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SHOULD THE EUROPEAN COURT OF JUSTICE DEVELOP A POLITICAL QUESTION DOCTRINE?[1]

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Abstract. This paper comparatively investigates the role of the so-called political question doctrine in contemporary adjudication. Equally hailed and criticized, the doctrine is an indirect discussion on the perennial question of the border between law and politics. Thus, this contribution firstly seeks to illustrate the idiosyncratic context in which the political question doctrine operates and to ascertain the instability of its meaning, as well as its evolving content over time. Second, this paper examines the scholarly debates that surround the existence of a political question doctrine in the practice of the European Court of Justice (ECJ), as well as the (in)desirability of an express articulation of the doctrine by the ECJ. This study is therefore imagined as an implicit comparison: the theoretical insights drawn from several common law jurisdictions inform the approach to EU law, while, in turn, the EU example is employed as a background against which to consider and revisit some of the doctrine's limits and possibly even perils. Without attempting to provide a taxonomy of cases in which "political question" types of arguments may arise before the ECJ, this paper identifies – mostly through doctrinal study – examples of alternative strategies or concepts so far employed by the Court in order to deal with issues generally defined as "political". Finally, this contribution weighs some of the advantages and disadvantages that the adoption of the doctrine would bring in practice, both in light of the Court's position within the institutional system, and of the specific features of the EU's legal construction as a whole.

Keywords: political question doctrine, law and politics, standards of review, US case-law, EU law, US Supreme Court, CJEU

Introduction

Courts resolve cases. Sometimes, however, they do more than just that – such as when they delve into theorizing about their very role. When this happens, judicial review becomes the locus of a meta-discourse. The courts' dicta are no less theory than the theory of a constitutional law treatise. At the same time, they are no less law than the law of the Constitution itself.

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Together with the matter of unconstitutional amendments to the Constitution, the political question doctrine comes perhaps closer than any other issue to confronting judges with the need to overtly expose their views regarding the distribution of power in the very process of adjudication. Conceived as a legal tool that serves to prevent judges from "entering political waters", the doctrine forces them (or rather judges force themselves) to reflect on the endless topic of the interface between law and politics (Cohn, 2011, p. 681). Should judges review the composition and training of the military (*Gilligan v. Morgan*, 1973), control the budgetary decisions of health authorities (*R. v. Cambridge*, 1995), determine police impeachment procedures (*Nixon v. United States*, 1993), discuss foreign policy matters (*United States v. Curtiss-Wright Export Corp.*, 1936; *Youngstown Sheet & Tube Co. v. Sawyer*, 1952), or decide whether a date can be declared a public holiday by the government (*Patriotic Party v. Attorney-General* (31 December Case), 1994)? These are just some of the myriad of questions that can and have raised puzzling issues concerning the reach of the judiciary's power. When it comes to the idea that judges engage in (judicial) politics, their reactions – as expressed in judicial opinions – vary from strong rejection to mild acceptance, with no judge openly admitting that they retain enough freedom to act politically within the constraints imposed by the law.

It is, of course, no surprise to anyone that constitutional and other apex courts have the "authority to promulgate doctrine that is supplemental to and different from the commands of the Constitution itself (…) because, taken by themselves, the Constitution's commands are too porous and general to be instantiated in everyday life" (Seidman, 2004, p. 470). In the context of the increased judicialization of politics (Ferejohn, 2002; Guarnieri & Pederzoli, 2002; Hirschl, 2004), the fact that judges have composed a doctrine of deference towards the political branches of government might appear to be an act of appeasing modesty. On the other hand, given that the judicialization of politics is sometimes a deliberate enterprise on the part of politicians who strategically invite courts to deal with highly controversial issues, this doctrine could also be seen as a riposte by courts who refuse to "taint" their legal purity. Depending on one's views on judicial review, then, the doctrine can be interpreted either positively, negatively, or – alternatively – there might be some who perceive it as neutral.

Indeed, the political question doctrine has been both celebrated as securing and enhancing the principle of the separation of powers and denounced as "the most dangerous concept in all of constitutional law" (Seidman, 2004, pp. 442–443). When applied to constitutional adjudication, the debate is essentially one between legal and political constitutionalism (for an applied discussion of the various types of constitutionalism, see Blokker, 2017a). Should courts be the exclusive interpreters of the Constitution, or should we entrust the other branches with the possibility of having the final say over the meaning of at least some constitutional provisions? This question is far from a purely theoretical one, without any real-world consequences. An important point is made by Paul Blokker (2017b), who maintains that "an intrinsic problem of legal constitutionalism in the post-communist transformations has been its tendency to isolate constitutional questions from the wider public", an observation in line with Gabor Halmai (2019) and Wojciech Sadurski's (2005) assessments, the latter of whom "argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society" (Blokker, 2017b). Thus, if these authors are correct, legal constitutionalism could be linked – albeit indirectly – to the current wave of populism, at least in Central and Eastern Europe. However, to what extent does the presence of a political question doctrine actually result in the increased participation of the public in societal debates regarding values? In other words, does the existence of a political question doctrine in a court's vocabulary bring about less legal constitutionalism and more political constitutionalism?

In this paper, we argue that the contrary might, in fact, be the case. Assuming that the existence of political constitutionalism alongside legal constitutionalism is a desirable outcome, the doctrine under scrutiny merely creates the illusion of a superior distribution of powers. Our argument is organized into two main parts. The first part – the more theoretical of the two – draws mainly (but not exclusively) on US case-law and legal scholarship to show that the political question doctrine cannot be stabilized. Rather, its content changes from one jurisdiction to another, from one period to another, and from one interpreter/judge to another. As a consequence, no matter what judges pretend to do when using it, the doctrine itself remains a question of form rather than substance,

offering no principled basis for judicial decision-making. As such, it only adds to the already vast arsenal of formal self-abnegation. Alternatively, the focus on form is tributary to a "command model" of adjudication, which has been shown to have important limits and possibly deleterious effects on political and civic constitutionalism (2). In the second part of the paper – which is specifically dedicated to the political question doctrine at the ECJ – we aim to highlight that, besides its theoretical shortcomings, this doctrine might also be inadequate when applied to a particular institutional setting (3). Thus, the current study is imagined as an implicit comparison: the theoretical insights drawn from several common law jurisdictions will inform our approach to EU law – a legal order which, until now, has been much more reluctant to work with a so-called political question doctrine. In turn, the EU example will serve as a valuable background against which to consider and revisit some of the doctrine's limits and possibly even perils.

