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**PRE-EMPTION IN U.S.A. AND EUROPE:  
A COMPARATIVE ATTEMPT**

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## **INTRODUCTION**

Since its beginning the process of European integration has been faced with the “existential drama” which generally affects most forms of social organization, i.e. the dilemma of reaching an equilibrium between – on one hand – a respect for the autonomy of the individual unit, freedom of choice and diversity of action, and – on the other hand – the societal need for cooperation, integration, harmony and unity.

In the context of dynamic relationships occurring between the EC and its Member States such desire for this equilibrium has gradually become more intense and noticeable, being it related not only to a general need for a functional optimization and rationalization of economic and social welfare, but also to a more profound and never-ending effort aimed at the establishment of a common democratic order, which is at the same time consonant with the ideals of liberty and justice shared by the EC Member States. The tensions that exist between the two poles – the one only Union and the presence of many peripheral entities, i.e. the Member States – and the specific solutions for their reconciliation on one side in the context of north American federal system, on the other side within the European Community constitute the object of this thesis, particularly focused on the pre-emption theme.

Formerly the pre-emption doctrine was developed in the context of American federalism by the U.S. Supreme Court, which has over the last century established a sophisticated modern pre-emption framework. Apparently, some decisions taken by the European Court of Justice validate the idea of a transposition of the doctrine of pre-

emption into the European experience, which has seemingly offered it a suitable and fitting habitat where to become one of the most effective tool used by the ECJ itself, in order to achieve and defend the aims of European integration. Hence the purpose of this thesis is – from a theoretical point of view – quite simple: first of all I would like to examine such peculiar legal phenomenon and some of its implications within its former legal context (the American one); secondly, I would try to discover whether it is possible to hypothesize the presence of pre-emption – properly conceived – within the context of the European semi-federal experience or not, and possibly to discover which are the required perspective adjustments needed.

For now a very approximate definition of the pre-emption theory is adequate, as we will come back on it in the future. Within the American experience, as well as in the European one, such legal doctrine has revealed to be deeply connected to the very essence of the constitutional structure, by playing a crucial role in the allocation of legislative and regulatory competences, as well as in the exercise of the relevant powers between central authority and peripheral entities. According to the largest number of commentators, within a federal or *quasi-federal* system the word ‘pre-emption’ identifies the mechanism that “*determines, even before an express central measure in point exists, whether a whole policy area has been actually or potentially occupied by the central authority in such way as to influence the intervention of the states in that area*”<sup>1</sup>, by obstructing *a priori* Member States from the adoption of other/different legal

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<sup>1</sup> See M. Cappelletti, M. Seccombe, J.H.H. Weiler, *Integration through Law*, Vol. 1, de Gruyter, 1985.

acts within the same legislative area. The difficulties stemming from the pre-emption doctrine clearly arise from its very potentiality, which makes it hard to define in advance which areas are pre-empted and under what conditions, and also whether powers in such areas are concurrent or exclusive<sup>2</sup>. From a comparative point of view my analysis will thus try to answer to a huge question, as so to discover whether it is possible or not to talk about a ‘transmigration of models’ at the supranational level.

The basic difficulty in such comparative task surely derives from the fact that we are going to juxtapose two extremely different constitutional experiences: on one side the United States of America, a proper federation of States which derives its State sovereignty and legitimacy directly from its own people and not from its constituent States<sup>3</sup>; on the other side the European Community, an international organization which lacks its own unitary *people* and is composed of more or less sovereign nations trying to establish a common higher legal order, as so to bring about a closer union among their peoples<sup>4</sup>.

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<sup>2</sup> According to M. Cartabia and J.H.H. Weiler during the 1970’s the European Court of Justice started a jurisprudential path subsequently developed into two parallel core principles, embodied on one side the exclusivity which features some Community competences, and on the other side the complementary pre-emptive nature of such powers (see *L’Italia in Europa*, p. 77 and 175, ed. Il Mulino, Bologna, 2000).

<sup>3</sup> In the U.S.A. a common national feeling arose since the beginning, and was later strengthened by the Revolution. The U.S. Constitution’s opening recalls “*We the people of the United States*”, together to form a more perfect Union and to achieve common aspirations. Such “*People*” is the only people arising from the dissolution of political borders between States within the Union.

<sup>4</sup> See the Preambles to the Treaty establishing the European Community (TEC) and to the Treaty on the European Union (TEU): express references are made to the mutual effort aimed at creating “*an ever close union among peoples of Europe*” and ensuring its development. See also the Preamble to the Draft Treaty establishing a Constitution for Europe, which remarkably recall the various European national identities by referring to the idea of unity in the diversity.

Any comparison between the United States and the Community today must of course acknowledge the fundamental difference occurring between, on one hand, maintaining a semblance of balance in the power relations between the federal government and the States in a system designed along federal lines from its very beginning, and, on the other hand, consciously imposing a new multi-layered legal system on a continent historically dominated by sovereign Nation-States, themselves mostly unitary in structure.

In order to overcome the structural diversity occurring between a Federal State and a community of States, we need to think of federalism as an *unicum*, as so to refer to it both constitutional experiences, identifying in the concept of federalism the common comparative ground which allows our inquiry to prevail over the abovementioned gap. Such approach may be strengthened by the fact that in many areas and legislative fields the Community has adopted solutions that clearly resemble those belonging to the proper federal experience. Accordingly, some of the jurisprudential doctrines developed to describe the relations occurring between Community law and State legal orders seem to emulate those doctrines elaborated by the United States jurisprudence. The ‘minimum common denominator’ occurring between these two different legal

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Art. 189 TEC remarkably describes the European Parliament as “*consist[ing] of representatives of the peoples of the States*”, as if an express reference to a unitary “European people” was too inappropriate. According to some commentators such explicit reference could not be made because of the subsequent implied application of traditionally *national* categories to a non-national legal experience (see S. Dellavalle, *La legittimazione del potere pubblico europeo*, in “Teoria politica” XIX, n. 1, 2003, p. 57). For this reason, the (even hopefully) recourse to the idea of a whole “European people” would not be possible, being such entity currently not existent (*no demos thesis*): hence Europe can be seen only as formed by the aggregate of different national peoples, each maintaining its own identity and history.

experiences can thus be identified in a wider concept that allows evaluating both juridical phenomena as expressions of the same underlying philosophy, i.e. federalism.

The idea of integration is deeply rooted within the European legal experience: such term is featured by an implied looseness which allows to encompass a whole spectrum of activity in it, ranging from mere cooperation between different entities, to ultimately complete unification in one only organization. The element of completeness and unity which integration includes does not negate, however, but rather implies the possibility of compositeness: the term is primarily concerned with how various independent entities come together and interrelate so as to form an identifiable whole. On one hand “integration” connotes the process of integrating; but it is also concerned with the final results, the integrated system and the degree of integration that they achieved, for the process may successfully stop well before unification. Both these elements – the process and the final results – are essential to an analysis of integration, for the success of a process can be assessed only in term of its results, whereas a result which represents only one step in an ongoing process may lose much of its significance if assessed out of its developmental context.

In order to evaluate the accomplishment of the integration purpose it is necessary to establish a connection with the concept of federalism, which embodies the ideology the integration process seeks to promote. Such integrational ideology incorporates not only the idea of partnership or community in a democratic government, but also notions of western civil libertarianism. Our inquiry is thus aimed at studying both the integration process and its final results, inspired by

the federal idea as a common point of departure which legitimize a comparison between the U.S.A and the EC. In 1982 Judge Pierre Pescatore of the European Court of Justice echoed this rationale while actually comparing the American and European experiences, by stating that “[...] [t]he methods of federalism are not only a means of organizing states. It would rather seem that federalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisite are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interest of the particular entities”<sup>5</sup>. Such overview – expressly based on the balance between two core values, such as the common research for unity and the effective care for national interests – fully fits the dualistic conception of supranationalism identified by the doctrine<sup>6</sup>. Accordingly, an EC description that renders it as an organism ranking above Member States<sup>7</sup> would provide a too old-fashioned and archaic overview of the Community system, whose structure on the contrary comprehends “bits and pieces of the national governments”<sup>8</sup> playing a part in all the EC dynamics. Just like every other federal model<sup>9</sup> the European

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<sup>5</sup> P. Pescatore, *Foreword*, in *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. 1, Sandalow and Stein, Clarendon Press, Oxford/New York, 1982.

<sup>6</sup> Cf. J.H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, in *Yearbook of European Law*, (1981) 1, p. 267 - 306.

<sup>7</sup> Cf. A.H. Robertson, *Legal Problems of European Integration*, in *Recueil des Cours*, Volume 91 (1957-I), pp. 105 e 143.

<sup>8</sup> See A. Shonfield, *Europe: Journey to an Unknown Destination*, Penguin, 1974, p. 17.

<sup>9</sup> The term ‘federal’ is featured here by a wide meaning, inclusive of all the relations between entities which have subscribed an agreement concerning government powers sharing: according to D.J. Elazar “[t]he original use of the

Community is featured by a tension between the whole system and the parts, a clash of centripetal and centrifugal forces. In the classical understanding and evaluation of European legal and political integration a large number of analysis has always tended to emphasized uniformity and the concept of higher legal order, by favouring the concept of supremacy and exclusive Community competence: accordingly, each time the Member States asserted their dominance within the Community system, this has been taken to be a retrograde step in the process of integration, and any development in the Community detracting from the centrality of EC institutions in favour of the Member States has been regarded as a symptom of disintegration, being therefore integration identified with a strengthening of the centre at the expense of the periphery (or, at least, with an ever-tightening hold of the centre over the periphery). On the contrary, if we accept that at least one construction of federalism offers a counter concept to the centre-periphery model, it may be possible to give a new interpretation to integration as well: according to this understanding, federalism concerns the whole frame and not merely a centre surrounded by revolving peripheries<sup>10</sup>. Subsequently, and in accordance with a federalist view of integration, the concept of unity as an absolute value shall be

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*term deals with contractual linkages that involve power sharing - among individuals, among groups, among states. This usage is more appropriate than the definition of modern federations, which represents only one aspect of the federal idea and one application of the federal principle” (Self Rule/Shared Rule, Turtledove 1979, p. 3).*

<sup>10</sup> See again Elazar, *id.*: ““Integration on [this] model is potentially quite different from integration around a common centre. [...] [The] measure of [...] integration is not the strength of the centre as opposed to the peripheries; rather the strength of the framework. Thus both the whole and the parts can gain strength simultaneously and, indeed, must do so on an interdependent basis”.

rejected, regarding integration and federalism as “*twin concepts*”<sup>11</sup> both expressing the societal philosophy and organizational principle which require a particular balancing of individual and shared interest, a balance between particular and general, peripheral and central, and between autonomy and heteronomy.

Many other elements will harden the inquiry on pre-emption within the EC system: we must keep clear in mind that the analysis will involve two experiences that, even if featured by some mutual attributes (such as the presence of similar organs exercising somehow comparable functions), deeply differ from a purely geo-dimensional point of view, to cultural, linguistic, historical, juridical, political and economical backgrounds: any comparative discussion of European integration and the American federal experience must thus rest on an appreciation of each system as the product of a peculiar history.

Three cautionary remarks can be drawn over such impressions: first of all, an analysis of the EC in federal or *quasi-federal* terms must take account of the evolutionary character of the Community<sup>12</sup>, clashing with the relatively stable character of today’s American federal system. We can surely affirm that the idea of integration is easily linked to the evolutionary character of the Community, while it seems to have lost much of its relevancy in the (now stabilized) United States system: as a matter of fact, while the integrative

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<sup>11</sup> See M. Cappelletti, M. Seccombe e J.H.H. Weiler, *Integration through Law*, Vol. 1, p. 15

<sup>12</sup> Since the beginning the European experience was not featured by a general stability, neither for what it concerns the exercise of Community activities nor in relation to the principles inspiring the institutional organization. Such feature characterized also the univocal identification of organs able to exercise decisional powers, and generally all the relationships occurring between Community and Member States (cf. Weiler, *id.* p. 269).

supremacy and uniformity of federal law over States common law<sup>15</sup>: in the Community, where the central authority has been weak, the courts (both those of the Member States and that of the Community) have had to play an important role in defending Community prerogatives against Member States encroachment. From this point of view, the distinction between the U.S. as a nation and the EC as, in part, an international organization has relevant consequences for the ability of each system's judiciary to serve as an integrative force. Surely the American experience serves as a positive precedent for the hopeful success of the European integrative *iter*, even if it is true that it took a long time for the American federal judiciary to secure a sound jurisdictional base for carrying on its integrative task<sup>16</sup>. In a similar way, in Europe the fear of Community power dissuaded Member States from granting to (both governmental and judiciary) Community institutions too wide powers and prerogatives<sup>17</sup> and from establishing a body of lower Community courts<sup>18</sup>. Community

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<sup>15</sup> It is also true that especially in the early XX century another function of the American judiciary (to protect constituent States against encroachment by the central authority) came to special prominence.

<sup>16</sup> The United States Supreme Court was still being faced with defiance of its appellate jurisdiction over State courts decisions some three decades after Congress gave it that jurisdiction in 1789. Additionally, although Congress created lower federal courts in the same 1789 statute, it was not until 1875 that they were given general jurisdiction over cases arising under federal law.

<sup>17</sup> Such reluctance arose from the first version of art. 228 EC, whose initial formulation did not point out any possible countermeasure suitable for Member States not complying with the judgement of the Court of Justice. The Maastricht Treaty tried to solve the problem by setting out an inquiry procedure and the potential imposition of a penalty payment.

<sup>18</sup> We must recall the role of art. 234 EC, which attributes to the ECJ the competence to give preliminary rulings over questions raised before any court or tribunal of Member States, in order to interpret Treaty and acts of the EC institution. Accordingly, the ECJ serves as a federal court (determining for example with final authority, for all courts of the Community, questions of law, including questions of private law) and as a constitutional court (by

institutions are clearly more limited in their activities than the American federal government is<sup>19</sup>: such limitation is intimately linked to the abovementioned evolutionary feature of the EC experience. The American experience was equally featured by an evolution represented by the increase of federal powers attributed to the Government: in the beginning such powers were limited and precisely enumerated by the Constitution, then they grew through an extensive reading of constitutional provisions and through the creative use of the *Necessary and Proper clause*<sup>20</sup>.

While the United States was a nation from a time long antedating Independence, on the other hand the European Community can usefully be seen as a symbiosis between inter-governmental and supranational elements, uniting some features of an international organisation of the traditional kind and some features of a federal state. Both systems include checks and balances on the vertical and on the horizontal levels, and in both experiences heavy reliance was

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determining the compatibility with the Treaty of Community legislation, or by adjudicating on the division of competences between the Community and the Member States).

<sup>19</sup> Such limitation directly flows from the attributed competences principle (principle of conferral - *competence d'attribution*) stated by art. 5 EC. Accordingly, the Community EC enjoys no general competence, but rather the specific competences or enumerated powers conferred on it by its constitutive Treaties, while all residual powers are left with the Member States. The application of such principle gets harder “[...] *the stronger is the belief that it is important to preserve the original allocation of normative powers, as so to protect States’ essential identity*” (cf. M. Cartabia, J.H.H. Weiler, *id.* at 102).

<sup>20</sup> See art. 1, s. 8 of the American Constitution: “*The Congress shall have power [...] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all the other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof*”. The first extensive reading of such clause was provided in the 1819 case *McCulloch v. Maryland* (17 U.S. 316), when the implied powers doctrine was established (see *infra* par. 1.4.2). The American *Necessary and Proper clause* finds its European analogue in art. 308 EC, a provision that is potentially unlimited in its scope (see *infra*, par. 3.5).

placed on the judiciary system as so to lead the integration process. In the U.S. the Supreme Court and the lower federal courts system played a central role in supporting the integration process, “*drawing on a tradition that views them as the authentic voice of a national community’s values*”<sup>21</sup>; in Europe, on the contrary, still there is no certain answer about whether and when a similar evolution will completely occur.

In the American checks and balances system context the pre-emption doctrine embodies one of the most used mechanism employed by the central authority at the legislative level in order to occupy – preventively or not – a specified legislative field: such ‘device’ stands besides the supremacy doctrine<sup>22</sup> and the implied powers doctrine, which have defined the current relationship existing between national law and States’ laws. On the contrary, for what it concerns the European legal order, while there is plenty of literary essays and reports about the supremacy doctrine, the doctrine of pre-emption seems to be a little bit absent, as long as it is pretty hard to find general treatments of it in the majority of today’s European law textbooks. The pre-emption principle in the Community law was (implicitly) stated by the European Court of Justice through a series of cases placed in the early 1970s and continued thereafter, in which the main achievement was the establishment of the complete and

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<sup>21</sup> See F.G. Jacobs and K.L. Karst, in *Integration through Law*, Book 1, p. 173.

<sup>22</sup> In this respect, the distinction between *federal law* and *common law* refers to the legislative authority involved from time to time: the term *federal law* (or *statutory law* or *regulatory law*) indicates the federal national law issued by the United States Congress through *regulations*, or the law issued by federal agencies delegated by the Government to adopt specific *acts* or *statutes*, in order to regulate specific areas. On the other hand, the so-called *common law* identifies the jurisprudentially formed law (case-law), developed by each State’s courts system.

exclusive competence of the EU in a number of specific fields, most importantly in Common Commercial Policy. In those fields Member States were precluded from taking any action *per se*, whether or not their actions conflicted with a positive measure of Community law; in other fields the exclusivity was not an *a priori* notion: here only the positive Community legislation caused a pre-emptive effect, barring Member States from any action, whether or not in actual conflict with Community law.

As already said, there is an enormous amount of essays dedicated to the doctrine of Community law supremacy, while the very concept of pre-emption has remained foreign to the Community legal order: in most cases it has been assimilated or linked to the supremacy question, and this is the most probable reason of its under-theorization.

In my enquiry I will try to demonstrate that though related, the two doctrines should be kept apart: supremacy denotes the superior hierarchical status of the Community legal order over the national legal orders – thus giving Community law “*the capacity to pre-empt national law*”<sup>23</sup>. Once stated the pre-eminence of Community law over national legislations, the matter is “*determining the scope of application of disposition of Community law with a view to deciding if in a given situation a conflict between Community law and national law has arisen. The problem in other words is to define the limits for national legislative activity set by the Community law*”<sup>24</sup>.

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<sup>23</sup> Robert Schütze, *Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption*, in C.M.L.Review, 43, 2006, at 1033.

<sup>24</sup> P. Baumann, *Common organizations of the market and national laws*, in C.M.L.Review, 14, 1977, pp. 303-327.



## Chapter 1: American federalism

### 1.1 1787 Federal Constitution main features

Even if the United States Constitution is not featured by the express presence of the word *federalism*, we can surely affirm that such conception represents one of the main cornerstones of the whole American constitutional system.

The federal American Constitution is at the same time featured by some typical elements of confederate system and by the presence of some peculiar aspects usually present in unitary systems: this seems to be the fundamental premise for the birth of a federal structure under which some specific political powers were originally delegated to the Congress, while all the remaining ones were given to the Member States<sup>25</sup>, according to the general presumption under which while some issues – such as national defence and inter-State relationship as commerce, for instance – are better managed on a national level, some others problems locally relevant require a decentralized governance.

It is wise to keep clear in mind that as a matter of fact the presence of the 1787 Constitution together with the Amendments represents the main distinctive attribute of the American common law experience, if compared with the British one. Originally the Constitution embodied the post-revolutionary dissatisfaction arising

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<sup>25</sup> According to the X Constitutional Amendment “*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*”.

from the decennial confederative experience<sup>26</sup>: such document is therefore an outstandingly complicated act, whose description would require a specific and dedicated essay as it appears to be featured by several different details, everyone of which is remarkable.

As the greatest part of the political acts adopted during transitional periods, the American Constitution embodies desires arising from the past, wishes coming from the present and hopes for the future, everything bound up with different elements inspired by various constitutional models acquired through ages. Additionally, it exemplifies several different ideologies – such as the federalist, republican and liberal ones – which after various conflicts and frictions managed to reach a definitive settlement with the end of the Convention meetings in Philadelphia.

Every ideology there involved, usually supported by clearly different political projects, managed to bring to debate its own requests, which were adequately represented in the final version of the act, as it was ratified by every Member State at last<sup>27</sup>. Furthermore, a striking tension gradually built up between federal forces – willing to constitute a unitary nation – and centrifugal forces, primarily fearing the establishing of a too solid Union, able to gain excessively powers, sovereignty and rights at Member States' expenses.

During the 18<sup>th</sup> century and even after the Civil War the idea of “sovereign legal order” was automatically connected on one side to

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<sup>26</sup> Cf. in general A.H. Kelly, W.A. Harbison, *The American Constitution, Its Origin and Development*, rev. ed., 1955.

<sup>27</sup> Among the various essays dedicated to the American constitutional history, referring widely to the colonial experience and to the pre-unitary model, see L.W. Levy, *The Framing and Ratification of the Constitution*, 1988; T. Ball, J.G.A. Pocock (ed.), *Conceptual Change and the Constitution*, 1988; D. Lutz, *The Origins of American Constitutionalism*, 1988.

the concept of legal order itself, i.e. to the fact that such order had been originally created according to the autonomous determination of its Founding Fathers. On the other side, it was linked to the idea of necessary correspondence between authority and exercise of governing powers: as a direct consequence, according to natural law the idea of ‘sovereignty’ (meaning the power to give authoritative orders toward the People, organized in a social structure) belonged to the People itself. While in other legal orders, according to positive law sovereignty belonged to different subjects (to the king or to an aristocratic elite, for instance), after the Declaration of Independence from the British Commonwealth the fact that in the new born union the People could be the only legitimate owner of sovereignty was undoubted, being therefore the People seen as the unitary entity which delegated to the various Member States its sovereign power through the adoption of several Constitutional Charts.

Even if as a matter of fact the concept of sovereignty was unmistakably related to the idea of ‘People’, different issues emerged in relation to the operative extent of such idea within the Union’s federal framework. Jurists from Southern States generally held that the thirteen original States delegated to the new federal government relevant portions of their sovereign rights, by the means of the Constitution: accordingly, laws produced thereon from the new central government were to be considered as prevailing on those produced individually by every Member State government. However, States were supposed to retain both the power of evaluate every possible outbound exercise of power by central authorities, and the subsequent power to recede from the Union in case of severe or repeated illegitimate excesses carried out by federal authorities. The

supreme touchstone of sovereignty was thus located in such residual power, given to every Member States as so to withdraw autonomously from the federal partnership.

On the contrary, jurists from Northern States perceived the Union as a prevailing legal order directly founded on the federal Constitution, having the exclusive right of interpreting in a binding way the effective extent of the sovereign powers delegated to the centre. Any outbound exercise of power could be rectified through particular procedural *iters* specifically designed, such as the Supreme Court's judgment. Therefore Member States could neither unilaterally judge on Constitution potential violations nor recede from the Union: accordingly, the American People unitarily considered were the only sovereign, able to act within the terms of the Constitution.

It could be useful to recall briefly some of the constitutional articles defining the relationships occurring between federal authority and Member States. Formally the whole constitutional framework is based on seven original articles establishing the foundations of the whole system of government and of the allocation of powers between States and federation; to these articles were then added several subsequent Amendments. The *separation of powers* rationalization – very favoured at that time because of the popularity of Montesquieu's *De l'esprit des lois* – became a dominant aspect of the constitutional Chart structure<sup>28</sup>, which now contains the unmissable *checks and balances* system according to which governmental powers limit each others in the effective exercise of their functions, as so to cooperate in order to achieve their constitutional goals.

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<sup>28</sup> Cf. C.L. Secondat de Montesquieu, *De l'esprit des lois*, 2 volumes, I, book XI, in particular Ch. 6 (1748, Classiques Garnier, Paris, s.d., I, at 163.).

American Republic Founding Fathers put the *separation of powers* idea into practice both vertically – i.e. between a higher central federal authority and the Member States – and horizontally, between legislative, judiciary and executive powers, to which the first three articles of the Constitution have been dedicated<sup>29</sup>. The first article, composed of ten sections, is dedicated to the legislative power; the second article, composed of four sections, is dedicated to the executive power; the third article, composed of three sections, is the so-called *judicial article*.

The legislative power was conferred to a bicameral organ called Congress, formed by a Senate (elected on a State basis) and by a House of Representatives (elected on national basis)<sup>30</sup>. Some of the dispositions founding the vertical separation of powers are included in the first article, according to which some specific entitlements are reserved to the central system of government, while the residual ones are part of the Member States' competences. Federal authority can legitimately produce law on some specific reserved areas: such

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<sup>29</sup> During the 19<sup>th</sup> century and until the New Deal revolution such double vision has been partially consolidated and partially modified: it allowed the deep fragmentation of political power and supported the autonomy of civil society, according to the idea under which the form of government should serve at best the achieving of the desired relationship between community and government. See G. Bognetti, *La divisione dei poteri*, at 121-24, ed. Giuffrè, Milano 2001.

<sup>30</sup> The institution of a bicameral system constituted a real compromise, as the task of creating a new government was not easily accomplished: disputes among the States' delegates nearly ended the Convention on several occasions. Larger States favoured the *Virginia Plan*, under which population would determine the number of representatives a State could send to the legislature. Smaller States supported the *New Jersey Plan*, which proposed that all the States would have an equal number of representatives. The Connecticut delegates suggested a compromise that settled the problem: their plan provided for equal representation in the Senate, along with representation in proportion in the House of Representatives: this proposal became known as the *Connecticut Compromise* or the *Great Compromise*.

legislative powers are divided in express or enumerated powers and implied powers.

The first set of powers is listed in section 8 of article 1<sup>31</sup>, while the implied set of powers finds its premises in the last paragraph of the

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<sup>31</sup> Art. 1, Section 8:

*The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;*

*To borrow money on the credit of the United States;*

*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;*

*To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;*

*To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;*

*To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;*

*To establish Post Offices and Post Roads;*

*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;*

*To constitute Tribunals inferior to the supreme Court;*

*To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;*

*To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;*

*To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;*

*To provide and maintain a Navy;*

same section, according to which the Congress is entitled to make all the laws considered necessary and proper in order to carry into execution the abovementioned express powers<sup>32</sup> (*Necessary and Proper clause*).

As already stated, article 2 of the Constitution is dedicated to the executive power which is represented by the President, formally elected through an indirect system of election that manages to ensure the complete democratic legitimacy<sup>33</sup>.

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*To make Rules for the Government and Regulation of the land and naval Forces;*

*To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;*

*To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;*

*To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And*

*To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

<sup>32</sup> See *supra*, footnote 31, last paragraph.

<sup>33</sup> More specifically on the presidential election procedure, and generally on the United States presidential form of government see A. Barbera, C. Fusaro, *Il governo delle democrazie*, ed. il Mulino, Bologna 2001.

The third article<sup>34</sup> of the Constitution represents the core of the whole American judicial system, as it can be clearly seen as the necessary premise of the so-called *federal jurisdiction*. First of all the Constitution sets up the necessary premises as so to guarantee judicial branch's independence from other institutional powers; then it states that the Supreme Court has *original jurisdiction* in cases

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<sup>34</sup> Art. 3: The Judicial Branch  
Section 1

*The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.*

Section 2

*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*

*The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*

Section 3

*Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.*

*The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.*

affecting governments and their representatives and in cases to which a State government is one of the parties, meaning that cases of this kind are directly judged by the Supreme Court. In other cases, the Supreme Court has only *appellate jurisdiction*, meaning that the cases are tried first in a lower court and may come up to the Supreme Court for review, if Congress has authorized an appeal for such kind of cases<sup>35</sup>.

Additionally, the relationships between Member States and federal Union are shaped according to the X Constitutional Amendment<sup>36</sup>, which briefly outlines the powers allocation scheme between central Government and peripheries. According to this disposition “[t]he 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”. During our constitutional survey we will realize how such constitutional guideline actually collides with the general vagueness of the Constitution in defining the relationships between Union and Member States, and how the Supreme Court tried to provide a satisfactory answer to related issues<sup>37</sup>.

Before going into the deep examination of pre-emption related issue it is wise to keep clear in mind how during centuries American jurists handled the Constitution in a very peculiar way, shaping its modern interpretation by overlapping to the formal articles partitioning a new substantial division which tends to individuate the so-called *clauses*. A clear example of this practice can be easily found in the

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<sup>35</sup> See *infra*, par. 1.2 dedicated to the judicial power.

<sup>36</sup> See *supra*, footnote 25.

<sup>37</sup> A bright overview of the legal oscillation concerning the interpretation of Amendment X cf. M.A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: the Demise of A Disguised Doctrine*, 99 Harv. L. Rev. 84, 1985.

abovementioned *Necessary and Proper clause*, a flexible general rule according to which Congress is entitled to take all the necessary and proper actions as so to carry on its constitutional functions and fully achieve its objectives as stated by article 1<sup>38</sup>. Many legal theories (as the pre-emption one, for instance) have been developed by the doctrine in relation to this circumstance, as so to legitimate Congressional actions and legislative steps even beyond what was originally conceived by the Founding Fathers. Another relevant clause is located in article 1 as well. I am referring the so-called *Interstate Commerce clause*<sup>39</sup>, which grants federal Congress the exclusive power of regulate commerce both externally (i.e. with foreign nations) and internally (i.e. relating to all the commercial activities occurring within the Nations, between Member States).

For what it concerns pre-emption, the most relevant clause is undoubtedly the so-called *Supremacy clause*<sup>40</sup>, according to which on one side the federal Constitution and all the laws adopted as so to assure its full execution “*shall be the supreme law of the land*”, and on the other side every State legal and judicial order is bound to the observance of such supreme laws. In this statement were found both the premise of federal law’s hierarchical predominance in case of conflict with State law, and also the constitutional prescription of a

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<sup>38</sup> See *supra*, footnote 31, last paragraph.

<sup>39</sup> See *supra*, footnote 31, 3<sup>rd</sup> paragraph: “*The Congress shall have power [...] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*”.

<sup>40</sup> See art. 6, 2<sup>nd</sup> paragraph: “*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of ant State to the Contrary notwithstanding*”. See also Ch. 2.

judiciary pyramidal scheme according to which the greatest part of the decisions delivered by every State highest court can be reviewed through the final judgment of the federal Supreme Court. The Supremacy clause had a prominent role especially during the 19<sup>th</sup> century, as the Supreme Court often referred to it in order to find a solution to recurrent conflicts between State law and federal law enacted by Congress<sup>41</sup>, being such federal organ not expressly given a real power of removing any conflicting State law.

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<sup>41</sup> See *infra*, footnote 243.

## 1.2 Judicial power and the concept of Federal Common Law

As already mentioned above, the Constitution's third article established the judiciary as a separate and independent branch of the Federal Government. The judicial power of the United States was vested "*in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish*"<sup>42</sup>. The judges were to be appointed for life, during good behaviour, and they were protected against reduction of their salaries<sup>43</sup>.

As so to challenge "the prevalence of local spirit"<sup>44</sup> existing among State courts, the First Congress did establish a system of lower federal courts<sup>45</sup> that today have jurisdiction where the opposing parties are of different States, where the United States is a party, or in a case arising under the Constitution or other federal law. The Supreme Court sits not only at the apex of the pyramid of federal courts but also as the final appellate jurisdiction in cases involving federal law that arise in the State courts<sup>46</sup>: the decision of a State's highest court concerning a question of federal law can be reviewed by the Supreme Court, with or without the State court's blessing.

In carrying out both the "federal" and the "constitutional" judicial function, the Supreme Court is thus joined by a nationwide body of

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<sup>42</sup> U.S. Const, Art. 3, par. 1.

<sup>43</sup> *Id.*

<sup>44</sup> A. Hamilton, *The Federalist*, at 486.

<sup>45</sup> See the Judiciary Act of 1789, 1 Stat. 73.

<sup>46</sup> The Supreme Court's jurisdiction is established in U.S. Const, Art. 3, par. 2, and in 28 U.S.C. par. 1251-58. At least some of the Framers of the Constitution expected the federal judiciary to enforce the Constitution by refusing to enforce legislation that violated its terms: thus, when the Supreme Court announced the principle of judicial review in 1803 (See *Madbury v. Madison*, 5 U.S. (1 Cranch) 137) it broke no new theoretical ground.

lower federal courts whose judges are appointed by the President with Senate approval, and which basically operate separately from the courts of the States. The existence of this federal court system has proved fundamental to the development of the federal legal system in America, as the Supreme Court's appellate jurisdiction over State court judgments on question of federal law is essential not only for the uniformity of interpretation of federal law, but also for the supremacy of federal law over inconsistent State law: the Supremacy clause<sup>47</sup>, which provides the substantive basis for the supremacy of federal legislation, finds in the Supreme Court's appellate jurisdiction an institutional mechanism for translating that supremacy into case-by-case reality.

The jurisprudential *iter* followed by the Supreme Court was strongly influenced by the judicial nationalism doctrine promoted during the 19<sup>th</sup> century, according to which there is a federal "general common law" – apart from the common law of each of the several States – that should govern decisions by the federal courts in cases not governed by statute. Such federal common law was thus seen as an opportunity for the federal judiciary to serve as a unifying force, developed under the supervision of the federal courts. Justice Story helped building such notion in the 1842 decision of *Swift v. Tyson*<sup>48</sup>, where at issue was the enforceability of a type of secured credit in pre-Civil War America, recognized in most States but not in New York, the site of litigation. The spread of interstate commerce necessitated some form of uniform rules concerning the

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<sup>47</sup> U.S. Const. Art. 4, par. 2.

<sup>48</sup> 41 U.S. (16 Pet.) 1 (1842). See S. Issacharoff & C.M. Sharkey, *Backdoor Federalization*, American Law & Economics Association Annual Meetings Paper n. 39, 2006, p. 154-163.

enforceability of commercial paper, regardless of the State in which the holder in due course might seek to enforce judgment. Justice Story held that, in the absence of express State statutes, federal judges were charged with articulating a general common law to be developed through the federal courts: a federal court in a diversity-of-citizenship case was thus to apply such general common law, even if the decision of State courts were contrary to that general law. State courts seemed persuaded that such reasoning would have led to a desirable uniformity in commercial matters, and above all the decision seemed a clarification of the role of the “general common law” as it applied to commercial transactions unaffected by the particularized concerns of local law. As the *Swift* rule began to intersect the decidedly more interventionist jurisprudence of the Supreme Court after the Civil War, it emerged as a symbol of the critical fault line in a system premised on dual sovereignty: as the same case could well be decided differently depending upon the accident of citizenship of the parties, the rule encouraged litigants to select a State or federal court on the basis of the rules of law that each court might be predicted to apply to their cases. This forum-shopping opportunity meant that while the “general common law” might be uniform from one federal court to another, the result of a case in a give State may vary, depending on whether it was brought in a State or federal court: as long State courts continued to exercise jurisdiction over commercial matters that were insulated from appellate review by the Supreme Court, Story’s dream of uniformity of commercial law could not be realized.

After a century, in 1937 the Supreme Court overruled *Swift v. Tyson* by stating in *Erie v. Thompkins*<sup>49</sup> that federal courts are supposed to apply State law and not to develop their own common law, otherwise States' authority would be infringed by such judicial activism. Here the Supreme Court pointed out that when a federal court decides a case not governed by statute, it normally must follow the decisions of the courts of the State in which it sits<sup>50</sup>. If there is any "general common law" today, it is to be found either in acts of Congress (which is the institution explicitly entitled by the Constitution to produce federal law) or in the parallelism to be found in State common law precedents or in the adoption by the States of uniform legislation<sup>51</sup>.

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<sup>49</sup> 304 U.S. 817 (1937).

<sup>50</sup> There is one major exception: federal courts will follow the Federal Rules of Civil Procedure even where State procedural rules would produce significantly different results (see *Hanna v. Plumer*, 380 U.S. 460 (1965)).

<sup>51</sup> Such as the Uniform Commercial Code. The "Federal Common Law" nonetheless remains alive – although reduced in stature – in a number of fields such as maritime cases, cases in which governments are in contention with each others, certain cases in the area of foreign relations. Apart from those limited fields, however, the "American Common Law" is the law of the several States, and its most authoritative interpreters are the highest State courts (the U.S. Supreme Court will not review a decision of a State court that rests independently on a ground based on State law, even when there is a federal issue in the case: see Cappelletti & Golay, footnote 4 at par. 4.B.3.a in M. Cappelletti, M. Seccombe e J.H.H. Weiler, *Integration through Law*).

### 1.3 Dual federalism and cooperative federalism

The supreme federal legal order created by the United States Constitution shares its operative field with other fifty legal orders belonging to the several Member States who joined the Union: according to the X Amendment they retained their original sovereign powers, limited only by the constitutional restrictions on which they freely agreed.

The fundamental need for a flexible constitutional framework, suitable for the surrounding conditions and for unpredictable requirements made the Founding Fathers chose a constitutional wording which is not too elaborated or detailed, as so to describe generally the edges of a framework which is capable of adaptation in order to find the most suitable balance between striking needs through the interpretative action of the Supreme Court.

Since its birth and still nowadays north American federalism deeply evolved, and such transformation has been read in different ways, referring to two opposite ways of interpretation. The first concept of such phenomenon is called *dual federalism*: it has long been the common starting point in legal debates about American legal structure<sup>52</sup> prevailing during the whole 19<sup>th</sup> century. As the Supreme Court has expressly stated, “[*The American legal system*] is a ‘dual

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<sup>52</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 246 (2005) (noting that dual federalism “continues to haunt contemporary discussions of federalism”); *id.* at 251–52. The Court frequently invokes “dual sovereignty” as the foundation of its federalism jurisprudence. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”).

*system of government*”<sup>53</sup> in which State governments and federal government are two uncoordinated domains, operating in separate and clearly demarcated spheres<sup>54</sup>. Although many commentators generally hold that until the 19<sup>th</sup> century American federalism was mainly featured by a dual structure (later replaced by a cooperative structure with the New Deal revolution, during the first half of the 20<sup>th</sup> century), and despite repeated declarations of the death of dual federalism<sup>55</sup>, this vision of constitutional structure continues to hold a strong grip over the modern jurisprudence. As a matter of fact some Authors agree with a view according to which Member States are units acting separately and autonomously from the central federal government<sup>56</sup>.

During the 19<sup>th</sup> century American federalism was featured by a dual structure according to which judiciary and legislative allocation of competence was strongly demarked and imperative: federal government and States were allowed to act only within their functions field, as the total lack of competence on other subjects

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<sup>53</sup> Cf. *Comm'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982) (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1942) and *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

<sup>54</sup> According to E. Corwin, the dual federalism model is composed of four principles: 1) The national government is one of enumerated powers only; 2) Also the purposes which it may constitutionally promote are few; 3) Within their respective spheres the two centres of government are “sovereign” and hence “equal”; 4) The relation of the two centres with each other is one of tension rather than collaboration (see *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950)).

<sup>55</sup> Cf. G. Bognetti, *Lo spirito del costituzionalismo americano*, Vol. 2, at 203, Giappichelli ed., Turin 2000; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, Publius: J. Federalism, Spring 2001, at 15.

<sup>56</sup> See J.C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 Ind. L. Rev. 35, 41-43 (1998).

strictly precluded any outbound action. Foreign affairs issues and foreign relations belonged to the federal authority, whilst federal action in domestic affairs was so narrow as so not to infringe traditional Member States' prerogatives on them. In relation to these subjects federal action was allowed only for specific reasons, such as the defence of individual fundamental freedoms or national commercial market protection against invasive State regulation.

Basically the allocation of competence was founded on one side on the exclusive (or largely prevalent) sovereignty given to central authority in foreign matters and in some domestic related issue, while on the other side Member States retained exclusive competence relating to some the greatest part of domestic issues<sup>57</sup>: such sovereign authority was limited only by constitutional safeguard limits, therefore outside the influence of central government. This conception of constitutional structure, often described as a *layer cake*<sup>58</sup>, posits the federal government and state government operating in separate, clearly demarcated spheres, both on the legislative and the judicial sphere.

The New Deal revolution upset such system, as it inspired and favoured a whole new way of interpretation of the constitutional articles and rules (such as the *Interstate Commerce clause*) which identified and defined central authority's prerogative: basically it allowed the substantial overlap of federal legislation on States' legislations in many relevant social and economical fields:

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<sup>57</sup> Civil law, tort law and penal law, which include the so-called "traditional state policy powers".

<sup>58</sup> See N.M. Davidson, in *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, Virginia L. Rev. 93-2007, p. 959-1034.

accordingly, the concurrent competences area between centre and peripheries grew dramatically, thus allowing federal authority to penetrate deep into almost every related area, following therefore the noticeable reduction of State rules' application, as a direct consequence of the Supremacy clause enforcement at a national level. Accordingly, during the 1950s some commentators held that as a matter of fact, on the juridical and constitutional level American federalism was unable to provide any real guarantees for Member States' prerogatives: the *enumerated powers* principle had been somehow forgotten to the detriment of States' legislative competences.

Such *dualistic* conception of federalism – featured by a complete separation between States and centre – has constantly been held by the Supreme Court until the first half of the 1990s, with the exception of a single landmark decision where the Court attempted to distinguish between traditional and non-traditional State functions<sup>59</sup>.

Notwithstanding such extensive cancellation of competences allocation both on a formal and substantial level, Member States managed to keep a relevant role as political and administrative centres of law production. As a matter of fact federal law now relates to all the necessary and relevant subjects as so to assure a robust

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<sup>59</sup> In *National Leagues of City v. Usery*, 426 U.S. 833, 855 (1976) the Supreme Court held that Congress may not apply the *Commerce power* arising from the Commerce clause by forcing State to follow its determinations in the State government functions area: the Court divided 5 to 4 in striking down a congressional statute that extended federal wage-and-hour provision to almost all State employee. The Court listed State functions as traditional and exempt from congressional control through the Commerce power, but such decision was overruled nine years later in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), again by a 5-4 vote. During the 1990s, the Court has once again revisited this issue, casting doubts on *Garcia* through a string of 5-4 decisions.

economical national development, whilst the States are supposed to manage the regulation and definition of all the legal instruments and institutions through which everyday civil society life can carry on. The vision of federalism there emerging is usually identified as *cooperative federalism*: in spite of the dualistic vision it involves a presumption according to which Member States and central power are constitutionally bound to cooperate. Such conception has frequently been described as *marble cake*<sup>60</sup>, a metaphor that perfectly fits the interstitial nature that features centrally produced federal law, if compared to the common law body produced by the Member States.

