Just Hitting the Nail or Also the Thumb? The Court's Deference to Member States

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Jan Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020) pp. 256.

The four freedoms are at the heart of the European integration project. Their proclaimed indivisibility contributed to the UK's decision to withdraw from the EU, after limits to the free movement of persons were deemed unacceptable. Referring to Alexander Bickel's analysis of the US Supreme Court, Zglinski's 'passive virtues' refer to the practice of the European Court of Justice (the Court) to either grant member states' executives and legislatures a margin of appreciation when regulating in the realm covered by free movement law, or to give their Courts scope for decentralised judicial enforcement. Such deference to the level of the member state, Zglinski argues, is the other side of the coin of the rise of the proportionality analysis, which empowers the Court to engage in far-reaching analyses of member states policies, entering genuinely political grounds under the 'camouflage' (p. 138) of a legal analysis.

The book offers a detailed and systematic analysis of the Court's free movement case law, tracing the growth of these two kinds of deference to member state institutions. The positive, empirical analysis is followed in the text by a normative argument for deference to member states' institutions. Thus, Zglinski's book is a model example of legal scholarship engaging with social sciences' quantitative methods to describe legal developments as well as making the more traditional normative arguments of the discipline. The discussion of how the Court does and should administer the reach of its case law, and where it should carve out a role for member state institutions, is extremely timely and relevant.

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However, within this very convincing empirical and normative analysis, I struggle at times with the relatively mild interpretation of the findings. Is the extent of deference sufficient? Does the Court really meet its many challenges, given this empirical analysis, which uncovers a jurisprudence that is hardly guided by systematic rules and which seems haphazard? Zglinski's comparison to the US experience, in particular, suggests that we may have to interpret the observations as hesitant steps in the right direction, falling short of what might, ideally, be required.

Given the empirical complexity of the analysis, I will summarise the findings of the book in some detail, before setting out the instances where I find the interpretation lacks bite. I embed this alternative, more sceptical interpretation in a short comparison with what we find in the US, building on the author's comparisons with the US Supreme Court. I conclude by arguing that without contestation and critical discussion of the right balance, the European Court is not in a good position to successfully master the many challenges it faces.

Zglinski's passive virtues

Four decades after the 'path-breaking' *Cassis* ruling, Zglinski presents this thorough analysis of the Court's free movement jurisprudence in six chapters, with an introduction and conclusion. Its ambitious qualitative and quantitative analysis relies on a dataset covering the years 1974 to 2013. All free movement rulings every five years were coded for 12 different independent variables, such as policy field, level of harmonisation, free movement rights, discrimination, as well as length of EU membership of the issuing state, and formation of ECJ. 1974 was the year of *Dassonville* (Case 8/74) and the first deference to national institutions in *van Duyn* (Case 41/74). The dataset of 247 rulings, comprising preliminary rulings and infringement procedures, covers 20% of all free movement case law.

Chapter 1 'The New Free Movement Architecture' starts with the two stages of free-movement jurisprudence, where the Court first determines whether a measure restricts free movement rights (affirmed in almost 90% of cases brought to it (p. 14)), and –if it does – then asks whether such restriction can be justified. Here, deference to national institutions can play a role. Starting with *van Duyn*, the Court has slowly built its doctrine on the margin of appreciation, and it has done so, as Zglinski shows, using different expressions, such as 'degree of latitude', 'power of assessment', or 'discretion' (p. 19). These different phrases are used, yet the Court also requires member states to use their discretion 'within the limits imposed by the Treaty' (p. 21). Similarly paradoxical is the frequent formulation that 'Member States determine the level of protection', but need to do so while honouring free movement and proportionality. As Zglinski argues, in this way the

Court makes the margin of appreciation doctrine largely 'obsolete', because 'it does not alter the normal review routine in free movement cases' (p. 21)

Despite these contradictions, Zglinski uses the example of *Schindler* (C-275/92), a case on lotteries, to show how the case law varies. There are cases where the Court grants: no margin of appreciation at all (e.g. *Cassis*); a partial margin, where the Court gives guidelines on how the national executive/legislature should carry out the proportionality assessment; or, as in *Schindler*, a full margin, by deferring the proportionality test to the national level. It is important to note that the words and deeds of the Court not necessarily correspond. The Court may speak of a margin, but not grant one; or grant one without explicitly stating it (p. 29-30).

