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# Constitutional Adjudication in Federal Systems

## A Comparison between the US and the Austrian Models

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*There is hardly a political question in the United States which does not sooner or later turn into a judicial one.*

*– Alexis de Tocqueville, Democracy in America*

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## Methodological introduction

The comparison this thesis pursues is based on the acceptance of the construction of "models" – as proposed in the subtitle of the elaboration. It is methodologically necessary to introduce the significance of such a classification and its origins, together with the path which has lead to its acceptance in the legal theory and the critics it has received.

The necessity to organize positive law into classes and sections is intellectually clear. This research goes both towards the direction of the best detailed analysis possible and towards the simplification of the scheme, which is in the same way extremely useful for the comprehension of the subject.

The thesis of the models is based on two principal assertions. The first one enhances the idea that the two areas include a number of features which can be found to be totally in opposition to the other one. These characteristics are defined as the main points of analysis, which go beyond the shadows and details elaborated by scholars. The second assertion regards the adoption and application of such models in different countries.

On these premises, there is a distinction between two models: the American and the European one.

The American model is embodied in the person of John Marshall, Chief Justice of the United States Supreme Court from 1801 to 1835. He was the editor of the Marbury v. Madison case, which has affirmed the practice of judicial review – not expressly present in the Constitution of 1787. So the introduction of Constitutional adjudication in the USA was established through jurisdiction.
The abovementioned differentiating features regarding the American model are manifold. It is possible to count four main points and other three additional ones which seem to be typical for this tradition. Among the most influential and difference-creating principles are: the decentralization and diffusion of judicial review, which can be practiced by all tribunals – both at the federal and at the state level; the concreteness of the control, since it can be exercised only in relation to practical cases; the incidental character of the practice, where the question of Constitutionality can be raised only during a ruling when a doubt is raised (the answering to the question is in this way accessorial and a precondition for the resolution of the case); the efficacy of the decision over Constitutionality is only *inter partes*, meaning that the law in question is disapplied only in the case under scrutiny and continues to be valid and applicable elsewhere.

The other two additional elements, found to be typical, include the control which is carried out only after the law is promulgate and into force (successive character) and the beneficial consequence of the resolution of the question incidentally, since a real and not hypothetical problem is raised and can be solved. At the same time, the third typical principle associated with the American model shows some weaknesses: the *a posteriori* control also means that not all the norms will be Constitutionally scrutinized and the efficacy of the resolution *inter partes* leaves open the interpretation of the norm by other judges, which could apply the law without declaring it unconstitutional and in such a way creating legal uncertainty.

On the other hand, the European Model presents totally opposite characteristics. This time, it is a legal scholar who embodies the model: Hans Kelsen, with his masterpiece *Reine Rechtslehre*. His theory of the hierarchy of the norms found its conclusion in the understanding that, at the presence of inferior and superior norms – with the former being the application of the latter, an organ to control such compatibility was of the uttermost importance. Such an organ found its first practical application in the Austrian Constitution of 1920, where a Constitutional Court is designed.
As the American Model, also in this case there are some essential features which can be counted. The first one is centralization: judicial review is conferred upon a specialized tribunal which is placed at the margin of the judicial apparatus and which is the one and only entrusted to exercise the function. The second element is the control being abstract: the question of Constitutionality is presented without any legacy to pending cases. Then, the judge is asked to check such a compatibility in action, not after a controversy has been raised: there is a independency in this trait, a way of considering main and as principal the question. Fourthly, the efficacy of the final decision is *erga omnes*: the unconstitutional norm is disapplied in the case at hand but also declared void and expelled by the legal system. Finally, some authors add other three features to the European model: there is also the possibility of control *a priori* – before the entry into force of the law; the certainty of law is guaranteed through the action of one and only organ and through the absolute disapplication of the norm; the weakness lies in the consideration of only hypothetical problems in the *a priori* judgment, so that it can happen that further incompatibilities may arise in the future without the possibility to solve them.

The thesis of the "models" has received some critiques, which encompass not only empirical questions but also theoretical ones – regarding the way in which such two models are then opposed.

The empirical problems are referred to the cases of positive law, where it is sometimes difficult to classify examples of judicial review in the models previously presented.

First of all, geography: some European states have similar features in their practice of judicial review to the American ones (Greece, Ireland, Denmark, Sweden, Finland, Norway) while some countries from Latin America were largely influenced by the European model. On the Asian continent, we find both solutions to be applied: examples are Japan and Philippines which follow the American characters while Taiwan and South Korea can be said to follow the European side.
Secondly, as also presented in the chapter of this analysis regarding the Austrian Constitutional Court, there was already an organ precedent to the Constitutional Court of 1920 which was conferred the duty to listen to questions of administrative acts being found in violation of individual rights recognized by one of the five Constitutional laws. This organ was the *Reichsgericht* and was active from 1867. This reasoning detaches the foundational element of the studies by Hans Kelsen and his centralized and specialized – one and only – tribunal.
Then, it is important to mention the existence of mixed or hybrid models which can be counted in the number of at least three. Firstly, the organ which is entrusted to the practice of judicial review in some countries is the Supreme Court – the tribunal at the top of the hierarchy of ordinary courts. This would make us think about the American Model, since this court is not specialized only in the process of Constitutional adjudication. However, among the ordinary courts, it is the one and only to carry out the subject and in this way is also near to the European Model. Examples are Estonia, Panama and Eritrea.
In addition, in many states all the tribunals are able to exercise judicial review incidentally while the Supreme Court is entrusted with the compatibility check in cases of violation of Constitutional guaranteed rights. This is the case of Switzerland, Mexico and Brazil.
While in the aforementioned examples it seems that the American model goes towards an hybridization with the European one, also the opposite is found in positive law. Namely, it is possible to find a specialized court in Constitutional questions and also ordinary tribunals enabled to judicial review (Guatemala, Portugal).

Thirdly, there are cases in which Constitutional adjudication is processed by a chamber of the Supreme Court – which is the only one to exercise such activity: the court in question is specialized (European trait), but still part of the ordinary system (American feature). Examples of this type are African States after decolonization: Gabon, Marocco, Ciad, Mali, Niger.

Part of the empirical doubts is also the finding that there are only few states in which there is only one type of process of judicial review of legislation. In particular, in Europe there is no case besides France where the abstract control eliminates the possibility of the concrete forms. In this way coexist in Spain the *a priori* and abstract control over the Constitutionality of treaties, the abstract and *a posteriori* control of legislative acts, the concrete and *a posteriori* control on the wave of ordinary tribunals, the concrete and *a posteriori* control in action (*recurso de amparo*) and the abstract and *a posteriori* control over the conflicts among organs of states and levels of government.

The concrete versus abstract question *per se* presents certain shadows of understanding. The judge is pushes towards an intellectual reasoning which cannot exclude both an abstract and long term view and a concrete dimension. Furthermore, the principle of *stare decisis* – deeply analyzed in the paragraphs of this comparison – determines that the decision of a tribunal even if with *inter partes* efficiency will guide all the similar cases in the jurisdiction. The doctrine of precedence so delineated makes us understand how the American Model does not create such uncertainty of law as presented by the model: when the Supreme Court declares an act unconstitutional, no other tribunal will ever apply that act in the future and all the similar cases will be solved following the same reasoning.

As far as the theoretical problems are concerned, the first one enhanced by the study of Guillame Tusseau regards a juridical "illusion"[1]. According to most scholars, the models are applied in positive law. At the same time, these models are the consequence of an analysis of the positive law. There is temptation and disillusionment about thinking that there is little reconstruction from positive law in order to create units which can be intellectually understood and that are the

[1] Tusseau, G. (2009). *Modelli di giustizia costituzionale. Saggio di critica metodologica*. Bologna: Bononia University Press.

development of previous researches. In this way, the models are discovered from the reality, where they already exist and are applied. Going on in this reasoning, Constitutionalists would therefore only have to choose between one or the other model. But this is not the case: it is far more real to think that legal actors create the institutions they imagine suit best their country, looking at the example of other countries and taking into account their goals.

Secondly, it is true that many scholars associate some essential features together and tend to understand them as a closed package – but the diversity among existing systems makes clear that there is no perfect correspondence nor complementarity between the opposed points in the models.

Another point to consider is that the confrontation of the models of Constitutionalism and the activity of Constitutional Courts is only based on their activity of judicial review and its characteristics. However, the Constitutional Court has numerous other functions, such as the control over elections, the check on referendums, high court of justice, the conclusion of certain public functions). Of course, the models are the elaboration of the position according to which Constitutional review of legislation is the *raison d'être* of Constitutional justice.

Thirdly, referring to the construction of such classification, it is understandable that its categories should be exhaustive and exclusive. But this is a goal far from reality, given the variety existent in positive law. The elaboration of two opposite tracks is this way criticized, because the phenomenon is too complex to restrict the study to models confronted feature by feature.

