules state courts shall apply to union rights in the European Community and in the United States respectively. We now turn to remaining mechanisms in the European and American doctrines. Thus, what the objects of study in this chapter have in common is that they are included in either of the two doctrines, i.e. they are mechanisms of union law that govern what procedural rules state courts shall apply to union rights, and that they are neither union regulation nor general union principles.

It is evident from the case-law forming the American and European doctrines that state law is sometimes set aside, not because it directly contradicts union regulation or principles but because it in a more abstract way hinders union law or, perhaps more correctly, hinders the achievement of objectives underlying union law. In the United States, the State Grounds doctrine allows State procedure to be set aside, on among other grounds, when it unnecessarily burdens Federal rights. Similarly, when national procedural law is set aside under the European doctrine it is only sometimes because it conflicts with Community regulation or a general principle of Community law. National law can be set aside on the ground that it to an unacceptable degree hinders Community law using the principle of effectiveness. The American State Grounds doctrine

1403 See supra Part 5.6.3. The case-law of the U.S. Supreme Court also contains the locution “adequate and independent”. Herb v. Pitcairn, 324 U.S. 117, 125 (1945). However, in the interest of brevity an abbreviated form found in Cynthia L. Fountaine, Article III and the Adequate and Independent State Grounds doctrine, 48 Am. U. L. Rev. 1053, 1054 (1999), will be used herein.

1404 See supra Part 3.6.
and the European principle of effectiveness are the primary objects for comparison in this chapter. The examination in this chapter will follow the format of preceding chapters: identification, explanation, and finally evaluation of differences between the European doctrine and the American doctrine. Application of the theory of preemption, most importantly obstacle preemption, to the European principle of effectiveness will be considered separately at the end of the chapter. The second to last section of the chapter is dedicated to approaches that were tried and subsequently abandoned in the United States. European Community law can hopefully draw some valuable lessons from American experiences with these failed approaches.

After comparison of the European doctrine and the American doctrine, it will be concluded in this chapter that the principle of effectiveness is a disadvantageous but probably necessary mechanism in the European doctrine; that setting aside procedural rules that are novel or inconstantly applied has merit; that neither the substance/procedure dichotomy nor looking at the outcome of litigation are advisable approaches in the European doctrine; and that the theory of preemption could be used to improve the principle of effectiveness.

9.1.2 Why More Mechanisms and How Do They Operate?
The examination begins however with a more general question. That state law must be set aside when it directly violates union law is largely uncontroversial. Why state procedure can also be set aside in other situations and how the mechanisms governing such situations operate is however somewhat more complicated. The existence of mechanisms studied in this chapter reveals that state procedural law can be set aside even though it violates neither union regulation nor general union principles. This has been the case for so long that it is rarely challenged. Is it however not reasonable to question if additional mechanisms governing what procedural rules state courts apply to union rights are really warranted. Assume that the union has neither regulated a procedural issue nor stated, implicitly or explicitly, that states are preempted from regulating the issue and that state rules governing the issue is consistent with fundamental requirements of a fair judicial process, are applied equally to state law and

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1405 See also supra Part 1.3.2.
1406 See discussion supra Part 7.4.2.
1407 In European Community law since the presentation of the principle of effectiveness in 1976.
1408 This matter is discussed further infra part 9.6.
union law, and does not discriminate against out-of-state litigants. In such a situation, are there any valid reasons for the union to be able to require state courts to not apply the state rules? This question shall be considered throughout the comparison of these additional mechanisms in the European and American doctrines.

Mechanisms like the American State Grounds doctrine and the European principle of effectiveness operate differently than mechanisms previously examined. A theory developed by Louise Weinberg explains the difference. In studying conflicts between Federal and State policy in the United States, Weinberg found that claims of conflicts between Federal and State law can be placed in one of two categories.\(^{1409}\) The first category, which she refers to as actual conflicts, contains situations where State law cannot be applied at the same time as Federal law. Actual conflicts are relatively easy to resolve; if there is an actual conflict between Federal law and State law, Federal law wins by merit of its primacy.\(^{1410}\) The situation becomes more problematic if it is possible to apply State law and Federal law at the same time. In such situations, the case may be that there is no conflict between State law and Federal law. It is however also possible that there is a conflict between State and Federal law in the absence of actual Federal regulation on the subject, what Weinberg refers to as an inchoate conflict.\(^{1411}\)

I believe that Weinberg’s distinction between actual and inchoate conflicts can be applied to European conditions. It was established in preceding chapters that the European doctrine contains situations when national law is in direct violation of a Community law, either Community regulation or a general principle of Community law. Like Weinberg’s actual conflicts, such conflicts between national and Community law turn primarily on the question of whether there is a conflict. The principle of supremacy resolves actual conflicts once their existence is established. Such situations should be distinguished from those where the principle of effectiveness operates in which Member State law conflict with Community law not by being directly contrary to the latter,\(^{1412}\) but

\(^{1409}\) Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 Texas L. Rev. 1744 (1992) (Weinberg also believes however that it is possible for one conflict to contain elements of both groups. *Id.* at 1753).

\(^{1410}\) Weinberg, supra note 1409, at 1753–54.

\(^{1411}\) Weinberg, *supra* note 1409, at 1754–55.

\(^{1412}\) In fact, the absence of a direct conflict with Community law is an explicit prerequisite for the application of the principle of effectiveness. According to the Rewe/Comet-formula “the absence of Community rules governing the matter” is a precondition for the application of the principle of effectiveness. Case 33/76, Rewe-Zentralfinanz eG & Rewe-
by hindering it, acting as an obstacle to the achievement of its objectives. Using Weinberg’s terminology, such conflicts can be described as inchoate.

Inchoate conflicts are not “smaller” conflicts than actual conflicts. In fact, if anything, it is the other way around. First, inchoate conflicts are more common than actual conflicts. In the absence of complete procedural harmonisation there are always inchoate conflicts every procedural requirement under state law to some extent hinders union law. For example, the fact that the local court is closed over the weekend constitutes an obstacle to the enforcement of union law, albeit a small one. Second, inchoate conflicts are more complicated and more difficult to resolve than actual conflicts. Unlike actual conflicts, inchoate conflicts cannot be resolved simply by referring to the supremacy of Community law. In such situations, the central question is not whether there is a conflict between state and union law but whether that conflict is sufficiently great for union law to require state law to be modified. The existence of a relevant inchoate conflict and its resolution are in this manner intertwined. As we shall learn below, this theory can help us understand what distinguishes mechanisms studied in this chapter from those previously examined.

9.2 Identifying and Comparing Other Mechanisms

9.2.1 Introduction

Following the same order used in previous chapters, we begin the process of comparison by identifying similarities and differences between mechanisms in the European and American doctrines respectively. As explained initially, we shall in this chapter compare mechanisms of union law that govern what procedural rules state courts can apply to union rights and which are neither union regulation nor general union principles. Between them, the European doctrine and the American doctrine raise three reasons for which state procedural law can be excluded from being applied to union rights even in the absence of a direct conflict with the latter: that state procedure burdens union law, that state court discretion is not used to further union law, and that state procedure is novel or inconsistently applied. These will be addressed separately and in order, here and in the following two sections.


1413 Weinberg, supra note 1409, at 1754–55.

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9.2.2 State Procedure Burdens Union Law

A mechanism of central importance in the European doctrine is the principle of effectiveness. Studying the principle of effectiveness is difficult however as it is very much a “moving target”. Even the way that the principle of effectiveness is formulated is not constant. The European Court of Justice has expressed the principle of effectiveness in a number of different ways in its case-law. This would perhaps be understandable if attributable to the standard developing over time but that is not the case: in 2003 alone, the ECJ stated the principle of effectiveness in no less than four different ways.\(^{1414}\) One of the few things that can be extracted from the different wordings used by the Court of Justice with some certainty is that the principle of effectiveness can be used to set aside national procedural rules that stand as obstacles to Community law. Beyond this, the case-law of the ECJ points in various directions.

Most formulations of the principle of effectiveness require for its application that national procedural law makes the exercise of Community rights “excessively difficult” or, in the alternative, some variation of nearly impossible.\(^{1415}\) Thus, many decisions by the ECJ indicate that not every national procedural rule that hinders Community law will fail the principle of effectiveness. The obstacle that national procedure poses to Community law must be of a qualified nature, making the exercise of Community rights not only difficult but excessively difficult. What makes an obstacle qualified in this sense is one of the central issues regarding the


principle of effectiveness, one that the Court of Justice has explored in its case-law.

Those decisions hold no clear answer however as to what separates a national procedural rule that makes the exercise of Community rights “acceptably difficult” from one that makes it “excessively difficult”. It was concluded above that whether a national procedural rule violates Community law’s requirement of effectiveness should be determined on a case-by-case basis considering if the national rule compromises the objective or purpose of Community law and that a national rule must be set aside when it is impossible to comply.\textsuperscript{1416} There is otherwise little firm guidance in the case-law of the ECJ how the requirement of effectiveness should be applied. In most cases, the adequacy of national procedure appears to be determined against a vague and abstract notion of when procedural rules are too burdensome in a general sense. In some cases, however, the size of the obstacle that national procedure constitutes is determined by considering the specific situation. For example, in Santex the ECJ concluded with regard to a time-limit under national law that it was “not in itself” in conflict with the principle of effectiveness but went on to consider if it nevertheless violated the principle of effectiveness “in the context of the particular circumstance of the case …”.\textsuperscript{1417} Similarly, in Leffler, the Court of Justice indicated that the adequacy of a national procedural rule should be determined by its effect on the litigant.\textsuperscript{1418} However, somewhat in conflict with this the Court has on other occasions deemed it irrelevant whether the national rule affected the outcome of the individual case.\textsuperscript{1419}

The situation becomes even more complex as the majority of the ECJ’s case-law on the principle of effectiveness is flanked by decisions containing at least partially conflicting approaches. On one side there is the sometimes applied more generous contextual approach under which the ECJ appears willing to accept that the effectiveness of Community law can take a backseat to other values, most importantly the preservation of legal certainty.\textsuperscript{1420} On the other side there is the recently revived, more restrictive full-effectiveness approach under which the size of the national procedural obstacle appears irrelevant. Cases relying on this approach suggest that national procedural rules may in no way detract from the full

\textsuperscript{1416} See supra Part 3.6.5.
\textsuperscript{1417} Case C-327/00, Santex SpA v. Unità Socio Sanitaria Local n. 42 di Pavia et al., 2003 E.C.R. I–1877, paras. 55–57 (para. 57 quoted).
\textsuperscript{1419} Case C-188/95, Fantask A/S et al. v. Industriministeriet, 1997 E.C.R. I–6783, para. 48.
\textsuperscript{1420} See discussion supra Part 6.2.2.
effectiveness of Community. Under this approach, every procedural rule that make the exercise of Community law “difficult”, something arguably true for every procedural rule, makes it “excessively difficult”.