In using the margin of appreciation, the Court defers to the political institutions of member states. With judicial deference, the Court leaves a role for national courts in judicial review. Such decentralised judicial review similarly comes in different forms: there may be *none*, as in *Cassis*; *tendency*, with a prima facie appraisal by the Court; *guidelines* given by the Court; *adoption*, where the Court takes on the assessment of the national court; and finally *full*, where the Court defers completely to the national court (p. 34). In sum, a complex picture emerges, where some national laws are scrutinised less intensely, and sometimes judicial review (or part of it at least) is also less carefully examined.

In Chapter 2 'The Rise of Deference' Zglinski enquires into the quantity and intensity of such deference. Among the 216 cases of the sample affirming the relevance of free movement law, in 47 cases (21.76%) the margin of appreciation mattered (in 29 cases giving full margin). This reflects a continuous growth, which is also found in decentralised judicial review (43 cases). Taking both political and judicial deference together, in 2013 some 44.44% of free movement cases included elements of deference, compared to only 12.5% in 1974 (p. 48) – a strengthened national leeway that needs to be viewed against the broadened reach of the four freedoms over time.

Against common criticisms of judicial activism, Zglinski interprets this development as judicial restraint. Deference, for him, reflects the maturing of the European legal order through harmonisation, the sheer workload of the Court, the overall good compliance of member states, as well as Treaty changes that have strengthened the protection of national identity.

Chapter 3 discusses 'The Margin of Appreciation: Theory and Practice', showing that no coherent theory governs its usage. When and whether the Court defers decisions to member states' executives or legislatures has been spelled out in different judgments over the years, drawing on 'over 50 different factors' (p. 68). In certain policy fields member states enjoy greater autonomy; the same is true in non-harmonised fields and when 'mandatory requirements' apply.

In contrast, discrimination on the basis of nationality or measures violating proportionality prohibit a margin of appreciation according to the Court.

Empirically, differences across policy fields are striking. In fact, the margin of appreciation is only applied to five areas more than once, and in this cluster public and animal health make up half the cases (p. 74). In four of these policy fields, the Court defers to national authorities in half or more of the cases that reach it: games of chance (75%), road safety (60%), public policy/morality/security (54.55%), and public and animal health (49.06%) (p. 74-75). Interestingly, it the margin of appreciation is never applied in tax law. Zglinski thus finds the practice of the doctrine to be much narrower than the Court claims. The different freedoms show considerable variation, with most deference being granted for the free movement of goods (30%), while workers and capital are at the bottom with 10%. Thus, when national authorities invoke mandatory requirements, the Court only sometimes responds by granting deference.

Zglinksi sees the Court diverting from its self-set rules. Fundamental rights, which in *Schmidberger* (C-112/00) the Court claimed resulted in a 'wide margin of discretion' for member states (p. 84), are addressed rarely and give an incoherent picture. With regard to discrimination, the Court partly grants a margin of appreciation when member states discriminate on the basis of nationality (p. 89). Interestingly, a serious interference with a freedom (32%) results in deference more often than a light interference (13%).

Zglinski's regression analysis reveals the clustering in certain policy fields to be the best explanation for deference. Once the Court has deferred decisions in an area, such as gambling, it becomes more likely to do so again. Path dependence best explains the use of deference, Zglinski concludes.

Chapter 4 turns to 'Decentralized Judicial Review: Theory and Practice', presenting the division of labour between the Court and member states' courts, where in theory the former interprets EU law, and the latter adds the facts (law versus fact rule). Practice, again, is another matter. The different steps of the proportionality analysis require repeated normative and fact-finding considerations. This results in 'creating uncertainty as to the division of judicial competences' (p. 103). After a somewhat long and winding discussion of proportionality analysis, the very interesting empirical analysis focuses on the 182 cases of preliminary references in the sample. In fact, the Court hardly defers, deciding three-quarters (i.e. 135 cases) of cases by itself (p. 113). If a ruling includes a proportionality analysis, a role for member states' courts is more common (45% of cases), but the expectation that proportionality analysis necessarily devolves responsibility to national courts is not substantiated. In addition, with a view to the distinctions established in chapter 1, in only 6% of cases is there fully decentralised judicial review, as the Court overwhelmingly gives guidelines to the national court (p. 118).