The conclusion is that the models result being well and logically constructed, but lack proof confrontation with reality. Best, the more they disclose and illustrate the instance, the less their analysis is rigorous. So would following a non-rigorous method of analysis be the path to follow – always considered as a difficulty in the study of positive law? Should the models be totally abandoned?

Some authors would advance to add new models to the existing ones. L. Pegoraro and L. Favoreu[2] have worked in this perspective, enhancing the idea of a third model which comprehends the Latin American countries – where diffused and centralized control coexist – and a fourth model where a specialized chamber of the Supreme Court is entrusted with judicial review. In this development

[2] Favoreu, L. (2019). *Droit constitutionnel*, 21st ed. In: Collection Précis. Paris: Dalloz.

of the field, some scholars prefer focusing on the principal scope of the system, while others focus on the nature of the question posed to the Constitutional judge.
At the same time, other scholars like V. Constantinesco and S. Pierré-Caps[3] go in another direction: a consistent renovation of the approach, formulating a more general thesis without the supplement of models. In particular, their study proposes to start from the questions that a Constitutionalist should solve.

What remains true, is the need we feel to compare – continuously – and the enriching experience it creates. We are pushed to compare and in every comparison there is a tendency towards the reduction into principles, easy and understandable, which rend us able to create a common plan. But here the difficulty arises in the issue of Constitutional law and legal systems. As J. Bentham wrote in his treaty "Of Laws in General"[4], we can aspire to create a piece which could be seen as the universal harmony of the laws – where all the dispositions of the systems are taken into account and a true classification can be made. As Tusseau concludes his critical essay, "la tâche et la méthode sont donc connues. Il ne reste plus qu'à suivre la seconde pour accomplir la première"[5].

[3] Constantinesco, V. and Pierré-Caps, S. (2016). *Droit constitutionnel*, 7th ed. In: Thémis. Paris: Presses Universitaires de France.
[4] Bentham, J. (1970). *Of laws in General*. London: Continuum International Publishing Group Ltd.
[5] Tusseau, G. *Modelli di giustizia costituzionale*, cit.

# 1. The origins of Constitutional adjudication in federal systems

The practice of Constitutional adjudication, also commonly known as *judicial review of legislation*, is the praxis through which a judicial body – thus we are clearly narrowing the field to those system which apply a jurisdictional review – has the right and also the duty to review actions of the legislature and the executive branches which are claimed to be unconstitutional. At the end of this adjudication process, the piece of legislation or activity under consideration can be invalidated.

The power to fulfill this task cannot be but granted to the judiciary, as the only independent and autonomous branch among the three which we recognize in the division of powers. This power is recognized and mirrored in a control over the activity of the legislator, under the light of the Constitution.

As society changes – at an always higher speed – also the law falls under the need to be revised continuously, in order to be up with the values and rights which constitute the solid basement of our democratic systems. This is where Constitutional adjudication finds its reason to be: Constitutional law can be seen as part of humanity's inheritance from the struggle for rights, freedoms and power-limited governments.

In this framework, the United States and Austria represent two models of Constitutional adjudication which are the subject of a comparative study in this dissertation. Their engagement in the diffusion of political democracy and Constitutionalism makes of them excellent protagonists of the proposed analysis, as also pioneers of two divergent models of judicial review.
The variation in Constitutional doctrine which we can observe between countries are the product of diverse general philosophical values and historical traditions, which then mirror the content, substance and meaning of Constitutions.
The additional feature which is underlined in the analysis will be the federal nature of the systems under study. Why was judicial review particularly born in a federal country? And why its development was so deeply crucial?

The federal character of the countries under scrutiny in this production is essential to the understanding of the birth of Constitutional adjudication and on its development. It is contemplated that the federal government is allowed to contest a statute conceived by a state, but the state cannot sue the federal government. The experience of judicial review, especially in the US, lead to a new approach to the federalist question: the Austrian Constitution recognizes a full equality between the state level and the federal level, allowing the federal government to apply to the Constitutional Court for state statutes or state administrative acts and at the same time allowing the state government to apply to the Constitutional Court for federal statutes or ordinances issued by administrative authorities at the federal level.

### 1.1. The supremacy of the Constitution and the check on the lawmaker

The task assigned to jurisdictional organs – which we will in the next paragraphs analyze – is not only to interpret the law beyond its literal meaning but to judge its validity, namely their correspondence with a primary law.

This reasoning entails the existence of a *lex superior*, to which ordinary law is completely subjected. This lex superior, which instead is not subject to the vulnerable changes of parliamentary majorities, is what we call today Constitution.

Constitutions are the great discovery of modern thought. The great fascination which derives from this documents is not only their wide coverage and spectrum of action, but furthermore the research for an instrument to ensure the superiority and applicability of such *lex superior*. That research, which started in the United States with the case Marbury vs. Madison, today finds its satisfaction in the practice of judicial review of legislation.

As Mauro Cappelletti underlines in his book "*Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*"[6], we can so distinguish a first and a second moment in the understanding of the supremacy of the Constitution.

[6] Cappelletti, M. (1971). *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*. Milano: Giuffré, pp.VIII-IX.

First of all, by recognizing that legislative acts need to evolve together with the people in their societal system, the founders of Constitutionalism wanted to freeze time by creating something semi-eternal, which entailed values which went far beyond flying customs.
Secondly, the brilliance relies in the character of such documents. How to create a primary source, capable of dominating over ordinary laws? The answer is in the rigidity of such Constitutions. A Constitution is defined to be rigid – as opposed to flexible – when its laws "cannot be changed in the same manner as ordinary laws", as stated by Dicey[7].
Following the reasoning of Heringa and Kiiver in "Constitutions compared: an introduction to comparative Constitutional law"[8], we can consider the supremacy of the Constitution as the first argument brought forward in order to justify the practice of judicial review of legislation.

The second argument would be the check on the lawmaker. As the authors explain, we can understand the notion of separation of powers in two ways. One, pursuing the French reading, would be of a complete separation between the judiciary and the legislature. On the other hand, separation of powers can also be read under the light of *checks and balances*.

Here the question arises on whether such an honorable and important task can be assigned to someone who is actually not elected – namely a judge. But, as we are familiar with the windy character of elections and the weaknesses of an often changing parliamentary body, we can else ways consider the figure of the independent judge as the only legitimate one to pursue the goal of Constitutional adjudication.
Constitutionalism searches for the recognition of fundamental rights of the individual and for a certain division of powers. It is not necessary that this guarantee is exercised by the judiciary, when there is a strong and trustworthy legislative branch. But it's true that judicial review, based on a rigid Constitution, gives light to all the bonds, ties, checks and balances of the legal system and highlights the true values, dear to Constitutionalism itself.

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[7] Dicey, A. (1885). *Introduction to the study of the law of the Constitution*. London: MacMillan, p.65.
[8] Heringa, A. W. and Kiiver, P. (2012). *Constitutions compared: an introduction to comparative Constitutional law*, 3rd ed. Cambridge: Intersentia, p.160.

As such, judicial review represents one of the "internal safeguards within Constitutions to protect the order they were creating", as N. Wenzel states in his article "Judicial review and Constitutional maintenance: Marshall, Kelsen and the Popular Will"[9].

The thesis supporting the role of the judiciary and its check on the lawmaker is supported also by Alexander Hamilton, in his essay "Federalist NO 78: The Judiciary department"[10]. Published in 1788, this work has the goal of explaining the structure of the judiciary as established in the Constitution.

Hamilton supports the argument according to which the judiciary branch is the weakest among the three. Since it has no power over money or over the military, the only capability that remains under its prerogative is judgment. Hamilton also quotes Montesquieu, underlying that the judiciary – among the three powers – is "next to nothing".

"*Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment…*"[11]

In the Federalist NO 78, Hamilton also accentuates the role of check on the lawmaker that the judiciary is called to perform through the process of judicial review. In fact, the legislative branch cannot scrutinize and review its own decisions or the product of the latter – legislative acts. And in this control over the legislature the federal courts protect the people: the structure of the

[9] Wenzel, N. G. (2013). *Judicial Review and Constitutional Maintenance: John Marshall, Hans Kelsen, and the Popular Will*. Political Science and Politics, 46 (3), p.598.
[10] Hamilton, A. (1788). *The judiciary department*. Federalist NO 78. New York: McLEAN's Edition.
[11] Ibid.

Constitution, if defended, ensures the preservation of fundamental rights, liberties and democratic procedures.

*"The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."*[12]

Therefore, judicial review mirrored the understanding that courts had to defend the preconditions for "a limited Constitution" – as Hamilton underlines – by safeguarding the autonomy and independence of all bodies.

According to some scholars, The Federalist 78 must be understood as allowing justices only to nullify a concededly unconstitutional act[13]. Others view this doctrine as entailing a wide reading of judicial review.

