The CJEU and EU (de-)constitutionalization: Unpacking jurisprudential responses

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The Court of Justice of the European Union has long been considered a steadfast advocate and engine of the constitutionalization of the European Union. More recently, however, critical voices about the Court's seemingly deferential stance on executive (crisis) governance have amplified among legal scholars and political scientists. We take issue with this claim and show that the Court's jurisprudence is neither predominantly hard-wired in favor of constitutionalization, nor is it deferential to governments' wishes. Instead, we show that factors external to the law—the politicization of an issue—and internal to the law—the juridification of an issue—prompt the Court to adopt different jurisprudential responses on issues of constitutional salience, ranging from the expansion of constitutionalization to its retreat. To probe our assertion, we zoom into the European Union's internal and external security policies—namely Justice and Home Affairs, on the one hand, and the Common Foreign and Security Policy, on the other—which exhibit contrasting constitutionalization trajectories. Based on a qualitative case law analysis, we demonstrate that the Court's constitutionalization responses are indeed systematically affected by different levels of politicization and juridification.

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We would like to thank the attendees of the colloquium at the Max Planck Institute for Social Law and Social Policy (May 2020) and of the *Wissenschaftszentrum Berlin für Sozialforschung* (WZB) Workshop on Emergency Politics (June 2020) for insightful feedback on our analysis, our colleagues at the Geschwister-Scholl-Institute and the Max Planck Institute Comparative Public Law and International Law for their detailed comments on earlier versions of this article in the respective research seminars (June and October 2020), the participants of the Virtual EU Seminar (VirEUS) at the University of Salzburg for a stimulating discussion (December 2020), and the two anonymous reviewers for their critical remarks and constructive suggestions. We also want to thank Rabia Ferahkaya and Lukas Märtin for their excellent research assistance. All remaining errors are our own.

1. Introduction: The CJEU, an unconditional proponent of EU constitutionalization?

Constitutionalization has for decades been a core characteristic of EU integration. Since the early days of the European project, a steady process driven by EU-integration-friendly political officials, savvy parliamentarians, and judges has incrementally enhanced the constitutional features of the European Union's political and legal framework.[1] As a result, the quasi-federal EU polity nowadays comprises a highly institutionalized legal system, based on judicial review and legal protection; it is flanked by a system of democratic scrutiny and parliamentary oversight, chiefly exercised through the European Parliament; and it entails governance standards to ensure, inter alia, decision-making transparency and accountability.[2] In more recent times, this "triad of constitutionalization" has come under pressure from different corners. Next to the (normative) criticism of over-constitutionalization,[3] pervasive crisis decision-making has come to challenge constitutionalization patterns, engendering politics of "necessity"[4] or progressive securitization.[5] Some authors also deplore the circumvention of constitutional standards by means of executive governance and

[1] Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1 (1981); Joseph H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2405 (1991); Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 Int'l Org. 121 (1998); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supra-National Constitution: Dispute Resolution and Governance in the European Community*, 92 Am. Pol. Sci. Rev. 63 (1998); Berthold Rittberger & Frank Schimmelfennig, *Explaining the Constitutionalization of the European Union*, 13 J. Eur. Pub. Pol'y 1148 (2006); Anne Peters, *The Constitutionalisation of the European Union: Without the Constitutional Treaty, in* The Making of a European Constitution: Dynamics and Limits of the Convention Experience 36 (Sonja Puntscher Riekman & Wolfgang Wessels eds., 2006); Thomas Christiansen & Christine Reh, Constitutionalizing the European Union (2009).

[2] Frank Schimmelfennig, *The Normative Origins of Democracy in the European Union: Towards a Transformationalist Theory of Democratization*, 2 Eur. Pol. Sci. Rev. 211 (2010); The Real World of EU Accountability 174 (Mark Bovens, Deirdre Curtin, & Paul 't Hart eds., 2010); Adrienne Héritier et al., European Parliament Ascendant: Parliamentary Strategies of Self-Empowerment in the EU (2019).

[3] Stefano Bartolini, Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union (2006); Peter Mair, *Political Opposition and the European Union*, 42 Gov't Opposition 1 (2007); Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 Eur. L.J. 460 (2015); Susanne K, Schmidt, *No Match Made in Heaven: Parliamentary Sovereignty, EU Over-constitutionalization and Brexit*, 27 J. Eur. Pub. Pol'y 779 (2020).

[4] Christian Kreuder-Sonnen, Emergency Powers of International Organizations. Between Normalization and Containment 23–32 (2020); Jonathan White, Politics of Last Resort. Governing by Emergency in the European Union 6–7 (2020); Mark Dawson, *The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance*, 53 J. Common Mkt. Stud. 976 (2015); Michael Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis*, 53 Common Mkt. L. Rev. 1237 (2016).

[5] Giorgio Agamben, State of Exception (Kevin Attell trans., Univ. Chi. Press, 2005); Jef Huysmans, The Politics of Insecurity: Fear, Migration and Asylum in the EU (2006); Thierry Balzacq, *The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies*, 46 J. Common Mkt. Stud. 75 (2008); Antje Wiener, *European Responses to International Terrorism: Diversity Awareness as a New Capability?*, 46 J. Common Mkt. Stud. 195 (2008).

secretive decision-making.[6] What these strands of literature suggest is that the pro-constitutionalization spirit that seemed so intimately linked to EU integration has abated and even given rise to de-constitutionalization maneuvers by which core constitutional principles are at risk of being weakened.

We take issue with this claim and approach the matter of (de-)constitutionalization at the EU level from a jurisprudential angle. It has been widely acknowledged that (constitutional) courts play a crucial role in fostering constitutionalization by curtailing executive and legislative power through their judicial review.[7] This also applies to the Court of Justice of the European Union (CJEU), which has a longstanding tradition of shaping EU constitutionalization through its case law.[8] The Court's famous judgments in *Van Gend en Loos* on direct effect and *Costa v. ENEL* on the supremacy of EU law marked the starting point of this process already in the early 1960s.[9] Given the CJEU's undisputed central role in modeling EU constitutionalization, our inquiry seeks to unpack the dynamics that shape the decisions on constitutionally salient matters handed down by the EU judicature—that is both the European Court of Justice (ECJ) and the General Court.

Conceiving of the Court as a genuinely judicial actor, we set out to provide a theoretically informed account of how its jurisprudence on constitutional matters resonates with the broader sociopolitical and legal context. As any apex court, the CJEU does not exercise its judicial function in a political, institutional, or societal vacuum. We therefore root our analysis in the assumption that the Court follows the path of legal rationality while, at the same time, judges care about compliance with and legitimacy of the law, which is why their jurisprudence cannot be seen in isolation from the sociopolitical context of EU governance.

Therefore, the central question we ask in this contribution is how the Court's jurisprudence on constitutionally salient matters responds to sociopolitical circumstances as well as institutional-legal constraints. We argue that the Court's constitutionalization responses are systematically shaped by different combinations of *politicization* and

[6] Berthold Rittberger & Klaus H. Goetz, *Secrecy in Europe*, 41 W. Eur. Pol. 825 (2018); Deirdre Curtin, *Second Order Secrecy and Europe's Legality Mosaics*, 41 W. Eur. Pol. 846 (2018); Mai'a K Davis Cross, *Secrecy and the Making of CFSP*, 41 W. Eur. Pol. 914 (2018); Vigjilenca Abazi, Official Secrets and Oversight in the European Union (2019).

[7] András Jakab, Arthur Dyevre, & Giulio Itzcovich, *Introduction: Comparing Constitutional Reasoning with Quantitative and Qualitative Methods*, *in* Comparative Constitutional Reasoning 1 (András Jakab, Arthur Dyevre, & Giulio Itzcovich eds., 2017).

[8] Stein, *supra* note 1; Weiler, *supra* note 1; Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 Int'l Org. 41 (1993); Alter, *supra* note 1; Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 Comp. Pol. Stud. 147 (1999); Loïc Azoulai, *Le rôle constitutionnel de la Cour de justice des Communautés européennes tel qu'il se dégage de sa jurisprudence* [*The Role of the Court of Justice of the European Communities as Evident from Its Jurisprudence*], 44 Revue Trimestrielle de Droit Européen 29 (2008); Jakab, Dyevre, & Itzcovich, *supra* note 7.

[9] For a very early account of the (constitutionalizing) effect of the Court's interpretation in these cases, see Jochen Frowein, *Zum Verhältnis zwischen dem EWG-Recht und nationalem Recht aus der Sicht des Gerichtshofes der Europäischen Gemeinschaften* [*On the Relationship between EEA Law and National Law from the Viewpoint of the Court of Justice of the European Communities*], Aussenwirtschaftsdienst des Betriebs-Beraters/ Recht der Internationalen Wirtschaft 233 (1964).

juridification. On the one hand, the Court's case law hinges on the level of juridification of a policy, that is both the proliferation of law and the expansion of judicial power (also referred to as judicialization).[10] On the other hand, the level of politicization of a policy, that is the political pressure and conflicts that accompany decision-making and implementation, impacts the Court's rulings. We show that different combinations of politicization and juridification allow us to gain a better understanding of the Court's variable constitutionalization responses in its jurisprudence, ranging from an expansion of constitutionalization to its retreat.

Our theoretical argument thus helps us to explain when the Court pushes the constitutionalization envelope, and when it decides to hold back or even step back. To assess the Court's constitutionalization response we develop a typology of different constitutionalization responses that the CJEU can draw upon when crafting its jurisprudence. Methodologically, to infer the Court's different constitutionalization responses, we focus on the Court's legal-reasoning techniques in its case law on constitutionally salient matters. Empirically, our analysis concentrates on two EU security policies, namely the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA).[11] Both policies are constitutional "latecomers," since member states have long guarded their decision-making prerogatives and have refrained from (supranational) codification. Yet, once juridified at the EU level, both policies have come to display diverging constitutionalization patterns. More recent case law indicates that, while the CJEU has actively supported the incremental constitutionalization of the CFSP, the Court has been more hesitant to promote or safeguard existing constitutional advances in the area of JHA, in particular as regards border control and migration management issues. Illuminating these diverging constitutionalization responses employed by the Court allows us to probe our expectations about the Court's tendency to press for or refrain from constitutionalization in its jurisprudence.

Our work demonstrates that the Court's jurisprudence is neither predominantly hard-wired in favor of constitutionalization, nor—as others have claimed—mainly deferential to governments' wishes.[12] The EU judicature can be both a "driver" of EU constitutionalization as well as a "brakeman," thwarting steps towards further constitutionalization by displaying deference towards governments that seek to block or circumvent the EU's constitutionalization. In the next section, we define our key

[10] *See* Lars C. Blichner & Anders Molander, *Mapping Juridification*, 14 Eur. L.J. 36, esp. 45–7 (2008). For more details regarding our understanding of juridification, including its relation to constitutionalization, see Section 2.1.

[11] We deal with JHA under the (internal) security label, as it comprises a range of policy issues closely related to core state powers, such as border control, law enforcement cooperation, or migration management. This classification does, however, not imply that we consider migration management essentially as a security issue. Rather, our approach reflects that border control together with migration management has increasingly been seen and addressed by EU policymakers as a security issue, as outlined below (*see* Section 3.2).

[12] Geoffrey Garrett, Daniel R. Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 Int'l Org. 149 (1998); Clifford J. Carrubba, Matthew Gabel, & Charles Hankla, *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 102 Am. Pol. Sci. Rev. 435 (2008).

concepts and develop a typology capturing the CJEU's different (de-)constitutionalization responses before we derive expectations about the conditions that give rise to this (de-)constitutionalization divergence (Section 2). We then present evidence for the different levels of juridification and politicization in the fields of external and internal security policies, before turning to our case law analysis, which confirms that the CJEU's different jurisprudential responses regarding the EU's internal and external security policies are linked to varying combinations of juridification and politicization (Section 3).