1. The Political Question Doctrine: Comparative Lessons

The notion of "generic law" features prominently among the theoretical notions developed by comparative constitutional lawyers in recent decades (see, for instance, Law, 2005). In short, it stands for the idea that judges around the world use similar tools of reasoning, whether or not this leads them to the same solutions – to such an extent that it might even be difficult to ascribe a specific language to a specific jurisdiction. If one were to choose what to include in a list of generic tools, proportionality would undoubtedly be the first candidate. The political question doctrine might well be the second. Having originated in the US, the doctrine gained traction in many other jurisdictions (see, for instance, Mhango, 2014) and has been said to "retai[n] a place of honour in other common-law systems" (Cohn, 2011, p. 679). *Marbury v. Madison* instituted judicial review, but at the same time "contain[ed] the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches" (Barkow, 2002, p. 239). Since then, the doctrine has been used with a certain constancy. However, with almost every iteration the doctrine has acquired new meanings, so much so that it has become difficult to talk about "the" political question doctrine. Indeed, while the name (the main signifier) might stay the same, what we put into the content of that which is signified varies in space (2.1), in time (2.2), and from individual to individual (2.3). Each of these sections will allow us to demonstrate that the political question doctrine has its own politics, and to anticipate some of the key aspects to be discussed later on in relation to the European legal order.

1.1. Culture Matters: From Israel to the US, Passing Through the UK

The idea that place matters is the first lesson to be learnt from a comparative study dedicated to the use of the political question doctrine in three common-law jurisdictions. Having investigated the functionality of the doctrine in Israel, the US, and the UK, Margit Cohn (2011) concluded that the way in which the doctrine is deployed depends on the country's constitutional ethos.

Thus, UK does not seem to have any "fixed formula" on which judges could rely should they wish to abstain from deciding a case deemed to be of a political nature, as:

> [The] British justiciability formula is linked to subject matter, a technical test that carries non substantive justification. (…) Additional explanatory and objective criteria have been proffered in the case-law, but in a haphazard fashion. To date, no court has been ready to advance a formula that would encompass these criteria (Cohn, 2011, p. 709).

The idiographic spirit of the common law, which understands justice as obtained through the flexibility of *ad hoc* adjudication, provides us with only a limited explanation for why the UK lacks a proper political question doctrine. After all, the US – another common law country – seemed ready to develop such a doctrine, and moreover did so

under the guise of a very specific test.[4] Therefore, a better explanation as to why the UK never embraced a fully-fledged political question doctrine lies, Cohn (2011) argues, in the transition that British public law has undergone from a "body of law based on history, tradition, the rule of law, and the sovereignty of Parliament" to a "body of law based on constitutionalism and liberalism" (p. 711), in relation to which courts are no longer as circumspect as they used to be. The recent decisions of the United Kingdom Supreme Court related to Brexit – informally known as *Miller I* and *Miller II* (*Miller; Cherry* (*R. (on the application of Miller) v. Prime Minister*, 2019) – might be regarded as confirmation of this transformation, although as this question continues to be hotly debated (see Craig, 2020a, 2020b; Loughlin, 2020) it could yet be too soon to pronounce a verdict. However, this shift in British constitutional law has not necessarily brought it closer to its American counterpart. Indeed, reading Jackson Myers (2020) – an author who compared the UK Supreme Court decision in the case of *Miller II* to the US Supreme Court judgement in *Rucho v. Common Cause* (2019) – one can see that, even though the two courts might operate under similar terms, they can still take different approaches and finally diverge regarding the solution in two particular cases:

> The U.K. Supreme Court's confident approach to a thorny question of justiciability in Miller/Cherry presents a striking contrast to the U.S. Supreme Court's. (…) [W]hereas the UKSC largely sidelined the manageability inquiry and instead focused on the dictates of the constitution, the *Rucho* Court was consumed by the question of whether an adequately clear and definite rule of decision could be found (Myers, 2020, p. 1026).

For its part, Israel's judiciary has not always cited the corresponding US doctrine with approval, and "never adopted its formula" (Cohn, 2011, p. 690). Justice Barak even went as far as to say that "this [the U.S.] doctrine is most problematic (...) its legal foundations are shaky (...) it is based to a great extent on irrational grounds; [and] it must be approached with caution" (*Ressler v. Minister of Defense*, 1988). In rejecting the notorious six-criteria test concocted by the US Supreme Court in *Baker v. Carr*, Israeli judges proposed, at least up until the mid-1980s, a distinct formula responding to their own views as regards adjudication. Thus, in *Jabotinsky v. Weitzmann* (1951), which was to be the leading case on justiciability for many decades, the Israeli Supreme Court retained "the rather fuzzy notion of 'the expert feel of lawyers'" (Cohn, 2011, p. 689) as a criterion to be used in determining which cases should be barred from review. When, in the late 1980s, Justice Barak introduced a new vision for the Court's role, the case of *Ressler* provided him with the opportunity to distance himself from at least one strand of the doctrine enunciated in *Baker* (Cohn, 2011). Thus, whereas *Baker* accepted the possibility that some questions might find themselves outside the scope of judicial decision-making since judges would lack the appropriate legal standards for their resolution, *Ressler v. Minister of Defense* – through the voice of Justice Barak – took a radically different view by contending that "every action can be 'contained' within a legal norm, and there is no action regarding which there is no legal norm" (*Ressler v. Minister of Defense*, 1988).

The comparative investigation of these three common-law jurisdictions is sufficient for highlighting the doctrine's diversity. The standards used to decide whether some issues are better left to the assessment of other branches are not culture-independent. Even where other courts resorted to citing the highly influential American case-law, they were not committed to following the exact steps of the American doctrine. Consequently, if the ECJ were to develop its own political question doctrine, we should expect that it would be designed in light of the EU's specific

[4] *Baker v. Carr* (1962). The test reads thus: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

institutional design, with comparative references serving as a useful background against which judges can engage in what Gary Jacobsohn (2010) calls a "dialogical articulation" of the law (p. 103). We can maintain in confidence that today's European judges belong "to a generation for whom the law is not a matter of national systems each with their own specific concepts, relations, and symmetries (or asymmetries) (…) [but] a mélange of ideas, of schemes of intelligibility, of structures, of sub-systems and the like" (Samuel, 2015, p. 64). Thus, comparative law offers an imaginary third space to where judges can travel mentally in order to deconstruct their legal knowledge by way of confrontation with another legal order. When courts are ready to renounce the paradigm of authority, one that relies excessively on the perceived sanctity of legal sources, they will pave the way for cultivating dialogical predispositions within the broader legal community too, which, one can speculate, will potentially spill over into society at large.