Regression analysis allows an examination of the additional factors determining the – few – cases of decentralised judicial control. The position of the referring court in the judicial hierarchy hardly matters, with higher courts actually receiving less leeway from the Court. The Court does not differentiate geographically, nor does it take into account length of EU membership (p. 121). The formation of the Court shows that small chambers permit the least decentralisation (13.33%), that five judges defer most (30%), and large chambers a little less (26.39%) (p. 121). Altogether, only proportionality analysis is statistically significant. The year of the ruling also has an impact, showing an increase in deference (p. 124). The author concludes: 'The power of Member State courts has grown immensely over the past four decades' (p. 125), which be critically discussed below.

Chapter 5 'Proportionality and Its Discontents' sets out to explain why the Court 'routinely defers to national authorities' (p. 127), arguing that the literature is too little aware of the costs of proportionality review for the Court. As proportionality analysis allows courts to review government activity, it is possible that this difficult task can be eased by the delegation of decisions to national courts. This extremely interesting chapter begins by tracing how the proportionality principle historically conquered the world of judicial review, with early instances going back to the Court of the Coal and Steel Community. Because proportionality allows the widening of the reach of European law against 'unwanted European and domestic measures' (p. 130), Zglinski finds private parties, member state Courts and Advocate Generals pushing the principle. After the first important case of *Internationale Handelsgesellschaft* (Case 11/70), the principle entered free movement law in the mid-1970s, and in 1979 the *Cassis* ruling established 'mandatory requirements' subjecting member state measures to this test (p. 131). Thus, the Court builds up the means for deference in parallel to the powerful broadening of the reach of EU law. In the late 1970s, deference via the margin of appreciation or decentralised judicial review was established (p. 133).

'Proportionality allows courts to do things they would otherwise be unable to do, through a method they would otherwise not have at their disposal' (p. 135). Essentially, it means that courts can examine the reasons behind legislative and executive actions, 'turning a deeply political inquiry into a legal test' (p. 138). Judicial overload and judicial overreach are the resulting dangers of this potent test. But instead of choosing to limit the reach of rights, courts respond with deference.

The comparison with the US Supreme Court (SC) provided by this chapter is very interesting. It is one of the few courts to have resisted the lure of proportionality analysis. Instead, it normally uses the rational basis review, and rarely the more interfering heightened scrutiny and strict scrutiny. In addition to these different standards for review at its disposal, the SC has much more control over its docket, limiting its case load to approximately 70–100 cases each year.

Between 1990 and 2003, strict scrutiny was used in only 12 cases. 'It would give an American constitutional lawyer cold sweat to hear that it is not unusual for the [European Court of Justice] to apply proportionality in free movement disputes twice as often within a single year' (p. 145).

The Court's use of proportionality analysis in free movement cases grew from below 20% in 1974 to around 60% in 2014 (p. 149). Whether the Court defers to national institutions in proportionality review varies much more, with the general trend pointing towards more deference. As only 12.5% of cases fall outside the scope of free movement law (p. 153), and the Keck principle is applied only three times in the sample, the quantitative analysis shows the wide reach of free movement law. The situation is thus very different to the US; I shall return to this point in the following text.

Chapter 6, 'Discovering Passive Virtues', turns to the difficult normative questions the Court encounters with the growth of proportionality review and deference. The Court is situated in the midst of three constitutional tensions embodied in the EU: the relationship between the judiciary and the executive/legislature; the allocation of competences between the EU and member states; and the division of labour between the Court and national courts. The first of these is the most fundamental one, pointing to the contradiction between democratic governance and judicial review, the 'counter-majoritarian difficulty' (p. 165). Different Treaty revisions have deepened these tensions, as democratic principles, subsidiarity, and the principle of conferral have been strengthened.

Zglinski advocates two criteria to decide between these contradictory constitutional goals of the EU: representation (asking which institution is permitted to provide justice to the different actors affected) and expertise (relating to relevant information). These criteria reflect the plurality of institutions deciding on state actions, their differences in decision-making ability, and the disagreement among actors about policies.