2. Unpacking the CJEU's (de-)constitutionalization jurisprudence

2.1. Conceptual clarifications: What is (de-)constitutionalization?

What exactly do we mean by constitutionalization and de-constitutionalization? We understand *constitutionalization* as an incremental process through which the political and legal framework of a polity—in our case the European Union—is gradually enriched with constitutional elements.[13] In other words, constitutionalization enhances step-by-step substantive and procedural safeguards that allow to keep (executive) power in check.[14] Concretely, this means that constitutionalization strengthens the "triad of constitutionalization"—that is democratic scrutiny by parliaments, judicial review, and fundamental rights protection by courts, and furthermore cements classical governance standards, such as transparent decision-making and political accountability. This understanding of constitutionalization, in turn, echoes well-established rule of law definitions.[15]

Conversely, we define *de-constitutionalization* as a process through which the constitutional features of a polity are weakened with regard to one or more elements of the aforementioned triad. Indicative of this weakening is, for instance, when parliaments are deprived of their ability to scrutinize executive power, or when political decisions are non-transparent and eschew political accountability. De-constitutionalization also manifests itself by a dwindling of the rule of law. This happens, for example, when there is a lack of judicial remedies against authoritative decisions, when judges are deferential to transgressions of executive authority, or when human rights are up for debate.[16] This weakening of constitutional elements can result either from a (gradual)

[13] Christiaan Timmermans, *The Constitutionalization of the European Union*, 21 Y.B. Eur. L. 1, 1–2 (2001); Peters, *supra* note 1, at 37.

[14] Christina Eckes, *Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction*, 22 Eur. L.J. 492, 494 (2016).

[15] *A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158 final (Mar. 11, 2014); *Further Strengthening the Rule of Law within the Union—State of Play and Possible Next Steps*, COM(2019) 163 final (Apr. 3, 2019); *2020 Rule of Law Report: The Rule of Law Situation in the European Union*, COM(2020) 580 final (Sept. 30, 2020) [hereinafter *Rule of Law Report 2020*]; *Rule of Law Checklist, Council of Europe (Venice Commission)*, CDL-AD(2016)007-e (Mar. 11–12, 2016).

[16] Christian Kreuder-Sonnen & Berhard Zangl, *Which Post-Westphalia? International Organizations Between Constitutionalism and Authoritarianism*, 21 Eur. J. Int'l Rel. 568, 577 (2015). These developments were also highlighted in the first "rule of law report" released by the European Commission. *See Rule of Law Report 2020*, *supra* note 15.

rearrangement of the legal or institutional framework—de jure adjustment—or from actors deviating from constitutionally enshrined procedures—de facto adjustment—or from an interplay of both. Indeed, in practice the line between de jure and de facto de-constitutionalization is thin as both patterns are mutually reinforcing.

Constitutionalization is linked to other legal dynamics relevant for this study. The process of constitutionalization generally coincides with *juridification*, which denotes a proliferation of legal rules via codification or legislative activity, on the one hand, and the expansion of the scope and intensity of legal review, on the other.[17] The inverse relationship can be observed with regard to the phenomenon of de-constitutionalization, where we mostly witness a retraction of legal rules and adjudicatory power. Therefore, it is fair to say that constitutionalization and juridification (or de-constitutionalization and de-jurificiation) are often intertwined. Despite their connectivity, some important differences exist: while (de-)juridification is limited to legal matters—it refers to the degree to which law permeates a polity—the conceptual ambit of (de-)constitutionalization is broader—it refers to the very nature of this polity as it relates to the intensity of its constitutional features, most notably democratic scrutiny, judicial review, and standards of good governance.

This leads us to highlight yet another important aspect of both constitutionalization and de-constitutionalization, namely their dynamic nature.[18] For both processes, we can witness a *gradual* enhancement (constitutionalization) or retraction (de-constitutionalization) of constitutional norms and principles. The dynamic nature of (de-)constitutionalization has further implications. It notably implies that (de-)constitutionalization processes can take place either within an already codified constitutional (law) framework by means of jurisprudence, legal amendment, or institutional practice, or with a view to (re-)modeling a constitutional order in the making.[19] In the EU context, it is above all the latter dimension of (de-)constitutionalization that is relevant. In the absence of an unequivocal "constitutional" foundation in law, EU constitutionalization was and still is to a large extent the result of treaty law being "constitutionalized" by a growing corpus of jurisprudence, legislation, and evolving institutional practice.

Finally, it is worth stressing that it is not least because of this dynamic character of (de-)constitutionalization that the sociopolitical context matters. It seems that situations of crisis or emergency generally increase the potential of de-constitutionalization, as checks and balances are more easily set aside to address what can be construed as exceptional circumstances,[20] as are individual rights protection and the separation of powers.[21] The handling of the COVID-19 pandemic is a case in point: across the

[17] Blichner & Molander, *supra* note 10, esp. at 45–7.

[18] On the dynamic nature of constitutionalization processes, in particular in the EU context, see Anne Peters, Elemente einer Theorie der Verfassung Europas [Elements of a Theory of Europe's Constitution] 74–5 (2001).

[19] Peters, *supra* note 1, at 46–47.

[20] White, *supra* note 4, at 2–8; for a (constitutional) law perspective on the matter, see Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice, 17–85 (2006).

[21] Kreuder-Sonnen, *supra* note 4, at 29.

European Union, the involvement of parliaments was strikingly limited when the first public health measures, many of which were drastically limiting fundamental rights, were decreed.[22] As a matter of fact, the logic of emergency politics and the logic of securitization bear strong analytical resemblance to de-constitutionalization, which we will draw upon in our analysis of EU security policies. For instance, political measures in the security realm are often justified with reference to the extraordinary quality of a political challenge or threat—and the European Union is no exception in this regard.[23]

2.2. Theory: The CJEU's (de-)constitutionalization responses

What prompts the CJEU to press for (de-)constitutionalization in its jurisprudence? Building on a broad literature, we conceive of the Court as an important judicial actor and its jurisprudence as a key factor shaping the constitutional features of the EU.[24] While the Court was initially viewed by many scholars as a purely judicial body that operated in insulation from political dynamics, authors have come to recognize that the CJEU is also a political actor.[25] Despite the EU judicature being in certain respects a somewhat "passive" constitutionalization actor, since its activity depends on third parties turning to the judges in Luxembourg, this has not prevented the CJEU from (re-)shaping constitutional boundaries. We are obviously aware that the Court consists of a multitude of members (judges, advocate generals, *référendaires*, etc.) who do not automatically share the same vision of the European Union or EU law, given their varying educational and cultural backgrounds.[26] What is more, the two courts composing the CJEU—that is, the ECJ and the General Court—may offer different, at times even conflicting interpretations of EU law. Notwithstanding this internal diversity of profiles, preferences, and interpretations, it is fair to assume that rulings of the Court—be they handed down by the ECJ or the General Court—can be attributed to the CJEU as a whole, and that decisions therefore shed light on the constitutionalization responses of the Court as a unitary actor.

We begin with the assumption that constitutional preferences among EU actors—that is both EU institutions and member states—are essentially contested. With

[22] Angelo J. Golia et al., *Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic*, Heidelberg J. Int'l L. 147 (2021). An insightful reflection on the constitutional law conundrums posed by the Covid-19 pandemic can be found in Tristan Barczak, Der nervöse Staat: Ausnahmezustand und Resilienz des Rechts in der Sicherunheitsgesellschaft [The Nervous State: State of Exception and Resilience of the Law in a Risk Society], 685–702 (2d ed. 2021).

[23] Balzacq, *supra* note 5; Kaarlo Tuori, European Constitutionalism 288–9 (2015).

[24] *See, e.g.*, Stein, *supra* note 1; Weiler, *supra* note 1; Burley & Mattli, *supra* note 8; Alter, *supra* note 1; Stone Sweet, *supra* note 8.

[25] For more recent accounts, see, e.g., Elise Muir, Mark Dawson, & Bruno De Witte, *Introduction: The European Court of Justice as a Political Actor*, *in* Judicial Activism at the European Court of Justice 1 (Mark Dawson, Bruno De Witte, & Elise Muir eds., 2013); Giulio Itzcovich, *The European Court of Justice*, *in* Comparative Constitutional Reasoning, *supra* note 7, at 277; Susanne K. Schmidt, The European Court of Justice and the Policy Process: The Shadow of Case Law (2018).

[26] On the impact of socio-historical and socio-professional elements on the Court's jurisdiction, see Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 Ann. Rev. L. & Soc. Sci. 417 (2011).

constitutional preferences we mean an actor's desired scope of parliamentary scrutiny, rights protection, and standards of good governance, such as decision-making transparency. We also assume that the constitutional status quo laid down in primary law corresponds to the preferences of a broad majority of member state governments, since the codified constitutional framework is the outcome negotiated and agreed upon by governments.

A broad strand in the literature on the CJEU has conceptualized the Court as an independent, trustee-like actor pressing forward the European Union's constitutionalization:[27] through its jurisprudence, the EU judicature seeks to expand the reach of EU law and adjudicatory supremacy, thereby advancing constitutionalization by means of legal integration.[28] Another strand in the literature has highlighted that the CJEU is subject to political pressure from member state opposition, and that its jurisprudence reflects governments' threats to challenge the Court's ruling through non-compliance and legislative override.[29] Instead of siding with one of these perspectives, we contend that the CJEU follows a legal-institutional logic that is influenced by its existing jurisprudence and, at the same time, is responsive to societal and political circumstances. The Court constantly needs to strike a balance between different rights and principles when interpreting EU law,[30] yet its weighing is not immune to external circumstances.[31] This does not imply that the Court leaves the path of legal rationality to accommodate external pressure or eschew political conflicts, but rather that it is aware of the context and, at times, develops its jurisprudence in view of that to ensure compliance and legitimacy.[32] As the former President of the ECJ Vassilios Skouris acknowledged, the overall context and the political environment play an important role for the development of the Court's jurisprudence.[33] This said, impromptu changes are generally not for the Court. Instead, the Court has been described as an oil tanker that "moves extremely slowly" and avoids jurisprudential zigzagging.[34] The path-dependent logic of legal interpretation, but also responsiveness to the sociopolitical environment, are thus likely to affect the Court's jurisprudence on matters of constitutional politics. We will address both factors and their likely jurisprudential impact in turn.

[27] Andreas Grimmel, *"This Is Not Life As It Is Lived Here": The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law*, 7 Eur. J. Legal Stud. 56 (2014).

[28] Weiler, *supra* note 1; Michael Blauberger & Susanne K. Schmidt, *The European Court of Justice and Its Political Impact*, 40 W. Eur. Pol. 907 (2017).

[29] Garrett, Kelemen, & Schulz, *supra* note 12; Carrubba, Gabel, & Hankla, *supra* note 12; Olof Larsson & Daniel Naurin, *Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU*, 70 Int'l Org. 377 (2016).

[30] Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 Colum. J. Eur. L. 3, 5 (2014).

[31] Michael Blauberger et al., *ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence*, 25 J. Eur. Pub. Pol'y 1422 (2018).

[32] In a similar vein, see Michael Blauberger & Dorte Sindbjerg Martinsen, *The Court of Justice in Times of Politicisation: "Law as a Mask and Shield" Revisited*, 27 J. Eur. Pub. Pol'y 382, 395–6 (2020).

[33] Grimmel, *supra* note 27, at 61, 75.

[34] *Id.* at 62.

a) Politicization

The contention that the CJEU pursues hardwired pro-constitutionalization preferences had traction as long as political integration in the European Union unfolded in a climate of a "permissive consensus,"[35] or, to put it in Eric Stein's famous words: "Tucked away in the fairyland Duchy of Luxembourg and blessed [. . .] with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."[36] Yet, over the course of the past decades, the transfer of prerogatives to the EU level has increased the constitutional salience of EU integration: new steps of integration increasingly threatened to undermine widely accepted constitutional standards domestically, but also at the EU level, for instance by limiting opportunities for parliamentary scrutiny or judicial redress. As a result, pro-constitutionalization actors, including the CJEU, but also members of the European Parliament, national parliamentarians, and, at times, certain member state governments, pressed, often successfully, for formal as well as informal constitutional change.[37] Against the backdrop of a "permissive consensus," constitutionalization advances have resulted from inter-institutional bargaining among elites, and have rarely been politicized and hence not been subject to contention in the wider public.