1.2. Time Matters: From Marbury to Rucho, Passing Through Baker

The section will show that even within one jurisdiction the political question doctrine changes in meaning from one period to another. Scrutiny of the relevant American legal scholarship and case-law reveals different understandings of the doctrine across time. As Tania Leigh Grove (2015) demonstrates, the 19th century and the first half of the 20th century saw the application of what she calls the "traditional" political question doctrine, by virtue of which the courts considered themselves bound to take for granted the factual determinations of the other branches of government. In other words, "courts did not dismiss as nonjusticiable an issue that presented a political question but rather *enforced and applied* the political branches' conclusion" (Grove, 2015, p. 1911, original emphasis). For instance, in the case of *United States v. Holliday* (1866), the defendant was charged with violating a law prohibiting the sale of alcohol to "any Indian (…) under the charge of any Indian agent appointed by the United States". Holliday sold liquor to a man who allegedly belonged to the Chippewa tribe. The resolution of this case depended on whether the Chippewa were actually a tribe. The Supreme Court found it necessary to defer to the assessment of the political branches in this specific factual regard, but moved on to determine the other legal aspects of the case – ultimately confirming Holliday's conviction. Other cases can be cited which followed the same rationale: federal and state courts alike would not give up on their jurisdiction, but retained Congress' evaluation of the facts as binding.

With *Baker*, decided in 1962, we witnessed a shift of paradigm. Grove (2015) argues that the Supreme Court created a new political question doctrine that, contrary to the traditional one, demanded a dismissal for non-justiciability. As Grove notes, under the influence of the legal process movement, which advocated for a judiciary confined by procedure, already from "the 1930s through the 1950s, in both casebooks and articles, legal scholars increasingly ignored the traditional doctrine" (Grove, 2015, p. 1912). For instance, they started to emphasize the importance of *Pacific States Telegraph and Telephone Co. v. Oregon* – a case that was dismissed as early as 1912 as non-justiciable. However, it is arguable whether, at that point, the Supreme Court truly intended to have non-justiciability extended beyond sets of facts that would imply the application of the Guarantee Clause (under which the "United States shall guarantee to every state […] a republican form of government"; Grove, 2015, pp. 1942–1943). In any case, after *Baker* it might seem that the Court became prepared to step out more frequently as it enlarged the number of criteria which would allow it to refrain from adjudicating – indeed, the Court now referred to no less than six. However, on closer scrutiny, the modern political question doctrine entrenched, rather than undermined, judicial supremacy – as long as the Court used a seemingly constraining language only to "decide who decides any constitutional question" (Grove, 2015, p. 1914). The empirical data supports Grove's interpretation: "in the fifty-three years since Baker v. Carr, the Supreme Court has on only two occasions exercised its 'power to decide' to hold that another branch had final authority over a constitutional question" (Grove, 2015, p. 1966).

A chronological evaluation of relevant Israeli case-law would also point to fluctuating patterns in the understanding of the political question doctrine. Thus, Justice Barak was keen to introduce "a distinct constitutionalist vision of public law" (Cohn, 2011, p. 692), according to which judges must bridge the gap

between law and society and must defend democracy. Or "[t]his avowedly activist platform led, inter alia, to [his] call for lesser reliance on justiciability as a bar from review" (Cohn, 2011, p. 692).

Given this evolutionary context, what are the lessons to be drawn for the European legal order? First, the diversity of concepts, even within one jurisdiction, suggests that one cannot achieve any fixity of meaning. It is well-known that under the pen of judges who pertain to different epochs, each with its own concerns (ultimately the America of the Vietnam war is not the America of *Bush v. Gore*), doctrines do change in form as in substance. Yet, one might have asked for more stability from the political question doctrine given that it entails the perennial question of the boundaries between law and politics. Even supposing that the ECJ was willing in the future to develop a non-justiciability doctrine, we already know that it could never be anything other than a provisional framework. As the EU moves from an international legal order to a federation (and possibly back and forth between), the questions regarding the limits between law and politics will necessarily be different. There is no reason to believe that a judicial doctrine discussing these issues would not closely accompany (in the sense of reacting to) the various transitions. Tradition might weigh in, of course, but in the longue durée it always ends up conceding to transition(s).

Second, the examples in this section show that there is no automatic relationship between a doctrine's form and its consequences. Thus, what appeared both in the US and in Israel as less constraining language turned out to be a mechanism of restraint for judges, and vice-versa – i.e., some of the detailed tests deployed by judges did little to prevent them from having the final word on all of the questions brought before the courts. If anything, this highlights the importance of the will of interpreters that underlies the strategic tools conventionally employed in the judicial realm. Thus, rather than distancing themselves from the question under scrutiny, judges create the appearance of distancing. This brings us to point 1.3, the final section of the first part of this paper, where we argue that variation remains the rule as regards the interpretation of the political question doctrine, even if we look at one given jurisdiction throughout one given period.

1.3. The Interpreter Matters: From Roberts to Sotomayor, Passing Through Breyer

A look at the reasoning of individual judges pertaining to the same legal culture in their use of the political question doctrine will reveal that they are not speaking the same language. Indeed, these variations in understanding teach us that "if a reader shifts his reading lenses a little – if he moves sideways a bit – he promptly tells a different [story]" (Legrand, 2019, p. 302). After all, a law text – while being about precepts – stays a text, and no interpreter can approach it in a vacuum. Rather, as comparatists of laws (who have the benefit of multiple scales of reference) have made plainly clear:

> [a]ny understanding of the significance of world (…) comes not from cognitive distancing, but from a situation within world allowing the individual to look at things as they actually appear within the nexus of world in which he himself partakes, rather than as synthesised data instantiated by way of a purportedly detached discursive articulation (Legrand, 2011, p. 398).