Turning to representation, Zglinski starts with the common argument[1] that the Court represents interests from other member states in its free movement jurisdiction, that are not represented in the national democratic process. This should mean that the Court need not become active when only national interests are concerned. In addition, interests closely connected to national identity require protection. 'There is no way to express a distinctly national identity if a polity is permanently forced to consider the interests and concerns of other Europeans' (p. 181). It is notoriously difficult to decide where core issues of identity start and protectionism ends. Zglinski turns to 'watershed issues' for help: 'A society

[1]C. Joerges, 'Deliberative Supranationalism – Two Defences', 8 *European Law Journal* (2002) p. 133; J. Neyer, *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford University Press 2012).

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is essentially defined – or, more precisely, defines itself – by its position on questions such as euthanasia, gambling, sex work, and surrogacy' (p. 184). Since the EU has increasingly become a 'community of values' (p. 186), he expects the representation of minority groups to increase in importance for the Court.

Expertise is the second reason why courts may defer the decisions to other institutions. This is less to do with technically complex issues, but rather a recognition of local expertise. However, as deference to national courts comes at the cost of unity in the interpretation of free movement rights, the Court could also communicate more clearly the type of information it requires from national courts in their preliminary references (p. 197). Then expertise would require less deference. Altogether, Zglinski draws a positive conclusion:

> The rulings in some of the well-known margin of appreciation cases, where the Court defers to national decisions on issues like human dignity, gambling, pornography, and religious sects, appear to suggest that free movement adjudication does comply with the idea of national representation, even if counterexamples exist. (p. 195)

On the basis of the empirical and normative analysis, the book concludes with a favourable picture of the Court's deference to member state institutions in free movement. Consequently, Brexit is judged an irony: the UK left the EU out of concerns about free movement, though 'there is (. . .) no support for the suggestion that national interests are no longer protected in free movement law' (p. 202). In light of the book's empirical findings, this favourable assessment may strike the reader as surprising. After all, the Court defers very unsystematically, if it defers at all. Similarly surprising is the author's apparent conclusion that the Court could be in a position to manage successfully the contradictory constitutional aims of the EU polity. In addition, it should be remembered that several difficulties that the Court confronts in this enterprise are outside the scope of the book: for example that it has to work with multiple languages embedded in heterogeneous legal and judicial traditions, while being organised in a large number of chambers. And indeed, the short summary of empirical findings could also be seen to paint a much more problematic picture:

> Whereas the Court's statements on the margin of appreciation suggest that a complex web of factors determine whether or not the doctrine is applied, in fact only three variables turn out to influence its usage. A handful of policy fields increase the chances of national institutions being given a margin of appreciation (public health; games of chance; public policy/morality and security; road safety), while discriminatory action and a high level of EU harmonization decrease them. In the case of decentralized judicial review, the divergences are even more pronounced.

> The principles laid down in the Treaties and, at least formally, embraced by the Court – that the interpretation of European law is for the Court of Justice, while its application to the facts of the case is for the national judiciary – largely fail to capture its relationship with domestic courts. (p. 200)

I now turn to this question of how to assess the empirical findings of the book.

A glass already half-full?

Quite a detailed account of the book was necessary to do justice to its impressive empirical work. Within the complex political system of the EU, the Court faces tremendous challenges. I am sceptical that the Court fares as well as Zglinski's analysis might suggest. In fact, to me, his empirical results suggest that the powerful political role granted to courts by proportionality analysis is used too boldly by the Court. In addition, the Court appears to apply its self-set criteria on deference at random. To underline these points, I briefly emphasise some crucial findings of the book.

While a margin of appreciation is granted in 42% of cases (p. 42), these are clustered in certain policy fields, with 26 of 51 cases relating to public health (p. 74). Is this sufficient, if the Court sees a restriction of free movement rights through national legislation in almost 90% of the cases (p. 14, 42) brought to it? Is it possible to conclude that protecting member states' interests has become easier, if one finding reads: 'That the Court lets national courts review Member State laws autonomously is, at least looking at the past four decades, not typical' (p. 113)? And regarding the margin of appreciation: 'The reach of the doctrine is much narrower than suggested by the Court of Justice' (p. 75).

