JUDICIAL REVIEW, A TOOL FOR JUDICIAL ACTIVISM
A COMPARATIVE STUDY OF FRANCE, THE UNITED STATES
AND THE EUROPEAN UNION

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I. INTRODUCTION

The purpose of this paper is to study the judicial activism of the courts in the following systems: France (III), the United States (IV) and the European Union (V). As we will see later, the courts used judicial review as a powerful tool to interpret the constitutions or treaties. It helps them in the tasks that were assigned to them by the different Constitutions, or treaties as far as the European Union is concerned. I will present how the courts enhanced their own power of judicial review. For the United States it was more a matter of creation, where in France and in the European Union, the courts merely improved the powers already delegated to them by the texts. However in those three systems the courts showed originality and determination in their search for tools. The courts did not just try to gain more power, they tried to find in the texts and in their spirit the justifications for the judicial review power they developed. The goal of the courts was to possess an efficient tool that would allow them to interact with the other institutions and follow the evolution of the structure they were in. Thus in their interpretation of their judicial review power, they went beyond the texts, but it was to protect, more efficiently, the
principles prescribed in their constitutions (or treaties). One might wonder at the relevance of such a comparison. The three systems are very different from the cultural, political and historical points of view. However the purpose of this thesis is to show striking parallels between the three systems, even though each system had a different way of foreseeing judicial review. This paper is an attempt to gain an insight into each court and the way they interacts with its system using its judicial review power.

II. THE METHODS OF INTERPRETATION

Section 3 (1) of the European Communities Act, 1972 provides that: "For the purpose of all legal proceedings, any question as to the meaning or effect of any Community instrument shall be treated as a question of law (and if not transferred to the European Court, be for determination as such in accordance

1 "The European Community is the antithesis of the United States in that it includes ten different states, embracing old, established people, speaking eight different languages, and which agreed to collaborate after centuries of strictly individual development, often in conflict with one another", Roderick MacFaquhar, "The Community, the Nation-State and the Regions", in Federal Solutions to European Issues (B. Burrows, G. Denton & G. Edwards eds., London, MacMillan, 1978).
with the principles laid down by and any relevant decision of the European Court". The reference to the "principles laid down by the European Court" is a wide enough proposition to justify a study of the different methods of interpretation used by the European Court.

Concerning secondary legislation, by its nature and purpose, it is much more tightly drafted. However, sometimes, Community legislation makes use of vague terms. Thus Treaty as well as Constitutions, especially long lasting ones like the American Constitution, leave some areas of the law relatively blurred. They leave to judicial interpretation the role of giving a sense to the meaning of

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2 Community law includes both the Treaties and secondary legislation made thereunder. However, the methods of interpretation do not substantially differ as between the two categories of Community law.

3 See for example, Council Directive No. 64/221 which failed to clarify sufficiently the reference in article 48 EC Treaty to "grounds of public policy, public security or public health", clarification which occurred thanks to the European Court in the Case 41/74 Van Duyn v. Home Office [1974] ECR 1337. See also Case 219/92 Ter Voort [1992] ECR I 5485, concerning the problem as whether "tisane" was within the term "médicament" as used in the Council Regulation 65/65.

4 The first three Treaties consisted of the Treaty Instituting the European Coal and Steel Community (ECSC, April 18, 1951), the Treaty Establishing the European Atomic Community (hereinafter EAC, March 25, 1957) and the Treaty Establishing the European Economic Community (hereinafter EEC, March 25, 1957). These Treaties have been amended several times, always moving towards a stronger Union. The most notable amendments were the Single European Act (hereinafter SEA, February 7, 1986) and the Treaty on the European Union (hereinafter Maastricht Treaty, February 7, 1992). This last Treaty changed the name of the European Economic Community Treaty in the European Community Treaty (hereinafter EC Treaty).
terms which have been deliberately left undefined in the texts.

I will first consider the problem of the many languages of the European Union (A), then I will consider different methods of interpretation, the literal method (B), the historical (C), as well as the importance of the intent of the farmers (D), and finally the "European way" ⁵ that is to say the contextual (E) and teleological (F) methods of interpretation.

A. MULTI-LINGUAL DIMENSION OF THE COMMUNITY LAW:

Of the three systems studied here the European Union is the only one offering the opportunity of analyzing different translations of a single text.

The European Union imposed the principle of linguistic equality concerning its different languages. ⁶ With each new enlargement of the Community the principle that the languages of all the Member States should rank equally has been "steadfastly upheld, no matter at what cost or


⁶ Article 1 of Council Regulation No. 1 of 15 April 1958, as amended: "The official languages and the working languages of the institutions of the Union shall be Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish".
inconvenience". All the texts of the Community law rank equally in different official languages, so that “the Court of Justice has had to evolve methods of interpretation appropriate to multi-lingual texts”. 8

A divergence in the languages can be source of problems; therefore the Court held in Bouchereau 9 that in case of divergence between the language versions, the provision in question was to be interpreted by reference to the purpose and general scheme of the rule of which it formed a part. 10

In the event of an ambiguity concerning a term in the Treaty, the Court should consider the different translations of the term in the various Community languages. In the Stauder case 11 the Court had to consider the different versions of the Commission decision addressed to the Member States permitting the sale of butter at reduced prices to any person in receipt of welfare benefits. The Dutch and German texts required the beneficiaries to receive their butter in exchange for a

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8 Id. at p. 300.
10 See below the contextual method of interpretation (E).
"coupon indicating their names". A German citizen challenged this, in his national court, as an infringement of his fundamental rights. When the case reached the European level, the European Court of Justice referred to the French and Italian versions which only stipulated the production of a "coupon referring to the person concerned". The Court adopted a more liberal version of the Commission's decision which enabled the Commission's objective to be achieved (giving welfare benefits for a certain category of person) by unexceptional methods of objectionable the beneficiaries.

Thus with a multi-language Community, the European Court of Justice has more versions of the same text to help it to identify the real aim of the text. However the Court will certainly use this method of interpretation merely to secure its position on the meaning of a text. Indeed this method of interpretation is risky. It supposes an elaborate and technical analysis of the different versions of a provision. Moreover the European Court of Justice tries to rely as little as possible on this system considering that it could hurt the susceptibility of the Member States, whose language is not recognized as "European" enough.

The European Community is the only system with this kind of
method of interpretation. As we have seen, the Court limits the reference to this method or just as a complement of other methods of interpretation. Methods that we are now going to examine are methods that could be used by any of the three systems studied here.

B. THE LITERAL METHOD OF INTERPRETATION:
This method can rapidly be eliminated at least concerning two of the systems studied here: Europe and the US. As stated earlier the purpose of interpretation is to give meaning to a relatively blurred proposition. The literal interpretation supposes that the Court\textsuperscript{12} looks at the wording of the texts; by doing so the Court will either look at their ordinary connotation or the special sense appropriate to the particular context.
Thus in other words this method of interpretation was generally displaced by the contextual\textsuperscript{13} or teleological\textsuperscript{14} approach, although the Court may speak rather in terms of

\textsuperscript{12} The expression “the Court” is used here in a general sense, referring to the US Supreme Court, the European Court of Justice or the Constitutional Council.

\textsuperscript{13} See below the contextual method of interpretation (E).

\textsuperscript{14} See below the teleological method of interpretation (F).
looking at "the spirit" of the text. \textsuperscript{15} For instance after 1958 the European Court of Justice had to face a more programmatic EC Treaty.

The Court's methods of interpretation shifted then perceptibly from the literal interpretation to the contextual and teleological methods, with an emphasis on the ratio legis, \textsuperscript{16} and the objectives of the Treaty: "It is not sufficient for the Court to adopt a literal interpretation and the Court considers it necessary to examine the question whether this interpretation is confirmed by other criteria concerning in particular the common intention of the High Contracting Parties and the ratio legis". \textsuperscript{17} It is then by necessity that the European Court of Justice decided to shift from one method to another, \textsuperscript{18} as we will see in the following sections.

The French Constitutional Council used the literal method of interpretation. Indeed, it is still the case, but it can also be considered as a disguised method of interpretation. The Constitutional Council feared to be considered as a judge making law. Thus it decided to use this method referring

\textsuperscript{15} See below the intent of the framers (D).

\textsuperscript{16} "Reason of Law", the principle behind the law.

\textsuperscript{17} Case 6/60 Humblet v Belgium [1960] ECR 559.