This is to say that Justice Frankfurter's understanding of the political question doctrine was not his colleagues', not least because a rule – and even less so a doctrine – is not identical to its application. Even naively assuming that in theory all judges of a court understand a specific doctrine in the exact same manner, we are still left with the possibility of divergence when the rule is brought to bear on a specific set of facts. Let us take the example of *Coleman v. Miller*, a case decided in 1939 by the US Supreme Court which involved the validity of a constitutional amendment concerning child labour (the case was brought by a group of Kansas legislators who claimed that the amendment had not been properly ratified by their state). Two Justices proposed to decide the case on its merits, while the other seven Justices agreed that the case should not be heard. Yet even within the majority the decision was "fractured" in terms of its justification, and therefore "provided little insight into how a 'political question doctrine' might apply, if at all, to constitutional questions" (Grove, 2015, p. 1945).

In his analysis of the political question doctrine, Zachary Baron Shemtob (2016) provides us with another useful example which underlines the instability of the doctrine's meaning. He discusses a US Supreme Court decision from 2012 and the impact it had on subsequent cases by remarking that:

> [s]ince Zivotofsky was decided, two circuit and eight district courts have wrestled with the political question doctrine, with eight of these cases occurring in the realm of foreign affairs. So far, the majority of these courts have declined to adopt Zivotofsky's textualist view. The circuit courts have taken varied approaches (pp. 1023–1024).

The author goes on to note that "[i]f Zivotofsky has had an unclear impact in the circuit courts, its effect on the district courts has been even more uncertain. (…) Even those two courts that have acknowledged Zivotofsky's potential impact have adopted different standpoints" (Shemtob, 2016, p. 1024). The doctrine of precedent notwithstanding, one can see that courts do not replicate each other's decisions. Rather, in the realm of words as in law, there is always repetition with a difference – something which French philosopher Jacques Derrida captured well when he coined the word iterability (Derrida, 1972, p. 375). Drawing on the Sanskrit word *itara*, meaning *other*, Derrida invented this notion to demonstrate that alterity will reveal itself in any repetitive process. Repetition does not equal exact replication; thus, a doctrine repeats itself (by definition, otherwise it would not have achieved doctrinal status) both vertically (in time) and horizontally (from one judge to another thinking in the same space-time). But transformation always takes place alongside each repetitive occurrence, even if only very slightly.

It is not only judges' treatment of the doctrine that points to its inherent instability; scholarly engagement with the doctrine attests to the same idea. As has been observed, "[f]ew legal concepts have generated as much controversy as the political question doctrine. (…) [T]his is primarily due to the diverse ways in which this doctrine has been formulated" (Shemtob, 2016, p. 1004). An overview of the relevant scholarly research reveals a wide range of positions vis-à-vis the existence, content, and desirability of this doctrine. One can encounter opinions as diverse as those that suggest: the doctrine does not exist (Henkin, 1976); the doctrine is well and flourishing (Cohn, 2011); the doctrine used to exist but then ceased to (Barkow, 2002; Tushnet, 2002); the doctrine continues to exist but should disappear (Redish, 1984); the doctrine has two main versions (Grove 2015); the doctrine comprises four different conceptions (Shemtob, 2016); or the doctrine applies in three configurations (Harrison, 2017). The following illustration is telling. In an influential paper written in 1976, Louis Henkin asked whether the political question doctrine really did exist. In raising this issue, Henkin (1976) suggested that judges were not doing what they were saying. He proceeded, in fact, to reformulate their words so as to better express what he thought they intended to convey: "when [the Court used the political question doctrine], it was using it in a different sense, saying in effect (…)" (p. 601). The irony of this will not be lost on the reader. Not only is the doctrine susceptible to multiple interpretations, but among these it is even possible to count one interpretation that denies the very existence of what is being interpreted. If anything, this example shows that the spectrum of possible (and plausible) interpretations of a legal construct is extremely broad. Incidentally, it also reminds us that – as the French poet Paul Valéry put it – once it is written, a text no longer belongs to its author (Valéry, 1936, p. 68). Rather, its subsequent semantic lives shall be in the hands of readers.

The political question doctrine's deployment in space, its evolution in time, and its treatment by individual judges all converge to sustain the idea that the doctrine has a politics of its own (which, paradoxically, is not necessarily one of judicial restraint – see Choper, 2005, p. 1459; Pushaw, 2002). Its versatility relates to its entanglement in a nexus of contingencies – be they ideological, political, economic, or otherwise. Doctrines do not float in thin air. They are the products of a place, of a Zeitgeist, of men and women, necessarily situated, with their own interests and assumptions. As such, "it is (…) clear that the issue of justiciability and the criteria to determine it are not exhaustive and are developed as new disputes arise" (Lone, 2016, p. 15) in a process of ad hoc self-authentication.

On the face of it, the doctrine prevents judges from deciding, yet two important observations help nuance this presupposition. First, as has been remarked, "no a priori rejection (…) is possible without some considerations of the merits of the case" (Cohn, 2011, p. 680). Indeed, in a convincing argument, Seidman (2004) notes that courts

tend to invoke the political question doctrine only if they have already appreciated that the merits of a case would warrant no relief. Second, even in those cases where the law would textually commit the decision to a different branch, courts still have to interpret that law to make sure that this is actually the case. The question which then arises is: to which method of interpretation do they resort? Depending on one's answer, the outcome might be drastically different. One can clearly see that even the more conservative, textualist conception of the political question doctrine "reintroduces textual analysis [and therefore, we would add, discretion] through the back door" (Seidman, 2004, p. 456).