Zglinski shows, time and again, that the Court develops criteria in its case law that are hardly followed. Deeds and words differ (p. 29-30). 'The field has become varied, complex, one may even say messy' (p. 38). While discrimination against non-nationals should prohibit a margin of appreciation (p. 71), this does not hold at all (p. 88). While the Court claims a wide margin for fundamental rights in *Schmidberger*, it is rarely applied (p. 84-85). Can one be satisfied regarding the rule of law? 'From a perspective of judicial competences, this, of course, is troubling: who decides on what in free movement law remains, to a large extent, a mystery' (p. 125). It is surprising that the conclusion does not pick up more forcefully this lack of principles.

And if this picture emerges, could it not be a result of the fact that the far-reach of free movement, applied to heterogeneous member states' conditions, forces the Court to be messy in its rulings, violating its self-proclaimed standards of judicial review, as it is hardly possible to arrive at good judgments in such a diverse context? I turn now to a comparison with the US, which underlines that the Court is

not exploiting the potential of deferral, and so in fact rather than a glass half-full, it presents a glass half-empty.

What does the US teach us?

Zglinski's comparison with the US Supreme Court reveals that the US Court rules on fewer cases and, politically, interferes less than the European Court. This is interesting, as the conditions the US Supreme Court faces should be much less challenging than those for the European Court of Justice. To explain why this is the case, let us start with some general considerations. All courts, whether national or international are in a difficult situation vis-à-vis the other branches of government, as courts depend on them to guarantee compliance with and implementation of their rulings[2] – courts themselves have no influence over 'either the sword or the purse'.[3] It is, therefore, important for courts not to become too politically contentious. If they do, they are presented with the difficult situation of losing their legitimacy, either because their rulings are no longer obeyed or because they no longer appear politically independent, as they change their jurisprudence in the face of pressure.[4] Courts are thus well-advised to assess carefully consequences of their rulings, something which is much more difficult in the economically and institutionally heterogeneous, multilingual EU, with few EU-level media, compared to the US. Could this be the reason why the Court is at pains to follow its self-set doctrines regarding deference? Research into the reasoning of constitutional judges of the German Federal Court shows that even at the national level a loose orientation on dogmatic principles is deemed necessary to arrive at 'just' rulings.[5]

Interestingly, despite the early, seminal comparison between the EU and the US,[6] there is not much research on how the EU compares to the US in terms of integrated rules.[7] In a recent contribution, Matthijs et al. emphasise that

[2]J.K. Staton and W.H. Moore, 'Judicial power in domestic and international politics', 65 *International Organization* (2011) p. 553.

[3]A. Hamilton, *Federalist No 78*.

[4]R.D. Kelemen, 'The limits of judicial power: trade-environment disputes in the GATT/WTO and the EU', 34 *Comparative Political Studies* (2001) p. 622.

[5]U. Kranenpohl, 'Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts' ['The importance of interpretation methods and dogmatics in the decision-making practice of the Federal Constitutional Court'], 48 *Der Staat* (2009) p. 387 at p. 393.

[6]M. Cappelletti et al., *Integration Through Law. Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* (Walter de Gruyter 1986).

[7]M.P. Egan, *Single Markets. Economic Integration in Europe and the United States* (Oxford University Press 2015).

notwithstanding the persistent calls to complete the integration of the single market, the EU is much more interventionist and harmonised in its economic regulations than is the case between the US states. To give a few examples, there is no open public procurement policy in the US, as 'buy local' policies are regarded as a legitimate way of spending of local taxes for local employment. There is no mutual recognition of qualifications or freedom of establishment, which implies that even a hairdresser cannot simply relocate from New York to New Jersey. 'We simply argue that the core rules of the Single Market and Eurozone limit member states' room for manoeuvre significantly more than do equivalent federal rules in the USA'.[8] Similarly, the very far-reaching demands of non-discrimination in the EU, resulting in the saga of German medical students in Austria, could be contrasted with the levy of out-of-state tuition in the US.[9] These differences in policy resonate with the analysis of Barnard[10] on how the legal principles pursued by the Court interfere with member states' policymaking.