The emergence of a new transnational cleavage, pitting proponents and opponents of integration against each other, has altered the dynamics of political competition in Europe,[38] and thus also changed the trajectory for constitutionalization in the European Union. What is more, the rise of this new cleavage has politicized EU integration, for EU politics touch upon socially and politically contested questions about the locus of sovereignty and the scope of political communities. External drivers, such as wars, can additionally fuel politicization. Politicization not only captures the importance of an issue pertaining to the European Union among elites and in the public, but also highlights its contestedness and the polarization of positions.[39] Once a policy issue becomes politicized, it can no longer be contained easily by political elites, but spills over into the mass political arena. Hence, EU integration can no longer progress on the basis of an elite bargaining only, as the "permissive consensus" concept implies, but may face adverse societal and political preferences, as the term "constraining dissensus" suggests.[40] The politicization of EU integration is thus

[35] Leon N. Lindberg & Stuart A. Scheingold, Europe's Would-Be Polity: Patterns of Change in the European Community 41 (1970).

[36] Stein, *supra* note 1, at 1.

[37] Berthold Rittberger, Building Europe's Parliament: Democratic Representation Beyond the Nation State (2005); Berthold Rittberger, *Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament*, 50 J. Common Mkt. Stud. 18 (2012); Schimmelfennig, *supra* note 2; Héritier et al., *supra* note 2.

[38] Lisbeth Hooghe & Gary Marks, *Cleavage Theory Meets Europe's Crises: Lipset, Rokkan, and the Transnational Cleavage*, 25 J. Eur. Pub. Pol'y 109 (2018).

[39] *See, e.g.*, Pieter De Wilde & Michael Zürn, *Can the Politicization of European Integration be Reversed?*, 50 J. Common Mkt. Stud. 137 (2012).

[40] Lisbeth Hooghe & Gary Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, 39 Brit. J. Pol. Sci. 1, 5 (2009).

likely to lead to cracks in pro-constitutionalization coalitions, for politicization implies additional constitutionalization obstacles, such as the mobilization of Euroskeptic voters and the rise of challenger parties, which may moderate a government's position towards constitutionalization. With regard to the CJEU, research shows that the Court has responded to politicization pressures, for instance by adjusting its jurisprudence on EU citizens' rights.[41] Judges definitely "read the morning papers"[42] and care about the legitimacy of their jurisprudence,[43] which should make them responsive to issues characterized by heightened politicization.[44] We therefore expect that the more a policy issue is politicized, the more likely it is that the CJEU's jurisprudence will refrain from advancing constitutionalization.

b) Juridification

The EU judicature reacts not merely to the external political context, as the politicization argument suggests, it also has to take into account the legal-institutional context. We argue that the degree to which a policy is juridified allows us to assess whether conditions for constitutionalization are either favorable or unfavorable. As mentioned above, juridification comprises two dimensions, that is, both the proliferation of law by means of codification, legislation, or adjudication, on the one hand, and the expansion of judicial power, on the other.[45] We put forward that policy areas characterized by lower levels of juridification are more conducive to constitutionalization advances than those that are already highly juridified. A policy with merely a modicum of juridification implies that law is making inroads to regulate political activity, and that actors can take recourse to judicial review in case of conflict.[46] Under such conditions, the potential to realize constitutionalization is (relatively) high. In policy areas that are under-juridified, because law has not yet expanded and penetrated a particular area, judicial actors have a wide interpretative leeway which, in turn, leaves ample room for judicial law-making.[47] Lower levels of juridification can therefore turn out to be beneficial to advance constitutionalization. In contrast, highly juridified systems may actually be detrimental to further constitutionalization. This may sound paradoxical at first, but the more juridified a policy area is, the smaller are the marginal constitutionalization gains that the CJEU can achieve through its jurisprudence. This is because constitutional norms may already be legally enshrined and part of institutional practice, and corresponding constitutional standards reflect a high level of rights protection, transparency, and scrutiny. A high level of juridification also implies that preexisting case law and precedence-based rulemaking should have a rather stabilizing effect on the prevailing constitutional status quo.

41 Blauberger et al., *supra* note 31; Blauberger & Martinsen, *supra* note 32.

42 Blauberger et al., *supra* note 31, at 1422.

43 *Id.* at 1429.

44 Alberto Alemanno, *The European Court of Justice Enters a New Era of Scrutiny*, Verfassungsblog (May 26, 2020), https://verfassungsblog.de/the-european-court-of-justice-enters-a-new-era-of-scrutiny/.

45 *See* Blichner & Molander, *supra* note 10; Eckes, *supra* note 14.

46 For a detailed account of the notion of juridification, see Blichner & Molander, *supra* note 10.

47 Carolyn Moser, Accountability in EU Security and Defence: The Law and Practice of Peacebuilding 180 (2020).

Table 1. A typology of (de-)constitutionalization responses

Socio-political context / Legal-institutional context	Weak politicization	Strong politicization
Low level of juridification	*Expansion*	*Collision*
High level of juridification	*Maintenance*	*Retreat*

c) Constitutionalization responses

Combining these two conditions, we can identify four different constitutionalization responses that the CJEU can adopt (see Table 1).

(i) *Expansion*: The CJEU's jurisprudence is most likely to advance constitutionalization in this constellation. On the one hand, the sociopolitical context is conducive because the issue at hand is weakly politicized ("permissive consensus"); on the other hand, the legal-institutional context is also favorable, since the overall level of juridification is rather low, allowing the Court to employ an expansive, pro-constitutionalization jurisprudential approach. As a result, the overall conditions for constitutionalization are favorable and expansion of constitutionalization is most likely.

(ii) *Collision*: In this constellation, conditions endogenous to the legal framework, reflected in low levels of juridificaton, are favorable for advancing constitutionalization. In turn, external sociopolitical conditions are marked by a high level of politicization. In this constellation, the Court has a lot to win by advancing the constitutional envelope as it seeks to establish or buttress constitutional norms in a not yet comprehensively juridified area. But the Court also has a lot to lose if it does not defend constitutional norms by picking a fight, since a deferential stance towards constitutionalization-skeptic governments and publics might imply a weakening of existing constitutional standards. It is thus in this constellation that the CJEU is most likely to risk outright collision with the opponents of constitutionalization.

(iii) *Maintenance*: Even though the sociopolitical conditions are conducive to constitutionalization due to weak politicization, constitutional preferences are largely saturated. Existing case law and precedent-based rulemaking contribute to the stability of the constitutional status quo, which the CJEU is likely to seek to maintain.

(iv) *Retreat*: When the Court faces stark political opposition against the backdrop of a juridified legal order, it has less to win and more to lose from a conflictual response. The Court might for instance fear losing (interpretive) authority and (institutional) legitimacy, both of which would in the long run weaken compliance with its judgments and hence deteriorate its stance in the overall EU framework. The CJEU is thus likely to opt for retreat: by laying low ("duck and cover")

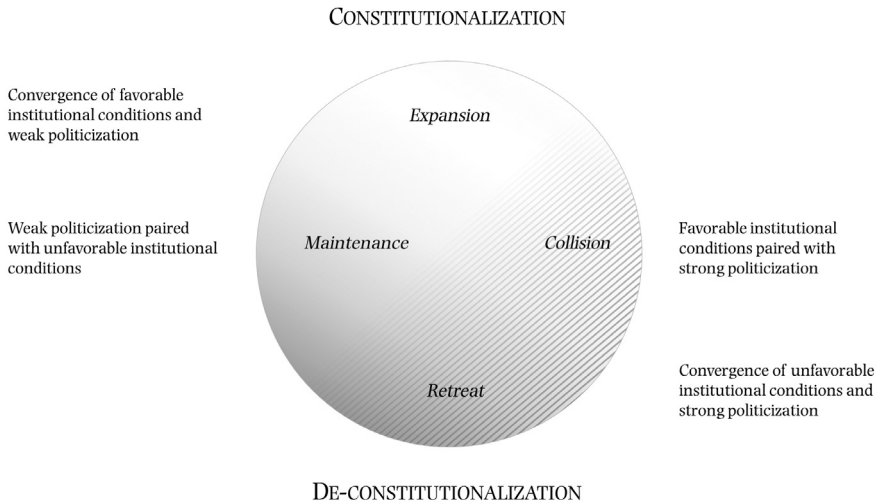

Figure 1. The gradualism of (de-)constitutionalization responses

until the storm has passed, by trying to pass the buck (to other courts), or simply through inaction.

It is important to emphasize at this juncture that the four abovementioned constitutionalization responses are ideal types. (De-)constitutionalization is neither a linear process nor is it binary. In the real world, it is characterized by gradualism (see Figure 1). This means that (de-)constitutionalization responses can, at different stages of the integration process, be more or less intense in accordance with the presence and strength of politicization and institutional framework conditions (i.e. juridification).

3. The CJEU's (de-)constitutionalization responses in EU security policies

EU security policies—namely the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA)—constitute an ideal terrain for testing our theory.[48] First, security policies show a distinctive integration trajectory with particular constitutional arrangements. Traditionally, security policies are characterized by executive leadership, weak accountability mechanisms, secrecy, and informality, and are moreover conducted at a safe distance from judicial scrutiny or parliamentary control. This governance framework, however, leaves in principle little room for constitutionalization at the EU level. Indeed, member states were reluctant to proceed

[48] We cluster the JHA and CFSP under the "security policy" category since they relate to the regulation of both internal and external core state powers, such as border control, law enforcement, migration management, foreign policy, and security and defense matters. *See* Philipp Genschel & Markus Jachtenfuchs, *More Integration, Less Federation: The European Integration of Core State Powers*, 23 J. EUR. PUB. POL'Y 42 (2016).

with (too much formal) integration of security policies to avoid sovereignty losses, and therefore opted for an intergovernmental governance structure.[49] This implies, on the one hand, that further integration, let alone constitutionalization, would be highly contested.[50] On the other hand, the late formal integration of security policies within the Union also means that their constitutional framework is comparatively recent and hence underdeveloped, which leaves ample room for adjustments via juridification, be it through legislation or adjudication.[51] Second, security matters stretch across two policy fields (or former "pillars"). The CFSP, including the Common Security and Defence Policy (CSDP), covers *external* security issues, whereas the JHA addresses primarily *internal* security matters. While law and practice have progressively diluted this dichotomous institutionalization of security, a division with other EU policies persists.[52] Indeed, both policy fields share some fundamental governance traits, namely the strong stance of executive actors and the limited participation of supranational actors, and increasingly present operational and geographic overlap.[53] This is particularly true for issues pertaining to border control and migration management where CFSP and JHA policies regularly intersect—an intersection that has already triggered Court cases in Luxembourg to clarify competences.[54]

3.1. Research design

To explain the Court's constitutionalization responses in the two security policy fields we follow a co-variational logic,[55] whereby the goal of our analysis is to establish a

[49] Panos Koutrakos, The EU Common Security and Defence Policy 5–21 (2013); Hylke Dijkstra, Policy-Making in EU Security and Defence: An Institutional Perspective 46–77 (2013).

[50] *See similarly* Panos Koutrakos, *Judicial Review in the EU's Common Foreign and Security Policy*, 67 Int'l Comp. L. Q. 1 (2018); Joni Heliskoski, *Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy*, 2 Eur. World L. Rev. 1 (2018).

[51] Eckes, *supra* note 14; Moser, *supra* note 47, at 179–80.

[52] Panos Koutrakos, *The External Dimension of the AFSJ and Other EU External Policies: An Osmotic Relationship*, *in* The External Dimension of the European Union's Area of Freedom, Security and Justice 139 (2011); Jörg Monar, *The External Dimension of the EU's Area of Freedom, Security and Justice: Progress, Potential and Limitations after the Treaty of Lisbon*, *in* Swedish Institute of European Policy Studies (SIEPS) Report n°1 (2012); Carolyn Moser, *¿Union de droit, Union de sécurité? Sobre la interacción entre actuación interior y exterior respecto a los valores y normas de la UE* [*Union Based on the Rule of Law, Union Based on the Rule of Security? On the Interplay between Internal and External Action with Respect to the EU's Values and Norms*], *in* La jurisdicción constitucional en la tutela de los Derechos Fundamentales de la Unión Europea 91 (J.I. Ugartemendia, A. Saiz Arnaiz, & M. Morales Antoniazzi eds., 2017).