Now, knowing that the doctrine cannot keep courts out of politics (indeed, it cannot "serve as a refuge for those who believe [that judges] should not have the final word on all constitutional issues" [Grove, 2015, p. 1973]), it is worth asking whether we are better off with or without the doctrine – especially were the question to be asked in advance by jurisdictions which, like the ECJ, have yet to compose a definitive version of it. As long as its advantages are not allowed to reside in isolation from its merits, the doctrine's benefit might exist in the message it transmits to a public who remain unaware of the intricacies of adjudication and who, moreover, are generally accustomed to understanding the activities of judges as neutral enterprises meant to tell us "what the law is". Thus, "it is perhaps true that the Court can better hide its politics when it refuses to decide than when it decides" (Seidman, 2004, p. 463). However, formalizing language is a process not without controversy (see Perju, 2009; Mercescu, 2021), and judges should seriously consider whether they want to add another tool of "cloaking the exercise of judicial power in the language of self-abnegation" (Seidman, 2004, p. 448) to an already long list which includes, among others things, proportionality (Kennedy, 2012) and the so-called "methods" of interpretation.[5]

This section suggests that there is no reason to believe that if the ECJ were to develop a political question doctrine it would speak with one voice. Even in the context of its decisions per curiam which admit no dissent, one can still imagine multiplicity springing from the dualistic nature of the Court's decision-making activities (with the Advocates General playing a significant role – see Lasser, 2004) and the diversity of its judges' cultural, ideological, and professional backgrounds. Moreover, judges should ask themselves whether the specific context of their adjudication lends itself well to the application of a political question doctrine. Therefore, the next sections will explicitly consider the limits of the idea of a political question doctrine in the context of the European Union.

2. The Political Question Doctrine and the ECJ[6]

The first part of this paper sought to illustrate the framework in which the political question doctrine operates in different legal systems in order to highlight its ambiguity and instability of meaning, as well as its evolving content over time. In this part, we set out to analyse the scholarly debates that surround the existence of an implicit or explicit political question doctrine in the practice of the ECJ, as well as the (in)desirability of its express adoption of such a doctrine. Section 2.1 includes an overview of the academic literature that examines the setting in which the political question doctrine could potentially be adopted in the ECJ's jurisprudence. Section 2.2 discusses some examples of case-law in which the doctrine was proposed before the ECJ, either through arguments raised by the parties or in the opinions of Advocates General. In these sections, without attempting to provide a taxonomy of

[5] The old habit of referring to "methods of interpretation" is unlikely to disappear from the vocabulary of jurists anytime soon. However, this should not prevent us from remarking upon the contradiction in terms. Hermeneutics, as understood today, is antithetical to method. Interpretative processes cannot be reduced to a rule or method, other than through a significant dose of factitiousness. Indeed, as Simone Glanert (in press) shows, drawing on Gadamer's thought, "hermeneutics properly understood has nothing to do with method or objectivity [;] (…) [b]ecause understanding amounts to an 'event', it simply cannot be mastered through method".

[6] In this paper, we use the generic term "European Court of Justice" ("ECJ" or the "Court") to designate both the Court of Justice of the European Communities and the Court of Justice of the European Union, depending on the moment at which different judgments were passed (before or after the entry into force of the Lisbon Treaty). For ease of reference, we also use the umbrella term "European Court of Justice" to designate both the General Court (or the Court of First Instance, as the case may be) and the Court of Justice *stricto sensu*, except for in situations where we carry out a distinct analysis in regards to decisions issued at different jurisdictional stages by each court.

cases in which "political question" types of arguments may arise before the ECJ, we seek to identify – mostly through doctrinal study – examples of alternative strategies or concepts that have so far been employed by the Court in order to deal with issues generally defined as "political". Section 2.3 considers the (in)desirability of an express adoption of the political question doctrine by the ECJ. In this sense, we evaluate whether there are potential "gaps" in the current approach of the ECJ that a political question doctrine might prove capable of filling. Additionally, we weigh some of the advantages and disadvantages that the adoption of the doctrine could carry in practice, both in light of the Court's position within the institutional system, and of the specific features of the EU's legal construction as a whole.

2.1. Political Questions and the ECJ: No Doctrine or Several Doctrines?

While writing on the political question doctrine abounds in regards to the US Supreme Court and other constitutional courts, the legal community has not dedicated such ample work to the issue in regards to the ECJ. The explanation for this is simple: the ECJ has not (yet) adopted or developed its own political question doctrine; moreover, when invited to do so, it has so far steered clear of this wording and has refused to define the concept (Butler, 2018, p. 330). However, contributions exploring the topic from a comparative perspective have found fertile grounds for discussion by highlighting the tactics used by courts to handle the justiciability of politically charged questions, as these are strongly connected to matters of institutional balance, legitimacy, and, more generally, to the wider concept of the rule of law.

When approaching these themes from the angle of the political question doctrine, a first observation to be mindful of is the different context in which the ECJ operates compared to national constitutional courts. Initially designed as a primarily international jurisdiction with special features, the functions of the ECJ have shifted increasingly over time towards those of an administrative and constitutional court (Dehousse, 1998, pp. 21–27). However, even though the ECJ often performs as a constitutional jurisdiction ensuring the uniform application of the Treaties – by the Court's own characterization, the EU's "constitutional charter" – it has simultaneously maintained its international status (Odermatt, 2014, p. 717). Against this background, questions regarding interactions between adjudicators and political issues, as well as issues relating to the court's internal and external legitimacy, are infused with a whole new flavour when analysing the position of the ECJ. The Court is constrained not only by ties pertaining to the institutional structure of the European Union, but also by its place within the intricate network of national courts of the Member States, on which it relies for the uniform application of EU law. Additionally, the ECJ sometimes serves as an international jurisdiction, adjudicating on the conduct of Member States (acting either individually or jointly through the political bodies of the Union) in relation to third-party actors (non-EU states or international organisations). This complex environment increases the probability of multiple pressure points emerging between the legal and the political, forcing the Court to devise strategies in order to navigate each type of relationship. In light of this, we ask whether a unique political question doctrine, specific to the ECJ, may constitute an instrument that could benefit the Court in managing such tensions.