In addition, in building the single market, the EU pursues a comprehensive approach. Cross-border economic activity must not be hampered by additional regulatory requirements. Once an area is regulated at the EU level, it regulates the domestic conditions in the member states as well. This follows from the idea that having to adapt to another set of rules would disadvantage cross-border movements. One example is the Working Time Directive, which defines working times and rest periods, but makes no mention of 'on-call' times. Together with the very broad definition of the term 'worker', this has led to difficulties with the organisation of voluntary firefighters (*Matzak* C-518/15).[11] As another example, joined cases C-360/15 and C-31/16, references from the Netherlands, elucidated how the Services Directive 2006/123 applies to purely internal situations. In this case a Dutch land-development plan restricted the establishment of companies to those selling bulky goods in order to concentrate retailing in the city centre. But by banning a retail outlet for shoes and clothing from the area the municipal council of Appingedam violated the freedom of establishment as specified by the directive.

The EU is much more heterogeneous than the US when it comes to judicial and legislative attempts at harmonisation. To highlight these differences, Table 1 below compares the average of the top and bottom three states in both the EU and the US in terms of economic indicators.

[8]M. Matthijs et al., 'Ever Tighter Union? Brexit, Grexit, and Frustrated Differentiation in the Single Market and Eurozone', 17 *Comparative European Politics* (2019) p. 209 at p. 210 ff.

[9]A. Schenk and S.K. Schmidt, 'Failing on the social dimension: Judicial law-making and student mobility in the EU', 25 *Journal of European Public Policy* (2018) p. 1522.

[10]C. Barnard, 'Restricting restrictions: lessons for the EU from the US?', 68 *Cambridge Law Journal* (2009) p. 575.

[11]M. Risak, 'The Position of Volunteers in EU-Working Time Law', 10 *European Labour Law Journal* (2019) p. 362.

Table 1. Economic heterogeneity in the EU and the US

	Average EU Top 3	Av. EU Bottom 3	Av. US Top 3	Av. US Bottom 3
Growth Gross domestic product 2018/9	+5.36%	+ 0.66%	+3.96%	+0.7%
	Ratio 8,1 : 1		Ratio 5.6 : 1	
GDP/head 2019	€64,510	€9,467	$74,955	$38,007
	Ratio 6.81 : 1		Ratio 1.97 : 1	
Unemployment rate 2019	13.93%	2.8%	3.6%	1.96%
	Ratio 4.98 : 1		Ratio 1.83 : 1	
Median household income 2019	€30,937	€4,650	$86,110	$47,861
	Ratio 6.65 : 1		Ratio 1.8 : 1	

Own calculation, Eurostat and US census bureau, and bureau of economic analysis.

Clearly, the economic divergence in the EU is significantly higher than it is among the US states, making it unlikely that a more integrated regulatory framework than in the US can accommodate the resulting heterogeneous needs. Adding to the heterogeneity of the EU are the 24 official languages, and all institutional and cultural differences, not as easily mapped.

Yet, the opposite assumption could also be argued. Given the extent of heterogeneity among member states, policies would need to aim at greater homogenisation, in order to further integration under these conditions. In this view, the European Court would be right to be less deferential than the US Supreme Court, as such diversity could only be overcome by integrated rules. Famously, in European monetary integration, the discussion between these two models of integration played an important role.[12] Should monetary union mark the final stage of economic integration, the common currency crowning the achievement of integration? Or should monetary union rather serve as the locomotive, helping to achieve integration? As we know, monetary union tested whether this second model of integration would be successful. But economic divergence in the Euro area increased as a result of the common currency, as the following data shows. Between 1999 and 2008 imports changed by the following percentages: in Ireland +2.68%; and in Spain +7.33%, but in Germany +42.86% and Finland +44.17%. In the same period, export figures were: Germany +62.46%, Austria +35.30%, but Spain −2.76% and Ireland -2.88%.[13]

[12]H. James, *Making the European Monetary Union* (Harvard University Press 2012).

[13]F.W. Scharpf, 'Forced Structural Convergence in the Eurozone', in A. Hassel and B. Palier (eds.), *Growth and Welfare in Advanced Capitalist Economies How Have Growth Regimes Evolved?* (Oxford University Press 2021) Table 5.3.

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Obviously, if monetary union furthers divergence, this does not mean that the same holds true for free-movement rights. However, the economic indicators cited show the tremendous economic costs if this 'locomotive' integration model works contrary to expectation. Alongside high unemployment, low growth and measures of austerity, the political legitimacy of member states and the EU suffers when EU rules have adverse effects.