[53] Gregory Mounier, *Civilian Crisis Management and the External Dimension of JHA: Inceptive, Functional and Institutional Similarities*, *in* The External Dimension of Justice and Home Affairs: A Different Security Agenda for the European Union? 43 (Sarah Wolff, Nicole Wichmann, & Gregory Mounier eds., 2010); Carolyn Moser, *Integrating Contrasting Approaches: Civil–Military Cooperation in CSDP*, PeaceLab (Jan. 7, 2020), https://peacelab.blog/2020/01/integrating-contrasting-approaches-civilmilitary-cooperation-in-csdp.

[54] Case C–658/11, European Parliament v. Council, ECLI:EU:C:2014:2025 (June 24, 2014) [hereinafter *Tanzania Agreement*]; Case C–263/14, European Parliament v. Council, ECLI:EU:C:2016:2436 (Jun. 14, 2016) [hereinafter *Mauritius Agreement*].

[55] Joachim Blatter & Till Blume, *In Search of Co-variance, Causal Mechanisms or Congruence? Towards a Plural Understanding of Case Studies*, 14 Swiss Pol. Sci. Rev. 315 (2008).

co-variation between changes in the main explanatory conditions (or independent variables)—that is politicization and juridification—and changes in the associated outcome, namely a particular constitutionalization response adopted by the CJEU. Our co-variational study rests on a qualitative approach: an in-depth analysis of a selection of CJEU landmark cases pertaining to the CFSP and JHA allows us to assess the Court's constitutionalization responses to different constellations of juridification and politicization.[56]

We gauge the *level of politicization* by drawing on the Conclusions adopted at the end of European Council meetings. The European Council is "the supreme political authority of the EU" and the "most powerful political body in the EU"[57]—qualifications the institution owes both to its exquisite membership, namely heads of state and government, and its agenda, which tends to be preoccupied with crisis scenarios that have far-reaching and long-lasting effects on member states.[58] Indeed, the agenda of European Council meetings generally comprises the most salient political EU issues, and the agreements reached during the meeting permeate EU policy and decision-making.[59] Key in this regard are the European Council Conclusions, which present the only formal evidence of what was discussed and decided during these otherwise opaque, very high-level gatherings. Although the said Conclusions are informal and not binding, these documents undeniably send strong signals to other EU institutions as they indicate the (future) political top priorities of the EU.[60] Notwithstanding some analytical limitations, European Council Conclusions unquestionably reflect the political salience of selected policy issues (including the importance accorded to these issues over time), and therefore are used in this study as a proxy for politicization. To assess the *level of juridification* of the two policy areas, we take recourse to both primary sources (i.e. Treaty provisions and secondary law) and secondary sources (i.e. scholarly analyses on the legal and institutional framework in place) as well as the corpus of existing jurisprudence.

To scrutinize *constitutionalization responses*, we undertake a qualitative analysis of the CJEU's jurisprudence, which is known to considerably impact the broader institutional setting as case law can (re-)draw constitutional boundaries.[61] This holds particularly true for the EU context, where Treaty law sets out the constitutional framework of EU policies by defining institutional competences and procedures and filling in normative lacunae.[62] Hence, the CJEU acts both as a facilitator of and as a standard-setter for (de-)constitutionalization: it can help other actors (e.g. the European Parliament

[56] For further details on our case law selection and the analytical grid applied thereto, please see below in this section.

[57] Petya Alexandrova, Marcello Carammia, Sebastian Princen, & Arco Timmermans, *Measuring the European Council Agenda: Introducing a New Approach and Dataset*, 15 Eur. Union Pol. 152, 154 (2013).

[58] *Id.* at 154; Petya Alexandrova, *Institutional Issue Proclivity in the EU: The European Council vs the Commission*, 24 J. Eur. Pub. Pol'y 755 (2017).

[59] Alexandrova et al., *supra* note 57, at 154.

[60] Wolfgang Wessels, The European Council 71 (2016); Alexandrova, *supra* note 58, at 762.

[61] Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 Colum. J. Eur. L. 565 (2007); Blichner & Molander, *supra* note 10; Eckes, *supra* note 14.

[62] Lenaerts & Gutiérrez-Fons, *supra* note 30, at 4; Grimmel, *supra* note 27, at 73.

or individual claimants) to have their constitutionally enshrined rights upheld, on the one hand, and set or cement (new) constitutionalization benchmarks by its jurisdiction, on the other. What is more, the CJEU is a multifaceted judicial body that simultaneously holds different adjudication functions. The Court can act as a constitutional court in the sense that it delivers authoritative rulings on constitutional norms, but it can in light of its diverse jurisdictional competences also act as highest court of appeals and even as an administrative court.[63] Hence, depending on the context, the EU judicature will be more (or less) tempted to engage in "constitutional reasoning" and it seems that, while the CJEU has positioned itself rather as a constitutional court in CFSP matters, basing its argumentation primarily on constitutional principles,[64] it increasingly adjudicates JHA cases related to migration matters as an administrative court with a focus on effectiveness considerations.[65] Our analysis therefore tries to unearth when the CJEU decides as a constitutional court and when it prefers to act as a highest appeals or administrative judicial body.

To gauge the Court's constitutionalization responses from its rulings is a challenging task, since we cannot know for sure what informs the Court's reasoning about constitutionalization.[66] What we can do, however, is infer constitutionalization responses from case law. We therefore define a set of four benchmarks (see Table 2), which we have developed based on the seminal literature on the CJEU's constitutional reasoning techniques,[67] and while drawing inspiration from other qualitative inquiries into the contextual embeddedness of the Court's jurisprudence.[68] These analytical benchmarks (or proxy indicators) enable us to draw conclusions from the Court's jurisprudence about its respective constitutionalization response.

First, we claim that the legal source referenced matters for (de-)constitutionalization, i.e. whether the Court relies (mainly) on Treaty provisions or, conversely, on secondary law sources to support its argument and reach its conclusions. A reference to the former obviously leaves more room for constitutionalization as it allows the Court to advance a specific (new) reading of constitutional provisions; it is also a sign that the Court acts as a constitutional court (and not as a highest appeals or administrative court). Interestingly, we find that the legal basis paving the way for proceedings before the Court—be it the ECJ or the General Court—seems to play no meaningful role in the Court's choice of legal references. In other words, it makes no noticeable difference for the Court's constitutionalization response whether the case relates to an infringement procedure (art. 258 of the Treaty on the Functioning of the European Union,

[63] Itzcovich, *supra* note 25, at 278–9.

[64] For an analysis of relevant case law, see Eckes, *supra* note 14; Moser, *supra* note 47, at 177–231.

[65] Daniel Thym, *Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: Jafari, A.S., Mengesteab and Shiri*, 55 Common Mkt. L. Rev. 549 (2018); Aysel Küçüksu, *Frequent Recourse to the Principle of "Effectiveness" in ECJ Asylum Jurisprudence*, Verfassungsblog (Oct. 1, 2020), https://verfassungsblog.de/frequent-recourse-to-the-principle-of-effectiveness-in-ecj-asylum/.

[66] Blauberger et al., *supra* note 31, at 1431–2.

[67] For a thorough analysis of the CJEU's constitutional reasoning technique(s), see Itzcovich, *supra* note 25, at 292–304.

[68] *See especially* Blauberger et al., *supra* note 31, at 1435.

Table 2. Legal analysis of (de-)constitutionalization responses

Analytical benchmark \ Court response	Expansion	Collision	Maintenance	Retreat
Legal references	Primary law ←			→ Secondary law
Interpretation technique	Teleological ←			→ Textual
Legal reasoning	Constitutional norms ←			→ Other norms
Contextualization	Constitutional salience ←			→ Political circumstances

TFEU), a failure to act (art. 265 TFEU), an annulment (art. 263 TFEU), an action for damages (art. 268 TFEU), a preliminary reference (art. 267 TFEU), a staff dispute (art. 270 TFEU; but also art. 272 TFEU), or a restrictive measure (art. 275 TFEU).[69]

Second, we observe that the approach to interpretation adopted by the Court makes a constitutionalization difference: teleological interpretation, along with contextual interpretation, generally favors constitutionalization; while a textual interpretation rather confirms (or may even reduce) the constitutionalization *acquis*. Empirical research has shown that teleological arguments constitute the most frequently employed interpretation technique in the CJEU's constitutional landmark cases.[70]

Third, (de-)constitutionalization depends on whether the CJEU's legal reasoning uses its "constitutional vocabulary"[71] by highlighting constitutional EU values, principles, and rights—such as the rule of law, democracy, equality, effective judicial review, solidarity, or conferred powers—or whether the Court concentrates on the (more technical) content of specific EU norms. If the Court's reasoning is related to constitutional (core) norms, we take this as an indicator of constitutionalization.

Finally, we show that contextual factors matter. For instance, when the Court adopts an expansive constitutionalization response, judgments as well as opinions delivered by Advocate Generals provide hints as to the political and/or constitutional salience of the case at hand.

While our analysis cannot demonstrate that politicization and juridification cause a certain type of jurisdictional development, it seeks to show via these fine-grained proxy indicators that different levels of politicization and juridification co-vary with the Court's differentiating interpretation of rules and thereby can alter the course of constitutionalization.[72]

[69] Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2016 O.J. (C 202) 47 [hereinafter TFEU].

[70] Itzcovich, *supra* note 25, at 288–9. On the (methodological) limits of textual interpretation of EU law, *see* also Alejandro Pizarroso Ceruti, *The European Court of Justice: Legal Interpretation and the Dynamics of European Integration*, 25 Colum. J. Eur. L. 253, 264–6 (2019). This finding is also backed by Peters, *supra* note 18, at 408–10.

[71] Anne Peters, *Constitutionalization*, *in* Concepts for International Law: Contributions to Disciplinary Thought 141, 147 (Jean D'Aspremont & Sahib Singh eds., 2019).

[72] Karen J. Alter, The New Terrain of International Law: Courts, Politics, Rights 338 (2004); Blauberger et al., *supra* note 31, at 1431–2.

To allow for a meaningful cross-policy comparison of jurisprudence, we selected above all landmark cases that, next to presenting contextual similarities, have some substantive and procedural overlap along the lines of the "triad of constitutionalization" since they touch upon parliamentary scrutiny, transparency, and rights protection. Our analysis concentrates on some 20 "leading cases" logged after 2009 (that is after the entry into force of the Lisbon Treaty) pertaining both to the JHA and CFSP fields.[73] All cases under scrutiny are rulings that the current scholarly consensus would place in the category of the most important CJEU judgments, because the decisions unequivocally set the tone of the Court's constitutional reasoning, or because they are likely to substantially impact on the practice of other European or national judges and hence influence further case law.[74] Most cited cases were handed down by the ECJ, but there are also decisions by the General Court that form part of our selection of leading cases. There is obviously a subjective element to our choice, as is the case with any other case law selection for qualitative studies.[75] Aware of this methodological challenge, we made sure that our case selection corresponded largely to the relative consensus on leading cases in both the legal and political science communities to render our sample as intersubjective as possible.

3.2. A reconfiguration of (de-)constitutionalization conditions

To show that the CJEU's constitutionalization responses depend on the theorized conditions, the ensuing sections provide an analysis of the constitutionalization conditions in external and internal EU security policies, after which we turn to probe whether the conditions map onto the CJEU's constitutionalization responses.

a) External security (CFSP): The expansion of juridification in a context of weak politicization

For decades, national governments consciously shielded European foreign policy and security from "supranational infection,"[76] including judicial review by the CJEU. Therefore, the general jurisdiction by the CJEU over CFSP dossiers is expressly

[73] At this juncture, it is important to note that the majority of CFSP cases concern sanctions. Yet, as our case selection is not based on the sheer incidence of certain types of cases, but on the respective constitutionalization potential of a decision, the proportion of sanctions cases relevant for our analysis is comparatively small. That is because the sanctions-related adjudication had its constitutionalization moment as a result of the *Kadi* saga, that is prior to the entry into force of the Lisbon Treaty and hence prior to the period our analysis covers. As our case selection above all covers litigation constellations for which the (constitutional) contours of judicial review and (individual) legal protection were or are still unclear, it is not surprising that sanctions cases account for a comparatively small part of our case selection.

[74] Jakab, Dyevre, & Itzcovich, *supra* note 7, at 27. More generally on the (genesis of) landmark cases, see Nele Yang, Die Leitentscheidung: Zur Grundlegung eines Begriffs und seiner Erforschung im Unionsrecht anhand des EuGH-Urteils Kadi [The Leading Case: Fundamental Elements of a Concept and Its Workings in EU Law] (2018).