### 1.2. Separation of powers and the birth of Constitutional courts

The conclusion of the Second World War brought many states to the creation of ad hoc courts, granted with the complicated and profound function of judicial review – on the model of the Supreme Court of the United States, where the practice was born centuries before. It was believed that to avoid another dramatic decline into totalitarianism or any form of authoritarianism, political constraints were no more enough to control legislatures. So, the first countries to create Constitutional Courts in their systems were Germany, Italy and Spain after the fall of fascist

[12] Hamilton, A. *The judiciary department*. Federalist NO 78, cit.
[13] Snowiss, S. (1990). *Judicial Review and the Law of the Constitution.* New Heaven: Yale University Press.

regimes and were followed by Eastern Europe countries, after the fall of the Berlin wall and communist regimes. As Christoph Grabenwarter underlines[14], the independence of such Courts is both an "objective of the separation of powers" and a precondition for this functioning, since independence "enables constitutional courts to effectively control the respect for the separation of powers".

The historical birth of the first court endowed with the power of Constitutional adjudication goes back to 1777, when the New York Constitution created the New York Council. A similar proposal had been advanced even before by the Virginia delegation, supported by James Madison. The power given to this council was to have a veto over the legislation approved by the Congress. In particular, as Paul Yowell describes in his chapter "Judicial Review and Constitutional design"[15] of 2018, the New York Council "had the power to reject laws inconsistent with the spirit of this Constitution or with the public good".

Nevertheless, it should be mentioned that in some countries *political* bodies have been entrusted – alone or together with a judicial one – to this control. In this cases, as underlined by Cappelletti, the control is carried out as a consultation and *ex ante*. This Latin expression means literary *before* and it clarifies the preventive character of these bodies, which check on the Constitutionality of actions of the executive and the legislative branches before they are published as acts.
This is the case of France, where a *Conseil Constitutionnel* (established with the Constitution of the 5th Republic, in 1958) is given the responsibility to control in prevention the compatibility of a legislative text or international treaty before its promulgation. This council is formed by all former Presidents of the Republic plus nine members, of which three are elected by the President of the Republic, three by the President of the *Assemblée Nationale* and three by the President of the *Sénat*.

[14] Grabenwarter, C. (2011). *Separation of Powers and the Independence of Constitutional Courts and Equivalence Bodies*. (Keynote Speech in 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro), p.1.
[15] Yowell, P. (2018). *Constitutional rights and Constitutional design: moral and empirical reasoning in judicial review*. Oxford: Hart Publishing, p.148.

The process undertook by the *Conseil Constitutionnel*, being ex ante, has to be seen as incorporated in the entire process of production of the act and that is the reason why it assumes the same political nature of the procedure.

Nikolai Wenzel, in his article "Judicial review and Constitutional maintenance: Marshall, Kelsen and the Popular Will"[16], explains the role of constitutionally created institutions which have the main role of "limiting the expansion of the state", being in this way "dissociated guardians". On the other hand, he considers as "integrated guardians" those institutions which have a personal interest in limiting the power of the other members of the system.

Constitutional courts, being dissociated guardians, have the burdensome responsibility of interpreting the primary source of law. All around the world, these bodies have developed a tendency to identify in the words of the Constitutional text generally endorsable principles – as equity, natural justice or civilized conduct – which are not directly readable from the paper.
However, as deeply illustrated by Paul Yowell in his work "Judicial Review and Constitutional Design" of 2018 (from the book Constitutional Rights and Constitutional Design), according to Kelsen Constitutional Courts should not be endorsed with the enforcement of bill of rights but only with "technical matters of Constitutional law within the domain of legal expertise". Kelsen was very strong against allowing the court to reason on principles such as justice, freedom, equality or equity: they belong to an abstract moral language, which in his view can be threatening for Constitutional adjudication. Nonetheless, the Constitutional courts born on the Kelsenian model all also have in their Constitutions a bill of rights, or a similar document.

As Brandon J. Murrill explains in his essay "Modes of Constitutional Interpretation"[17], superior courts assigned with the task of judicial review rely on some common methods of interpretation. He distinguishes among eight different techniques: textualism (focusing on the literal meaning of the text, which for textualists is objective), original meaning (constructing the public meaning at the time of the founding fathers), judicial precedent (also known as *stare decisis*), pragmatism (considering more interpretations and choosing the one which will lead to more benefits for

[16] Wenzel, N. G.. *Judicial Review and Constitutional Maintenance*, cit., p.593.
[17] Murrill, B. J. (2018). *Modes of Constitutional Interpretation*. Congressional Research Service, pp.5-24.

society), moral reasoning (searching for the moral value at the root of the logic), national identity (based on the specific features of American nationalism), structuralism (drawing from the relationship ascribed in the Constitution among the different branches of government) and historical practices (targeting previous arrangements decided by the political branches).
According to Treanor, arguing for the importance of early cases of judicial review before Marbury vs. Madison, also at the time a great number of interpretative approaches was used. We are referring either to a textual reading or to interpretations based on structural concerns. In the majority of the cases he discusses in his article – four out of seven – an expansive interpretation was carried out for Constitutional adjudication.

The birth of Constitutional courts and the power assigned to them has not been an issue of easy resolution, since it involves one of the main perpetual questions about Constitutional adjudication: as Mark Tushnet underlines in his book "Comparative Constitutional Law" [18], there is a confrontation between the right of people to be governed by their representatives in the legislature through their acts and the function of the Constitutional court to engage in the check of Constitutionality.
To address this delicate matter, Constitutionalists provided some counter balancing element in the formation of these *ad-hoc* courts. An example is the way in which judges are selected. For example, in Austria the judges of the Constitutional court are selected by the parliament, since they are asked to fulfill a negative legislative function. The president, the vice president and half of the members are elected by the House of Representatives while the other half of the members is elected by the Senate.
In particular, the Austrian model – drawing from the Kelsenian reasoning – possesses two meaningful features. The first one is the centralization of Constitutional adjudication, to which a paragraph will be subsequently devoted. The second one is the entrustment of this task to a body which is totally separate from the other branches of the legal system. This is opposed to the American reasoning, where decentralized judicial review of legislation is applied.

[18] Jackson, V. C. and Tushnet, M. (2006). *Comparative Constitutional law*, 2nd ed. New York: Foundation press, pp.321-322.

In the framework of a liberal separation of powers, Constitutional courts are collocated in the third branch: the judiciary. Montesquieu, together with Locke, is the cornerstone author for this doctrine. During his construction, Montesquieu works towards the preservation of political freedom rather than towards political self-determination. He was the first one to distinguish precisely the powers in three – in the same way in which we know them day. At the same time he underlines that these powers cannot rest in the same hands: they must be divorced. The latter is what is called a personal separation of powers: different people should be engaged in its exploiting. The division in three branches is, on the other hand, a functional separation. Lastly, there is what is known as the institutional separation of powers: the three functions are attributed to different organs.
As will be extensively presented in the next chapters, Alexander Hamilton[19] will claim that – out of the three – the judicial power is the weakest one. This goes together with the description of the judge by Montesquieu, "*bouche de la loi, en quelque façon nulle*"[20]. However, the latter thinker was the first one to include the judiciary into the separation of powers and to design it in his drawings as detached from the other two, independent and more solitary.

### 1.3. Marbury vs. Madison: the emergence of judicial review in US Constitutional history

The case Marbury vs. Madison is a legal dispute under the US Supreme Court, discussed on February 24th, 1803. Its implications will change forever the Constitutional history and foundations of the United States and of all the other systems which will adopt their same precedent.

This case was a confrontation which involved three founding fathers: Thomas Jefferson, James Madison and John Adams. When Adams was president, the Judiciary Act of 1801 was passed. This act created new district and circuit courts, enlarging also the number of judges. In this way, Adams could appoint more judges belonging to his faction – the federalist one – knowing that the election of Jefferson would mean a change in the political guidance of the country.

[19] Alexander Hamilton was one of the founding fathers of the United States. Main supporter of federalism, he headed the Federalist Party and was the first Secretary of the Treasury under the presidency of George Washington, enhancing the establishment of a national bank, of trade relations and of the management of the States. He was the foremost defender of a strong central government.
[20] Montesquieu, C. L. (1951). *De l'Esprit des lois*, 11(4). In: Œuvres completes, 2. Paris: La Pléiade, p.395.

One of the judges appointed in this framework was William Marbury. The secretary of state under Adams, John Marshall, did not made it in time to deliver his commission to Marbury before the new president's succession. The new secretary of state under Jefferson was James Madison. At this point, Jefferson asked to stop allocating the commissions and in doing so he prevented the new appointees from entering their role. This failure to delivery on time could imply the invalidity of the appointment – or this was what Jefferson expected from his actions.
Marbury filed his complaint to the Supreme Court, asking the executive to complete the task and give him his commission.

The case arriving at the Supreme Court was not only about the mere delivery of the commission – technically called *writ of mandamus* – but it involved more. Had Marbury the right to receive this document and was he entitled to a remedy enforceable through courts?

Marshall, Chief Justice of the United States, regarded the issuing of the famous writ of mandamus as the best remedy for this case. But could the Supreme Court itself issue such a document? By investigating such possibility, Marshall found a discrepancy between the Constitution and the Judiciary Act of 1789 – which had become the Act guiding the judiciary after the reforms of Jefferson. These two acts provided diverging guidelines for the Court's jurisdiction.
The Chief of Justice was in front of an interrogation of the pure principle of Constitutionalism in itself. For Marshall, the Constitution could not be modified by the Congress through regular legislation and it was superior to all other laws: the Supremacy Clause.