Can the EU continue as it is?

The 'ever closer union' of member states is part of the EU's DNA, and often appears to trump the commitment to diversity, which the motto 'united in diversity' emphasises. The comparison to the US and the divergence resulting from the experiences of the common currency indicate the vagaries of integration, where 'more' can result in 'less' in the medium to long term. Brexit also can be mentioned here. It is conceivable that the exit of the second largest economy in the EU-28 could have been avoided, had there been more deference. Arguably, the fact that the UK was a particularly difficult member state, along with the gratification of acting in unison, blinded the EU-27 to the depth of the break: the economic loss of the UK equalled the 18 member states with the smallest economies, not to mention the loss to Common Foreign and Security Policy. What Brexit means for the EU, and also for European law, remains to be analysed. Davies[14] has argued that national courts should see themselves as obliged to interpret EU law to allow the necessary flexibility for domestic policy, if indeed the constraints of EU law appear politically too costly, as was argued for the UK. This would make deference into a joint obligation at not only the European but also the national level.

The critical discussion thus far has very much centred on two of the three constitutional tensions raised by Zglinski in chapter 6: centralisation versus decentralisation and uniformity of EU law versus national application, questioning whether the deference that Zglinski observes reaches far enough. Another caveat can be mentioned in this respect. Zglinski assumes that member states are compliant, and dutifully follow the Court's decisions as to whether more centralisation and uniformity is needed or not. Recent research, however, casts doubt on this. Not only are there fewer infringement procedures, but the Commission appears to focus controls where there is broad public support for European integration.[15]

[14]G. Davies, 'Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness', 41 *European Law Review* (2016) p. 925 at p. 926.

[15]D. Finke, 'A Guardian in Need of Support: the Enforcement of EU State Aid Rules', *Journal of European Public Policy* (2021) at p. 15, ⟨https://www.tandfonline.com/doi/epub/10.1080/13501763.2021.1873403?needAccess=true⟩, visited 21 June 2021.

Lindstrom even speaks of 'creative' compliance, emphasising how the implementation of EU law is disputed at the member-state level.[16]

In addition to the division of competences at European and member state levels, the question of democratic governance versus judicial review similarly merits attention. It was mentioned above, in relation to the counter-majoritarian difficulty, that courts are deeply constrained in shaping political developments, given their reliance on political support. From such a perspective, rulings of the Court may not make a great difference. For the US, Rosenberg[17] argues that the impact of the important civil rights rulings has been overstated, as these rulings could only make a difference with the civil rights movement. In this vein, Martinsen[18] regards the Court not as particularly powerful.

While the Court can hardly shape policies on its own, its impact appears much larger if one asks whether decisions would have been the same without the Court. Without the revolutionary interpretation of free movement, starting in *Dassonville* and *Cassis*, and being used strategically by the European Commission for its single market programme,[19] it is hardly thinkable that '1992' could have had such momentum. Imbued with direct effect and supremacy, the Treaty serves as a de facto constitution. In so far as this relates to policy issues such as the four freedoms or competition law, Grimm[20] speaks of over-constitutionalisation, as such economic matters are subject to the legislative process at the member-state level.

Constitutionalisation withdraws these issues from democratic decision-making, heightening the conflict between democratic governance and judicial review. Notable in this sense is the recent annulment procedure initiated by Hungary and Poland against the reform introduced by the Posted Workers Directive (2018/957). Both member states held that this reform of posted workers violated the freedom to provide services (Article 56 TFEU), and that the EU legislature had overstepped its mandate. The Court, for its part, practised

[16]N. Lindstrom, 'Aiding the State: Administrative Capacity And Creative Compliance With European State Aid Rules in New Member States', *Journal of European Public Policy* (2020), ⟨https://www.tandfonline.com/doi/epub/10.1080/13501763.2020.1791935?needAccess=true⟩, visited 21 June 2021.

[17]G.N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change? American Politics and Political Economy* (University of Chicago Press 1993).

[18]D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015).

[19]K.J. Alter and S. Meunier-Aitsahalia, 'Judicial politics in the European Community. European integration and the pathbreaking cassis de Dijon decision', 26 *Comparativ Political Studies* (1994) p. 535.