In the American doctrine, the State Grounds doctrine and, more specifically, the unnecessarily-burdensome standard of the State Grounds doctrine is a mechanism similar to the European principle of effectiveness. Since the Judicature Act of 1789, Federal and State courts have existed side-by-side which has forced the U.S. Supreme Court to deal with a sometimes difficult question: on which questions do State courts have final say and, conversely, when can State courts’ decisions be reviewed by Federal courts? The Supreme Court established early that State independence in lawmaking requires that State law is interpreted by State courts and that the uniform application of Federal law requires that Federal law is interpreted by Federal courts. While this division of labor appears fundamentally sound, it raises a problem. Many cases involve both Federal and State law questions. How can one ensure that Federal courts examining State court decision regarding Federal law does not also interpret State law? The solution devised by the U.S. Supreme Court in Murdock was that Federal courts are to examine State decisions prima facie and decline to reconsider it if it finds matters “decided by the State court which are sufficient to maintain the judgment, notwithstanding the error in deciding the Federal question.”

A problem with the Murdock-test is that it is not self-evident when a State ground is “sufficient” to support a judgment. Subsequent decisions by the Supreme Court clarified things somewhat by declaring that “where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our [the Federal court’s] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.” The “independence” of a State law ground is comparatively easy to determine but whether that ground is also “adequate” is more difficult to establish.

1422 See discussion supra Part 9.1.2.
1423 See further supra Part 5.6.3.
1424 Murdock v. City of Memphis, 87 U.S. 590, 625–38 (1875) (635 quoted). One should note that Murdock was not the first case where the problem was addressed. In Klinger v. Missouri, settled a few years before Murdock, the Supreme Court stated that a similar rule was already well settled. 80 U.S. 257, 263 (1872).
1425 Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (emphasis added); see also, e.g. Klinger, 80 U.S. at 263; Herb, 324 U.S. at 125; Coleman v. Thompson, 501 U.S. 722, 729 (1991).
The requirement of adequacy means, in effect, that State law must meet a qualitative standard set by Federal law. This is the explanation why what has become known as the State Grounds doctrine allows the Federal judiciary to set aside State law even if it does not directly violate Federal law.\textsuperscript{1426} The State Grounds doctrine hinges on whether the State ground is deemed “adequate” to support the State judgment. Since first formulated, three types of State procedural inadequacies have developed under the State Grounds doctrine.\textsuperscript{1427} Each of these three types of inadequacies will be discussed in turn in this section but we begin with the unnecessarily-burdensome standard whose function in the American doctrine is similar to the requirement of effectiveness under the European doctrine.

According to the U.S. Supreme Court, State procedural requirements cannot be applied to Federal rights if the former \textit{unnecessarily burdens} the latter.\textsuperscript{1428} “Unnecessary” is the key-word. This standard, which is the most elusive of the three used under the State Grounds doctrine,\textsuperscript{1429} seeks to differentiate between State procedural requirements that hinder the assertion of a Federal right but serve a valid purpose and those which merely hinder the assertion of a Federal right.\textsuperscript{1430} The general rule is that a burden imposed on a litigant by State procedure is unnecessary for the purposes of the State Grounds doctrine if it does not serve “a legitimate state interest”.\textsuperscript{1431} In the words of the U.S. Supreme Court, State law cannot require an individual relying on Federal law to comply with an “arid ritual of meaningless form.”\textsuperscript{1432} Conversely, even if a State procedural

\textsuperscript{1426} A distinction can be made between, on one hand, State procedural rules that are so burdensome that they violate due process and therefore may \textit{never} be applied in any situation and, on the other hand, State procedural rules that are not adequate for application to a Federal claim. Alfred Hill, \textit{The Inadequate State Ground}, 65 COLUM. L. REV. 943, 951–52 (1965).


\textsuperscript{1428} Brown v. Western Ry. of Ala., 338 U.S. 294, 298 (1949) (“Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.”).

\textsuperscript{1429} How the case-law should be interpreted was discussed \textit{supra} Part 5.6.3.


\textsuperscript{1432} Staub v. City of Baxley, 355 U.S. 313, 320 (1958); \textit{see also} Osborne, 495 U.S. at 123–25 (quoting Staub).
rule completely “bars assertion of a federal right” State courts are allowed under the State Grounds doctrine to apply it to Federal rights as long as it serves a legitimate State interest and meets the other standards of adequacy.\textsuperscript{1433}

That the American approach considers the “necessity” of the state procedural rule rather than its “excessiveness” distinguishes it from the excessively-difficult approach to effectiveness under the European doctrine and even more so from the full-effectiveness approach. This has not always been the case. In some of the earliest decisions on this matter, the U.S. Supreme Court applied an individual perspective to what constitutes burdensome procedure treating it much in the same way as the constitutional requirement of due process:\textsuperscript{1434} the individual litigant should not be subjected to a State procedure that is “unduly” burdensome to him or her.\textsuperscript{1435} The Court shifted focus from the individual to the relationship between the Federal government and the States in \textit{Henry}.\textsuperscript{1436} After \textit{Henry}, the question has been not if the “burden” that State procedure places on Federal law is “unreasonable” but whether it is “unnecessary”. Whether or not State procedure is adequate, whether it constitutes an “arid ritual of meaningless form”, depends on if it fulfils a function or if it truly is only a technicality.\textsuperscript{1437}

The unnecessarily-burdensome standard of the State Grounds doctrine is reminiscent of the contextual approach to effectiveness under the European doctrine. Both support that the reasons underlying a state procedural rule are essential when determining if the rule hindering union law must be set aside. However, the American approach gives the States considerable flexibility in deciding what procedural rules are necessary. The State Grounds doctrine requires Federal law to accept a State procedural rule that limits its effectiveness if it serves a legitimate State interest.\textsuperscript{1438} By comparison, the contextual approach to effectiveness under the European doctrine appears only to allow State procedural law to limit the effectiveness of Community law for certain reasons.\textsuperscript{1439}

Another noticeable difference between these two mechanisms concerns the frequency by which they are used. The European Court of Justice has referred to the principle of effectiveness in nearly one hundred

\textsuperscript{1433} Sandalow, \textit{supra} note 1429, at 230.
\textsuperscript{1434} See \textit{supra} Part 5.2.2.
\textsuperscript{1435} Hill, \textit{supra} note 1425, at 951–52.
\textsuperscript{1436} \textit{Henry}, 379 U.S. at 443.
\textsuperscript{1437} Meltzer, \textit{supra} note 1426, at 1144.
\textsuperscript{1438} See sources cited \textit{supra} n. 1430.
\textsuperscript{1439} At least that has been the case so far. See \textit{discussion supra} Part 6.2.2.
decisions in the last thirty years. The U.S. Supreme Court has only resorted to the unnecessarily-burdensome standard of the State Grounds doctrine on a handful of occasions over a time period many times longer. The State Grounds doctrine balances State independence against Federal supremacy and when it is used to allow Federal review of State procedural default it is a rarely exercised exception to the general rule that the Federal government trusts State courts with the enforcement of Federal law.

9.2.3 State Court Discretion Is Not Used to Further Union Law

A second ground for inadequacy under the State Grounds doctrine is a State court’s failure to exercise discretion to further the effectiveness of Federal law. A State court’s ruling based on State procedural law can also be set aside if the State court had discretion to excuse procedural default but failed to exercise it. The U.S. Supreme Court has stated that Federal courts are not prevented from reviewing a State court’s decision when the State court failed to exercise discretion that State law grants it and in doing so hindered the enforcement of the Federal law. The European position appears similar. The European Court of Justice has suggested that where national law gives a national court a degree of discretion, Community law requires the national court to exercise that discretion for the furthering of the effectiveness of Community law.

Thus, in both Europe and in the United States, state courts should exercise discretion it has under state law for the furthering of union law. That this is the rule in the European Community is perhaps not surprising

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1440 Use appears to be escalating. About half of all cases where the European Court of Justice has referred to the principle of effectiveness were rendered after the year 2000.
considering the central position of the principle of loyalty and the many duties placed on Member State courts by the Court of Justice with reference to that principle. It is more surprising that such duties have been placed on American State courts. It seems to stand in stark contrast to the great importance attached to the division of State and Federal governments. That Federal law governs how State courts shall exercise discretion conferred upon it by State law appears, in my humble opinion as an outsider, as akin to Federal commandeering. While interesting, this line of inquiry is somewhat besides the object of this study. Here, it suffices to conclude that differences between the European and American doctrines are in this respect quite small.\textsuperscript{1445}

9.2.4 State Procedure Is Novel or Inconsistently Applied

The third and final ground of the State Grounds doctrine is \textit{novelty or inconsistency}. The State Grounds doctrine allows State procedural rules to be set aside if they are novel or if State courts apply them inconsistently.\textsuperscript{1446} By imposing this requirement, the American doctrine does not set a qualitative threshold that State procedure must meet. Any State procedural rule will meet this requirement as long as it is well-established and applied consistently. Rather, the novel-or-inconsistent standard of the State Grounds doctrine ensures that litigants have adequate opportunity to comply with State procedural law.\textsuperscript{1447} By giving the individual a fair chance to comply with State procedural law, the novel-or-inconsistent standard lessens the burden of compliance to the individual.