[75] Jakab, Dyevre, & Itzcovich, *supra* note 7, at 28.

[76] Piet Eeckhout, EU External Relations Law 467 (2d ed. 2011).

excluded by Article 24(1) TEU read in conjunction with Article 275 TFEU.[77] This, in turn, means that the Court can only "exceptionally adjudicate on CFSP matters,"[78] namely when policing policy delimitation between the CFSP and supranational policy fields and when reviewing sanctions in line with Article 275 TFEU. This "jurisdictional carve-out" was one of the core reasons for which the ECJ declared in its Opinion 2/13 of 2014 that the EU could not access the European Convention on Human Rights. The Luxembourg Court proved unwilling to accept that the Strasbourg Court could hear cases related to the CFSP (and CSDP) for which its own jurisdiction was prima facie precluded by primary law.[79] The Court concluded its assessment by stating that "as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice."[80] Therefore, the Court's decisions on CFSP/CSDP matters handed down since Opinion 2/13 must be read as an attempt at (re-)defining which acts actually fall *within* and which acts fall *outside* the Court's jurisdictional scope—and which cases hence land in Luxemburg (or Strasbourg) first.[81] Hence, Opinion 2/13 represents a turning point at which the EU judicature explicitly showed its discontent with the constitutional status quo limiting its jurisdiction, which it then subsequently expanded by its own jurisprudence by resorting to implicit and contingent adjudicatory competences.[82] Over time, the CJEU pursued its quest for constitutionalization through juridification, in particular the ECJ, ensuring that the Court has (primary) jurisdiction over CFSP/CSDP cases and that, consequently, claimants first have to go to Luxembourg before they can turn to Strasbourg. And given that the CFSP is in many regards a "legal order in the making,"[83] the Court had and still has ample room for maneuver to act as a constitutionalization standard-setter.

Hence, the proliferation of law (by means of judicial law-making) together with a significant expansion of jurisdictional competences paved the way for the subsequent constitutionalization of the CFSP in the aftermath of the entry into force of the Lisbon Treaty in 2009.[84] Although the jurisdiction of the Court in CFSP matters is in principle severely limited by primary law, the Court has in practice incrementally enlarged the substantive and temporal scope of its judicial review of the subject matter which, in turn, has contributed to an expansion and differentiation of the applicable legal framework.[85] The most notable jurisprudential developments exist in several respects, namely (i) the review of different CFSP decisions (including in the CSDP realm) of administrative nature, that is derivate decisions taken by the Brussels-based bureaucracy

[77] Consolidated Version of the Treaty on European Union, December 13, 2007, 2016 O.J. (C 202) 1 [hereinafter TEU]; Koutrakos, *supra* note 49, at 5–6.

[78] Opinion Procedure 2/13, EU Accession to ECHR, ¶ 43 (June 13, 2014) (Kokott, A-G).

[79] Opinion 2/13, EU Accession to the ECHR, ECLI:EU:C:2014:2454, ¶¶ 256–7 (Dec. 18, 2014).

[80] *Id.* ¶ 252.

[81] Moser, *supra* note 47, at 224–5. *See also* Peter Van Elsuwege, *Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice*, 58 Common Mkt. L. Rev. 1731 (2021).

[82] *Id.* at 203–21, 228–31.

[83] Eckes, *supra* note 14, at 502.

[84] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

[85] See the numerous examples given by Eckes, *supra* note 14.

or actors in the field to implement decisions of the Council of the EU, (ii) the competence to oversee sanctions, including by delivering preliminary rulings on such matters, and (iii) the safeguard of democratic standards in EU foreign policy. More recently, we have also seen noteworthy jurisprudence on (iv) decision-making discretion and CFSP objectives in relation to the adoption of sanctions by the Council; this jurisprudential strand is likely to further expand given the current geopolitical context.

As regards administrative CFSP decisions, the ECJ, first, held in *Elitaliana* that it had jurisdiction to hear cases related to budgetary matters,[86] and, second, affirmed that acts of staff management taken at theater level were equally subject to its review in *H v. Council and others*.[87] Staff management cases—all related to civilian CSDP missions—have indeed opened a jurisdictional window of opportunity to reconfigure the legal framework. To paraphrase Advocate General Tanchev in his *SV v. Kosovo* opinion, these cases allowed the EU judicature to forge a body of case law which highlights that the jurisdiction of the Court is not automatically excluded because a disputed act falls under the CFSP framework.[88] The first and famous staff-related case, *H v. Council and others* (hereinafter *H*), paved the way for the incremental judicialization and hence constitutionalization of the CFSP/CSDP through the jurisdictional backdoor. In *H*, a case that concerned the reallocation and downgrading of a seconded staff member of the European Union's civilian mission to Bosnia and Herzegovina, the ECJ reiterated that a lack of judicial review of EU acts would contravene EU law and held that it could adjudicate the case at hand by legal analogy.[89] In this way, the Court considerably enlarged the circle of potential applicants and possible claims in the area of CFSP. In reference to the *H* precedent of 2016, the Court subsequently further extended the subject matters it could adjudicate and moreover expanded the temporal reach of its review. In *SatCen*, another staff dispute but this time related to the European Union's Satellite Centre, the General Court for instance reasoned that its competences to review administrative decision stretched well beyond theater-level staff management acts taken in the context of civilian CSDP missions, and actually encompassed comparable acts in the CFSP realm at large.[90]

Concerning sanctions, our selection of landmark CJEU cases includes two notable decisions. First, the ECJ held in *Rosneft*, a case that concerned the legality of sanctions adopted by the EU and imposed on certain Russian enterprises (including Rosneft), that it could give preliminary rulings on CFSP matters provided that the request relates either to sanctions or to policy delimitation.[91] As preliminary rulings have often served as constitutionalizing moments of EU (legal) integration,[92] the possibility of rending such

[86] Case C–439/13 P, Elitaliana SpA v. EULEX Kosovo, ECLI:EU:C:2015:753, ¶ 49 (Nov. 12, 2015).

[87] Case C–455/14 P, H v. Council & Ors., ECLI:EU:C:2016:569, ¶ 55 (July 19, 2016).

[88] Case C–730/18 P, SC v. Kosovo, Judgment, ECLI:EU:C:2020:176 (June 25, 2020); C–730/18, SC v. Kosovo, Opinion, ECLI:EU:C:2020:176, ¶ 50 (Mar. 5, 2020) (Tanchev, A-G).

[89] Case C–455/14, H v. Council, ECLI:EU:C:2016:569, ¶¶ 41, 55, 59 (July, 19 2016).

[90] Case T–286/15, KF v. SatCen, ECLI:EU:T:2018:718, ¶ 96 (Oct. 25, 2018).

[91] Case C–72/15, Rosneft v. Her Majesty's Treasury, ECLI:EU:C:2017:236 (Mar. 28, 2017), ¶ 81.

[92] *See, e.g.*, Joe Hoevenaars, *Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References*, 5 Eur. Papers 777 (2020); Michal Ovádek, *The Making of Landmark Rulings in the European Union: The Case of National Judicial Independence*, J. Eur. Pub. Pol'y (forthcoming 2022), https://doi.org/10.1080/13501763.2022.2066156.

judgments with respect of certain CFSP issues holds (further) constitutionalization potential for the Court. Second, in its *Bank Refah Kargaran* judgment, the Court furthermore found that it had jurisdiction to rule on claims for damages in the CFSP area.[93] At this juncture, it is worth mentioning that another proceeding has the potential of becoming a third leading case; we therefore included it in our analysis, even though the final word (by the ECJ) has not been spoken yet. The dispute concerns restrictive measures adopted by the Council against *Russia Today France* in the wake of the Russian aggression against Ukraine, banning the media outlet from broadcasting on EU territory for several months. In its decision on the matter, dated July 2022, the General Court found that the Council had the competences to take sanctions of this type under its CFSP prerogatives. Importantly, the Court also reasoned that a transitory restriction of certain fundamental rights (i.e. the freedom of expression) would be proportionate, necessary, and justified if it pursued the general interest of protecting international peace, security, and stability.[94] Regardless of further judicial developments, the case will (re-)draw constitutional boundaries as regards (i) the type of sanctions the Council can adopt in the CFSP context and (ii) the balancing of fundamental rights (including their restriction), on the one hand, and a general interest linked to security in the CFSP realm (in the context of war), on the other.

Finally, the Court strengthened the democratic credentials of the CFSP, that is the position of the European Parliament in relation to international agreements concluded in the CFSP realm. The Luxembourg judges unequivocally emphasized in *Mauritius Agreement* and *Tanzania Agreement*, respectively, that the European Parliament acted as a democratic watchdog over CFSP matters and therefore held information rights that the Council of the European Union was bound to respect when negotiating and concluding international agreements.[95]

What the Court's case law thus demonstrates is an impressive juridification push in the CFSP field, which in turn implies that the jurisdiction of the Court henceforth covers a large portion of CFSP decisions. Next to adjudicating on sanctions (including preliminary rulings) and policing policy delimitation, the CJEU has declared itself competent to deal with (derivative) administrative CFSP acts.[96] The only CFSP decisions that remain, for the time being, outside the CJEU's jurisdictional remit are highly political and strategic decisions related to policy priorities, deployment, and senior-level appointments. Yet, the Court has to deal precisely with the reviewability of predominantly political and strategic choices in an ongoing proceeding regarding the legality of a decision by the head of EULEX Kosovo to prioritize certain activities in light of limited resources. While the General Court expressly denied jurisdiction for this type of CFSP decision,[97] it remains to be seen whether the ECJ will follow suit in the pending

[93] Case C–134/19 P, Bank Refah Kargaran v. Council, ECLI:EU:C:2020:793 (Oct. 6, 2020).

[94] Case T–125/22, RT France v. Council, ECLI:EU:T:2022:483 (July 27, 2022).

[95] Case C–263/14, Mauritius Agreement, ECLI:EU:C:2016:2436, ¶¶ 79–87 (June 14, 2016); Case C–658/11, Tanzania Agreement, ECLI:EU:C:2014:2025, ¶¶ 68–72 (Jun. 24, 2014).

[96] On the CJEU's jurisdiction regarding derivative administrative acts in the CFSP realm, see Moser, *supra* note 47, at 218–20, 228–31.

[97] Case T–771/20, KS & KD v. Council & Ors., ECLI:EU:T:2021:798 (Nov. 11, 2021).

appeal.[98] Should the ECJ decide that its jurisdiction extends to these political and strategic choices, friction with (national) decision-makers is inevitable, not least because decisions of this kind are usually not subject to judicial review by national courts.[99]

Moreover, constitutionalization conditions were also favorable because of relatively low levels of politicization. It is true that, in general, foreign policy issues together with defense rank quite high on the agenda of the European Council.[100] Indicative hereof is not least that the CSDP was put in place in 1999 and incrementally institutionalized at successive European Council meetings in the early 2000s.[101] However, in the wake of the financial crisis, the attention of European leaders to foreign policy and defense drastically declined, while economic governance issues dominated debates.[102] Between 2009 and 2022, foreign policy as well as security and defense dossiers did indeed rank rather low on the European Council's agenda. Two notable exceptions to this lack of attention occurred, namely in 2014, when the Russian Federation annexed Crimea, and around 2017/18, when Permanent Structured Cooperation (PESCO) was launched.[103] Yet, since the Russian aggression against Ukraine in late February 2022, foreign policy and, in particular, security and defense matters have dominated the agenda of both formal and informal European Council meetings, and also led to two special European Council meetings on the issue. What is more, European citizens consider security and defense a key EU priority, and are massively in favor of the European Union and its Member States improving their geopolitical standing, including by increasing cooperating in and spending more on security and defense.[104] We can expect that the much greater politicization of CFSP will reconfigure the conditions for the future (de-)constitutionalization of CFSP issues. To the extent that greater politicization is accompanied by heightened contestation among elites and publics, further expansion of constitutionalization in this policy field becomes less probable.

Finally, civilian CSDP—the policy instrument that served as a jurisdictional window of opportunity for constitutionalizing EU security and defense—tends to fly under the political and academic radar.[105] While military defense matters are likely to attract the attention of the European Council, civilian missions are addressed only occasionally. Indeed, once the bureaucratic structures in charge of civilian crisis management had been put in place in the early 2000s, the civilian dimension of the CSDP was

[98] Case C–29/22 P, KS & KD v. Council & Ors. (App. lodged Feb. 18, 2022).