The cooperative model allows finding a remedy to some of the negative outcomes arising from the dual model, which basically masks two different aspects of federal constitutional structure. First, as a description of actual intergovernmental relations, dual federalism ignores the ubiquity of policies that involve cooperation rather than conflicts, while cooperative federalism involve ongoing cooperation rather than clear and separate spheres of competing authority. Second, in contemplating two, and only two, sovereigns, it tends to ignore all the cooperative and collaborative relationships that may occur among different government levels, by excessively squeezing the roles and functions of all the local governance intermediary levels.

Although the dual-sovereignty model predominates in judicial account of federalism, in practice Congress has long chosen to approach regulations, spending and enforcement through regimes that

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<sup>60</sup> See N.M. Davidson, *supra* footnote 46.

actually blur the boundary between national and state authority<sup>61</sup>, involving varying shades of pre-emption and the beginning of a collaborative trend between States and federal power, as so to reflect the existing dynamism of relationships between different levels of government<sup>62</sup>.

Starting most notably with the environmental protection statutes enacted during the 1970s, federal regulatory programs increasingly adopted such collaborative spirit by relying on State agencies in order to implement federal law<sup>63</sup>: in enacting such programs,

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<sup>61</sup> See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* 619, 624 (2001) (“*The contemporary debate about whether to prefer, a priori, the states or the federal government for certain forms of lawmaking misses dynamic interaction across levels of governance. In practice, federalism is a web of connections formed by transborder responses (such as interstate agreements and compacts) and through shared efforts by national organizations of state officials, localities, and private interests*”).

In addition to *cooperative federalism* as a primary alternative to dual sovereignty, contemporary accounts in the legal literature emphasize a variety of other theoretical frames for understanding the federal-state relationship. *Process federalism*, for example, emphasizes procedural and political protections, rather than strict judicial enforcement, to manage the federal-state balance. See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 *Vill. L. Rev.* 1349, 1350, 1390–91 (2001). *Empowerment federalism*, by contrast, seeks to magnify state and federal power without limiting either. See, e.g., Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 *U. Kan. L. Rev.* 1219, 1221, 1234 (1997); Deborah J. Merritt, *Federalism as Empowerment*, 47 *U. Fla. L. Rev.* 541, 541–42 (1995). Robert Schapiro proposes yet another alternative, which he labels *interactive* or “*polyphonic*” *federalism*, emphasizing intergovernmental dialogue as a hallmark over cooperation or confrontation (see R.A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 246, 2005).

<sup>62</sup> A survey on cooperative federalism is provided in P.J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 668–73 (2001).

<sup>63</sup> For example, the *Resource Conservation and Recovery Act* (RCRA) anticipates that State agencies will act in lieu of the federal government to administer and enforce its hazardous waste program (24 U.S.C. § 6962(b) 1994), making clear that any State agency action “*has the same force and effect*” as action taken by the federal Environment Protection Agency; see *Harmon Indus. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999) (noting that

Congress opts for the benefits of diversity in regulatory policy within a federal framework. Rather than pre-empting the authority of State agencies and supplanting them with federal branch offices, cooperative federalism programs invites State agencies to superintend federal law. Cooperative federalism has allowed thus Congress to set forth some uniform federal standards – as embodied in the statute, federal agency regulations, or both – but leaves State agencies with discretion to implement the federal law, supplement it with more stringent standards<sup>64</sup>, and, in some cases, receive an exemption from federal requirements.

Such mutual cooperation allowed State to experiment with different approaches and tailor federal law to local needs and conditions; additionally, greater authority has generally been granted to State organs involved in the implementation of federal law, given their effective participation in the enforcement procedure<sup>65</sup>.

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RCRA gives state agencies prime responsibility of implementing this federal law).

<sup>64</sup> Cooperative federalism statutes regularly include *savings clauses*, which explicitly allow states to impose more stringent requirements than federal law demands. See, e.g., *Clean Water Act*, 33 U.S.C. §1370 (1994); *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), 42 U.S.C. §9614(a) (1994); *Telecom Act*, 47 U.S.C. §251(d)(3) (Supp. IV 1998). As the Second Circuit put it in *Mianus River Pres. Comm. v. EPA*, 541 F.2d 899, 906 (2d Cir. 1976):

*“By the contemplation of minimum federal standards, however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to attempt a pre-emption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards”.*

<sup>65</sup> In some cases, the cooperative federalism statute takes the form of allowing state law to operate within a federal scheme: see *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (calling state water quality standards promulgated by states

A critical feature of cooperative federalism statutes is the balance they strike between complete federal pre-emption (a pre-emptive federalism where State legislative acts are superseded by paramount congressional intent and supreme federal law) and uncoordinated federal and State actions in distinct regulatory spheres (a dual federalism where federal and States' authorities act separately and in an uncoordinated way, producing sometimes unclear legislative schemes, lacking exactness and accuracy of details to the detriment of third regulated parties<sup>66</sup>). The rationale for cooperative federalism regulatory strategy makes sense thus as the benefits it ensures of allowing for diversity in federal regulatory programs grants the compromise between the need for national uniformity and the search for specific solutions, locally oriented. By allowing Member States to adopt legislative acts that encourage the local adaptation of national standards to local needs, and by favouring State implementation of federal law, Congress frequently opted for a collaborative attitude instead of governing without State cooperation. In particular, there are at least two related reasons why the federal government has decided to promote diversity in federal regulatory regimes: (1) to allow States to tailor federal regulatory programs to

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with EPA's guidance under Clean Water Act "*part of the federal law of water pollution control*").

<sup>66</sup> This aptly characterizes the challenges under the old dual federalism regime set forth in the *Communications Act* of 1934. See § 652, 48 Stat. 1064 (current version codified as amended in scattered sections of 47 U.S.C.). Other statutory regimes create similar challenges for the regulated parties. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (noting "tension" under *Atomic Energy Damages Act* (Price-Anderson Act), 42 U.S.C. §2210 (1994), where "*Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear accidents [...] even though it was well aware of the [Nuclear Regulatory Commission's] exclusive authority to regulate safety matters*").

local conditions and to promote competitions within a federal regulatory framework; and (2) to permit experimentation with different approaches that may assist in determining an optimal regulatory strategy<sup>67</sup>.

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<sup>67</sup> Some commentators have suggested that a fourth possible reason in favour of decentralised implementation of statutory regimes is enhancement of political participation. See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203, 1232 (1997) (“*Political participation is likely to increase as policy responsibilities are decentralized to state and local governments.*”). In a succinct explanation of the significance of federalism that touches on these four reasons, the Supreme Court explained that:

*It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. (Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).*

See also Deborah R. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Columbia L. Rev. 1, 3-10 (1988).

### 1.3.1 Local tailoring and interstate competition

A cooperative federalism approach recognizes that many regulatory problems “*are so complex that they cannot be resolved by one level of government acting alone; rather, they require cooperation among all levels*”<sup>68</sup>. Such “reconstitutive” approach to regulatory programs is embodied by a strategy which can “*afford flexibility to accommodate diverse subsystem conditions and values, broaden decisional responsibility, and reduce costly and dysfunctional centralized decisionmaking*”<sup>69</sup>: in some cases the federal government’s interest is clearly to cooperate with States’ administrations by requiring their legislative enforcement and cooperation as it simply does not have the know-how and resources to tailor broad standards to local circumstances<sup>70</sup>. Additionally, another benefit which may emerge from such a cooperative approach may be found the so-called interstate competition, i.e. the belief that by adopting a flexible federal regulatory regime a cooperative federalism program allows for a degree of competition between the States for residents, capital, and economic activity in an increasingly

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<sup>68</sup> Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 Yale L. & Pol’y Rev. 187, 215 (1996).

<sup>69</sup> Richard B. Stewart, *Reconstitutive Law*, 46 Md. L. Rev. 86, 92 (1986).

<sup>70</sup> See Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1544 (1994): “*Realistically speaking, Congress [cannot] [...] have federal bureaucrats assume full responsibility [for administrative programs]*”; cf. also John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, 60 Law & Contemp. Probs., Summer & Autumn 1997, p. 220: “*To be effective, regulatory officials must be knowledgeable about local conditions and concerns to set appropriate regulatory priorities and to plan for future developments*”.

mobile society<sup>71</sup>. One classic approach for achieving these objectives is to set a federal minimum standard legislative “floor” that provides flexibility to the States to enact stricter standards, in order to adapt federal rules to their local situation: such scheme, which has been adopted by almost all federal environmental statutes, appropriately recognizes a role for central administration involvement, but remarkably leaves the States with important flexibility in order to adapt federal legislative provisions to local conditions, compete for superior regulatory approaches, and experiment with various normative arrangements<sup>72</sup>. As an important case in point, modern environmental regulation convincingly demonstrated how the need to tailor environmental policy to local conditions and the even more important need to use State technical and personnel resources force Congress to share part of its authority<sup>73</sup>, by favouring State tailored implementation: a notable case in point concerns a federal body (namely the Federal Environmental Protection Agency – EPA) which during the 80’s stepped in for the of Idaho State, in order to

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<sup>71</sup> See Jacque LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555, 559-60 (1994), discussine Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

<sup>72</sup> Another way to encourage local competition may be exempting State from federal requirements when they supplement federal law with more stringent standards (see David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 Harv. Envtl. L. Rev. 1, 31 (2000)

<sup>73</sup> See John D. Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 Tul. L. Rev. 299, 313 (1983): “One of the primary reasons for utilizing the cooperative approach is the great variation in geological and ecological conditions under which surface mining is conducted.”. As one example, Congress structured 1977 SMCRA (Surface Mining Control and Reclamation Act) to enable State to regulate surface mining in a manner that best fit local needs and conditions.

administer its air quality regulatory program: the federal agency clearly was not up to the task, reportedly spending almost five times as much as the State administration would have spent to carry on and complete the same operations<sup>74</sup>. As a result of this need for cooperation, both the States and the federal government are well aware that they are tied together in their ability to administer cooperative federalism programs, and the resulting interdependence gives each important influence over the other.

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<sup>74</sup> Martha Derthick, *American Federalism: Madison's Middle Ground in the 1980s*, 47 *Pub. Admin. Rev.* 66, 70 (1987).

### 1.3.2 Legislative experimentation within the States

In defence of federalism, Justice Brandeis in 1932 recalled the concept of legislative experimentation by explaining that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens so choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”<sup>75</sup>.

When Congress allows States to enjoy significant regulatory discretion, they are enabled to experiment and test different normative solutions, learning from one another when performing complex regulatory tasks. One of the most relevant cases of cooperative federalism experimentation concerns an environmental protection related area, namely water and air pollution: between the second half of 1960s and the beginning of 1970s Congress enacted a string of federal acts defining environmental standards and requirements on a national level: such standards were binding for Member States, which were however allowed to adopt the final legislative implementation by choosing the necessary and proper means. Most provisions of the federal *Clean Air and Water Act* set a federal “floor” on a particular issue, leaving the States free to impose more rigorous standards above that level. Others, such as the mobile

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<sup>75</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Justice Brandeis, dissenting Opinion). See also S. Issacharoff & C.M. Sharkey, *Backdoor Federalization*, American Law & Economics Association Annual Meetings Paper n. 39, 2006 (<http://law.bepress.com/alea/16th/art39>).

source provision of the *Clean Air Act*<sup>76</sup>, impose non-discretionary standards that set both a floor and a ceiling.

Perhaps the most interesting aspect of the *Clean Air* regime is California's exemption from the mobile source provisions, which allows California to set significantly more stringent standards for emissions by autos and other vehicles than would otherwise be permitted under federal law<sup>77</sup>. The exemption illustrates two central federalism values: the value of state experimentation (the exemption is based in part on California's pioneering efforts in the field) and the need to tailor regulatory solutions to local conditions.

In the context of California legislative experimentation two other aspects are particularly interesting: first of all if the experiment works out properly then the nation as a whole may benefit through its adoption at the federal level; secondly, Californian legislative experimentation in the environmental area has also been followed by two other remarkable outcomes: on one side it corroborates the assumption under which adopting experimental legislative solutions may provide a benefit for the nation as a whole, because if such experimentation works out fine it can be then adopted at the federal level; on the other side such phenomenon highlights the fact that relying on their local needs some States may increase their level of influence and importance within the Union political balance, by adopting legislative solutions exempt from pre-emption and therefore emerging as more autonomous than other States<sup>78</sup>.

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<sup>76</sup> See *Motor Vehicle Air Pollution Control Act* of 1965, Pub. L. No. 89272, 79 Stat. 992 (1965).

<sup>77</sup> 42 U.S.C. § 7543(b)(1).

<sup>78</sup> As E. Young properly points out, "*California is so big that its policies have an impact even if they are never adopted outside the boundaries of the Golden*

Resisting the immediate institution of a uniform national rule hedges the federal government's bet by waiting to pick a single standard. Especially on complicated subjects, the evaluation and survey of State specific solutions may lead to the individuation of a federal definitive standard, avoiding thus the premature selection of suboptimal national standards. The absence of a federal standard in difficult regulatory policy areas can help ensure that the regulatory regime does not "lock in" a suboptimal standard: in this context national uniformity is not seen as an absolute value which as to be enforced at any cost, but as a relative value which should be favoured only if empirical observation of States legislative experimentations' effects justify its adoption<sup>79</sup>.

Such considerations reinforce the impression that pre-emption is generally deregulatory in nature. While the federal statutes may originally have been enacted as responses to State inaction, the *Clean Air and Water Act* experience evidences that State governments today often seek to go further in protecting the environment than federal law provides: under such circumstances pre-emption becomes important where the States have not only enforced the federal "floor" but gone further by imposing more stringent standards, and regulated

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*State. California on its own outpaces most of the world's nations in energy consumption, and its auto market is sufficiently large that no automaker, even foreign ones, can afford to ignore its requirements". Cf. R.A. Epstein, M.S. Greve (ed.), Federal Preemption: States' Power, National Interests, AEI Press 2007.*

<sup>79</sup> According to some Commentators, "[u]niformity mandated at the 'wrong' level, or administered incompetently even at the 'right' one, may well be worse than heterogeneous outcomes among the states.": see Peter H. Schuck, *Some Reflections on the Federalism Debate*, 14 *Yale L. & Pol'y Rev.* 1, 19 (1996). Put differently, where the optimal approach is unclear, "*the learning model of the law suggests that values other than uniformity may be primary*": Mary Loring Lyndon, *Tort Law, Preemption and Risk Management*, 2 *Widener L. Symp. J.* 69, 80 (1997).

entities seek relief from these additional regulatory burdens by invoking federal law<sup>80</sup>.

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<sup>80</sup> See, e.g., *Central Valley Chrysler-Plymouth v. California Air Resources Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002) (issuing a preliminary injunction, on pre-emption grounds, against California's new zero-emissions-vehicle rules).

## 1.4 Cooperative federalism constitutional grounds

As already stated, the American federal Constitution includes a set of provisions meant to safeguard the allocation of powers between Union federal government and Member States. Such provisions are expressed through restrictions, limitations and constraints towards the constitutional institutions there involved. We can surely affirm that the interpretation of such provisions, as it was delivered during the first half of the 18<sup>th</sup> century, established the grounds of the current federal constitutional theory.

Between 1801 and 1835 John Marshall was appointed Chief Justice at the United States Supreme Court: during that period of time he managed to shape the Supreme Court jurisprudence by exercising its extraordinary influence and by imposing its dynamic view of the Constitution, deeply related to its expansive understanding of national powers<sup>81</sup>. At the end of the century the expansive view embraced by Marshall was replaced by a more restrictive approach, which lasted until the 1930s, when because of the severe economical crisis a stronger governmental intervention was required. In 1933 Congress started adopting a string of economical legislative acts as so to find a solution to the crisis, while the Supreme Court gradually favoured the New Deal regulatory programme.

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<sup>81</sup> In one of its well known Opinions he declared: “*we must never forget that it is a Constitution we are expounding*” (*McCulloch v. Maryland*, 17. U.S. (4 Wheat.) 316, 407 (1819), on which see *infra* par. 1.4.2). In opposition to Marshall’s interpretative efforts, see S.C. Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 Connecticut Law R., 829, 1992, where the Author highlights the unreasonably nationalistic extent of the principles expressed in *McCulloch v. Maryland* and *Gibbons v. Ogden*, cases which apparently destabilized the delicate asset of powers as originally stated by the Constitution.

In 1941<sup>82</sup> the Court started reinforcing the “constitutional revolution” officially begun in 1937<sup>83</sup> by President Franklin D. Roosevelt: for what it concerned the system of relationships occurring between national federal law and Member States various legal orders, the most important restrictions on the latter arose from the Supremacy clause<sup>84</sup> – which ensures federal law primacy on every conflicting State law – and from the tenth section of article 1<sup>85</sup>, which expressly grants federal power the exclusive competence on some subjects to the detriment of Member States’ prerogatives. The aim of such constitutional restrictions is namely to preserve the Union’s existence by neutralising probable centrifugal forces: therefore such limitations are primarily addressed to the States, whereas the federal power as well has to comply with them, by not enacting legislative acts which can potentially authorise States to go beyond the limits set by the Constitution.

Such restrictions can be conceptually categorised in two classes. The first class includes all those limitations whose respect is granted by the attribution to Congress of specific coercive powers, suitable to be exercised toward Member States in case of necessity. It includes all the limitations listed in abovementioned section tenth of article 1, according to which without the consent of Congress the States cannot tax goods entering or leaving their territory, and cannot make treaties or negotiate with foreign countries. Therefore such limitations on

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<sup>82</sup> See *United States v. Derby*, 312 U.S. 100 (1941): here the Court’s unanimous Opinion embodies its approval for the *New Deal* plan.

<sup>83</sup> See the case *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

<sup>84</sup> See *infra* Ch. 2.

<sup>85</sup> According to such section “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws”.

States' powers arise from the Constitutional system considered as a whole, because of the mutual relationship between their listing and the correspondent granting to Congress of the *consent* power, by the means of which State actions may be authorised. On the contrary, the second class of restrictions on States' powers includes all those limitations abstracting from any potential granting of specific powers to Congress, such as the impossibility of unilateral rescission from the federal Union agreement or the core principle according to which neither the States nor the Congress can legitimately modify relations and representative instruments occurring between the People and its federal representatives, as disciplined by the constitutional text<sup>86</sup>.

In such context, the Supreme Court's interpretation of the *Dormant Commerce clause* and of the *Necessary and Proper clause* helped defining the relationships occurring between federal power and States' prerogative, deeply influencing the balance of powers between centre and peripheries.

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<sup>86</sup> See, generally, L.H. Tribe, *American Constitutional Law*, 3<sup>rd</sup> ed, Vol. 1, Foundation Press.

#### 1.4.1 *Interstate Dormant Commerce clause* and congressional consent to State laws

Over the last half-century the powers of the federal government have expanded through an increasingly muscular reading of the Commerce clause. With the broadened scope of federal power, the Supreme Court has engaged the delicate balancing act inherent in a dual sovereign world, increasingly determining whether State law has been pre-empted by federal laws, policies, and regulations<sup>87</sup>. Underlying the balance between federal and state power is the critical recognition that, “[t]he extent to which a federal statute displaces (or pre-empts) state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government”<sup>88</sup>.

According to the provision stated in article 1, section 8, third paragraph, of the federal Constitution the Congress is the only constitutional organ entitled to regulate commerce with foreign Nations, among the several States and with the Indian Tribes<sup>89</sup>. Even if the constitutional text explicitly tends to limit States’ influence in

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<sup>87</sup> At least since *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Supreme Court has recognised the ability of federal law to trump inconsistent or conflicting state law.

<sup>88</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 225 (2000). That said, “[t]he powers of the federal government and the powers of the state overlap enormously. Although the Constitution makes a few of the federal government’s powers exclusive, the States retain concurrent authority over most of the areas in which the federal government can act.” *Id.* See also *Kelly v. Washington*, 302 U.S. 1 (1937) (“Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected”).

<sup>89</sup> Such provision is the so-called Commerce clause: see *supra*, footnote 39.

the sole area of commerce with foreign Nations<sup>90</sup>, for at least 150 years<sup>91</sup> the Supreme Court deemed the Commerce clause as relevant not only in such cases, but also in all cases of commercial activity between the States, including additionally not only transactions across State boundaries but also any activity that affects commerce in more than one State within the Nation. The Court has thus construed this clause as incorporating an implicit negative restraint on State power even in the absence of congressional action, perceiving it as the real basis of a substantive restriction on permissible State regulation of interstate commerce<sup>92</sup>.

As stated by the Supreme Court's jurisprudential interpretation, although Congress failed to enact legislation pre-empting State commerce regulations, nevertheless State regulations should be deemed as invalid, as a violation of the Commerce clause<sup>93</sup>. The Court held such view when it found that such regulations either discriminate against out-of-state interests or unduly burden the free flow of commerce among the States. The Commerce clause in its "dormant" state is thought to invalidate such State regulations, although it is accepted that Congress may choose to overrule the

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<sup>90</sup> See Art. 1, par 10, 2<sup>nd</sup> par.: "*No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws*".

<sup>91</sup> Since the historical case *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852).

<sup>92</sup> See *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Justice Scalia, joined by Thomas, J., concurring in the judgment: "*The 'negative commerce clause' [...] is negative not only because it negates State regulation of commerce, but also because it does not appear in the Constitution*").

<sup>93</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (State statute requiring prescribed packaging for native fruit sold outside State unconstitutionally burden interstate commerce); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (State statute requiring specific type of read fender mudguard for truck unconstitutionally burdened interstate commerce).

judicial invalidation of a particular State regulation by statutorily authorising it<sup>94</sup>. The Dormant Commerce clause is featured thus by a negative implication whose theory finds its basis in the interpretation of one of those “great silences”<sup>95</sup> which feature the constitutional text, and it has been gradually developed and supported by the Court’s judicial activism: the Court held that “[a]lthough the language of th[e] Clause speaks only of Congress’ power over commerce [...] it also limits the power of the States to erect barriers against interstate trade”<sup>96</sup>. The contours of the Dormant Commerce clause are fairly clear, although the doctrine is often the target of criticism both on and off the Court<sup>97</sup>.

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<sup>94</sup> In *Southern Pacific Co. v. Arizona* ex rel. *Sullivan*, Chief Justice Stone, speaking for the Court, stated that Congress has “undoubted” power to “permit the states to regulate commerce in a manner which would otherwise not be permissible” 325 U.S. 761, 769 (1945). See generally *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-40 (1946) (McCarran Act constitutionally validated state statute that discriminated between foreign and domestic insurance companies).

<sup>95</sup> Cf. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949): (Justice Jackson) “Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution”. See more specifically v. R.J. Pierce, *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Pre-empt State Regulation*, Univ. of Pittsburgh Law R., Vol. 46:607, 1985.

<sup>96</sup> Cf. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991).

<sup>97</sup> Some Commentators disagree with this view by holding that the supposed negative implication flowing from the Commerce clause lacks a foundation or justification in either the Constitution’s text or history: Congress’s power to regulate interstate commerce has grown only through judicial interpretation, and such implied extent of the Commerce clause alters the delicate balance of federalism clearly manifested in the constitutional text, by undermining the Constitution’s carefully established textual structure for allocating power between federal and state sovereigns: “[It has been argued] that the Court may “read into” the Constitution’s broad precepts that lack a specific basis in text – what has been referred to as the “unwritten constitution”. Such a position has in fact been specifically urged as a justification for the dormant commerce clause” (M.H. Redish, S.V. Nugent, *The Dormant Commerce clause and the Constitutional balance of Federalism*, Duke Law Journal, September 1984 no.

The historic foundations of the Dormant Commerce clause doctrine can be found in two landmark cases (*Gibbons v. Ogden*<sup>98</sup> of 1824 and *Willson v. Black Bird Creek Marsh Co.*<sup>99</sup> of 1829), with particular focus on the Opinions delivered by Chief Justice Marshall's, the greatest advocate and architect of a strong central government. Under his leadership the Court established itself as a co-equal branch of the federal government, rather than as a mere subordinate of the legislative and executive branches; furthermore, the Marshall Court systematically established the national government as the political and legal superior to the State governments: this latter achievement was realised principally by Marshall's expansive interpretation of the Supremacy clause in *McCulloch v. Maryland*<sup>100</sup> and by the standards for federal pre-emption of State law he enunciated in *Gibbons v. Ogden*. Since this latter case the Supreme Court has struggled with the issue of whether Congress's power to regulate commerce among the several States was exclusive or concurrent with the States: a concession law enacted by the State of New York granted to Mr. Ogden a monopoly on the right to operate steamship between New York and New Jersey, whilst Thomas Gibbons, a citizen of New Jersey who had a coasting licence under Congress's Federal Navigation Act of 1793, was held by State courts to have violated

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4, pp. 569-617). See also *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Justice Scalia, concurring: "*The so-called 'negative' Commerce Clause is an unjustified judicial invention*").

<sup>98</sup> 22 U.S. (9 Wheat.) 1 (1824). According to V. Dinh this case "*is considered the foundation of the 'dormant commerce clause'*" (see V. Dinh, *Federal Displacement of State Law: the Nineteenth Century View*, in R.A. Epstein, M.S. Greve (ed.), *Federal Preemption: States' Power, National Interests*, AEI Press 2007).

<sup>99</sup> 27 U.S. (2 Pet.) 245 (1829).

<sup>100</sup> 17 U.S. (4 Wheat.) 316 (1819).

such monopoly. He appealed the Supreme Court, arguing that the federal law conflicted with and trumped the State monopoly: the Court was thus asked to solve the conflict between the federal licensing law and the State monopoly. Justice Marshall observed in his opinion that Congress's power over commerce was "*complete in itself, [as it] may be exercised to its utmost extent, and acknowledges no limitations, other than prescribed in the Constitution*"<sup>101</sup>: Marshall's gloss on the Supremacy clause's directive to set aside "contrary" State laws was condensed in the ruling that State laws that "*interfer[e] with, [or are] contrary to*" federal law must be displaced by federal law, which "*in every such case [...] is supreme*"<sup>102</sup>. To determine whether the federal act did indeed conflict, Marshall turned to statutory construction, as so to decide whether the word "licence" meant permission and entitlement to trade or merely, as Ogden argued, conferred an American identity<sup>103</sup>. The Court adopted Marshall's opinion as so to design the statutory hierarchy of the federal system, by stating that Congress has complete authority to define the distribution of federal and State regulatory power over what is concerned to be interstate commerce. Therefore, a State could not enact a regulation concerning interstate trade, as this whole area is exclusively granted to the Congress. The very brief decision in *Willson*<sup>104</sup> most directly demonstrates that Marshall recognized a negative implied aspect to the commerce power, as the word "dormant" was here employed for the first time,

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<sup>101</sup> 22 U.S. at 196. On Justice Marshall Opinion see G. Buttà (ed.), "*John Marshall, 'Judicial Review' e stato federale*", Giuffrè Editore, Milan 1998, p. 165.

<sup>102</sup> 22 U.S. (9 Wheat.) at 210.

<sup>103</sup> *Id.* at 213-15.

<sup>104</sup> See *supra*, footnote 99.

in relation to the Commerce clause. In the case at issue the Court uphold a Delaware authorizing act concerning the building of a dam across a navigable waterway even though it could have been construed as contrary to general federal provision for navigation, which is clearly related to the congressional exclusive power over commerce: the State regulation at issue was considered valid by the Court, as Congress's commerce power still was latent at the time of the controversy<sup>105</sup>.

Even under Chief Justice Marshall, after *Gibbons* the Court did not invalidate all State laws that could be construed as regulating commerce. Instead, the Court's Commerce clause jurisprudence drew a distinction between "commerce" regulations and "police" regulations: Marshall was apparently the first to employ the rubric "police power" in order to describe the residual prerogatives of sovereignty which the States had not surrendered to the federal government, while the "commerce" regulations were State regulations unduly relating to interstate commerce. In the years between *Gibbons v. Ogden* and the middle of the 19<sup>th</sup> century, the legislative tensions between States and federal government were frequently resolved by reference to Marshall's distinction: State regulations were either deemed invalid because of their character as "regulations of interstate commerce" or valid because of their character as "police power regulations".

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<sup>105</sup> See *Willson v. Black Bird Creek Marsh Co.* at 252: Marshall declared "we do not think the act [...] can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject".

In 1851, the landmark case *Cooley v. Board of Wardens*<sup>106</sup> brought coherence to Commerce clause doctrine and additionally addressed the question concerning the power of Congress to permit State commercial regulations, which would otherwise not be permissible. In 1803, the State of Pennsylvania enacted a law that required ships entering or leaving the port of Philadelphia to engage a local pilot to guide them through the harbour; nearly half a century later, petitioners contended that the Pennsylvania law was invalid for two reasons: on one side they argued that Congress had exclusive power under the Commerce clause to regulate navigation, including the subject of pilots; on the other side it was contended that Congress lacked power, through consent, to validate those State laws within the field of exclusive federal power.

Even the State act at issue manifestly and purportedly affected interstate commerce, the Court upheld it not because Congress had validated the law by its consent, but because it fell within State power to regulate interstate commerce which was “*local and not national; [...] best provided for not by one system, [...] but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits*”<sup>107</sup>. The Court held that the concerned State law had no national relevance, as it regulating a subject that was *local* rather than *national*, and therefore not requiring a uniform exclusive Congress legislation. To bolster its own conclusion the Court invoked a congressional statute purporting to authorize such State

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<sup>106</sup> 53 U.S. 299 (1851).

<sup>107</sup> *Id.* at 319.

regulation<sup>108</sup>: therefore the result of the Court's decision was to validate not only the 1803 Pennsylvania law, but the decision of the first Congress to leave the subject of pilotage to State control until Congress enacted further laws. The *Cooley* doctrine held thus that “States are free to regulated those aspects of interstate and foreign commerce so local in character as to demand diverse treatment, while Congress alone may regulate those aspects of interstate and foreign commerce so national in character that a single, uniform rule is necessary”<sup>109</sup>: when Congress expressly determines, as it did in *Cooley*, that the nature of the commerce in question does not require exclusive regulation, the States may exercise power over that commerce. Alternatively, when Congress determines, by enactment of federal legislation, that certain objects of commerce require exclusive federal regulation, the conflicting State regulations are clearly invalid under the Supremacy clause<sup>110</sup>. Under *Cooley*, when Congress has not regulated the objects of commerce in question, the Court itself determines whether the nature of the commerce requires exclusive federal regulation: therefore the Court in testing State legislation essentially makes what amounts to an intrinsically legislative determination as to whether a particular type of commerce

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<sup>108</sup> In its reasoning the Court invoked an act of Congress of August 7, 1789, 1 Stat. 54, which permitted the States to regulate pilotage but did not purport to authorize States to enact regulations discriminating against foreign or interstate commerce, as Pennsylvania's statutes appears to have done. The *Cooley* doctrine became thus a device to justify the power of consent, because Congress can authoritatively declare which subjects are local and it has power to ensure the validity of State laws which might otherwise fall foul of the Commerce clause.

<sup>109</sup> See L.H. Tribe, *American Constitutional law*, p. 1048.

<sup>110</sup> See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. (1981); *Raymond Motor Transportation Inc. v. Rice*, 434 U.S. 429 (1978). Cf. also Cappelletti, M. Seccombe e J.H.H. Weiler, *op. cit.* Book 2, p. 284; G. Bognetti, *Lo spirito del Costituzionalismo americano*, p. 214.

requires exclusive federal regulation. The *Cooley* theory was later employed by the Court in a large number of decisions concerning State legislation<sup>111</sup>: it became clear that whether a given subject matter should be judged appropriate for State regulation often depended upon how the State proposed to regulate it in the particular case and depending on the overall context in which the State act was placed, as so to set State's action limits and its possible justifications. Such analysis was at first conducted by classifying the impact of State regulation on interstate commerce as either "direct" or "indirect". Before the *New Deal* period State regulations affecting interstate commerce were permitted by the Supreme Court only if the concerned regulatory impact on interstate commerce was felt "*only indirectly, incidentally, and remotely*"<sup>112</sup>.

Since the mid-1930s, the Court's analysis of State regulations of commerce evolved remarkably, as the Court's analysis gradually focused on those State interstate regulations explicitly featured by a discriminatory extent<sup>113</sup>: since the New Deal revolution the Dormant Commerce clause has been employed increasingly and Congress's power to regulate interstate commerce has grown through judicial interpretation to the point where today it is virtually unlimited in its reach. In that period the Court interpreted the clause by invalidating

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<sup>111</sup> Cfr. ad es. *Wabash, St. Louis & Pacific Railways Co. v. Illinois*, 118 U.S. 557 (1886); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1866); *Ex parte McNeil*, 80 U.S. (13 Wall.) 236 (1872).

<sup>112</sup> Cf. *Smith v. Alabama*, 124 U.S. 465, 482 (1888); *Accord Erb v. Morasch*, 177 U.S. 584 (1900); *Chicago, R.I. & Pacific Ry. Co. v. Arkansas*, 219 U.S. 453 (1911).

<sup>113</sup> Cf. cases *Kassel v. Consolidated Freightways Corp.*, 450 U.S. (1981); *Raymond Motor Transportation Inc. v. Rice*, 434 U.S. 429 (1978). For what it concerns the doctrine see also *supra*, M. Cappelletti, M. Seccombe, J.H.H. Weiler, Book 2, p. 284.

a large number of State regulations<sup>114</sup>: under this approach, a State law had to, in the first instance, concern a legitimate State end<sup>115</sup>; second, it had not to discriminate unduly against interstate or out-of-State commerce<sup>116</sup>; third, it had not to impose on interstate commerce a burden which was “*clearly excessive in relation to the putative local benefit*”<sup>117</sup> arising from it.

The severe test employed by the Court clearly highlights how State legislative authorities may adopt acts that import *spillover effects*, i.e. State laws that, by their operation, shift costs and favours their own citizen while disproportionately affecting out-of-State interests, by imposing externalities on other States<sup>118</sup>. This problem is most

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<sup>114</sup> Such regulations were related to many different areas and topics, such as the imposition of compulsory requirements in transportation (*Di Santo v. Pennsylvania*, 273 U.S. 34, 1927; *Buck v. Kuykendall*, 267 U.S. 307, 1925); freight trains and road truck length (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 1945); imposition of compulsory requirements related to sales and prices (*Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 1977; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 1951; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 1935). According to some Commentators there is no effective limit to the potential reach of Congress’s regulatory power, as it can potentially affect every aspect of economy: all the possible limits have only a political weight (cf. F. Jacobs e K. Karst, *The “Federal” Legal Order: The U.S.A. and Europe Compared – A Judicial Perspective*, in M. Cappelletti, M. Secombe e J.H.H. Weiler, *Integration through Law*, Book 1 pp. 169-243).

<sup>115</sup> See *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

<sup>116</sup> See *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994).

<sup>117</sup> Cf. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970): here the Court formulated a test according to which “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit”.

<sup>118</sup> See R.M. Hills, *Against Pre-emption: How Federalism can Improve the National Legislative Process*, Public Law and Legal Theory Research Paper No. 27, available at [http://papers.ssrn.com/paper.taf?abstract\\_id=412000](http://papers.ssrn.com/paper.taf?abstract_id=412000) (“Congress frequently regulates activities because state regulation or lack of regulation of those activities imposes external costs on neighboring states. The whole point of the federal scheme is to suppress state creativity, which

acute when a State enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the State's borders. Because regulations unduly burdening or discriminating have been thought to result from the inherently limited constituency to which each State or local legislature is accountable, the Supreme Court has viewed with suspicion any State action which imposes special or distinct burdens on out-of-State interests unrepresented in the State's political process<sup>119</sup>, invalidating a wide range of legislative measures not by the *involved interests' adequate representation*.

State regulations are rarely struck down for the explicit reason that they are the products of unrepresentative political processes; rather, this political defect has been seen as underlying the forms of economic discrimination which the Supreme Court has treated as invalidating certain State actions with respect to interstate commerce: subsequently, the negative implications of the Commerce clause derive principally from a *political* theory of Union, not from an *economic* theory of free trade: hence the function of the clause is to ensure national solidarity, not necessarily economic efficiency<sup>120</sup>. Recently, however, the Court has in several opinions espoused the economic language of the "free market" as being the basis of the Dormant Commerce clause: in *General Motors v. Tracy*<sup>121</sup>, for example, the Court highlighted a passage from the then almost half-

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*might consist only in creatively gaining benefits for their own citizens at the expense of non-residents");* see also S. Issacharoff & C.M. Sharkey, *Backdoor Federalization*, American Law & Economics Association Annual Meetings Paper n. 39, 2006, p. 120; G. Bognetti, *supra*, p. 214.

<sup>119</sup> Cf. *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 237 U.S. 83 (1927).

<sup>120</sup> See *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 522-23 (1935).

<sup>121</sup> 519 U.S. 278 (1997).

century old case *H.P. Hood & Sons, Inc. v. Du Mond*<sup>122</sup>, which stated that the Commerce clause’s aim is to foster for “[...] every farmer and every craftsman [...] free access to every market in the Nation” and that “every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any”<sup>123</sup>. The Court’s operative definition of “discrimination” has been fairly broad in this context: any disparity in the treatment of in-State and out-of-State interests constitutes discrimination, even if the disparity is slight<sup>124</sup>. Additionally, the Court held that “where discrimination is patent, [...] neither a widespread advantage to in-State interests nor a widespread disadvantage to out-of-State competitors need to be shown” as so to invalidate the law, and that nor does a finding of discrimination necessarily depend on purely economic analysis<sup>125</sup>. This expansive notion of “discrimination” has particular importance because it affects the strict scrutiny of discriminatory measures, through which the Court can apply its balancing test weighing the burden on interstate commerce against the benefit to the State’s legitimate interests.

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<sup>122</sup> 336 U.S. 525 (1949).

<sup>123</sup> This viewing agrees with the dissenting Opinion delivered by Justice Scalia in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where he held that “[O]ur negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market [...]”.

<sup>124</sup> See for example *supra*, footnote 106.

<sup>125</sup> See *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 276 (1988): here the Court found discrimination even though only one company was hurt, and only one company was benefited by the challenged State action.

#### 1.4.2 *McCulloch v. Maryland* and the implied powers doctrine

The so-called *Necessary and Proper clause* is located in the first article, 8<sup>th</sup> section, last paragraph, of the federal Constitution. During its jurisprudential *iter* the Court delivered an interpretation of this provision that has always been featured by an expansive spirit. According to such provision Congress is allowed to adopt all those necessary and proper acts functionally useful as so to put into effect its constitutionally enumerated powers<sup>126</sup>.

The interpretative activity provided by the Court has therefore been central to the complete and effective fulfilment of Congress's federal prerogatives, and the roots of the implied powers doctrine is unanimously found<sup>127</sup> in Chief Justice Marshall's Opinion delivered in *McCulloch v. Maryland*<sup>128</sup>. This 1819 case clearly showed how the "*implied powers*" could have caused institutional uncertainty, if not explained and defined properly.

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<sup>126</sup> "The Congress shall have power [...] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

<sup>127</sup> Cf. T.M. Cooley, *The General Principles of Constitutional Law in the United States of America*, op. cit. p. 92; G. Buttà, *John Marshall. 'Judicial Review' e stato federale*, op. cit. pp. 83 ss.; M. Cappelletti e D. Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, in Cappelletti, Seccombe, Weiler, *Integration Through Law*, Book 2. p. 280; S. Gardbaum, *Congress's Power to Preempt the States*, UCLA School of Law Research Paper No. 05-33, 2005 (<http://ssrn.com/abstract=821324>), e *Rethinking Constitutional Federalism*, vol. 74:795 *Texas Law Review*, 1996; C. Nelson, *Preemption*, vol. 86:225 *Virginia Law Review*, 2000; D.E. Engdahl, *Preemptive Capability of Federal Power*, 45 *U. Colo. L. Rev.* 58, 1973-1974.

<sup>128</sup> 17 U.S. (4 Wheat.) 316, (1819). See S.C. Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause* (see above, footnote 70); S. Gardbaum, *The Nature of Pre-emption*, 79 *Cornell Law Rev.* 767 (1994).

The *McCulloch* facts are well known: as the Bank of the United States tried to establish and open new branches across the whole Country, it aroused strong opposition in the States, where the national Bank competed for business with local concerns; furthermore, bank officers allegedly committed fraud and embezzlement thus exacerbating the whole situation. As a response, the Maryland legislature chose to impose a tax on any corporation not chartered by the State, and when the Bank refused to pay the tax, process was issued against a Bank officer who had been exposed as a speculator and an embezzler. The Maryland Court of Appeals upheld the State's power to collect the tax, and the parties presented two questions to the Supreme Court in order to find out whether the Congress possess the power to incorporate the Bank, given that this power was not expressly enumerated in article 1, and – assuming creation of the Bank was a proper exercise of Congress's power – whether it was susceptible to the Maryland tax.

Chief Justice Marshall elaborated the Supremacy clause's import in answering both questions, holding that being the Congress explicitly granted of the powers to tax, regulate commerce and organize a national centralised economy, it was implicitly granted as well of all those necessary powers by the means of which it could put into full effect its constitutional prerogatives<sup>129</sup>. He recalled national supremacy as a supra-constitutional value, according to which *“States have no power [...] to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by*

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<sup>129</sup> *“Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional”* 17 U.S. (4 Wheat.) 316, 421 (1819).