Consequently, Marshall declared the Constitutional clashing part of the Judiciary Act of 1789 invalid, with unanimous support.
In conclusion, Marbury did not receive his mandate through the writ of mandamus for the District of Columbia (because the document had to be issued under Adams, as he was the appointer) – but this case is of crucial importance for the development and birth of modern American Constitutionalism: it establishes not only the supremacy of the Constitution over any other source of law but also the practice of judicial review.

The *ratio* which the court posed as the basis of its jurisprudence is the key to the understanding of all American Constitutional law. According to the court, legislative powers derive their authority from the delegation made through elections, by the sovereign people. This happens through the Constitutional norms, both at the state and the federal level. The American Congress fits in this scenario; if then the legislative act infringes the limits posed by the Constitution, it is an act with no juridical power.

William Michael Treanor, in his structured article "Judicial Review before Marbury"[21] gives a different perspective for the origins of judicial review and in particular for the "expansive view" of the modern Supreme Court.

The author claims that there was an early practice of judicial review, more wide-ranging than the usual vision of scholars. And this early practice made of Constitutional adjudication nothing new and extraordinary when the ruling Marbury v. Madison was carried out. This is why, the author explains, there was no profound crisis in the system following the decision of Judge Marshall.

First of all, Tenor discusses that there were two types of exercise of judicial review before 1803: one when legislative acts concerned juries or Constitutional courts – and in this case the court had never the doubt and invalidated the act; the second when federal courts analyzed the Constitutionality of state legislation.

This initial cases are similar to the modern case law, where the Supreme Court has struck down the legislation of Congress when in conflict with federal positions. For example, the crucial *Hayburn Case* 1792 was the first occurrence of ruling over the issue of justiciability. The case was brought before the Supreme Court and all the justices agreed that just reading the text of the act[22] under scrutiny, it could be deemed unconstitutional. But the latter never ruled over this case, delaying its judgment in the hope of a repeal by the Congress – which arrived in 1793. Apart from the lack of conclusion from the most important Court in the matter at hand, we can deduce from this case the readiness of justice to the idea of void declaration and unconstitutionality. And such

[21] Treanor, W. M. (2005). *Judicial review before Marbury*. Stanford Law Review, 58, p.455.

[22] Invalid Pensions Act, 1792.

reasoning was not made on text reading *per se*, but mainly considering broad principles covering the role of the judiciary and its independence.

Professor Suzanna Sherry[23] maintains that at the time of the founding fathers, there was an expansive conception of Constitutional adjudication: it was believed that all the legislation had to be judged in its adherence not only to the Constitutional text but also to essential principles of natural law.

It is worth underlying also the background of Judge Marshall, in order to understand the value of precedent jurisprudence on his academic and professional life. He came from Virginia, where the discussion over the Constitution was fervent and many cases on the matter were debated. The judge ruling over the crucial Case of the Prisoners – George Wythe – was the mentor of John Marshall and was the first American Law professor, participating also to the Philadelphia Convention. In this case, the professor and judge released strong statements in favor of judicial review. This reasoning can explain the role of Marshall and his keenness to act according to what now can be seen as a probable *common* practice for the time.

[23] Suzanna Sherry is one of the most well-known scholars in the field of Constitutional law. She is currently professor of Law at the Vanderbilt Law School, holder of the Cal Turner Chair. Among her representative publications it is important mentioning "The Founders' Unwritten Constitution" 1987.

# 2. The US system and its application

## 2.1. US Federalism: *e pluribus unum*

The *motto* on the head of the Bald Eagle in the American national symbol recites "*e pluribus unum*": out of many, one. As the name of the country itself suggests, the United States of America are constituted by a plurality of single States, which all together establish a federal presidential and Constitutional Republic.

The confederational asset established in 1777 just after the independence was soon understood to be incapable of absorbing the needs of the 13 states, since the Congress had no enforcement authority. The urgency for a change was evident and in 1786 Alexander Hamilton proposed to hold a Constitutional Convention. The Congress accepted the idea and on May 25, 1787 the Pennsylvania State House opened its doors to 55 delegates representing the states. A totally new form of government was being written down: three branches (separation of powers), a system of checks and balances and precise responsibilities.

*But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*[24]

As the American Revolution was bringing about its main results, the Constitutional thought belonging to Americans was also departing totally from the British conceptions and priorities. Constitutionalists from the United Kingdom supported the unique concept of parliamentary supremacy as the defense for their liberty. This was seen by the Americans as the maximum outcome of what they feared the most – discretionary power – in complete antithesis with their aims: checks and balances, restrictions to power and protection by the rule of law.

[24] Madison, J. (1788). *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*. The Federalist NO 51. New York: McLEAN's Edition.

The Congress, invested with all legislative powers, is composed by the Senate and the House of Representatives. In each of the two chamber, the ground for the representation are the single States. The House is composed of Representatives from each State, depending on the population of the State. On the other hand, the Senate is composed of an equal number of representatives per State. This feature is not alterable in the Constitution, according to Article V[25].

It was also clear to the constituent fathers that there was the need for "an energetic executive"[26]. With this aim in mind, a monocratic executive was the first choice in order to ensure unity, rapidity in the decision making and a transparent accountability. As stated in Article II of the Constitution: "The executive Power shall be vested in a President of the United States of America". The President holds his office for four years, together with the Vice President. In the beginning, there was no mention to the times allowed for possible re-election. However, it became a custom with George Washington and Thomas Jefferson not to hold the office for more than two mandates. This tacit rule became part of the Constitution with the XXII amendment. The essence of the power of the President is persuasion and his leadership is based on his ability to negotiate.

The form of government of the United States can therefore be defined as a system of separated and balanced powers. It is a presidential-congressional government, which does not always function following the same rhythms: there can be a phase in which the Congress is predominant, a predominance of the President, more collaborative periods or more conflictual ones. The executive and the legislative branches have separated electoral legitimacy and are the voice of different interests and hopes.

The separation of powers applied in the United States is not only horizontal, dividing the three branches of powers, but also vertical. This dimension is the one taking into account the role of the

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[25] Article V of the Constitution of the USA recites: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[26] Hamilton, A. (1788). *The Executive Department Further Considered*. Federalist No 70. New York: McLEAN's Edition.

States and the role of the Federal government. As far as competences are concerned, the Congress has its powers enumerated textually in the Constitution. Those areas not covered by such explicit clause are subject matters of the States and their people, unless their own Constitution prohibits them[27]. This means that the States and their citizens have expendable legislative powers.

In American Constitutionalism, the founding fathers had the intent to create a dispersion of power which could avoid the danger of an enormous concentration of power in few hands. This is why they ensured both a vertical and horizontal variety of organs, which function as previously defined "integrated guardians": they check each other in a healthy competition. It is worth mentioning the federal and the state level, the upper chamber and the lower chamber and the obvious distinction between legislature and executive.

In this great "mixed government", as Lee and McKenzie call it in their work "Regulating government: a preface to Constitutional economics"[28], all US courts – so including those at the state level – are invested with the duty of Constitutional review. After the case Marbury vs. Madison, the judiciary can be defined to act as a dissociated guardian, checking on the activity of the other two branches of the system.

The procedure through which judicial review is enacted is the main divergence between the US model and the Austrian model of Constitutional adjudication. In American Constitutionalism, the question of Constitutionality is raised incidentally – in a case under scrutiny where there is a doubt about a statute.

All federal judges have the right to review a piece of legislation for its Constitutionality, coming both from the state and federal level. As a "federal question", as Heringa & Kiiver call it, a doubt over the Constitutionality of a federal statute arisen before a State court – in a dispute – must be brought to a federal court.

The fact that all the judges are able to perform the task of Constitutional adjudication, makes of the American system a *diffused* example of judicial review system. The disorder which can follow

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[27] This is stated in the 10th amendment of the American Constitution, 1791: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

[28] Lee, D. and McKenzie, R. (1987). *Regulating government: a preface to Constitutional economics*. Lexington (MA): D.C. Heath.

from this general diffusion is mitigated by another feature of the American system, namely *stare decisis* – a feature of every Common Law judicial tradition. This principle states that inferior judges must conform to the decisions of the Supreme Court.

### 2.2. The judiciary and the Supreme Court

Article III of the American Constitution introduces the third branch in the separation of powers of its system, the power of the Judiciary. As Hamilton has stated in his essay mentioned beforehand, this power is weakly structured and can be seen as the least dangerous branch. We read in Section I of Article III:

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

Being it the judiciary of a federal state, the tasks under its unique jurisprudence are limited. Namely, the federal level is placed side by side with the state level judiciaries, with their courts and decisions.