Imposing requirements on how procedural state law is applied is not unknown in the European doctrine. Both the principle of equality and the principle of equivalence leaves it to the Member States to enact any procedural rules they see fit as long as national courts apply them without distinction to all individuals and to all substantive legislators. There is however nothing equivalent to the American novel-or-inconsistent standard in the European doctrine. The ECJ has not indicated that national procedural law can be set aside under the principle of effectiveness on the ground that it is novel or applied inconsistently.

\textsuperscript{1445} It appears inconsistent that in relation to the European Union and the United States respectively, Member States and American States have the power to order their courts what to do but not power to confer discretionary powers on the same matters to the same courts.


\textsuperscript{1447} Meltzer, \textit{supra} note 1426, at 1138–39.
9.2.5 Summary and Conclusion

It was concluded above that under both the European doctrine and the American doctrine a state procedural rule can be set aside even though it does not directly conflict with union law if it hinders union law to a sufficiently large extent. Where the two doctrines differ is regarding how it should be determined if state procedure poses a sufficiently great obstacle to union law. States have considerable flexibility under the American doctrine: only when the State has no reason for imposing a procedural requirement does Federal law require that it is set aside, an exception that has been exercised in only a handful of cases thus far. The European principle of effectiveness, by comparison, has been applied relatively frequently by the ECJ and forbids any national procedural rule that “excessively” hinders union law. The two doctrines appear however largely identical on the point that state courts are under an obligation to exercise any discretion it has been afforded by the state legislator in a manner that further union rights. Finally, where the two doctrines again differ is regarding state procedural rules that are novel or applied inconsistently: that is an independent ground for setting aside state procedural law under the American doctrine but not under the European doctrine.

9.3 Explaining Difference in Approach

Before evaluating the different approaches used in the European doctrine and in the American doctrine observed above, four likely explanations why the two legal systems have developed in different directions will be proposed.

First, differences in the background of the two doctrines may have affected how state enforcement of union rights is understood in the United States and in the European Community. In the United States, which was originally designed as a federation, the issue of State court enforcement of Federal law is considered important from a federalist perspective. State court enforcement of Federal law was first seen as a way for States to limit the power of the Federal judiciary and States fought for State courts’ right to enforce Federal rights. The positions of the States and the Federal government were later reversed and focus shifted to State courts’ duty

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1449 Compare Martin v. Hunter’s Lessee, 14 U.S. 304 (1816) and Claflin v. Houseman, 93 U.S. 130 (1876); see further supra Part 4.4.3.
to enforce Federal claims but the issue of State court enforcement of Federal law continued to be viewed as having a federalist dimension. Traces of this development are still visible in the American doctrine as Federal influence over State court enforcement of Federal law is considered a sensitive federalist issue, the resolution of which should be supported by the U.S. Constitution. The European Community, by comparison, has its origin in international law where the duty of the signatory states to loyally realize obligations emanating from a treaty is well-established. This may explain why the American approach is more restrictive than the European when it comes to setting aside state procedural law as reflected both in the conditions for the operation of the mechanisms discussed and in the frequency by which they have been used.

Differences in the theoretical foundation of the European doctrine’s requirement that national procedural law may not impair the effectiveness of Community law and the American State Grounds doctrine can also explain why the European approach focuses on the “reasonableness” of a state procedural rule and the American approach on its “necessity.” The principle of effectiveness builds on the notion that Community law confers substantive rights on individuals which Member State courts are under a duty to enforce by merit of the principle of loyalty. Through the principle of effectiveness the duty of loyalty is transformed into a positive duty of Member State courts to effectively realize Community law, if need be through the modification of national procedural law. The American doctrine, by comparison, builds upon the assumption that States should be shielded from Federal interference. The Federal government can govern rights and obligations of individuals living in the States and require State courts to apply Federal law over State law but there are limits to the burdens that the Federal government can place on State courts. States are not under a duty to realize Federal goals. The supremacy of union law and state enforcement of union law are separated in the American doctrine in a way not done in the European doctrine.

Second, in the United States, union courts enforce state law much in the same way that state courts enforce union law. Because the American Federal judiciary sometimes enforces State law, the U.S. Supreme

1450 See further supra Part 4.4.4.
1452 The principle of loyalty enshrined in Article 10 of the EC Treaty exhibits many similarities with the principle of good faith found in Article 18 of the Vienna Convention on the Law of Treaties of May 23, 1969.
1454 See supra Part 4.3.3.
Court has in developing the American doctrine faced issues mirroring those it faces under the Erie doctrine. This, in turn, may have had consequences for the development of the American doctrine. U.S. Supreme Court Justices have considered the interests of the government supplying the court when settling Erie-type cases, in that case the Federal government, and that will likely remain with them when later faced with a case under the American doctrine. Because the Community judiciary does not enforce Member State law, the European Court of Justice has never had to consider things from “the other side” in the same way as the U.S. Supreme Court. That is not to accuse the ECJ of being partial. It appears reasonable however that even the most unbiased judge will weigh competing arguments more fair-handedly if forced to consider the issue from both perspectives; in this case, the perspective of the lawmaker providing the substantive law and the perspective of the lawmaker providing the procedural law. This could explain why the American approach is more restrictive than the European when it comes to setting aside state procedural law.

Third, when it comes to preventing states from defeating important union goals under the guise of procedure, the novel-or-inconsistent standard under the State Grounds doctrine has played a significant role in the American doctrine. One can suspect that the U.S. Supreme Court would have found State procedural grounds inadequate by reason of being burdensome in more cases had it not had access to the optional ground of novelty and inconsistency. The European doctrine lacks an equivalent mechanism. Thus, that the European Court of Justice uses the principle of effectiveness to resolve inchoate conflicts more frequently than the U.S. Supreme Court applies the comparable American mechanism can at least in part be attributed to the fact that it does not have the same alternative instruments at its disposable.

Fourth and finally, the difference in internal legal diversity between the European Community and the United States previously addressed may also explain differences observed in this chapter. While state proce-

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1455 This separate legal doctrine regulates, somewhat simplified, the adequacy of Federal procedure for the enforcement of State substantive law. See further supra Part 4.5.2.
1456 For example, during the civil rights era there were a number of cases in which States tried to escape Federal law by imposing tough and technical procedural requirements on the litigants which the U.S. Supreme Court set aside on grounds of novelty or inconsistency. E.g. Patterson, 357 U.S. 449; Flowers, 377 U.S. 288; Barr v. City of Columbia, 378 U.S. 146 (1964). Had that possibility not been open to the Supreme Court, it is conceivable that it would have turned to inadequacy by reason of being too burdensome instead.
1457 See supra Part 8.3.
dural laws in the several American State are by no means identical, differences between them are significantly smaller than those between European Member States. With the exception of Louisiana, every State’s procedural system has its roots in the English legal system. Differences between the State systems have also been smoothed over by centuries of coexistence and many States enacting procedural codes strongly influenced by the Federal Rules of Civil Procedure which although not directly applicable in the States has become a sort of model code.

There is greater procedural diversity in the European Community as indicated by the broad representation of legal families. The Member States includes the representatives of several commonly recognized legal families, including the Romanistic legal family, the Germanic legal family, the Nordic Legal family, and the Common Law family. Although the division into legal families has been the subject of much critique, it represents certain fundamental differences between legal systems. This can explain why the principle of effectiveness is so frequently applied: greater interstate procedural diversity means that out-of-state litigants will to a greater extent be subjected to judicial proceedings to which they are unaccustomed, in turn making compliance with such rules more burdensome for the individual.

9.4 Evaluating the Different Approaches of the Two Doctrines

9.4.1 Introduction

Having above identified and explained differences between the European doctrine and the American doctrine we will now evaluate the two doctrines’ approaches. With regard to two reasons for not applying state procedural law to union rights, that state procedure burdens union law and that state procedure is novel or inconsistently applied, differences between the two legal orders have been observed. These differences will be evaluated in turn below. A third reason for setting aside state procedure was also observed, that state court discretion was not used to further the

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1458 See generally Flemming James, Jr. et al., Civil Procedure 12–28 (5th ed. 2001).
effectiveness of union law, but it was concluded that the American and European approaches on this issue were largely the same and it will therefore not be discussed further in this sections.

9.4.2 State Procedure Burdens Union law

Both the European doctrine and the American doctrine allow for state procedural law to be set aside on the ground that it hinders union law. Such mechanisms are problematic when it comes to balancing the interests affected by state courts enforcing union rights. To be able to set aside national procedure whenever it hinders the attainment of the Community’s legislative goals is advantageous for ensuring the effectiveness of Community law. However, the principle of effectiveness as it is currently constructed impairs the foreseeability of the judicial process to the detriment of individuals. It is rarely clear what the application of the principle of effectiveness will mean in a specific situation, especially after the introduction of the contextual approach. Prior to a preliminary ruling by the ECJ, it is often uncertain whether a state procedural rule fails the requirements of the principle of effectiveness in the specific case. Furthermore, the principle of effectiveness does not promote a proper division of power between Community and Member States. Because it is not apparent what the principle of effectiveness requires of Member State procedure, there is no clear limit to what extent national procedural self-regulation may be limited for the furthering of the effectiveness of Community law. It is difficult to see how the principle of effectiveness can be consistent with a proper division of power between Community and Member States as long as it is so open-ended.