A second, connected observation relates to the usefulness of the political question doctrine as one of several available strategies for avoiding resistance. Both constitutional and international courts may face resistance against their judgments from a range of internal or external actors. This is especially true when, by adjudicating on certain matters, judges are perceived to have delved (too far) into the political realm. It is on this sensitive terrain that the political question doctrine is discussed as an instrument through which courts seek to avoid or mitigate resistance – a "resilience technique" (Madsen et al., 2018, p. 208). However, in the case of international and regional courts such as the ECJ, the phenomenon of resistance gains complexity, as it involves a larger number of actors – ranging from national governments, parliaments, or national courts to other international organizations and courts (see Madsen et al., 2018, pp. 215–216). Resistance may also take more diverse and dramatic forms in response to the judgments of international courts, varying "from criticizing the IC [international court] to leaving the IC altogether, […] often provoked by a particular judgment or line of judgments, in which the IC is viewed as having overstepped its boundaries, straying into the world of the 'political'" (Odermatt, 2018, p. 221). Given this wide array of potential sources of pushback, as well as the diversity of forms of resistance, courts such as the ECJ have in turn

developed avoidance and mitigation techniques that are themselves varied and may involve, among other methods: changes in legal reasoning; judicial diplomacy; adjusting the level of scrutiny (Madsen et al., 2018, p. 214); deference doctrines; the narrow framing of legal issues; or the "interpretation of rules of jurisdiction, standing and admissibility" (Odermatt, 2018, p. 222). In the panoply of strategies available to the ECJ, the political question doctrine would thus constitute merely one of many, whose usefulness we seek to ascertain in light of the paths already trodden by the Court in its previous case-law on politically sensitive questions.

A third point to be made at this stage is the notion that regardless of the strategies applied in cases involving politically sensitive questions, considerations of legitimacy permeate the debate at every step. To borrow terminology from the realm of the political question doctrine, the need to preserve judicial legitimacy (either internal or external) underpins both the principled and prudential approaches that justify the doctrine. Under a principled approach, "[e]ven where a dispute meets the criteria for admissibility and jurisdiction, an IC may exercise its discretion to not hear a dispute, since it involves a question that, due to its inherently political character, goes beyond the IC's authority" (Odermatt, 2018, p. 227). In the setting of the ECJ, a principled approach may correspond, for instance, to a situation of deference to one of the political institutions of the EU, in order to maintain institutional balance and the proper allocation of powers (internal legitimacy). Under a prudential or pragmatic approach, "ICs may seek to avoid adjudication to prevent them from being drawn into disputes that would potentially hurt their reputation and public image by delving (or appearing to delve) into the political arena". Such techniques may be used as "safety valves", with "the effect of preventing instances of resistance by states and other actors, thereby bolstering the IC's external legitimacy and compliance in the longer term" (Odermatt, 2018, p. 227). The concern with maintaining internal and external legitimacy has a significant bearing on the strategies developed by the ECJ when operating "at the border" between law and politics, and may better explain why the Court has so far refrained from developing a political question doctrine as an all-encompassing tool for managing this divide. Doctrinal contributions discussing such strategies at the ECJ help to further illustrate this point.

In his comprehensive study on judicial legitimacy in the EU, Koen Lenaerts identifies several techniques for reasoning developed by the Court in close connection with the three-stage evolution of its role at the heart of the European construction (Lenaerts, 2013, pp. 1307–1309). He posits that:

> [a]s the constitutional court of a more mature legal order, [the ECJ] now tends to be less assertive as to the substantive development of EU law. It sees its role primarily as one of upholding the "checks and balances" built into the EU constitutional legal order of States and peoples. […] This does not, however, prevent the ECJ from taking a more proactive stand in some areas of EU law, *yet overall it displays greater deference to the preferences of the EU legislator or, as the case may be, to those of the Member States*. *The ECJ thus favors both continuity of its role as a constitutional umpire and change in the substantive EU law achieved by the traditional interaction between the political and judicial processes* (p. 1309, emphasis added).

The four types of judicial strategies identified by Lenaerts for managing "hard cases" (understood here as cases touching upon various political areas) largely depend on the normative level at which the tension arises. Thus, firstly, "when the validity of secondary EU law is called into question, the ECJ strives to uphold the principle of separation of powers" and "to avoid inter-institutional conflicts which could arise if the contested act is annulled" (Lenaerts, 2013, p. 1370). In this classic scenario that could call for the application of a political question doctrine, the ECJ relies instead on the rule of "'reconciliatory interpretation', according to which secondary EU legislation must be interpreted in light of primary EU law in so far as the limit of '*contra legem*' is not overstepped" (p. 1370). Secondly, in cases that do not endanger the core values of the Union, "the ECJ favors 'value diversity'" and "will strive to interpret EU harmonizing measures in a way that accommodates the interests pursued at both national and EU level" (p. 1370). Thirdly, in relation to national apex courts – especially those of a constitutional nature – the ECJ is described as "committed to respecting the jurisdiction of national courts, in the same way as the former expects the latter to respect its own" (p. 1370). The Court is said to follow the rules of judicial comity and limit

itself to laying down "a framework of analysis" for the national courts to apply, rather than impose its own findings.[7] Lastly:

> in hard cases of constitutional importance, the legal reasoning of the ECJ follows a "stone-by-stone" approach. This means that, in order to guarantee consensus and as a token of judicial prudence, the argumentative discourse of the ECJ is limited to answering the legal questions that are necessary to solve the case at hand. […] [T]he incremental approach followed by the ECJ guarantees a solid and sound evolution of the case-law that allows room for the national courts to engage in a constructive dialogue (p. 1371).

Lenaert's findings lead toward the conclusion that while the ECJ is acutely aware of the political dimensions of the cases before it (see Mańko 2020; 2020), it decides to employ technical, interpretative instruments in order to navigate such questions, rather than to construct justiciability rules akin to a political question doctrine. Similar conclusions emerge when approaching the legitimizing strategies of the ECJ from the angle of the high/low politics distinction (with the former being the traditional domain of the political question doctrine): the Court's approach does not correspond to a coherent doctrine, but is rather modulated over time by narrower or wider interpretations of the Treaties and of their provisions regarding the division of competences between the EU and its Member States. For example, Pola Cebulak's study focusing on the EU's external relations reveals that the deployment of the administrative and constitutional paradigms for judicial review does not actually correspond to a pattern reflecting the distinction between low politics and high politics, but is in reality mostly issue-dependent (Cebulak, 2017, p. 265). Such findings further suggest that the ECJ's stance in regards to politically sensitive matters is not structured around a comprehensive set of justiciability criteria corresponding to a political question doctrine, but is instead composed of a wide range of issue-dependent techniques meant to avoid confrontations between its own "democratic credentials against those of the political branches" (Semple, 2007, p. 22).