As we can read from Article III, the Congress is left with what we can define as a possibly jeopardizing power to define the number of minor courts and also the areas of jurisdiction of the federal judiciary itself. This potential could be used to make of the third branch an even weaker power as already depicted in the Constitutional text and in the opinion shared by Hamilton. However, the course of history has shown instead that the federal judiciary has been and is a fundamental actor in the judicial and political life of American citizens.

The First Judiciary Act of 1789 created enough inferior judges with a good number of competences, but at the same time it gave powers to the Supreme Court – making it effectively a superior player and guidance in the field.

The Supreme Courts' composition was fixed to 9 judges in 1869 and its role is explained in Section II of Article III:

*"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned[29], the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."*[30]

In addition, it was clearly thanks to the quality of its conduct and decision-making that the federal level of the judiciary was capable of affirming itself as a proper actor in the American scene. Particularly, the main character in this understanding is the Supreme Court – able to establish itself as a Constitutional power and authority.

Of course, the judges of the Supreme Court are skillful to be independent and – we can say – audacious in their rulings also thanks to the safeguards they receive from the Constitution itself. First in line, they are not elected members: they are all appointed by the President, with the consent of the Senate. This enables them to avoid being influenced by the preferences of the public, looking forward to the next elections. Secondly, and probably what counts the most, is what Bognetti[31] calls *inamovibilità*. Judges, once appointed, remain in charge for life as long as "during good behavior" – as Article III again has underlined in its first section.

As far as the figure of the judge is concerned, in the American States it is important to underline their special and "unique relationship to the public" – as Crabtreee and Nelson highlight in their article[32]. The majority of the rulers in question (namely the state level ones) *need* public support in order to be reelected. Does this imply that the public is more prone to accept resolutions by justices which it has itself elected? The working assumptions of the two scholars just cited is that

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[29] First part of Section II, Article III of the American Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[30] Section II, Article III of the Americano Constitution.

[31] Bognetti, G. (1998). *Lo spirito del costituzionalismo Americano: breve profilo del diritto costituzionale degli Stati Uniti*. Torino: Giappicchelli, p.62.

[32] Crabtree C. and Nelson M. J. (2019). *Judging Judicial Review in the American States*. State Politics & Policy Quarterly, p.2.

not only the answer to this question is affirmative – since the court is entailed with more credibility through elections – but also that compared to judicial review carried out by unelected courts, the elected ones are more supported in the use of this power.

Of course, the concept of legitimacy is dear to all courts – which desire to see the acceptance[33] of their decisions in the public. Given their unique relationship underlined before, "courts tend to be majoritarian, rather than counter majoritarian institutions": they often rule in line with the civil opinion and the US Supreme Court tends to use less the power of judicial review when there is a clear sign of loss of legitimacy in that period of time[34]. In fact, the use of Constitutional adjudication in general is associated with a general decline in civil credence in the judiciary. Similarly, state Supreme Court judges tend to use less of this power when the elections for their position is approximating.

As already mentioned, the Supreme Court has a favorable position in the field of credibility, since its decisions are always diffused in written form along with reasons. This could counter the hypothesis of the authors.

Furthermore, the article focuses the attention also to the purpose of the introduction of elections for judges in the first place. US States adopted this practice in order to boost the use of judicial review for the cases of fiscally irresponsible budgets. This shows that the thought of the reformers was in line with the writers of the article: such striking down of budgets would be accompanied by public acceptance and would be implemented.

Final findings ascertain that if justices are appointed, their decision making is less accepted by the civil society. It can be added that in general judicial decision which invalidate legislative acts are not well welcomed. An interesting discovery, however, is that the public is ready to admit rulings against the majoritarian opinion. The only struggle remaining is about the overturning of current legislation.

As far as the use of judicial review is concerned, the obstacle with its adoption does not rely on the nature of the court – being it elected or unelected. Instead, it is clear from their analysis that the difficulty comes from the legal instrument in itself.

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[33] The concept of acceptance is here defined as the scholars Gibson, Caldeira and Spence did in 2005: entailing "citizens to respect the court's decision, to cease opposition and get on with politics".

[34] Clark, T. (2009). *The separation of Powers, Court Curbing and Judicial Legitimacy*. American Journal of Political Science (53), p.973.

The Supreme Court is the organ which is assigned with the task of judicial review. When we talk about Constitutional adjudication in the USA, we are mentioning the practice by which the federal court can review congressional laws, actions taken by the president and laws and actions of the states for Constitutionality.

The practice of judicial review is not mentioned in the Constitution, but we can find it implicitly in the *supremacy clause* in Section II of Article VI:

*"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."*

Namely, the Courts of the member states must nullify their own laws – even the Constitutional ones – when they are in contrast with the federal law and of course in particular with the law of the Constitution. Here there is a reference to a Constitutional control exercised by some courts – in this case the state level ones – on some legislation, again the singular member one. Following this logic, Bognetti argues, it can be supported that also the federal courts and the Supreme Court at their summit are called by the Constitution to disregard unconstitutional laws when ruling over state law. This is what happens in the case of "diversity jurisdiction": this refers to complex situations where the federal court can exercise authority in a case which involves citizens as parties coming from different states. The fundamental preconditions for this competence to apply are complete diversity between the two parts involved in the dispute and a high level of controversy.

According to the view of Adam R. Brown in his work "The Role of Constitutional Features in Judicial Review"[35], however, supreme court judges are not "just mechanical appliers". This goes against the spirit of Hamilton, who was cited in the previous chapter: for him, judges have "no will but merely judgment".

The study conducted by this author takes into account many variables to understand the behavior and to track and analyze the decisions of judges. First of all, it involves whether these figures are

[35] Brown, A. R. (2018). *The Role of Constitutional Features in Judicial Review*. State Politics & Policy Quarterly, 18(4), p.351.

elected or not: if yes, they seem to "deliver rulings that more closely record citizens' preferences". This is an example of the kinds of mechanisms which can make the role of judges a vulnerable one.

More precisely, the inquiry compares Constitutions on the basis of their age, length and amendment rate, matching them with the rate at which actions of Constitutional review of legislation are finalized by judges. In the example of the American Constitution, we can value it as a short length one – compared to the ones developed in Europe. In this case, being short, the text leaves many areas of interest vague and open to federal policy – and in direct consequence to the federal court action on the extension.

The second level of investigation is the rate of amendment of the Constitution. Always talking about the US case, it has not undergone many passages of modification. Out of thirty-three Constitutional amendments proposed by the Congress, only twenty-seven were ratifies by the states on the second step of the process (the requirement is to be ratified by ¾ of the states) – since the Constitution was adopted in 1789[36]. The first ten of these are the Bill of Rights, simultaneously included in the Constitution[37].

This technically means that it doesn't involve the issues of major modern interest (think about privacy, abortion and other important concerns of today's society). On the side of the Supreme Court this has meant be ready to handle all the issues of the 21st century.

The last point of consideration is the age of the Constitution: do judicial review cases grow directly proportional to the agedness of the text? It may be expected to be so, but statutes of this importance only enrich themselves by persisting their existence in a specific country (with new case law, new legislatures and experiences of government, modern relationships with foreign countries, comparisons with the steps of other models).

Among the three variables, the most influential ones are the amendment rate and the length of the Constitution.

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[36] Besides the Bill of Rights, it is worth mentioning the 13th amendment, ending slavery; the 14th amendment, declaring *ius soli*; the 19th amendment, giving women the right to vote.

[37] The first ten amendments are all together the Bill of Rights. They were discusses during the Constitutional Convention of 1787 and in 1791 they were ratified by 2/3 of the states. These ten additions regarded the limitation to the power of the federal government.

### 2.3. Stare decisis and retroactivity

Judicial review originated in the United States as a practice under which a court could decide the unconstitutionality of a statute incident in the case under scrutiny and – thanks to *stare decisis* – other courts of lower level would then follow the choice and consider the act as not having legal effects as well.

The rule of *stare decisis* is a cornerstone of US law. This principle comes from Latin, meaning "to stand by things decided". This doctrine is the basis for all the systems of Common Law – main examples of whom are the UK and the USA of course – and it implies the shaping of the ruling according to a whole body of precedents. These precedents are bounding to the Court, even if nonetheless every court exercise its jurisprudence according to its interpretation of the Law.

The main arguments supporting this procedure are that firstly, in this way the rulings of courts are more predictable. Also, stare decisis enhances stability, diminishes the costs of high burden decisions, binds judges to discretion and assures judges more trust to their role. We can state that by practicing this doctrine, Common Law becomes more punctual and the efficiency is improved thanks to the sequential decision making.

However, the last assertion is questionable. It is true that a progressive process is carried out, always evolving; but whether this converges to (full) efficiency is not beyond doubt.

In the case in which a Court is ruling originally on a matter, presumably it would rule in favor of the weakest option – obviously for the consequences its decisions will have on future jurisdiction through stare decisis. Thus, the Court in question is puzzled between a tough and a weak decision making. Deciding for the tough option will restrain the decisions of future Courts and will guide them towards some kind of optimality, but this restriction reduces the gains for the hard decision itself in the medium-long run. On the other hand, staying with the weak option will ease future Court – leaving them more space – but precedents will stop evolving because the choice will be repeated.