*Congress [...]”*<sup>130</sup>. Remarkably, Marshall decided to describe the interrelation between State and national laws as “conflicting”, somehow anticipating the mode of analysis adopted: this assumption that the powers themselves were inherently in conflict foreclosed a more limited inquiry into the actual effect of State regulation on the federal entity, and whether the State’s exercise of its powers was, in this instance, proscribed. Another presupposition was that the Union was “*supreme within its sphere of action*”<sup>131</sup>, as it “*result[ed] necessarily from its nature*”<sup>132</sup>: accordingly, speaking about the *necessity* and *properness* requirements he seemed to overshadow the first one, while placing great emphasis on the latter element, by holding that Congress was thus enabled to adopt not only the strictly *necessary* means but every *proper* means (among which the creation of new National Bank branches across the Country) as so to achieve the full satisfaction of its enumerated powers.

It is wise to keep clear in mind that the Necessary and Proper powers theory neither does expand the extent of constitutionally granted powers, nor it grants Congress brand new powers: it can be seen as a core principle according to which all the proper means granted to Congress are somehow ‘included’ in the constitutional provisions defining the so-called enumerated powers. According to the predominant doctrine, the notion of *implied powers* is linked on one side to a general extension of Congress prerogatives, and on the other side to the concomitant presence of implied limitation on States’ powers: for example, if Congress has been accorded the power to

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<sup>130</sup> 17 U.S. (4 Wheat.) at 436.

<sup>131</sup> *McCulloch*, at 405.

<sup>132</sup> *Id.*

regulate commerce among States and with foreign Nations, such power impliedly excludes States from the related regulatory fields; on the contrary, pre-emption would be present where Congress has effectively exercised its powers by adopting a legislative act that occupies the whole area, by precluding Member States from enacting further legislation on the same subject<sup>133</sup>.

As already stated, a subject not expressly related to the enumerated powers can be regulated by Congress *if and only if* such action is suitable as so to achieve the complete fulfilment of a congressional enumerated power: for instance, while Congress is not generally supposed to regulate the manufactory industrial area (as it is not *per sé* closely connected to interstate commerce issues<sup>134</sup>), which belongs to States legislative competence, it is obvious that commercial monopolies built in such area or workers' conditions therein<sup>135</sup> may be regulated by Congress, as these two element can potentially affect commerce among States: under such circumstances, the relevant federal act becomes a *necessary* and *proper* means as so to regulate a field connected to the exclusive competence of Congress (or to effectively put into action another enumerated power).

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<sup>133</sup> Stephen Gardbaum is the only Author according to which such dual categorisation does not exist: pre-emption entirely abstracts from any actual conflict between federal and State law, as it would find its rational basis in the Necessary and Proper clause (see Ch. 2)

<sup>134</sup> See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905).

<sup>135</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

## Chapter 2: Pre-emption in the United States

*“Most commentators who write about pre-emption agree on at least one thing: modern preemption jurisprudence is a muddle”*<sup>136</sup>

Before going into detailed pre-emption analysis, it is wise to keep clear in mind that in the 19<sup>th</sup> century there was no “pre-emption doctrine” as such. The word “pre-empt” only entered the constitutional lexicon when Justice Louis Brandeis used it in a dissenting opinion in 1917<sup>137</sup>: borrowing from a longstanding aspect of property law which favoured the first developers of unoccupied land<sup>138</sup>, he turned it into a metaphor for the relationship of overlapping State and federal law, so as to describe the case of federal law capable of fully occupying a certain regulatory field.

Many authors and commentators focused their attention on the

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<sup>136</sup> See C. Nelson, *Preemption*, vol. 86 Virginia Law Review, 86, 2000.

<sup>137</sup> See *New York Central R.R. v. Winfield*, 244 U.S. 147, 169 (1917) (Brandeis, J., dissenting). Rejecting the notion that the New York statute at issue had been displaced by federal regulation, Justice Brandeis declared “*Congress has [not], by legislating on one branch of a subject relative to interstate commerce, pre-empted the whole field [...]*”. See also Stephen A. Gardbaum, *The Nature of Preemption*, (*id.*), noting that *Winfield* seems to be the first case to use the word “pre-empt” in the constitutional context.

<sup>138</sup> Federal legislation had, from the earliest times, established laws regarding private acquisition of public land which favoured those who first settled on and developed the land: see, e.g. *Sweeney’s Lessee v. Toner*, 2 U.S. (2 Dall.) 129, 130 (1791); *Buford v. Houtz*, 133 U.S. 320, 327 (1890) (“*Congress, by a system of laws called the ‘Pre-emption Laws,’ [...] confer[red] a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain*”).

federal pre-emption theory as developed by the Supreme Court from the 40's onward: through decades such arcane topic has generated much public debate and institutional dispute, as broad federal pre-emption claims allegedly interfered with the States' historic police powers to protect their citizens. Remarkably, the debate on pre-emption is particularly prominent for what it concerns the tort law area. Congress has increasingly exercised its legislative powers in many subjects and gradually regulated so many products in so many areas<sup>139</sup> by enacting federal statutes which frequently overlapped existing States' regulations: the products liability cases present themselves as a particularly propitious area of inquiry, because of the fact that tort law is so thoroughly a traditional area of State governance, the federalisation of this branch of common law threatens a serious reallocation of power in the delicate U.S. system

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<sup>139</sup> From cigarettes (see the 1965 *Federal Cigarette Labelling and Advertising Acts* and the 1969 *Public Health Cigarette Smoking Act*, which imposed compulsory requirements relating to advertising and promoting cigarettes, preempting thus any State law liability claim and forbidding States from requiring any additional statement relating to smoking and health (cf. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), on which see *infra*)), drugs (see *Federal Food, Drug and Cosmetic Act*, 21 U.S.C. §§ 301-393 (1994)), cars (see the 1966 *National Traffic and Motor Safety Act*, 49 U.S.C. §§ 30101-30169 (1994), which establishes a minimum floor in motor vehicle safety standards: in *Geier v. American Honda Motor Co., Inc.* (529 U.S. 861, 2000) the Court was asked whether such federal statute pre-empted all State law and therefore also common law tort rights, which were subsequently compared to additional requirements), and medical devices (see *Medical Device Amendments* of 1976 to the *Federal Food, Drug and Cosmetic Act*, 21 U.S.C. §§ 360c-360k, 379, 379a (1994)), to workplace safety (see *Occupational Safety and Health Act* of 1970, 29 U.S.C. §§ 651-678 (1994), establishing standards aimed at making the workplace safer and healthier), nuclear power safety (see *Atomic Energy Act* of 1954, 42 U.S.C. §§ 2011-2297g-3 (1994); see also *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Dev Comm'n*, 461 U.S. 190, 205 (1983)), and labor relation (see *National Labor Relations Act*, 29 U.S.C. §§ 151-169 (1988), see also *Allison Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)). Cf. also B.J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 *Boston Univ. L. Rev.* pp. 559-627, 1997.

of dual sovereignty. Following the enactment of federal pre-emptive legislation by Congress, which gradually reduced the amount of existing State regulation, chiefly by placing a ceiling or prohibition on stricter State regulation, a large amount of essays and papers has been produced, arguing that probably pre-emption questions cannot be reduced only to the judicial exegesis of (often ambiguous) federal statutes involved, but also raising profound questions of institutional design and constitutional understanding, in relation to the competence allocation issue between centre and peripheries.

Additional relevance to the topic is given by the fact that the pre-emption analysis delivered by the Court through its huge case law has often shown inner incoherence and conflict, gradually leading to the birth of a confused doctrine. Hence the pre-emption theory can be described as a “messy universe”<sup>140</sup> lacking a shared consensus even on its main foundations or issues: basically, such pervasive confusion arises from the fact that “*notwithstanding its repeated claims to the contrary, the Supreme Court’s numerous pre-emption cases follow no*

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<sup>140</sup> Cf. R.A. Epstein, M.S. Greve, *Federal Preemption: Principles and Politics*, in *Federalist Outlook*, No. 25, June 2007; see also *supra*, note n. 137. As many authors pointed out, pre-emption appears to be messy in general, not only in relation to a specific legal field: according to S.C. Hoke the U.S. Supreme Court “*has failed to articulate a coherent standard for deciding pre-emption cases, and its haphazard approach fails to provide meaningful guidance to lower courts, legislators, and citizens*” (cf. *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. at 687, 1991). D.P. Rotschild pointed out that “*what had been a classic division of functions between the Federal Government and the States and localities has become a confused mess*”, mainly because of a lack of coherence in the Supreme Court case law: in its decisions the Court seemed “*to be relying more often on an ad hoc balancing of interests based on the particular facts of each case*”, letting thus pre-emption doctrine proliferating “*to the stage where there is too much conflicting precedent for the courts to apply the doctrine with precision*” (see *A Proposed “Tonic” with Florida Lime to Celebrate our New Federalism: How to Deal with the “Headache” of Preemption*, 38 U. Miami L. Rev. 829, 1984).

*predictable jurisprudential or analytical pattern*”<sup>141</sup>: if the purpose of Congress appears to be the “*ultimate touchstone*”<sup>142</sup> in every pre-emption case, then the Court’s pre-emption decisions necessarily vary across the different statutory schemes at issue.

Although individual judgments may vary, surely the basic analytical framework should not differ across cases presenting essentially the same question: whether and to what extent federal law has displaced State law. Problems and accusation of judicial activism arise when the Court professes adherence to established analytical framework and principles, but as a matter of facts adopts decisions that somehow betray such conceptual homogeneity<sup>143</sup>, changing its course within the span of a few decisions: the Court’s approach appears to be highly fact-dependent, without relying on a set of fixed guiding principles.

While on one side powers granted to Congress are enumerated and

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<sup>141</sup> V. Dinh, *Reassessing the Law of Pre-emption*, Georgetown Law Journal, 88, 2085 (2000).

<sup>142</sup> Cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>143</sup> The Court’s “schizophrenia” and tendency to produce fractured opinions is particularly noticeable with regard to those cases in which a State tort remedy is involved: with increasing frequency corporations have attempted to assert federal pre-emption as a defence to State common law actions, by turning the federal statutes from regulatory acts into private “shields”, contending thus the complete pre-emption of the recovery of damages under State tort law. Whether to allow the pre-emptive defence is of critical importance to accident victims, because if the defence is upheld, they may be left without recourse to a damage remedy. Current federal legislation concerning product safety, for example, typically does not provide a damages remedy, requiring instead only that manufacturers engage in certain affirmative conduct, such as putting warnings on products or meeting certain safety standards (see the *Federal Cigarette and Advertising Act*, requiring warnings on labels and advertisements, but providing no damage remedy for injuries from failure to meet these standards; 49 U.S.C. §§ 44701-44723 (1994) establishing minimum safety standards for civil aircraft, but providing no damages remedy for injuries resulting from failure to meet these standards).

explicitly stated in the Constitution<sup>144</sup>, on the other side States hold concurrent competence on a large amount of subjects and areas on which as a matter of fact Congress is enabled to legislate as well. Products liability law shows how almost every statute federally enacted can potentially overlap a State legislative act: federal pre-emption is an increasingly favoured mechanism used to centralize power nationally and to assure national uniformity by suppressing State creativity. This aspect of the American federalism system highlights the great relevance given to the evolving relationships occurring between State and federal law, in relation to issue of the internal division of political power: on the basis of the pre-emptive potentiality of a federal act we are able to determine the rules which as a matter of fact regulate the subject at issue, in order to define the real allocation of competence between States and federal government<sup>145</sup>.

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<sup>144</sup> Cf. U.S. Const. Art. 1, s. 8, par. 5, and s. 10, par. 1, exclusively allowing Congress to coin money; Art. 2, s. 2, par. 2, and Art. 1, s. 10, par 1, granting Congress the exclusive power to make Treaties with foreign Nations.

<sup>145</sup> For this reason the pre-emption theory “*is almost certainly the most frequently used doctrine of constitutional law in practice*” (cf. S. Gardbaum, *The nature of preemption*, 79 Cornell L. Rev. 767, 768 n. 65, 1994).

## 2.1 Pre-emption categories in the Supreme Court case-law

Statutory pre-emption, i.e. the constitutional mechanism by the means of which State laws may be superseded following to the enactment of a federal statute finds its roots back to the Court's decisions in *McCulloch v. Maryland* of 1819 and *Gibbons v. Ogden* of 1824<sup>146</sup>. Over time, the Supreme Court jurisprudence and the doctrine have refined the concept of pre-emption, currently applying these categories: *express*, *implied*, *conflict*, *field* and *obstacle* pre-emption. According to the greater part of the doctrine such categorization has only a *descriptive* extent, while it lacks a *prescriptive* purpose<sup>147</sup>: for this reason, the presence of some of the prominent attributes of a category does not necessarily preclude, for instance, the simultaneous presence of another category's features. Hence the various types of pre-emption do not exclude each other: they frequently overlap and such coexistence identifies a large amount of "grey areas" which cannot be univocally labelled. Such grey areas embody the more difficult pre-emption cases, where instead of applying an express pre-emption clause (which clearly identifies the superseding intent of Congress) the Court has to reconstruct congressional intent by interpreting the whole statute and its often-ambiguous language<sup>148</sup>.

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<sup>146</sup> See Ch. 1.

<sup>147</sup> See P.E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 Case Western Reserve Law Review 823 (1995); L.H. Tribe, *American Constitutional Law*, 3<sup>rd</sup> Edition, Vol. 1, Foundation Press.

<sup>148</sup> Such issue is particularly remarkable in relation to the distinction between *express* and *implied* pre-emption. Interestingly, while some Commentators (such as L.H. Tribe or V. Dinh) believe that the former category should be considered as a genuine form of pre-emption, some others (see S. Gardbaum,

During the 1990's the Supreme Court's effort was aimed at defining an analytical standard capable of being applied to every pre-emption case, by describing a conceptual univocal framework which could actually address and solve any possible case of conflict occurring between federal and State law: remarkably, there occurred a striking contradiction between the principles stated by the Court (favouring express textualism in statutory interpretation) and its definitive decisions, in which frequently as a matter of fact the distinction between *express* and *implied* pre-emption has been deemed as insubstantial<sup>149</sup>.

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S.R. Jordan, C. Massey) hold that it cannot be considered as actually existing, autonomously from other categories: accordingly, pre-emption should be found only where Congress had decided to use an express language, while it cannot be retrieved if it stands on purely implied basis. This viewing is coherent with the *presumption against pre-emption*, according to which if Congress intends to supersede State law has to choose an express language that clearly defines its goal. Another debate concerns the categories of *field* and *obstacle* pre-emption (on which see *infra*): some authors hold that that they stands on autonomous basis, while some others think that they should be regarded only as secondary expressions of *implied* pre-emption (see S. Issacharoff & C.M. Sharkey, *Backdoor Federalization*, American Law & Economics Association Annual Meetings Paper n. 39, 2006, note n. 35; J. Goldsmith, *Statutory Foreign Affairs Preemption*, Chicago John M. Olin Law & Economic Working Paper No. 116, 2<sup>nd</sup> series, p. 29, available on <http://www.law.uchicago.edu>).

<sup>149</sup> See *infra*, par. 2.3.1.

### 2.1.1 *Express and implied pre-emption*: a distinction without much difference

As most cases assert that the congressional legislative authority derives directly from the *Supremacy clause*<sup>150</sup>, the judicial pre-emption inquiry is conventionally described as being a matter of discerning Congress's intent<sup>151</sup>: the Supreme Court has insisted that congressional intent to pre-empt state law has to be clear so as not to impinge unduly upon States' powers<sup>152</sup>. Thus, the Court has often held that it assumes Congress does not intend federal law to supersede "*the historic police powers of the States [...] unless that was the clear and manifest purpose of Congress*"<sup>153</sup>: however, Congress often does not attempt to expressly articulate its intent regarding pre-emption, and in such circumstances courts may infer pre-emptive intent either from the fact that a statute "*occupies the field*" or from the fact that state law directly conflicts with or somehow "*stands as an obstacle to*" the objectives of Congress<sup>154</sup>. Although the Supreme Court has insisted that Congress must make a plain statement when it enacts legislation that alters the balance of powers between the state and federal governments, it has been suggested that this "plain statement" rule may conflict with some implied pre-emption cases<sup>155</sup>, and as a matter of fact implied pre-

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<sup>150</sup> See par. 2.2.

<sup>151</sup> See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

<sup>152</sup> Cf. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Gregory v. Ashcroft*, 501 U.S. 452, 457-461 (1991), requiring a "plain statement" by Congress.

<sup>153</sup> *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>154</sup> Cf. *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190, 204 (1983).

<sup>155</sup> H.H. Drummonds, *The Sister Sovereign States: Preemption and the Second*

emption doctrines have always been in tension with the Court's claim that congressional intent has to be plain.

Theoretically *express pre-emption* should be found where Congress has clearly and unambiguously declared its intention to preclude State regulations of a described sort in a given area<sup>156</sup>: a specific *pre-emption clause* usually defines the extent of the federal act by stating that no State or other regulatory authorities may impose any additional requirements or prohibition. Here the *Supremacy clause* "makes clear that pre-emption provision takes precedence over conflicting State law, and all State laws within the defined scope of the pre-emption provision are by definition in conflict with it, and the latter is supreme"<sup>157</sup>, and subsequently the work of the Court here should be quite simple and straightforward: through a plain operation of statutory construction it has to find the original meaning of the express pre-emption clause and determine which part of State law falls within its scope<sup>158</sup>.

According to this the doctrine of express pre-emption is easily stated,

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*Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 528 (1993).

<sup>156</sup> See *Hillsborough County v. Automated Med. Lab. Inc.*, 471 U.S. 707 (1985): "[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms". Where congressional intent can be inferred from the overall meaning of the federal act there occurs implied pre-emption: "In the absence of express pre-emptive language, Congress's intent to pre-empt [...] state law [...] may be inferred" (id. *Hillsborough County v. Automated Med. Lab. Inc.*).

<sup>157</sup> See V. Dinh, *Reassessing the Law of Preemption*, 88 Georgetown Law J. 2085, July 2000, p. 7.

<sup>158</sup> See D.P. Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. Miami Law Rev. 829, 843 (1984): "The majority view is that an explicit statement in a statute that certain federal regulations are exclusive, or a statement prohibiting state action in a given field, bars states from enacting measures that address the same area as the federal standards".

while as a matter of fact its application has always been far more problematic, since before an express pre-emption clause can be applied to State action, a court must inquire whether the clause is truly applicable to the particular state action considered. Since an express provision can bar all state action to which it applies, the dispositive factor in such cases is whether the express pre-emption provision is applicable, by its own terms, to the particular state action at issue in the case.

Historically, the courts have addressed this question by determining the legislative intent of the Congress: this freewheeling approach allowed the adoption of a broad-based inquiry, which as a matter of fact permits courts to go to great lengths to find pre-emption of state-law claims by simply finding some perceived obstruction of congressional purpose in enacting legislation, despite what Congress may have stated in its legislation about its pre-emptive intent. Subsequently courts have been allowed a certain discretion in invoking pre-emption, and their approach on this issue often turn out to be frustrating and incoherent, because even after the most thorough examination of relevant legislative history the intent is often found to be ambiguous or non-existent<sup>159</sup>. Therefore the main problem in ascertaining congressional intent is not limited to ambiguous pre-emption clauses, as even unambiguous statements of statutory intent require deep analysis to determine the scope of the pre-emption clause.

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<sup>159</sup> See *NOTE – Preemption as a Preferential Ground: A New Canon of Construction*, 12 *Stan. L. Rev.* 208 (1959); cf. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 103 S. Ct. 1717, 1728 (1983): “[I]nquiry into legislative motive is often an unsatisfactory venture. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it”.

The modern incoherence in pre-emption analysis begins with the 1992 decision of *Cipollone v. Liggett Group, Inc.*<sup>160</sup>, concerning the pre-emptive extent of two federal acts (namely the 1965 *Federal Cigarette Labelling and Advertising Act*<sup>161</sup> and the 1969 *Public Health Cigarette Smoking Act*<sup>162</sup>): in 1983 petitioner Cipollone maintained a suit against three different cigarette manufacturers on behalf of his mother, who died of lung cancer allegedly caused by smoking respondents' cigarettes: the suit involved the *common-law* tort theories of strict liability, negligence, fraudulent misrepresentation, conspiracy to defraud and the theory of express warranty<sup>163</sup>. Each tobacco company asserted an affirmative pre-emption defence contending that the two-abovementioned federal acts pre-empted any state law tort claims<sup>164</sup>.

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<sup>160</sup> 505 U.S. 504 (1992).

<sup>161</sup> Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)).

<sup>162</sup> Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)).

<sup>163</sup> For a complete overview on this well-known case, see H.V. Kehoe, *Narrowing the Scope of Federal Preemption: Tobacco Torts Become Winneable*, 38 Loy. L. Rev. 1191, (1993); M.A. Bakris, *Constitutional Law-Preemption-The Federal Cigarette and Advertising Act's Express Preemption Provision Defines the Pre-emptive Reach of the Act and Must be Construed Narrowly*, 70 U. Det. Mercy L. Rev. 487 (1993); J.F. McCauley, Note, *Cipollone & Myrick: Deflating the Airbag Preemption Defense*, 30 Ind. L. Rev. 827 (1997); S.R. Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 Arizona L. Rev., p. 1379, (1998); D.E. Seidelson, *Express Federal Preemption Provisions, State Law Action for Damages, Congress, and the Supreme Court: A Penitent Seeks Redemption*, 58 La. L. Rev. 145 (1995); J.R. Stern, *Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group*, 80 Virginia Law Review, pp. 979-1014 (1994).

<sup>164</sup> *Cipollone*, 593 F. Supp. at 1149. The tobacco companies contended “that state tort law has a direct regulatory impact on an industry by redistributing losses caused by certain products from injured individuals to the products’ manufacturers” (*id.* at 1155). The *Cipollone* case represents the first time that cigarette manufacturers asserted a pre-emption defence: prior to this case the

Remarkably, prior to ascertaining the pre-emptive effect of the federal statutes, the Court set forth its pre-emption doctrine and in so doing appeared to work a significant change in the law of pre-emption, as many had understood it up to that time<sup>165</sup>. The Court repeated the settled and familiar principles by stating that when in considering the issue of pre-emption the Congress has adopted an express language, including in the enacted legislation a provision explicitly addressing that issue, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation: apparently the Court needs only to identify the domain expressly pre-empted by each of the statute sections at issue<sup>166</sup>.

Apparently the Court seemed to express in *Cipollone* a basic rule in pre-emption analysis: if pre-emption clearly emerges from congressional intent and if Congress has seen fit to express its intent in express statutory language only, then courts should be to spot Congress's pre-emptive intent only from clear statutory text. According to this, courts should not be given free action to search for some other way to pre-empt state law, which result may even

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tobacco industry relied primarily on the affirmative defences of assumption of risk and contributory negligence.

<sup>165</sup> See *Cipollone*, 505 U.S. at 547 (Scalia, J., concurring in part and dissenting in part: "To my knowledge, we have never expressed such a rule before [...]"); Bakris, *supra* note 163, at 500 (stating that *Cipollone* "represents a departure from both established principles of pre-emption analysis and prior case law"); McCauley, *supra* note 163, at 841 ("Federal pre-emption analysis changed dramatically with the Supreme Court's decision in *Cipollone* [...]"). But on the contrary see S.R. Jordan, *supra* note 163, at 1418.

<sup>166</sup> *Cipollone*, 505 U.S. at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) and *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987)). The dissenters interpreted this statement basically to mean that once there is an express pre-emption provision, all doctrines of implied pre-emption are eliminated (*Id.* at 547: Scalia, J., concurring in part and dissenting in part).

contradict Congress's clearly expressed intention. However, a closer look at the Court's further analysis demonstrates that the principles held by the Court in *Cipollone* were in fact soon to be contradicted by reality: because the plaintiff in *Cipollone* sought an award of tort damages for the defendant cigarette manufacturers' alleged intentional and negligent torts and breaches of warranties, the U.S. Supreme Court was required to address whether a federal statute that prohibited *any requirement* of a statement and one that prohibited *any requirement or any requirement of prohibition* under state law also prohibited common-law damage awards<sup>167</sup>. Despite that the Court's majority labelled this as an express pre-emption case, it did not confine itself to the pre-emption provision alone and what it gleaned from the purportedly plain meaning: as a matter of fact the majority viewed the express terms as sufficiently ambiguous that it needed to resort to a general analysis of Congress's purposes in enacting the legislation at issue, since the Court proceeded to

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<sup>167</sup> The *Federal Cigarette Labelling and Advertising Act* (Pub. L. No. 89-92, 79 Stat. 282 (1965)), amended by the *Public Health Cigarette Smoking Act* (Pub. L. No. 91-222, 84 Stat. 87 (1969)). The Act establishes uniform standards involving cigarette labelling and advertising, and section 5 of the 1965 Act provides an express pre-emption provision under which:

- (a) *No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package;*
- (b) *No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labelled in conformity with the provision of this Act.*

Section 5(b) was amended by the 1969 Act to specify:

*No requirement of prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provision of this Act.*

determine that state common-law actions for damages would not conflict with those congressional purposes.

Basically the Court used some implied pre-emption analysis in its express pre-emption assessment. Despite its declaration that the express terms alone governed, the majority thereby remained consistent with what the Court had permitted in the past: it went beyond the express terms to reach some mysterious congressional purposes, derived from statutory language or the structure of the act at issue, to search for some purpose that might have been obstructed by the federal law. The majority opinion therefore did not deviate from precedent in the application of the doctrine, and the core problem of pre-emption doctrine remained as heavy as before.

The opinion delivered by Justice Blackmun<sup>168</sup> probably provided the most coherent approach, as he held that when there existed express pre-emptive language “*the Court’s task is one of statutory interpretation – only to ‘identify the domain expressly pre-empted’ by the provision*”<sup>169</sup>, and also that the Court should resort to principles of implied pre-emption only if the Congress has been silent with respect to this issue<sup>170</sup>. Eventually Justice Blackmun agreed with the majority opinion, which found no pre-emption of state claims under the older version of the Act at issue, but disagreed with the balance of the decision: more specifically, he was of the opinion that the language chosen in federal statutes prohibited any

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<sup>168</sup> Concurring in part, dissenting in part (*id.* at 540). Justice Blackmun provided an example of language that Congress has used that made clear its intentions toward state common-law: “*ERISA statute defines ‘any and all State laws’ as used in pre-emption provision to mean ‘all laws, decisions, rules, regulations, or other State action having the effect of law.’*”

<sup>169</sup> *Cipollone*, 505 U.S. at 532.

<sup>170</sup> *Id.*

“*requirement or prohibition [...] imposed under State law*”<sup>171</sup>, and did not simply prohibit the application of State law in general. In his view the regulatory effect arising from State tort law is, if anything, only indirect and cannot be compared to the effect arising from true regulation acts: the function of tort law is basically to compensate, not to regulate, therefore “*it cannot be said that damages claims are clearly or unambiguously ‘requirements’ or ‘prohibitions’ imposed under State law*”<sup>172</sup>. Justice Blackmun pointed out that the two core elements in the Court’s pre-emption analysis should always be on one side the general presumption against pre-emption and on the other side the concomitant requirement that any intent to pre-empt must be “*clear and manifest*”<sup>173</sup>: this view was held also by some authors<sup>174</sup> which pointed out that if such requirements are not binding in pre-emption analysis then courts can easily imply pre-emption and override state law by going beyond the express language, superseding almost all of the state common-law damages actions. On the contrary, in his opinion Justice Scalia<sup>175</sup> criticized the Court’s new narrow approach to express pre-emption provisions by reasoning that if needed courts can imply pre-emption without any express language indicating Congress’s intent, agreeing thus with those

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<sup>171</sup> *Id.* at 535.

<sup>172</sup> *Id.* at 538.

<sup>173</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977): “*We start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress*”; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947): “*Congress legislated here in a field which States have traditionally occupied. So we start with the assumption that the historic police powers were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress*”.

<sup>174</sup> Cf. S.R. Jordan, *supra* note 163.

<sup>175</sup> *Cipollone*, 505 U.S. at 547 (Scalia, J., concurring in the judgment in part and dissenting in part).

authors who hold that an unconditional preference for express textualism in statutory construction cannot be justified.

Because both federal statutes contained express pre-emption clauses, the Court eventually determined that its sole task was to identify the “*domain expressly pre-empted by each of those sections*”<sup>176</sup>, and apparently there was no need to perform an implied pre-emption analysis. Additionally, to aid in its analysis the Court employed several tools of statutory construction, among which presumption against pre-emption. As a result of its analysis, the Court noted that none of the petitioner’s claims were pre-empted by the 1965 Act<sup>177</sup>: however, because the language of the 1969 Act was more broad, only some of the common law claims were pre-empted<sup>178</sup>.

Three years after *Cipollone* the Supreme Court addressed the pre-emptive effect of the *National Traffic and Motor Safety Act* of 1966 (Safety Act) in *Freightliner Corp. v. Myrick*<sup>179</sup>, and again took the opportunity to clarify the rules of pre-emption analysis. The federal act at issue was passed by the Congress in response to mounting highway deaths and injuries, by increasing automotive safety through the promulgation of motor vehicle safety standards. The federal Act at issue included an express pre-emption provision which forbidden states from “*establishing [any motor vehicle] safety standard which*

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<sup>176</sup> *Cipollone*, 505 U.S. at 517 (quoting *Malone v. White Motor Corp.*, 475 U.S. 497, 505 (1978)).

<sup>177</sup> *Id.* at 518-519.

<sup>178</sup> *Id.* at 530-531. On the contrary see *Palmer v. Liggett Group, Inc.*, (825 F.2d 620, 1<sup>st</sup> Cir. 1987), where the United States Court of Appeals for the First Circuit ruled that the *Cigarette Labelling and Advertising Act* at issue in *Cipollone* impliedly pre-empted state-based tort claims against cigarettes manufacturers, as such claims would upset the carefully wrought balance and thereby frustrate the overall intent of Congress.

<sup>179</sup> 514 U.S. 280, 287-89 (1995).

*is not identical to the Federal standard [promulgated by the federal agency]*”<sup>180</sup>. The plaintiffs in *Myrick* sued defendants for negligent design of their products, while defendants defended in part on the grounds that the Safety Act and regulations promulgated under it either expressly or impliedly pre-empted state tort law claims for damages<sup>181</sup>. First, the Courts held that, whether or not common-law claims are considered “standards” under the act, the state law claims were not expressly pre-empted because there was no applicable federal safety standard in effect at the time of the lawsuit<sup>182</sup>.

The most significant portion of the opinion was the Court’s explanation of the precise effect the *Cipollone* decision had on pre-emption doctrine. In answering the plaintiff’s argument that in light of *Cipollone* the Court did not need to address defendant’s implied pre-emption argument, Justice Thomas, writing for the Court, explained that the Court had not announced a “*categorical rule precluding the coexistence of express and implied pre-emption [...]*”: it clarified that the *Cipollone* holding articulated *only an inference, and not a rule*, that where Congress has expressly pre-empted a certain area in a statute, matters outside that area are not pre-empted<sup>183</sup>.

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<sup>180</sup> *Id.* at 289 (quoting the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392 (d)).

<sup>181</sup> The pertinent statutory language had forbidden states from establishing any motor vehicle “*safety standards [...] which is not identical to the Federal standard*” (see the *National Traffic and Motor Vehicle Safety Act*, 15 U.S.C § 1392(d)).

<sup>182</sup> *Id.* at 289.

<sup>183</sup> *Id.* at 288: “*The fact that an express definition of the pre-emptive reach of a statute “implies” – i.e. supports a reasonable inference – that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption [...] At best, Cipollone supports an inference that an express pre-emption clause forecloses implied*

In 1995 the Court was faced with another landmark pre-emption case in *Medtronic, Inc. v. Lohr*<sup>184</sup>, in which at issue was whether the Medical Device Amendments of 1976 (MDA)<sup>185</sup> – containing an express pre-emption provision<sup>186</sup> – “*pre-empt[ed] a state common law negligence action against the manufacturer of an allegedly defective medical device*”<sup>187</sup>. In the course of setting out the general rules governing pre-emption questions the Court seemed to completely ignore *Myrick* and its cautionary directive that the mere existence of express pre-emption provisions does not foreclose the possibility that federal law impliedly pre-empts state law. Additionally, the *Medtronic* Court seemed to intersperse its express pre-emption analysis by introducing implied pre-emption considerations, even more clearly than it did in *Cipollone*<sup>188</sup>: it first did so in its long statement of the principles guiding the Court in these cases. After stating that the pre-emption analysis must be coherent to the express language used by the Congress<sup>189</sup>, the Court

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*pre-emption; it does not establish a rule*”. Justice Thomas pointed out that the *Cipollone* Court itself, despite its rethoric, had gone beyond the terms of the statute and “*engaged in a conflict pre-emption analysis [...]*” (*id.*).

<sup>184</sup> 116 S. Ct. 2240 (1996). See M.E. Gelsinger, *Medtronic, Inc. v. Lohr: Is Federal Pre-emption a Heartbeat away from Death under the Medical Device Amendments?*, 25 Pepperdine Law Rev., pp. 647-684 (1998); G.J. Scandaglia, T.L. Tully, *Express Preemption and Premarket Approval Under the Medical Device Amendments*, 59 Food & Drug Law Journal, pp. 245-264 (2004).

<sup>185</sup> Pub. L. No. 94-295, § 1(a), 90 Stat. 539 (codified as amended in scattered sections of 21 U.S.C., 42 U.S.C.).

<sup>186</sup> “[N]o State [...] may establish or continue un effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which related to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter” (21 U.S.C. § 360k(a)).

<sup>187</sup> *Medtronic*, 116 S. Ct. at 2245.

<sup>188</sup> *Id.* at 2250.

<sup>189</sup> *Id.*: “*We need not go beyond that language to determine whether Congress*

held again that the interpretation of that language should be informed by the usual two presumptions about the nature of pre-emption<sup>190</sup>: the first one is the well-known one against pre-emption when the case involves the historic police powers of the States, whilst the second is the most troubling in the extent to which it goes beyond the language of the statute. The Court repeated that in statutory construction “‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case”<sup>191</sup> and explained that “[a]s a result, any understanding of the scope of a pre-emption statute must rest primarily on ‘a fair understanding of congressional purpose’”. Congress’s intent, of course, primarily is discerned from the language of the pre-emption clause and the ‘statutory framework’ surrounding it”<sup>192</sup>.

Even if such statements flow from general rules of statutory construction and are therefore somehow consistent with a general principle of textualism, the Court held that “[a]lso relevant, however, is the ‘structure and purpose of the statute as a whole,’ as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law”<sup>193</sup>.

Despite the notion of a supposed distinction between express and implied pre-emption, the Court purposely referenced approaches that

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*intended the [statute] to pre-empt at least some state law”.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

<sup>192</sup> *Id.* at 2250-51 (quoting *Cipollone*, 505 U.S. at 530 n. 27, and *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>193</sup> *Id.* at 2251.

do not stand for that proposition<sup>194</sup>: accordingly a consistent part of the doctrine<sup>195</sup> pointed out that in the end the Supreme Court case-law does not support an artificial and rigid distinction between express and implied pre-emption, highlighting that even if the existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines, disallowing an implied pre-emption on an *a priori* basis may result in decisions that will not adequately address Congress' purpose in enacting its substantive legislation. According to this approach, supplementing the analysis of whether a federal statute expressly pre-empts state law with an implied pre-emption analysis would allow a greater and more accurate balance of both the competing federal goals and of the state interests.

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<sup>194</sup> In *Medtronic* the Court even stated that “*it is impossibile to ignore [the] overarching concern [of the statutory and regulatory language] that pre-emption occurs only where a particular state requirement threatens to interfere with a specific federal interest*”(id. ad 2257): this language recalls the concept of *obstruction of purpose – conflict pre-emption* (on which see the next paragraph), showing the effective impossibility of demarcate a real separation between the several categories of pre-emption (see *supra*, note 148).

<sup>195</sup> Cf. S.J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 Villanova Law Rev., 1 (1995).

### 2.1.2 *Implied* (or *conflict*) pre-emption's sub-categories: *field* and *obstacle* pre-emption

Depending upon the case, the Court has erected both varying categories of pre-emption and divergent standards for adjudicating pre-emption claims<sup>196</sup>. Accordingly, the supposedly distinct types of pre-emption are not so much opposed to one another as individually incomplete<sup>197</sup>. Although the Supreme Court is generally reluctant to find pre-emption when Congress has been ambiguous, the question whether federal law should be read to pre-empt state action in any given case necessarily remains, in the end, a matter of careful statutory construction: in the absence of an express pre-emption clause clearly defining the extent pre-emption, the touchstone of implied pre-emption analysis is congressional intent to pre-empt state law.

As pre-emption cases involve a broad range of subject matters and a variety of statutes, each decision is specific: as a matter of fact the outcome in one pre-emption case will not necessarily determine the outcome of the next case<sup>198</sup>, and subsequently the analysis underlying each decision is important in ascertaining whether a consistent doctrine of pre-emption exists or not. In evaluating existing relationships between federal and state legislations, the Supreme

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<sup>196</sup> See *Wardair Can., Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986) (“[T]his Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption”)

<sup>197</sup> Cf. S.C. Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, at 731.

<sup>198</sup> See K.L. Hirsch, *Toward a New View of Federal Preemption*, Univ. Of Illinois Law Forum, 515 Vol. 1972, at 520-521: “The need of focusing on [...] specific means that the Court’s preemption decision are largely based on ad hoc considerations, especially on the exact statutes in question”.

Court has declared generally that, in the absence of express pre-emption language within the federal statute itself, federal pre-emption of state laws, regulations or standards may be reasonably implied from the structure and purpose of the federal legislation at issue.

*Implied* or *conflict* pre-emption could thus arise in either of two set of circumstances<sup>199</sup>: first, federal law may impliedly pre-empt state law where federal regulations are so extensive that there can be no room for state law to add to the comprehensive federal regulations in a certain area<sup>200</sup> (*field pre-emption*); second, where a federal regulation makes it impossible to comply with both state and federal regulations in a given area, or where compliance with state law “*stands as an obstacle*” to the federal regulation, the federal regulation pre-empts state law (*obstacle pre-emption*)<sup>201</sup>.

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<sup>199</sup> Cf. E.M. Martin, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, at 1236; see also R.R. Gasaway, A.C. Parrish, *Implied Conflict Pre-emption: A Formal Approach*, in R.A. Epstein, M.S. Greve (ed.), *Federal Preemption: States’ Powers, National Interests*, AEI Press, 2007

<sup>200</sup> See *English v. General Electric Co.*, 496 U.S. 72, 79-80, n.5 (1990) (majority opinion of Blackmun, J.): “[F]ield pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation”.

<sup>201</sup> According to L.H. Tribe, *conflict* pre-emption would occur “where Congress did not necessarily focus on pre-emption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives” (cf. *American Constitutional Law*, at p. 1176-77). According to V. Dinh, the idea of *conflict* pre-emption “[...] rest on a fundamental misconception of the nature of pre-emption and how it relates to the Supremacy Clause. Recall that the legislative power to pre-empt derives from the enumeration in Article I, Section 8 and not from the Supremacy Clause. The latter is a constitutional choice of law rule specifying that federal law is supreme. So conceived, *conflict* pre-emption is not implied pre-emption - it is not even pre-emption at all. Rather, it is the quintessential application of the Supremacy Clause to resolve conflicts between State and federal law” (cf. *Reassessing the Law of Pre-emption* at p. 9).

### 2.1.2.1 *Field* pre-emption

Traditionally, the Supreme Court has recognized that congressional intent to pre-empt state law may be inferred where the state law regulates conduct in a field that Congress intended the federal government to occupy exclusively, impliedly intending to preclude any state regulation in the same area by legislating comprehensively in it<sup>202</sup>. Perhaps because of the danger of misinterpreting unexpressed congressional intent<sup>203</sup>, and being *occupation of the field pre-emption* the most comprehensive type of pre-emption, the Court has generally been hesitant to find that the federal legislation occupies the field, by requiring that congressional intent has to be “clear and manifest”<sup>204</sup>: this insistence offsets the comprehensive effect of *occupation of the*

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<sup>202</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947): here the Court found that Congress had legislated in the area of warehousemen and that “Congress in effect said that the policy which it adopted in each of the nine [matters charged in the complaint] was exclusive of all others [...]” *Id.* at 235-236.

<sup>203</sup> In addition to not having expressed its intent explicitly, Congress may not even have considered the pre-emptive effect of its legislation. See K.L. Hirsch, *supra*, note 274, at 542: the author notes that “[q]uestions of the relation of the federal law to existing and potential state law are seldom considered in detail in the drafting of federal legislation. Consequently, many federal acts are adopted without serious consideration of their impact on state law dealing directly with the same subject matter”. This fact further complicates the resolution of this type of pre-emption.

<sup>204</sup> See D.P. Rothschild, *A Proposed “Tonic” with Florida Lime to Celebrate Our New Federalism: How to Deal with the “Headache” of Preemption*, at 848-854: the Court has identified several important factors in determining Congress’s intent to pre-empt state law: 1) the federal regulation may be so pervasive that a state cannot operate in the same area; 2) the federal interest may be so dominant in an area that the states are precluded from regulating it; 3) the object to be obtained by the federal law and the type of obligations imposed by it may disclose the same purpose; and 4) the result of the state law may be inconsistent with the objective of the federal law. See also E.M. Martin, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, at 1234.

*field* pre-emption<sup>205</sup>, in which therefore the Court maintains a general presumption against the pre-emption of state law<sup>206</sup>.

When a court finds that Congress has occupied a field, it holds that the States are completely barred from regulating that area: courts bar states regulations not because the Constitution gives Congress certain exclusive and enumerate powers<sup>207</sup>, but because Congress has deemed it necessary and proper to exclude the States from a particular area. Congress may occupy a field even when it seems unlikely that the operation of state law would disrupt the regulatory scheme Congress has set.