[99] *See* Moser, supra note 47, at 186–7.

[100] Alexandrova et al., *supra* note 57, at 161.

[101] Wessels, *supra* note 60, at 54–5; Dijkstra, *supra* note 49; Ana E. Juncos, *Civilian CSDP Missions: "The Good, the Bad and the Ugly," in* Research Handbook on the EU's Common Foreign and Security Policy 89 (Steven Blockmans & Panos Koutrakos eds., 2018).

[102] Alexandrova, *supra* note 58, at 766; Suzana Anghel & Ralf Drachenberg, *The European Council under the Lisbon Treaty. How Has the Institution Evolved since 2009?, in* Study PE 642.806 of the European Parliament Research Service 1, 19–22 (2019).

[103] Anghel & Drachenberg, *supra* note 102, at 23.

[104] *Key Challenges of Our Times—The EU in 2022*, Special Eurobarometer 526 (June 15, 2022), https://europa.eu/eurobarometer/surveys/detail/2694.

[105] Juncos, *supra* note 101.

largely absent from the European political scene until 2018 when member states decided to revive their civilian commitments.[106] In other words, there was for many years a "permissive indifference," as we dub it, as to whether there was more or less constitutionalization or judicial review which, in turn, was indicative of a low level of politicization. Hence, civilian CSDP offered perfect institutional and political conditions to expand constitutionalization of EU security and defense—and the CJEU gladly seized the opportunity and expanded the juridification regarding the CFSP more broadly. But it is still unclear whether and how the war in Ukraine—which has undoubtedly sparked the politicization of foreign affairs, security, and defense at the EU level—will prompt the CJEU to change course to avoid political and societal friction.

b) Internal security (JHA): De-juridification and heightened politicization

Compared to the CFSP, the constitutionalization conditions were quite different in the JHA sphere. The last substantial changes to the legal or institutional framework date back to the Lisbon Treaty, which abolished the European Union's pillar structure and introduced the ordinary legislative procedure, that is co-legislation, for the quasi-majority of JHA dossiers.[107] What is more, the progressive integration of JHA dossiers has considerably upscaled cooperation and coordination as well as regulatory and operational activities, which, in turn, has contributed to shaping an integrated administrative space in relation to migration management and border control.[108] The subsequent mandate expansions of Frontex, the European Union's border control agency, illustrate this incremental Europeanization of transboundary administrative tasks, including regulatory, supervisory, and operational responsibilities.[109] In line with the latest treaty revision, the governance framework of the JHA realm is hence characterized by a growing legislative activity paired with an unbroken trend to increased administrative interlacement. This development, in turn, has led to the CJEU increasingly dealing with applications concerning migration management and border control.[110]

Akin to the CFSP, the Court has played a crucial role in juridifying JHA. But unlike the CFSP, the scope of juridification in JHA is considerably broader. Next to Treaty law (including annexed Protocols), the rules pertaining to the JHA also entail the vast Schengen *acquis* and, moreover, count numerous legislative acts; the same cannot be said about the CFSP, where we only find some primary law rules (notably in Title V

[106] Moser, *supra* note 47, at 49–54.

[107] Nadine El-Enany, *EU Asylum and Immigration Law under the Area of Freedom, Security and Justice*, *in* The Oxford Handbook of European Union Law 868 (Anthony Arnull & Damian Chalmers eds., 2015).

[108] Cathryn Costello, *Administrative Governance and the Europeanisation of Asylum and Immigration Policy*, *in* EU Administrative Governance 287 (Herwig C.H. Hofman & Alexander H. Türk eds., 2006); Herwig C.H. Hofmann & Alexander Türk, *The Development of Integrated Administration in the EU and Its Consequences*, 13 Eur. L.J. 253 (2007).

[109] Carolyn Moser, *A Very Short Introduction to Frontex: Unravelling the Trajectory of one of the EU's Key Actors*, Verfassungsblog (Feb. 3, 2020), https://verfassungsblog.de/a-very-short-introduction-to-frontex-unravelling-the-trajectory-of-one-of-the-eus-key-actors/.

[110] Allan Rosas, *The European Court of Justice: Do All Roads Lead to Luxembourg?*, CEPS Policy Insight No. 2019/03, at 1–8 (2019), www.ceps.eu/wp-content/uploads/2019/02/PI2019_03_AR_ECJ_0.pdf.

of the TEU) and decisions (including on sanctions) of the Council of the EU, as legislative acts are precluded according to Article 31(1) TEU. One reaches the same conclusion regarding jurisdictional competences. Since the entry into force of the Lisbon Treaty, the Court's online inventory of jurisprudence *InfoCuria* inventories 610 lodged applications for the AFSJ field, compared to 425 proceedings initiated in the CFSP field (of which more than 400 cases relate to sanctions).[111]

While a high level of juridification has prompted considerable constitutionalization advances, namely by case law that imposed the validity of EU principles and protected fundamental rights (Lenaerts 2010; Halberstam 2015), some recent judgments, including in landmark cases, seem to indicate a de-juridification (thinning out of legal provisions) and de-judicialization (narrowing of jurisdictional competences), leading eventually to a de-constitutionalization of the policy.[112] Particularly noteworthy in this context is the Court's jurisprudence on migration matters, specifically since 2016 when the European Union for the first time alluded to migration as a (potential) security threat to the Union, next to terrorism and organized crime.[113] Indeed, European policymakers have increasingly come to see and deal with migration as a security issue, with the result that migration is nowadays primarily addressed under a security label.[114]

One of the CJEU's judgments that has received most (academic) attention—*NF v. European Council*—related to the contested European Union–Turkey Deal, which was concluded in 2016 with a view to containing the massive migratory pressures at Europe's borders. The Deal raised a series of constitutional law questions, namely whether concerned individuals could seize the Luxemburg Court given the *locus standi* rules, and whether the disputed act was reviewable by the EU judicature.[115] Both the General Court and the ECJ dealt with the case, while the ensuing analysis will concentrate on the ruling of the former (which was not squashed by the latter). In its decision, the General Court only scratched the surface of the first question, and spent most of the judgment discussing whether the European Union–Turkey Deal actually

[111] This case count includes all applications lodged between December 1, 2009 and August 1, 2022 respectively under the heading "CFSP" (6.01 in the systematic classification scheme of the CJEU), and the heading "AFSJ" (4.06 in the systematic classification scheme of the CJEU).

[112] On de-juridification, see also Blichner & Molander, *supra* note 10. Regarding the lowering of legal/constitutional standards in recent migration-related case law, see Iris Goldner Lang, *Towards "Judicial Passivism" in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference*, EU Migration L. Blog (Jan. 1, 2018), http://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/.

[113] European External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy* (June 28, 2016),

[114] Jef Huysmans, *The European Union and the Securitization of Migration*, 38 J. Common Mkt. Stud. 751 (2000); Balzacq, *supra* note 5; Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility*, *in* The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in dialogue 3, 51–57 (Ayelet Shachar ed., 2020).

[115] Jürgen Bast, *Scharade im kontrollfreien Raum: Hat die EU gar keinen Türkei-Deal geschlossen?* [*Charade in a Control-Free Sphere: Has the EU Failed to Seal a Deal with Turkey?*], Verfassungsblog (Mar. 3, 2017), https://verfassungsblog.de/scharade-im-kontrollfreien-raum-hat-die-eu-gar-keinen-tuerkei-deal-geschlossen/; Goldner Lang, *supra* note 112.

constituted a (binding) international instrument for which it had jurisdiction, the final answer being negative.[116] The Court reached the conclusion that it lacked jurisdiction because the disputed agreement—the European Union–Turkey Deal—had not been adopted by an EU institution but by the member states, and did therefore not fall under the category of reviewable EU acts, even if this implied that the claimants were left without judicial redress.[117] As several scholars have claimed, this interpretation was difficult to square both with previous case law and constitutional arrangements.[118] First, the decision contravened the Court's longstanding *ERTA* doctrine according to which member states can lose their treaty-making power if and when the Union has already acted internally on the matter.[119] In other words, in *ERTA*, the Court gave preference to (implied) powers over national sovereignty,[120] and this preference has, with some variations, marked the Court's case law until today[121]—but not in the European Union–Turkey Deal scenario. Consequently and secondly, the Court's decision left an essential part of EU action on the ground—namely border control and migration management in relation to migrants transiting Turkey—without judicial review at the EU level, which is also conflicting with its well-known case law on the necessary amenability of EU acts.[122] In the same vein, the Court's acceptance that claimants could be left without means of redress under EU law seemed contrary to previous reflections on the essential nature of judicial review, including in the field of foreign policy, developed inter alia in *H* and *Rosneft* respectively.[123] Third, the classification of the European Union–Turkey Deal as a non-EU instrument deprived the European Parliament of its constitutionally enshrined participation and consent rights.[124] Indeed, had the Court found the contested Deal to constitute an EU legal act, the European Parliament would have had its say in the conclusion of the agreement.[125] The ECJ did not (re-) examine these issues in its judgment on appeal, as the judges considered the appeal to be manifestly inadmissible given its incoherence and unfoundedness.[126] The European Union–Turkey jurisprudence is hence indicative of a shift to a more deferential stance that leaves executive actors with much unchecked power. Indeed, some of the Court's

[116] Case T–192/16, NF v. European Council, ECLI:EU:T:2017:128, ¶¶ 71–3 (Feb. 28, 2017).

[117] *Id.* ¶¶ 70, 74.

[118] *See especially* Bast, *supra* note 115; Lynn Hillary, *Down the Drain with General Principles of EU Law? The EU-Turkey Deal and "Pseudo-Authorship,"* 23 Eur. J. Migration L. 127 (2021).

[119] Case 22-70, Commission v. Council, ECLI:EU:C:1971:32, ¶ 263 (Mar. 31, 1971) [hereinafter *ERTA*].

[120] J.A. Winter, *Annotation on Case 22/70, re ERTA. Commission of the EC v. Council of the EC*, 8 Common Mkt. L. Rev. 550 (1971).

[121] Merijn Chamon, *Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence: The Continued Development of the ERTA Doctrine*, 55 Common Mkt. L. Rev. 1101 (2018).

[122] Case 294/83, Parti Écologiste "Les Verts" v. European Parliament, ECLI:EU:C:1986:166 (Apr. 23, 1986).

[123] Case C–455/14 P, H v. Council, ECLI:EU:C:2016:569, ¶ 58 (July 19, 2016); Case C–72/15, Rosneft, ECLI:EU:C:2017:236, ¶ 74 (Mar. 28, 2017).

[124] Caterina Molinari, *Parallel Paths that Need to Cross? EU Readmission Deals and Constitutional Allocation of Powers*, Verfassungsblog (Sept. 9, 2020), https://verfassungsblog.de/parallel-paths-that-need-to-cross/.

[125] Joni Heliskoski, *The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU*, 57 Common Mkt. L. Rev. 79 (2020).

[126] Joined Cases C–208/17 P to C–210/17 P, NF, NG & NM v. European Council, ECLI:EU:C:2018:705 (Sept. 12, 2018).

more recent decisions on access to document requests and administrative decisions concerning border control and migration management issues paint a similarly deferential picture.[127]

The politicization of migration policy resulting from the upsurge in migratory pressures has left a strong mark on the JHA. While migration issues received little attention by European leaders until the migration crisis, the topic has dominated the agenda of the European Council since then.[128] Actually, before the migration crisis erupted, the European Council had ceded the JHA turf to the European Commission.[129] In clear contrast to this trend of ebbing political attention paid to JHA dossiers, between early 2015 and late 2018 migration was discussed during twenty-one of the twenty-five formal and informal European Council meetings—not counting the high-level encounters with homologues from the Western Balkans and Turkey in 2015—and accounted for roughly 30% of the text of European Council Conclusions.[130] This predominance clearly indicates an increase in politicization of the migration management and border control dimension of the JHA. The political salience of immigration and asylum law questions was also highlighted by members of the CJEU, who stated that the "so-called refugee crisis, which peaked in 2015, has, of course, rendered this area of law particularly sensitive from a political point of view."[131] In sum, the JHA experienced an unprecedented politicization thrust in the wake of the 2015 migratory pressures, which considerably impacted institutional conditions: there was a high-level political "permissive consensus" in favor of stricter border control and curbing (illegal) migration, and a "constraining dissensus" as to how to operationalize migration management, in particular burden-sharing among member states. In many instances, EU law was bent and at times even broken due to political dynamics—a development that some scholars have called a "European constitutional crisis."[132]

In the preceding discussion we have shown that politicization and juridification differentially affect external and internal security. Based on our theoretical arguments, we would expect the Court to take recourse to different constitutionalization responses. Generally, lower levels of politicization should make it likely that the CJEU opts for rather *expansive* constitutionalization response regarding the CFSP, in particular as this policy field is so far relatively weakly juridified. As juridification increases over time, the CJEU will likely seek to *maintain* extant constitutionalization advances; if the politicization of security and defense dossiers further intensifies as a result of the war in Ukraine or other geopolitical developments, the Court might even opt for a more deferential stance (*retreat*).