In fact, the vast majority of legal literature approaches the topic of the political question doctrine at the ECJ in an area- and issue-specific fashion. Most studies focus on the area of the EU's external action and, in particular, on the Common Foreign and Security Policy (CFSP), given the express limits to the ECJ's power of review under Articles 24 (1) and 40 TEU and Article 275 TFEU (see Butler, 2018; Gutiérrez-Fons, 2009; Heliskoski, 2018; Lonardo, 2018). In other domains where political questions might arise, the general conclusion is that where the ECJ's role is limited this is "due to a division of competence between the EU and the Member States rather than to prudential considerations", thus the lack of support for the adoption of the doctrine (see Gutiérrez-Fons, 2009, p. 105). In the CFSP area, some scholars in search of the political question doctrine in the EU affirm that "[i]n contrast to the US, […] the doctrine is treaty-mandated, but only tenuously adopted by the judiciary" (Butler, 2018, p. 341). However, such a deduction is not only unwarranted under the limited jurisdictional carve-out in the field of CFSP, but also goes against the definition of the doctrine which is, by its very essence, a judge-designed rule operating as a self-imposed restraint on the exercise of powers of review. In fact, as observed elsewhere, the ECJ has rather tended to expand its review in CFSP matters in order to ensure a coherent, albeit incomplete, system of legal remedies (see Van Elsuwege, 2017; Lonardo, 2018). In this sense, it has been argued that while the ECJ's jurisdictional limitation in CFSP matters is "not uncommon and perhaps unavoidable with respect to sovereign foreign policy questions, the Treaty-based jurisdictional carve-out remains an anomaly in a Union based on the rule of law" (Van Elsuwege, 2017, p. 17; see also Gutiérrez-Fons, 2009, p. 119). Since the question of whether the ECJ should actually exercise review or not in certain CFSP matters exceeds the purpose of this article, we shall not be venturing into these specific arguments. We confine ourselves instead to a general analysis of the Court's approach to cases in which the political question doctrine (or arguments deriving therefrom) was either invoked by the parties or discussed by the Advocates General in their opinions. The cases examined in the following section can provide illustrative examples as to the Court's stance in this respect.

[7] In reality, it is often the case that the framework of analysis laid down by the ECJ will leave little or no room for the national court to decide on its own, thus attracting criticism against the former's expansive interpretations or activist rulings.

2.2. ECJ – the Sidestepper

If one searches the case-law database of the ECJ for the exact phrase "political question", the system returns only nine results. This figure in itself is not surprising, as the ECJ has so far refused to embrace a political question doctrine and, in any case, the notion might remain hidden under various terminologies. What is rather unexpected is that the Court also appears to refuse to engage with this specific wording even in cases where the Advocates General (AG) themselves expressly refer to it: out of the nine documents resulting from the search, only one is a Court judgment (*LTTE* [2014], including the wording "political question" in para. 156), while the rest are AG opinions.

As noted, the largest number of cases in which some form of the political question doctrine was invoked relate to CFSP matters, prompted also by the limited jurisdictional powers of the Court in this area. However, arguments that a dispute is not justiciable because "the dispute is not a legal one are usually given short shrift" (Odermatt, 2018, p. 229). In fact, the Court has frequently been criticized for its decision in *Rosneft* – where it extended the mechanism of preliminary rulings to CFSP measures (*Rosneft*, 2017, paras. 60–63) – for having overstepped its jurisdictional boundaries under the Treaties (see Lonardo, 2018, p. 552; Heliskoski, 2018, p. 19).

Non-justiciability arguments have also been raised by the Council and the Commission in *Kadi* (2008), but were rejected by AG Maduro, who reasoned that even in cases involving the political process – and especially in matters of public security – "courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow" (see Opinion of AG Maduro in *Kadi*, paras. 33, 34 and 45). The Court, however, chose not to approach the matter from this perspective, but instead focused on its powers to ensure the "review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law" (*Kadi v. Council and Commission*, 2008, para. 326). Similar arguments were discussed by AG Sharpston in *People's Mojahedin Organization of Iran* (Opinion of AG Sharpston, paras. 252–255), and by the Court in *LTTE* (2014, paras. 161–163). However, in these cases the Court chose to base its reasoning concerning the exercise of its powers not on conceptions about the legal nature of the dispute or about its judicial role, but rather on arguments regarding the applicable standards of review and the level of discretion which the Council enjoyed (see Odermatt, 2018; Butler, 2018).

In other situations, the Court chose to rely on strategies concerning standing and admissibility in order to avoid potential clashes with the competences of political institutions (see, for instance, the evolution of case-law on individual standing in annulment actions – discussed in Semple, 2007). The *Front Polisario* (2016) is a case in point, with AG Wathelet discussing the idea that the argument that the question brought before the Court was of a political nature (Opinion of AG Wathelet in *Front Polisario*, para. 141). The Court did not approach the issue from the perspective of its political nature, but chose instead to rule that the applicants did not have standing under EU procedural law, since the international agreement in question did not apply to the territory of Western Sahara; the question was therefore not of "direct concern" to the applicants (*Front Polisario*, 2016, paras. 125–127).

Perhaps the most eloquent syntheses so far concerning the ECJ's power of review in the context of political questions are those comprised in AG Bobek's opinions in *Puppinck* and *SatCen*, respectively. In *Puppinck*, in the context of a European Citizens' Initiative (ECI), AG Bobek examines the applicable scope and standard of review in relation to acts adopted by the Commission in the exercise of its power of initiative. Amongst other things, his analysis encapsulates the standards that relate to the preservation of the EU's institutional balance:

> the standard of judicial review limited to the verification of manifest errors of assessment attaches to situations where EU institutions enjoy wide discretion, in particular, when they adopt measures "in areas which entail choices, in particular of a political nature". Indeed, it is settled case-law of the Court that the intensity of its review varies with the discretion accorded to the institutions (Opinion of AG Bobek in *Puppinck*, para. 123).

In *SatCen*, on the other hand, AG Bobek engages in a thorough examination of the CFSP jurisdictional derogation under the Treaties, mapping the entire institutional framework and the law-politics interaction in this domain. He remarks that:

> despite the significant limitations with regard to the justiciability of CFSP measures – which led Advocate General Wahl to refer to the CFSP as lex imperfecta – the fact remains that, even for such acts, rules apply. Lex imperfecta does not mean absentia legis (Opinion of AG Bobek in *SatCen*, para. 66).