*Hines v. Davidowitz*<sup>208</sup> constitutes the historical landmark case for *field pre-emption*<sup>209</sup>: in 1939 Pennsylvania enacted a law requiring

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<sup>205</sup> Occupation of the field pre-emption is the most comprehensive type of pre-emption because a state law can be pre-empted although it does not actually conflict with the federal law in any way.

<sup>206</sup> See *Reid v. Colorado*, 187 U.S. 137, 148 (1902) (“*It should never be held that Congress intends to supersede or by its legislation suspend the exercise of police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested*”). See also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (pre-emption of state law should not occur unless there are persuasive reasons for doing so); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (police power of the States is not to be superseded by the federal law “*unless that was the clear and manifest purpose of Congress*”); *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940) (congressional intent to pre-empt is not to be inferred unless clearly indicated). As explained above, the presumption against pre-emption is not limited to occupation of the field pre-emption: see *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

<sup>207</sup> As it happens in relation to the foreign affairs power and to the power over immigration, both granted by the Constitution (art. 1. § 8) (see J. Goldsmith, *Statutory Foreign Affairs Preemption*, Chicago John M. Olin Law & Economic Working Paper No.116; E.L. Richardson, *Checks and Balances in Foreign Relations*, 83 *American Journal of International Law*, 736 (1989)).

<sup>208</sup> 312 U.S. 52 (1941).

<sup>209</sup> In the standard recitation of pre-emption tests in Supreme Court opinions, the “*stand as an obstacle*” formula is usually followed by a citation to *Hines v. Davidowitz*, (*id.* at 67: whether challenged state action has been pre-empted turns on whether or not it “*stands as an obstacle to the accomplishment and*

registration of all aliens inhabiting the State. At that time, no federal law required such registration; in light of growing international unrest, however, Congress enacted an alien registration statute in 1940, but did not directly specify its intent regarding the survival of pre-existing state registration statute. Inevitably, a pre-emption challenge to Pennsylvania's law found its way to the Supreme Court, which concluded that the federal act impliedly precluded concurrent state regulation from the whole field at issue. The Court began its analysis by demarcating the field, identifying as critically relevant the national government's supreme power over foreign affairs<sup>210</sup>, holding that "*where the federal government, in the exercise of its superior authority [...] has enacted a complete scheme of regulation and has therein provided a standard [...] States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations*"<sup>211</sup>.

Importantly, the federal act by its terms did not expressly pre-empt state law, which actually preceded Congress's action and provided a model for the national statute. The Court defined the federally occupied field expansively, with little reference to legislative history and with no application of either the "clear statement" requirement or the presumption favouring concurrent state power. Rather, the Court

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*execution of the full purpose and objectives of Congress*").

<sup>210</sup> This recognition has led one commentator to suggest that when Congress exercises key national powers in the allegedly pre-emptive legislation, the pre-emption analysis should proceed with more relaxed standards for permitting implication of pre-emption. Under this theory, federal regulation affecting foreign affairs and national security would legitimately yield expansive pre-emption of state law, even without clear direction from Congress (see P. Wolfson, *Preemption and Federalism: The Missing Link*, at 103-05).

<sup>211</sup> See *Hines v. Davidowitz* at 66-67.

emphasized that the state statute implicated the foreign affairs power, thus producing consequence that Congress merely had to act on the subject for its statute to be deemed generously pre-emptive.

The first of the Supreme Court's modern pre-emption cases, *Cloverleaf Butter Co. v. Patterson*<sup>212</sup> repeats *Hines*'s orientation implying the presence of an exclusive federal regulatory field, but in the commercial area rather than the public sector: here the Court held that although Congress had not expressly directed pre-emption, the federal act involved impliedly pre-empted the state's attempt to enforce its more stringent standards for the product. The Court reasoned that the strict state standards effectively "*nullified federal discretion*"<sup>213</sup>, determining that state standards which are higher or more exacting than those imposed by the federal scheme constitute an impermissible conflict with federal act: the underlying theory is that Congress has struck the precise regulatory balance desired, and also has stated whether and how the states are to be involved in the regulatory scheme: any state involvement other than that specified in the federal act thus constitutes intrusion into the federal field and must be ruled invalid<sup>214</sup>.

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<sup>212</sup> 315 U.S. 148 (1942).

<sup>213</sup> *Id.* at 168.

<sup>214</sup> Accordingly, some commentators pointed out that *Cloverleaf Butter* reverse the traditional presumption against pre-emption by establishing a presumption of federal pre-emption when state and federal regulations seek to operate concurrently (cf. Hoke, *Pre-emption Pathologies and Civic Republican Values*, 71 Boston Univ. L. Rev. 685, (1991) at 742). Another element which here has been taken into account in the *field pre-emption* analysis is the comprehensiveness and the complexity of the federal scheme at issue: as long as pre-emption is a matter of congressional intent to supersede state law (see *Metropolitan Life ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) legislative complexity should not be considered as an element addressing Congress's intent to pre-empt state law: instead, this approach forces courts to balance

A remarkable and relatively new area in which pre-emption problems have arisen is that of nuclear power<sup>215</sup>. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*<sup>216</sup> the Court upheld a California statute conditioning the construction of nuclear power plants on a state commission finding that adequate storage and disposal facilities were available for the nuclear waste. The Atomic Energy Act of 1954, under which the federal government chose to exclusively regulate the nuclear and safety aspects of nuclear power plants, left the States free to regulate on economic questions such as generating capacity and rates. In *Pacific Gas* the Court did not have to infer Congress's intent to pre-empt, as it was clearly expressed: rather, the Court had to decide if the state law fell within the occupied field. Under the congressionally mandated system of dual regulation, the state statute needed only to be pre-empted if it regulated the safety aspects of nuclear power plants: according to the Court, Congress had not intended to accomplish the promotion of nuclear power "at all costs"<sup>217</sup>, as it "ha[d] left sufficient authority in the states to allow the development

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federal and state laws and to hold state laws pre-empted when the scheme of regulation is so broad and detailed as to be comprehensive, and because the scheme is comprehensive any further regulation by the States would disrupt Congress's general vision for the field (cf. L.H. Tribe, *American Constitutional Law*, at 1206 (note no. 12); Wolfson, *Pre-emption and Federalism: the Missing Link*, at 73). For a more recent case employing an approach similar to *Cloverleaf Butter*, see *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973). To the contrary, in *DeCanas v. Bica* (424 U.S. 351 (1976)) although the pervasiveness of the federal act at issue the Court refused to the Congress did not intend to pre-empt state laws under an *occupation of the field* analysis.

<sup>215</sup> See D.R. Hague, *New Federalism and "Occupation of the Field": Failing to Maintain State Constitutional Protections Within a Pre-emption Framework*, 64 Washington L. Rev. 721 (1989).

<sup>216</sup> 461 U.S. 190 (1983).

<sup>217</sup> *Id.* at 222.

of nuclear power to be slowed or even stopped for economic reasons”<sup>218</sup> the statute served economic purposes because a waste disposal problem would lead to unpredictably high operating costs, thus making the building of the plant economically unfeasible<sup>219</sup>. By holding the state law pre-empted, the Court upheld the system of dual regulation which Congress had established – permitting the States to regulate aspects which were of local concern while not hindering the operation of a uniform system regarding the safety of nuclear power plants<sup>220</sup>. The Court realized that by finding occupation of the field pre-emption it would be performing, in effect, a legislative function, and eventually it declined to do so<sup>221</sup>. The Court concluded that “*the only reasonable inference [was] that Congress intended the States to continue to make*” judgments about need, reliability, economic consequences of service shutdowns due to waste disposal problems and other economic matters<sup>222</sup>. Thus, absent a more explicit congressional mandate than was present in *Pacific Gas & Electric*,

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<sup>218</sup> *Id.* While declining to give pre-emptive effect to Congress’s general purpose of promoting nuclear power, the majority found that any state nuclear safety regulation would be pre-empted, whether or not it conflicted with broad federal objectives: “*the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States*” (*id.* at 212).

<sup>219</sup> 461 U.S. at 213-214. The Supreme Court interpreted the purpose of the statute as economic rather than safety related, because an “*inquiry into legislative motive is often an unsatisfactory venture*” (*id.* at 216).

<sup>220</sup> According to “*Comment - Federal Supremacy Versus Legitimate State Interests in Nuclear Regulations: Pacific Gas & Electric and Silkwood*”, 33 Cath. U.L. Rev. 899 (1984), neither *Pacific Gas* nor *Silkwood* effectuates the purpose of federal occupation of the nuclear safety field.

<sup>221</sup> The Court also refused to pre-empt the state law under an obstacle conflict analysis: although the federal law sought to encourage the development of nuclear power, Congress had granted the States enough authority to slow down the development for economic reasons. The Court left it for the Congress to remedy the problem of a State which used that authority to “*undercut a federal objective*” (*id.* at 221-23).

<sup>222</sup> *Id.* at 207-08.

Congress's decision not to regulate nationally the economic concerns of power generation was not to be equated with a congressional determination that the States may not enact their own regulations addressing those same concerns locally.

Notwithstanding its decision in *Pacific Gas* which required the pre-emption of any state law which sought to regulate the safety of nuclear facilities, the Court in *Silkwood v. Kerr-McGee Corp.*<sup>223</sup> held that state common law providing for compensatory and punitive damages for tort victims was outside that occupied field and therefore not pre-empted<sup>224</sup>. The Court rejected an argument that punitive damages are imposed as a punishment and, as such, regulate conduct in connection with safety, a regulatory field which Congress had pre-empted<sup>225</sup>. Significantly, the *Silkwood* Court abandoned an occupation of the field pre-emption analysis in cases of damage from radiation injury<sup>226</sup>: according to the Court, pre-emption should be based “*on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the*

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<sup>223</sup> 104 S. Ct. 615 (1984).

<sup>224</sup> *Id.* at 626. Kareen Silkwood, an employee of Kerr-McGee, and her property were contaminated by radiation from the defendant's nuclear facility. Silkwood died in an unrelated car accident, but her father, as executor of her estate, sued Kerr-McGee for damages on common law tort principles.

<sup>225</sup> *Id.* at 622. The Court determined “[t]hat Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort remedies” and placed the burden on the defendant to show that Congress intended to preclude the award of punitive damages (*id.* at 623, 625). The Court admitted that its decision created “*tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability*” Nevertheless, the Court believed it could live with this tension because it assumed that Congress was doing the same (*id.* at 625).

<sup>226</sup> *Id.* at 626.

*federal law*”<sup>227</sup>.

The Court also saved from pre-emption state tort claims for intentional infliction of emotional distress in the context of a nuclear plant employee’s attempt to blow the whistle on alleged federal safety standards violations<sup>228</sup>. In concluding that such torts were not pre-empted, *English v. General Electric Co.* clarified how the pre-empted *field* was defined in *Pacific Gas & Electric*. The Court in *English* first stated that it was not necessary that the purpose of the state law coincide with the purpose of the federal law in order for the former to be pre-empted. The Court went on to emphasize that the crucial question was whether the state law at issue would have a “*direct and substantial*” conflicting effect in the pre-empted field<sup>229</sup>: *English* thus seems to indicate that generally applicable state laws with only a remote relation to or impact on a pre-empted field will not ordinarily be trumped by federal law<sup>230</sup>.

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<sup>227</sup> *Id.*

<sup>228</sup> See *English v. General Electric Co.*, 496 U.S. 72 (1990).

<sup>229</sup> *Id.* at 84-85. Later, *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 105, 107 (1992) (plurality opinion), indicated that non-conflicting concomitant state purposes were not enough to avoid implied pre-emption, matching *English*’s statement regarding concomitant effects in field pre-emption.

<sup>230</sup> Whether this decision states a generally applicable principle of pre-emption doctrine remains a matter of dispute, as some Justices have recognized a potential distinction between “generally applicable” or “background” state law and more targeted regulatory efforts that parallel federal standards (see *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 235 (1995); *Gade*, 505 U.S. at 107).

### 2.1.2.2 *Obstacle* pre-emption:

Express pre-emption involves an actual conflict between the state law and some federal statutory language, while implied pre-emption doctrines displace state law absent any actual conflict with some federal provision. According to traditional Supreme Court's case law, *obstacle pre-emption* (also known as *frustration of purpose* pre-emption<sup>231</sup>) occurs where compliance with both federal and state law is impossible<sup>232</sup>, or where the States enact or enforce a legislative act in an area already governed by the Congress, by posing “*an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*”<sup>233</sup>.

In such cases the Supreme Court generally interprets the federal statute as so to ascertain Congress's objectives<sup>234</sup>, determining

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<sup>231</sup> Cf. V. Dinh, *Reassessing the Law of Preemption*, at 9.

<sup>232</sup> Cf. E. Young, “*The Ordinary Diet of the Law*”: *Federal Pre-emption and State Autonomy*, in R.A. Epstein, M.S. Greve (ed.), *Federal Preemption: States' Powers, National Interests*, AEI Press, 2007.

<sup>233</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). On the contrary, according to C. Nelson (cf. *Preemption*, at 265) as long as the Court presents the doctrine of obstacle pre-emption as a general rule of statutory interpretation (implying that all federal statutes should be read to imply a clause forbidding states to enact or enforce laws that would get in the way of Congress's full purposes and objectives) a general constitutional doctrine of *obstacle* pre-emption cannot be logically supported. Therefore, whether a particular federal statute requires obstacle pre-emption depends on the specific words and context of the federal statute at issue.

<sup>234</sup> See *id.* at 67. The Court observed: “*There is not – and from the very nature of the problem there cannot be – any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress [...]. In the final analysis, there can be no one crystal clear distinctly marked formula*”.

In *Perez v. Campbell*, 402 U.S. 637 (1971) the Court articulated a two-step analysis for deciding when an obstacle conflict exists. The Court's job is to “*first ascertain the construction of the two statutes and then determine the constitutional question whether they are in conflict*” (*id.* at 644): thus, obstacle conflict pre-emption allows the Court the discretion to determine initially what

whether the state law poses an obstacle to those objectives and considering the state and federal interests involved<sup>235</sup>. For example, in *Felder v. Casey*<sup>236</sup> the Court held that a state law requiring plaintiff to file a notice of claim before suing governmental actors – and thus imposing a procedural hurdle to suit – was pre-empted because it stood as an obstacle to the congressional purpose behind “*the compensatory aims of the federal civil rights laws*”<sup>237</sup>.

As previously highlighted, the ‘*stand as an obstacle*’ formula usually quoted from *Hines v. Davidowitz* was rarely cited until the issue clearly re-emerged twenty years later in *Florida Lime & Avocado Growers v. Paul*<sup>238</sup>, a landmark case in which the Court’s majority held that the involved California law did not stand as an obstacle to the accomplishment of Congress’s purposes and objectives<sup>239</sup>. The

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the federal objectives are and then whether the state law poses an obstacle to those objectives.

<sup>235</sup> For example, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), the Court upheld the pre-emptive extent of a federal act toward a California statute which required the net weight label on food packages to accurately state the actual net weight of the food. When applied to packaged flour, the Court found that the statute posed an obstacle to the objective of the federal *Fair Packaging and Labelling Act* (“FPLA”) which was “*to facilitate value comparisons among similar products*” (*id.* at 541). The California statute did not permit variations between the stated and actual net weights while the FPLA allowed reasonable variations in weight due to the gain or loss of moisture (*id.* at 531-533). The Court concluded that the state statute would induce the overpacking of flour, while manufacturers operating under the federal statute would not need to overpack. Therefore, consumers would be comparing flour packages with the same stated net weights but different actual net weights (*id.* at 542-43).

<sup>236</sup> 487 U.S. 131 (1988).

<sup>237</sup> *Id.* at 141.

<sup>238</sup> 373 U.S. 132 (1963).

<sup>239</sup> The majority upheld a California law that regulated the marketing of avocados sold in California on the basis of oil content in order to protect consumers from being disappointed by edible but unsavoury avocados. Federal regulations of Florida productions determined marketability on the basis not of oil content but of size, weight and picking date, with the same general objective. As a consequence, about six of every one hundred Florida avocados

majority understood its analysis simply to embrace two long-standing pre-emption tests: the existence of an actual conflict between federal and state laws, and the occupation of an entire field by Congress<sup>240</sup>. On the contrary, the dissenters introduced a new aspect to pre-emption doctrine by concluding that, even without total occupation of the field, Congress had pre-empted state law because its purpose in enacting federal standards was to establish uniform standards of avocado quality throughout the whole national market<sup>241</sup>: even in the absence of a clearly expressed congressional intent to pre-empt the field, courts might therefore conclude that some federal regulation requires the exclusion of parallel state legislation.

Following such view – which is remarkably consistent with the “comprehensiveness theory” connected to the *field* pre-emption theory explained above – courts should hold that State laws are pre-empted whenever the federal government strikes a particular “delicate balance”<sup>242</sup> among competing considerations that could be upset by more stringent state regulation. A significant example of this reasoning can be easily found in a more recent case in which the Court recognized that the federal Clean Water Act had not occupied the entire field of water pollution regulation, and concluded

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meeting the federal marketing standards were excluded from California’s market by that state regulation (*id.* at 140; see also L.H. Tribe, *American Constitutional Law* at 1199).

<sup>240</sup> *Id.* at 141.

<sup>241</sup> *Id.* at 169 (Justice White, dissenting): uniformity in commerce represented thus a predominant federal interest because “[l]ack of uniformity tends to obstruct commerce, to divide the Nation into many markets”.

<sup>242</sup> See also *City of Burbank v. Lockheed Air Terminal*, 411 U.S. at 638-39, where the Court held that Burbank’s ordinance prohibiting jet aircraft takeoffs from Burbank airport was pre-empted by the Federal Aviation Act of 1958 and the Noise Control Act of 1972. After discussing the “pervasive” control of aircraft flight by the federal government the Court stressed that the FAA had established a “delicate balance” between the two most important factors.

nonetheless that by setting up an elaborate permit system for the discharge of polluting effluents, Congress had established a delicate balance that should not be upset by the application of the state law involved<sup>243</sup>.

If, virtually every federal regulatory statute reflects a delicate balance among competing interests, and if the Supreme Court concludes – as it happened in the case at issue – that such a carefully planned balance should have a pre-emptive outcome, the States would always be left with only a tiny amount of legislative authority. The “delicate balance” theory overlooks the fact that at least two levels of legislative activity operate in the United States. Congress’s decision to strike a particular balance on the federal level does not necessarily mean that it is unwilling to have the balance potentially altered by the States: a conclusion that Congress has established such balance requiring automatically pre-emption of any State activity would have the identical effect as a conclusion that Congress has occupied the whole field and entirely divested States of authority in that subject area. If, however, Congress has not occupied the field but continues to operate under the assumption that state legislatures continue to pass laws, “delicate balance” pre-emption requires on one side that such balance must not be modified by the States, and on the other side that States may however continue to pass laws affecting the field of legislation considered. As a matter of fact therefore such pre-emption theory would reconvert itself back into a particular

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<sup>243</sup> See *International Paper Co. v Ouellette* (107 S. Ct. 805 (1987)). Here the Court provided a surprising answer by stating that State nuisance law had been half pre-empted and half saved: Justice Powell, writing for the Court, concluded that the State law of the source State could continue to apply to trans-boundary pollution, but the State law of persons in affected states was pre-empted.

category of the *occupying the field* model, featured by the Congressional pre-emption of only a small field of the legislative area involved.

## 2.2 *Supremacy clause* and pre-emption

As the Supreme Court acknowledges<sup>244</sup>, the pre-emption doctrine's constitutional roots are to be found in the *Supremacy clause*, the core provision<sup>245</sup> according to which valid federal law is hierarchically supreme in case of conflict resulting from concurrent State and federal powers.

With a small number of exceptions<sup>246</sup>, the largest part<sup>247</sup> of the

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<sup>244</sup> See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982) (noting that pre-emption doctrine “has its roots in the *Supremacy clause*”); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (attributing “[t]he underlying rationale of the pre-emption doctrine” to the *Supremacy clause*); *Philadelphia v. New Jersey*, 430 U.S. 141, 143 (1977) (observing that “federal pre-emption of State statutes is, of course, ultimately a question under the *Supremacy clause*”). See also cases *Chicago & Northwestern R.R. Co. v. Fuller*, 84 U.S. 560, 570 (1873): “[State regulations are] to be valid until superseded by the paramount action of Congress”; *the Passenger Cases*, 48 U.S. 7 How. 283 (1849): “[T]he very language of the Constitution may be appealed to for the recognition of powers to be exercised by the states until they shall be superseded by a paramount authority vested in the federal government”; *Houston v. Moore*, 18 U.S. 1, 49-50 (1820): “There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being “the supreme law of the land,” are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists must necessarily yield”.

<sup>245</sup> Cf. U.S. Const. Art. 6, par. 2.

<sup>246</sup> A remarkable exception in the pre-emption analysis is provided by the smart analysis offered by S. Gardbaum: the Author tends to separate the concept of pre-emption from the idea of supremacy, while the largest part of the doctrine tends to link each other. According to his survey (cf. *The Nature of Preemption*, 79 Cornell L. Rev. 767 (1994); *Rethinking Constitutional Federalism*, 74 Texas L. Rev. 795 (1996); *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997); *Preemption*, in *Encyclopedia of the American Constitution*, Ed. Leonard W. Levy & Kenneth L. Karst, 2<sup>nd</sup> edition, 2000; *Congress's Power to Preempt the States*, UCLA School of Law Research Paper No. 05-33, available at <http://ssrn.com/abstract=821324>, 2005) pre-emption and supremacy are two separate, distinct and mutually exclusive methods of regulating the relationship between federal legislative powers and concurrent State competences: *supremacy* would simply embody a principle according to which in case of conflict federal law trumps State law (as stated by Art. 6 U.S.

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Const.), regardless of any Congress's intent; on the contrary, *pre-emption* would be related to a proper discretionary power granted to Congress, which thus may be or may not be exercised. Although both methods may be said to result in the displacing of State law, failure to distinguish them has had serious consequences for the law of pre-emption: such Congress prerogative could not derive from the *Supremacy clause*, which only states a feature of federal law without granting any specific power to Congress. Moreover, Congress's power of pre-emption, when exercised to the full, has a far more radical impact on State law than the automatic characteristic of federal supremacy: first, by exercising its power of pre-emption, Congress can displace State law even where the latter is not in conflict with federal law; second, by exercising its pre-emption power, Congress may not only displace particular non-conflicting State laws, but redistribute general legislative competence between itself and the States: it may convert concurrent federal and State power over a give regulatory area into exclusive federal power, to deprive the States of their pre-existing concurrent legislative authority, in whole or in part. Therefore, whereas supremacy means the displacement of conflicting state law, pre-emption means the displacement of non-conflicting state law and/or concurrent state authority in a given field, leaving out of consideration potential conflicts. Pre-emption is not needed to – and does not – displace state laws that conflict with valid federal laws; they are automatically displaced by the operation of the *Supremacy Clause*. Thus, although both supremacy and pre-emption displace (or supersede) state law, they operate to displace different types of state law and do so by the different mechanisms of automatic consequence and discretionary power respectively. Additionally, like all powers of Congress the power of pre-emption must be an enumerated one, and its source cannot be the *Supremacy clause*, which only supplies the rule for resolving conflicts resulting from exercise of concurrent federal powers granted elsewhere in the Constitution: the constitutional justification for pre-emption would be the *Necessary and Proper clause* of article I, section 8 U.S. Const., which basically authorizes it as a means of effectuating other congressional powers: in certain areas and under certain circumstances, Congress needs to pass uniform national laws in order to exercise its express powers effectively. The *Necessary and Proper clause* provides the power to supersede State law, as the existence of a layer of State regulation, although not in conflict with the federal, is sometimes inappropriate: such power has nothing to do with the Supremacy clause, as the independent principle of supremacy is insufficient to guarantee the uniform national regulation that is sometimes required.

<sup>247</sup> See for example *supra*, L.H. Tribe, *American Constitutional Law*, K.L. Hirsch, *Toward a New View of Federal Preemption*, Univ. Of Illinois Law Forum, 515 Vol. 1972; M.J. Alonso, *Environmental Law: A Reevaluation of Federal Pre-emption and the Commerce Clause*, 7 Fordham Law J., 515, 1979; S.R. Armstrong, *Oil Spills – State Prevention and the Possibility of Pre-emption*, 30 Mercer Law Rev., 559, 1979; A.M. Segreti, *The Federal Preemption Question – A Federal Question? An Analysis of Federal Jurisdiction Over Supremacy Clause Issues*, Cleveland State Law Rev., Vol 33:653, 1984-85; E.M. Martin, *The Burger Court and Preemption Doctrine*:

doctrine tends to identify such constitutional provision as the textual justification for pre-emption; furthermore, in the greatest part of cases arising from a conflict between federal and State law<sup>248</sup> this constitutional provision was directly recalled by the Supreme Court, that frequently employed a language very similar to the one used by Chief Justice Marshall in the historical case *Gibbons v. Ogden*<sup>249</sup>. Under such circumstances, the *Supremacy clause* alone (instead of the whole constitutional framework) is conceived as the direct source of the pre-emption power granted to Congress, as under its operative extent all the conflicting State law are to be considered invalid.

Remarkably, a rapid survey of the whole American Constitution

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*Federalism in the Balance*, Notre Dame Law R., Vol. 60:1233, 1985; E.L. Stettin, *Federal Pre-emption: Time to Reestablish an Old Doctrine*, 12 Nova Law Rev., 1331, 1988; J.D. Titus, *Federal Pre-emption and the Cigarette Act – The Smoke Gets In Your Eyes*, 20 Arizona State Law J., 897, 1988; R. Waltz, *Environmental Protection and Pre-emption of State Common Law Tort Claims by FIFRA: Netland v. Hess*, 11 Southeastern Environmental L. Journal, p. 114, 2002.

<sup>248</sup> These cases are also known as the “*Supremacy clause cases*”: cf. *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152 (1982) (“[...] preemption doctrine has its roots in the Supremacy Clause”); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (where “[t]he underlying rationale of the preemption doctrine” is linked to the *Supremacy clause*); *Philadelphia v. New Jersey*, 430 U.S. 141, 142 (1977) (where it is pointed out that pre-emption of State laws “[...] is, of course, ultimately a question under the Supremacy Clause”); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (“We consider first appellants’ challenge to [the state law] under the Supremacy Clause”); *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum*, 485 U.S. 495 (1988) (“Our Supremacy Clause cases typically involve analysis of the scope of pre-emptive intent [...]”); *Perez v. Campbell*, 402 U.S. 637 (1971) (“any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause”). See also *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986); *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 151 (1978); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

<sup>249</sup> Cf. *id.* 211: “[...] acts of the State legislature [which] interfere with, or are contrary to the [valid] laws of Congress, are invalid under the Supremacy Clause” (see *supra*, footnote 98).

unveils that the *Supremacy clause* is actually the only provision where a United States legal system's legislative hierarchy is articulated<sup>250</sup>. Under such clause it is stated that:

*“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 the 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”*<sup>251</sup>

The clause includes three different statements. According to the first one (a) the Constitution, treaties, and valid federal law enacted by Congress constitute a distinct category of law: they are “the supreme Law of the Land”, and in every State judges are bound thereby; secondly, it express the principle according to which (b) such specific category is *supreme*; thirdly, it states that (c) federal law is binding “any Thing in the Constitution or Laws of any State notwithstanding”.

The first rule (a) sets out a *rule of applicability* of federal law, by pointing out that it applies not only in federal courts, but even in State courts: accordingly, federal statutes take effect automatically within each State and form part of the same body of jurisprudence as State statutes. In the absence of such provision, State courts might

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<sup>250</sup> A potential exception may be represented by the Constitution's Preamble, according to which the Constitution and the whole American federal Union are based on the determination expressed by the People of the United States.

<sup>251</sup> U.S. Const. Art. 6, par. 2.

have sought to analogize federal statutes to the laws of another sovereign (the federal one<sup>252</sup>), which they could ignore as they ignore acts enacted by foreign sovereign, under principles of international law. From this point of view the federal Constitution set a significant departure from the pre-unitary Confederation, which gave Congress only some specified powers<sup>253</sup> and left all the remaining questions to the States, thus stating a substantial separation between concurrent legal orders. The inclusion of the *Supremacy clause* in the final Constitutional wording<sup>254</sup> clearly established a unitary legal system

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<sup>252</sup> Being these acts enacted by a legal order which is different from the State one, they could be considered as enacted by a foreign one: cf. *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) e *Ingraham v. Geyer*, 13 Mass. (12 Tyng) 146, 147 (1816). Similarly, a modern invocation of this analogy can be found in *Testa v. Katt*, 47 A.2d 312 (R.I. 1946), rev'd, 330 U.S. 386 (1947), where the federal Supreme Court held that the *Supremacy clause* prevents State courts from refusing to enforce a federal statute on the ground that it is of a foreign sovereign (the federal one).

On the basis of Article XIII of the pre-federal Confederation, Congress's acts not necessarily became part of the law applied in State courts: each State legislature was supposed to pass laws implementing Congress's directives. If a State legislature failed to do so, and if Congress's acts had the status of another sovereign's law, then Congress's acts might have no effect in the courts of that State (cf. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in *Papers of James Madison* 345, 352, Rutland & Rachal Editions, 1975, noting that in practice even if not in theory "*the acts of Congress [...] depend for their execution on the will of the State legislatures*").

<sup>253</sup> For example, in foreign affairs Article IX of the Confederation gave Congress "*the sole and exclusive right and power of determining on peace and war*" and of "*entering into treaties*".

<sup>254</sup> The *Supremacy clause* inclusion procedure is extensively described by S.C. Hoke in *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause* (pp. 871-872). During the Constitutional Convention several alternative proposals were submitted: the so-called *Virginia Plan*, proposed by Governor E. Randolph on May 29, 1787, listed among the powers to be given to Congress the authority "to negate all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union" (see *The Records of the Federal Convention of 1787*, M. Farrand ed., rev. ed. 1937, at 21). On June 15, 1787, W. Patterson introduced an alternative set of resolutions (known as the *New Jersey Plan*) not including any authority to negate State law.

by telling courts to treat valid federal statutes and treaties as “in-State law” rather than as the law of another sovereign.

The second aspect (*b*) of the *Supremacy clause* substitutes a federal rule of priority for the traditional temporal rule of priority usually employed in case of conflicting laws (*lex posterior derogat priori*): the *Supremacy clause* not only makes valid federal law part of the same body of jurisprudence as State law, but also declares that within that body of jurisprudence federal law is *supreme*. If federal laws were merely on a par with State statutes, than they would obviously supersede whatever pre-existing State law they contradicted, but they might themselves be superseded by subsequent acts enacted by State legislatures. Under this new rule of priority, when courts had to choose between following a valid federal law and a following State law, the federal law would prevail even if the State law had been enacted more recently. Such rule matters only when State law is in conflict with a valid federal law: hence the rule of priority comes into play only when courts cannot apply both State law and federal law, but instead must choose between them<sup>255</sup>.

The third section of the *Supremacy clause* (*c*) defines a peculiar rule of construction concerning the dynamic relationship between State

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<sup>255</sup> According to V. Dinh the pre-emption doctrine finds its roots in the *Supremacy clause*, which actually does not grant any affirmative power to Congress. Such constitutional provision “*only prescribed a constitutional choice of law rule, one that gives federal precedence over conflicting State law*” (cf. *Reassessing the law of Preemption, id.*). The *Supremacy clause* is relevant only at the post-enactment stage, where a State law conflicts to some degree with a federal law: it tells courts not to apply State laws repugnant to federal laws, while it is obvious that where the conflict is absent courts can freely apply both laws. Pre-emption would thus be a mechanism arising from the *Supremacy clause* as so to resolve legislative conflicts, not occurring where no conflicts arise (see also S.C. Hoke, *Preemption Pathologies and Civic Republican Values, id.*).

and federal laws, by confirming the connection existing between pre-emption and the implied repeals theory. The final part of the *Supremacy clause* is a global *non-obstante provision*<sup>256</sup>, whose interpretation appears to be particularly complicated, because of the *Supremacy clause*'s alleged redundancy: once it told that valid federal law is supreme and binding, apparently no reasons justify the statement under which it applies “*any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*”. While the *rule of applicability (a)* told courts to treat the federal Constitution, treaties and valid federal statutes as in-State law, and the *rule of priority (b)* told them that the federal portion of in-State law trumped whatever aspects of the State portion it contradicted, the last

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<sup>256</sup> History and meaning of the so-called *non-obstante provisions* in the American pre-unitary legal system are extensively described by C. Nelson (cf. *Preemption*, at 237, 245). During the 18<sup>th</sup> century, if a State legislature was aware of a particular statute that it wanted to replace with a new law, it could include a clause in the new law expressly repealing the old one. In order to avoid the burden of having to list all repealed statutory provisions separately, legislatures sometimes enacted general clauses repealing all prior legislation within the purview of the new statute by specifying that they applied notwithstanding any provisions to the contrary in prior laws (“*any law to the contrary notwithstanding*” or “*any law, usage, or custom to the contrary notwithstanding*” or “*any thing in any law to the contrary notwithstanding*”): given the well established principle that a new statute would abrogate contrary prior statutes anyway, such new interpretative principle seemed to be superfluous. The great use of such clause arose from the fact that it was well-established that a new statute should not be read to contradict an earlier one if the two laws can possibly be harmonized, and such presumption against reading a statute in a way that would contradict prior law created an obvious problem for legislatures. Sometimes legislatures wanted a new statute to supersede whatever prior law it might contradict, but in the absence of some direction to the contrary, courts might give the new statute a strained construction as so to harmonize it with prior law. The presumption against implied repeals might then cause courts to distort the new statute. The *non-obstante clause* addressed this problem by establishing an important rule of construction: it acknowledged that the statute might contradict prior law and instructed courts not to apply the general presumption against implied repeals: courts were thus supposed to give the new statute its natural meaning rather than harmonize it with prior law.

statement included in the *Supremacy clause* set a general rule of interpretation according to which courts are supposed not to apply the traditional presumption against implied abrogation in determining whether federal law contradicts State law. Therefore, even if a federal statute or treaty do not contain a specific *non-obstante provision*, the *Supremacy clause* tell courts not to strain its meaning in order to harmonize with State law<sup>257</sup>.

It goes without saying that such general provision does not affect the presumption against reading two federal statutes to contradict each other: in this situation, the normal presumption against implied repeals continues to apply fully. The *non-obstante provision* does caution against straining the meaning of a federal law to avoid a contradiction with State law: unless there is a particular reason to believe that Congress meant to avoid such a contradiction the *Supremacy clause* indicates that the content of State law should not alter the meaning of federal law. From a global reading of the whole *Supremacy clause* it emerges that the *rule of applicability* and the *rule of priority* combine as so to mean that courts must follow all valid rules of federal law. When courts can follow State law too, the *Supremacy clause* leaves them free to do so. Under the *Supremacy clause*, then, the test for pre-emption asks courts to disregard State law if, but only if, it contradicts a rule validly established by federal law.

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<sup>257</sup> Cf. *Gibbons v. Ogden*, noting that the presence or absence of a specific *non-obstante clause* in the federal act at issue cannot affect the extent or operation of the act of Congress, because its laws need no *non-obstante clause* (*id.* at 30-31).

### 2.3 *Presumption against pre-emption*, traditional State powers and exclusive State legislative competences

The doctrine of federal pre-emption has deeply evolved through decades, and its current idea is striking different from the original conception that featured it: in the beginning, in case of conflict between federal law and State regulations pre-emption was usually seen by the Supreme Court as a direct consequence arising from the action of Congress in specific contexts, such as interstate commerce<sup>258</sup>. During the 1930's, especially in connection with the New Deal revolution, an extensive reconstruction of the American federal system occurred and the so-called *Commerce clause* went under a substantive re-interpretation according to which congressional prerogatives were gradually made more extensive and pervasive<sup>259</sup>. Congress was thus able to exercise its regulatory action in an increasing number of areas and subjects<sup>260</sup>, by imposing a system of laws and regulations aimed at ensuring national

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<sup>258</sup> See *Southern Railway Co. v. Reid*, 222 U.S. 424, 442 (1912): here the Court struck down a State statute regarding railroad rates after the creation of the federal Interstate Commerce Commission, by pointing out that through its institution the federal power had taken full possession of the concerned field, having therefore States lost their concurrent competence. The Court held that “[i]t is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised” (*id.* 436).

<sup>259</sup> See *supra*, footnote 31.

<sup>260</sup> See the *Federal Cigarette Labelling and Advertising Act*, 15 U.S.C. §§ 1331-1341 (1994); the *Federal Food, Drug and Cosmetic Act*, 21 U.S.C. §§ 301-393 (1994); the *Motor Vehicle Safety Act*, 49 U.S.C. §§ 30101-30169 (1994); the 1976 *Medical Device Amendments* (21 U.S.C. §§ 360c-360k, 379, 379a); the 1970 *Occupational Safety and Health Act*, 29 U.S.C. §§ 651-678 (1994); the 1954 *Atomic Energy Act*, 42 U.S.C. §§ 2011-2297g-3; the *National Labor Relations Act*, 29 U.S.C. §§ 151-169 (1988); the *Federal Insecticide, Fungicide and Rodenticide Act*, U.S.C.A. § 136(v)(b) (West 2002).

uniformity. Subsequently, the number of conflicts occurring between State and federal laws grew remarkably, as far as Congress's set compulsory minimum standard legislative floors and pre-emption cases involved all State common-law damage awards, which were considered as additional regulation or setting of standards and requirements. In its early decisions in the area of pre-emption of State tort actions, the Supreme Court analyzed pre-emption like the pre-emption of any State law<sup>261</sup>: if the State law purported to regulate the same conduct as federal law, generally the Court declared the State law pre-empted<sup>262</sup>, thus considering the specific purpose of the State act at issue as irrelevant. By the 1980's, the Supreme Court decisions had changed focus, embracing the importance of ensuring that citizens had a means of seeking compensation and rejecting the notion that allowing State tort claims was akin to impose State regulation: in these decisions, the Court considered whether the purpose of the State law at issue clashed with the purpose of the applicable federal statute, suggesting that a general *presumption against pre-emption* of tort damages actions existed and applied when the federal law afforded no alternative remedy<sup>263</sup>.

Both the enlarged idea of Congress's prerogatives and the pervasiveness of the pre-emption phenomenon gradually imposed a

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<sup>261</sup> See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (stating that “*judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate rather than on the method of regulation adopted*”).

<sup>262</sup> See *id.* (stating that when a State regulation “*threatened interference*” with a federal policy, “*it has been judicially necessary to preclude the States from acting*”).

<sup>263</sup> See *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (noting that the federal *Clean Water Act* pre-emption of nuisance claims under the laws of the affected State would not leave property owner without a remedy, because the owners could bring nuisance claims under the laws of the source State).

deeper analysis of its dynamics<sup>264</sup>, and gradually imported a general presumption according to which State laws is not pre-empted by the simply enactment of a federal statute on the same area, if Congress has not plainly and univocally intended to occupy the whole field of regulation. The Court in many cases<sup>265</sup> has stated such guiding principle by the means of varying formulations, sometimes lacking clarity: on some occasions it held that such presumption was generally embodied by the “*assumption that Congress did not intend to displace State law*”<sup>266</sup>, whilst in other cases the extent of such negative presumption has been formulated in a stricter way, as so to protect not every possible legislative act produced by State legislatures but only the so-called States’ “*historic police powers*”<sup>267</sup>. In some other occasions the Court has pointed out that the negative presumption against pre-emption can be avoided only if Congress’s purpose to displace State law was clear and manifest<sup>268</sup>: in the absence of an express statutory language the Court has generally held a positive presumption in favour of State law (especially in field traditionally occupied by States’ legislative competences) according to which the analysis of the relationships occurring between State and federal law must take into account the assumption that “[...] *the historic police powers of the States were not to be superseded by the*

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<sup>264</sup> See *infra* par. 2.3, dedicated to the different types of pre-emption invoked by the Court.

<sup>265</sup> See for example some historical landmark cases, such as *Savage v. Jones*, 225 U.S. 501 (1912); *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Malone v. White Motor Corp.*, 534 U.S. 497 (1978); *Pacific Gas & Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983); *English v. General Electric Co.*, 496 U.S. 72 (1990).

<sup>266</sup> Cf. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

<sup>267</sup> Cf. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>268</sup> Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Rice*, 331 U.S. (*id.* 230).

*Federal Act unless that was the clear and manifest purpose of Congress*”<sup>269</sup>.

After having stated such guiding principles, seemingly trying to ensure a univocal pre-emption analysis and to give full application to an unambiguous analytical framework, as so to protect States’ prerogatives against federal intrusions, the Supreme Court stated that even absent express language Congress’s “clear and manifest” purpose to displace State law could be perceived also impliedly, i.e. by determining what Congress intended the federal law to be or to do in relation to State law. Congressional intent can be thus be inferred by ascertaining whether the entire scheme enacted by Congress pre-empted State action by implication: absent express language, a State law is pre-empted when it “[...] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>270</sup>. Such interpretative guidelines encouraged the growth of the constitutional debate: according to some commentators<sup>271</sup> the Court has somehow blurred the principles, leaving the doctrine in a

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<sup>269</sup> See *Rice v. Santa Fe Elevator Corp.* (*id.* 237).

<sup>270</sup> Cf. *Hines v. Davidowitz*, 312 U.S. 52 (1941). On the *obstacle* pre-emption category see *infra* par. 2.3.2.2; see also L.H. Tribe, *American Constitutional Law*, p. 1176; S.R. Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 *Arizona L. Rev.*, p. 1391, (1998). According to S.R. Jordan, “[b]ecause common-law actions for damages have traditionally been firmly within States’ domain, [...] the presumption against pre-emption and the clarity requirement dictate that State common law actions for damages get the highest order of protection against pre-emption” (*id.* at 1428).