\textsuperscript{18} See below (E) and (F).
essentially to the text. The problem for the Constitutional Council was to be able to interpret the Constitution knowing that its structure, powers and authority did not permit it to go too far in its freedom of appreciation of what the Constitution means. Thus the literal method was the most appropriate method of interpretation that the Constitutional Council could use.

However the Constitutional Council used this literal method to invoke the Fundamental Principles recognized by the Laws of the Republic. It used a sentence of the preamble of the Constitution of 1946, thus basing its decision on the text of the Constitution, where reference is made to those Fundamental Principles. Consequently, when the Constitutional Council started to make references to the Fundamental Principles Recognized by the Laws of the Republic, it gave itself a wider freedom of appreciation, wide enough to be considered as its reserve of competence.

Thus the Constitutional Council gave itself a wider freedom of interpretation, justifying its action by using a literal, a textual method of interpretation.

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19 See Part III on the French system.

20 The Preamble of the Constitution of 1958 makes reference to the preamble of the Constitution of 1946, thus integrating it in, see Part III.
C. THE HISTORICAL METHOD OF INTERPRETATION:

This method suggests recourse to the discovery of the purpose of a measure at the date of enactment. Indeed this method of interpretation suggests that the Court will make references to the travaux préparatoires, \(^{21}\) in pursuit of the objective intention of the legislature.

In regard to the European system this method is little used. Concerning Treaties, the negotiations have remained secret by common agreement of the contracting States. Thus as far as Community legislation is concerned both the Council and the Commission deliberate in secrecy (especially concerning the Council where hard bargaining is common). Mr. Pescatore reinforces this belief stating:

"Treaties are not established unilaterally, they are negotiated. In order to interpret an international treaty correctly, account must therefore be taken of the actual conditions in which it was negotiated. However, it is precisely one of the rules of negotiation that one does not always reveal one's intentions. It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the written formulas of the treaties and only on that. It is by no means that agreement on a text in any way implies agreement as to the intentions. On the contrary, divergent, even conflicting intentions may perfectly well underlie a given text and I would even go so far as to say (...) that the art of treaty-making is in part the art of disguising irresolvable differences between the contracting

\(^{21}\) i.e., the legislative history.
Thus the historical method of interpretation is not a reliable tool. For instance if we look at the European system and the dynamic character of the Treaties, which lay down programs for the future, such references to the "travaux préparatoires" tend to reduce the Treaties to the more limited documents they were at the date of their conclusion, receding them into past. However the American system uses the historical methods of interpretation, combined with the "intent of the framers". In a way referring to the intent of the framers suggests a return in the past, analyzing the situation at the time the provision was established to try to understand its purpose.

D. THE INTENT OF THE FRAMERS:

As we read cases of the US Supreme Court we can see a lot of references made to the intent of the Founding Fathers. Here are some examples:

- Lunch v. Doonnelly, 465 US 668 (1904), "Our history is replete with official references to the value and invocation of Divine guidance in deliberation and pronouncements of the Founding Fathers and contemporary leaders", (majority

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22 Mr. Pescatore during a public lecture in 1963. Mr. Pescator is a former judge of the European Court.
opinion).

- **EEOC v. Wyoming, 460 US 226 (1983)**, "It was also clear from the contemporary debates that the *Founding Fathers* intended the Constitution to establish a federal system. As James Madison, 'the Father of the Constitution', explained it to the people of New York", Justice Powell (dissenting opinion).

- **Young v. US ex rel. Vuitton et Fils, 481 US 787 (1987)**, "Yet no one suggests that some doctrine of necessity authorizes the Executive to raise money for its operation without Congressional appropriation, or to jail malefactors without conviction by a court of law. Why, one must wonder, are the courts alone immune from this independence? The *Founding Fathers*, of a certainty, thought that they were not", Justice Scalia (concurring opinion).

The intent of the *Founding Fathers* is often referred to in cases. Sometimes it is referred to it in its historical context, 23 sometimes merely considering what the *Founding Fathers* wanted to express in the Constitution.

There is another theory about the use of the intent of the Framers. By doing so Justices often refer to the structure of

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23 References are often made to The Federalist Papers. Written by the authors of the Constitution, they are used to understand the purpose of certain provisions of the Constitution.
the Constitution. The analysis is not only about what the framers of the Constitution intended to include in it, but also what they implied in it and what can be inferred from the structure of the Constitution.  

E. THE CONTEXTUAL METHOD OF INTERPRETATION:

This method involves placing the provision in issue within its context and interpreting it in relation to other provisions. It is a method extensively used by the European Court of Justice in interpreting both the Treaties and Community legislation. The Treaties, in particular the EC Treaty, set out a grand program, and it appeared natural for the Court to stress the interrelationship of the Treaties and their provisions as component parts of the total "scheme". The European Court's decisions abound with references such as: "the context of all the provisions establishing a common organization of market", "the general scheme of the Treaty

24 Such an analysis falls within the contextual method of interpretation, see below (E). However this method is always used by reference to the intent of the Founding Fathers, and will not be subject to an analysis under (E).

25 The expression "scheme of the Treaty " is often referred to by the Court in its case law, as we will see in different examples.

26 Case 190/73 Officer van Justice v Van Haaster [1974] ECR 1123.
as a whole", 27 "taking account of the fundamental nature, in
the scheme of the Treaty, of the principle of freedom of
movement and equality of treatment of workers", 28 "one must
have regard to the whole scheme of the Treaty no less than to
its specific provisions", 29 "the context of the Treaty", 30
"the framework of Community law". 31
The idea is that a provision is not to be understood outside
its context. The provision is part of a program and as such
must be interpreted to fit in it. The EC Treaty is an
instrument as a whole and each of its provisions must be
understood according to the chapter in which it is situated or
the title it is related to. In the Gingerbread case, 32 the
European Court of Justice dealt with customs duties and
charges having equivalent effect under Article 12 EC Treaty.
33 The Court stated: "The position of those Articles (Articles

31 Case 90 and 91/63 Commission v Luxembourg and Belgium [1964] ECR 625 (Dairy Products case) and Case 6/64 Costa v ENEL [1964] ECR 585.
33 Article 12 EC Treaty provides: "Member States shall refrain from introducing between themselves any customs duties on imports or exports or
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and 12) towards the beginning of the Part of the Treaty dealing with the 'Foundation of the Community' - Article 9 being placed at the beginning of the Title relating to 'Free Movement of Goods', and Article 12 at the beginning of the section dealing with the 'Elimination of Customs Duties' - is sufficient to emphasize the essential nature of the prohibition which they impose. Relying on, among other things, 35 the "general scheme of these provisions and of the Treaty as a whole, the Court went on to argue that there was evidence of "a general intention to prohibit not only measures which obviously take the form of the classic customs duty but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory or protective results as customs duties".

Thus the European Court of Justice bases its reasoning on the content of the provision, referring not only to the Chapter in any charges having equivalent effect, and from increasing those which they already apply in their trade with each other".

34 Article 9 EC Treaty provides: "The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries (...)

35 As we will see in the following section, the European Court of Justice uses this method of interpretation very much in parallel with the teleological method of interpretation, see below (P).
which it is situated but also on the Part and Title. 36 This method of reasoning gives the judges of the Court the possibility of interpreting the provisions while respecting the scheme of the Treaty. It is a way to create a harmonization in the interpretation of the Treaty. However the European Court of Justice does not rely solely on contextual interpretation; it combines it with the teleological method of interpretation.

F. THE TELEOLOGICAL METHOD OF INTERPRETATION:

"The term teleological is applied to an interpretation which is based upon the purpose or object of the text facing the judge". 37

This approach is increasingly used by the European Court of Justice. As we have seen Community law is originally defined as a broad program rather than a detailed one. The preamble and certain Articles of the Treaties express the objectives of the Communities in general terms. Then the Court must retrieve

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36 In a characteristic passage in the Case 24/68 Commission v Italian Republic [1969] ECR 193, the Court held: "Thus, in order to ascribe to a charge an effect equivalent to a custom duty, it is important to consider this effect in the light of the objectives of the Treaty, in the parts, Titles and Chapters in which Articles 9, 12, 13 and 16 are to be found, particularly in relation to the free movement of goods".

those objectives to interpret the different provisions submitted to it. Those objectives must be read together with the assumption that they are leading to an economic and political union. A notable illustration is the case law of the European Court of Justice Continental Can, a leading case concerning Article 86 of the EC Treaty. This Article prohibits any "abuse of a dominant position within the common market or in any substantial part of it (...) in so far as it may affect trade between Member States". The Continental Can case raised the question whether Article 86 could apply to takeovers or mergers. In its decision the European Court of Justice made references to "the spirit, general scheme and

38 The Maastricht Treaty, Article B, sets its objectives as "the establishment of economic and monetary union, ultimately included a single currency".