This is not to suggest that the European Court of Justice failed in developing the principle of effectiveness. On the contrary, American experiences in this field indicate that not much can be done to improve the European principle of effectiveness. The American approach, which focuses on the “necessity” rather than the “excessiveness” of the state procedural rule, can be considered advantageous to the European in the sense that it more rarely displaces state procedure law and therefore to a lesser extent impairs the foreseeability of procedure and state self-governance. The introduction of the contextual approach to effectiveness could potentially cause the European doctrine to develop in the same direction as the American doctrine as a Member State’s reason for enacting a procedural rule appears to have some relevance under the contextual approach. However, even after more than a century of trial and error in a more homogenous setting than the European Community, the American doctrine does not include a clear, simple, and suitable approach to resolve inchoate conflicts
between Federal and State law. The American State Grounds doctrine does not provide Community law with sound and practical advice on how to construct a workable standard for determining when state procedure becomes too burdensome on union rights.\footnote{What perhaps can provide some assistance on this matter is the theory of preemption considered next. As we shall see further below, the American experiences in this field also points to some approaches that has not worked there and probably will not work in the European Community either.}

American experiences at the same time indicate that a mechanism allowing state procedure to be set aside when hindering union law is necessary. It was initially questioned whether there are any valid reasons for union law to set aside state law even in the absence of a conflict with union regulation or general principles of union law.\footnote{Supra Part 9.1.2.} American experiences suggest that there are situations when an evenly and consistently applied state procedural rule neither discriminates against union law nor violates a fundamental positive requirement but still defeats union law in a way that also violates the proper division of power between union and states. Decisions in the American doctrine where the U.S. Supreme Court applied the unnecessarily-burdensome standard of the State Grounds doctrine illustrate that the union’s ability to regulate matters within its area of competence ultimately requires a mechanism that allows state procedure to be set aside when it becomes a too large obstacle to the exercise of union powers.\footnote{See, e.g. Davis, 263 U.S. at 24 (“the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”); Brown, 338 U.S. at 296–99 (“over-exacting local requirements for meticulous pleadings” was found to deny the petition “a right of trial granted him by Congress.”); Henry, 379 U.S. at 447–48 (a State procedural rule should not be allowed to bar implementation of a Federal right when it does not serve “a legitimate state interest.”).}

American experiences show that even in a mature legal system where similarities in interstate procedure are significantly greater than the differences, situations will arise where state procedure must be set aside to protect the uniform application of union rights. In light of this, the complete abolition of the principle of effectiveness in the European doctrine does not appear advisable.

While the American doctrine in this way supports the existence of the European principle of effectiveness, another comparative lesson from the American State Grounds doctrine is that the mechanism allowing burdensome state procedural law to be set aside can be used sparsely. One difference observed between the European doctrine and the American doctrine in this chapter was how seldom the latter has set aside state procedural rules for being burdensome to union law. The fact that the U.S.

1461 What perhaps can provide some assistance on this matter is the theory of preemption considered next. As we shall see further below, the American experiences in this field also points to some approaches that has not worked there and probably will not work in the European Community either.
1462 Supra Part 9.1.2.
1463 See, e.g. Davis, 263 U.S. at 24 (“the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”); Brown, 338 U.S. at 296–99 (“over-exacting local requirements for meticulous pleadings” was found to deny the petition “a right of trial granted him by Congress.”); Henry, 379 U.S. at 447–48 (a State procedural rule should not be allowed to bar implementation of a Federal right when it does not serve “a legitimate state interest.”).
Supreme Court has only used the burdensome standard in a handful of situations\textsuperscript{1464} indicates that it is possible to create a system where a union lawmaker can create substantive rights to be enforced by State courts without using a mechanism such as the principle of effectiveness except in the most extreme situations. Decreased use of the principle of effectiveness may however require that the European doctrine is modified in other respects.\textsuperscript{1465} That the principle of effectiveness also \textit{should} be used sparsely follows from two conclusions previously drawn in this section: that it protects neither individuals’ interest of procedural foreseeability nor states’ interest to be protected against the union usurping more power and that no suggestion for how the European principle could be significantly improved has emerged herein.

What might suggest against drawing these comparative conclusion are the explanations for differences between the two doctrines presented in the preceding section. Historical differences between the two doctrines are relevant when explaining the current order but less so for upholding it. It seems untenable that a better balance of competing interest, especially maintaining a proper division of power between union and states, should not be achieved for historical reasons.\textsuperscript{1466} More relevant in this context is the significant extent of interstate procedural diversity in the European Community. In the absence of harmonization in the procedural field, state procedural law is possibly a larger obstacle to the enforcement of union rights in the European Community than in the United States. The absence of procedural Community regulation is however hardly an excuse for more extensive use of the principle of effectiveness.\textsuperscript{1467} The negative effects that legal diversity may have on Community law are somewhat counteracted by the fact that the European Community has broader powers in the field of state procedure than its American counterpart.

In conclusion, the European doctrine can probably not do without the principle of effectiveness but one should be aware that its application promotes the interests of the Community at the expense of those of individuals and Member States. It is therefore suggested that its application should as far as possible be avoided. Moreover, experiences in the American doctrine suggest that using such a mechanism is only necessary in exceptional cases.

\textsuperscript{1464} Meltzer, \textit{supra} note 1426, at 1142–43.
\textsuperscript{1465} One such adjustment of significance is discussed immediately \textit{infra}.
\textsuperscript{1466} \textit{See supra} Part 6.4.2.
\textsuperscript{1467} \textit{See also discussion supra} Part 7.4.1.
9.4.3 State Procedure is Novel or Inconsistently Applied

The novel-or-inconsistent standard of the State Grounds doctrine is one well-functioning mechanism to which the American doctrine points the European doctrine. To use novelty and consistency of application as standards for resolving conflicts between union and state law, as in the American doctrine, would be a new concept in the European doctrine. There are, in my view, four notable advantages with adopting consistency and novelty as standards for determining if Member State courts can apply national procedural rules to Community rights.

First, to disapply national procedural rules that are novel or inconsistently applied protects the interests of involved individuals. It would enhance the ability of individuals to exert Community rights by ensuring a reasonable opportunity to become knowledgeable of and comply with Member State procedure. Also, to require that state procedural requirements must be well-established and consistently applied is consistent with the aim to provide individual litigants with a minimum level of procedural protection underlying several general principles of Community law. The U.S. Supreme Court has noted that for a State court to suddenly change the procedural requirements that a litigant must comply with “deprives him of due process of law ‘in its primary sense of an opportunity to be heard and defend [his] substantive right’.” A comparable action taken by a Member State court is hardly fairer to the European litigant. Conversely, it is rare that time-honored, well-known, and generally applicable procedural rules impose unreasonable burdens on the litigants.

Second, the addition of a mechanism such as the novel-or-inconsistent standard to the European doctrine would assist in maintaining a proper balance of power between Community and Member States. Such a mechanism would enhance the Community’s ability to regulate matters within its competence as it would limit the ability of the Member States to escape Community law under the guise of procedure. At the very least, it would limit how fast Member States can change their procedural rules, thereby allowing the Community opportunity to react, for example through regulation or the centralized enforcement system. Such a mechanism would at the same time not come at great expense to the Member States. Forbidding the application of novel or inconsistently

\[1468\] See supra Parts 6.2.3, 8.2.1.
\[1470\] See supra Part 2.3.
applied procedural rules protect both individuals and the Community but does not significantly impair the Member States’ ability to design procedural systems that fit their diverse conditions, nor would its application result in an expansion of Community power at the expense of the Member States. Moreover, few valid arguments can be made by Member States against such a mechanism. It is difficult to imagine a Member State having valid reasons for applying its procedural rules inconsistently. With regard to the ground of novelty, it should of course be possible for Member States to change their procedural systems but it is perhaps reasonable that steps are taken so that such changes do not have detrimental effects on individual litigants during a transitional period.

Third, a standard of novelty-or-inconsistency is a comparably workable approach for resolving inchoate conflicts between state procedural law and union substantive law. It was concluded above that neither the European principle of effectiveness nor the American State Grounds doctrine clearly define when state procedural rules are unacceptably burdensome to union law and subsequently can be set aside. Although it is not always evident what a test of the novelty and consistency of application would require of state procedural law, it is comparatively easy to determine if a state procedural rule is novel and if state courts have applied it inconsistently. Thus, such a standard could, if adopted in the European doctrine, lead to inchoate conflicts between Member State procedural law and Community substantive law being resolved in a clearer, more straightforward manner compared to applying the vaguer requirement of effectiveness.

Fourth and finally, the novel-or-inconsistent standard of the State Grounds doctrine is consistent with the Community law principle of legal certainty. The European Court of Justice has since the earliest days of the Community held that respect for legal certainty is a general principle of Community law. The principle of legal certainty expresses the “fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly.” Respect for legal certainty can be found, in one form or another, in the legal systems of the Member States. Even though the principle of legal certainty is

widely recognized, it is not easily defined.\textsuperscript{1474} According to the ECJ, the principle of legal certainty is a fundamental principle of Community law that aims to ensure that legal situations, relationships, rights, and duties are as clear and foreseeable as possible.\textsuperscript{1475} It requires that individuals are able to ascertain their legal rights and obligations.\textsuperscript{1476} For example, a measure can violate the principles of legal certainty if it is not clear from it what legal position a concerned individual occupies.\textsuperscript{1477} The interest of maintaining legal certainty has also been used to justify national law that prevented individuals from exercising Community rights.\textsuperscript{1478} The principle of non-retroactivity and the principle of protection of legitimate expectations\textsuperscript{1479} are sometimes recognized as included in the “umbrella