<sup>271</sup> Cf. M.A. Bakris, *The Federal Cigarette Labelling and Advertising Act’s Express Pre-emption Provision Defines the Pre-emptive Reach of the Act and Must Be Construed Narrowly*, 70 *University of Detroit Mercy L. Rev.*, p. 487, (1992); H.V. Kehoe, *Narrowing the Scope of Federal Preemption: Tobacco Torts Become Winnable*, 38 *Loyola L. Rev.*, p. 1191, (1993); S.R. Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, *op. cit.* pp. 1379-1469.

state of uncertainty. The lack of an unambiguous rule actually able to guide lower courts in deciding pre-emption cases (especially those involving State common-law actions for damages) is precisely what continues to plague pre-emption questions: accordingly, State laws should be displaced only by clear congressional language, but the Court traditional approach seems to be dominated by too much discretion in determining Congress's purposes, being free to disregard Congress's express pre-emptive language and instead roam about a federal statute in a freewheeling search for federal purposes that may be obstructed by State common-law.

In *Rice v. Santa Fe Elevator Corp.*<sup>272</sup> the Court held that Congress's purpose to displace State law could be "clear and manifest" even absent express language. Furthermore, displacement of State law was Congress's "clear and manifest" intent not only if the legislation showed the area involved one of dominant federal interest<sup>273</sup>, but also if it appeared that Congress intended to occupy the field of regulation or, more importantly, if State regulation would obstruct what appeared to be federal legislative purposes.

Such incoherent interpretative approach basically eliminates any distinction between federal statutes that contain express language regarding the pre-emptive effect of statute and statutes that contain no indication at all of Congress' pre-emptive intent. For that reason, when statutory ambiguity exists, courts should be extremely wary of finding congressional intent to pre-empt by exercising extreme caution before disrupting important State interests. Such *presumption* in favour of States' prerogatives finds its roots in basic federalism

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<sup>272</sup> 331 U.S. 218, (1947)

<sup>273</sup> As in *Hines v. Davidovitz* (see footnote 208).

principles, which counsel a strong reluctance to displace tort remedies, for those remedies entail the States' historic power to protect the health and safety of their citizens and to redress injuries<sup>274</sup>. Hence the *presumption* should be regarded as an essential device of interpretation that allows to carefully weigh the balance of federal and State interests before displacing State authority: it operates to confine extent of congressional action, and in the absence of a clear directive from Congress, the burden of proof of pre-emptive intent ought to be on those asserting such congressional intent<sup>275</sup>.

On the contrary, some other commentators hold that the clear and express formulation of congressional intent should be regarded as a compulsory requirement in order to find pre-emption, being thus the abovementioned *presumption* an unjustified interpretative device<sup>276</sup>: when Congress decides to produce a legislative act concerning one of its exclusive competence area, the Supreme Court's task is to evaluate the act's pre-emptive extent by employing its *statutory construction* abilities. To employ a general *presumption* favouring State laws would unduly expand the Court's judicial competences:

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<sup>274</sup> Cf. B.J. Grey: "Pre-emption in such circumstances will undermine the States' effort to protect their citizenry – the core concern of federalism" (in *Make Congress Speak Clearly: Federal Pre-emption of State Tort Remedies*, 77 Boston Univ. Law Rev., at 615).

<sup>275</sup> Cf. C. Massey, "Joltin' Joe has left and gone away": the Vanishing Presumption Against Preemption, 66 Albany Law Review p. 759, 2003: "The presumption is against a broad reading of federal law that purports to pre-empt the state law and that expressly acts like other clear statement rules to ensure that the federal political process has focused upon the displacement of state authority. Without such a rule, there is no assurance that Congress has in fact attended the consequences of displacing state authority".

<sup>276</sup> Cf. J.R. Stern, *Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group*, 80 Virginia Law Review, pp. 979-1014 (1994); C. Nelson, *Preemption*, p. 290; V. Dinh, *Reassessing the Law of Preemption*.

furthermore, it would lead to an inappropriate alteration of the balance of powers set by the Constitution. The objection according to which the abovementioned *presumption* would stem from a constitutional provision (namely the Tenth constitutional Amendment, according to which “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”<sup>277</sup>) would be defeated by the fact that it does not have independent operating force, as it can be read simply as the flip side of the enumeration of congressional powers under article 1, section 8<sup>278</sup>.

Such restrictive reading of the Tenth Amendment was provided by the Supreme Court’s constitutional jurisprudence, which followed a controversial judicial path between the end of the 1970’s and the first half of the 1980’s. In the historic case *National League of Cities v. Usery*<sup>279</sup> the Court divided five to four in striking down three 1974 federal amendments to the *Fair Labour Standards Act* of 1938. Such legislation extended minimum wage and maximum hour provisions to cover almost all employees of States and their political subdivision: the Court held that even if the statute passed by Congress was pursuant to the Commerce clause, the 1974 amendments directly displaced the States’ freedom to regulate areas of traditional

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<sup>277</sup> See Ch. 1.

<sup>278</sup> Therefore, the assumption according to which “[...] *the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress*” would simply suggest that when Congress has to legislate in areas traditionally governed by the States it has to “[...] *proceed more cautiously and provide an interstitial rather than a comprehensive or primary set of regulations*” (cf. V. Dinh, *Reassessing the Law of Pre-emption*, at 8).

<sup>279</sup> 426 U.S. 833 (1976).

governmental functions<sup>280</sup>. From that case onward, the Supreme Court tried to draw a federalism doctrine based on the core differentiation between traditional and non-traditional State functions<sup>281</sup>, as so to create a legal theory that could actually protect States from inappropriate federal intrusions into State traditional legislative competence. The Court bifurcation between traditional and non-traditional governmental functions proved to be too abstract and vague for federal judges to apply with confidence or consistency, either in the lower courts or in the Supreme Court itself: lower courts frequently found a function to be “traditional” and thus within the area of State sovereignty; repeatedly, the Court would reverse these decisions and call the function non-traditional and beyond the protection of *National League*<sup>282</sup>.

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<sup>280</sup> See the Opinion delivered by Justice Rehnquist (426 U.S. 852 *id.*). See also D.M. O’Brien, *The Rehnquist Court and Federal Preemption: In Search of a Theory*, 23 *Publius: The Journal of Federalism*, p. 15, Autumn 1993. Cf. also *Fry v. United States*, where the Supreme Court noted that the Tenth Amendment prohibited Congress from exercising power “in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system” (427 U.S. 542, 547 n. 7 (1975)).

<sup>281</sup> The traditional functions and activities related to States, as listed in *National League* were: schools and hospitals, fire prevention, police protection, sanitation, public health, parks and recreation. A final interpretation of these functions was delivered in 1979 by the Labor Department, which determined that libraries and museums were additional functions of States and their political subdivisions (see L. Fisher, N. Devins, *Political Dynamics of Constitutional Law*, p. 85, American Casebook Series, West Group, St. Paul, Minnesota, 2001).

<sup>282</sup> For example, in 1980 a federal district court concluded that land use regulation for surface coal mining represented a “traditional governmental function” reserved to the States under *National League*. A unanimous Supreme Court rejected the district court’s argument by holding that *National League* applied to “States as States” and not to the private business operations at issue in this case (cf. *Hoodel v. Virginia Surface Mining & Rcl. Ass’n*, 425 U.S. 264 (1981)). Two years later, the Court reversed another federal district court ruling that the federal *Age Discrimination in Employment Act* violated the Tenth Amendment theory articulated in *National League* (cf. *EEOC v. Wyoming*, 460

Nine years after *National League* the Court reversed itself in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>283</sup>, again by a five to four vote. Here the Court argued that the effort to distinguish between traditional and non-traditional State functions was not only unworkable, but also inconsistent with established principles of federalism<sup>284</sup>, according to which the federal Congress is the only institution legitimated to make constitutional interpretations about federalism and the *Commerce clause*; moreover, the Supreme Court announced that the protection of federalism largely depends on the political process operating within Congress<sup>285</sup>.

According to the expectations arising from the *National League of Cities v. Usery* jurisprudence and from the statements delivered during the Reagan administration<sup>286</sup> it was likely that the Supreme Court would have increasingly defended States' prerogatives against excessive federal intrusions. On the contrary, as a matter of fact the Court majority never favoured an express limitation on Congress's powers<sup>287</sup>: indeed, the Court recalled the basic assumption according to which the Constitution deprived States of their sovereign powers, therefore being federalism based on a organized framework where States' interests are adequately represented in the national political

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U.S. 226 (1983)).

<sup>283</sup> 469 U.S. 528 (1985).

<sup>284</sup> Cf. the Opinion delivered by Justice Blackmun (*id.* at 531).

<sup>285</sup> Cf. *From National League to Garcia*, in L. Fisher, N. Devins, *Political Dynamics of Constitutional Law*, op. cit., pp. 81-85.

<sup>286</sup> According to which the presumption of sovereignty stands with States (cf. R. Reagan, in "Federalism: Executive Order 12612" of October 26, 1987, in *Weekly Compilation of Presidential Documents*, November 2, 1987, at 1231).

<sup>287</sup> Cf. *Hoodel v. Virginia Surface Mining & Recl. Ass'n.* (*supra*, note n. 280); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678 (1982); *EEOC v. Wyoming*, 460 U.S. 222 (1983).

process and ultimately in the Congress, which is the only institution allowed to distribute competences between centre and peripheries<sup>288</sup>.

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<sup>288</sup> The only case where the *National League* reasoning was recalled is *New York v. United States* (112 S.Ct. 2408 (1992)): here Justice O'Connor held that the national political process does not guarantee the most suitable balance of power, as prescribed by the federal scheme: subsequently, one of the Court's task is to safeguard the borders of national and States competences, by avoiding mutual intrusions.



### **Chapter 3: A sketch of European federalism: the competence problem and related issues**

As we have seen in previous chapters, without doubts the North American Federation of States embodies the principal model for a comparison with the European Community, since they are popularly treated as the epitome of the ‘federal State’. We do not need to outline here the numerous and profound differences existing between the European Community, on one hand, and – on the other hand – a federal State. The basic difficulty, however, derives surely from the fact that such comparison involves an entity which remains – perhaps permanently – composed of more or less sovereign nations and the object of which is to try to bring about a closer union among its peoples<sup>289</sup>, and a proper federation which derives its sovereignty and legitimacy directly from its own people and not from its constituent States<sup>290</sup>.

As well as the American constitution the EC Treaty does not include any explicit reference to the ‘federalist’ concept: if compared with proper federal constitutional experiences, the European Community is featured by the outstanding role of its Member States in the configuration of Community activity and in the enforcement of the related legislative acts. Basically The EC does not employ its powers as so to actually apply its governance powers on the European territories: rather, it has a general function aimed at supervising and controlling Member States’ behaviours.

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<sup>289</sup> See *supra*, Introduction.

<sup>290</sup> See *supra*, par. 1.1.

In the context of the Community legal order the so-called problem of competences – i.e. the question about the division of legislative powers between central entity and peripheries – arises in two linked aspects: first, it is not always possible to determine on an *a priori* basis who is legitimated to do what in the EC context, as the Treaties do not explicitly share out or clearly define boundaries between the competences of the Community and the Member States; secondly, the Treaties offer no statement of the consequences arising from the overlap of national competence and Community competence in a particular field.

It is well known that for what it concerns legislative activity within the European borders the EC enjoys no general competence, but rather the specific competences or enumerated powers conferred on it by its constitutive Treaties, while all residual powers are left with the Member States. By the means of Articles 3 and 4 EC it is simply introduced a general outline of the whole Treaty, providing a list of subjects which is opened by a proposition according to which Community activities should be pursued “*in accordance with the timetable set out [in the Treaty itself]*”<sup>291</sup>, whilst the core provision included in Article 5 (ex Article 3b) EC states that the Community shall act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it by the Treaty<sup>292</sup>. In other

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<sup>291</sup> See Art. 3 EC.

<sup>292</sup> It has also been stated by the Court in cases C-188-190/80 (*France, Italy and United Kingdom v. Commission*) (1982) that the Community legislative powers could not be described in terms of a general proposition, but resulted from different Treaty provisions attributing that power for each of the areas entrusted to the Community. Another core provision is Art. 10 EC, considered by the doctrine as the fundamental legal basis of the pre-emption theory, as it states in its second part that the Member States “*shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty*”. The whole

words, the EC is competent only in the areas in which its Treaties attribute competence to it: therefore, the principles of Community law apply only in areas falling within Community competence, and subsequently it is necessary to identify in the Treaty a specific legal base authorizing action before Community legislation is ‘constitutionally’ valid and legitimate.

The absence of an adequate legal base means that the Community is not competent to act, even if as a matter of fact the principles of Community law exert a remarkably wide influence outside EC competence field: such influence has been allowed by the jurisprudence of the European Court of Justice, which shaped and fixed the relationship between Community law and Member State law by establishing the supremacy doctrine<sup>293</sup>, attempting to render that relationship indistinguishable from analogous legal relationships in constitutional federal States.

The European Court of Justice has assumed an outstanding key role in this field by keeping on construing the Treaties “[...] *in a constitutional way rather than employing the traditional international law methodology. Proceeding from its fragile jurisdictional base, the Court has arrogated to itself the ultimate authority to draw the line between Community law and national*

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jurisprudential path created by the ECJ finds its roots in these words, and starting from here the Court has implicitly defined the doctrine of pre-emption: it is an implicit definition because as a matter of fact the word “pre-emption” hardly occurs in the judicial discourse of the Court.

<sup>293</sup> See *infra*, par. 3.1.

law”<sup>294</sup>, so as to develop and affirm the so-called ‘constitutionalization’<sup>295</sup> of the Treaty.

The debate over legislative competences allocation is at the heart of the discussion on the equivalent of federal pre-emption in the European Union (EU)/European Community (EC)<sup>296</sup>, which is ultimately a discussion on the delimitation of vertical (but also horizontal) competences<sup>297</sup>. This is one of the most contentious issues

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<sup>294</sup> E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, (1981) 75 *American Journal of International Law*, 1.

<sup>295</sup> In the landmark case *Les Verts v. Parliament* (C-294/83) the ECJ referred to the EC Treaty as a “*basic constitutional charter*”. Such perception was later confirmed in Opinion 1/91, where the Treaty was acclaimed as “*the constitutional charter of a Community based on the rule of law*” (see B. Brandtner, *The ‘Drama’ of EEA – Comment on Opinions 1/91 and 1/92*, 3 *EJIL*, 1992, p. 300-328). Cf. also J.H.H. Weiler, *The Community system: the dual character of supranationalism*, 1 *Yearbook of European Law* 267 and *The Transformation of Europe*, (1991) 100 *Yale Law Journal* 2403; K. Lenaerts, *Constitutionalism and the many faces of federalism* (1990) 38 *American Journal of Constitutional Law*; F. Mancini, *The making of a Constitution for Europe* (1989) 26 *Common Market Law Review* 595. See also M. Cartabia and J.H.H. Weiler, *L’Italia in Europa*, *id.* at 79.

<sup>296</sup> The European Union consists of three pillars: the first one is made up of the three European Communities (EEC, Euratom, ECSC), which have been deepened and enlarged by the economic and monetary union. When the EU was established in 1992 by the Maastricht Treaty, the ‘European Economic Community’ was renamed the ‘European Community’: the EEC Treaty became the EC Treaty, and this change was intended to give expression to the transition from a purely economic community to a political union. The first pillar embodies Community jurisdiction, and within the framework of the EC, the Community institutions may draw up legislation in their respective areas of responsibilities which applies directly in the Member States and may claim precedence over national law. The second pillar was established by the EU Treaty, and comprises common foreign and security policy: here common positions are set out, joint actions and measures carried out and framework decisions passed. The third pillar initially comprised cooperation in justice and home affairs, and after the 1997 Amsterdam Treaty it included also judicial cooperation (see G. Gaja, *Introduzione al diritto comunitario*, Ed. Laterza 2003; M. Horspool & M. Humphreys, *European Union Law*, 4<sup>th</sup> edition Oxford University Press 2006).

<sup>297</sup> ‘Competence’ is the authority or power to undertake legislative, executive or judicial action: competences flow from the Treaty to the institutions of the Community, as pre-emption arises primarily in the first pillar. Vertical

within the legal debate concerning the EC, as it is permeated by an extensive view according to which the European Community tends somehow to usurp competences thereby eroding Member States' statehood: on one side the delimitation of competences is not precise enough, while on the other side the European Community allegedly tends to legislate either in areas in which it is not competent (thus encroaching on the competence of Member States), or in areas where it is not appropriate for it to do so, or in a too detailed way<sup>298</sup>. The delimitation is also said to lack clarity, therefore obscuring responsibility and thus appearing to be moving inevitably toward a deeper democratic *deficit*<sup>299</sup>, as it is difficult for European citizens to understand how powers are divided between the EU and the Member States.

A hopeful sign of change was given at first by the Laeken *Declaration on the Future of the European Union*<sup>300</sup>, according to which a delimitation of EC competences was meant to be clarified by the Draft Treaty establishing a Constitution for Europe<sup>301</sup>: in a first

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competences denote the delineation between Member States and the European level, while horizontal competences denote the distribution of prerogatives among European institutions.

<sup>298</sup> See the *NOTE from the Praesidium to the Convention* of 28 March 2002 (CONV 17/02) for the Constitution for Europe. Usually such criticism is based on the undetermined structure of Art. 308 EC and the finality driven structure of Art. 95 EC, on which see *infra*, par. 3.5.

<sup>299</sup> See F. Petrangeli, *Processo di riforma dell'Unione e questione democratica*, in "Democrazia e diritto" n. 2, 2003, pp. 114-140. See also G. Pasquino, *Deficit democratico e leadership nell'Unione Europea*, in "Teoria politica" XVI, n. 1, 2000, pp. 3-23.

<sup>300</sup> *Laeken Declaration on the Future of the European Union*, in *Presidency Conclusions*, European Council meeting in Laeken 14 and 15 December 2001, SN 300/01, Annex 1 at 19, 20 (December 15, 2001), available at <http://ue.eu.int/pressData/en/ec/68827.pdf>.

<sup>301</sup> The final version of the *Draft Treaty establishing a Constitution for Europe* can be found online at <http://europa.eu.int/eur-lex>.

step the (now abandoned) Constitutional Treaty tried to clarify the competences allocation by strengthening the subsidiarity principle in comparison with the *status quo* defined by the two fundamental Treaties, but it still drew criticism which finally turned into its fatal rejection by French and Dutch voters in referenda held in 2005. One of the main issues addressed by the abovementioned Constitutional Treaty<sup>302</sup> was the general confusion arising from the fact that as a matter of fact the European system of alignment of competences has no list or catalogue of competence provisions, which on the contrary are found scattered all over the Treaties<sup>303</sup>.

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<sup>302</sup> See Articles I-11 to I-18.

<sup>303</sup> As well as the abovementioned Constitutional Treaty, now defunct, the recent Reform Treaty (available at [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm)) signed in Lisbon on 13 December 2007, seeks to describe and codify a proper division of competences between the Union and the Member States. The Reform Treaty does not constitute a third Treaty, nor it replaces the two current Treaties with a single Treaty (as the Constitution for Europe was supposed to do): rather, it is supposed to amend both the existing Treaties and also to rename one of them, as the EC Treaty will become the “Treaty on the Functioning of the European Union” (TFEU, or in some commentaries TOFU), and all references in the TEU and TEC to the “Community” or “European Community” will be simply made to the “Union”.

One of the most important changes brought about by the Reform-Lisbon Treaty is the attempted establishment of a taxonomy of competences (see new Articles 4 and 5 of the amended TEU, and the new Title I of the TFEU): it defines – or at least attempts to – who does what in the EC. The new Treaty maintains the existing (but frequently forgotten) system of conferred powers: according to that, the EC can only do what the Treaty expressly allows it to do and its competence cannot be extended with the agreement of the member States. Article 5 of the amended TEU states that “*the limits of Union competences are governed by the principle of conferral*”, under which “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*”. The amended TEU (Article 4) confirms for the first time and in the clearest terms that “*competences not conferred upon the Union in the Treaties remain with the Member States*”: the Union “*shall respect [Member States’] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*”. The Treaty provides for the first time lists setting out the divisions of policy areas into

In such context, when we speak about pre-emption within the European legal framework we are basically referring to the preclusion of national regulatory powers resulting from a decision by the European Court of Justice: for some, pre-emption should be regarded as one of the foundation of the European Community's normative supranationality, along with the principle of supremacy of Community law and with the implied powers doctrine.

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three types of competence (*exclusive, shared and supporting* competence): the TFEU expressly “*determines the areas of, delimitation of, and arrangements for exercising [the Union’s] competences*” (new Article 1, TFEU). Where the Union has *exclusive* competence (see Article 2(1) TFEU), only the Union can legislate and adopt legally binding acts, and the principle of subsidiarity does not apply. *Shared* competence exists in areas where the Union and Member States are both able to act: this is the case in most areas both under the current Treaties and under the reformed Treaties, as a list in the reformed TFEU confirms. According to Art. 2(2) TFEU “*the Member States shall exercise their competence to the extent that the Union has not exercised its competence*”.

A Protocol to the Lisbon Treaty states that “*when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area*” (Protocol on the exercise of shared competence). Member States are therefore free to act in the same area, as long as they do not enact legislation that conflicts with EU law or principles (see Article 2(2) TFEU).

Finally, the Union enjoys the so-called *supporting* competence, which is related to specific areas of action. Here the Union has competence to carry out actions to support, coordinate or supplement the actions of Member States: action by the Union may include adopting incentive measures and making recommendations, but it does not supersede the competence of Member States to act and must not entail the harmonisation of national laws (Article 2(5) TFEU).

### 3.1 The Supremacy doctrine

While an abstract ruling on the interpretation of Community law would have given the European Court of Justice a central place in the Community legal system – in some respects comparable with the position of a federal supreme court – the ECJ has not limited itself to ruling on interpretation alone, but has had occasion to deal also with the effects of Community law. In so doing, it has developed doctrines that can be described as featured by a constitutional character: doctrines such as those of the supremacy (or primacy) of Community law, of EC implied powers and of direct effect of Community law.

Unlike some federal constitutions, the European Community Treaty does not include a specific supremacy clause<sup>304</sup>; however, in a series of cases starting in 1964 the Court has pronounced an uncompromising version of EC law supremacy: in the sphere of application of Community law, any Community norm – be it an article of the fundamental Treaty or any other lower regulation – is hierarchically placed above national law<sup>305</sup>. Moreover, one of the most relevant implications of this theory is the fact that the European Court of Justice seems to be the only organ which holds the so-called *judicial kompetenz-kompetenz*, i.e. the competence to declare or to determine the limits of the competence of the Community: in other

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<sup>304</sup> See Gerhard Bebr, *How supreme is Community law in the National Courts?*, in C.M.L.Rev, 11, 1974, pp. 3-37.

<sup>305</sup> In this way we can say that the European Union is the organization called to state the “*higher law of the land*”: see J.H.H. Weiler, *The Constitution of Europe*, p. 22, 1999, Cambridge University Press.

words the Court is the body that determines which norms come within the sphere of application of Community law<sup>306</sup>.

The principle of pre-emption goes along with the supremacy doctrine and the *kompetenz-kompetenz* matter, as long as they preserve the homogeneity of Community law in the Member States and provide the ECJ with the highest position in the European legal system.

In order to affirm the idea of supremacy<sup>307</sup> the Court has asserted that Community law is superior to national law, not only in the Community legal order but also in the national legal orders. Subsequently, a national judge cannot refuse the application of a self-executing rule of Community law, on the ground that either it was adopted by a Community organ in violation of the rules of its national constitution, concerning the forms and procedure, or that it violates the fundamental rights guaranteed by it: he can no longer be tempted to give precedence to the law in which he was trained; nor he can refuse application of a Community rule and apply subsequent national legislation based on the general chronological rule *lex posterior derogat priori*<sup>308</sup>.

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<sup>306</sup> The individuation of the organ having the final decision as to definition of competence spheres (question of *Kompetenz-Kompetenz*) is crucial. The European Court has never answered this issue directly, but implicit in the case-law is the clear understanding that the Court itself has the ultimate say on the reach of Community law. See Case 66/80, *Spa International Chemical Corp. v. Amministrazione delle Finanze dello Stato* [1981] ECR 1,191; Case 314/85, *Firma Foto Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4,199.

<sup>307</sup> Supremacy, or primacy, or *primauté*.

<sup>308</sup> The principle of supremacy has been defined “[...] not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence. This more accurate characterization of supremacy renders crucial the question of defining the spheres of competence” (J.H.H. Weiler, *The Transformation of Europe*, 100 *Yale Law Journal* pp. 2403-2483, 1991). According to part of the doctrine, however, such definition is misleading, as it uses the vocabulary of dual federalism by referring to mutually distinct spheres of competences: as R.

The doctrine of supremacy was gradually elaborated by the European Court in the course of its interpretation of the Treaties, through a substantial number of cases, some of which became a sort of milestone decisions such as *Van Gend en Loos*<sup>309</sup> and *Costa v. ENEL*<sup>310</sup>. Primacy of Community law was further emphasized in the

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Schütze points out, in dual federalist systems there is no need for the supremacy clause as a conflict resolution mechanism, as each law has its own sphere of competence. Therefore, “*the construction of separate competence spheres under a philosophy of dual federalism serves the very purpose of avoiding the supremacy issue. The doctrine of supremacy only makes sense in a constitutional setting of co-operative federalism with overlapping spheres of competence*” (cf. R. Schütze, *Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order*, *European Law Review*, Vol. 32 No. 1 February 2007, fn. 2).

<sup>309</sup> Case 26/62, in which the Court reasoned that “[t]he purpose of the EEC Treaty [...] implies that this Treaty is more than an agreement creating only mutual obligations between the contracting parties [...]. The Community constitutes a new legal order in International law, for the benefit of which States have restricted their sovereign rights, albeit in limited areas, and the subject of which are not only the Member States but also their nationals”.

<sup>310</sup> Case 6/64, [1964] C.M.L. Report 355. Here the European judiciary was asked whether national legislation adopted after 1958 would prevail over the EC Treaty: the Italian dualist tradition had treated Community law as ordinary legislation that could be derogated from by subsequent national legislation (see M. Cartabia and J.H.H. Weiler, *id.* at 129. See also R. Bin and G. Pitruzzella, *Diritto Pubblico*, 5<sup>th</sup> Edition, Giappichelli Ed. 2007, at 348). In *Costa* the Court drew more far-reaching conclusions from the principle formulated in the *Van Gend en Loos* Case. The reasoning of the Court was based on the legal nature of the Community, the spirit and the terms of the Treaty demanding its supremacy: “[t]he incorporation into the legal order of each Member State of the provision of Community law and the letter and spirit of the Treaty in general, have as a corollary the impossibility for states to assert against the legal order accepted by them, on a reciprocal basis, a subsequent unilateral measure which could not be challenged by it [...]”.

Others significant decisions are *Defrenne II* (case 43/75 [1976] ECR 455), *Simmenthal* (case 106/77 [1978] ECR 629) and *Factortame*, (case C-213/89, 1990). There are plenty of decisions containing a statement on the primacy of Community law: see also *Politi s.a.s. v Ministero delle Finanze* (case 43/71: 1971 ECR 1039, 1973 CMLR 60); *Commission of the EC v Italy* (case 48/71, 1972 ECR 529); *Denkavit Italiana* (case 61/79); *Amministrazione delle Finanze dello Stato/San Giorgio* (case 199/82); *Pfeiffer and Others v. Deutsches Rotes Kreuz, Kreisverband Waldshut Ev* (cases C-397/01 to C-403/01 [2005] 1 CML Report 44, p. 1123); *Germany v. Commission* (case C-8/88),

*Walt Wilhelm v. Bundeskartellamt* case<sup>311</sup> arising from the conflict between the German Cartel law and art. 87 EC, in which the Court drawing arguments from the nature of the Community order upheld that “*by virtue of the respect of the general finality of the Treaty, the parallel application of a national system cannot be admitted, unless it does not prejudice the uniform application in the whole of the Common Market, of Community rules in case of agreements*”.

The immediate impact of supremacy doctrine can be found in many other cases, where the Court did not hesitate in commenting upon constitutional issues by adopting a monist approach according to which Community law operates within the EC system by integrating with national laws and prevailing in case of conflict. Such view was clearly expressed in *Internationale Handelsgesellschaft v. Einfuhr*<sup>312</sup>: here, on the question whether an agricultural EC Regulation did violate fundamental rights guaranteed by the German Constitution, the Court pointed out the validity of the EC provisions by concluding that “[...] *no provisions of municipal law, of whatever nature they may be, may prevail over Community law [...] lest it be deprived of its character as Community law and its very legal foundations be endangered*”.

According to these assertions, the underlying philosophy of the theory of supremacy of Community law seems to be the effectiveness and the homogeneity of law in the Community legal order: in the silence of the texts and in the absence of a written evident supremacy ground-rule, the core device in achieving primacy has been a

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*Kühne & Heintz NV v. Productschap Voor Pluimvee en Eieren* (case C-453/00: [2006] 2 C.M.L.Report 17, p. 483).

<sup>311</sup> Case 14/68, [1969] ECR 1.

<sup>312</sup> Case 11/70, [1972] CMLReport 255.

functional interpretation by the ECJ. Supremacy, therefore, reflects the need for separating the European Community from the international legal order by giving it a *sui generis* character.

Theoretically, the jurisprudential path followed by the Court and the clear and univocal provisions of art. 10 EC<sup>313</sup> seem to be the most suitable instruments to guarantee the supremacy of Community law and the respect of the European hierarchical law order by the Member States, but several conflicts between Community law and national legislations have occurred nonetheless, with particular reference to the problem of competences allocation.

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<sup>313</sup> *“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.”*

### 3.2 EC Exclusive competences

Within the EC legal system, the division of powers into two mutually exclusive spheres embodies the dualist federal principle, as the central government and States governments are allowed to operate independently within two mutually exclusive spheres of competences. As we have seen in Chapter 1, the two dominant expressions of the federalist principle have emerged within the United States legal system, under the names of *dual federalism* and *cooperative federalism*<sup>314</sup>: exclusive competences are the distinctive feature of the first model, as their “*positive side entitles one authority to act, while their negative side excludes anybody else from acting*”<sup>315</sup> autonomously within the same scope or field.

Although the original Treaties generally conferred legislative prerogatives<sup>316</sup> upon the EC on the basis of objectives to be attained by the Community legal order, successive revisions of the Treaties have replaced this method in certain areas by a precise definition of the action to be taken by the Community, in some instances together with a specific exclusion of competence (method of substantive allocation), but the distinction is still not clear cut<sup>317</sup>. On one side, in certain areas the Union’s legislative competence is defined both in

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<sup>314</sup> See *supra*, par. 1.3.

<sup>315</sup> R. Schütze, *Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order*, *id.* at p. 4.

<sup>316</sup> An accurate account of the EC competences’ evolution throughout decades can be found in M. Cartabia and J.H.H. Weiler, *id.* Chapter 4.

<sup>317</sup> For a critique see A. von Bogdandy & J. Bast, *The Vertical Order of Competences*, in A. von Bogdandy, J. Bast (Eds.), *Principles of European Constitutional Law*, p. 335-372, 2006 Hart, Oxford.

terms of objectives (functional method<sup>318</sup>) and subjects (also called area fields<sup>319</sup>); on the other side there are functional competences featured by a cross-sectorial character<sup>320</sup>, as well as functional competences in a special policy field<sup>321</sup>, and even competences in a particular field without a specific reference to functional elements<sup>322</sup>. From a global perspective the allocation of competence based on EC objectives is difficult to realize, as the finality driven structure of competence seems to broaden the scope of a single field<sup>323</sup>. We cannot find a coherent and undisputed system of competence neither in academic writings nor in the ECJ case-law. The EC Treaty contains indeed no explicit reference to the concept of exclusivity, as

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<sup>318</sup> The subsidiarity principle typically embodies such approach: cf. M. Cartabia & J.H.H. Weiler, *id.* at 99. See *infra*, par. 3.3.

<sup>319</sup> In 1992 the Commission tried to define a set of criteria for the individuation of EC exclusive competences: according to its view, exclusivity is generally featured by a *functional element* (being the Community the only entity entitled to act so as to fulfil specific tasks and objectives) and by a *material element* (being Member States unable to act unilaterally within the same field of interest). Such views are expressed in the Communication from the Commission to the Council and the European Parliament on the subsidiarity principle of 27 October 1992 (EC Bulletin 10-1992, p. 116).

<sup>320</sup> See Articles 88, 94, 95, 308 EC, which are also the most problematic ones.

<sup>321</sup> See Art. 37 EC (dedicated to the establishment of a common agricultural policy) and Art. 175 EC (dedicated to the adoption of measures for the establishment of the environmental Community policy).

<sup>322</sup> Especially in the institutional area: see Articles 194 par. 4 and 255 EC.

<sup>323</sup> See H.D. Jarass, *Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten*, in *Archiv des öffentlichen Rechts*, 121 (1996), p. 180. On the contrary I. Pernice holds that the finality structure tends somehow to limit the EC field of competence, if compared with the lists of area fields (see *Kompetenzabgrenzung im Europäischen Verfassungsverbund*, in *Juristenzeitung*, 2000, p. 866). A deeper analysis is provided by C. Trüe, who clarifies that EC objectives may limit area fields but may also extend competences as the objectives stated by Art. 3 EC potentially cover all fields (cf. *Das System der Rechtsetzungskompetenzen der Europäischen Gemeinschaft und der Europäischen Union*, Baden-Baden, p. 398). According to von Bogdandy and Bast, “the derivation of competences from general goals [...] does not respect the principle of conferral” (*id.* at 342).

the only textual distinction can be inferred from Art. 5 par. 2<sup>324</sup> EC, which on one side provides a distinction between *exclusive* and *non-exclusive* EC powers<sup>325</sup> while on the other side introduces the abovementioned functional approach<sup>326</sup> by the means of the subsidiarity principle<sup>327</sup>. The indirect recognition of *areas “fall[ing] within [EC] exclusive competence”* can be found also in Article 43(d) EU, confining the mechanism of enhanced cooperation to those

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<sup>324</sup> “*In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community*”.

<sup>325</sup> The ECJ usually only distinguishes between exclusive and parallel competences, where the latter includes all those which are not covered by the exclusive competences (see Bogdandy & Bast, *Art. 5 EGV*, in Grabitz, Eberhard/Meinhard Hilf (Eds.), *Das Recht der Europäischen Union, Kommentar*, München 2005). According to M. Horspool and M. Humphreys “*Article 5 EC implicitly distinguishes between exclusive and concurrent competence. [...] The EC cannot share the exercise of [exclusive] powers with the Member States. But while the powers defined an exclusive competence by the Treaty are to be exercised by the EC from their entry into force, the exercise of its concurrent powers is postponed and made subject to compliance with certain conditions. [Meanwhile,] the Member States will retain the right to legislate, and will lose that right only when the EC decides to exercise its power in the area in question*” (cf. *id.* at 95)

<sup>326</sup> Art. 43(d) TEU has also impliedly affirmed such distinction by stating that the Enhanced Cooperation between Member States “[...] *does not concern the areas which fall within the exclusive competence of the Community*”. Furthermore, according to some EC Treaty provisions introduced by the Maastricht Treaty or by the Single European Act Member States and the Community share the same concurrent competence: Art. 177 states that “*Community policy in the sphere of development cooperation [...] shall be complementary to the policies pursued by the Member States*”; Art. 164 adopts the same approach in connection to the area of Research and Technological Development. Additionally, according to Art. 176 “[t]he protective measures adopted pursuant to Article 175 [concerning Environmental Protection] shall not prevent any Member State from maintaining or introducing more stringent protective measures [...]”.

<sup>327</sup> This central provision must be placed alongside Article 7(1) EC, which requires that each institution must act within the limits of the powers conferred upon it by the Treaty. See *infra*, par. 3.3.

policy areas that do “*not concern the areas which fall within the exclusive competence of the Community*”.

Exclusivity is generally understood as a constitutional exclusivity or an “*a priori exclusivity*”<sup>328</sup>, including “*powers which have been definitely and irreversibly forfeited by the Member States by reason of their straightforward transfer to the Community. [...] Where the Community has exclusive competence, this means that any action by a Member States in the same field is a priori in conflict with the Treaty*”<sup>329</sup>.

In a large number of cases the European Court of Justice attempted to state the core principles governing the competence allocation system between Community and Member States, hence the original idea of exclusive powers pertaining to the EC was essentially a judicial creation. Apart from the spectrum of naturally exclusive implied organisational powers typical of an international organisation<sup>330</sup>, all EC competences appeared to be shared with the Member States, having the EC Treaty not grouped them into classes of exclusive, shared or complementary competences.

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<sup>328</sup> A. Dashwood, *The Relationship between the Member States and the European Union/European Community*, 41 CMLRev. 355 (2004) at p. 369.

<sup>329</sup> K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (Thomson, Sweet & Maxwell, 2005), at p. 5-22. A much softer definition of exclusivity is provided by P. Koutrakos, claiming that “*instead of seeking to exclude Member States*” the idea of exclusivity only “*serves to highlight the essential role of the emerging policy for the achievement of the main objectives of the EC Treaty*” (P. Koutrakos, *EU International Relations Law*, Haw 2006, p. 21).

<sup>330</sup> Such as the power of the EC institutions to determine their internal organization under Articles 210 and 283 EC (see case 6/60, *Humblet v. Belgian State* [1960] ECR 559). However, some moderation on the exclusive nature of organisational powers occurs, for example in relation to the European Parliament, whose election are governed by common principles and each Member State still retains the power to decide on the form of these elections in its territory.

In order to ascribe a specific field of competence to the EC, the Court frequently recalled the ideas of *source* and *nature* of the competence at issue<sup>331</sup>. For what it concerns the first concept, according to the ECJ the allocation of powers within the EC legal system is based on a theory of attributed competences, as it is always necessary to identify in the Treaty a specific legal base authorizing action before Community legislation is constitutionally valid. As said, the only textual distinction between different kinds of legislative competences can be inferred from art. 5 EC: the absence of an adequate legal base in the Treaty means that the Community is entirely not competent to act: any act there adopted is therefore susceptible to annulment, as an invalid trespass on to areas of national competence. This is in theory the competence attributed to the Community, but in practice the principles of Community law exert a remarkably wide influence<sup>332</sup> even in other fields not

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<sup>331</sup> Such concepts were expressly recalled by the Court in Opinion 2/91 of 13 March 1993, *Convention no. 170 of the International Labour Organization concerning safety in the use of chemicals at work*, 1993 [ECR I-1061]; Opinion 1/75 of 11 November 1975 (*Understanding on a Local Cost Standard*) [ECR I-1355]; Opinion 1/03 of 7 February 2006 [ECR I-01145]. See also joined cases 3,4,6/76 (*Cornelis Kramer and others*) of 14 July 1976 [ECR I-1279]. The ECJ took the chance to clarify its reasoning on the idea of *source* in relation to the attribution of external action to the EC: cf. Opinion 1/94 (*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*), [ECR I-5267]; Opinion 2/92 (*Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment*) of 24 March 1995 [ECR I-521].

<sup>332</sup> Such influence is embodied by the fact that in many areas the Community is able to make Regulations as well as to issue Directives, thus effectively defining the allocation of competences (see art. 37(2), 40(1), 83(1) EC) between EC and Member States. Secondly, EC institutions are generally entitled to adopt all necessary measures to attain Community objectives: subsequently EC competences somehow define themselves by the means of their effective enforcement. Thirdly, a large number of EC competences is construed in a teleological way: art. 308 EC embodies such nature of the EC

expressly included into EC competences, remarkably being the areas where the Community is arguably without competence few and far between. The corollary of the incremental growth in the Community's sphere of influence is that areas where the Member States are able to claim that they hold exclusive competence – untouched by Community membership – are rather less extensive than it might be expected.

Exclusive powers are those authorizing only the Community – and not the Member States – to act<sup>333</sup>: subsidiarity does not apply here and any intervention by the Member States is in principle excluded. A first consideration for establishing exclusivity is to induce the Community to decide on legislative action rather than the Member States: with regard to certain policy matters (see *infra*) the Member States possess no autonomous legislative powers, as the Community is the only legitimated legislative entity. A second consideration for establishing exclusivity (applying to fields where Member States originally had a concurrent power) is the prevention of States' intervention which could affect Community legislation: the so-called pre-emption theory requires that whenever the EC has adopted

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legal order by granting Community institutions the power to take appropriate measures in order to attain one of the objectives of the Community.

<sup>333</sup> According to M. Horspool & M. Humphreys, *European Union Law*, at 95, exclusive Community competence may be derived from:

- a. express provisions in the primary legislation (e.g. the common agricultural policy and the common commercial policy).
- b. the scope of internal measures adopted by the Community institutions: at internal level within the Community this is described as pre-emption (see *infra* Ch. 4); at the external level it leads to exclusive external competence for the Community.
- c. express provisions in internal Community measures; and
- d. situations where internal powers can only be effectively exercised at the same time as external powers (see case 22/70 *Commission v. Council* (ERTA) [1971] ECR 263, 275: see *infra*, footnote 398).

common rules which are of such a nature to entail a transfer or power, modifications of these rules can only be decided by the Community itself, being Member States unable to act unilaterally in order to modify such rules.

Nothing in the Treaty provides an explicit list of the areas in which the Community is originally and exclusively competent: this mirrors the absence of any list of areas in which the Member States are exclusively competent. Especially during the 1970's the Court gave express indications of EC exclusive competences by pointing out some specific fields, but it has in recent years been clearly more reluctant to expand these spheres of competence.

First of all, the European Community enjoys exclusive competence in relation to the common commercial policy<sup>334</sup> and common customs tariff<sup>335</sup> areas: the 1957 Treaty of Rome gave the Community the central task of “*establishing a common market and [of] progressively approximating the economic policies of Member States*”<sup>336</sup>, through the “elimination, as between Member States, of customs duties” and “the establishment of a common customs tariff

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<sup>334</sup> See *Opinion 1/75, Understanding on a Local Costs Standard* ([1975] ECR 1361, 1976, 1 CMLReview 85) where the Court made it clear that the Community's competence is exclusive, and not concurrent, by stating that “[t]his conception [in Article 113] is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community”. See also cases 21-24/72, *International Fruit* [1972] ECR 1219, par. 14-16, where the Court stated that “[t]he Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles 111 and 113 of the Treaty”.