40 According to a decision taken by the Commission, Continental Can Company Inc. of New York, which held, through the medium of its German subsidiary, a dominant position over a substantial part of the common market in certain packaging products, had abused that dominant position by acquiring, through a Belgium subsidiary Europemballage Corporation, a Dutch company which was the only significant competitor in those products. The Commission’s decision required Continental Can to put an end to its alleged infringement of Article 86 of the EC Treaty and to submit proposals to the Commission for that purpose by a specified date. The decision was challenged before the Court by Continental Can and Europemballage, who argued that the Commission wrongly interpreted Article 86 and was trying to introduce merger control in the EC Treaty. The ECSC Treaty made express provision for merger control but there was no such provision in the EC Treaty. The European Court of Justice rejected the comparison with the ECSC Treaty as a method of interpretation. Case 6/72 Europemballage Corporation and Continental Can Co. v Commission [1975] ECR 215.
wording of Article 86, as well as to the system and objectives of the Treaty". It went on to examine Article 86 in the context of other Treaty provisions on competition and in the light of the principles and objectives set out in Articles 2 and 3. The idea is to harmonize the way the provisions are articulated, and to reach this goal the European Court of Justice tries to discover the real intention behind the provisions of the Treaty, keeping in mind that they all lead to a political and economic union.

As we have seen the European Court of Justice does not use only one method of interpretation but combine the contextual and the teleological methods. Thus its method is not a pre-defined one but a mix of literal, contextual and teleological methods: "In order to answer this question, one has to go back to the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty". The US Supreme Court uses one method of interpretation more intensively: the reference to the intent of the authors of the

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41 Finally the Court annulled the decision on other grounds but kept the Commission’s extensive interpretation of Article 86 of the EC Treaty.

42 The question was whether or not Article 86 of the EC Treaty applies to changes in the structure of an undertaking.

Constitution.

According to Klaus Lackoff, "the two Courts differ in their methods of interpretation because one (the European Court of Justice) uses the contextual and teleological methods, while the other (the US Supreme Court) refers to the Founding Fathers' intent. It is true, the two Courts are using a different method of interpretation; however they are both trying to reach the same goal.

After a short period of confederation, the United States was formed and became a nation with one language. They also had the unifying experience of war against a colonial power. Thus the United States was, at the beginning, already, a more perfect union than the European Union is today.

In the US Constitution the Union was a creation from the beginning, in the European Treaties it was the goal to be achieved. Thus when the US Supreme Court refers to the intent of the Founding Fathers, it refers to the protection of the Union, 45 whereas in the European Legal system, the European Court of Justice refers to the scheme of the Treaties which

44 Restrictions on State Interference with Commerce in the USA and in the EC, 2 Columbia Law Journal 336 (1996).

45 A fragile one at first, reinforced by the desire to create a more perfect Union.
was, and still is, to tend towards an Union. The methods of interpretation differ but the result to be achieved is the same; they both tend to the same goal, the installation and protection of an Union.

For the Constitutional Council the situation was different. It had to act very carefully at first, considering that its power was not really recognized. It could not use any method that would give it too much power. The literal method of interpretation was the safer way for the Constitutional Council to be able to take its decision without being considered as a judge making law. However when it started to make references to the Fundamental Principles Recognized by the Laws of the Republic, it gave itself a wider freedom of appreciation. Indeed it was such wide freedom of appreciation that certain authors even considered it had a reserve of competence.

III. FRANCE

Title VII of the French Constitution of 1958 is dedicated to the Constitutional Council. However to create a judicial review system in France was not an easy task. Moreover the
evolution that followed was not expected. However the result of this evolutive situation is an institution dedicated to protect the Constitution and to ensure its respect, as well as an authority able to ensure the protection of the freedoms and liberties of the citizens. This evolution is divided in three steps: the Constitutional Council’s decision of 1971, \(^{46}\) the enlargement of the referral mechanism by a constitutional amendment of 1974 and the “alternance” in the government. \(^{47}\) Each of these steps brought new powers and more legitimacy to the Constitutional Council, powers that could not be imagined in the early days of the Constitutional Council.

I will divide this chapter in three sections, the first one will be a brief presentation of the objection of the French to a judicial \(^{48}\) review system, a historical and political fear of the power of the judges (A), then I will present the Constitutional Council the way it first appears in 1958, its purpose, the access to it, whom, when and its constitutional evolution (enlargement of 1974) (B) and I will study the


\(^{47}\) During a certain period of the Fifth Republic, the majority and the opposition often shifted from the right to the left and vice versa.

\(^{48}\) It is important to note that “Judicial” is used in a broad sense because, in theory, the Constitutional Council is not a judicial court, but rather a special body set up to ensure that parliament and the executive operate within their proper limits.
evolution of the Constitutional Council responding to an ambiguous political climate and its evolution through its decisions (C). I will finally analyze how the Constitutional Council developed the bloc of constitutionality (D).

A. HISTORICAL AND POLITICAL REFUSAL OF JUDICIAL REVIEW:
For a long time France rejected even the idea of a judicial review system in the sense that the judges could look upon the work of the legislator and check or even oppose its action for incompatibility to the Constitution. This attitude flows from political (1) and historical (2) reasons and can be seen in the way the different Constitutions considered the problem of judicial review or more precisely constitutional review (3).

1. Historical reasons:
During the Ancien Regime, \textsuperscript{49} the power of the judges was relatively important. Magistrates often opposed new laws that they declared in contradiction with the fundamental laws of the Kingdom. More concretely they were opposing laws disturbing a certain way of life and a certain social order that they wanted to preserve. Most of the reforms concerning

\textsuperscript{49} The Ancien Regime was the political regime preceding the French Revolution of 1789.
a more equitable system, before the Revolution were vetoed by the magistrates.

As a result of this continual opposition, the new institutions of the Revolution tried to find a way to eliminate any kind of super power of the judges, and tried to prevent the judges from opposing the will of the legislator. The idea was to impede the judges from interfering with the work of the legislator. The new institutions had a total mistrust of the judges and decided to limit their actions. The Law of August 16-24, 1790, stated that: "les tribunaux ne pourront prendre directement ou indirectement aucune part à l'exercice du pouvoir législatif, ni empêcher ou suspendre l'exécution des décrets du corps législatif sanctionnés par le roi - à peine de forfaiture". It seems interesting to note that after two hundred years the idea is still the same. However the mistrust in the judges' power did not only have a historical origin but also a political, or philosophical one.

2. Political Reasons:

At the time of the Revolution the new representatives of the people were familiar with and convinced by Rousseau's ideas of

50 Turgot's reforms concerning the abolition of the privileges for instance had to face the strong opposition of the magistrates.

51 Loi des 16-24 Aout 1790, Title II, Articles 2 in Duverger, CONSTITUTIONS ET DOCUMENTS POLITIQUES (Paris 1991).
a law as a representation of the will of the sovereign people and the belief that the law has to be created by authorities elected, that is to say representing the people. The Revolution acknowledged the principle of the supremacy of the law, which is enacted by the legislator, an organ representative of the people. The judiciary has only the role of applying this law mechanically to concrete cases. Rousseau's definition of the law was that it is the expression of the "volonté générale". The Constitution was considered as superior to the ordinary law, and this superiority was reinforced by a difficult procedure of amendment. However no authority was created to ensure the respect of the Constitution, and none of the authorities already existing was given the power to act as a judicial authority, especially not the judges. The authors of the Constitution of 1791 decided to rely on the fidelity of the authorities constituted and on the vigilance of the citizens to ensure the respect of the Constitution. According to the political context at the time, it is

52 Jean Jacques Rousseau was in favor of a "republican government", that is to say a government "guided by the general will, which is the law". Jean Jacques Rousseau, DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE, Book II, Ch. VI.

53 The general will of the people.
understandable that the judges did not consider themselves a judicial review authority, contrary to what happened in the United States. The judges needed an express power directly set up in the Constitution, as for the European Union. However, as we have seen, it was neither the intent of the authors of the Constitution of 1791, nor the intent of the authors of the following Constitutions. Moreover France had a tradition of strict separation of power: none of the authorities should be able to review the actions of the others, and a particular emphasis was put on limited powers given to the judges. At this time the fear of the government of the judges reached its apex. 54 France had to wait until the Constitution of 1958 to introduce this revolutionary system of judicial review and at first in a very limited way.