[127] Case T–212/18, Romańska v. Frontex, ECLI:EU:T:2019:581 (Sept. 6, 2019); Case T–31/18, Izuzquiza & Semsrott v. Frontex, ECLI:EU:T:2019:815 (Nov. 27, 2019).

[128] Alexandrova et al., *supra* note 57, at 160; Anghel & Drachenberg, *supra* note 102, at 19–23.

[129] Alexandrova, *supra* note 58, at 767.

[130] Anghel & Drachenberg, *supra* note 102, at 20–2.

[131] Rosas, *supra* note 110, at 4.

[132] Rosemary Byrne, Gregor Noll, & Jens Vedsted-Hansen, *Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System*, 33 Leiden J. Int'l L. 871 (2020).

In JHA, by contrast, the already quite high level of juridification, which has helped to bring about a considerable constitutionalization of JHA in the past, makes further constitutionalization pushes less probable. Moreover, the migratory peak of 2015 has led to heightened politicization so that the CJEU is likely to face significant political and societal backlash if it pushes for further constitutionalization, and may consequently opt for *retreat*. The ensuing section will probe whether these expectations can be corroborated empirically.

3.3. The CJEU's reaction to a change of constitutionalization circumstances

In this section, we now discuss how the CJEU reacted to a change of constitutionalization circumstances. To this end, we analyze the Court's case law with reference to the four analytical benchmarks introduced previously (see Table 2): legal references, the Court's interpretation techniques, legal reasoning, and contextualization. Taking these benchmarks into account allows us to gauge to which constitutionalization category the respective jurisprudence corresponds—that is expansion, collision, maintenance, or retreat (see Figure 2).

a) Expansion

The Court's CFSP-related case law after Opinion 2/13 clearly falls onto the expansion side of our constitutionalization spectrum, where we find a convergence of all four benchmarks. The *H v. Council* precedent of 2016 is a case in point. Here, the ECJ took a rather unspectacular (and hence not politicized) staff management dispute as a jurisdictional entry point to reconfigure the constitutional setup, in particular the boundaries of its judicial review as defined by the Lisbon Treaty. Interestingly, the Court chose to address a fundamentally administrative matter not as an administrative court, but as a constitutional court by providing a classical constitutional reasoning in the judgment, including references to core principles and the use of teleological interpretation. In line with this expansion response, the ECJ's legal reasoning circled around the meaning of the relevant primary law provisions, namely Article 24(1) TEU and Article 275 TFEU, while secondary law was referred to in an ancillary fashion to back up the main argument. The Court's main argument—namely that it had jurisdiction to hear the case despite the "jurisdictional carve out" concerning CFSP matters laid down in primary law—was based on a teleological interpretation of the law that emphasized the constitutional values and principles of the Union, first and foremost the rule of law and equality.[133] In other words, the Court argued that, in light of these constitutionally enshrined values and principles, the restrictions imposed on its scope of jurisdiction "cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review [the contested decision]."[134] Besides, the constitutional relevance of the case was clearly spelled out by Advocate General Wahl in his opinion when he stated that the case at hand "offer[ed] to the Court of Justice. . .

[133] Case C–455/14 P, H v. Council, ECLI:EU:C:2016:569, ¶ 41 (July 19, 2016).
[134] *Id.* ¶ 55.

one of the first opportunities to determine the scope of its jurisdiction with regard to the CFSP."[135] With some variations, we observe similar patterns for the other cases falling into the expansion category, including *Elitaliana*, *Rosneft*, *Jenkinson*,[136] and *SatCen*, along with *Mauritius Agreement* and *Tanzania Agreement*. Indeed, the reliance on constitutional values and principles, combined with a teleological (and at times contextual) interpretation, is a constant feature across these cases. This corresponds to our theoretical framework: low levels of juridification and a comparatively low level of politicization allowed the CJEU to adopt an expansive constitutionalization response regarding CFSP dossiers. It also holds for more recent CFSP jurisprudence, namely the *Bank Refah Kargaran v. Council* case, in which the Court reasoned that, given the values underpinning the European Union's foreign policy—notably the rule of law requirement set out in Article 21 TEU—its jurisdiction extended to actions for damages in relation to restrictive measures.[137] This primary law interpretation was qualified as an act of constitutionalizing the EU's foreign and security policy and described as a normalization of the CFSP, in the sense that it brings this policy field judicially closer to other EU policy areas.[138]

b) Maintenance

A more recent judgment of the *H* saga delivered in 2019—the proceedings went on appeal a second time—illustrates that the Court does not wish to extend its jurisdiction on this matter any further, but tries to ensure the constitutional standard it has previously set. In the judgment of December 2019, the CJEU reasoned that, as it has jurisdiction, the right to a fair trial needed to be respected.[139] This decision can be categorized under maintenance as it primarily confirms previous case law without further expanding the Court's jurisdictional remit. A cursory look at the final decision in the *H* saga delivered in November 2020 leads to the same conclusion: the Luxembourg judges upheld fundamental (procedural) rights, without however expanding the Court's jurisdictional remit (once more).[140] Another recent case follows the same maintenance pattern, namely *KS and KD v. Council and others*, which relates to the reviewability of political and strategic CFSP decisions by the EU judicature.[141] While the General Court in its 2021 judgment acknowledged the Court's expanded jurisdictional competences regarding CFSP matters based on case law, it refrained from expanding its adjudicatory competences to yet another category of acts, namely decisions on political or strategic issues. It is all but certain, however, whether the ECJ will share the General Court's assessment on the exclusion of political or strategic

[135] Case C–455/14 P, H v. Council & Ors., Opinion, ECLI:EU:C:2016:212, ¶ 3 (Apr. 7, 2016) (Wahl, A-G).
[136] Case C–43/17 P, Jenkinson v. Council & Ors., ECLI:EU:C:2018:531 (July 15, 2018).
[137] Case C–134/19 P, Bank Refah Kargaran, ECLI:EU:C:2020:793, ¶¶ 33–7 (Oct. 6, 2020).
[138] Christina Eckes, *Constitutionalising the EU Foreign and Security Policy*, Verfassungsblog (Oct. 10, 2020); Alina Carrozzini & Luigi Lonardo, *Non-Contractual Liability For EU Sanctions: Towards the Normalization of CFSP*, 26 Eur. Foreign Aff. Rev. 459 (2021).
[139] Case C–413/18 P, H v. Council, ECLI:EU:C:2019:1044 (Dec. 4, 2019).
[140] Case T–271/10, RENV II H v. Council, ECLI:EU:T:2020:548 (Nov. 18, 2020).
[141] Case T–771/20, KS & KD v. Council & Ors., ECLI:EU:T:2021:798 (Nov. 11, 2021).

CFSP choices from CJEU jurisdiction. Yet, as foreign policy together with security and defense dossiers have gained traction in the wake of Russia's war on Ukraine, the ECJ's findings of whether strategic CFSP choices are reviewable by the Court will unfold in a significantly more politicized context. Therefore, the forthcoming ECJ decision on the matter could open a new chapter in CFSP jurisprudence—being potentially more conflictual (collision) but also more lenient (retreat) than previous case law.

c) Retreat

In contrast to the CFSP cases, many proceedings related to migration management and border control in the JHA field, which experienced a considerable increase in politicization after the migration crisis, display a marked absence of references to constitutional values and principles. This interpretive approach is very rare in leading cases of the CJEU,[142] and therefore marks a clear departure from the Court's "constitutionalizing" adjudication. The adherence to a rather narrow, textual interpretation characterizes the case law on the other end of the constitutionalization spectrum, that is the retreat category.[143] Exemplary of this approach is the *NF v. European Council* case on the European Union–Turkey Deal. In this case, the Court limited its analysis to a narrow textual interpretation of (internal) European Council documents that ought to prove that European leaders did not adopt the European Union–Turkey Deal in their capacity as intergovernmental representatives of an EU institution. At the core of the Court's legal reasoning was the *intended* composition of the entity that concluded the deal (national government representatives only), not the *actual* composition of the entity (the European Council with all its members, including its President and the President of the Commission, as expressly stated in Article 15(2) TEU).[144] Instead of referring to core principles, doctrines, and jurisprudence—such as implied external powers (*ERTA*), the necessary amenability of EU acts (*Les Verts*), or the importance of democratic security over foreign policy acts (*Mauritius Agreement*)—the CJEU came to its conclusion that it lacks jurisdiction in light of "the overall context preceding the online publication [. . .] setting out the EU–Turkey statement,"[145] without even considering the legal effects of the contested measure. And while no mention was made of the constitutional dimension of the case, the ruling stated that the contested agreement concerned the "management of the migration crisis."[146] This means that, when faced with the very clear political expectation of member states to *not* strike down the Deal, the Court remained cautious in declaring the applications inadmissible as this also precluded further jurisdictional activity. The CJEU hence avoided taking a decision on the substance of the matter which, however, resulted in essential parts of the constitutionalization acquis (parliamentary involvement in the conclusion of

[142] Itzcovich, *supra* note 25, at 294.

[143] Other authors have analyzed the Court's jurisprudence on these matters under the label of "judicial passivism." *See* Goldner Lang, *supra* note 112.

[144] Case T–192/16, NF v. European Council, ECLI:EU:T:2017:128, ¶¶ 67–70 (Feb. 28, 2017). See further, on the matter of (pseudo-)authorship of the Deal, Hillary, *supra* note 118.

[145] Case T–192/16, NF v. European Council, ECLI:EU:T:2017:128 (Feb. 28, 2017), § 71.

[146] *Id.* ¶ 70.

international treaties, individual legal protection, amenability of EU acts, etc.) being suspended. One could add here that the Court referred the touchy issue of informal (migration management) agreements back to policymakers, suggesting that the legislator and not the judiciary needed to act as the core of the problem was not a judicial but a political one.[147]

In another highly politicized case related to the JHA—this time on the possibility to extraterritorially apply for a humanitarian visa—the Court equally adopted a deferential stance favoring constitutionalization retreat, but one that indicated rather a "duck and cover" tactic. In *X and X v. Belgium*, the Court indeed proposed a restrictive reading of the existing EU law and denied that the European Union's Visa Code would allow for the extraterritorial application for a visa on humanitarian grounds.[148] At the same time, the Court did not rule out that this would be possible under national law under the heading of international protection.[149] Put differently, the Court ducked and waited for the migration storm to pass to (maybe) deal with the broader question underlying the *X and X* case, namely whether there should be a harmonized EU stance allowing for alternative routes for visa applications. The "duck and cover" nature of the ruling is reflected in all four analytical dimensions. In the final judgment, the Court did not mention the salience of the case despite the Advocate General having clearly hinted at the relevance of the application by stating that it was "crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law or, if you will allow me the expression, their EU law and our EU law."[150] Next to the silence about the importance of the case, the Court also opted for a rather literal interpretation of secondary law provisions without reference to the fundamental rights at stake. Interestingly, the "duck and cover" attitude of the Court seems to have played out. Shortly after, the *X and X* case was also dealt with by the European Court of Human Rights (under the label *N.M. v. Belgium*[151]), which equally adopted a reticent jurisdictional stance. The Strasbourg Court declared the application inadmissible because it found that it lacked jurisdiction given the territorial constraints of its jurisdictional competence. What has been qualified as an expression of jurisprudential *realpolitik* by the Strasbourg judges[152] sends a clear signal to the EU judicature and to EU member states alike (eleven of which had intervened before the Strasbourg Court to back Belgium's position denying the extraterritorial grant of a visa): states only need to deal with applications for visas once applicants are physically on their territory. Thus, in light of the overall jurisprudential context, it has become unlikely that the Court in Luxembourg will have to deal anew with cases of this type anytime soon.