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\textsuperscript{1474} Tridimas, supra note 1471, at 164; John Temple Lang, Legal Certainty and Legitimate Expectations as General Principles of Law, in General Principles of Community Law 163, 164 (Ulf Bernitz & Joakim Nergelius eds. 2000).
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\textsuperscript{1475} See, e.g. Case C-63/93, Duff et al. v. Minister for Agriculture and Food & Attorney General, 1996 E.C.R. I–569, para. 20 (the principle of legal certainty “requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable.”).
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\textsuperscript{1477} Case 169/80, Administration des douanes v. Société anonyme Garancini, 1981 E.C.R. 1931, para. 17 (“The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.”); Lang, supra note 1473, at 169. It has also been used to determine the proper interpretation of Community law, Tridimas, supra note 1471, at 165, if Member States have fulfilled their duty to implement Community law, Case C-220/94, Commission v. Luxemburg, 1995 E.C.R. I–1589, para. 10; Case C-36/95, Commission v. Greece, 1996 E.C.R. I–4459; Tridimas, supra note 1471, at 166–67, when a Member State can place a duty on individuals, e.g. Case C-208/90, Emnett v. Minister for Social Welfare & the Attorney General, 1991 E.C.R. I–4269; Santex, 2003 E.C.R. I–1877; Case C-459/02, Gerenkens et al. v. Luxemburg, 2004 E.C.R. I–7315, and whether a Member State should be allowed to challenge the validity of a decision, Case C-188/92, TWD Textilwerke Deggendorf GmbH v. Germany, 1994 E.C.R. I–833, paras. 16–17.
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\textsuperscript{1478} E.g. Case C-228/96, Aprile Srl, in liquidation v. Amministrazione delle Finanze dello Stato, 1998 E.C.R. I–7141, para. 19; Case C-255/00, Grundig Italiana SpA v. Ministero delle Finanze (No. 2), 2002 E.C.R. I–8003, para. 34 (national time-limits were justified by legal certainty and therefore not in violation of the principle of effectiveness).
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\textsuperscript{1479} Duff, 1996 E.C.R. I–569, paras. 19–20; Groussot, supra note 1472, at 299; Tridimas, supra note 1471, at 163. When it comes to Community measure an ever present question is of course whether the measure in and of itself has any effect, retroactive or otherwise. Absence of direct effect or applicability naturally also precludes retroactive effect. Case 14/86, Pretore di Salò v. Persons Unknown, 1987 E.C.R. 2545, paras. 19–20. Community law has borrowed the principle of protection of legitimate expectations from French and German law. Tridimas, supra note 1471, at 163.
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principle” of legal certainty.\textsuperscript{1480} Many decisions where the ECJ applied this principle concerned Community measures but it is clear that it also applies to Member State law.\textsuperscript{1481} The principle of legal certainty has however thus far had limited impact on national procedure.\textsuperscript{1482} It has been used under the contextual approach to the principle of effectiveness to defend national procedural rules that otherwise impaired the effectiveness of Community law.\textsuperscript{1483} It appears natural if the principle of legal certainty would also be used to defeat national procedural rules that are novel or inconsistently applied along the lines of the American States Ground doctrine.

One should note, however, that like the European principles of equality and equivalence,\textsuperscript{1484} a novelty-or-inconsistency standard does not impose a fixed, qualitative standard for national procedural law. Even the most exorbitant national procedural requirement will pass a test if it has been around for some time and has been consistently applied. Thus, for the sake of both the Community and individuals, a novelty-or-inconsistency standard should be supplemented by mechanisms imposing qualitative requirements on state procedure. In the European doctrine, such requirements are posed through Community regulation, general principles of Community law, and the principle of effectiveness.

9.4.4 Summary and Conclusion

It has been concluded in this section that the principle of effectiveness could not likely be eliminated from the European doctrine without seriously impairing the Community’s ability to regulate matters within its competence. However, the principle of effectiveness is disadvantageous if one seeks to balance interests involved in state enforcement of union rights. American experiences indicate that such disadvantageous effects are difficult to prevent but that the principle of effectiveness can be used more sparsely in favor of other, alternative approaches. One such alterna-

\textsuperscript{1480} Groussot, \textit{supra} note 1472, at 282. That the principle of legal certainty also includes other, partially independent principles makes it somewhat difficult to discuss. Lang, \textit{supra} note 1473, at 164.
\textsuperscript{1482} The principle plays an important role with regard to criminal law, prohibiting criminally liability when the act that was not criminalized when committed (\textit{nulla poena sine lege}), \textit{e.g.} Case 63/83, Regina v. Kirk, 1984 E.C.R. 2689, para. 22; Pretore di Salò, 1987 E.C.R. 2545, para. 20; Case 80/86, Criminal Proceedings against Kolpinghuis Nijmegen BV, 1987 E.C.R. 3969, para. 13.
\textsuperscript{1483} See \textit{supra} Part 6.2.2.
\textsuperscript{1484} See \textit{supra} Chapter 8.
tive approach could be the introduction of standards of novelty or inconsistent application which would make valuable additions to the European doctrine. They protect the interest of all parties involved in the European doctrine and correspond with central concepts of Community law. In many situations it is also a more practical approach than the principle of effectiveness when it comes to resolving inchoate conflicts between procedural national law and substantive Community law.

9.5 Other Lessons for Europe: Approaches Tried and Failed in the American Doctrine

9.5.1 Introduction

The examination of the American doctrine in this chapter has thus far focused upon the State Grounds doctrine. The U.S. Supreme Court has however previously experimented with two mechanisms not yet discussed herein: one based upon the substance/procedure dichotomy, the other on the outcome of litigation. While both approaches have now been abandoned, American experiences can be valuable in the development of the European doctrine. These approaches can only be fully understood if considered against the Erie doctrine in which the U.S. Supreme Court determines which procedural rules Federal courts shall apply when enforcing State rights.\footnote{1485} There is significant overlap between the American doctrine and the Erie doctrine since they are mirror images of each other and are developed by the same court.\footnote{1486}

9.5.2 The Substance/Procedure Approach

A first approach tried and subsequently abandoned in American law was based upon the dichotomy between substantive and procedural law. When the U.S. Supreme Court decided \textit{Erie}, it declared, at least implicitly, that while Congress can decide what procedural rules Federal courts shall apply when adjudicating State-based claims, it may not regulate

\footnote{1485} The Erie doctrine was described more fully \textit{supra} Part 4.5.2.
\footnote{1486} In fact, case-law that developed the State Grounds doctrine is often referred to as the reverse Erie doctrine or the converse Erie doctrine. \textit{See}, e.g. Alfred Hill, \textit{Substance and Procedure in State FELA Actions – The Converse of the Erie Problem?}, 17 \textit{Ohio St. L.J.} 384 (1956) (appears to be the first to detect the similarities between the two doctrines); \textit{Note}, \textit{State Enforcement of Federally Created Rights}, 73 \textit{Harv. L. Rev.} 1551, 1560 (1960); \textit{cf. Brown}, 338 U.S. at 301 (Frankfurter, J., dissenting).
Although the distinction made between procedural law and substantive law was far from clear, it would guide the Supreme Court in cases following Erie. The Supreme Court applied that distinction in the American doctrine as well. In doing so, the Supreme Court borrowed from conflict of laws theory where the general rule was and still is that courts can apply foreign substantive law but not foreign procedural law. The Supreme Court took a similar position in early decisions regarding the State Grounds doctrine where it accepted that the applicable procedural law, unlike the applicable substantive law, would be determined by where the claim was filed. Similarly, early decisions in the part-and-parcel doctrine relied on the distinction between substantive and procedural rules.

The U.S. Supreme Court gradually came to abandon this approach. Even in Erie, one of the Justices had noted that “[t]he line between procedural and substantial law is hazy.” Similarly, in Sibbach, a minority of the Court expressed grave doubts as to whether substance and procedure really “are mutually exclusive categories with easily ascertainable

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1487 Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (The Court found that “Congress has no power to declare substantive rules of common law applicable in a state … [a]nd no clause in the Constitution purports to confer such a power upon the federal court …”); see also id. at 92 (Reed, J., concurring (“no one doubts federal power over procedure.”)); Ralph U. Whitten, Erie and the Federal Rules: A Review and Reappraisal after Burlington Northern Railroad v. Woods, 21 Creighton L. Rev. 1, 1 (1987). This was one of the most debated aspects of the Erie judgment. Charles E. Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L.J. 267, 288 (1946).


1490 Cf. Brown, 338 U.S. at 301 (Frankfurter, J., dissenting) (“the terms ‘substance’ and ‘procedure’ … serve here in precisely the same way in which we have applied them in reverse situations …”).


1492 Hill, supra note 1485, at 385–86; Note, supra note 1485, at 1556–61.

1493 E.g. Central Vermont Ry. v. White, 238 U.S. 507 (1915); Minneapolis & St. Louis R. Co. v. Bomblis, 241 U.S. 211 (1916); Hill, supra note 1485, at 384.


1495 Erie, 304 U.S. at 91–92 (Reed, J., concurring).
contents.” The U.S. Supreme Court finally abandoned the approach in 1945 on the ground that the traditional distinction between substantive and procedural law cannot be allowed to affect the constitutional division of power between the Federal government and the States. After the traditional substance/procedure dichotomy had been abandoned as an approach in the Erie doctrine, it was soon thereafter abandoned in the American doctrine as well. The substance/procedure dichotomy would not be used to determine if State courts could apply State procedural law to adjudicate Federal rights.

An approach based on the substance/procedure dichotomy is likely to fail in the European Community in the same way as it failed in the United States. The U.S. Supreme Court failed to make a workable distinction between substance and procedure, a task that is hardly easier in the European Community. To establish clear and workable definitions of substance and procedure is reasonably even more difficult in the European Community than in the United States as the former has a greater degree of interstate procedural diversity than the latter. The traditional concepts of procedure and substance are too vague to serve as a foundation for a solution to conflicts between Community law and Member State law under the European doctrine.

The European Community is also reminded by the American experience that categories of law serve primarily a pedagogical value. I agree with two prominent British scholars that “[w]hat is procedural, what substantive, cannot be determined in the abstract”; if we are to separate substance from procedure we “must realize the exact purpose for which we are making the distinction.” When deciding what procedural rules Member State courts shall apply to Community law we should take notice of Justice Sutter’s warning that classification of a state rule can

1496 Sibbach, 312 U.S. at 17 (Frankfurter, J., dissenting with whom joined Black, J., Douglas, J., and Murphy, J.).
1497 Guaranty Trust v. York, 326 U.S. 99, 109 (1945); Note, Substance, Procedure and Uniformity – Recent Extensions of Guaranty Trust Co. v. York, 38 Geo. L.J. 114, 117 (1949). The U.S. Supreme Court continued to use the terms but gave them new meanings that were disconnected from their traditional use and which conformed with how it perceived that conflicts between union and state law should be resolved from a constitutional standpoint. York, 326 U.S. at 107–10.
1498 See, e.g. Testa v. Katt, 330 U.S. 386, 389–90 (1947) (rejecting a conflict-of-laws approach); Brown, 338 U.S. at 296 (“Other cases in this Court point up the impossibility of laying down a precise rule to distinguish ‘substance’ from ‘procedure.’”).
1499 Discussed supra Part 8.3.
1500 North & Fawcett, supra note 1490, at 77 (discussing the issue in the context of international private law).
never replace a constitutional analysis. The traditional division of law into procedural and substantive rules should not, as the U.S. Supreme Court correctly concluded, be allowed to control the division of power between Community and Member States. This conclusion casts doubt not only over Community law affecting national procedural but also over the concept of “national procedural autonomy” as such.