3. The Evolution before the Constitution of 1958:
From the Revolution until the Fourth Republic, 55 France established different constitutional systems. Each of them had its particularities but in every case the constitutional

54 The notion "gouvernement des juges" entered French political and legal vocabulary with Edouard Lambert, who used this expression to criticize the U.S. judicial review system. See Edouard Lambert, LE GOUVERNEMENT DES JUGES ET LA LEGISLATION SOCIALE AUX ETATS UNIS (1921).

55 Post-Revolution French history is divided as follow: the First Republic (September 22, 1792 - May 18, 1804); the Second Republic (February 26, 1848 - November 7, 1852); the Third Republic (September 4, 1870 - June 16, 1940); the Fourth Republic (October 27, 1946 - October 4, 1958) and the Fifth Republic that is now in its fortieth year.
review system was non-existent or merely symbolic.

a. Consulat and Empire:
The controlling organ was the Senate, its mission was to maintain or nullify acts that the "Tribunat" or the Government considered unconstitutional. However it was not an independent organ vis-à-vis the Emperor and moreover the "Tribunat" and the Government were both subject to the Emperor. As a result the system did work only at the end of Napoleon's reign when the Senate then declared all the Emperor's acts unconstitutional. 56

b. The Second Empire and the Third Republic:
The Constitution of 1852 (Second Empire) instituted a Senate, conferring on it the same kind of attributions as in the preceding system. However there was one main difference: not only the political organs' petition but also citizens' petitions could be refereed to the Senate. Nevertheless the Senate did not play a more active role than its predecessor. The Constitutional laws of the 1875, the Third Republic, did not provide for any constitutional review system.

c. The Constitution of October 27, 1946, the Fourth Republic:
The Constitution provided for an organ of constitutional

56 La Documentation Française No 1.15, Documents d'études Droit Constitutionnel et Institutions Politiques, "Le Contrôle de Constitutionnalité, I. Présentation Générale - France - Etats-Unis", p. 7.
review; however not in the sense we understand it now. Its name was the Comité Constitutionnel. From a political point of view it was a concession from the socialists and communists, to the moderates. This organ was not a judicial organ but more a conciliator between the two chambers: the national assembly and the Council of the Republic. Its composition was merely a political one: all its members were designated by a political authority and no juridical qualifications were required.

The Committee intervened only when there was a disagreement between the two chambers, for instance if a law was passed by the National Assembly although the Council of the Republic opposed it. A demand could be submitted to the Committee by the president of the Republic and the President of the Council acting together. The role of the Committee was to examine the law (before its promulgation) and to try to reach an agreement between the two chambers. If no agreement was

57 "Constitutional Committee".

58 Socialists and Communists refused any idea of "gouvernement des juges", they considered it a potential obstacle to social reforms.

59 Its president was the President of the Republic, and the Committee was constituted of the presidents of the two chambers, plus seven members elected by the National Assembly outside the National Assembly and three members elected by the Council of the Republic.

60 Article 92 if the Constitution of 1946.
reached the Committee had five days \(^{61}\) to decide if the law passed by the National Assembly necessitated a constitutional review. If the Committee considered that the law was constitutional it was promulgated in the normal time limit. However the conformity of the law to the Preamble of the Constitution of 1946 \(^{62}\) could never be examined thus limiting substantially the power of the Committee. Indeed only one question was submitted to the Committee, and the procedure was over before it reached any constitutional question. \(^{63}\) It was the closest attempt at a constitutional review system for France, before the Constitution of the Fourth of October 1958.

B. THE CONSTITUTION OF 1958:

The Fifth Republic represents an important evolution from the preceding systems, however it took time for the system to be considered as a fully effective mechanism. The Constitution of 1958 organized the Constitutional Council with different kinds of competencies \(^{(1)}\). It also enumerated the authorities that

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\(^{61}\) Two days in case of emergency.

\(^{62}\) As we will see further the preamble of the Constitution of 1946 has a great importance for the Fifth Republic and in the action of the Constitutional Council.

\(^{63}\) The Committee succeeded in reconciling the view of the two chambers and did not have to solve any question of conformity to the Constitution.
can refer a case to the Constitutional Council, this enumeration was completed by a constitutional amendment in 1974 (2).

1. The different competencies of the Constitutional Council:
The Constitution of 1958 gave two kinds of competencies to the Constitutional Council, a jurisdictional function (a) and an advisory function (b).

a. Jurisdictional function of the Constitutional Council:
This function gathers four kinds of activity:
The Constitutional Council checks the legality of the elections of the President of the Republic (Article 58 of the Constitution) as well as the election of the members of Parliament ⁶⁴ (Article 59 of the Constitution), their ineligibility or incompatibility with other functions. It also assures (Article 60 of the Constitution) that the procedure for referendums is duly respected.
In those particular situations, the case can be brought before the Constitutional Council by any public authority, as well as by an elector or a candidate. Thus the "popular sovereignty" is more respected under the Constitution of 1958 than under any of the preceding Constitutions.

⁶⁴ Concerning the election of the members of the European Parliament, the function of control belongs to the Council of State.
The second activity concerns the constitutional review of the law. Article 61 states that: "Organic laws, before their promulgation, and regulations of the parliamentary assemblies, before they come into application, must be submitted to the Constitutional Council which rules on their constitutionality. To the same end laws, before their promulgation, may be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the National Assembly, the president of the Senate or sixty members of the National Assembly or sixty members of the Senate (...)." 65 There were some attempts to allow a citizen to bring a case on the constitutional review of a law before the Constitutional Council however until now every attempt had been rejected. 66

The third activity concerns the control of compatibility with a Treaty. If the Constitution is not compatible with a Treaty,

65 Article 61 de la Constitution de 1958, as amended in 1974: "Les lois organiques, avant leur promulgation, et les règlements des assemblées parlementaires, avant leur mise en application, doivent être soumis au Conseil constitutionnel, qui se prononce sur leur conformité à la constitution. Aux mêmes fins, les lois peuvent être déferées au Conseil constitutionnel, avant leur promulagation par le président de la République, le premier ministre, le président de l'Assemblée nationale, le président du Sénat ou soixante députés ou soixante sénateurs (...)."

66 Nevertheless Robert Badinter cleverly suggested that the reform seems inevitable considering that it is not possible to treat the citizen as an "eternal minor", Le Monde, March 3, 1989 (DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES Jean Gicquel, at 755).
the former must be amended before the ratification of the Treaty. 67

Finally the Constitutional Council must check that the regulations of the assemblies do not contravene the Constitution (Article 61 al. 1 of the Constitution of 1958). The action of the Constitutional Council is mandatory on this matter. Apart from this jurisdictional function the Constitutional Council has also a consultative function. Although it is not the purpose of this paper to discuss this activity, a few words on it seem indispensable to fully understand the work of the Constitutional Council.

b. Consultative function:

In certain circumstances the Constitutional Council is called to give advice concerning crisis powers 68 (Article 16 of the Constitution), concerning elections 69 (Article 58 of the

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67 As an example we can cite the Constitutional Law of June 25, 1992.

68 Article 16 of the Constitution: "Lorsque les institutions de la République, l'indépendance de la nation, l'intégrité de son territoire ou l'exécution de ses engagements internationaux sont menacés d'une manière grave et immédiate et que le fonctionnement régulier des pouvoirs publics constitutionnels est interrompu, le président de la République prend les mesures exigées par ces circonstances, après consultation officielle du premier ministre, des présidents des assemblées ainsi que du Conseil constitutionnel. (...) Ces mesures doivent être inspirées par la volonté d'assurer aux pouvoirs publics constitutionnels, dans les moindres délais, les moyens d'accomplir leur mission. Le Conseil constitutionnel est consulté à leur sujet. (...)".

69 The Constitutional Council is consulted on the organization of the election of the president.
Constitution) or concerning a referendum 70 (Article 60 of the Constitution). Those are the powers enumerated in the Constitution in 1958. Compared to what France was used to, it was an advanced system. However the Constitutional Council reaches a higher level of autonomy from the government 71 when the amendment of 1974 passes.

2. The Constitutional Amendment of 1974:
The constitutional amendment 72 expanded the referral system. It authorized sixty members of the National Assembly or sixty members of the Senate to refer a law, before its promulgation, to the Constitutional Council.

France was traditionally opposed to a system of judicial review, and left wing parties were the most vigorous in this opposition. The left considered the judicial review system an obstacle to social reforms. However, in 1972 the Common Program of the Left adopted by the Socialists and the

70 In that case it is not really an advice given by the Constitutional Council but more an acceptance of the situation, a conformity to the decision of referendum: "avis conforme".