[147] Küçüksu, *supra* note 65.

[148] Case C–638/16 PPU, X and X v. Belgium, ECLI:EU:C:2017:173 (Mar. 7, 2017).

[149] *Id.* ¶¶ 49, 51.

[150] Case C–638/16 PPU, X and X, Opinion, ECLI:EU:C:2017:93, ¶ 4 (Feb. 7, 2017) (Mengozzi, A-G).

[151] M.N. & Ors. v. Belgium, App. no. 3599/18, Eur. Ct. H.R. (Grand Chamber) (May 5, 2020).

[152] Achilles Skordas, *The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part II)*, EU Migration L. Blog (May 8, 2020), http://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-ii/.

d) Collision

This said, we observe a different response by the CJEU—namely collision—in relation to other touchy migration management cases. First, there is the 2020 decision in *Commission v. Poland, Hungary, and the Czech Republic* on the legality of the relocation scheme for migrants adopted in the wake of the migration crisis.[153] Handed down not only in the context of the highly politicized issue of migration management but also against the backdrop of the considerable rule of law friction with some eastern European member states,[154] the Court adopted a conflictual stance. Indeed, had the Court not picked this fight, it would have sent a strong signal to Warsaw, Budapest, and other non-compliant governments that EU law can be disregarded or even disapplied for internal political reasons—which would deprive EU norms of their primacy and therefore undermine the EU legal order the Court is to safeguard. Therefore, the CJEU crafted a judgment that closely connected the relocation of migrants with a range of constitutional EU values and principles, first and foremost the rule of law and the legality of EU actions. Accordingly, the Court's (constitutional) reasoning unfolded from the primary law framework and took into consideration the objectives pursued by the pertinent rules as well as the context. The constitutional and political salience of the cases was also made evident. Advocate General Sharpston emphasized in her opinion that the case at hand was not a merely academic debate, but that "the future management of mass migration may well give rise to problems similar to those that led to the adoption of the [contested decision]. In my view, the Commission's interest in having infringements established and in clarifying Member States' obligations is thus beyond dispute."[155] The Court (implicitly) endorsed this reading and recognized the constitutional importance of the infringement procedure against Poland and the other non-compliant member states, in particular in terms of the rule of law and lawfulness.[156] This means that, despite the high degree of politicization, the Court decided to adopt a collision response which, in turn, was sustained by a favorable condition: in line with our expectation that lower levels of juridification would favor constitutionalization, it was to the advantage of the CJEU that its own rule-of-law jurisprudence was back then still in its infancy, as this allowed the Court—even in the relatively juridified JHA field—to define more precisely the contours of what rule of law, lawfulness, and solidarity in the EU entail—including under difficult political conditions.

Second, we see a very similar pattern in a case on transit zones for asylum seekers in Hungary that equally pertained to the highly politicized issue of field migration management and was also adjudicated against the backdrop of the rule of law friction

[153] Joined Cases C–715/17, C–718/17, and C–719/17, Comm'n v. Poland, Hungary, and Czech Republic, ECLI:EU:C:2020:25 (Apr. 2, 2020).

[154] For an insightful analysis of the legal aspects and political dimension regarding the rule of law issues with certain eastern European member states, notably Poland and Hungary, see Gráinne de Búrca, *Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments*, 20 Int'l J. Const. L. 13 (2022).

[155] Joined Cases C–715/17, C–718/17, and C–719/17, Comm'n v. Poland and Ors., ECLI: EU:C:2019:917, ¶ 105 (Oct. 31, 2019) (Sharpston, A-G).

[156] Joined Cases C–725/17, C–718/17 and C–719/17, Comm'n v. Poland and Ors., ECLI:EU:C:2020:25, ¶ 139 (Apr. 2, 2020).

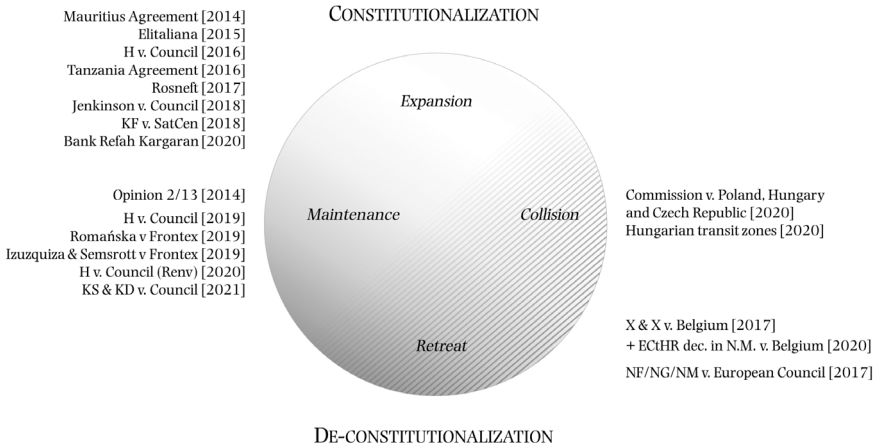

Figure 2. Constitutionalization responses in jurisdictional practice

with some eastern European member states. In its 2021 judgment in the joined cases C–924/19 *PPU* and C–925/19 *PPU*, delivered in response to a request for a preliminary ruling by the Szeged Administrative and Labor Court (Hungary), the ECJ ruled that Hungary's transit zones for asylum seekers constituted detention within the meaning of EU law, and was unlawful because it did not derive from a proper detention order.[157] While the Court analyzed the relevant secondary law provisions in detail, its core argument was based on primary law provisions that the Court gave a teleological and also contextual reading. Also, core EU law principles and constitutionally enshrined rights were at the heart of the Court's legal reasoning in this both legally and politically explosive case: the CJEU found that that the principle of primacy of EU law and the right to effective judicial protection, read in connection with the principle of the separation of powers, would contravene the Hungarian transit zone scheme.

4. Conclusion

In this article, we have developed a theory that sheds light on the encounter between the "constraining dissensus" and judicial dynamics in the European Union, which has prompted a nascent but growing field of inquiry.[158] While we agree with the argument that politicization leaves its mark on the CJEU's jurisprudence on matters of constitutional importance, we also found that the legal context matters considerably. The degree to which a policy under the jurisdiction of the EU judicature is juridified affects the Court's jurisprudence on constitutional matters against the backdrop of politicization. By systematically exploring the interplay between the sociopolitical and

[157] Joined Cases C–924/19 PPU and C–925/19 PPU, FMS & Ors. v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság & Ors., ECLI:EU:C:2020:367 ¶¶ 231, 281 (May 14, 2020).

[158] *See, e.g.*, Blauberger et al., *supra* note 31; Blauberger & Martinsen, *supra* note 32.

the legal context in which the Court operates, this article offers novel insights into the complex role the Court is playing in EU governance. Conceiving of the CJEU as an "agent" of the member states or their "trustee" is not overly helpful, unless we have a closer understanding of the different political and legal constraints the Court is operating under.[159] More importantly, we have shown in this article how these political and legal constraints—politicization and juridification—precisely affect the Court's legal reasoning and hence its constitutionalization responses.

The Court's constitutionalization role is therefore not a purely reactive or passive one, but can well set the constitutionalization tone, also when a subject matter is highly politicized and hence contested: when the constitutional status quo is at risk and needs jurisprudential backing, the Court will not shy away from collision with member state governments, as it did in its decision in *Commission v. Poland, Hungary, and the Czech Republic* or in its preliminary reference judgment on the Hungarian transit zones for asylum seekers. Conversely, as in the *NF v. European Council* case on the European Union–Turkey Deal, the Court seemingly accepted the "primacy of politics" against the backdrop of a highly politicized political environment. The Court effectively declared that matters of constitutional relevance, such as the legal protection of certain migrants, fall outside its jurisdiction. In considering the European Union–Turkey Deal a non-EU issue, the Court used its jurisprudence to engage in full retreat, while, at the same time, suggesting that the European Union's constitutional status quo was not at stake. But politicization is a variable, and so the Court's rulings on constitutional matters will unfold differently against the backdrop of a "permissive consensus."

In areas of low politicization, as in our CFSP cases predating the war in Ukraine, the Court opted for an expansionary jurisprudence when constitutional principles lacked an unequivocal basis in treaty law and judicial review was limited, and it engaged in their maintenance when the constitutional status quo was juridified. It remains to be seen how the recent upsurge in politicization of foreign policy and, in particular, security and defense dossiers will affect the CJEU's jurisprudence. Our assumption is that the case relating to sanctions against media outlets under the (in)direct control of the Russian Federation and operating in the European Union (i.e. Russia Today and Sputnik), which were adopted in the wake of Russia's aggression against Ukraine, will be decisive in this context. In its 2022 decision on the matter, the General Court, sitting in grand chamber configuration, reached two constitutionally significant conclusions. First, it declared that the Council had the competences to impose a broadcasting ban (in the form of an EU sanction) under its CFSP prerogatives.[160] And, second, the Court held that a restriction on the freedom of expression and information aimed at preventing the dissemination of propaganda and other destabilizing disinformation in EU member states during wartime was a legitimate measure of general interest to promote peace, security, and stability[161]—provided it was proportionate and provided for

[159] *See, e.g.*, Fabien Terpan & Sabine Saurugger, *The Politics of the Court of Justice of the European Union*, *in* Research Handbook on the Politics of EU Law 31 (Paul James Cardwell & Marie-Pierre Granger eds., 2020).

[160] Case T–125/22, RT France v. Council, ECLI:EU:T:2022:483 ¶¶ 49–64 (July 27, 2022).

[161] *Id.* ¶¶ 160–67.

by law. The ruling has all the hallmarks of constitutionalization: the judges unequivocally emphasized the constitutional and political salience of the matter before them; they employed a teleological reading of primary law provisions; and the main argument rests on core constitutional norms and principles (fundamental rights; institutional balance; competences, etc.). Interestingly, the constitutionalization pursued by the General Court in this case is one that, in the face of an eminent external threat, gives priority to the general interest (i.e. safeguarding the values, security, integrity, and public order of the European Union as well as the protection and promotion of international peace and security) over individual rights (i.e. the freedom of expression and information). In light of previous jurisprudence, one might wonder whether the ECJ would reach the same conclusion on appeal. Indeed, the ECJ might offer a version of constitutionalization that focusses more on individual rights protection and less on external action objectives. This, in turn, would most certainly engender a clash with the member states, whose political priority is to put a halt to propaganda and disinformation (as means of modern warfare).[162]

Besides its theoretical contribution, our study also proposes a methodology to assess the Court's constitutionalization behavior, short of knowing what impacts judges' decisions. Focusing on the Court's reasoning techniques in its case law, we suggested four indicators or benchmarks, which allowed us to infer the Court's jurisprudential constitutionalization responses. We were able to demonstrate that the kind of legal references used, the choice of interpretation techniques, the employment of particular substantive norms, and the (lacking) reference to the broader context are useful benchmarks to capture the variability in the Court's constitutionalization responses.

Finally, our findings suggest that—even in the present period of political turbulence and crisis—we should approach claims about the EU's quasi-imminent descent into some form of semi-authoritarian orbit with a grain of salt. Even though the CJEU is no longer a hard-wired champion of constitutionalization (or over-constitutionalization), it also does not simply yield to the primacy of politics when political crises loom. Indeed, the Court is not immune to political pressure, but it responds to external constraints and expectations in a nuanced way, not least because not all policy issues are equally politicized and juridified. The Court may thus be deferential to member state governments on matters of constitutional importance on a heavily politicized issue, but only as long as the respective policy is already juridified and hence has a protected constitutional core. Yet, in policy realms with relatively weakly juridified constitutional cores, the Court will try to protect it, even when opposition is strong and the political stakes are high.

[162] *See specifically*, Council of the EU, *A Strategic Compass for the Union*, Council 7371/22 (Mar. 21, 2022).