However, another argument on the case discusses the issue of efficiency by referring to the rules on which – in practice – judges are called to rule. We can undoubtedly state that inefficient rules are more often the origin of litigations and their inefficient character can only lead to a more

efficient Case Law through stare decisis. This is an argumentation brought about by evolutionary models of Common Law, exemplified by the scholars Priest[38], Rubin[39] and Goodman[40] in the 70s. As James Kent wrote in his Commentary of Law[41]:

*[...] It would, therefore, be extremely inconvenient to the public, if precedents were not duly regarded, and pretty implicitly followed. It is by the notoriety and stability of such rules, that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy, and to trust, and to deal with each other. [...]*

In the article proposed by Jonathan F. Mitchell in the Michigan Law Review[42], it is clear that the argumentations about stare decisis are controversial. In particular, the author express the difficulties that occur for the reconciliation of stare decisis with textualist interpretations. In fact, according to textualists, judges can rely on precedents only when these decisions are "proper textual constructions of the Constitution". Nevertheless, the Supremacy clause[43] gives a role to stare decisis. Textualist views do not take into account two important background features of the process: in the case of Constitutional adjudication, first of all the Supreme Court is not required to invalidate every federal act which is controversial to the Constitution. Since the court is not bound to disregard every federal statute, it cannot be compared to the action expressed in Article VI which requires judges to neglect state law that goes against treaties, federal statutes and Constitutional provisions. Even if the Constitution gives the possibility to the Supreme Court to decide about the unconstitutionality of federal statutes, the Supremacy Clause again underlines a different balance

[38] George L. Priest, professor of Law and Economics at Yale Law School. In this area, his main publication was "The Common Law Process and the Selection of Efficient Rules", 1977.

[39] Edward L. Rubin is specialized in administrative and Constitutional law in addition to legal theory. He is professor of Law and Political Science at Vanderbilt University.

[40] Frank I. Goodman is professor of Law at University of Pennsylvania Law School since 1976. Is it worth mentioning in this field his publication "Judicial Review of Federal Administrative Action: Quest for the optimum Forum", 1975.

[41] Kent, J. (1832). *Commentaries on American Law*, 1. New York: O. Halsted, p.476.

[42] Mitchell, J. F. (2011). *Stare decisis and Constitutional text*. Michigan Law Review, p.6.

[43] Article VI, Section II of the US Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

for state laws: judges "in every State" must enforce the hierarchy, whose apex is the "supreme Law of the Land".
In this reasoning, in conclusion, we can understand that stare decisis causes difficulties in the legal system – especially in a federal one like the United States – only when there is a Constitutional discussion about Article VI and the hierarchy of the sources. In the other cases of the Supreme Court, the latter is not obliged to regard its earlier pronouncements.

Anyway, there is an exception if we want to interpret the Constitution, which states that "Constitutional questions are always open to investigation". This makes it conceivable that the Supreme Court could consider a statute Constitutional in one stance and unconstitutional in a successive one.
Another risk attached to this practice is that a lower court decides about a question of Constitutionality without bringing the case before the Supreme Court; and the latter could then be requested to give its judgment on the same act. Here, under the principle of *res judicata,* the lower court would not even be allowed to alter its previous judgment and make it compatible with the new decision of the Supreme Court.
The consequence of these prospects is of course legal uncertainty, the main adversary of Constitutional law; to tackle this uncertainty, the Austrian system decided to centralize its process of judicial review and to enlarge the abolishment of a statute by the Constitutional Court, no more limited to the incidentally met case.

Another case of wide legal uncertainty generated in this field happens when the primary remedy of nullification is used in Constitutional review. In fact, by removing existing statutes from the legal system, a legal vacuum is created.
The annulation of a statute in the United States generates ambiguity about the legal status on the subject under consideration. There can be two main cases: in the first case, the subject was not regulated before the annulled statute and so the previous legal status is restored. In the second case, when the subject was already regulated by a previous statute, there cannot be a direct recovery of the old positions, because the precedent statute had been derogated. There must be an express provision by the Constitutional Court in order to clarify such restoration, which would be a positive act of legislation.

The Austrian Constitution solved this other point of uncertainty, by including this passage:

*"If by a decision of the Constitutional Court a statute or a part of it has been annulled on the ground of its unconstitutionality the legal rules derogated by the mentioned statute come into force simultaneously with the decision of the Constitutional Court unless the latter provides otherwise".*

The immediate successive question we ask ourselves is whether the annulment of the statute will have retroactive effects or it will have consequences *ex nunc*. In the case of American Constitutionalism, the unconstitutional law is regarded as null *ab initio*. Of course the implications of retroactivity are wide, since it has effects on all the decisions taken including that specific law from the beginning of its existence into the legal system. As Yowell underlines[44], judges have made use of some procedures in order to avoid the creation of problematic consequences; one example is the refusal to impose retroactive effects at all. This scenario clearly generates some doubts about this Constitutional design in general, since it does not allow a smooth procedure towards a less intricate judicial review of legislation.

### 2.4. The procedural democracy doctrine and the Equal protection clause

*All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The expression "equal protection of the laws" is formulated in the XIV amendment and the same also stands for the federal government. At the origins this clause was applied only to discrimination cases based on race. A case in point was the declaration of unconstitutionality of a state law by the Supreme Court in 1880, which excluded black people from juries. In 1883, the Court invalidated the Civil Rights Act from 1875 which did not allow equal access to public services.

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[44] Yowell, P. *Constitutional rights and Constitutional design: moral and empirical reasoning in judicial review*, cit., pp.160-162.

Since there were numerous cases ranging from the private sphere to the public one, justices decided to invoke the Equal Protection Clause only in the presence of *state action*. For the private discrimination, it was up to single States to administer those difficulties.

However, such a deliberation was followed by the severe ruling in *Plessy v. Ferguson*[45], where the doctrine of "separate but equal" was validated. This step constitutionalized segregation and was pursued by the diffusion in the South of the USA of segregation laws. This discrimination was never found in contrast with the XIV amendment: it was not a legal discrimination, which could be tackled by the judiciary. It was, on the other hand, a social kind of separation which the Constitution could not solve.

All this reasoning will be reversed only on May 27, 1954 by Chief Justice Earl Warren in the case *Brown v. Board of Education of Topeka*. His ruling was mainly based on psychological data, showing how much the doctrine of "separate but equal" was causing harmful effects on African American children.

White southerners reacted harshly to *Brown* and in 1956, 96 members of Congress signed the Southern Manifesto – they were all democratic members from the South. However, even those governors who tried to impose their view by force lost their point and the federal government sent its troops to allow children to enter the school (Central High School, Little Rock 1957 and University of Mississippi 1962).

The fight was pursued through non-violence: in 1909 the National Association for the Advancement of the Colored People was founded and the civil rights movement reaches its peak in 1963, with the march on Washington and the speech by Martin Luther King. In 1964, the Civil Rights Act was signed by President Johnson. The Equal Pay Act 1963 gave credit to women's manifestations and the Voting Rights Act 1965 produced the disenfranchisement of African Americans.

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[45] The case was discussed on May 18, 1896 and a majority of 7/8 justices asserted the Constitutionality of racial segregation. The case originated in 1892, as the Louisiana Law demanded all operators of railroads to provide for "qual but separate" seats for white and African American clients on the train. This was subsequent to the Louisiana Separate Car Act of 1890. Homer Plessy, a passenger which was for 7/8 white and for 1/8 African American, traveled in the car for white people. This caused him arrest and charges for the violation of the Act above mentioned. According to the majority of the judges, the arguments of Plessy were not valid: the act did not violate neither the XIII amendment (abolishing slavery) nor the XIV amendment (equal rights to citizenship). In fact, Judge Brown argued that through the Act legal equality was respected: dividing the cars of the train by race did not mean elevating one race over the other one. Previous state court decisions had established separate public schools, and this could be read in the same light: public peace and good order. Social equality was not taken into account.

Nowadays, the Equal Protection Clause does not comprehend in its subjects only racial discriminations. It is instead applied also to sex issues like sexual orientation and same sex marriages.

The concept of procedural democracy was born on the tables of American Constitutionalism. This discourse is linked to the Equal Protection Clause in its attention to discriminations to specific groups and in particular to the true values of democracy. In fact, in the discussion about Constitutional adjudication, many times scholars were trying to understand when this *corrective mechanism* could be applied and which were the needed signs for a right use of the jurisdictional tool.

To assess whether the legislative or the administrative branches were doing their work properly, it was suggested to analyze the procedure. In democratic decision making, if legitimacy or democracy quality are undermined there clearly is a need for intervention – through judicial review. Symbols of negligence by the law makers can be recognized in the disregard of fundamental Constitutional rights and values, such as the right to vote or the freedom of association and expression. Another example showing a misconduct in the democratic procedure can be the oversight towards single interest groups, leading us also to the Equal Protection Clause. Namely, the fundamental values which should be best protected are the mirror of the concept of democracy of the country. The United States of America in this spectrum usually enhance the protection of minorities and freedoms which defend against public interference.