71 As we have seen, the authorities able to bring a case before the Constitutional Council were the President, the prime minister, and the president of the Parliament or the president of the Senate. Those authorities were usually of the same political side. Thus the constitutional review by the Constitutional Council was less effective: they would not refer to it a law they voted for.

Communists called for a Supreme Court with more power of judicial review. It was not that there was no system of judicial review at all, but the system was not very efficient. Prior to 1974, only the President, the Prime Minister, and the Presidents of the Senate and National Assembly had been empowered to refer a bill to the Constitutional Council. Thus during the first years of the Constitutional Council, due to the indirect method of electing Senators, only the President of the Senate was likely to be in political disagreement with the bill proposed by the Government. Indeed, most of the referrals, occurring between 1958 and 1974, were referrals from the President of the Senate. The 1974 Parliament took an important step in amending Article 61 (2) of the Constitution, allowing 60 members of the


74 When the Constitutional Council was first created under the Constitution of 1958, its purpose was to maintain the balance between the Government and the Parliament, and to prevent violations of the Constitution. However at the time, its organization merely led it to support the government in its action not to block it. Thus the authors of the Constitution did not consider it necessary to allow the referral power to too many authorities, and especially not politically opposite authorities.

75 Article 61 prior to the constitutional amendment of 1974, read as follows: "(...) To the same end laws, before their promulgation, may be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, or the President of one or the other assembly", in E. A. Groerner THE CONSTITUTIONS OF EUROPE, at 151 (University of Notre Dame, 1967).
Senate or of the National Assembly to invoke the jurisdiction of the Constitutional Council; thus opening the system of judicial review to a political minority. The increasing number of referrals after this amendment is a proof of the success of the operation. 76 For many authors the next step in the amendment process should be to allow the citizen to refer to the Constitutional Council. 77

The evolution of the Constitutional Council is not limited to a textual evolution. The legitimacy of the Constitutional Council also grows from its decisions and from its reactions to the political context in which it must act.

C. THE CONTEXTUAL EVOLUTION:
The interaction of the Constitutional Council towards political change 78 (3) and its decisions concerning the

76 However, as we will see in the next paragraph, this amendment became an important tool for political parties, trying to stop the bill of the opposite parties.

77 Several attempts were made between 1990 and 1993, all unsuccessful. However it seems more like a necessity to allow the citizen to be able to refer to the Constitutional Council when he can refer to the European Court of Justice or the European Court of Human Rights. It is not possible to consider the citizens an "eternal minor" in this area. Robert Badinter, Le Monde, March 3, 1989 (DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES Jean Gicquel, at 755).

78 This political change will be referred as political "alternance". During a certain period of the Fifth Republic, the majority and the opposition often shifted from the right to the left and vice versa. See footnote 2 and text accompanying.
Freedom of association 79 (1), leading to the development of the bloc of constitutionality (2), are two very important elements in the legitimization of the Constitutional Council.

1. The Decision of 1971:
The procedural history of the decision is the following: acting on the instructions of the Minister of the Interior, the Chief of the Paris' Police prohibited the formation of a radical political group on the ground that it was an attempt to reconstitute an organization that had been already lawfully banned. Simone de Beauvoir, one of the group's founders, challenged the refusal before an administrative court. The court stated that the Minister of the Interior lacked power to prevent the formation of a political group in the absence of explicit legislative authorization. Thus the Minister of the Interior sought legislative permission from the National Assembly. The latter amended the law of July 1, 1901, 80 to permit the executive to delay the recognition of suspect groups pending judicial investigation of their legality. The Constitutional Council invalidated the amendment. It ruled that freedom of association was "a fundamental principle


80 Law on the freedom of association, governing political organizations.
recognized by the laws of the Republic", protected by the Preamble to the Constitution of 1958. Thus this fundamental principle could not be subject to restraint even by the legislature. \(^{81}\) There are two important elements in this decision. First of all, and for the first time, the Constitutional Council decided to act against the government. Then the Constitutional Council based its decision on the preamble to the Constitution of 1958, giving a constitutional value to this preamble and to all the sources it incorporates. It gave a constitutional value to what is called the bloc of constitutionality. \(^{82}\)

2. The Bloc of Constitutionality:

The bloc of constitutionality contains the 1789 Declaration of the Rights of Man, and the Preamble to the Constitution of 1946, as well as the "fundamental principles recognized by the laws of the Republic". \(^{83}\)

The preamble of 1958 provides: "The French people solemnly proclaim their attachment to the rights of Man and the


\(^{82}\) "Le Bloc de Constitutionalité".

\(^{83}\) "The fundamental principles recognized by the laws of the Republic" are the laws promulgated during the first three Republics, relating to rights and liberties. DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES Jean Gicquel, at 765.
principles of national sovereignty as they are defined by the Declaration of 1789 and confirmed and completed by the Preamble of the Constitution of 1946". 84 Thus it incorporates the preamble of 1946 and the 1789 Declaration of the Rights of Man which clearly reflect a basis for protection of human rights and freedoms. However, under the Constitution of 1958 the preamble was not given the same effect as the rest of the Constitution. Moreover the Constitutional Council was not given judicial review power concerning the preamble. With the decision of 1971, the Constitutional Council gave itself competence to review bills according to the preamble, opening a wide field of review concerning human rights and individual freedoms. Moreover by incorporating the preamble of the Constitution of 1946, the Constitutional Council could then refer to the fundamental principles recognized by the laws of the Republic". 85

The Constitutional Council was, at first, conceived as an arbiter in the separation of powers. Then it granted itself a constitutional review power in cases concerning human rights. This new competence opened a new set of activities for the


85 The preamble of the Constitution of 1946 incorporated those fundamental principles.
Constitutional Council, and gave it the opportunity to set aside this role of mere arbiter between the different political authorities.

Two conclusions can be drawn from this decision. First of all there are rights guaranteed by the preambles to the Constitutions of 1946 and 1958, and, together with those of the Declaration of 1789, they must be considered fundamental rights. Therefore these rights must be given constitutional protection by the Constitutional Council. Secondly the Constitutional Council is the final arbiter of which rights are "fundamental" and thus protected by it. The Constitutional Council defined the various sources of fundamental rights that are refereed as "le bloc de constitutionalité" 86 in French Constitutional law. Thus 200 years after the French revolution and the Declaration of 1789, the Constitutional Council has emerged as an institution with expansive powers in the area of human rights. Those new powers, which the Constitutional Council granted to itself at first, are now accepted by the other French authorities. The Constitutional Council opened the door to a concept of judicial review power more in tune with other countries of the world. However the door is not

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86 The bloc of constitutionality.
open enough to allow the citizen to be part of this judicial review process.

Following this decision, the Constitutional Council had to face a more political problem, the political "alternance" of the government.

3. The political "alternance":
The political "alternance" is defined as the replacement, following an election, of a political majority by another one. It happened in France five times since 1981, and the last one was in 1997. The combination of the "alternance" and of the constitutional amendment of 1974 created a formidable tool for the opposition (whatever its political color) to restrain the action of the majority. "Referrals to the Constitutional Council are extraordinarily efficacious weapons in the hands of the opposition". Indeed the referral of a bill to the Constitutional Council automatically suspends its promulgation until the Constitutional Council reaches its decision. By repeating the operation systematically, it was the risk to create a political instability. France has now a better

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89 This fear was expressed by a member of the Consultative Constitutional Committee, formed to consider the Constitutional Council: "Every times a law gives rise to an impassioned debate, the opposition
understanding of the alternance mechanism, at first it was a confused situation for the Constitutional Council. However, the Constitutional Council acted as a non-political body and tried to harmonize its decisions. Nowadays the political "alternance" is no longer a problem, considering that most of the bills are referred to the Constitutional Council anyway.

In the European Union, like in the French system, the judicial review system was introduced by the text. However, the Constitution of the United States does not mention a judicial review power.

IV. THE UNITED STATES

The judicial review power, in the United States, was not a power expressly mentioned in Constitution (A). However the Constitution granted a "judicial power", Article III, 90 to the

will not fail to refer it to the jurisdiction of the Constitutional Council, and in the end the actual government will be in the hand of the retirees who will be sitting on this Council", Louis M. Aucoin, Judicial Review in France: Access of the Individual under French and European Law in the Aftermath of France's rejection of Bicentennial Reform, 15 B.C.Int'l & Comp.L.Rev. 443, footnote 24.