<sup>335</sup> See case C-125/94, *Aprile srl v. Amministrazione delle Finanze dello Stato*, [1995] ECR I-2919.

<sup>336</sup> Art. 2 EEC.

and of a common commercial policy toward third countries”<sup>337</sup>. According to the current version of art. 131 EC, by establishing a customs union between themselves the Member States aim to contribute in to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers. Article 132 induces the Member States to progressively harmonise their national systems of aid for export to third countries so as to ensure that competition between undertakings in the Community is not distorted. The core provision of the common commercial policy, however, is art. 133(1) EC, according to which:

*“The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies”.*

The common commercial policy exclusivity first emerged in relation to the customs union with the *Social Fonds voor de Diamantarbeiders* case<sup>338</sup>, where the ECJ pointed out that subsequently to the introduction of the common customs tariff “[...] all Member States are prohibited from introducing, on a unilateral basis, any new changes or from raising the level of those already in

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<sup>337</sup> Art. 3(a) and (b) EEC.

<sup>338</sup> Joined cases 37 and 38/73, *Social Fonds voor de Diamantarbeiders v. NV Indiamex et Association de fait De Belder* [1973] ECR 1609.

*force*”<sup>339</sup>. The constitutional justification of exclusive EC competences fully emerged in Opinion 1/75<sup>340</sup>, where the Court took the chance to clarify the scope and nature of Community powers arising under art. 133 EC and characterised such competences as exclusive treaty-making powers, whose exclusiveness was necessary as so to ensure the harmonious operation of the institutional framework of the EC. Any unilateral action on the part of the Member States is thus prohibited in order to eliminate any potential distortion or risk of compromising the effective defence of the EC common interests. Accordingly, Member States are supposed to fulfil the solidarity obligation arising from art. 10<sup>341</sup> EC, so as not to put in danger the strict uniformity set by the Community. The total exclusion of any concurrent power on the part of the Member States both in the internal and the external sphere announced the arrival of constitutional exclusivity in the EC legal order, and such announcement was later supported in *Donckerwolcke*<sup>342</sup>, where the court held that “*full responsibility in the matter of commercial policy was transferred to the Community by means of [art. 133(1)]*”, with the consequence that “*measures of commercial policy of a national*

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<sup>339</sup> *Id.* at par. 15-18.

<sup>340</sup> See *supra*, footnote 331.

<sup>341</sup> “*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*”.

<sup>342</sup> Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v. Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] ECR 1921.

*character are only permissible after the end of the transitional period by virtue of specific authorization by the Community*”<sup>343</sup>.

Hence the Court tried to define the *nature* of exclusive competences by stating that when the EC takes measures (in whatever form) establishing common rules to implement a common policy envisaged by the EC Treaty, Member States are no longer entitled to contract obligations that affect those rules or alter their scope with non-Member States: in a series of landmark cases the Court stated that the EC enjoys an exclusive external competence to sign international agreements when it has acted on the related internal plane<sup>344</sup>. With a series of similar decisions applied to several different context, the ECJ stated the so-called *implied powers doctrine*<sup>345</sup>, according to which the EC is allowed to enjoy all those powers having functional utility to the effective attainment of its objectives<sup>346</sup>, even if such powers have not been expressly conferred or mentioned by primary legislation.

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<sup>343</sup> *Id.* at 32. See also case 174/84 *Bulk Oil v. Sun International Trading*, where the Court held that “*measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community*” [1986] ECR 559. See also case 131/73 *Grosoli* [1973] ECR 1555.

<sup>344</sup> On the *exclusive nature* of EC competences see for example Opinion 1/76 of 26 April 1977 (Draft Agreement establishing a European laying-up fund for inland waterway vessels), [1977] ECR 741.

<sup>345</sup> Cf. case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263, concerning the implied powers theory and the external relations field (See *infra*, par. 3.4).

<sup>346</sup> See for example the so-called *Open Skies* litigation, which started with a series of eight judgments on 5 November 2002 in which the Court found eight Member States in violation of Community law for concluding bilateral agreements with the US in the field of air transport. The latest case (C-523/04) saw the Commission seeking a similar ruling against the Netherlands, alleging that it had infringed the EC Treaty by concluding and applying Air Service Agreements with the US since the mid-1940s: see *infra*, par. 3.4.

The Court gradually adopted an extensive interpretation of the concept of common commercial policy<sup>347</sup>, by stating that the competence of Community is exclusive whether or not it has been exercised: accordingly, national action is precluded not because the rules of EC law apply and prevail over conflicting national measures, but instead because – even though no EC rules have been adopted – the national action is simply impermissible. Such phenomenon identifies EC pre-emption, which seems thus to logically precede supremacy by exerting its exclusionary effect of national powers even in the absence of an enforced EC measure in the field concerned<sup>348</sup>.

Another field featured by exclusive EC competence is the conservation of biological resources of the sea and marine fisheries area: here the exclusiveness did not flow directly from Treaty provisions, as it arose indeed as a consequence of the Act of Accession of 1972<sup>349</sup>. Since the exclusivity in this field was independent of prior EC legislative action, it can be considered original and of a constitutional nature.

In order to accommodate the prominent economical interests of Denmark, Ireland and United Kingdom, art. 102 of the 1972 Accession Act confirmed Community shared competences and obliged EC institutions to exercise their prerogatives in respect of marine fisheries before a specific deadline, in order to ensure the

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<sup>347</sup> See for example *Opinion 1/78 on Natural Rubber Agreement* [1979] ECR 2871, 2910, 2912-13.

<sup>348</sup> See more specifically *infra*, Ch. 4, dedicated to a detailed analysis of pre-emption within the EC context.

<sup>349</sup> Cf. case 804/79, *Commission v. United Kingdom* [1981] ECR 1072, 1982 CMLReview 543. See also J. Temple Lang, *The ERTA judgment and the Court's case-law on competence and conflict*, *Yearbook of European Law* (1986) 6, p. 183-218; G. Gaja, *Introduzione al diritto comunitario*, *id.* at 94.

protection of the fishing ground and conservation of the biological resources of the sea. In other words, by the means of a transitional provision EC institutions were supposed to exercise their competences before a specific deadline, after which fishing conservation measures were supposed to be part of the common agricultural policy, within the sphere of shared powers. The striking change from shared to exclusive EC powers started with *Kramer*<sup>350</sup>, where the Court developed the doctrine of parallel external powers and found an implied external power of the Community to enter into the North-East Atlantic Fisheries Convention: according to the Court reasoning, the Member States' authority in the area at issue was only of a transitional nature, therefore expiring at the end of the transitional period set by art. 102 of the 1972 Act of Accession. The Court did not refer to the idea of exclusive powers, neither in the external nor in the internal sphere: it only recalled the transitional nature of Member States' authority in engaging international agreements in the concerned field. The reason for the exclusion of Member States was thus the future legislative pre-emption of the Member States "*since the Council must by then have adopted, in accordance with the obligation imposed on it by Article 102 of the Act of Accession, measures for the conservation of the resources of the sea*"<sup>351</sup>. In a series of subsequent cases against the United Kingdom, the Court confirmed that since the expiration of the transitional period laid down by the Act of Accession, power to adopt – as part of the common fisheries policy – measures relating to the conservation of the resources of the sea belonged fully and

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<sup>350</sup> Joined cases 3, 4 and 6/76, *Cornelis Kramer* [1976] ECR 1279.

<sup>351</sup> *Id.* at 41.

definitively to the Community: because uniform rules were needed, the power at issue could not be concurrent or shared, and the transfer of powers to the Community could not in any case restore to the Member States the freedom to act unilaterally in this field<sup>352</sup>.

As a matter of fact the deadline set by art. 102 elapsed, and the Community legislature had been inoperative because of British obstinacy: the United Kingdom had vetoed all EC legislative measures, and the Commission brought the State before the Court<sup>353</sup>. Here the ECJ formally declared the constitutional exclusivity of this policy area by pointing out to the expiry of the deadline and held that *“Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restriction which they imply as regards fishing activities, is a matter, as from that date, of Community law”*<sup>354</sup>.

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<sup>352</sup> See case 801/79, *Commission v. United Kingdom* [1981] ECR 1045.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 18.

### 3.3 EC non-exclusive competences and the subsidiarity principle

According to the largest number of commentators, EC competences can be generally divided into two categories: exclusive and non-exclusive competences<sup>355</sup>. The latter category is widely identified also as concurrent, i.e. inclusive of legislative fields on which both Community and Member States are entitled to enact legal provisions on the basis of the application of the so-called subsidiarity principle. Within the power-sharing context, the relationship between the different levels of government is subject to a number of constitutional principles aimed at coordinating the co-existence of two sources of autonomous legislative powers: here *“Member States retain a concurrent power to regulate matters falling within the*

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<sup>355</sup> Within the field of non-exclusive competences, several sub-categories have been identified: there are concurrent competences (occurring where *“Member States may legislate until such time and insofar as the Union has not legislated”*); parallel competences (where *“the Union and the Member States may both exercise their competences alongside one another”*: for example, this situation occurs where *“the Union is allowed to set minimum standards”*); complementary competences (where the Union is allowed *“to act in areas where [it] confines itself to supplementing or supporting the action of the Member States, or to adopting measures of encouragement or coordination”*), and negative competences (where *“the Treaties expressly exclude Union competence or expressly recognise the competence of Member States, [or] where the Treaty forbids the Union/Community to legislate, or, lastly, areas not referred to in the Treaty and therefore, as a result of the principle of allocation of powers, not within the competence of EU/EC”*): cf. A. van Aaken, *Political Economy of Federal Pre-emption: A View from Europe*, in R.A. Epstein, M.S. Greve (ed.), *Federal Preemption: States’ Powers, National Interests*, AEI Press, 2007. See also A. von Bogdandy, J. Bast, *I poteri dell’Unione: una questione di competenza. L’ordine verticale delle competenze e proposte per la sua riforma*, in *Rivista Italiana di Diritto Pubblico Comparato*, 2002, p. 303.

*reach of the Community's power, as long as in so doing they do not create a conflict with the rules adopted by the Community*"<sup>356</sup>.

While the abovementioned categorization does not clearly define the allocation of competences between the Community and its Member States, it postulates that the EC, in addition to its exclusive set of powers, maintains an additional area of powers which rests within the broad frame of Community goals: the subsidiarity principle clarifies thus the limitation of existing non-exclusive powers, being it "*aimed at stopping the flow of centralisation the dynamic of integration had imposed on the material division of powers between the Community and the Member States*"<sup>357</sup>.

The inspiring *ratio* of the subsidiarity principle generally lies in the protection of primary values such as self-determination and individual freedom: in the EC context, it represents a defensive device aimed at protecting Member States from the uncontrolled concentration of competences within the EC system. On one hand, the positive implications arising from the subsidiarity principle lead to an effective obligation for the EC so as to pursue and realize its objectives; on the other hand, we must keep clear in mind that the fulfilment of Community objectives generally prevails over subsidiarity aims: according to this cohesive/unitary view the Community shall adopt all the appropriate and necessary measures to attain its objectives, and subsequently an exclusive set of competences is granted to the Community in order to ensure the

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<sup>356</sup> Cf. M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation*, in Sandalow and Stain (eds.), *Courts and Free Markets*, Vol. II, Clarendon Press, Oxford 1982.

<sup>357</sup> See A.G. Soares, *Pre-emption, Conflicts of Powers and Subsidiarity*, *European Law Review* 1998, 23(2), p. 132-145.

observance of such principle within the EC legal system; furthermore, the subsidiarity principle does not apply to exclusive competences, hence being subordinated to the abovementioned cohesive approach frequently expressed by pre-emption of Member States' law or, within harmonisation processes, by the imposition of minimum standards<sup>358</sup>.

In other words, the application of the subsidiarity principle somehow counterbalances the pursuit of the common EC interest, realized by the full attainment of the objectives described by the Treaties. Such objectives represent a sort of common good shared by all the EC Members, and their attainment is concretely realized by the means of the actions carried out by Community institutions. In consideration of the predominant relevance of common EC interests, Member States' *room for manoeuvre* obviously concerns all those actions not involving such interests, as well as those situations where their attainment can be obtained through State action. In case of conflict between EC interests and Member State interests the formers prevail, even if in some cases a State action apparently clashing with the attainment of EC interests has been upheld by the ECJ<sup>359</sup>.

In EC law, pre-emption and subsidiarity are two concepts mutually linked as they both refer to the question on the division of powers between the Community and the Member States. Within the EC legal system pre-emption is a legal device generally employed in areas of

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<sup>358</sup> See *infra*, par. 4.3.

<sup>359</sup> See case 302/86, *Commission v. Kingdom of Denmark*, where the Court upheld a Danish measure aimed at ensuring a commercial standard actually higher than the one uniformly imposed by the EC. According to such principle of '*inverse* subsidiarity', being the Community unable to impose and enforce the attainment of a certain objective, it prefers to let Member States aim for it when they can assure higher level of quality and attainment. Such circumstances may occur in the context of legislative harmonization.

concurrent powers, generally producing two ‘reciprocated’ effects: on one hand it precludes States’ regulatory powers by expropriating national powers, whilst on the other hand it transfers such regulatory prerogatives from peripheries to the centre of the Community, producing an irreversible damage to Member States’ regulatory spheres.

Historically, the subsidiarity rule finds its roots in the Roman Catholic doctrine<sup>360</sup>, and it is also present in the Constitutions of federal States such as the German *Grundgesetz*, which went so far as to distinguish between powers that were permanently concurrent and others that were concurrent only until the federal government took action of some kind, at which time the matter passed into that government’s exclusive domain<sup>361</sup>. Basically it expresses a preference for governance at the most local level, consistent with achieving government’s stated purposes. Within the EC legal experience, the principle of subsidiarity is not entirely new, as it was first expressly introduced in the Treaties through the 1986 Single European Act, which modified article 130R<sup>362</sup> of the Treaty

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<sup>360</sup> The idea of subsidiarity was first introduced in the Catholic doctrine of social philosophy by the encyclical letters of Pope Leo XIII, *Immortale Dei* of 1 November 1885 (available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/ff\\_e-xiii\\_enc-0111185\\_immortale-dei\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/ff_e-xiii_enc-0111185_immortale-dei_en.html)) and *Rerum Novarum* of 15 May 1891 (St. Paul ed., Boston). The principle of subsidiarity was however most distinctly enunciated by Pope Pius XI in his encyclical letter *Quadragesimo Anno*, of 15 May 1931 (St. Paul ed., Boston) which states that “[i]t is an injustice, grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies”.

However, the differing reach of the Catholic and European principles of subsidiarity is underlined in N.W. Barber, *The Limited Modesty of Subsidiarity*, *European Law Journal*, Vol. 11, No. 3, May 2005, pp. 308-325.

<sup>361</sup> See art. 72 of German Constitution.

<sup>362</sup> Art. 130R was introduced in the EC Treaty by art. 25 of the Single European Act. The specific reference to the subsidiarity principle in the environmental

Establishing the European Economic Community<sup>363</sup>; however, the interpretation and meaning of such article remained controversial among the Member States<sup>364</sup>. In 1992 the Maastricht Treaty provided the explicit adoption of the principle as a general rule of Community law<sup>365</sup>: according to art. 5 EC it only applies to the so-called concurrent competences, where the Member States and Community share their legislative powers. Here the States retain their right to legislate until the Community has acted; once the Community has adopted legislative acts in a given area the supremacy rule applies, and Member States are subsequently no longer entitled to act: the concurrent field of competence dynamically evolves into an exclusive field of competence, becoming entirely occupied by the EC<sup>366</sup>.

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field was then removed by the Maastricht Treaty, which introduced the general provision of art. 3B (now art. 5). The subsidiarity principle was also recalled by art. 130T and 118A EC Treaty.

<sup>363</sup> In relation to Community actions in the environmental field, the Treaty stated that “*the Community shall take action [...] to the extent to which the objectives referred to [...] can be attained better at Community level than at the level of the individual Member States*” (see the EEC Treaty, art. 130R(4), 298 U.N.T.S. 11, as amended by the Single European Act, 25 I.L.M. 506, 515 (1986)).

<sup>364</sup> See, e.g., Manfred Zuleeg, *Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiet des Umweltschutzes*, in *Neue Zeitschrift für Verwaltungsrecht*, 280 (1987).

<sup>365</sup> With the amendment of the Community Treaties through the Maastricht Treaty, art. 130r(4) was abolished, and art. 130r reworded. As a result of the Amsterdam Treaty, art 130r was renumbered, becoming art. 174 EC. The subsidiarity principle is now expressly recalled by the art. 5, par. 2 EC: “*In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community*”.

<sup>366</sup> On the concept of European *field* pre-emption see *infra*, par. 4.2.1.

Before 1997 the application of the principle was dependant on political and thus largely non-binding tendencies<sup>367</sup>, but after the adoption of the Amsterdam Treaty its application found a proper juridical basis in the binding *Protocol No. 30 on the application of the principles of subsidiarity and proportionality*<sup>368</sup>, which forces the Commission to “consult widely before proposing legislation and, wherever appropriate, publish consultation documents”<sup>369</sup>, as well as to justify its legislative proposals in the light of the subsidiarity ratio.

Basically, subsidiarity implies a significant degree of autonomy to the levels of government closer to the problems involved, and in better position to formulate responsive solutions: it “requires that the Community refrain from action where the goals of that action could be better achieved by the Member States”<sup>370</sup>, aiming thus at the protection of Member States’ prerogatives against undue Community interference. In order to evaluate the suitability of EC legislative acts two specific tests must be complied with. On one side a negative test (also called *comparative efficiency test*) has to demonstrate whether “the objectives of the proposed action” can be “sufficiently achieved by the Member States”<sup>371</sup>; secondly, the Community must evaluate whether “by reason of the scale or the effect of the proposed action,” its objectives can be “better achieved by the Community”<sup>372</sup> (*better*

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<sup>367</sup> See for example the *Interinstitutional Declaration on democracy, transparency and subsidiarity* of 25 October 1993, (Bulletin of the European Communities, No. 10/93. pp. 118-120).

<sup>368</sup> Available at <http://eur-lex.europa.eu/>.

<sup>369</sup> See art. 9.

<sup>370</sup> See G. Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, in CMLReview 43, p. 63-84, 2006.

<sup>371</sup> See art. 5 EC Treaty.

<sup>372</sup> *Id.*

*attainment test*), so as to demonstrate that Community action should be only preferred to Member States action if this will bring proven advantages. According to its formulation, the subsidiarity clause is only important in relation to powers that are shared between the Community and Member States: it does not raise any presumption of competence in favour of the Community or the Member States, as it only constitutes a general means to distribute or allocate powers similar to that of proper federal entities, in which State authority is the rule and federal rule the exception<sup>373</sup>.

The interpretative function of this rule contributes to the proper definition and allocation of competences, even if it is important to realize that as a matter of fact the subsidiarity clause's wording neither provides any particular guideline for its application nor gives any indication toward its justiciability.

In order to define the effective application of this rule in 1992 the European Council set for itself the task of clarifying how subsidiarity would be effectively applied within the European Community system: in the Birmingham Declaration of October<sup>374</sup> 16, 1992, the European Council focused on the necessary support of the Community by its citizens, and the Member States reaffirmed that "*decision must be taken as closely as possible to the citizens*" and stressed that "*great unity can be achieved without excessive centralization*"<sup>375</sup>. Moreover, the European Council evoked subsidiarity legislative function by affirming that the principle was

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<sup>373</sup> See, e.g., U.S. Constitution, art. 1, § 8(3) and Tenth Amendment (see *supra*, footnote 25); see also art. 30 of German *Grundgesetz*: "*Except as otherwise provided or permitted by this Basic Law, the exercise of governmental powers and the discharge of governmental functions is a matter for the Länder*".

<sup>374</sup> Bulletin of European Communities, No. 10-1992, p. 9.

<sup>375</sup> *Id.*

binding on all of the Community political institutions: it expressed more explicit guidelines in its Conclusions of the Edinburgh meeting on December 1992<sup>376</sup> and made the principle subject to judicial review by stating that “[the] interpretation of this principle, as well as review of compliance with it by the Community institutions, are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned”<sup>377</sup>.

Since the ratification of the Maastricht Treaty the ECJ was faced with a large number of cases involving the enforcement of the subsidiarity rule<sup>378</sup>, even if as a matter of fact there are only few cases dealing directly with the annulment of Union law due to art. 5 EC. Two remarkable cases, in particular, involved the question related to the justicial enforcement of the core principle at issue, and here the Court took the opportunity to define the extent of such core rule: in *United Kingdom v. Council*<sup>379</sup> the UK sought annulment of part of directive 93/104 containing minimum requirements for

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<sup>376</sup> *Conclusions of the Edinburgh European Council on Transparency Declaration* (Bulletin of European Communities, No. 12-1992, p.19-21).

<sup>377</sup> *Id.*

<sup>378</sup> See, e.g. case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission*; case C-11/95, *Commission v. Kingdom of Belgium*; case C-89/94, *United Kingdom v. Council of the European Union*; joined cases C-36/97 and C-37/97, *Hilmar Kellinghusen v. Amt für Land- und Wasserwirtschaft Kiel and Ernst-Detlef Ketelsen v. Amt für Land- und Wasserwirtschaft Husum*; case C-242/99, *J. Vogler v. Landwirtschaftliche Alterskasse Schwaben*; case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*; case 91/95P, *Roger Tremblay & Others v. Commission*; case T-5/93, *Roger Tremblay & Others v. Commission*; case 11/95, *Commission v. Kingdom of Belgium*; case 415/93, *Union Royale Belge Des Societes De Football Association (ASBL) and Others v. J.M. Bosman*.

<sup>379</sup> Case 84/94, *United Kingdom of Great Britain and Northern Ireland v. Council*, [1996] ECR I-5755.

working time, based on art. 137 which allowed for minimum harmonization measures, based *inter alia* on the argument that minimum harmonization needs to be interpreted in the light of the subsidiarity principle. Here the ECJ clearly stated the scope of its review, by pointing out that “[...] *it is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercised must be [...] limited to the legality of the disputed measure*”<sup>380</sup>: the ECJ thereby narrowed down the practical significance of the principle to obvious violations and manifest error<sup>381</sup>.

Case C-233/94<sup>382</sup> was the first case that addressed the question of whether EC legislation should be annulled due to an alleged violation of the principle of subsidiarity: the case dealt with minimum harmonization measures concerning deposit guarantee-scheme, as German challenged Community directive 94/19 (on the establishment of a European wide market on financial services) arguing that there had been a breach of the obligation to show sufficient grounds under art. 235<sup>383</sup> (ex art. 190) EC. The German government asserted that the Community institutions must give detailed reasons to explain why only the Community, to the exclusion of the Member States, is empowered to act in the concerned field. Moreover, it held that the

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<sup>380</sup> *Id.* at par. 23.

<sup>381</sup> The subsidiarity principle is also recalled in case 114/01, *AvestaPolarit Chrome Oy*; case 202/01, *Commission v. Republic of France*; case 229/00, *Commission v. Republic of Finland*.

<sup>382</sup> *Federal Republic of Germany v. EP and Council*, [1997] ECR I-2405.

<sup>383</sup> “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty”.

concerned directive neither indicated in what respect the objectives could not have been effectively met by action at Member State level, nor showed grounds justifying the need for Community action. The ECJ rejected all arguments made by the German government, by ruling that although Community institutions do not expressly refer to the principle of subsidiarity, they comply with the general obligation to give reasons if they duly explain in the legislative act at issue why they consider that their action is in conformity with that principle, by stating that, because of its dimensions, their action can be best achieved at Community level and cannot be achieved sufficiently by the Member States<sup>384</sup>.

At present, the enforcement of the Treaty of Lisbon – signed by the EU countries on 13 December 2007 – could entail a significant changes for the application of the subsidiarity principle within the European legal system: according to Article 5 of the amended TEU *“in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either*

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<sup>384</sup> The general restraint in interpreting the principle of subsidiarity or in establishing additional justiciable standards clearly emerges from the Court’s ruling: on one hand the Court has refused to set measures allowing a more specific interpretation of the requirement to show sufficient ground with regard to the principle itself, on the other hand it clearly has not determined the legal value of the Conclusions expressed by the European Council in Edinburgh, by keeping on interpreting the subsidiarity principle in a rather formal and cautious way. Obviously, the debate over the justiciability of the rule at issue involves the capacity of a jurisdictional organ to decide on the legitimacy of Community acts: in 1990 the ECJ somehow favoured the express justiciability of the principle at issue by confirming that even if its effective content is frequently defined and influenced by political factors arising from the wide freedom of action granted to EC institutions, it is however entitled to defend its application by ruling on those cases where manifest violations of the principle have occurred (See the Communication of 20 December 1990 to the Intergovernmental Conference on European Union).

*at central level or at regional and local level*". Furthermore, "Union action shall not exceed what is necessary to achieve the objectives of the Treaties": in other words, the Reform Treaty tries to re-formulate both the subsidiarity and proportionality principles; moreover, a detailed description of their application is provided by a Protocol to be annexed to the Treaties.

According to the 2007 Reform Treaty the subsidiarity principle keeps its central relevance in the EC system<sup>385</sup>. The Lisbon Treaty clearly tries to emulate somehow the cooperative mechanism already set by the 2004 Constitutional Treaty<sup>386</sup> by granting national parliaments the

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<sup>385</sup> For the first time sub-state governance levels are directly recalled by the new wording of the Treaty: "*in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" (see art. 5 TEU). Additionally, the Lisbon Treaty recalls the proportionality principle by stating that "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*". The new formulations expand thus on such principles, setting out in considerable detail what effects arise from their enforcement (see *infra*); the Reform Treaty also sets guidelines for judging whether they have been observed, laying down procedural requirements. Basically The Lisbon Treaty rewrites TEC Protocol no. 30, dedicated to the application of such principles, and deletes everything except the procedural requirements that however are considerably extended. Commission consultation is to "*take into account the regional and local dimension*", and justification is to cover proportionality as well as subsidiarity, and is to include financial and regulatory impact assessment. Cf. the reports on the enforcement of subsidiarity within the Lisbon Reform Treaty, provided by the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) in November 2007 (*Testing the subsidiarity check mechanism of the Lisbon Treaty: The Framework Decision on Combating Terrorism*) and July 2008 (*Aide-mémoire for the subsidiarity check under the Treaty of Lisbon on the Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*), both available at <http://www.cosac.eu>.

<sup>386</sup> See the *Protocol on the application of the principles of subsidiarity and proportionality* annexed to the Draft Treaty, stating that every legislative proposal had to be evaluated by national parliaments through a reasoned

power to police the principle of subsidiarity: national assemblies are supposed to “*ensure compliance with the principle of subsidiarity*” in accordance with the Protocol on the application of the principles of subsidiarity and proportionality (new art. 5 TEU). Accordingly, “*national Parliaments contribute actively to the good functioning of the Union*” in certain specified ways (new art. 12 TEU). Basically the Lisbon Treaty rewrites the current TEC Protocol No. 30 on the application of the abovementioned principles, setting out in considerable detail what effect they do and do not have, and also giving guidelines for judging whether they have been observed<sup>387</sup>.

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opinion (art. 6), potentially leading to a general reconsideration of the proposal at issue. On the basis of the evaluation provided by its Parliament, every Member State was then able to start an *early warning* mechanism by directly invoking the ECJ.

<sup>387</sup> A remarkable change is provided by the introduction of two new procedures, known as the “*yellow and orange cards*”, two procedures which could actually embody a significant step forward for the democratic life of the EU, by favouring the capacity of national parliaments to co-operate with one another: national parliaments would thus be granted the right to express concerns on subsidiarity directly to the institution which initiated the proposed legislation. The first procedure (yellow card mechanism) covers proposal not just from the Commission, but also from other EU institution with powers of initiative: within eight weeks from “*the date of transmission of a draft legislative act in the official languages of the Union*”, any parliament or chamber may submit “*a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity*”. A voting system then applies, with two votes for each national parliament (in a bicameral parliament each chamber has one vote, and they may be operated independently). If at least one third of available votes are cast against a proposal in this way, the institution which made it must review it (For proposals on judicial cooperation in criminal matters and police cooperation, the threshold is one quarter of votes); following review, the institution which proposed the draft legislative act may maintain, amend or withdraw it, by giving reasons for its decision. The “*orange card*” mechanism applies only to the ordinary legislative initiative carried out by the Commission: it involves a higher threshold and more stringent consequences. If a majority of available votes are cast against a proposal, the Commission must review it: if the proposal is maintained, reasons must be given. Before the end of first reading, the European Parliament and the Council must consider the proposal against the subsidiarity principle, in the light of the reasoning offered by national parliaments and by the Commission. If the Council, by a majority of

### 3.4 The *implied powers* doctrine

Where competences are distributed over different entities, it is always necessary to set up a framework of rules clearly showing which institution has the competence to do what. As we have seen, in federal countries the horizontal distribution of prerogatives is based on a system of checks and balance where no level of government is allowed to determine competences of other levels on a unilateral basis: constitutional rules are thus set in order to define the precise allocation of competences and to describe the abovementioned system of checks and balances. A proper and express enumeration of powers does exist also in the quasi-federal system of the European Community even if obviously an international organization cannot function properly if its institutions have to adhere to the principle of attributed powers very strictly. Being the European integration a

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55%, or the Parliament, by majority of the votes cast, find against the proposal, it falls. The effective employ of such “subsidiarity objection” could surely improve the enforcement of such EC law principle, as the current general restraint in interpreting the principle of subsidiarity or in establishing additional justiciable standards clearly emerges from the Court’s interpretative point of view: the Court has generally refused to set measures allowing a more specific interpretation of the requirement to show sufficient ground with regard to the principle itself, by keeping on interpreting the subsidiarity principle in a rather formal and cautious way. Obviously, the debate over the justiciability of the rule at issue involves the capacity of a jurisdictional organ to decide on the legitimacy of Community acts: throughout the 1990’s the ECJ somehow favoured the express justiciability of the principle at issue by confirming that even if its effective content is frequently defined and influenced by political factors arising from the wide freedom of action granted to EC institutions, it is however entitled to defend its application by ruling on those cases where manifest violations of the principle have occurred. Granting national parliaments a direct role in the assessment of whether the objectives of a particular measures can be sufficiently achieved by Member States or by the EC either at central level or local level would be particularly important, as such mechanism could ensure a better compliance with the effective enforcement of the principle at issue in legislative procedures, on the same basis as other general principles of EU law.

dynamic process, any attempt to crystallize powers and competences would lead to the complete paralysis of the system, which would be thus unable to provide for all possible future contingencies. Under such circumstances, implied powers have thus the function of providing the required flexibility, behaving as “*dynamic and living creatures, in constant development, whose founding fathers can never completely envisage the future*”<sup>388</sup>. Any attempt to ‘solidify’ powers and competences in a fixed and immutable manner would lead to a stifling of the process of European integration, which would thus be deprived of the suitable degree of dynamism, and unable to deal with the issues of an ever-changing society. Subsequently, the drafters of the Treaty tried on one hand outline the general principles governing the division of powers between EC institutions and between the Community and its Member States, and on the other hand to set up a specific procedure aimed at solving possible future competence conflicts<sup>389</sup>.

According to the general framework set up by the Treaties, the European Community enjoys the enumerated specifically conferred by the Treaties, as art. 3 EC provides a concise summary of the powers granted under the Treaty – while all residual powers are left with the Member States – and art. 2 describes the general purposes of the Community for which those powers are given, while the ultimate goals are stated in the Preamble. According to art. 5 (ex art. 3b) EC

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<sup>388</sup> J. Klabbers, *An introduction to International Institutional Law*, Cambridge University Press, 2002, p. 66.

<sup>389</sup> See art. 230, 232, 300 EC Treaty, which allow EC institutions and Member States to bring action before the ECJ “*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*” (art. 230).

the Community is supposed to act only within the limits of the powers and of the objectives identified by the Treaty: the Community only possesses the powers expressly conferred on it, which are limited in scope; according to this general assertion, the Court has interpreted the requirements stated by art. 253 EC by pointing out that every regulatory/legislative act enacted by the Community “[...] shall state the reasons on which [it is] based”, implying that Community institutions are always supposed to state the legal basis of the act at issue<sup>390</sup>. Just like in the U.S. federal system central authorities have been granted limited powers, and the judicial system has played an important role in defining them: within the EC the European Court of Justice has extensively recognised and developed a proper theory of implied powers, which can be compared and linked to the active interpretation and enforcement of the *Necessary and Proper clause* of the U.S. Constitution<sup>391</sup>, according to which the American Government not only has the powers that are expressly conferred on it by the Constitution, but also the necessary powers to exercise these ones and the powers necessary to reach the objectives of the federal government.

Even where the required specific legal base for legislative action is lacking, the Court has been employing of the idea of implied powers so as to extend the reach of EC competence. The Court delivered one of the clearest formulations of the implied powers doctrine was in joined cases 281/85, 283-285/85 and 287/85<sup>392</sup>, where the ruling

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<sup>390</sup> See case 158/80, *Rewe Handelsgesellschaft Nord Mbh v. hauptzollamt Kiel*, [1981] ECR 1805.

<sup>391</sup> See *supra*, Ch. 1.

<sup>392</sup> *Germany, France, Netherlands, Denmark and United Kingdom v. Commission*, [1987] ECR 3203. Cf. also D. Chalmers, *European Union Law*,

concerned the implications of extensive implied powers granted to the Commission, rather than the European Community in general. Art. 118 of the Treaty of Rome gave the Commission the task of promoting close co-operation between Member States in the social field, but omitted any reference to the relevant legislative power: in the cases at issue the Court pointed out that the conferral of a specific task carried with it an implication of conferral of powers regarded as indispensable in order to carry out that task. Here the ECJ employed a language clearly resembling the wording chosen by the U.S. Supreme Court in *McCulloch v. Maryland*<sup>393</sup>: this kind of approach embodies the so-called *wide formulation* of the implied powers theory, according to which the powers at issue may flow from the interpretation of a legal basis expressly provided for in relation to its objectives. In this case, the recognition of implied powers stems from a teleological approach, being the powers at issue related to a given objective or function implying the existence of any necessary power to attain it. This approach was originally developed in *Kramer*<sup>394</sup> and in Opinion 1/76, where the Court held that “*whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that*

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Vol. 1 – *Law and EU Government*, Biddles Ltd. Dartmouth Ashgate Great Britain 1998, at 208.

<sup>393</sup> The ECJ stated that “[...] it must be accepted that if that provision [art. 118] is not to be rendered wholly ineffective it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task” (see cases 281 and 283-285, 287/85, *Germany, France, Netherlands, Denmark and United Kingdom v. Commission* [1987] ECR 3203).

<sup>394</sup> See *supra*, note 349.

*connexion*”<sup>395</sup>. On the contrary, the so-called narrow formulation is a bit more flexible, as it assumes that implied powers are powers without which the expressly attributed powers would be rendered useless, or “*without which they could not be reasonably and effectively applied*”<sup>396</sup>.

The field of EC external relation has been an especially remarkable area for the Court’s assertion of the abovementioned wide approach. Being the Community based on a principle of attributed powers, any external Community legal activity needs a specific legal basis granting the power at issue<sup>397</sup>: such attribution can be made *expressly* by Treaty provisions, or it can be *implied* from these provisions or from secondary internal legislation adopted pursuant to these provisions. For what it concerns the source of an implied external power, the Court has constantly held that whenever Community law has granted to EC institutions internal power aimed at attaining a certain objective, the Community has the authority to enter into international agreements necessary for the attainment of that objective. One of the most relevant statement in this field results from case 22/70 *Commission v. Council*, concerning the European Road Transport Agreement (ERTA)<sup>398</sup>. Prior to the effective

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<sup>395</sup> Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECR 741, par. 3. See also *infra*, footnote 403.

<sup>396</sup> See case 8/55 of 29 November 1956: *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*.

<sup>397</sup> See Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedom* [1996] ECR I-1759.

<sup>398</sup> Cf. J.A. Winter, *Annotation on Case 22/70, Re ERTA*, in CMLRev. 1971, p. 550-556; N.A. Neuwahl, *Joint Participation in International Treaties and the exercise of Powers by the EEC and its Member States: Mixed Agreements*, in CMLRev. 28, p. 717-740, 1991; D.S. Collinson, *The Foreign Relations Powers of the European Communities: A Comment on Commission v. Council*, in Stanford Law Review, 23 (1971) pp. 956-972.

conclusion of the treaty between Member States and third countries, the Commission asked for its annulment arguing that the Community had to have the exclusive competence to conclude treaties with third countries where it had already legislated extensively internally; the Court was thus asked by the Commission to rule that the Community alone had the power to negotiate the agreement at issue.

In its judgment the Court somehow toned down the principle of attributed powers by establishing that the power of the EC to enter into agreements with third countries and international organizations was not confined to the cases specifically provided for in the Treaty (i.e. tariff and trade agreements *ex art. 133 EC* and association agreement *ex art. 310 EC*): indeed the Court held that even if the Treaty did not expressly confer such power on the EC, its internal authority to set a common policy in the field of transport carried with it treaty power in that field, and that a regulation previously adopted by the Council on the same subject covering internal transport “*necessarily vested in the Community power to enter into any agreement with third countries relating to the subject-matter governed by that regulation to the exclusion of any concurrent powers of the Member States*”<sup>399</sup>.

According to the ECJ’s teleological view, implied powers may thus stem from the overall Community system, as a narrow enumerated powers approach could be inappropriate. In its view “*regard must be had to the whole scheme of the Treaty no less than to its substantive provisions*”: the existence of Community external affairs competence arose “[...] *not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from*

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<sup>399</sup> Case 22/70, *ERTA*, [1971] ECR 263, 275, 276.

*measures adopted, within the framework of those provisions, by the Community institutions*”<sup>400</sup>. The ERTA case set thus the foundations for potentially very broad external competences of the EC, as the Court deduced from the international legal personality of the Community – as laid down in art. 281 EC – that it enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty. The Court stressed that granting the Community implied external powers in the same area where common rules have been internally adopted aims at ensuring the uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

The analysis provided by the Court highlights thus two different aspects of the implied external EC powers matter: first of all the Court has dealt with the proper implied powers question raised by the Commission, trying to justify such constitutional doctrine by describing implied powers as additional devices aimed at ensuring the uniform application of Community rules<sup>401</sup> and thus at effectively developing the activities listed in art. 3 EC. On the other hand – and that is why such theory seems to be closely connected to the pre-emption issue – the Court has taken the opportunity to introduce the question of *exclusivity of implied external powers*, i.e. whether this competence excludes any autonomous legislative intervention by Member States in the external field. According to the largest part of

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<sup>400</sup> *Id.*, par. 15 and 16.

<sup>401</sup> See S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford 1995, at 55.

the doctrine<sup>402</sup>, implied external powers can be exclusive in two different ways:

a) an unconditional and *a priori* exclusivity may arise in situations where no prior EC internal legislation exists. According to Opinion 1/76, whenever EC institutions are empowered to take internal measures, they also enjoy the relative exclusive external competence: *it does not depend on the effective prior adoption of internal measures*, but exists whenever the internal power exists. The EC power to enter into an international agreement flows by implication from the provisions of the Treaty creating the internal power, *“insofar as the participation of the Community in the international agreement is [...] necessary for the attainment of one of the objectives of the Community”*<sup>403</sup>: here the attribution of concurrent competence Member States this might create distortions within the EC system<sup>404</sup>;

b) a second type of exclusivity arises only where internal measures have been adopted by the Community, as in the *ERTA* case: such

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<sup>402</sup> Cf. M. Waelbroeck, *id.* at 568; R. Holdgaard, *The European Community's Implied External Powers after the Open Skies Cases*, in *European Foreign Affairs Review* 8, p. 365-394, 2003.

<sup>403</sup> Opinion 1/76, *id.* par. 4. As the Court stressed in Opinion 1/03 of 7 february 2006 (*Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2006] ECR I-01145), when such an implied competence exists in relation to the conclusion of an international agreement, the Community may act alone, without the intervention of Member States, as it does when it adopts internal measures on the basis of concurrent competence. See *infra*.

<sup>404</sup> Such exclusivity would be necessary in order to defend the Community interests on the internal level. According to Opinion 1/75 (see *supra*, footnote 331) in the common commercial policy field the EC exclusive competence is necessary because *“any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets”*.

rules could be affected by autonomous external Member States actions<sup>405</sup>, therefore exclusive implied external powers arise and such exclusivity aims at preserving the effectiveness of the existing Community *acquis*<sup>406</sup>, being the Community alone capable to “*assume and carry out contractual obligations toward third countries affecting the whole sphere of application of the Community legal system*”<sup>407</sup>.

The principle on implied external competences were later confirmed by the Court in the so-called *Open Skies* cases, which started with a series of eight judgments on 5 November 2002 – in which the Court found eight Member States in violation of Community law for concluding bilateral agreements with the US in the field of air transport<sup>408</sup> – and came to an end with case C-523/04 of 24 April

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<sup>405</sup> Under such circumstances the existence of a Community competence “*excludes the possibility of a concurrent competence of the Member States, since any initiative outside of the framework of the common institutions would be incompatible with the unity of the Common Market and the uniform application of Community law*” (case 22/70 *ERTA* at 76). In Opinion 2/91 (*Convention No 170 of the International Labour Convention concerning the Safety in the Use of Chemicals at Work*, [1993] ECR I-1061, at par. 11) the Court explained that this kind of exclusivity applies in all areas corresponding to EC objectives, since “*the objectives of the Treaty would also be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope*”.