What has here been concluded regarding substance and procedure applies with almost equal force to other categories of law. American experiences teach us to be careful with attaching too much importance to categories of law in the European doctrine. Like substance and procedure, many categories of law are vague and tell us little, if anything, about the proper division of power between Community and Member States.

9.5.3 The Outcome Determination Approach

A second approach tried and subsequently abandoned by the United States Supreme Court focused on whether the choice of procedural law affected the outcome of litigation. When the Supreme Court retreated from the substance/procedure dichotomy in *York*, it replaced it with what has become known as the outcome-determinative test. According to the *York* Court, the constitutional division of power between Federal government and States and the interest of intrastate uniformity required Federal courts to be neutral enforcers of State law. This was in the Supreme Court’s opinion only possible if Federal judges applied State law on all matters that significantly affected the result of the litigation.

1503 That is, uniformity in the outcome of similar cases among State and Federal courts situated in the same State. Note, *After Erie Railroad v. Tompkins: Some Problems in “Substance” and “Procedure”*, 38 COL. L. REV. 1472, 1484 (1938) (“mere choice of court should not be important in the settlement of disputes”); *cf. Klaxon*, 313 U.S. at 496 (the Supreme Court declared that *Erie* required Federal courts to apply the conflict-of-laws rules applicable in the State where it is sitting since doing otherwise would “disturb equal administration of justice in coordinate state and federal courts sitting side by side.”).
The outcome-determinative approach proved to have two significant disadvantages. First, like the substance/procedure dichotomy, the outcome-determinative approach does not account for the constitutional division of power between union and states. Second, an outcome-determinative approach is much too generous to the creator of the substantive law. It is open-ended to such an extent that the distinction between the two lawmakers is for practical purposes erased. Critique against the outcome-determinative test mounted as it was applied following York. Application of the outcome-determinative test in Bernhardt caused the Federal government to lose all meaningful power of Federal courts, something hardly consistent with the constitutional division of power between Federal government and States, and the outcome-determinative approach was subsequently abandoned.

The outcome-determinative approaches never really caught on in the American doctrine. Early decisions in the part-and-parcel line of reasoning used an approach that is reminiscent of the outcome-determinative test, but the Supreme Court retreated quite quickly from this path. The Supreme Court had an opportunity to adopt the outcome-determinative approach in the American doctrine with the case of Brown v. Western Railway of Alabama, a FELA claim brought in a State court.


See supra Part 5.4.4.

338 U.S. 294.

who, applying a State rule requiring that allegations in the complaint was “construed most strongly against the pleader”, dismissed Brown’s claim.\(^{1513}\) When Brown reached the U.S. Supreme Court it declined to adopt an outcome-determinative approach.\(^{1514}\) One possible explanation for this is that the approach was criticized early and extensively in the context of the Erie doctrine.

American experiences with the outcome-determinative approach is a cautionary example not to determine what procedural rules Member State courts shall apply to Community law by looking at the outcome of litigation. First, experiences in the American doctrine teach us that an outcome-determinative approach is open-ended to the point where the government that established the court – in Europe the Member States – ultimately lose all control. Second, it also shows that the outcome of litigation completely ignores the proper division of power between union and states. Also, it is important to keep in mind that the outcome of litigation depends not only on the procedural rules of the forum but also on the behavior of the litigants. Even the “best” procedural requirement can affect the outcome of litigation if the litigants fail to adhere and it is untenable to set aside local procedural requirements every time a litigant fails to comply.

9.6 The Principle of Effectiveness and Preemption Theory

The application of preemption theory to union regulation was examined in chapter 7. It was concluded in the course of that examination that the concept of obstacle preemption, the idea under preemption theory that state law can be set aside when it hinders the achievement of union law aims, is sufficiently similar to the European principle of effectiveness to warrant comparison of the two.\(^{1515}\)

The U.S. Supreme Court has concluded that an inchoate conflict between state procedural law and union substantive law is “essentially one of pre-emption”.\(^{1516}\) In my opinion, this conclusion carries equal weight on both sides of the Atlantic. As we have seen in this chapter, both the

\(^{1513}\) Brown v. Western Railway of Alabama, 49 S.E.2d 833 (Ga. App. 1948).

\(^{1514}\) Brown, 338 U.S. at 301 (Frankfurter, J., dissenting) (arguing that the problem in Brown is essentially the same as in York and should be resolved using the same standard).

\(^{1515}\) See supra Parts 7.2.3, 7.4.2.

\(^{1516}\) Felder, 487 U.S. at 138.
European doctrine and the American doctrine recognizes that state law can be set aside when it sufficiently burdens union law. Similarly, both American law and European Community law includes the theory of obstacle preemption which allows state law to be set aside if it is an obstacle to union law. Considering this, it would be natural if the theory of obstacle preemption was used in both the European doctrine and in the American doctrine to determine the adequacy of state procedural law. However, it is only in the United States that the theory of obstacle preemption has been used to determine what procedural rules state courts shall apply to union rights. An example of a case where this was done is *Felder* where the U.S. Supreme Court held that a Federal law providing individuals with a right to damages when Federal law has been violated preempted a State law requiring prospective plaintiffs to notify the prospective defendant of the intent to file for such damages 120 days before the claim could actually be filed in a State court. By comparison, the European Court of Justice has not extended its use of preemption theory across the substance/procedure-line. It has used preemption theory to set aside substantive national law that hinders substantive Community law but not to set aside procedural national law that hinders substantive Community law. In such situations, the Court of Justice has instead turned to the principle of effectiveness.

The appropriateness of applying preemption theory to substantive matters but not to procedural matters can be questioned. If the ECJ is to determine if a substantive provision of Member State law hinders a substantive provision of Community law it will include preemption theory in its analysis. If, by comparison, the national rule is considered to be of procedural nature, an examination of whether it hinders a substantive provision of Community law will be made using the principle of effectiveness. Thus, it appears as if national law must meet different requirements depending on whether it is classified as procedural or substantive. Such an order is problematic. As discussed in the previous section, experiences in American law advice against using the substance/procedure dichotomy to determine what procedural rules state courts shall apply to union rights. It seems inappropriate that what power the Community

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1519 *Felder*, 487 U.S. at 153. For more examples, see *supra* Parts 5.4.3, 7.2.3.

1520 *See supra* Part 7.2.3.
has over Member State law should depend on a vaguely made distinction between substance and procedure that differs between the legal orders of the Member States. If Community law is to continue to subject substantive national law to one test and procedural national law to another, the ECJ should produce a clear and workable definition of substance and procedure respectively and motivate how such a division is warranted on constitutional grounds. American experiences with the substance/procedure dichotomy suggest that such a task is not easily achieved.  

To introduce preemption theory as a separate mechanism in the complex system that is the European doctrine would not improve an already confused situation. A possibly more beneficial use of preemption theory would be to use it to improve the principle of effectiveness.

First, introduction of preemption theory in the principle of effectiveness could contribute to the latter’s legitimacy. That Member State law must conform to Community law has not been uncontroversial but has over time become accepted. It can be more difficult to understand why national law can also be set aside even in the absence of directly conflicting Community law under the principle of effectiveness. It is easier to justify setting aside Member State procedure using a preemption-based approach: preemption theory carries with a theoretical framework that can explain and motivate setting aside national law. The validity of the principle of effectiveness would be strengthened if setting aside national procedure could be motivated on the ground that it was at least implicitly the Community’s intent to do so and there is evidence of such intent.

Second, approaching the question of whether a national procedural rule unacceptably hinders substantive Community law using the theory of obstacle preemption would be a qualitative improvement over the different approaches currently used in connection with Community law’s requirement of effectiveness. A test based on the showing of implicit Community intent to preempt national procedural law is far from clear but it would at any rate be an improvement; any test less vague than “virtually impossible or excessively difficult” would be a change for the better.

Finally, it is conceivable that there could exist situations where national law would be set aside if the principle of effectiveness as it currently

\[1521 \text{ See supra Part 9.5.2.} \]
\[1523 \text{ These are the two so-called “black letter rules” of American preemption theory. See supra Part 7.2.3; Robert R. Gasaway, The Problem of Federal Preemption: Reformulating the Black Letter Rules, 33 Pepp. L. Rev. 25 (2005).} \]
stands was applied but not under a preemption-based approach. If so, this would in my opinion be acceptable. It appears reasonable to require a showing of Community intent of some sort, explicit or implicit, before setting aside national law if the latter does not directly conflict with either Community regulation or a general principle of Community law.

9.7 Summary and Conclusions

By comparing mechanisms other than union regulation and general union principles in the European and American doctrines, a number of conclusions have been drawn in this chapter. First, the existence of a similar mechanism in the American doctrine suggests that something with the function of the principle of effectiveness is necessary in the European doctrine. There are however significant drawbacks with such a mechanism when it comes to achieving a proper balance between the different interests affected by state court enforcement of union rights and it both can and should be used sparsely. American experiences indicate that neither the traditional dichotomy between substantive and procedural law nor the outcome of litigation should be used to determine what procedural rules national courts shall apply to Community rights. Setting aside procedural rules that are novel or inconsistently applied and using preemption theory are however two avenues with possible merit.
PART IV.