90 Article III, Section I: "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 (...)".

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US Supreme Court. The judicial review power has grown out of the interpretation, by the US Supreme Court, of the Article. The initiative was seized by the Chief Justice Marshall in Marbury v. Madison (1803). In this case, Chief Justice Marshall took upon himself to interpret the Constitution and to deduce from it, a judicial review power inherent to the Court (B). This case brought to light a new power for the US Supreme Court, which had to determine how far it could go using it. Thus I will study the action of the US Supreme Court regarding the development of the right of privacy (C).

A. THE US CONSTITUTION, ITS ORIGIN AND ACCOMPLISHMENT

After the breach with the United Kingdom, a commission was given the task to write the "Articles of the Confederation and Perpetual Union". Those Articles were ratified by the different States between 1778 and 1781. However, those Articles were not strong enough to prevent economic problems and stagnation that occurred at this time. To try to solve this problem, a convention was organized in Philadelphia in May 1787. The idea was to create a central government with

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91 Marbury v. Madison, 1 Cranch 137 (1803).

92 Mainly, the small states of the Union applied a strong protectionism towards any other states.
real power, and at the same time to avoid that the smallest states were put in continual minority. As a compromise between those two interests, the Convention created a Congress with two chambers. Moreover the Constitution organized the division of powers: the legislative was given to the Congress, the executive to the President, elected for four years, and the judiciary was divided between a Supreme Court and lower courts. The Framers of the Constitution tried to balance two conflicting interests: giving more power to the central government without diminishing the power of the states. According to the Founding Fathers, the Articles of the Confederation did not succeed in creating a Union, the executive was not strong enough and the states were too independent. With the new Constitution, the Founding Fathers tried to re-equilibrate the situation. The Founding Fathers believed the Union needed a stronger central government than the one under the Confederation. However, the Constitution was missing a written document protecting the fundamental rights of the citizens. Without this document the fear of a too strong government was predominant. Consequently, the

93 The lower courts were to be created by the Congress, Judiciary Act of 1789.

94 See A. Hamilton, The Federalist, no. XV and LXX.
Constitution was only ratified when the assurance was given that a bill of rights would be proposed. The Constitution entered into force the first Wednesday of March 1789. Between 1789 and 1791, the States agreed on the Bill of Rights that correspond to the first ten amendments of the Constitution. As much as the Constitution tried to organize the different powers within the federation, it did not anticipate the judicial review power. However the question was raised a few times, before Marbury v. Madison, between scholars as well as before the courts. In a very interesting article, Donald F. Melhorn relates a moot court argument pro and con a constitutional review power given to the US Supreme Court. Listening to each argument we can understand the complexity of the problem. Mr. Twining (pro argument for constitutional review power) argued that because the Constitution defined and limited the power of the legislature, it is necessary to find a way to ensure the respect of those limitations. "The limitations of the powers of the Government, by the

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96 To be exact, the argument does not distinguish judicial review power given to the Supreme Court or to State Courts. The students, opposing in this Moot Court, decided not to make a distinction. "As framed by agreement, the proposition to be argued in the Moot Court did not specified whether judicial review was to be addressed as a matter of federal or state constitutional law", at 346.
Constitution will be considered as merely advisory and we at once adopt the doctrine of omnipotence of the Legislature". 97 If the legislature is the sole judge of the unconstitutionality of its action, its power cannot be said to be limited by the Constitution. Thus it is not possible to rely on the good will of the legislature to respect the limitations imposed by the Constitution. One of the reproaches to the Constitution was that it considered that each institution would, honestly and carefully, respect its powers and limitations. This position was considered too idealistic, and originated the discussion of the judicial review power. As a contra argument, Mr. Tod mentioned what was in everybody's mind at the time of *Marbury v. Madison*, i.e. where in the Constitution is it written that the Courts can review the acts of the legislature. 98 Moreover, the power to repeal a law is in better hand if it belongs to the legislature than to the judges. Mr. Tod considered that if a law is unconstitutional it will, soon, be repealed by the legislature. Giving the

97 *Id.* at 348.

98 "But it becomes here important to determine by what authority the judges claim a right to this power, do they derive it from the Constitution? This has not even been pretended. Have the people given them this power? The people have spoken by the Constitution, in which it is not claimed that there is any such authority given. It is plain then that it must be an assumption of the power by the judges if they pretend to any such Authority". *Id.* at 349, 350.
power of judicial review to the judges would transform the legislature into "mere cyphers in the government". The reproach is that the judge would become the law-maker. However to this argument, Mr. Twining retorted that: "It is said that this power elevates the judges above the Legislature and that it makes them Legislators. But it is not true, for by exercising this power the judges do not make laws, they only declare what is law". According to him the power of constitutional review will be less abused if in the hands of the judges than of the legislature.

Those arguments are still valid, however the judicial review power of the US Supreme Court is not questionable anymore. The only interrogation is probably the limits of this power. This discussion showed us the ambiguity of the power of judicial review, it was not foreseen in the Constitution but at the same time the system would not have worked without it. Reading the argumentation against the judicial review power recognized to the courts, reminds us how much power the US Supreme Court holds in its hands. The US Supreme Court is able to defeat a

99 "Not an act can they pass but must be scrutinized by the judges and receive their sanction before it can be considered as a Law obligatory upon the people". Id. at 350.

100 An argument well known in France, see above Part III.

101 Id. at 349.
law of the Legislature; it is not a mere reading of the Constitution. One proof of the large power of the US Supreme Court in interpreting the Constitution, lies in the analysis of Marbury v. Madison, in which the Court gave itself this power of judicial review.

B. MARBURY v. MADISON:

As mentioned earlier the Constitution does not state any judicial review power. However Chief Justice Marshall took the opportunity of the Marbury v. Madison case, to infer this power from the Constitution.

1. The facts of the case:

The historic context of the case influenced the decision. At the time, there was a conflicting situation between the federalists and the anti-federalists. The former supporting the outgoing President, John Adams, and later the new President, Thomas Jefferson. On March 4, 1801, the power changed hands. However to avoid losing too much influence, the Federalists decided to act before the new President entered into office. They were holding the executive as well as the majority of the outgoing Congress. To ensure them a future support of the judiciary, the Federalists amended the federal

102 Marbury v. Madison, 1 Cranch 137 (1803).
courts' system in February 1801. The Organic Act of the District of Columbia of February 27, 1801, allowed President Adams to appoint 42 Justices of the Peace, before the arrival of the new President. William Marbury was one of those Justices. The law stated that the President should appoint the judges and that the Secretary of State should sign after the confirmation of the Senate. Then the person nominated should be notified. On March 2, 1801, President Adams signed 42 nominations, he obtained confirmation from the Senate on March 3. The same day, the Secretary of State, John Marshall, signed the nomination. He, then, entrusted his brother, James Marshall, to notify the people concerned of their nomination. It was late on March 3, 1801, when James Marshall decided to stop working, he did not complete his task. James Madison, the new Secretary of State, refused to pursue the notification. The would-be justices of peace, included William Marbury brought suit directly to the US Supreme Court. They sought a writ of mandamus compelling Jefferson's Secretary of State (Mr. Madison) to deliver their commissions.

2. The reasoning of the US Supreme Court:

Chief Justice Marshall divided the decision in three different

103 The same John Marshall who, a few years later, was Chief Justice of the US Supreme Court and decided this case. The reason why he did not dismiss himself for conflict of interest is still not answered.
parts corresponding to three different questions. He first considered the right to the commission of the justices of the peace (a), then he examined the remedies that were available to them (b), and finally he stated on the granting of the mandamus (c). 104

a. The right to the commission: Marshall stated that the justices of peace did become entitled to their commission once the commission had been signed by the President and sealed by the Secretary of State. Thus it is not the delivery of the Commission that created the office but the signature of the President. Marshall decided not to considered the delivery of the commission a validity requirement to get into the office. According to this statement, the justices of the peace were entitled to their commissions.

b. Remedy: Marshall had to decide whether the failure to deliver the commission entitled the plaintiffs to some sort of remedy. 105 Marshall distinguished between political acts, which are not entitled to review by the courts, and acts

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104 It is concerning this question that Chief Justice Marshall declared the judicial review power of the US Supreme Court, which as we can see was not addressed directly to the Court.