Procedural democracy doctrine can in this way be viewed as a justification to judicial review which can correct the mistakes in the process of democratic decision making. This understanding can also be interpreted as a middle way between the total trust in the legislator and a too invasive investigation of its decisions.

# 3. The Austrian system and its application

## 3.1. The federal republic and Bundes-Verfassungsgesetz

The federal republic of Austria is composed by nine States: Vienna (*Wien*), the capital; Lower Austria (*Niederösterreich*) with Sankt Pölten as its capital; Upper Austria (*Oberösterreich*) with Linz as its capital; Styria (*Steiermark*) with Graz as its capital; Tyrol (Tirol) with Innsbruck as its capital; Carinthia (*Kärnten*) with Klagenfurt as its capital; Salzburg, also the name of the capital; Vorarlberg with Bregenz as its capital and Burgenland, with Eisenstadt as its capital.

The Austrian Republic was born in 1918, when the conclusion of World War I brought the Austro-Hungarian Empire to an end. The *Länder* had federalist tendencies, while the central government in Wien was of course more centralist. The federalist form was an historic compromise reached between the two inclinations and was reached in 1920 and is still valid today in the same organizational principles.
Even if the individual States had always their own independence, they were never understood by the Habsburgs as more than decentralized administrations. The empire was composed not only by numerous states, but also by a variety of ethnicities. This reality was considered as a unitary element only in 1713, when Maria Teresa was accepted as the next successor to the throne by the nobility of the *Länder*. This was a first act of centralization, which will be a never ending feature not only of Austria in general but also of its Constitutional history.

In 1918, the newborn Republic instituted a Constituent Assembly which was unable to produce a satisfactory text. The *Länder*, on their side, promoted a conference whose final resulting document was supported by the social democratic party – even if lacking true legal value. On the wave of the fear of a centrifugal push, on the 1st October 1920 the Austrian Republic was proclaimed Federal State through the adoption of what we today recognize as the Austrian Constitution.
This Constitutional law acknowledged the nine autonomous regions. The *Länder* could always decide about their form of government and all of them have preferred parliamentary options. The legislative power is entrusted to two chambers, in an imperfect bicameralism: the National Council

and the Federal Council. The National Council stays in office for four years. They sit together as the Federal Assembly. The presence of numerous parties in parliament, caused by the choice of proportionality system, has had many coalition governments as a consequence.
The president is directly elected by the people and he/she is still accountable to them. Namely, people can remove him from his position through a referendum. Similarly to Italy, the President names a Chancellor which proposes him his rose of ministers. All the ministers are accountable to the first chamber of parliament.

With this organization, we can define the Austrian form of government as including a semi presidential system at the central level, a parliamentary system at the *Länder* level and a mixed system at the municipal level. The Constitution anyway sets some organs which cannot be excluded from the Land: the legislative assembly or *Landtag* and the *Landeshauptmann*, head of the *Land* government. The electoral system chosen is the proportional one, chosen by the Constitution and with no authorization to change. This choice is the result of the polarization of the political parties. The proportional system is also employed for the election of the president of the *Landtag*. In this way, the executive results being a homogenous institution – compared to a very heterogeneous representative parliamentary organ.

The pivotal principles of the Constitutional Law of the Austrian Republic represent all the shared points among the *Länder* and are three: the democratic principle, the federal principle and the rule of law. The first one is best represented in the first article of the BVG:

*Artikel 1.*
*Österreich ist eine demokratische Republik. Ihr Recht geht vom Volk aus.*

This democratic principle, traduced in "Austria is a democratic Republic and its law comes from the people" was also inspirational for the Italian Constitution in its first article as well. The doctrine of democracy is not only reflected in the representative forums but also in the participation of the citizens in public policies, especially at the administrative level.
The second principle is the federal one and is expressed in many articles of the Constitution. It entails a clear division of the competences between the *Länder* and the *Bund*, their homogeneity

and the imperishability of the latter, which cannot even be eliminated with an act of revision of the Constitutional text.
The third and last principle is the rule of law. This is expressed and explained in art. 18 of BVG:

*Artikel 18.*
*1. Die gesamte staatliche Verwaltung darf nur auf Grund der Gesetze ausgeübt warden.*

Every public act, the entirety of administrative action can be carried out only under the law. This as already stated does not only so comprehend the legislative action but also the administrative decisions: all the *legis executio*.

The Austrian Constitutional text has undergone during the years many revisions. It is worth mentioning the reform of 1928, which expanded the powers of the federal president – such that its position could be related to presidential forms of government even if in a parliamentary context.
After the Second World War, it was clearly understandable that the conflict had not jeopardized the Austrian state organization and that is why the old Constitution could be re applied – starting from 1955, at the end of the occupation by the Allies. From that point in time, all the revisions of the Constitutional text have been additions towards a true application of federalism: in 1974, for example, there was a re division of the competences between the *Länder* and the *Bund*. The participation of the regions in decisions about communitarian law was essential for the integration and reevaluation of the federal principle.
However, despite those innovations, the Austrian system is not excluded from the reasoning of scholars which underline its strong tendency for centralization. This tendency is firstly sustained by the element of the parties: they value the decision making at the state level – more prone to compromise. In addition, the second element are the theories of Hans Kelsen and his ideas of hierarchical public functions.

Hans Kelsen was born in Prague in 1881 and had studied in Vienna, where he became a professor thanks to his masterpiece *Hauptprobleme der Staatsrechtslehre*[46]: he was already going towards

[46] Kelsen, H. (1984). *Hauptprobleme der Staatsrechtslehre*. Amsterdam: Scientia Verlag.

the study of pure theory of law. He never became a militant in a political party or subscribed to any of them. For him, democracy was the relatively best option among the types of government but not the ideal one. Rule of law was for him essential and this is why in his proposals for the Constitutional text he introduced the idea of the judicial control over the legislation.
In 1919, Hans Kelsen was the assistant to the Constitutional department of the federal Chancery. This was the moment in time when the preparatory works for the Constitution were started and he was the main author of the proposals. He was also asked to be part of the subcommittee named by the Constituent Assembly.

The contribution of Kelsen to the legal field, both philosophically and in his theory, is globally appreciated. His approach is considered the most prominent doctrine of law of the 20th century. The Kelsenian Pure Theory of Law is based on the notion of *Grundnorm* – a basic norm, which is the top in the hierarchy and which is the key to understand the system and gives authority to the latter. The presence of this *Grundnorm* is also the cornerstone for his enhancement of centralization – which is a more sophisticated development of law theory – whose central point is the Basic Norm again. The hierarchy of the norms elaborated by Kelsen entails that the creation of inferior laws in application of superior ones implies the establishment of an organ which must be able to control the compatibility of the former in the respect of the latter. This control found its first concrete application in Austrian Constitution of 1920.

Austrian Federal Constitution is not however only formed by the *Bundesverfassungsgesetz* of 1920 (which was successively reformed in 1945) but must be viewed as a combination. It encompasses single Lander Constitutional laws, ordinary laws which include dispositions of Constitutional importance and laws coming from the period of the Constitutional Monarchy which are still valid for their Constitutional rank. All the mentioned acts, however, had to possess in their promulgation an explicit constitutional character in order to be included in such level of hierarchy.[47] Nevertheless, it is the BVG which establishes the process of judicial review of legislation.

[47] Heller, K. (1989). *Outline of Austrian Constitutional Law*. Deventer (NL): Kluwer Law and Taxation Publishers, p.16.

The Austrian Constitution is guided by a principle called *Lehre vom Stufenbau*[48], which evokes the image of a pyramid. The sources of law are in this way represented, as having higher or lower rankings. The classification is based on the assessment of how simple or complex the procedure to create or amend the act is. The more complex the process, the higher the position in the hierarchy. In the case of constitutional laws, their position is higher than normal acts because their adoption needs a two thirds majority in parliament, not a simple one. Additionally, when the whole constitution is under revision also a referendum is called. The constitutional principles underlying the primary law (democratic, republican, federal and rule of law) are contemplated to be the apex of the pyramid. Going to the basis, administrative acts, court rulings, executive acts and ordinances are found.

### 3.2. The Constitutional Court as negative legislator

The Austrian Constitutional Court owns some of its features to its predecessors, firstly the Imperial Court. The latter ruled during the Constitutional Monarchy in the country from 1867 – date of the enactment of the December Constitution – until 1919, when the new court German-Austrian Constitutional Court was established.

The initial powers included jurisdictional conflicts, litigations between territorial authorities and also some ruling over political rights. The Imperial Court was composed by twelve members – appointed for life – and the President was chosen by the Emperor. One of the features the current Constitutional Court has inherited is the presence of permanent reporters. At the time of the December Constitution, the State Court was created as well. Its main aim was to rule over cases of impeachment of ministers – which never happened during its existence.