<sup>406</sup> In connection to this second type of exclusivity the ECJ referred also to the obligation of loyal cooperation arising from art. 10 EC (see case 22/70 at par. 21-22).

<sup>407</sup> Cf. case 22/70, par. 17-18.

<sup>408</sup> The 2002 judgments (C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98) saw the UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany censured by the Court for negotiating, applying and/or keeping in force certain international air transport commitments with the US (a ‘third country’), thereby failing to fulfil obligations under Article 10 and 43 EC and under Council Regulations 2409/92 and 2299/89, on fares and rates on air services and on a code of conduct for computerised reservation systems.

2007<sup>409</sup>. The key feature of the *Open Skies* judgments was the Court's acceptance of the Commission's argument that aviation Agreements concluded between the Member States and the US were incompatible with the Community's exclusive competence in the area, in light of Community legislation on airport services and transport adopted in 1991 and the internal market it established. Before the ECJ, the Commission claimed that the Community legislation adopted had established an internal market in the sector at issue, and thus the agreements concluded between these Member States and the U.S. were incompatible with the Community's exclusive competence in the area. The judgments definitively confirmed the pre-emptive assumption under which the EC has exclusive external competence where it has already adopted internal provisions laying down common rules, whatever form these might take. By impliedly referring to the concept of *field pre-emption*, the Court recalled all those situations where the Community has complete and exclusive policy-making competence and the Member States are not only precluded from doing any act contrary to Community law (in light of the doctrine of supremacy), but are pre-empted from taking any action at all: in this sense, Member States are prevented from introducing measures even in the absence of (or before the adoption of) a specific Community rule. It means that the Court does not even investigate any eventual material normative conflict, but simply excludes Member States' action in the fields embraced by the EC's

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<sup>409</sup> The latest case saw the Commission seeking a similar ruling against the Netherlands, alleging that it had infringed the EC Treaty by concluding and applying Air Service Agreements – also known as ‘Bermuda’ Agreements – with the U.S. since the mid-1940s (cf. D. Borghetti, *Il Caso Open Skies*, in *Quaderni Costituzionali* 3/2007 at p. 659).

exclusive competence: once a Community common policy has been initiated, the Community competence pre-empts Member States' competence<sup>410</sup>.

The question concerning the division between the Community and the Member States of the competence to conclude a given agreement with non-Member States was further examined by the European Court of Justice in Opinion 1/03<sup>411</sup>: the request for an Opinion was made by the Council who asked whether the conclusion of the Convention at issue fell entirely within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States<sup>412</sup>.

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<sup>410</sup> Remarkably, the *Open Skies* judgements provided also a fresh interpretation of the principles governing exclusivity, somehow moving away from the rigid demarcation described in the *ERTA* case. For instance, in case C-467/98, *Commission v. Denmark*, (see par. 79 and 111) the Court explained the purpose of *ERTA* exclusivity arguing that it arises if an international commitment falls within the scope of Community rules or at least within an area largely covered by EC rules. Such flexible test allows comparing the scope and intensity of the EC regulatory system, on one hand, with the scope and intensity of the international commitment at issue, on the other hand.

<sup>411</sup> Opinion 1/03 of 7 February 2006, *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (see *supra*, footnote 403).

<sup>412</sup> According to art. 293 EC (ex art. 220) Member States shall enter into negotiations with each other in order to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. Pursuant to this, in 1968 Member States concluded a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the so-called Brussels Convention). In 1988 the EFTA countries and the EC concluded the Lugano Convention, which instituted a system similar to that of the Brussels Convention between the parties of that Convention and the EFTA countries. In 1997 the Council started a revision process of both the Brussels and Lugano Conventions, and adopted Regulation 44/2001: this act replaced the Brussels Convention and applies between the Member States. With regard to the Lugano Convention, in 2002 the Council authorised the Commission to begin negotiations aimed at establishing a new agreement which would align its substantive provisions with the provisions of Regulation 44/2001.

According to the reasoning of the Court, the purpose of the internal legislative act enacted by the Community (Regulation No. 44/2001) was to establish a general scheme for jurisdiction and the recognition and enforcement of judgments applicable in the Community in civil and commercial matters, in order to remove obstacle to the functioning of the internal market which may stem from disparities between national legislation on the subject: given the unified and coherent system on rules of jurisdiction which Regulation 44/2001 provided for, any international agreement also establishing a unified system of rules on conflict of jurisdiction was potentially capable of affecting Community law<sup>413</sup>.

In its reasoning the Court recalled and upheld the principles previously expressed in the *ERTA* case and in Opinion 1/76, by stating that “*the competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions*”<sup>414</sup>, and that “*whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect*”<sup>415</sup>. Moreover, the Court recalled Opinion 2/91 by stating that that principle also applies where rules have been adopted in areas

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<sup>413</sup> See also case C-281/02, *Owusu* of 1 March 2005.

<sup>414</sup> See the *ERTA* case, par. 16.

<sup>415</sup> See Opinion 1/76, par. 3, and Opinion 2/91, par. 7.

falling outside common policies and, in particular, in areas where there are harmonising measures; additionally, an explicit reference was made to art. 10 EC, requiring Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty<sup>416</sup>.

According to the Court, it is not necessary that the areas covered by the agreements and the internal Community legislation “*coincide fully*”: where the *quantitative test*<sup>417</sup> is to be applied, “*the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law [...] but also its future development*”<sup>418</sup>. This comprehensive and detailed analysis must be carried out in order to ensure that the “*agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish*”<sup>419</sup>. Being the purpose of the new Lugano Convention the same of Regulation 44/2001, in the view of the Court its provisions implement the same system as that of the internal EC act at issue, in particular by using the same rules of jurisdiction which ensures consistency between the two legal instruments and thus ensures that the Convention does not affect the Community rules. The Court found thus that the new Lugano Convention “*would affect the uniform and consistent application of Community rules*”<sup>420</sup>

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<sup>416</sup> See Opinion 1/03, par. 119, and Opinion 2/91, par. 10.

<sup>417</sup> See Opinion 2/91, par. 25 and 26.

<sup>418</sup> See Opinion 1/03, par. 126.

<sup>419</sup> See Opinion 1/03, par. 133.

<sup>420</sup> See Opinion 1/03, par. 172.

concluding that it fell entirely within the sphere of the exclusive competence of the Community. In other words, according to the ECJ Member States lose competence to adopt national measures or to enter into international agreements when such acts are liable to affect or somehow alter the scope of existing Community rules: in theory, Member States could thus be allowed to adopt measures in an area regulated by the EC, provided that those national measures do not interfere with Community rules. Hence, the issue is not so much about whether there occurs an effective conflict between a national measures and Community rules, but rather whether such national acts are liable to interfere in any way with the attainment of the objectives pursued by the EC.

### 3.5 Article 308 EC: the *Necessary and Proper* clause of Europe

The basic consequence arising from an extensive use of the *implied powers* doctrine is generally represented by the fact that, pursuant to this interpretative device, the EC enjoys an enlargement of its legislative powers. However, it must be stressed that such implied growth should not be identified with a proper *extension* of prerogatives or competences, as long as *implied powers* relate only to those areas where – on the basis of an express conferral granted by the fundamental Treaties – the Community is *already* entitled and legitimated to act<sup>421</sup>. On the contrary, a proper *expansion* of EC legislative competences may be based on art. 308 (formerly art. 235) EC, whose formulation clearly resembles the *necessary and proper clause* included in art. 1, section 8, of the U.S. Constitution<sup>422</sup>.

According to the EC flexibility clause,

*“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.*

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<sup>421</sup> From this point of view, *implied powers* can be seen as additional devices aimed at ensuring the EC the effective attainment of its objectives: cf. M. Cartabia and J.H.H. Weiler, *L'Italia in Europa*, *id.* at 112.

<sup>422</sup> According to the last paragraph of section 8, “[the Congress shall have Power to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” (see *supra*, Chapter 1, footnote 31).

At first sight, art. 308 EC only seems to be a codification of the *implied powers* theory, but its effective application through decades proved this restrictive viewing to be wrong. As already pointed out, while *implied powers* are to be referred to existing EC prerogatives (leading thus to a simple *enlargement* of existing competences), actions adopted *ex art. 308 EC* are to be referred to areas where no other powers are available to Community institutions (leading to a proper *expansion* of EC competences). Even if recourse to the *flexibility clause* should be conceived as residual<sup>423</sup>, it must be kept clear in mind that in order to promote an action pursuant to art. 308 Community institutions have to deem the action at issue necessary for the attainment of one of the Community's objectives. Here, the concept of 'necessity' has generally relied on a high degree of legislative and administrative discretion granted to the decision-making organs, given the circumstances under which the wording of art. 308 does not provide any further indication on the nature of such 'necessity'<sup>424</sup>. As a matter of fact, the only textual limit to the application of art. 308 EC is embodied by the required unanimity vote within the Council.

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<sup>423</sup> And subsequently legitimated only *a)* in presence of EC legal order's gaps which need to be filled; *b)* in the absence of EC necessary powers and more specific Treaty's provisions.

<sup>424</sup> The 'subsidiarity' nature of art. 308 EC is embodied by the fact that EC actions adopted under its invocation must however comply with the proportionality principle: cf. R. Schütze, *Organized Change towards an 'Even Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence*, *id.* at p. 95 *et seq.* Some commentators tried to define the effective limits of this provision, through an extensive analysis of its pre-required conditions: see P. Mengozzi, *Il diritto della Comunità europea*, Cedam, Padova 1990, p. 69; *Istituzioni di diritto comunitario e dell'Unione europea*, Cedam, Padova 2003, p. 96-97.

For what it concerns the use of art. 308 EC, in accordance with the conferral principle<sup>425</sup> it cannot be employed to expand EC competences beyond the Treaties' explicit limits (arising on one hand from the explicit enumeration of EC institutions' competences; on the other hand from the generic list of EC objectives which gives birth to the functional definition of competences) through the identification of new objectives. The general uncertainty and inexactness of meaning of the chosen wording, together with the ambiguous nature of the objectives pursued by the Community, rendered art. 308's operating criteria indeterminate, and without any univocal conceptual limit.

Until the 1972 Paris Summit, art. 308 EC was rarely used being thus the residual legislative power restrictively interpreted by the Community organs<sup>426</sup>. After 1973 the picture changed dramatically, as EC institutions started adopting a creative interpretation of the provision at issue relying on its open wording. Until the adoption of the 1986 Single European Act, art. 308 became one of the most employed legal bases in the Community system of competences: basically, art. 308 operative criteria allowed deriving new competences from existing EC objectives, leading to a violation of the enumeration principle on which the whole Community system of competences was supposed to be founded. The creative and expansive interpretation of art. 308 led to its almost unconditional

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<sup>425</sup> Art. 5, par. 1, EC.

<sup>426</sup> Cf. M. Cartabia and J.H.H. Weiler, *L'Italia in Europa, id.*; R. Schütze, *Organized Change towards an 'Even Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence*, *Yearbook of European Law*, 2003, at footnote 24.

invocation in a large number of sectors<sup>427</sup>, confirming the assumption under which, potentially, every material field of action could have been included in Community competences or intertwined to EC core objectives.

After that period, the number of measures adopted *ex art. 308* decreased remarkably and its effective extent became more and more related to the subsidiarity principle. A large number of EC competences which, up to that moment, had been based on the *flexibility clause*, were later provided with a proper legal basis specifically included in the Treaty; moreover, the adoption of the qualified majority vote in a large number of sectors – coupled with the adoption of art. 100A (now art. 95) EC dedicated to harmonizing measures – further smoothed the way for European integration, providing a valid alternative to the burdensome unanimity vote procedure required by art. 308 EC.

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<sup>427</sup> *Id.*



## Chapter 4: Pre-emption in Europe

Within the exercise of its constitutional and integrative function the European Court of Justice has been trying to formulate and develop a doctrine aimed at clarifying and defining under which circumstances “*Member State law will be invalidated on the basis of its conflict with the legislation of the Community institution*”<sup>428</sup>. Such attempt, however, has always been made impliedly by avoiding any direct reference to the express notion of pre-emption or to the taxonomic classification provided by the U.S. Supreme Court<sup>429</sup>.

As I have already pointed out, apart from one pioneering study<sup>430</sup> and from a small number of essays and papers actually trying to apply the U.S. pre-emption classification to the EC legal experience, such topic still remains “*one of the most obscure areas of Community law*”<sup>431</sup> even if it embodies the core essence of European federalism, together with the doctrines of supremacy and direct effect. Pre-emption plays a crucial role in shaping the EC competences asset and in defining the relationships occurring between the EC legal system and national legal orders, as it determines the way in which EC law and national provisions are connected within the same policy area. Being legislation an embodiment of political choices expressing

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<sup>428</sup> See E.D. Cross, *Pre-emption of Member State law in the European Economic Community: a Framework for Analysis*, 29 CMLRev 1992, at 447.

<sup>429</sup> Cf. R. Schütze, *Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption*, 43 CMLRev 2006, at footnote 41.

<sup>430</sup> M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation*, in Sandalow and Stain (eds.), *Courts and Free Markets*, Vol. II, Clarendon Press, Oxford 1982

<sup>431</sup> Cf. M. Cappelletti, M. Seccombe and J.H.H. Weiler (Eds.), *Integration Through Law: Europe and the American Federal Experience – A General Introduction*, in Cappelletti et al. (op. cit.), Vol. 1, Book 1, 1986, at 32.

compromises between various diverging values, in a quasi-federal order such as the European one pre-emption features the constant tension occurring between the different levels of government. As we have seen in Chapter 3, the EC legal system is featured by the presence of a large number of elements which play a relevant role in the allocation of competences matter: Member States' and Community's competences often overlap in many policy fields, being thus powers divided and mixed in a dynamic manner.

In the framework of relations between national legal orders and the European one, pre-emption covers situations where the application of laws enacted by the by the EC precludes the corresponding regulatory powers of Member States. Apart from the general reluctance adopted by the ECJ in explicitly using the word 'pre-emption' and in referring to a proper taxonomy, the abovementioned under-theorisation of pre-emption ought to be related to the fact that such mechanism has often been envisaged as a device concerning exclusively the analysis of conflict between Member States law and Treaty provisions, rather than including all instances of actual and potential conflict between Member States law and Community legislation.

As a matter of fact, pre-emption matters have generally been associated with the supremacy principle, i.e. an all-embracing formula judicially established by the ECJ in a purposely-comprehensive manner with a view to provide a foundation to the European constitutionalization process. As we have seen in Chapter 3, such core rule states the general superior hierarchical status of EC legal order over national ones. Contrariwise, in my opinion pre-emption deals with the actual degree to which national law is

displaced by EC legislation whereas conflicts between EC legislation and Member State law occur. Therefore, within the European context the notion of pre-emption should thus be linked to the resolution of conflicts of *powers*: in other words it should be given a proper conceptual autonomy, and be conceived as an analysis of competing legislation aimed at providing the exact location of the delicate demarcation line of material powers between EC and Member States. The formal identification of pre-emption standards and a proper analysis of such phenomenon would thus allow a clear identification of the effective exercise to which States may submit matters when they retain overlapping powers with the Community.

Within the European *quasi-federal* experience, the general tendency to assimilate pre-emption to the supremacy principle has led to the gradual disappearance of the distinction between conflicts of rules and conflicts of powers<sup>432</sup>; moreover, an unconditional application of primacy to the resolution of conflicts of power has bent out of all recognitions the conceptual independence of the pre-emption phenomenon, by favouring the swift of national powers over to the Community. The needs for a clearer analytical distinction between the two doctrines and for the subsequent introduction of a proper pre-emption framework were explicitly expressed in 1977 by Baumann: once stated the primacy of Community law over national legislations, the matter is “*determining the scope of application of disposition of*

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<sup>432</sup> Cf. A.G. Soares, *Pre-emption, Conflicts of Powers and Subsidiarity*, 23(2) European Law Review 1998, at 133.

*Community law with a view to deciding if in a given situation a conflict between Community law and national law has arisen*"<sup>433</sup>.

In other words, in order to provide a suitable analysis of the European pre-emption phenomenon it would be necessary to set up a proper and autonomous framework able to define the circumstances in which Member State law are invalidated on the basis of the conflict with the legislation of the Community institutions, so as to define in advance which areas are pre-empted and under what conditions, and also whether powers in such areas are concurrent or exclusive<sup>434</sup>.

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<sup>433</sup> Cf. P. Baumann, *Common organizations of the market and national laws*, in C.M.L.Review, 14, 1977, at p 303. See also M. Waelbroeck: "*The problem of pre-emption consists in determining whether there exists a conflict between a national measure and a rule of Community law. The problem of primacy concerns the manner in which such conflict, if it is found to exist, will be resolved*" (in *The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation*, in Sandalow and Stain (eds.), *Courts and Free Markets*, Vol. II, at 551).

<sup>434</sup> A clear example of the conceptual haziness covering the pre-emption doctrine is provided by A. van Aaken: according to the Author, "[...] *within the primary exclusive competences of the Union, pre-emption problems do not occur as the Member States are explicitly and ex ante excluded from legislating in the field*". According to the view expressed above, in the primary law field there is no need and no chance for pre-emption to occur, being the supremacy principle the legal basis granting EC laws the higher hierarchic position in the European legal system (see *Political Economy of Federal Pre-emption: A View from Europe*, at footnote 164).

#### 4.1 *Express* pre-emption

According to a coherent pre-emption paradigm, clearly separated from supremacy issues and from the exclusive nature of EC competences, such mechanism should be understood as an analysis aimed at defining the effects that the coverage of a certain legal space by the Community will have on related Member States' legislation.

Within the context of U.S. American federalism, Congress is generally required to “manifest its intention clearly”<sup>435</sup>. However, Congress does not always manifest its intention by explicitly by the means of a specific *pre-emption clause*: rather, the Supreme Court may seek to find its intent by referring to the pervasiveness of the federal scheme<sup>436</sup>, the need for uniformity<sup>437</sup> or the danger of conflict between the enforcement of State laws and the administration of

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<sup>435</sup> See *New York State Dept. of Social Services v. Dublin*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952). See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978): “*This Court is generally reluctant to infer pre-emption [...]*”; *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), where the Supreme Court showed reluctance in finding that a State law dealing with family and family property law was pre-empted, unless it caused “*major damage*” to “*clear and substantial*” federal interests. According to the Supreme Court, mere conflict in the words of two statutes does not imply federal pre-emption.

<sup>436</sup> See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where State taxes as applied to commerce by non-Indians on an Indian reservation pre-empted by pervasive federal regulation.

<sup>437</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), where the Supreme Court held that States may not enact food labelling requirements which do not permit “reasonable weight variations” when the federal law allows such reasonable variations in accuracy due to moisture loss during distribution because the State law conflicts with the goal of the federal law to facilitate value compensation (cf. *supra*, footnote 235).

federal programmes<sup>438</sup>. As we have seen, *express* pre-emption would occur where Congress has clearly and unambiguously declared its intention to preclude State regulations of a described sort in a given area, although in a large number of cases Congress omitted to expressly articulate its pre-emptive intent towards State laws by employing instead forms of *implied* pre-emption.

In the same way, *express* pre-emption represents the simplest form of national law displacement stemming from the adoption of Community measures. According to a thorough article dedicated to the taxonomy of European pre-emption<sup>439</sup>, *express* pre-emption would occur where Community legislation includes explicit prohibitions on the Member States to enact in a particular field, or where it expressly requires that Community regulation of an area is exclusive or exhaustive. Generally though, EC secondary legislation is not very direct on the issue of its pre-emptive effect: rather, it may contain provisions framed in terms of affirmative obligations for the Member States.

In order to enforce a legislative act with a view to impose a common standard throughout the whole Community territory, the European legislator frequently employs pre-emption clauses, which facilitate the explicit and univocal expression of the act's pre-emptive extent toward national legislations<sup>440</sup>. Such clauses assist the Court of

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<sup>438</sup> See *Pennsylvania v. Nelson*, 350 U.S. 497, 505-510 (1956), where the Supreme Court held that the enforcement of State sedition acts presented serious danger of conflict with administration of the federal program because sporadic local prosecutions could obstruct federal undercover operations and enforcement plans.

<sup>439</sup> Cf. E.D. Cross, *Pre-emption of Member State Law in the European Economic Community: a Framework for Analysis*, 29 CMLRev 1992, at p. 458.

<sup>440</sup> According to Cross, pre-emption clauses are generally "[...] framed in terms of affirmative obligations to the Member States". Furthermore, "[...] the lack of

Justice in resolving pre-emption issues by often taking the form of free movement clauses, expressly preventing Member States from taking more restrictive measure on a matter, if that matter fulfils the requirements stated by the EC act at issue<sup>441</sup>.

Remarkably, in the *Ratti* landmark case<sup>442</sup> the ECJ evaluated free movement clauses' extent by pointing out that such propositions do not have any independent value, being “*no more than the necessary complement of the substantive provisions [of the EC legislative act at issue]*”<sup>443</sup>. Hence, such provisions should be simply regarded as confirming and supporting the pre-emptive effect of the considered act, since their application is entirely dependent on the latter's substantive scope. Similar conclusions may be drawn from case

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*clearly expressed pre-emption clauses in Community legislation may be due to the politically sensitive nature of the pre-emption issue. Since an express limitation or restriction on the legislative competence of the Member States can be perceived as a further infringement on “national sovereignty”, Community legislation is probably much easier to adopt if it simply focuses on the goals being sought rather than the reallocation of legislative competence to the Community away from the Member States” (id. at footnote 28).*

<sup>441</sup> A clear example of *free movement clause* can be found in Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances, as amended by Commission Directive 98/101/EC adapting to technical progress Directive 91/157/EEC (Battery Directive): according to art. 9, “*Member States may not impede, prohibit or restrict the marketing of batteries and accumulators covered by this Directive and conforming to the provisions laid down herein*”; another example can be found in Directive 89/622, harmonising national laws governing the size of health warning labels which must be printed on cigarette packets: according to art. 8(1), “*Member States may not, for reason of labelling, prohibit or restrict the sale of products which comply with this Directive*”. See also Community Regulation No. 2771/75, providing that eggs and egg packaging shall not bear any indications other than those provided for in the regulation (cf. case 130/85, *Wulro*, [1986] ECR 2035).

<sup>442</sup> Case 148/78 (*Criminal Proceedings against Tullio Ratti*, [1979] ECR 1629). This case is generally linked to the *occupation of the field* pre-emption standard: see *infra*, footnote 465.

<sup>443</sup> *Id.* at par. 13.

60/86, *Commission v. United Kingdom (Dim-Dip)*<sup>444</sup>, where the Commission maintained that by virtue of the free movement clause included in the debated Directive “[...] *it is not possible to prohibit the use of a motor vehicle on grounds connected with the installation of lighting and light-signalling devices if such devices are installed in the vehicle in question in accordance with the requirements set out in Annex I to the directive*”<sup>445</sup>.

Therefore, *free movement clauses* do not constitute an actual prerequisite for *express pre-emption*, being on the contrary legislative devices just facilitating its application<sup>446</sup> by the means of their univocal formulation.

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<sup>444</sup> Case 60/86, *Commission v. United Kingdom*, [1988] ECR 3921 (see *infra*, par. 4.2.2).

<sup>445</sup> Par. 6 of the judgment.

<sup>446</sup> According to the Court’s reasoning in the *Ratti* case, “[...] *it is a consequence of the system introduced by Directive No. 73/173 that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different [...]*” (*id.* at par. 27).

## 4.2 *Implied* pre-emption

If we try to analyse the European Court's jurisprudence on pre-emption through the lens of the U.S. American constitutionalism, we are immediately faced with the main difference occurring between American pre-emption and its European corresponding phenomenon. Such dissimilarity lies in the fact that whilst the former legal system may include actual instances of *express* preclusion of State regulatory powers<sup>447</sup>, the European legislator is generally reluctant to clearly define the pre-emptive extent of EC laws.

Subsequently, while American pre-emption may be either *express* (thus featured by a proper pre-emption clause defining the extent of the federal act, by stating that no State or other regulatory authorities may impose any additional requirements or prohibition) and *implied* (in the forms of *occupation of the field* and *obstacle* pre-emption<sup>448</sup>), when we speak about European pre-emption we mainly refer to the second form of pre-emption, i.e. the preclusion of national regulatory powers resulting from a decision adopted by the European Court of Justice, concerning the interpretation of an EC secondary act and its extent or influence on the corresponding area of competence (being it an exclusive or concurrent/shared field).

In its case-law the ECJ has frequently been faced with questions concerning the interpretation of provisions lacking explicit guidance on the pre-emption issue. From this point of view, European implied

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<sup>447</sup> Arising from the fact that on some occasions the U.S. legislator adopts specific and unambiguous pre-emption clauses: cf. *supra*, par. 2.1.1.

<sup>448</sup> See *supra*, par. 2.1.2.

pre-emption might be analysed by referring to the classificatory taxonomy developed by the U.S. Supreme Court.

#### 4.2.1 *Field* pre-emption

Apart from the abovementioned assimilation with supremacy questions, the conceptual independence of European pre-emption has long been threatened by the nature of the involved competence field, having the ECJ frequently supported a rigid *conceptualist-federalist approach*<sup>449</sup>. Under such view, the concept of European pre-emption refers uniquely to those areas involving an exclusive EC competence<sup>450</sup>. Hence, the idea of pre-emption has frequently been identified only with the most comprehensive type of pre-emption, namely *occupation of field pre-emption*<sup>451</sup>.

According to this paradigm, the exercise of Community powers through the adoption of exhaustive secondary legislation causes the total removal of State regulatory jurisdiction in the concerned fields. *Field* pre-emption refers thus to all those sectors where “[t]he Community [acquired] exclusive competence”, to the effect that “State powers are ‘pre-empted’ and the Community has ‘occupied the field’”<sup>452</sup>. Therefore, pre-emption merely becomes “[...] a question of determining competence. National action is precluded not

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<sup>449</sup> M. Waelbroeck was the first author introducing such approach (cf. *The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation*, *id.* at p. 551). The author in question also described the opposite *pragmatic approach*, according to which “[...] Member States retain a concurrent power to regulate matters falling within the reach of the Community’s power, as long as in so doing they do not create conflict with the rules adopted by the Community”.

<sup>450</sup> The various criteria and approaches adopted by the ECJ in its case law dealing with pre-emption issues will be describe in detail *infra*.

<sup>451</sup> On the concept of *field pre-emption* see *supra*, par. 2.1.2.1.

<sup>452</sup> S. Weatherill, *Law and Integration in the European Union* (Clarendon Press, 1995), at p. 136-137; *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in O’Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty*, (Wiley Chancery Law, 1994), at p. 14.

*because the rules of Community law apply in the field and prevail in the event of conflict with national provisions, but instead where, even though there are no Community rules with which national rules can come into conflict, the national action is impermissible. Pre-emption in this sense logically precedes supremacy*"<sup>453</sup>.

In my opinion, if we assimilate the idea of pre-emption with the sole *occupation of the field* standard, it would only occur where the whole policy area has become fully occupied by the EC, even if no specific Community measure has been enacted. Pre-emption would feature all those situations where Member State law is excluded in principle, being thus inapplicable in a large number of cases, namely those where the policy field at issue is subject to dual regulation by both the Member States and the Community. Under this view pre-emption relates only to the cases where there occurs a conflict between Member State law and Treaty provisions establishing exclusive EC competence, even if it should be conceived as a means to analyse the Member State law in light of the relevant Community legislation field<sup>454</sup>.

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<sup>453</sup> *Id.* To the same extent, J.H.H Weiler expressly associated the doctrine of pre-emption with a form of exclusive competence (see *Il sistema comunitario europeo: struttura giuridica e processo politico*, il Mulino 1985, at p. 61). See also F. Jacobs and K. Karst: "[...] the idea [of pre-emption] will be treated as going beyond the principle of the primacy of Community law over Member State law; it will be taken to refer to cases where the Member States are precluded from legislating, not because legislation would conflict with Community law, but because the competence in question is an exclusively Community competence" (*The 'Federal' Legal Order: The U.S.A. and Europe Compared – A Judicial Perspective*, in *Integration Through Law*, Book 1, p. 237).

<sup>454</sup> According to E.D. Cross, a proper pre-emption framework would exclude conflicts between Member States law and Treaty provisions, so as to avoid decisions of a constitutional nature: "[t]he explanation for this preference is that a judicial decision based upon an interpretation of Community legislation is safer than basing it upon an interpretation of a Treaty rule because mistakes in the latter case are more encompassing and more difficult to repair" (see

A comparison between the U.S. federal experience and the European legal scenario can easily show how the programmatic nature of the EC fundamental Treaty generated a legal framework slightly different from the one determined by the U.S. Constitution. As we have seen in Chapter 2, according to the general rule the federal Congress is enabled to pre-empt State powers only in specific cases, featured by an express intent statement delivered in legislative and regulatory acts<sup>455</sup>. Apart from those peculiar situations where the federal Government is granted with exclusive powers<sup>456</sup>, this view is coherent with the interstitial nature of federal law<sup>457</sup>, which leads to the presumption that the constitutional enumeration of powers granted to the federal Government does not in general prevent States from legislating in the same areas concurrently, as long as they do not use such powers in contravention of some others specific federal law or policy. On the contrary, pre-emption in the European sense frequently involves a much more drastic line-drawing activity, with central powers clearly isolated from those retained by the Member States, and with Member State activities in the forbidden areas totally pre-empted.

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*Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 CMLRev 1992, at p. 454).

<sup>455</sup> See *supra*, footnote 153.

<sup>456</sup> Such as the postal power, the power to conclude international agreements, the power to coin money, or the power to regulate commerce with foreign Nations, among the several States and with the Indian Tribes (see *supra*, par. 1.4.1). As we have seen in Chapter 1, even in presence of Federal Government's exclusive powers pre-emption cases may arise because of the presence of vague overlapping areas lying between the federal power to regulate commerce and the States' powers to regulate their intrastate economies.

<sup>457</sup> See *supra*, par. 1.3.

In this respect, both the programmatic nature of the Treaties and the overall institutional weakness of the Community have led to the articulation of the abovementioned *conceptualist-federalist approach*, followed by the European Court of Justice especially in early cases by simply defining the extent of EC competences and declaring such competences to be exclusive<sup>458</sup>. Obviously, identifying pre-emption uniquely with this model restricts its relevance as it simply becomes a sort of defensive device employed by the Court with a view to restrict national prerogatives.

The Court followed such rigid approach in all those cases where it deemed necessary to affirm EC competence's exclusiveness – as it happened in the field of foreign commerce<sup>459</sup> – by stating that under particular circumstances Member States are deprived of the right to exercise a power concurrent with that of Community because of the risk of adopting positions potentially different from those the EC intended to adopt. For that reason, Member States retain the right to exercise such powers only where Community provisions expressly allow them to do so<sup>460</sup>, or in case of emergency, even if the

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<sup>458</sup> Cf. case 22/70, *ERTA* (see *supra*, footnote 397), where the ECJ held that “[E]ach time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the powers to adopt legislative provisions in the field” (*id.* at 274).

<sup>459</sup> See for example Opinion 1/75, concerning the common commercial policy (see *supra*, footnote 331); case 41/76, *Donckerwolcke*; case 131/73, *Grosoli*; joined cases 37 and 38/73, *Indiamex v. Sociaal Fonds voor Diamantarbeiders*.

<sup>460</sup> See case 16/83, *Criminal proceeding against Karl Prantl*, [1984] ECR 1299, at par. 13: “[...] once rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise”. See *infra*, par. 4.3 dedicated to derogations from pre-emption and *saving clauses*.

Community remains inactive<sup>461</sup>. In order to establish the absolute predominance of EC law, the Court has also recalled the general obligation of cooperation arising from art. 10 (ex art. 5) EC, under which Member States shall abstain from all those measures that could endanger the attainment of the objectives of the EC Treaty. It held that “*once the Community has [...] legislated for the establishment of the common organisation of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it*”<sup>462</sup>.

The *a priori* exclusion of Member States’ action stems from the fact that where *field* pre-emption occurs, the ECJ does not investigate about any (potential or effective) normative conflict between EC laws and national provisions.

As it emerges from consistent case-law, the *field* pre-emption analysis carried out by the ECJ includes element clearly resembling the *field* pre-emption ‘comprehensiveness test’ employed by the U.S. Supreme Court since *Hines v. Davidowitz*<sup>463</sup>. The criterion applied by the European Court of Justice for determining the circumstances for the pre-emptive effect of secondary EC legislation lies in the existence of a complete, coherent and exhaustive system of

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<sup>461</sup> In the past, the establishment of an exclusive EC competence frequently caused the emergence of *regulatory gaps*, being States precluded from regulating the concerned area whilst still no EC legislative act was enabled. To prevent this, in all those fields where the Community had exclusive powers national measures were permitted, provided prior authorisation had been given for these measures (see case 804/79, *Commission v. United Kingdom*, at par. 31 et seq.; case 70/77, *Simmmenthal v. Italian Finance Administration*).

<sup>462</sup> Case 83/78, *Redmond*, at par. 56. See also case 51/74, *Van der Hulst*.

<sup>463</sup> See *supra*, footnotes 208 and 211. However, within the European legal context a relevant portion of *field* pre-emption cases arise in connection with the *minimum harmonization* legislative technique, which relies on the idea of *relative exhaustiveness* (cf. *infra*, par. 4.3 b)).

Community measures in the field at issue. The ECJ has argued that secondary EC legislation can form a comprehensive and exhaustive system of law in which a national legislature has no room left to enact its own legislative aim<sup>464</sup>. Therefore, *field* pre-emption may occur where Member States are totally excluded from the adoption of legislative acts on the ground that the EC legislator has exhaustively legislated for the field at issue<sup>465</sup>. *Field* pre-emption is manifestly the most damaging form of pre-emption, being the reason for the total exclusion of Member States measures the perceived fear that any

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<sup>464</sup> See A. Furrer, *The Principle of Pre-emption in European Union Law*, in Gerd Winter (Ed.), *Sources and Categories of European Union Law*, Nomos Verlagsgesellschaft Baden-Baden 1996.

One of the most recent *field* pre-emption formulation may be retrieved in case C-523/04, *Commission v. the Netherlands (Open skies)*, of 24 April 2007: on that occasion the ECJ clearly employed the *occupation of the field* rationale by arguing that where the Community has complete and exclusive policy-making competence Member States are not only precluded from doing any act contrary to Community law (in light of the doctrine of supremacy), but are prevented *from taking any action at all*: in this sense, Member States are prevented from introducing measures even in the absence of (or before the adoption of) a specific Community rule. It means that the Court does not even investigate any eventual material normative conflict, but simply excludes Member States' action in the fields embraced by the EC's exclusive competence: once a Community common policy has been initiated, the Community competence pre-empts Member States' competence (see *supra*, footnotes 409 and 410).

<sup>465</sup> Cf. case 148/78, *Criminal proceeding against Tullio Ratti*, [1979] ECR 1629, where in the context of a total harmonization measure adopted pursuant to art. 94 EC the ECJ found all national measures pre-empted. According to the Court's reasoning, "[...] it is a consequence of the system introduced by Directive no. 73/173 that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the Directive in question, or which are even more detailed or in any event different, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not provided for applies both to the direct marketing of the products on the home market and to imported products" (cf. par. 27 of the judgment). In accordance with the *occupation of the field* standard, the Community measures represented an exhaustive set of rules and thus pre-empted national legislators. See J.A. Usher, *The direct effect of directives – Case 148/78, Ratti*, in *European Law Review*, 1979, Vol. 4, p. 268-273.

supplementary national action may endanger or interfere with the strict uniformity of the Community regime<sup>466</sup>. The established EC legislative standard is considered absolute, coherent, and exhaustive: hence Member States measures are considered invalid even when such measures do not obstruct the objectives of EC legislation<sup>467</sup>.

If compared with other areas, agricultural policy seems to be one of the fields where, by the means of the conceptualist-federalist approach the ECJ has been more inclined to find that Community law made use of its occupying force. Case 31/74, *Galli*<sup>468</sup>, embodies one of the clearest formulations of this approach. Here the Court was faced with the question of the compatibility of a national price control system with the common organisation of agricultural markets: the Court held that in sectors covered by a common organisation of the market Member States could no longer interfere unilaterally in price formation procedure established under the common organisation; moreover, in the exercise of their retained competences Member States could not jeopardise the aims and functioning of the common organisation of the market in question. However, being the EC Regulations at issue applicable solely at the production and wholesale stage, Member States were free to take appropriate measures relating to price formation at the retail stage,

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<sup>466</sup> Cf. R. Schütze, *Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption*, at 1040.

<sup>467</sup> Cf. case 216/86, *Prefetto di Milano*, [1987] ECR 2919, at par. 10: “In view of the fact that [...] the Community has the exclusive legislative power which precludes any action on the matter by a Member State, it is not necessary to examine the question whether such national rules do or do not jeopardize the objectives or the functioning of the common organization in the sectors under consideration”.

<sup>468</sup> Case 31/74, *Criminal proceeding against Mr. Filippo Galli*, [1975] ECR 47.

on condition that they did not jeopardise the aims and functioning of the common organisation of the market in question.

Rather than referring to the well-known notion of Regulations' direct applicability, the ECJ made implied reference to that of pre-emption by stating that being the aim of the common market to maintain prices at a certain level, national measures prejudicial to this objective were clearly incompatible with Regulations establishing such common market.

The idea of exhaustiveness was also recalled in case 222/82<sup>469</sup>, where the Court ruled that in presence of an exhaustive system of quality standards, national authorities were prevented from imposing unilateral quality requirements unless the EC expressly provided for such a power. Furthermore, the presence of a comprehensive set of rules precluded States from adopting unilateral measures also in cases 48/85<sup>470</sup> and 218/85<sup>471</sup>, where the Court held that national rules were precluded “[...] either because the extension of those rules affects a matter with which the common organization of the market has dealt exhaustively or because the rules so extended are contrary to the provision of Community law or interfere with the proper functioning of the common organization of the market”<sup>472</sup>.

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<sup>469</sup> Case 222/82, *Apple and Pear Development Council v. K.J. Lewis Ltd. and others*, [1983] ECR 4083.

<sup>470</sup> Case 48/85, *Commission v. Germany*, [1986] ECR 2549.

<sup>471</sup> Case 218/85, *Association comité économique agricole régional fruits et légumes de Bretagne (CERAFEL) v. Albert Le Campion*, [1986] ECR 3513.

<sup>472</sup> *Id.* at par. 13. In this judgment the Advocate General was of the opinion that the Court should prefer a conflict analysis. The national regulations would be presumed lawful, unless they could be proven to conflict with the Community measure (cf. Cross, *Pre-emption of Member State law in the European Economic Community: a Framework for Analysis*, at p. 460).

The Court also in *Bulk Fruit*<sup>473</sup> drew particular attention on the concept of exhaustiveness: on one side a regulation enacted by the Kingdom of Belgium required national producers to indicate the minimum weight and the numbers of unit on the bulk packages of all agricultural products; on the other side the Community provided for the common organization of the market in fruit and vegetables by adopting Council Regulation no. 1035/72, imposing these same requirements only for some specific vegetables. According to the ECJ, the common organization of the market at issue was entirely governed by Community measures, “*which established a Community system of quality standards to which the products governed [...] must comply*”<sup>474</sup>. As the Court reckoned in *Apple and Pear*<sup>475</sup> and *CERAFEL*<sup>476</sup>, that system of quality standards is “*exhaustive*”, and “*even though those additional requirements concern only domestic products, they undermine the common nature of the quality standards which apply uniformly to all products in the Community*”<sup>477</sup>.

On many occasion the Court pointed out that where Community rules in a given field may be regarded as forming a complete system, Member States no longer retain competence in that field: if Community secondary legislation covers the specific Union policy exhaustively, this legislation has thus full pre-emptive effect on national laws and measures<sup>478</sup>. The exhaustiveness of Community measures may be expressly provided for<sup>479</sup> or it may follow impliedly

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<sup>473</sup> Case 255/86, *Commission v. Belgium (Bulk Fruit)*, [1988] ECR 693.

<sup>474</sup> *Id.* at par. 9.

<sup>475</sup> See *supra*, footnote 469.

<sup>476</sup> See *supra*, footnote 471.

<sup>477</sup> *Id.* at par. 11.

<sup>478</sup> See case 264/86, *French Republic v. Commission*, [1988] ECR 973.

<sup>479</sup> As it happened in *Prantl* (see *supra*, footnote 460).

from the overall purpose of the provisions<sup>480</sup>, especially where the measures lay down common standards meant to ensure free movement<sup>481</sup> or equal protection<sup>482</sup>, or also where EC measures provide for procedures for amending the common standards through the adoption of appropriate actions at Community level<sup>483</sup>.

The rigid *conceptualist-federalist* approach clearly embodies a model according to which Community's competence are construed as being necessarily exclusive: as Weatherill put it, "*in cases where [the ECJ] decides on the scope of the occupied field, [it] is not choosing between the merits of competing regulatory regimes. It is interpreting the Community provisions to determine whether they have occupied the field. If they have, they are applicable provisions and Member States, pre-empted, may not depart from them*"<sup>484</sup>.

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<sup>480</sup> Cf. case C-249/97, *Silhouette*.

<sup>481</sup> Cf. case C-83/92, *Pierrel*, where the ECJ held that "[t]he harmonized framework set up by the directives [...] and the effectiveness of those directives would be impaired if the Member States were permitted not only to prescribe circumstances entailing revocation other than those contemplated by the directives but also other grounds for the termination of authorizations" (*id.* at par. 28).

<sup>482</sup> In case C-215/97, *Bellone*, the ECJ held that "[...] by referring only to the [specified] requirement [...], the Community legislature dealt exhaustively with the matter in that provision. Member States may therefore not impose any condition other than requiring that a written document be drawn up" (*id.* at par. 14).

<sup>483</sup> Cf. case 28/84, *Compound Feedingstuffs*, where the Court pointed out that "[...] the two directives [at issue] have set up a comprehensive system which enables account to be taken of the need to amend the directives periodically and of urgent problems which may arise in practice" (*id.* at par. 14).