105 One element that surprised us, is that this question should have been discussed earlier. If the justices of peace did not have a remedy the whole action would have been over before starting. However the US Supreme Court decided not to study this question first, giving itself the opportunity to discuss the right to commission of the justices of peace.
specifically required by the law, which are entitled to
review. The delivery of the commission was an act specifically
required by the law, thus reviewable. The Justices of peace
had a remedy. This leads us to the third point of the case,
was the US Supreme Court entitled to grant a mandamus?
c. The granting of the Mandamus by the US Supreme Court: Chief
Justice Marshall had to decide whether the particular remedy
sought by the plaintiff could be granted. Marshall's argument
is divided in two parts. First of all the Judiciary Act 106
provided that the US Supreme Court had the jurisdiction "to
issue (...) writs of mandamus (...) [to] persons holding
office under the authority of the US". Thus accordingly, the
US Supreme Court should have been able to grant the mandamus.
However Chief Justice Marshall added an element to this
consideration, which led us to the actual power of judicial
review of the US Supreme Court. Chief Justice Marshall stated
that the authorization, of the Judiciary Act, to grant a writ
of mandamus was in conflict with Art. III, Section 2, § 2 of
the US Constitution. This article grants original jurisdiction
to the US Supreme Court only "in all cases affecting
Ambassadors, other public Ministers and Consuls, and those in

106 Judiciary Act of 1789.
which a state shall be a Party". Chief Justice Marshall mentioned that the grant of a writ of mandamus was not among the type of cases enumerated by the Constitution. Thus he held that the congressional statute was unconstitutional. To his argument, Chief Justice Marshall added two important elements. He first stated that the Constitution is "paramount". The purpose of the Constitution was to established a fundamental law, considering the Constitution a mere law would defeat its own purpose. Thus an act of the legislature repugnant to the Constitution should be void. Then he presented the argument concerning the judicial review power of the US Supreme Court. Chief Justice Marshall stated that: "it is emphatically the province and the duty of the judicial department to say what the law is". 107 By this very sentence, Chief Justice Marshall justified the power of judicial review of the US Supreme Court, considering that it was the duty of the Court 108 to consider the constitutionality of a congressional statute. Strictly speaking the Constitution did not consider that the US Supreme Court should exercise any power of judicial review on congressional acts. However the US Supreme Court, through

107 Marbury v. Madison, 1 Cranch 137 (1803).

108 Thus as opposed to the duty of the Congress.
Chief Justice Marshall, decided that it was its duty to do so. This point was not even among the questions asked to the US Supreme Court; however it turned out to be one of the most important decisions of the US Supreme Court.

3. The criticisms of the case:

One of the main criticisms of the case did not concern the fact that the Constitution was superior to a statute, but concerned more Marshall's argument that it is the Court and not the Congress that ought to decide whether a statute is in conflict with the Constitution.\(^{109}\) Nowhere in the Constitution is it stated that the US Supreme Court possessed the power of judicial review. Those criticisms could still be valid nowadays, however this decision was never overruled, and it would, now, be totally out of place to deny this power to the US Supreme Court. The US Supreme Court used this power to play a central role in the United States. It did not grant this power to itself just to have more power, but to participate, in its own way, in the unification process in which the United States was embarking.

After studying the different ways the Courts decided to enhance their power of judicial review, I will focus on the

\(^{109}\) This was also one of the argument mentioned during the debate in 1787 concerning a judicial review power, see (A) above.
different methods of interpretation used by the Courts. Studying the methods of interpretation gives an insight on the mode of action of the Courts. The methods of interpretation are an important tool in the definition and delimitation of the power of the Courts.

In the European Union, as in the French system but not as in the United States, the judicial review system was introduced by the text. However the evolution of the system in the European Union was easier than in France.

V. THE EUROPEAN UNION

The judicial review system was considered indispensable to the Framers of the Communities; it was thus included in the first Treaty concerning the European Communities. The EEC Treaty provided a system of judicial review of the legality of all

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The first three Treaties consisted of the Treaty Instituting the European Coal and Steel Community (ECSC, April 18, 1951), the Treaty Establishing the European Atomic Community (hereinafter EAC, March 25, 1957) and the Treaty Establishing the European Economic Community (hereinafter EEC, March 25, 1957). These Treaties have been amended several times, always moving towards a stronger Union. The most notable amendments were the Single European Act (hereinafter SEA, February 7, 1986) and the Treaty on the European Union (hereinafter Maastricht Treaty, February 7, 1992) this Treaty changed the name of the European Economic Community Treaty in the European Community Treaty (hereinafter EC Treaty).
acts of the Council and the Commission other than recommendations and opinions. With the amendments of the Maastricht Treaty, Article 173 states: "The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of powers (...)".

The amendment of Article 173 was the result of the European Court of Justice case-law. In this chapter I will discuss the evolution of Article 173 of the EEC treaty, which became Article 173 of the EC Treaty as a result of the European Court of Justice's case-law (B). However, it is, first, necessary to discuss why the European Court of Justice can be considered as a court exercising constitutional review. The question to solve is the following: are we dealing with a Treaty or a

111 European Central Bank.

112 The underlined parts represent the amendments of the Maastricht Treaty.
Constitution? (A). I will then examine how the European Court of Justice developed its own set of general principles of law (C).

A. ARE WE DEALING WITH A CONSTITUTION?

The purpose of this paper is to reveal the action of the Courts as Constitutional Courts, that is to say courts interpreting a Constitution or principles of constitutional values. To know if the European Court of Justice fits in this category it seems necessary to identify the nature of the texts it is referring to. Is the Treaty merely an International Agreement or a Constitution for the Union? It would be difficult to discuss the power of one of the authorities of the European Union without evoking the problem that is on everybody's mind concerning the Union: is it a federation? The distinction between confederation, federation and decentralization is a difference in degree. 113 A confederation will not have a federal government on the top of the states. It is more an alliance between states with a simple structure at the top. Its origin is in a treaty, an international agreement. The decisions have to be taken by an

unanimous vote. Its advantage is that it respects the sovereignty of the states, its disadvantage is a weak efficiency due to its infrastructure and the rule of unanimity. A federation has a more developed structure than a confederation. First of all there is a federal government on the top of the states. Its origin is in a constitution. The federal decisions are taken by a majority, and their execution can be imposed to the states by the federation. Its advantages are efficiency and flexibility but on the other hand it does not give much consideration to the sovereignty of the states. Finally there is decentralization, it concerns a unified state and its territorial communities. The latter do not have their own government or constitution, and they do not participate in the state's decision. The difference among those three infrastructures is a difference in degree, the question is: to which one does the European Union belong?

However this is not the purpose of this paper, and its length does not authorize me to develop this important topic. Nevertheless I will touch upon the subject by studying the texts creating the European Union and more precisely I will try to determine how close those texts are to representing a Constitution for the European Union.

It would be inadequate merely to compare the European Union to
another international organization. It is obviously much more than this. However some authors go very far in the qualification of the European Union. According to Koenraad Lenaerts there is no doubt that the European Union is a federal system and that the Treaty symbolized its Constitution: "Federalism is present whenever a divided sovereignty is guaranteed by the national or supranational constitution and umpired by the supreme court of the common legal order". Again I will not discuss the nature of the European Union but I will start from Koenraad Lenaerts' affirmation. He considered that the different treaties of the Union symbolized a Constitution for the European Union. From this affirmation I will try to determine if the European system has its place in this paper dealing with constitutional review.

114 "The Court has consistently and energetically espoused the view that the Community legal order has its own distinctive characteristics. It is neither national law, nor international law; it is sui generis; it is Community law". Stephen Weatherill & Paul Beaumont EC LAW at 41. To qualify an organization as sui generis implies that the unique nature of the organization does not allow us to classify it in a pre-determined category.

115 Judge at the Court of First Instance of the European Communities, and Professor of European Community Law at Leuven University.

116 "(There is) no longer (...) an obstacle to the characterization of the European Community as a federal system" in Koenraad Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 American Journal of Comparative Law 205, 256 (1990).