SUMMARY AND CONCLUSIONS
10 Summary and Concluding Observations

10.1 Summary of Findings

10.1.1 Introduction

Ordinary national courts have for some time applied substantive Community law.\(^\text{1524}\) For the last thirty years, the general rule has been that in doing so the national courts shall apply the procedural rules that the Member State provides.\(^\text{1525}\) However, for an equally long time it has been clear that there are exceptions to that general rule; the Member States’ influence over what procedural rules national courts apply to Community law is not without limit.\(^\text{1526}\) The system of legal mechanisms in Community law governing what procedural rules national courts shall apply to Community rights, herein referred to as the European doctrine,\(^\text{1527}\) is the central object of examination in this study.

The overall aim of this study has been to determine if the European doctrine can be reformed to strike a better balance between interests involved. To achieve this aim, the European doctrine has been compared to similar mechanisms in U.S. law governing what procedural rules State courts shall apply to Federal rights. These mechanisms are herein collectively referred to as the American doctrine.\(^\text{1528}\) Much like national courts in Europe, State courts in the United States enforce Federal rights and have done so for quite some time.\(^\text{1529}\) Also much like in the European Community, State law as general rule governs the procedure but this general rule is subject to certain exceptions.\(^\text{1530}\)

\(^{1524}\) See further supra Chapter 2.


\(^{1526}\) See further supra Chapter 3.

\(^{1527}\) See further supra Parts 1.7.1.

\(^{1528}\) See further supra Parts 1.2.2, 1.7.1.

\(^{1529}\) See further supra Chapter 4.

\(^{1530}\) See further supra Chapter 5.
10.1.2 What Interests Should Be Taken into Consideration in Shaping the European Doctrine?

The comparison of the European and American doctrines has been guided by two questions. A first question that has been considered is what interests should be taken into consideration in shaping the European doctrine. One difference between the European and American doctrines that has frequently surfaced in the comparison of the two is that they partially focus on different things. One of the most important elements underlying the European doctrine is the principle of loyalty which provides that Member States and national courts must take measures necessary to ensure the effective realization of Community law.\textsuperscript{1531} While there are exceptions, many of the mechanisms constituting the European doctrine are motivated by the principle of loyalty and the interest of enhancing the effectiveness of Community law. To ensure the Federal government’s ability to exercise its constitutional powers is also important in the American doctrine but such ambitions are there balanced against the interest of shielding States from undue Federal interference. Achieving and maintaining a proper balance of power between Federal government and the States is as important as ensuring the Federal government’s ability to effectively exercise its powers in the American doctrine.\textsuperscript{1532}

The idea that equal consideration should be taken to what powers the Community has under the Treaties and what powers it does not have in the formation of the European doctrine appears sound in light of the transformation that the European Community has undergone and still undergoes.\textsuperscript{1533} That this has not always been the approach under the European doctrine is perhaps attributable to procedural issues being viewed as less significant than substantive issues from a constitutional issues. The U.S. Supreme Court has attached constitutional importance to the issue of what procedural rules state courts apply in a way not observable in the decisions of the European Court of Justice who perhaps view the choice of procedural rules as technical and of little constitutional importance.

Finally, the comparison of the American doctrine and the European doctrine suggests that the struggle between the Community and the Member States should not be allowed to impair the clarity and foresee-

\textsuperscript{1531} Also discussed supra Part 2.4.5.
\textsuperscript{1532} See further supra Part 6.2.2.
\textsuperscript{1533} See further supra Part 6.4.2.
ability of procedure and that the European doctrine should ensure that national courts always provide individuals with a judicial process that meets fundamental requirements of procedural fairness.\textsuperscript{1534}

10.1.3 Suggestions for a More Balanced Approach: Comparison of Mechanisms

Introduction and Similarities

The second question answered herein is how the European doctrine can be modified to balance these partially competing interests. Comparison of the mechanisms contained in the European doctrine and in the American doctrine revealed both similarities and differences. While it was stated initially that this study will focus on the differences between the European and American doctrines rather than the corresponding similarities,\textsuperscript{1535} some similarities between the two doctrines are worth noting. First, the two doctrines are quite similar on a structural level. Both contain general union principles protecting individuals, general union principles preventing discrimination of union law, union regulation of state procedure, and mechanisms allowing state procedure to be set aside when it too an unacceptable degree hinders the effectiveness of union law.\textsuperscript{1536} Individual mechanisms contained in the two doctrines are also sometimes quite similar. For example, the right of access to a judicial process, the principle of equality, and related rights under European Community law fill functions quite similar to those of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.\textsuperscript{1537} Similarly, both the European doctrine and the American doctrine requires state courts to use discretionary powers granted under state law to enhance the effectiveness of union law.\textsuperscript{1538}

Structural Differences

The European doctrine and the American doctrine also differ in many respects. Some of these differences concern the structure of the doctrines and the legal system surrounding them rather than the mechanisms they contain. First, the United States has a constitutional document that was created at the same time as the union itself. By comparison, the European

\begin{itemize}
\item \textsuperscript{1534} See further supra Parts 6.2.3–6.2.4, 6.4.3–6.4.4.
\item \textsuperscript{1535} Supra Part 1.3.2.
\item \textsuperscript{1536} See supra Chapters 7–9.
\item \textsuperscript{1537} See further supra Part 8.4.1.
\item \textsuperscript{1538} See further supra Part 9.2.3.
\end{itemize}
Community has constitutional principles developed one-by-one in the case-law of the European Court of Justice. The absence of a constitutional document can be relevant when explaining why the European doctrine has developed in a different direction than the American doctrine.\textsuperscript{1539} It should however not be used as an excuse to ignore interests affected by the European doctrine nor should it prevent modifying the European doctrine to better balance those interests.

Second, state court enforcement of union rights is more likely to be problematic in the European Community than in the United States due to two factors. One factor is that the U.S. Federal government has local courts capable of directly adjudicating matters pertaining to Federal law whereas there are no alternative venues for Community law besides ordinary national courts. If state procedural law to an equal extent limits the effectiveness of union law on both sides of the Atlantic, the ramifications will still likely be greater in the European Community as litigants can never file in a union court. Another important factor making state court enforcement more problematic in Europe than in the United States is that the Member States forming the European Community are more heterogeneous than the several States forming the United States.\textsuperscript{1540}

Third, the European Community has greater formal power to regulate procedural matters than the U.S. Federal government and it would thus appear as if the former consequently has greater opportunity to prevent the application of state procedural law from impairing the effectiveness of union law through regulation.\textsuperscript{1541} Furthermore, the EC Treaty provides the European Community with mechanisms capable of promoting the realization of Community law on a local level: the centralized enforcement system.\textsuperscript{1542} Even though the centralized enforcement system is far from optimally effective,\textsuperscript{1543} it provides the European Community with something that the U.S. Federal government lacks as the latter does not have any comparable means it can use against uncooperative States.

\textit{Findings}

Taking into account these structural differences, a number of comparative findings were made above. First and most importantly, it can be concluded after comparison with the American doctrine that a clear, workable, and permanent solution to the issue of what procedural rules

\textsuperscript{1539} See, e.g. supra Parts 6.3.3, 8.3.
\textsuperscript{1540} See supra n. 17 and accompanying main text, Parts 8.3, 9.3.
\textsuperscript{1541} See further supra Part 7.2.2.
\textsuperscript{1542} See supra Part 2.3.2.
\textsuperscript{1543} See supra Part 2.3.3.
national courts shall apply to Community rights is unlikely to ever be provided.\footnote{1544} No single mechanism in either of the two doctrines balances all involved interests: every mechanism promotes one or two of the interests involved at the expense of the other. The European doctrine will thus likely continue to consist of several different mechanisms. Some mechanisms are however superior to other and some quite concrete suggestions for how the European doctrine can be modified to achieve a better balance of interests has emerged from the comparison. Five important conclusions shall be repeated here.

First, mechanisms forming the European doctrine should as far as possible not distinguish between different categories of law such as procedural and substantive law. Such divisions are difficult to uphold and is prone to prevent finding solutions that properly balance all involved interests.\footnote{1545}

Second, the outcome of litigation should not be used to determine if it is appropriate to apply national procedural rules to Community rights. A mechanism that focuses on the outcome of litigation tends to ignore the duty of the individual litigants to comply with reasonable and well-founded procedural rules and will always promote the interests of the lawmaker providing the substantive law over the lawmaker providing the procedural law without regard of the proper division of power between the two.\footnote{1546}

Third, the interest of the individuals to have access to a judicial process that is clear, foreseeable, and fundamentally fair can be protected through general principles of Community law at little expense to the interests of the Community and the Member States.\footnote{1547} Experiences in the American doctrine also suggest that the introduction of a requirement in the European doctrine that national procedural rules are well-established and consistently applied would also promote individuals’ interest along with those of the Community.\footnote{1548} The European doctrine also contains general principles that prevent discrimination of Community law vis-à-vis national law and discrimination of litigants from other Member States vis-à-vis nationals. These principles are reasonable and advantageous as mechanisms but unfortunately easily circumvented.\footnote{1549}

Fourth, although some Member States may react adversely to the idea of increased Community regulation of procedural matters it would be advan-

\footnote{1544} See also discussion supra Part 6.3.3.
\footnote{1545} See further supra Part 9.5.2.
\footnote{1546} See further supra Part 9.5.3.
\footnote{1547} See further supra Part 8.4.1.
\footnote{1548} See further supra Part 9.4.3.
\footnote{1549} See further supra Part 8.4.2.
tageous for achieving a better balance between the interests affected. That national procedure is set aside on a case-by-case basis using the principle of effectiveness may at first sight appear as a smaller infringement of national procedural autonomy than outright regulation but one then forgets that it contains no limits how far Community law may influence national procedure and operates at the expense of judicial foreseeability.\textsuperscript{1550}

Fifth and finally, a mechanism that allows Member State procedure to be set aside if it to an unacceptable extent hinders Community law, like the European principle of effectiveness, must likely exist to prevent the Community’s powers from becoming illusory. Such mechanisms do not however promote a proper balance between all involved interests and should be used sparsely and as a last resort. As far as possible, other means for resolving conflicts between state procedure and union rights should be used.\textsuperscript{1551} Moreover, such a mechanism could possibly benefit by merging it with preemption theory\textsuperscript{1552} which also has a role to play when it comes to determining to what extent the Community has regulated a matter.\textsuperscript{1553}

10.2 Concluding Observations

It would have been preferable if the comparison with the United States could provide the European Community with a ready-made solution. The United States can however not provide Europe with a blueprint how to determine what procedural rules national courts shall apply to Community rights. On the contrary, this comparison has probably complicated rather than simplified the issue of state court enforcement of union rights. By comparing the European and American doctrines side-by-side it has become evident that one cannot study one or two mechanisms in isolation but that all mechanisms governing this issue must be included in the equation. This complicates things but it is also helpful as it tells us to abandon all hope for a single, easy solution. The most important contribution of the American doctrine is that it points to the constitutional dimension of the issue and warn Europe against focusing too narrowly on the effective enforcement of Community law. The American doctrine does however also provide the European doctrine with some practical advices, pointing out both pitfalls and workable approaches, in the likely never-ending quest for a conclusive answer to the question of what procedural rules national courts shall apply to Community rights.