Further discussing the nature and depth of review performed by the Court in the CFSP area, the AG concludes:

> I would suggest understanding the jurisdiction of the Court of Justice of the European Union in those matters *as a scale or gradual continuum, and not as a matter of all-or-nothing extremes*, whereby the mere existence of dual content automatically renders everything open to review. At one end of the spectrum, there are decisions that, although formally based on a CFSP provision, have as to their content very little to do with the CFSP. At the other end, there are decisions that would clearly fall fully within the CFSP derogation. Then, *in the grey zone in the middle, there are the dual- or multiple-content decisions, in relation to which caution and self-restraint are advised*. If the non-CFSP content of an act is merely ancillary to its CFSP content, the latter may prevail and thus limit or even exclude judicial review (Opinion of AG Bobek in *SatCen*, para. 85, emphasis added).

Setting aside the fact that they all deal with some form of a political question before the ECJ, the examples above depict the variety of strategies available to, and implemented by, the Court in its exercise of judicial self-restraint. While the ECJ obstinately sidesteps and refuses to define a political question doctrine, it nonetheless restricts itself to exercising its power of judicial review within the limits of the Treaties by deploying doctrines, mechanisms, and instruments specific to the EU's own legal order. In this context, it is then worth asking: is there any need for a distinct political question doctrine in the ECJ?

2.3. One Doctrine Too Many

Most scholarly voices proposing an affirmative response to the question above substantiate their answer by invoking the need for more legal certainty in the exercise of judicial review, especially in matters of foreign affairs (see Butler, 2018, pp. 351–352; Lonardo, 2018, p. 555). Paradoxically, those opposing the adoption of a political question doctrine by the ECJ rely on precisely the same argument – that of legal certainty. In the latter view, by embracing the doctrine the Court would venture into treacherous waters, as it would find no legal basis in the Treaties and thus be likely to engender a great deal of uncertainty (see Van Elsuwege, 2017). In fact, Gutiérrez-Fons observes that, while the added-value of the doctrine would lie in its prudential foundation rather than in its classical construction, it is nonetheless "true that this strand of the doctrine renders outcomes more difficult to predict, reducing legal certainty" (Gutiérrez-Fons, 2009, p. 124). Additionally, the articulation of such doctrine could prove, at least in certain domains, difficult to reconcile with the ECJ's essential task of upholding the rule of law in the actions of the EU (Van Elsuwege, 2017, p. 18).

As this study has sought to demonstrate, the contours of the political question doctrine remain much too "fuzzy" and its application too controversial – even in the legal systems which expressly acknowledge it – for it to actually constitute a useful tool in the ECJ's arsenal of legal strategies. Rather than contribute to the consolidation of a higher degree of legal certainty, the articulation of the doctrine might produce the opposite effect, whilst also upsetting the Court's legitimacy in the process.

In addition to concerns about legal certainty and legitimacy, considerations of efficiency also support the case against the adoption of the doctrine by the ECJ. On the one hand, as our doctrinal and case-law analyses have sought to illustrate, the ECJ's approach to politically sensitive topics is issue-dependent to too large an extent to render the adoption of a coherent political question doctrine either practically feasible or desirable. On the other

hand, the Court's toolbox is already replete with original EU doctrines, judicial scrutiny standards, and interpretation techniques that have so far enabled it to navigate the political questions that have emerged in various fields of EU law. As we have seen, the Treaties themselves subtract from the Court's jurisdiction through express provisions – those areas deemed by the Member States too politically charged to form the subject of judicial scrutiny. Moreover, the strategies employed so far in the ECJ's practice touch upon everything – from rules on standing and admissibility, through methods of interpretation, to standards on the scope and depth of judicial review, and the evaluation of the limits of discretion (with judicial power of review understood as a "scale or gradual continuum", depending on the level of discretion of the political institution, rather than as a fixed point).

In this context, it becomes apparent that while the existing strategies applied by the Court at the boundary between law and politics are certainly not perfect (and are therefore subject to critique), they nonetheless perform the systemic function entrusted to them – that of allowing the Court to exercise judicial restraint and keeping it from veering (too far) into the political realm. In the absence of the precise parameters necessary for the coherent framing of a political question doctrine, there is no guarantee that the criteria fixed by the Court would actually ensure a smoother interaction with the political realm – in fact, the evidence from the experience of the US in the implementation of the doctrine rather suggests the contrary.

Thus, in our view, juxtaposing a political question doctrine over the currently extant strategies of the ECJ and the complexities that accompany them would likely generate a cacophony of legal tests and criteria, requiring continuous adjustment and severely weakening the position of the Court. This prospect is all the more probable in the context of the ECJ's relationship with the national courts of the Member States, whose individual understandings of the concept of political questions and judicial self-restraint might not correspond to the ECJ's articulation of the doctrine (see also Butler, 2018, p. 350). From the perspective of systemic evolutions, cementing non-justiciability criteria through the formulation of a political question doctrine could hamper the future organic development of the Union's internal checks and balances, as well as its relationship with third parties in the international arena.

Conclusions

In theory, the political question doctrine sets out to tame the possible inclinations of judges to act politically in their adjudication. Through an apparent gesture of conscious self-restraint, sophisticated tests are thus devised by judges themselves in order to keep their interpretative power in check. As we have shown, the political question doctrine remains more of a rhetorical device than a genuinely constraining tool. Indeed, the political question doctrine bends from one space to another, from one time to another, and from one judge to another so much so that its content is never fixed. Far from capturing what would be the immutable relationship between law and politics, the doctrine "is a formal cloak in which a court wraps up a belief that, having examined a decision, the decision is not apt for application of the general principles of judicial review" (Daly, 2010, p. 160).

As our exploration of the ECJ's approach to politically sensitive issues has revealed, the wide range of solutions already embraced by the Court and the normative differences between the various areas of the EU's legal framework render the articulation of a political question doctrine both unfeasible and undesirable. The ambiguity of the doctrine and its volatile content over time – even in its original formulation in the US system – point to its inherent limits as an instrument of self-restraint for judges. In addition, the articulation of a form of the doctrine by the ECJ in the complicated setting of the EU's own wealth of specific doctrines and existing judicial strategies would likely generate difficulties that would far outweigh its hypothetical benefits, as outlined in the sections above. In effect, the adoption of a political question doctrine by the ECJ would merely add another instrument to adorn the imaginary wall separating law from politics, without effectively contributing to a "neater", more tangible division between the two.

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