117 Id. at 263.
The European Court of Justice stated in one of its most important cases 118 that the Treaty was not a simple international agreement: "The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States". Moreover in another case, Les Verts v European Parliament, 119 the European Court of Justice even used the expression "constitutional charter" in reference to the Treaty. 120

"The term 'constitution' may not only designate the system or rules according to which a State (…) is governed and which affects the distribution as well as the exercise of sovereign power in the State. As the word stands for a general legal concept (…) it is also an appropriate name for the international act instituting an intergovernmental entity devoted to the pursuit of specific purposes, setting up principal organs, specifying the relationship of these organs


119 Case 294/83 Les Verts v European Parliament [1986] ECR 1339, see below section II.

to one another, defining the position of the international organization vis-à-vis its Member States". 121 This definition fits perfectly the Treaty of the European Union. 122 The scholars divide into two major groups. The one that considered that the European Court of Justice is interpreting a Constitution and those who considered that the European Court of Justice is merely interpreting principles enumerated in a Treaty but having constitutional value. Indeed considering the Treaty as a constitution would result in describing the European Union as a federation, which is a step that many scholars, politicians and citizens are not ready to take. The Treaty cannot merely be considered as another international agreement, but on the other hand it cannot either be considered as a Constitution like the French one or the American one. The solution is to identify the treaty as a text stating principles of constitutional value. Following this affirmation the European Court of Justice can be characterized as the authority exercising constitutional review in the


122 Indeed Mr. Hahn’s definition appears to have been written essentially looking at what the treaties of the European Union represent.
European judicial system. 123 Thus it has its place in this paper. Indeed the EEC Treaty considered this power of judicial review from the very beginning of the Communities, Article 173 of the EEC Treaty.

B. THE EVOLUTION OF ARTICLE 173:

At first the system of judicial review concerned only the legality of all acts of the Council and of the Commission other than recommendations or opinions. The European Court of Justice interpreted this provision relatively freely and transformed it into the judicial review of all "measures adopted by the institutions, whatever their nature or their form, which are intended to have legal effect", 124 including those adopted by the European Parliament. 125 The Maastricht Treaty amended Article 173 and merely included the power that the European Court of Justice recognized to itself in its

123 F.G. Jacobs explained that the European Court of Justice cannot be considered as a specialized constitutional court. It is a Court of general jurisdiction over all questions of community law (Article 164 EEC Treaty). It is by examining those questions of community law that the Court had to answer constitutional review questions. "Is the Court of Justice of the European Communities a Constitutional Court?" in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, Deidre Curtin & David O'Keefe (1992).

124 Case 22/70 Commission v Council [1971] ECR 263, 277 (ERTA case). In this case the question was whether or not an action is possible against acts, other than those enumerated in Article 189 EEC Treaty.

case-law. In their book EC LAW, Stephen Weatherill and Paul Beaumont pointed out that the European Court of Justice extends the field of the judicial review by exercising a power of policy-making. This power enables it to go sometimes beyond a mere interpretation of the Community texts. Although this attitude of policy-making by the European Court of Justice is often criticized, scholars recognized it as inevitable considering the problems encountered by the Court when it tries to interpret the Treaties.

Weatherill and Beaumont divided this policy-making power in three categories. The first situation concerned a legal provision that gives wide discretion to the judges. As an example we can refer to the European Court of Justice’s approach of the interpretation of “charges having equivalent effect”, Article 12 of the EC Treaty and “measures having equivalent effects”, Article 30 of the EC Treaty. Those two provisions can be refered to in a lot of cases. It is in the power of the European Court of Justice, policy-making power, to determine which cases fall in the field of those provisions. Then when the Treaty is silent on an important point of law, the European Court of Justice will exercise this

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power of policy-making. One of the best examples concerned the
development of the doctrine of the supremacy of community law.
The reasoning of the Court was the following: even if the Trea-
ty was silent on the point concerning the supremacy of com-
community law, it gave enough indications as to the fact that com-
community law is the supreme law of the land.\textsuperscript{127} Finally the third situation concerns cases in which the European Court of Justice reaches a decision despite textual indications to the contrary. An example is the case concerning the extension of judicial review to certain acts of the parliament: *Les Verts v. European Parliament*.\textsuperscript{128} Article 173 of the EEC Treaty did not authorize judicial review of acts of parliament. However the European Court of Justice departed from the letter of the Article, emphasizing that the European Communities are based upon the rule of law. Thus neither its Member States nor its institutions can avoid a review of their acts in conformity with the EEC Treaty, "the Community's basic constitutional document".\textsuperscript{129} The European Court of Justice justified its

\textsuperscript{127} However, Hjalte Rasmussen, one of the leading writers who has been critical of the European Court of Justice, stated that "the Court probably pushed its gap-filling activities beyond the proper scope of judicial involvement ... stating that ... Community law must be considered the supreme law of the land" in *ON LAW AND POLICY*, p. 28.


\textsuperscript{129} Stephen Weatherill & Paul Beaumont, *EC LAW*, p. 179.
reasoning by arguing that, at the time Article 173 was written, the European Parliament did not have the power to adopt acts intended to have legal force with regard to third parties. The purpose of Article 173 was to offer the possibility of submitting to judicial review any acts having legal force with regard to third parties. As European Community law developed the power of the European Parliament was often discussed. Finally subsequent amendments to the Treaty gave the European Parliament increased powers (particularly in relation to the budget). According to the Court it would have been contrary to the spirit, and the scheme of the Treaty to allow the European Parliament to pass measures that are not subject to review under Article 173, but that could encroach on the powers of the Member States or other institutions or exceed the limits of the Parliament’s powers. As we can see in this case, the European Court of Justice granted itself the power to interpret the meaning of Article 173 contrary to its letter. It based its argument on another article of the Treaty (Article 164), and invoked the

130 The Court referred to Article 164 EEC Treaty that stated: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". This Article offered, to the European Court of Justice, a rather wide field of action and interpretation.

131 Article 173 EEC Treaty stated precisely which acts were subject to judicial review and the acts of the parliament were not among them.
respect of the spirit and scheme of the Treaty. The European Court of Justice tried to fill in the gap of the Treaty. It was an attempt to compensate for the slowness of the institutions and to take the necessary measures to re-equilibrate the different powers after amendments. 132 However the European Court of Justice does not often reach decisions that are contrary to the textual indications of the Treaties, and it should cease to do so. Even if the Court was right in its action, 133 nothing gave it the power to rewrite the Treaty, even to achieve the institutional balance of the Union. The action of the Court can be understood as an anticipation of the needs of the Union. Nevertheless the European Court of Justice is a non elected body and as such it should not act contrary to the texts. In defense of the Court two elements can be noted. First of all the Court acted to preserve the legal value of the texts. As we read Article 164 of the Treaty, 134 the question that occurs is to which law it is referring? Is it the letter of the Treaty or the principles

132 As explained above the European Court of Justice justified its decision, in Les Verts v. European Parliament, on the basis that the Treaty was amended concerning the power of the European Parliament but not concerning the judicial review of the acts resulting from this new power.

133 The Maastricht Treaty clearly validated its decision by amending the EEC Treaty in conformity with this case-law.

134 "The Court shall ensure that in the interpretation and application of this Treaty the law is observed".
resulting from it? As we have seen in the case above mentioned, those two propositions (the letter of the Treaty or the principles resulting from it) can be opposed to one another. The Court decided to apply the principles resulting from the treaty. Moreover the Court must adapt skeletal provisions to concrete factual situations. Thus the court has to go beyond the letter of the Treaty. \textsuperscript{135}

\textbf{VI. CONCLUSION}

The differences between the three legal systems correspond to the different preoccupations that animated the framers when the systems were created. In the American system, the Founding Fathers had a more internal concern than in the European Union for instance. The US Supreme Court considered the necessity of a vertical delimitation of the different powers. The purpose was to ensure the integrity of the federal sphere of competence. At first it appeared that the authors of the Constitution had enough confidence in the different

\textsuperscript{135} As we have seen in part II, above, concerning the methods of interpretation, the European Court of Justice can be very inventive on the subject.
authorities not to step on the power of the other branches; thus the Constitution did contain a provision concerning judicial review. However, since the system appeared to be implausible, the US Supreme Court decided to step in, and granted to itself a power of judicial review. In the European system, the concern was of a different nature. There was a desire of the framers not to impinge upon the sovereignty of the different member states. Thus, from the beginning the judicial review power was granted to the European Court of Justice. 136 However the European Court of Justice, aware for its integrative mission, balanced the power of the institutions, even before the Treaty did so. The French system had to face a more delicate situation. Its whole history cries out against any judicial review power. When the Constitutional Council was created, under the Fifth Republic, the goal was not to have a real judicial review organ, but more an organ that could strengthen the action of the government.

What we have seen, throughout this thesis, is that those Courts used the power that was given to them to take part in the construction of their system. They did not just use and

136 The member states were concerned by the political power of the Community; thus some limited were placed from the very beginning on the power of the institutions. This is one of the reasons why the judicial review power was determined, from the very beginning, as a necessity in the Treaty.
abuse the power that was given to them. They tried to act in a reasonable way, aware of the power in their hand, but caution as well as to the reaction their decision could create. There is judicial activism from those courts, however they kept in mind the ideas that their credibility, and thus their action, could be endangered by an excess of their power.
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