[20]D. Grimm, *The Constitution of European Democracy* (Oxford University Press 2017).

restraint in its judicial review and upheld the Directive (C-620/18 and C-626/18).

For the balance between the legislature and the judiciary this is a highly welcome decision. It does not mean, however, that the EU legislature is able to shape the four freedoms independent of their interpretation through the Court. In addition to the fact that it is difficult to muster the relevant qualified majorities for EU legislation to overrule existing case law, legal scholarship is divided on the leeway the EU legislature enjoys within the constraints of Court case law.[21] Increasingly, the constraints of judicial review are discussed critically: 'The Court's assertion of direct policymaking functions has had a transformative impact on the development of substantive EU law, so much so that in specific instances the Union legislature has subsequently done little more than transpose the Court's interpretative choices into secondary legislation'.[22] Studying the US context, Silverstein[23] points to yet another critical dimension of 'law's allure'. When venues change, as courts decide, there are no compromises or attempts at political persuasion that characterise the political process and help to further societal support for decisions.

Zglinski establishes representation and expertise as criteria with which to assess the role of the Court vis-à-vis other institutions at the level of the EU as well as of member states. It is unfortunate that he does not discuss in any detail his suggestion to check the criterion of representation with a view to the type of legislative competences the Union enjoys (p. 183). Within the uproar that the *Laval* quartet of cases caused,[24] the Court was criticised for subjecting national regulation to a proportionality review in an area where the EU lacks legislative competence following Article 153.5 TFEU.[25] It would be interesting to analyse the extent to which a focus on legislative competence at EU or member-state level could meaningfully strengthen deference. Going back to the Dutch land-development plan and joined cases C-360/15 and C-31/16, the approach would

[21]M. Höpner and S.K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review', 22 *Cambridge Yearbook of European Legal Studies* (2020) p. 182 at p. 190.

[22]T. Horsley, *The Court of Justice of the European Union as an Institutional Actor* (Cambridge University Press 2018) p. 14.

[23]G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge University Press 2009) p. 268.

[24]C. Joerges and F. Rödl, 'Informal politics, formalised law and the 'social deficit' of European integration: reflections after the judgments of the Court in Viking and Laval', 15 *European Law Journal* (2009) p. 1.

[25]S. Garben, 'Competence Creep Revisited', 57 *Journal of Common Market Studies* (2019) p. 205 at p. 216; F.W. Scharpf, 'De-constitutionalisation and majority rule: A democratic vision for Europe', 23 *European Law Journal* (2017) p. 315 at p. 318.

hardly prevent the far-reaching constraints on municipal land development resulting from this ruling on the services directive.[26]

Other criteria appear necessary. The subsidiarity provision of Maastricht never acquired bite, which made it necessary to consider whether subsidiarity could play a role in the Court's jurisprudence. Is it enough to subject all national regulations that may potentially hinder the free movement to proportionality analysis, or do we need some prima facie evidence that regulations do indeed restrict the freedoms? I.e. is it in fact necessary to re-think the scope of free movement law, rather than focusing only on deference when assessing proportionality?

Judicial conflicts involve redistribution; some actors gain and others lose, as Hirschl forcefully argues:[27] elites protect their interests in delegating power to courts when majoritarian politics threatens to endanger these interests. Though European integration has been driven by the case law of the Court, while becoming politically contentious in the process, it is time to look at which actors have lost out and not been sufficiently compensated.

To conclude, Zglinski presents a very timely book on the role of the Court, combining an impressive empirical analysis with convincing normative considerations. Given the importance of the Court for European integration, and the difficult times ahead for the EU, the issues outlined in the book need further discussion in both legal and political science scholarship alike. Constitutional tensions in the EU abound. Beyond all differences in interpretation, one can assume that the Court cannot effectively navigate these challenges without the help of critical reflection by legal and social science scholars alike.

[26]The mayor of Mannheim, at the committee of the regions, criticised the fact that all land development plans seemed to need notification: ⟨http://www.mrn-news.de/2019/06/28/mannheim-ob-dr-kurz-spricht-in-bruessel-zur-drohenden-notifizierungspflicht-fuer-kommunale-bebauungsplaene-393743/⟩, visited 21 June 2021.

[27]R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) p. 44.