\textsuperscript{1550} See further supra Part 7.4.1.
\textsuperscript{1551} See further supra Part 9.4.2.
\textsuperscript{1552} See further supra Part 9.6.
\textsuperscript{1553} See further supra Part 7.4.2.
Table of Cases

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Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585 44, 58, 73, 75–76, 90–91
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Case 826/79, Amministrazione delle Finanze dello Stato v.  
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Case 169/80, Administration des douanes v. Société anonyme  
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Case 244/80, Foglia v. Novello (No. 2), 1981 E.C.R. 3045  

Case C-115/80, Demont v. Commission (No. 2), 1981  
E.C.R. 3147  

Case 8/81, Becker v. Finanzamt Münster-Innenstadt, 1982  
E.C.R. 53  

Case 155/79, AM&S Europe Ltd. v. Commission, 1982  
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Case 283/81, Srl. CILFIT & Lanificio di Gavardo SpA v.  
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Case 261/81, Rau v. De Smedt, 1982 E.C.R. 3961  

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Case C-331/88, The Queen v. Minister of Agriculture, Fisheries and Food & Secretary of State for Health, ex parte Fedesa et al., 1990 E.C.R. I–4023
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Case C-177/95, Ebony Maritime & Lotten Navigation Co. Ltd. v. Prefetto della Provincia di Brindisi et al., 1997 E.C.R. I–1111
Case C-180/95, Draehmpaehlv. Urania Immobilienservice OHG, 1997 E.C.R. I–2195
Case C-261/95, Palmisianiv. Istuto Nazionale della Prevenza Sociale (INPS), 1997 E.C.R. I–4025
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World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 161
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Bibliography

Books
Andersson, Torbjörn, Rättsskyddsprincipen (Iustus Förlag, Uppsala 1997)
Arnull, Anthony, The European Union and its Court of Justice (Oxford University Press, Oxford 1999)
Brealey, Mark & Mark Hoskins, Remedies in EC Law (2nd ed., Sweet & Maxwell, Cornwall 1998)
Cappelletti, Mauro & William Cohen, Comparative Constitutional Law – Cases and Materials (Bobbs-Merrill, Indianapolis 1979)
Constantinesco, Léontin-Jean, Rechtsvergleichung: Die rechtsvergleichende Methode, vol. 2 (Heymann, Köln 1972)
Cramér, Per, Neutralitet och europeisk integration (Norstedts juridik, Stockholm 1998)
de Cruz, Peter, Comparative Law in a Changing World (2nd ed., Cavendish, London 1999)
Dougan, Michael, National Remedies Before the Court of Justice (Hart Publishing, Cornwall 2004)
Grossfeld, Bernhard, Core Questions of Comparative Law (Vivian Grosswald Curran trans., Carolina Academic Press, Durham 2005)
Grousset, Xavier, Creation, Development and Impact of the General Prin-
ciples of Community Law: Towards a Jus Commune Europaeum? (Diss. Lund U. 2005)


Gutteridge, Harold Cooke, Comparative Law – An Introduction to the Comparative Method of Legal Study and Research (Cambridge University Press, Cambridge 1946)


Hettne, Jörgen & Ida Otken Eriksson (eds.), EU-rättslig metod (Norstedts juridik, Stockholm 2005)


Jackson, Vicki C. & Mark Tushnet, Comparative Constitutional Law (Foundation Press, New York 1999)


Lasok, KPE, QC & Timothy Millett, Judicial Control in the EU: Procedures and Principles (Richmond Law & Tax Ltd., Richmond 2004)


Lecourt, Robert, L’Europe des juges (Bruylant, Brussels 1976)


Reich, Norbert, *Understanding EU Law* (Intersentia 2003)
Reichel, Jane, *God förvaltning i EU och i Sverige* (Jure, Stockholm 2006)


**Articles**


Bellia, Anthony J., Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947 (2001)
Black, Hugo L., Address, 13 Mo. B.J. 173 (1942)


Case Comment, *Federal Jurisdiction: Adequate State Grounds and Supreme Court Review,* 65 Colum. L. Rev. 710 (1965)


Corbin, Arthur L., *The Laws of the Several States,* 50 Yale L.J. 762 (1941)
Craig, Paul P., *The Jurisdiction of the Community Courts Reconsidered*, in *The European Court of Justice* 177 (Gráinne de Búrca & J.H.H. Weiler eds. 2001)


Dennington, Andrew R., We Are the World? Justifying the U.S. Supreme Court’s Use of Contemporary Foreign Legal practise in Atkins, Lawrence, and Roper, 29 B.C. Int’l & Comp. L. Rev. 269 (2006)
Derlén, Mattias & Johan Lindholm, Direktivs verkan före genomförande­fristens utgång, 2007 Europarättslig Tidskrift (forthcoming)
Fairman, Charles, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)
Furrer, Andreas, The principle of pre-emption in European Union Law, in Sources and Categories of European Union Law – A Compara-
Green, Nicholas & Ami Barav, Damages in the National Courts for Breach of Community Law, 6 Y.B. EUR. L. 55 (1986)
Greve, Michael S., Against Cooperative Federalism, 70 MISS. L.J. 557 (2000)
Hallström, Pär, Institutionell balans i den Europeiska Unionen, 1997/98 JURIDISK TIDSSKRIFT 334
Harden, Ian, What Future for the Centralised Enforcement of Community Law?, 55 CURRENT LEGAL PROBS. 495 (2002)


Hill, Alfred, The Inadequate State Ground, 65 COLUM. L. REV. 943 (1965)


Keeffe, Arthur John et al., Weary Erie, 34 CORNELL L.Q. 494 (1949)


Lenaerts, Koen, *Form and Substance of the Preliminary Rulings Procedure*, in Institutional Dynamics of European Integration: Essays in
Lindholm, Johan & Mattias Derlén, EG-domstolen behåller kontrollen – Kraven enligt CILFIT och Foto-Frost efter Gaston Schul, 2006 Europa-rättslig Tidskrift 343
Lindholm, Johan, Harmonisering av processrätten – utvecklingslinjer, in Svensk rätt i EU 151 (Örjan Edström ed., Iustus, Uppsala 2007)
Merrigan, Edward Lawrence, Erie to York to Ragan – A Triple Play on the Federal Rules, 3 Vand. L. Rev. 711 (1950)
Monaghan, Henry Paul, Of “Liberty” and “Property”, 62 Cornell L. Rev. 405 (1977)
Morgan, Edmund M., Choice of Law Governing Proof, 58 Harv. L. Rev. 153 (1944)
Note, After Erie Railroad v. Tompkins: Some Problems in “Substance” and “Procedure”, 38 Colum. L. Rev. 1472 (1938)
Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551 (1960)
Note, Substance, Procedure and Uniformity – Recent Extensions of Guaranty Trust Co. v. York, 38 Geo. L.J. 114 (1949)
Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375 (1961)


van Gerven, Walter, *The Effects of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continent-


Weiler, Joseph H., The Transformation of Europe, 100 Yale L.J. 2403 (1991)


Wróblewski, Jerzy, Problem of Incomparability in Comparative Law, 53 Rivista Internazionale de Filosofia di Diritto 92 (1976)


European Community Legislative Acts
(excluding Treaties)


Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employ-
ment, vocational training and promotion, and working conditions, 1976 O.J. (L 39) 40
Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of the review procedures to the award of public supply and public works contracts, 1989 O.J. (L 395) 33
Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, 1992 O.J. (L 76) 14
Council Regulation 40/94/EC on the Community trade mark, 1994 O.J. (L 11) 1
Council and Commission Action Plan on how to best implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom security and justice, 1999 O.J. (C 19) 1
Council Regulation 1346/2000/EC on insolvency proceedings, 2000 O.J. (L 160) 1
Council Regulation 1348/2000/EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 2000 O.J. (L 160) 37
Council Resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, 2000 O.J. (C 155) 1
Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1
Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1

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Council Regulation 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 2001 O.J. (L 174) 1
Protocol on the Statute of the Court of Justice, 2002 O.J. (C 325) 167
Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1
Draft Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1
Decision of the President of the Court of Justice, 2005 O.J. (L 325) 1

Legislative Acts in the United States (excluding the U.S. Constitution)
Judiciary Act of 1789, Act of Sept. 24, 1789, 1 Stat. 73
Judiciary Act of 1801, Act of Feb. 13, 1801, 2 Stat. 89
Act repealing the Judiciary Act of 1801, Act of March 8, 1802, 2 Stat. 132
Judiciary Act of 1802, Act of April 29, 1802, 2 Stat. 156
Act of April 10, 1869, 16 Stat. 44
Conformity Act of 1872, Act of June 1, 1872, 17 Stat. 196
Circuit Court of Appeals Act of 1891, Act of March 3, 1891, 26 Stat. 826 (a.k.a. “the Evarts Act”)
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