<sup>484</sup> S. Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, *id.* at p. 18.

#### 4.2.2 *Obstacle* pre-emption

Even if in European pre-emption matters it is “[...] *almost impossible to find an inherent logical system to the question of in which cases the Court will apply particular criteria*”, the first form of implied pre-emption primarily rests on the idea of exhaustiveness, the second form of implied pre-emption seems to be based on the determination of scope of the debated national measures.

In *obstacle* pre-emption cases national measures are regarded as pre-empted if they provide resistance, delay or obstruction to the full attainment of EC objectives. This may happen when they are directly incompatible with the contents of a valid EC legal rule or when they interfere with the proper functioning of the common organization of the European market<sup>485</sup>. *Obstacle* pre-emption may be connected with a *pragmatic* approach (as juxtaposed with the *conceptualist-federalist* approach described above) according to which Community competence is not construed as being necessarily exclusive<sup>486</sup>: this form of pre-emption mainly occurs in areas of concurrent/shared competence, hence the Court is tasked with solving the conflict of

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<sup>485</sup> In a large number of cases the Court was asked to decide whether a particular national tax was compatible with Community law, and in particular with the provisions of the Treaty prohibiting charges having an effect equivalent to customs duties. Under such circumstances, the *ratio* of the *obstacle* pre-emption paradigm is generally based on fundamental concepts of free trade philosophy, being several EC directives aimed at ensuring internal market economic uniformity objectives (cf. *infra*, footnote 490 and 491).

<sup>486</sup> Member States retain a “*concurrent power to regulate matters falling within the reach of Community’s power, as long as in so doing they do not create a conflict with the rules adopted by the Community*” (cf. M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation*, at 551).

powers arising from the coexistence of Community and national provisions on the same matter.

As it happens for the previous form of *implied* pre-emption, the European *obstacle* pre-emption paradigm clearly resembles the one originated within the north American legal context<sup>487</sup>: as the U.S. Supreme Court is asked to interpret Congress' objectives so as to discover whether State law poses an obstacle to their full attainment, the ECJ is asked to determine the purposes of conflicting levels of legislation. Therefore, the preclusive effect following *obstacle* pre-emption is not based on an *a priori* analysis aimed at defining the legislative area occupied by the EC, but on a survey aimed at ascertaining whether EC legislation and national measures cover the same scope or not<sup>488</sup>.

The Court is faced with more than a matter of simple textual analysis: the legal analysis embraced by the Court mainly focuses on an extended survey of EC laws' aims and objectives, whilst on the

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<sup>487</sup> Cf. *supra*, par. 2.1.2.2.

<sup>488</sup> Cf. case 65/75, *Criminal proceeding against Riccardo Tasca*, [1976] ECR 291, at par. 6: "It must therefore be concluded that the unilateral fixing by a Member State of maximum prices for the sale of sugar [...] is incompatible with Regulation no. 1009/67 once it jeopardizes the objectives and the functioning of this organization [...]"; joined cases 88 to 90/75, *SADAM and Others v. Italian Minister of Industry*, [1976] ECR 323, at par. 7; case 5/79, *Agricultural Price Freeze*, [1979] ECR 3203, at par. 22: "[...] the fact that the national price-freeze rules concerned [...] constitute a short-term economic contingency measure [...] cannot rule out their proving to be incompatible with the provisions of Community law dealing with agricultural matters, since even if it is merely a temporary contingency measure a price freeze may jeopardize the objectives and functioning of the common organization of the market in question"; case 216/86, *Prefetto di Milano*, [1987] ECR 2919, at par. 10: "[...] an examination [on the question whether such national rules do or do not jeopardize the objectives or the functioning of the common organization in the sectors under consideration is necessary] [...] when national measures are adopted in respect of retail or consumer prices and are thus in a field which does not fall within the exclusive powers of the Community"; case 35/88, *Commission v. Hellenic Republic*, [1990] ECR I-3125.

other hand particular attention is drawn on how such aims might be affected by the adoption of conflicting national measures. In order to evaluate the extent of the normative conflict at issue, the Court examines the EC objectives and determines whether they can be obstructed or hindered by the operation or the effects of national law, irrespective of whether the matter has been dealt with exhaustively or not<sup>489</sup>.

A clear *obstacle* pre-emption theorisation can be found in landmark case *Bussone*<sup>490</sup>, where the Court held that the debated national measure had to be evaluated “[...] *in the light of the aims and objectives of the regulation within the context of the principles laid down by the Treaty itself*”<sup>491</sup>. According to the Court’s reasoning, where Member States are left free to adopt national rules with a view to implement EC legislation, in so doing they cannot act in such a way as to jeopardize the objective of the Community rules<sup>492</sup>. The mere co-existence of national measures or the presence of an insubstantial conflict is generally overlooked by the Court: *obstacle* pre-emption occurs where the ECJ considers the actual effect of national measures on the objectives of the EC legislation, and thus

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<sup>489</sup> Cf. case C-1/96, *Compassion in World Farming*, [1998] ECR I-1251, at par. 41: “*It should be noted at the outset that, where there is a regulation on the common organisation of the market in a given sector, the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it. Rules which interfere with the proper functioning of a common organisation of the market are also incompatible with such common organisation, even if the matter in question has not been exhaustively regulated by it*”. See also cases C-27/96, *Danisco Sugar v. Allmänna Ombudet*, [1997] ECR I-6653, at par. 24; C-507/99, *Denkavit*, [2002] ECR I-169, at par. 32; C-332/00, *Belgium v. Commission*, [2002] ECR I-3609, at par. 29.

<sup>490</sup> Case 31/78, *Francesco Bussone v. Italian Ministry for Agriculture and Forestry*, [1978] ECR 2429.

<sup>491</sup> *Id.* at par. 43.

<sup>492</sup> Cf. par. 16.

determines if such unilateral provisions have negative influence on the functioning of the EC secondary legislative system<sup>493</sup>. A clear theorisation of this approach may be found in the decision on recent case C-360/06<sup>494</sup>, handed down on 2 October 2008. In its decision the European Court of Justice argued that national measures conflicting with EC provisions could be justified only after a proper objectives assessment which had to prove their effective compatibility with the EC Treaty. A similar approach was also adopted in joined cases 36 and 71/80<sup>495</sup>, where the ECJ took the chance to point out that the touchstone principle for the evaluation of the suitability of national measures consists in assessing the “[...] *effects which obstruct the working of the machinery established by the common organization of the market*”<sup>496</sup>. The same approach features also case 223/78<sup>497</sup>, concerning the interpretation of Community provisions relating to free movement of goods: the Court was asked to judge on the compatibility of a concurrent national system of maximum retail prices, and concluded by affirming that the unilateral imposition of national measures “[...] *is incompatible with the common organization of the market [...] only to the extent to which it endangers the objectives or the operation of that organization*”<sup>498</sup>.

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<sup>493</sup> Cf. case 9/74, *Donato Casagrande v. City of Munich*, [1988] ECR 973; case 36/79, *Denkavit Futtermittel GmbH v. Finanzamt Warendorf*, [1979] ECR 3439.

<sup>494</sup> Case C-360/06, *Heinrich Bauer Verlag v. Finanzamt für Großunternehmen in Hamburg*, [2008] ECR 01.

<sup>495</sup> Joined cases 36 and 71/80, *Irish Creamery Milk Suppliers Association and others v. Government of Ireland and others*, and *Martin Doyle and others v. An Taoiseach and others*, [1981] ECR 735.

<sup>496</sup> *Id.* at par. 19.

<sup>497</sup> Case 223/78, *Grosoli*, [1979] ECR 2621.

<sup>498</sup> *Id.* at par. 13.

An interesting *a contrario* implication stemming from the *obstacle* rationale crystallized in case 53/86, *Romkes*<sup>499</sup>, where the Court was asked whether in presence of an exhaustive system of measures set up by the Community, art. 20(1) of EC Regulation no. 171/83<sup>500</sup> empowered a Member State to adopt, even after the entry into force of that Regulation, technical measures for its fishing industry going beyond the minimum requirements of that Regulation.

Although the debated national measure had not been adopted in pursuance of any Community directive or protective measure provided for in the Treaty, the Court interpreted the vague *saving* clause<sup>501</sup> of the EC Regulation by upholding the debated national measure. In its reasoning the ECJ focused on the fact that through its adoption the Member State tried to pursue a legitimate and permissible aim, consisting in “*ensur[ing] better management and better use [...]*”<sup>502</sup> of the common system established by the EC Regulation itself. Therefore, while the presence of a conflict between EC measures and national provisions is generally deemed as implying *obstacle* pre-emption, national measures which support and enhance the attainment of the Community legislation objectives are approved by the Court, given the consistency and homogeneity occurring between national and supranational aims.

From a general point of view, although both *obstacle* and *field* pre-emption may be regarded as effective enforcements of the fundamental rule expressed by art. 10 EC, the former pre-emption

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<sup>499</sup> Case 53/86, *Officier Van Justitie v. Lubbertie Romkes, et al.*, [1988] ECR 2691.

<sup>500</sup> EC Regulation no. 171/83 of 25 January 1983 laying down certain technical measures for the conservation of fishery resources (O.J. 1983, L 24/14).

<sup>501</sup> Cf. art. 20(1) of Regulation 171/83.

<sup>502</sup> Cf. par. 16 of the judgment.

paradigm is generally believed to be more “*significant for the preservation of Member State law*”<sup>503</sup> than the latter: while *field* pre-emption utterly precludes the adoption of any national measure in a given field, *obstacle* pre-emption affects only the specific provision at issue and not every national measure in the concerned field. For this reason, *obstacle* pre-emption does not have a total blocking effect on national competence to act.

Even in the absence of explicit interpretative guidelines, a precise logical path aimed at determining whether national measures are compatible with Community law or pre-empted may be retrieved in the European Court of Justice case-law. The Court first tries to ascertain whether such national measures relate to a sector regulated by a common organisation of the market; if they do, the ECJ then strives to find out whether the Community provisions are intended to establish a comprehensive scheme of regulation, so as to discover whether the *field* pre-emption model may apply. If the debated national measures do not concern a sector regulated by the common organisation of the market (or if the Community provisions do not establish a comprehensive scheme of regulation) further steps are taken in order to find out whether – in the light of the scopes and effects of the provisions involved – the national provisions at issue might interfere with the proper functioning of the Community secondary legislation. Again, if the effect hinders Community law objectives, national provisions may be deemed as obstacles and thus pre-empted.

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<sup>503</sup> E.D. Cross, *Pre-emption of Member State law in the European Economic Community: a Framework for Analysis*, p. 467.

However, implied pre-emption classifications are everything but tight models: it is not always possible to rigidly follow the abovementioned interpretative path, as neither the *field* nor the *obstacle* model univocally fit for some *implied* pre-emption cases. For example, the ECJ struggled in trying to unambiguously define the nature of case 60/86<sup>504</sup>, concerning the compatibility of a national measure with an EC Directive dealing with car lighting installations standards. According to the harmonizing Directive at issue, Member States could not refuse to authorise the sale or use of vehicles that featured certain lighting systems accepted by the Community, and the Commission questioned an additional Dim-Dip lighting requirement unilaterally imposed by the United Kingdom. Even though the Dim-Dip system was not included in the Directive, the U.K. prohibited the use of vehicles without that device, arguing safety reasons for it. In response, the Court struck down the U.K. measure by recalling two different sets of reasons.

On one hand the exclusion of the U.K. measure originated from the fact that the EC Directive had set an “[...] *exhaustive* [...] *list of lighting and light-signalling devices*”<sup>505</sup>: the Court employed the *field* rationale by implying that having the Directive had entirely occupied the field, Member States were subsequently denied unilateral competence to further regulate the market. In its reasoning the ECJ explicitly referred to the necessity of imposing a harmonized

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<sup>504</sup> Case 60/86, *Commission v. United Kingdom (Dim-Dip)* (see *supra*, footnote 444).

<sup>505</sup> According to the ECJ, the preclusion of further national requirements stems from the interpretation of the exhaustive nature of the common system set up by the Directive. Furthermore, such nature is consistent with the purpose of the Directive itself, which is “[...] *to reduce, and even eliminate, hindrances to trade within the Community resulting from the fact that mandatory technical requirements differ from one Member State to another*” (*id.* at par. 11).

and uniform safety standard throughout the whole European territory, and to the risk of trade distortions and restrictions caused by the existence of different national standards.

On the other hand, it seems clear that the *field* model alone did not provide full explanation on why the national requirement was banned, as the ECJ focused also on the conflicting aims of the debated provisions, as well as on the overall system and objectives of the EC Directive at issue. The Court impliedly referred to the *obstacle* pre-emption model by suggesting that the conflicting national measure hindered the full attainment of the EC law objectives: therefore, having the Community established a right of free movement, unauthorized national derogations including additional or clarifying provisions denoted the existence of a conflicting national objective which obstructed the full achievement of the free movement objective<sup>506</sup>.

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<sup>506</sup> The Court stated that “*Member States cannot unilaterally require manufacturers who have complied with the harmonized technical requirements set out in Directive 76/756/EEC to comply with a requirement that is not imposed by that Directive, since motor vehicles complying with the technical requirements laid down therein must be able to move freely within the common market*” (*id.* at par. 12).

### 4.3 Exemptions from the pre-emption rule

#### a) *Express saving* clauses

Secondary EC legislation may provide Member States with the possibility to implement its legislative aims in different ways. Along with the *express* or *implied* pre-emption rationales, the presence of provisions expressly allowing Member States to uphold a specific national measure may be considered as an additional interpretative criteria in settling pre-emption matters.

As a ‘mirror image’ to the abovementioned *express free movement clauses*<sup>507</sup>, *saving clauses* expressly allowing the adoption of stricter (or even different<sup>508</sup>) national measures may be included in a harmonizing Community laws: such provisions are adopted when the Community expressly authorizes Member States to legislate concurrently in a certain area, thereby preventing a pre-emptive interpretation of Community legislation. Member States are straightforwardly and expressly allowed to uphold certain national measures, being given the space for their own legislation: provisions allowing the adoption of stricter national measures are typically

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<sup>507</sup> Cf. *supra*, par. 4.1.

<sup>508</sup> Cf. for example EC Regulation no. 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code (ISM Code) within the Community, at preamble consideration 10: “*If a Member State considers it difficult in practice for companies to comply with specific provisions of Part A of the ISM Code for certain ships or categories of ships exclusively engaged on domestic voyages in that Member States, it may derogate wholly or partly from those provisions by imposing measures ensuring equivalent achievement of the objectives of the Code. It may, for such ships and companies, establish alternative certification and verification procedures*”.

employed in environmental protection legislative acts, being that a field of interest embodying one of Europe's essential objectives.

A clear example of *express saving* clause is represented by art. 14 of Council Directive 79/409/EEC<sup>509</sup>, under which “*Member States may introduce stricter protective measures than those provided for under this Directive*”. The scope of the act is to cover the conservation of all birds<sup>510</sup>, and within that scope varying levels of protection are set for all different birds: the Directive sets thus a minimum level of protection, allowing Member States to take more stringent measures nationally. Another clear example is provided by art. 16(1) of Council Directive 92/43/EEC<sup>511</sup> on the conservation of natural habitats and of wild fauna and flora, stating that for some specific reasons “[p]rovided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate [...]” from the harmonising provisions. Again, Directive 91/629/EEC<sup>512</sup> provides that “[from] the date set in paragraph 1, Member States may, in compliance with the general rules of the Treaty, maintain or apply

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<sup>509</sup> Council Directive 79/409/EEC on the conservation of wild birds (O.J. 1979, L 103/1).

<sup>510</sup> According to art. 1(1), “[t]his directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and controls of these species and lay down rules for their exploitation”.

<sup>511</sup> O.J. 1992, L 206/7.

<sup>512</sup> Council Directive 91/629/EEC, laying down minimum standards for the protection of calves.

*within their territories stricter provisions for the protection of calves than those laid down in this Directive*”<sup>513</sup>.

The environmental field represents thus a clear example of legislative area where although the Community originally held exclusive competence, a shift towards a model of shared/concurrent competence with Member States has gradually occurred. This approach is marked by the presence of *saving clauses* aimed at promoting greater flexibility and responsiveness with respect to local needs, encouraging Member States to regulate in certain areas of traditional national concern even where such fields have a super-national character. Within the framework of Community legislation, employing such clauses gives importance to national initiatives that must however comply with compulsory standards and core principles of the Community, according to which Member States are empowered to introduce their own measures. If such national measures are enacted without complying with background EC principles, they are usually struck down, as it emerges from recent ECJ case law<sup>514</sup>.

Being courts generally bound to the express terms of the legislation, the presence of *express pre-emption* and/or *express saving* clauses generally restricts or keeps within bounds the need for judicial inquiry into the pre-emptive effect or particular provision of EC law. However, if compared with the derogation clause of art. 95 par. 4 and

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<sup>513</sup> *Id.* art. 11(2).

<sup>514</sup> Cf. cases C-507/04, *Commission v. Republic of Austria*; C-508/04, *Commission v. Republic of Austria*; C-342/05, *Commission v. Republic of Finland* (on which see D. Borghetti, *Note on case C-342/05*, in *Bulletin of International Legal Developments*, 2007 Issue 12).

5, EC<sup>515</sup>, *express saving* clauses appear to suffer from clear handicaps, as they are considerably less transparent unless formulated in great detail<sup>516</sup>. Furthermore, such provisions may lack the rigorous control of the Commission that is part of the derogation procedure<sup>517</sup>, whilst they may be used for instance where there is a group of Member States sharing identical concerns<sup>518</sup>.

However, being European pre-emption a phenomenon constantly featured by a dynamic tension, it is extremely hard to define in advance all the possible causes of exemption for Member States.

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<sup>515</sup> “4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them”.

<sup>516</sup> Even in presence of *saving clauses*, the ECJ has been called upon to determine whether a specific national measure falls within the protection of the clause at issue: see case 53/86 (*Officier Van Justitie v. Lubbertie Romkes, et al.*: see *supra*, footnote 499), where the Court was asked whether a certain *saving clause* had to be interpreted restrictively (allowing thus only those national rules in force at the time that the regulation at issue was adopted) or broadly (allowing also the future adoption of stricter national rules).

Such clauses must be distinguished from the standard derogation regime provided by article 95, par. 4 and 5 EC (ex art. 100), which create a Treaty-based constitutional right for Member State to derogate from a harmonising measure under specific circumstances (see *infra*, b)).

<sup>517</sup> Cf. art. 95, par. 6 EC: “The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market”.

<sup>518</sup> See *supra*, Chapter 3, par. 3.4.

Apart from those cases where Member States are expressly allowed to derogate by the means of an *express saving* clause or because of the presence of a *minimum harmonization* regime, other principles defining the conditions for national derogations emerge from the ECJ case law. In case C-158/88, *Minimum Stay*<sup>519</sup> the Court expressed the general rule according to which in presence of an exhaustive and complete system of EC measures Member States may derogate from or add provisions to the common system only if the prescribed derogatory procedures are followed. In *Minimum Stay* action was brought by the Commission under Article 169 (now 234) of the EC Treaty for a declaration that, by limiting the application of the exemptions provided for in Council Directive 69/169/EEC<sup>520</sup> to goods contained in the personal luggage of travellers arriving at its borders after a period of 48 hours outside its territory, Ireland failed to fulfil its obligations under the EEC Treaty. In other words, Ireland was restricting the benefit of tax exemption provided for in articles 1, 2 and 4 of Directive 69/169 only to a certain category of travellers, whilst the Directive at issue made no distinction as between travellers and provided no restrictions based on the period spent outside the jurisdiction of a Member State. The European Court held that Member States are allowed to derogate from an exhaustive system of EC measures only where the prescribed procedures for derogation are followed: hence, “[...] where on account of the

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<sup>519</sup> Case C-158/88, *Commission of the European Communities v. Ireland*, [1990] ECR I-02367.

<sup>520</sup> Directive 69/169/EEC of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and exercise duty on imports in international travel (O.J. English Special Edition 1969, I, p. 232), as last amended by Council Directive 85/348/EEC of 8 July 1985 (O.J. 1985, L 183/24).

*economic situation in a Member States, it becomes necessary to adopt exceptional provisions making the grant of exemptions subject to a period of time spent outside national territory, such provisions may be adopted only in pursuance of a directive derogating from Directive 69/169, [...] or by way of protective measures, when the conditions laid down in Articles 108 and 109 of the Treaty are satisfied”<sup>521</sup>.*

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<sup>521</sup> C-158/88, par. 9.

b) European harmonization and minimum harmonization regime

As already pointed out, the principle of conferral implies that every Community action finds its legitimacy on a specific legal basis expressly included in the Treaties wording. Whilst on one hand this core rule could surely embody a sort of defensive device against potential EC encroachments on Member States' prerogatives, on the other hand such precept could turn itself into a threat, as long as the Treaties establish legal basis founded on merely functional – instead of material – terms.

For what it concerns pre-emption, explicit reference must be made to all those situations where Community institutions adopted harmonizing acts pursuant to EC Treaty articles 94 (dedicated to the establishment and functioning of the common market), 95 (dedicated to the establishment and functioning of the internal market) and 308 (dedicated to the adoption of the appropriate measures necessary to attain one of the objectives of the Community), granting Community institutions new independent powers of action alongside existing ones<sup>522</sup>. As a matter of fact, such provisions deeply influence the EC competences asset by enlarging its extent with the inclusion of fields not always straightforwardly linked to Community functions.

According to art. 94 EC, “[t]he Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives

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<sup>522</sup> According to the doctrine, such legal basis are usually conceived as “general”, as they allow the Community freedom of action in areas traditionally linked to Member States' competence (see K. Lenaerts & M. Desomer, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, in *European Law Review*, 2002, at 393).

*for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market*". Article 95 EC (formerly art. 100A, originally conceived as a derogation to the rule set by art. 94) was introduced by the Single European Act with a view to favour and speed up the establishment of the internal market and the attainment of the objectives set by art. 14 EC<sup>523</sup>. According to its formulation, by way of derogation from art. 94 the Council shall "[...] *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*". In other words, both article 94 and 95 set up legislative procedures allowing the adoption of harmonization measures, with a view to remove all those national provisions that may endanger or hinder the creation of an integrated market<sup>524</sup>.

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<sup>523</sup> According to art. 14 EC (formerly art. 7A), "1. *The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.* 2. *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.* 3. [...]"

<sup>524</sup> Interestingly, for what it concerns the procedural point of view while art. 94 requires an unanimous Council action (implying a veto for every Member States), art. 95 recalls the less onerous procedure established by art. 251 EC, which requires a qualified majority vote. Additionally, art. 94 refers to the idea of 'common market' (which should include the four fundamental freedom and the common policies) whilst art. 95 makes reference to the concept of 'internal market' (including uniquely the four freedom). However, both the terms seem to be used with variance by legal commentators and in jurisprudence (see A. Furrer, *The principle of pre-emption in European Union Law*, in Gerd Winter (Ed.), *Sources and Categories of European Union Law*, Nomos Verlagsgesellschaft Baden-Baden 1996, at p. 525). On the harmonization issue see M. Cartabia, J.H.H. Weiler, *L'Italia in Europa* (*id.* at p. 113); M. Horspool, M. Humphreys, *European Union Law*, (*id.* at p. 91); R. Schütze, *Organized*

The use of such measures has produced relevant consequences on Member States' prerogatives by increasing the extent of Community powers: on the basis of the generic content of arts. 94 and 95 EC, EC institutions often took action so as to regulate areas traditionally included in States' competences, only tangentially linked to the idea of 'common' or 'internal' market<sup>525</sup>. This has happened for instance in relation to the fields of environmental protection and consumer or workers protection<sup>526</sup>, even if some Treaty provisions expressly exclude the adoption of harmonizing measures in certain fields (such

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*Change towards an 'Even Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence*, Yearbook of European Law, 2003, p. 79-115; S. Weatherill, *Cases and Materials on EU Law*, 6<sup>th</sup> ed., Oxford University Press, Oxford 2003, p. 613 et seq.; S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford 1995, p. 49; P. Rott, *Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law*, 40 CMLReview, 2003, p. 1107-1135; N. De Sadeleer, *Procedures for Derogations from the Principle of Approximation of Laws under Article 95 EC*, 40 CMLReview, 2003, p. 889-915.

<sup>525</sup> On the alleged intrusion of EC into Member States' field of competence by the means of art. 94 and 95 see M. Cartabia, J.H.H. Weiler, *L'Italia in Europa* (*id.* at p. 113); K. Lenaerts, M. Desomer, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, *id.* at 394.

<sup>526</sup> See Directive 1999/44/EC on consumer sales and associated guarantee (O.J. 1999, L 171/12); Directive 84/450/EC on misleading advertising (O.J. 1984, L 250/17) as amended by Directive 97/55/EC on comparative advertising (O.J. 1997, L 290/18); Directive 85/577/EEC on contracts negotiated away from business premises (O.J. 1985, L 372/31); Directive 93/13/EEC on unfair terms in consumer contracts (O.J. 1993, L 95/29); Directive 97/7/EC on distance contract (O.J. 1997, L 144/19); Directive 85/374 on product liability (O.J. 1985, L 210/29).

See also the Directive 98/43/EC on advertising and sponsorship of tobacco products (O.J. 1998, L 213/9), annulled by the ECJ in case C-376/98, *Federal Republic of Germany v. European Parliament and EU Council*; Directive 2001/37/EC (replacing Directives 89/622 and 90/239) concerning the manufacture, presentation and sale of tobacco products (O.J. 2001, L 194/26), on which see case 491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd.*

as education, professional training and youth<sup>527</sup>, culture<sup>528</sup>, public health<sup>529</sup>).

To a considerable extent, par. 4 and 5 of art. 95 EC define the effective meaning of the Community harmonising powers: even after the adoption of a harmonization measure under art. 95, par. 1, Member States are allowed to adopt and apply different national provisions where such procedure is deemed necessary on grounds of major needs referred to in art. 30<sup>530</sup> EC, or when the national measures at issue may be related to the protection of the natural environment<sup>531</sup> or the improvement of working conditions, being however subject to a notification and to an approval by the

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<sup>527</sup> See arts. 149-150 EC.

<sup>528</sup> See art. 151 EC.

<sup>529</sup> See art. 152 EC.

<sup>530</sup> The justificatory grounds recalled by art 30 EC are the following: public morality, public policy or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archaeological value; the protection of industrial and commercial property.

Art. 30 EC is frequently recalled in those cases where although no harmonising rules have been adopted, the principle of proportionality requires that the power of the Member States to impose restrictions in trade in products from other Member States should be limited to what is necessary to attain the objectives of protection being legitimately pursued (cf. for example case *C-55/99 Diagnostic Devices*, where the Court held that in the absence of harmonising rules it is for the Member States to decide on their intended level of protection of human health and life and on whether to require prior authorisation for the marketing of such products. In other words, Member States may derogate from or add more stringent requirements to Community provisions if the derogative measures comply with the proportionality principle, with reference to their own standard of protection).

<sup>531</sup> In the U.S. federal system, the Water Quality Act of 1965 (79 Stat. 903, 33 U.S.C. § 667 (1985)) was the first minimum standards pre-emption act. To abate water pollution, the Congress decided that it was essential to have national water quality standards: the Water Quality Act allowed each State a choice of regulating in accordance with standards at least as stringent as national ones, or allowing the federal government to assume complete regulatory responsibility.

Commission<sup>532</sup>. On conditions of respect for certain requirements, Member States are thus authorized to implement more stringent measures than those provided for by the EC harmonizing provision, although the Community act at issue does not expressly provide for a specific *saving clause*<sup>533</sup>.

The *minimum harmonization* technique is expressly recalled by the EC Treaty in order to promote the adoption of Community actions “[...] not prevent[ing] Member States from maintaining or introducing more stringent measures”<sup>534</sup> in the concerned fields. An interesting example of harmonising legislation can be found in directive 89/622/EC on the labelling of tobacco products<sup>535</sup>: on the same day (June 22, 1993) the ECJ delivered two (apparently) conflicting judgments<sup>536</sup> on the interpretation of this directive, which was adopted on the basis of art. 100A of the EC Treaty (now art. 95) with a view to eliminate barriers to trade which might arise as a result of differences in national provisions on the labelling of tobacco products, and thereby impede the establishment and operation of the internal market.

In *Gallaher Ltd.* the Court was asked to interpret the extent of Articles 3(3) and 4(4) of the debated directive, requiring the prescribed warnings to cover at least 4% of the cigarettes packaging

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<sup>532</sup> Cf. art. 95, par. 6 EC.

<sup>533</sup> See *infra*, par. 4.1.

<sup>534</sup> Cf. EC arts. 137(4) (Social policy), 152(4) (Public health), 153(5) (Consumer protection) and 176 (Environment protection).

<sup>535</sup> Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1).

<sup>536</sup> Case C-11/92, *The Queen v. Secretary of State for Health ex parte Gallaher*, [1993] ECR I-3545, and case C-222/91, *Ministero delle Finanze and Ministero della Sanità v. Philip Morris Belgium SA*, [1993] ECR I-3469.

surface. In accordance with the *free movement* clause included in the directive, the British implementer regulation<sup>537</sup> provided that the warnings had to cover at least 6% of the surfaces on which they were printed. The applicant tobacco companies sought judicial review before the English High Court of national Regulations, on the ground that these Regulations were incompatible with the relevant EC provisions: their concern was essentially that the UK's more restrictive requirements would have placed them at a competitive disadvantage compared to the manufacturers of cigarettes in other Member States, since the larger the health warnings required the less space was available to make the packets commercially attractive. The UK government, however, successfully argued that the EC directive was a *minimum directive*, forcing to comply with the 4% requirement and at the same time allowing for the imposition of stricter rules on domestic productions, as long as such rules did not impede the free movement of goods between Member States. In response, the European Court of Justice upheld the UK argument, holding the national regulation valid by stating that a less favourable treatment for national products in comparison with imported products and the existence of some subsequent inequalities in conditions of competition are attributable to “[...] *the degree of harmonization sought by the provision in question, which laid down minimum requirements*”<sup>538</sup>.

In *Philip Morris* the Court was asked to interpret Article 4(2) of the same harmonising directive: such provision required that a large portion of each tobacco packet carried warnings to be selected from a

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<sup>537</sup> Tobacco Products Labelling (Safety) Regulations 1991 (S.I. 1991 No. 1530).

<sup>538</sup> Cf. C-11/92 at par. 22.

specific list. The Italian Government interpreted the plural word ‘warnings’ as enabling it to require the printing of multiple warnings whose total surface area met the 4% requirements, and subsequently the Italian tobacco labelling law imposed such interpretation on all tobacco packets sold in Italy. Many foreign tobacco producers challenged this interpretation, because allowing Italian tobacco manufacturers to split the 4% surface area requirement between two smaller warnings gave them a competitive advantage.

The ECJ took the opportunity to further clarify the extent and the implications arising from the adoption of a *minimum harmonization* directive: in the Court’s opinion, being the act at issue primarily designed to eliminate trade barriers potentially arising from the enforcement of different national provisions on the labelling of tobacco products, no discretion to impose requirements stricter than those provided for in the directive itself (or even to impose more detailed or at any rate different requirements) was given to Member States. According to the Court’s reasoning, some provisions of the directive granted Member States a degree of discretion so as to adapt the labelling of tobacco products to the requirements of public health protection. Art. 4(2) is one of such provisions, as it “[...] allows Member States to select the specific warnings which must appear on cigarette packets [...]”<sup>539</sup>: however, Member States which have made use of the powers conferred by the provisions containing *minimum requirements* cannot prohibit or restrict the sale within their territory of products imported from other Member States which comply with the directive. Therefore, although Member States are not prevented from requiring manufacturers of tobacco products to ensure that the

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<sup>539</sup> Cf. C-222/91 at par. 11.

general warning covers a minimum of 4% of the surface to which it is affixed, “[...] *such requirements cannot be imposed with regard to imported products which comply with the directive*”<sup>540</sup>.

To summarize, the ECJ supported minimum harmonization in one case but not in the other, being the stricter national law upheld in *Gallaher Ltd.* and, on the contrary, rejected in *Philip Morris*.

However, rather than demonstrating that “[...] *the implementation of European directives may give rise to conflicting interpretations by the same court*”<sup>541</sup>, such allegedly incoherent approach reveals the ECJ’s remarkable attention for the individual relationship occurring between national law and secondary EC legislation in each specific case. While the Italian tobacco labelling law was binding for all products *sold* in Italy (both national and foreign), the British one imposed stricter requirements only for those products *produced or labelled* in the UK, without hindering the import of foreign tobacco products labelled in accordance to the requirement of the EC directive. Therefore, while the British regulation’s aims were perfectly consistent with those of the EC directive at issue (i.e. maintaining the health and well-being of human beings), the Italian labelling rule was pre-empted because of its conflict with the harmonisation aims of the debated EC act.

As highlighted in the *Ratti* case<sup>542</sup>, comprehensive harmonization stemming from European directives prevents Member States from adopting *any* type of supplementary regulation; on the contrary, many harmonization directives addressing environmental, consumer

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<sup>540</sup> *Id.* at par. 17.

<sup>541</sup> N. Fernanda, F. Marchetti, *Constitutionalizing Tobacco: the Ambivalence of European Federalism*, Harvard Int. Law Journal 46 (2005), at p. 515.

<sup>542</sup> See *supra*, footnote 442.

and employee protection make use of the *minimum harmonization* technique by explicitly allowing Member States to adopt tailored rules if they wish to achieve higher standards<sup>543</sup>. Such approach allows both the Community and Member States to regulate the concerned field, sharing thus responsibilities even after the EC had acted.

Two main reasons justify the concept of *minimum harmonization*: on one hand such legislative technique ensures the enforcement of

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<sup>543</sup> Many EC consumer law directives follow and apply the concept of *minimum harmonization*: see art. 8(2) of directive 1999/44/EC on consumer sales and guarantees (O.J. 1999, L 171/12), reading that “*Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this directive, to ensure a higher level of consumer protection*”. See also art. 7(1) of directive 84/450/EEC on misleading advertising (O.J. 1984, L 250/17), as amended by directive 97/55/EC on comparative advertising (O.J. 1997, L 290/18); art. 8 of directive 85/577/EEC on contracts negotiated away from business premises (O.J. 1985, L 372/31); art. 8 of directive 93/13/EEC on unfair terms in consumer contracts (O.J. 1993, L 95/29); art. 14(1) of directive 97/7/EC on distance contracts (O.J. 1997, L 144/19).

As the ECJ acknowledged in case C-183/00, *M.V. Gonzalez Sánchez v. Medicina Asturiana SA*, [2002] ECR I-3901, the Product Liability directive 85/374/EEC (O.J. 1985, L 210/29) provides an exception among consumer protection directives, as it fully defines the balance of interests between producers and consumers, rather than prescribing a *minimum harmonization* regime. Hence, Member States are allowed to deviate from the common system only if the directive expressly provide so: the identification of a complete and exhaustive system of harmonisation aimed at building an internal market emerges also from the ECJ’s two other rulings delivered on the same day, dealing with the same directive (case C-52/00, *Commission v. France*, [2002] ECR I-3827, and case C-154/00, *Commission v. Grece*, [2002] ECR I-3879). According to the Court, the margin of discretion available to Member States in order to make provisions for product liability is entirely determined by the directive, and must be inferred from its wording, purpose and structure. In other words Member States are not authorised to adopt more stringent provisions, and possibility of derogations apply only in regard to the matters exhaustively specified and it is narrowly defined. See P. Rott, *Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law*, 40 CMLReview, 2003, p. 1107-1135; see also N. De Sadeleer, *Procedures for Derogations from the Principle of Approximation of Laws under Article 95 EC*, 40 CMLReview, 2003, p. 889-915.

uniform standards on the whole European territory, being Member States in great difficulties particularly when it comes to find an agreement on common levels of protection; on the other hand, such flexible approach grants Member States discretion in defining higher level of protection, respecting thus the role of national regulatory initiatives within the framework of Community legislative activity.

In my opinion, the pre-emption model arising from the *minimum harmonisation* technique stands upon a partial application of the classic *field* pre-emption paradigm. In order to ensure the right level of flexibility and intra-State integration, the pre-emption rule concerns only the compulsory observance of *minimum standards*, rather than all the regulatory set of provisions enacted by the Community in a given field. While the application of the *field* pre-emption standard generally leads to EC exclusive competence (following the adoption of an exhaustive set of measures or *total harmonization acts*<sup>544</sup>) *minimum harmonization acts* generally rely on the concept of *relative exhaustiveness*, which implies a partial application of the classic pre-emption rationale. The European legislator defines exhaustively the lowest standard to be complied with: on the one hand Member States cannot deviate from such minimum standard, but on the other hand rather than being forced to comply with the whole set of Community measures they are allowed to impose more stringent standards. Therefore, Member States

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<sup>544</sup> Cf. directive 2000/31/EC on electronic commerce (O.J. 2000, L 178/1), or directive 2002/65/EC on the distance marketing of consumer financial services (O.J. 2002, L 271/16), expressly adopted so as to ensure a “*high common level of consumer protection*” (cf. Council Resolution on Community consumer policy strategy 2002-2006, O.J. 2003, C 11/1, at I). Obviously, a *total harmonization* approach serves the purposes of the internal market better than *minimum harmonization* one, since the latter still allows for different sets of rules in the Member States.

complying with the minimum asset of EC standards are somehow allowed to derogate from the pre-emption rule. *Minimum harmonization* pre-emption has the advantage of ensuring that a floor is established for regulatory standards, while some State regulatory discretion is preserved. From this point of view, this form of pre-emption applies only *partially* to national measures, affecting only national provisions not complying with the common set of minimum standards. Accordingly, *minimum harmonization* pre-emption favours the shift towards a pragmatic model of EC shared competences, where European objectives are not only for the Community, but also for national authorities. In other words, such model of legal integration would genuinely reflect the diversity of interests in the EC, and enhance the hopeful European sensitivity to national preferences and initiatives.

In resuming the findings developed here with a view to the construction of an effective pre-emption framework for the European legal experience, one comes across a series of marked considerations. Although a comparison may be drawn between the North American federal system and the European Community, we must of course acknowledge the fundamental difference between “*maintaining a semblance of balance in the power relations between the federal Government and the States in a system designed along federal lines from its very beginning*”<sup>545</sup> and “*consciously imposing a new multi-*

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<sup>545</sup> G.A. Bermann, “*Taking Subsidiarity seriously: Federalism in the European Community and the United States*”, 94 *Columbia Law Review*, 1994, No. 2, p. 449.

*layered legal system on a continent historically dominated by sovereign Nation-States, themselves mostly unitary in structure*”<sup>546</sup>.

Such fundamental dissimilarity is clearly resembled by the fact that while the U.S. federal law is featured at the same time by a limited scope (embodied by the express constitutional enumeration of powers belonging to the federal Government) and a wide constitutional significance (supporting and encouraging the creation of a single national system of uniform law), the European legal experience relies on the hopeful coordination of systems which today remain separate and independent at the Member State level.

Trying to apply the North American pre-emption taxonomy to the European legal experience clearly helps in analyzing and discussing the ways in which the division of power is organized among the different levels of government in the EC, although differences are easily noticeable. Both legal experiences are characterized by sovereignty being shared and divided between different levels of government, rather than being located at one level exclusively, and the study of the pre-emptive mechanism helps in defining where competences’ boundary lines should be located. Just like North American pre-emption, the European mechanism for the displacement of State law concerns indeed the very essence of the federal dimension, playing “[...] *a crucial role in the allocation of competences and the exercise of powers*”<sup>547</sup> between a central entity and several peripheries. The European process of coordination is protected at the EC level by the mechanism of the Community legal

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<sup>546</sup> *Id.*

<sup>547</sup> M. Cappelletti, M. Seccombe, J.H.H. Weiler, *Integration through Law*, Book 1, p. 34.

system, and the interpretation of European integration instruments remains within the jurisdiction of the Court of Justice.

As highlighted above, when the Court is faced with solving conflicts occurring between laws enacted by different legal orders (which by the way occupy different levels in the legal hierarchy) it generally tends to relate the whole issue to the idea of EC exclusive competences or the Supremacy theory: as a consequence, European pre-emption has increasingly been identified with the sole *field* paradigm, i.e. the most invasive form of pre-emption.

Such interpretative tendency has been favoured by the fact that while the American system is featured by the presence of different levels of government – whose institutional autonomy is emphasized through the recourse both to express and implied pre-emption so as to define a clear vertical separation of powers where each level has an autonomous sphere of responsibilities – the European legal experience is featured by the lack of an EC autonomous sphere of legislative and executive competences in certain fields.

The general ECJ tendency to adopt the abovementioned *conceptualist-federalist* approach on one hand hinders the full realization of the ‘transmigration of models’ from the U.S. experience to the European one, whilst on the other hand frequently causes the disproportionate compression of Member States’ prerogatives because of the overwhelming effects arising from *field* pre-emption. From this point of view, a constant effort towards a complete and effective application of the North American pre-emption taxonomy would hopefully lead to a better resolution of conflicts occurring between different legal orders. The lack of a conceptual independence for the idea of pre-emption within the

European legal context seems to be primarily caused by the ECJ reluctance in solving conflict of powers by explicitly referring to the existence of a common European legal order: in case of conflict, Member States are to be deprived of those powers whose exercise creates a conflict with the European ones. Hopefully, such intermediate stage will be over when Member States will univocally share the common political willing to give up further portions of their national sovereignties, with a view to effectively establish such common European legal order and move from the current *quasi-federal* experience to a federal one. Hopefully, pre-emption will be seen as a juridical device aimed at solving laws conflict with a view to ensure the full attainment of EC Treaty objectives<sup>548</sup> within the European territory.

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<sup>548</sup> Cf. arts. 23 (freedom of goods), 39 (free movement of persons), 43 (freedom of establishment) and 49 (freedom to provide services) EC.





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