When the German-Austrian Constitutional Court replace the imperial one, it was invested with the power of reviewing legislation by the provincial assembly. The members were always twelve, this time designated firstly by the *Staatsrat* and then by the National Assembly.

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[48] Stelzer, M. (2011). *The Constitution of the Republic of Austria: a contextual analysis*. In: *Constitutional Systems of the World*. Oxford: Hart Publishing, p.23.

Finally, when the Federal Constitutional Law of 1920 was enacted (BVG), the Constitutional Court as we know it today was born and received all the powers already assigned to the cited courts[49]. The members were appointed for life and where named in the same quantity by the Federal and National Council.

Of course, it received completely new functions to accomplish: review of federal laws (it already had this power over legislation coming from the provinces); control the legitimacy of elections; the power of judicial review in the abstract and the decision-making capacity over international law's abuses.

*Abstrakte Normenkontrolle*, which we can translate into abstract judicial review, is the main characteristic of the model of Constitutional adjudication deriving from Austrian Constitutionalism. With the word "abstract", we refer to the methods allowed for the raising of the question of unconstitutionality. Namely, as opposed to the American tradition where Constitutional questions can be brought before the Supreme Court only if part of an ordinary litigation, in the Austrian model and in all the countries following it (Italy, Germany, Spain, Belgium and Portugal to name some) there is the possibility to address a question also without an actual dispute being conducted.

The centralization of Austrian Constitutional adjudication occurred with the enactment of the Austrian Constitution of 1920. With this ratification, judicial review was assigned to the *Verfassungsgerichtshof* – the ad-hoc Constitutional Court. Before this point in time, if the court of the highest level in Austria decided over the Constitutionality of an act, it had no ramification effect: there was no binding repercussion over lower courts.

When the Constitution was amended in 1929, there were some modifications over the appointment mechanism of the members of the Constitutional Court. Always in the number of twelve, they were now named by the federal president on the proposal of the parliament and the federal government.

The Constitutional Court suffered a stop in its activities through the war years, when firstly it saw itself being traduced in the High Federal Court and then into the Vienna Administrative Court

[49] B-VG Art. 137-144.

(1940) when Austria was annexed to the German Reich. In 1945 the Constitutional Court returned to its pre-wars activities and position. Its powers were extended again, for example with the power to review treaties as well. At this point in time, the Court could receive applications of review from 1/3 of the National Council, from 1/3 of the Federal Council, from single individuals (under severe and detailed conditions), from the Federal Procurement Office, from second instance courts, from the Supreme Court and from the Administrative Court.

The acts which are under the review capacity of the Constitutional Court include all Austrian legislation, including both primary and secondary sources of law. Being a federal state, all the Lander have their own symbolic Constitutions and provincial legislation must be in conformity with both the latter and the Federal law.

The annulment of a statute or ordinance with the decision of the court was nonetheless a statute itself, conferring to the judges of the ad-hoc court a legislative function, which we will identify as negative – as negative is the act of legislation produced. As Yowell further describes[50], this remedy had the same quality of a statute nullifying another one. The statute which was nullified did not exist anymore in the legal system and retroactive effects were applied only for the precise dispute the decision was taken. This construction operated by Kelsen for the Austrian Constitutional Court designates it as a negative legislator, being it bale to annul laws and considering the annulment as a legislative action itself.

It is possible to summarize the different typologies of judgment which the Constitutional Court can produce both regarding ordinances and legislative acts in four cases. The Court can declare the act void; it can declare that the act, already nullified, was unconstitutional; it can declare that the act, already nullified, was not unconstitutional; and finally the Court can declare that the ordinance or law is not void since it is not unconstitutional.

[50] Yowell, P. (2018). *Constitutional rights and Constitutional design: moral and empirical reasoning in judicial review*. Oxford: Hart Publishing, p.161.

However, the power of the Constitutional Court to nullify acts is only one element to consider among the various impacts that this court has over the legislature. The blurred line between judiciary and legislative power is more than one time touched and this relationship has also positive aspects[51]. First, courts have wide discretion when deciding about the constitutionality of an act on whether to declare it unconstitutional or read it in another interpretative manner so to make it compliant with the primary law. By reviewing the original interpretation with a new one, the Constitutional Court is actually modifying the law *de facto.* Secondly, sometimes the Court does not limit itself to give the justifications for the annulment of the piece of legislation, but it can further its reasoning by providing new guidelines for future acts. These guidelines are very useful when the decisions of the Court are generally accepted by the parties in Parliament. Thirdly and lastly, the Constitutional Court can be asked to present its opinion on political questions by one or more political parties involved in a conflict inside Parliament. This shows how the two powers approach themselves in more than one occasion.

### 3.3. Centralization

Before WWI, the only model available of Constitutional adjudication was the example set by American Constitutionalism: a decentralized system, in which all courts – both inferior and superior ones – had the possibility to declare a piece of legislation as unconstitutional. After the end of this conflict and following the ideas of Kelsen, the Austrian Constitutional Court was established and with it an entirely new conceptualization of the mechanism, now centralized: only the named court could apply judicial review and it could do it following a specific procedure idealized *ad hoc*. The model constructed by Kelsen became more and more known during in the aftermath of the war but it was the end of the Second World War and the fall of Communism to enhance its endorsement in many countries in Europe, despite the American influence as winner and solver of the conflict. In general, this heritage was accompanied by the introduction of human rights in the Constitutions. The confidence in the legislature was lost, together with the idea that the supremacy of parliament was the ideal model.

[51] Grabenwarter, C. *Separation of Powers and the Independence of Constitutional Courts and Equivalence Bodies*, cit., p.4.

The centralized model proposed by Kelsen particularly sets the Constitutional court as not only autonomous and separate from the legislative branch – as expected from the basic doctrine of judicial review – but also from the judicial power itself. The centralization of the Kelsenian model is connected to its power to review statutes in the abstract. The American model of judicial review is based on concrete cases.

If review is made abstract, then it not only avoids the problem of influence by the circumstances of the case but it can also avoid some contingencies that arise from the nature of litigation. By making judicial review abstract rather than concrete, the process could be made more transparent.

Structurally speaking, the Supreme Court, the Administrative Court and the Constitutional Court all perform on the same grade as the supreme courts[52]. The power to abrogate laws and ordinances is the only actually centralized competence, given to the Constitutional Court. Nevertheless, all the other actors mentioned above have the duty to meditate over constitutional issues since the Constitutional Court is not allowed to revise their decisions.

Although the constitutional court may review laws under any possible constitutional aspect, some provisions play an overwhelming part in the jurisprudence of the court. These are the constitutional provisions pertaining to the allocation of power between the federation and the states which had a dominant role especially in the 50s and 60s, further article 18 of the federal constitution providing for sufficiently clear and detailed laws and the principle of equality.[53]

The centrality of the allocation of power between the federation and the states is also the ground reason for the adoption of the practice of constitutional adjudication *per se*. In fact, among the functional explanations for the endorsement of judicial review is the connection with federalism[54]. The first examples and disputes where constitutional adjudication was practiced are in the United States and in Austria: federal states. This feature entails the production of legislative, executive and administrative acts on more than one level – with the likely chance of a clashing between intentions, substance and division of competences. Therefore, in such a framework, a mediator

[52] Stelzer, M. *The Constitution of the Republic of Austria: a contextual analysis*, cit., p.177.
[53] Id., p.202.
[54] Ginsburg, T. (2008). The Global Spread of Constitutional Review: an empirical analysis. In: Keith Whittington and Daniel Keleman (eds.), Oxford Handbook of Law and Politics, pp.15-16.

was needed to decide over disputes among different levels of government – centered on questions of jurisdiction, rule, fitness, appropriateness and hierarchy.

### 3.4 Judicial effects: *erga omnes* and *ex nunc*

When the Constitutional Court decides over questions of Constitutionality, it is differentiated from the American model in two crucial features.

Firstly, its decisions have an *ex nunc* effect. This characteristic speaks about the consequences of the decision. The Latin expression just quoted means "from this moment/now on": namely, there is no retroactive effect besides the consequence on the case under scrutiny if the process of judicial review was enacted incidentally. An example of the same consequences is the action of the legislature with the abrogation of a law. What was decided in the past with such act remains valid and without alterations. The starting date of the nullification can be decided by the Constitutional Court with some margin (six-eighteen months) – even if usually the entry into force is the day after the conclusion of the opinion. This happens in order to give time to the legislator to be active so that no normative gaps are created but filled as soon as possible.

Nonetheless, the judge can also decide that the ruling has effect – besides on the future and present – also on particular proceedings which were pending at the time of the start of the ruling. There is also an even harder retroactive possibility, which touches questions already judged and are so considered *res judicata*. But this is a remote case.

*Article 140*

*(1) The Constitutional Court decides on the unconstitutionality of a Federal or Land Law on the application of the Administrative Court, the Supreme Court, a court which is competent to render a decision in the second instance, an independent Administrative Senate or the Federal Contract Awarding Office, but ex officio if the Constitutional Court were to apply such a law in a pending legal matter. […]*

In financial and fiscal matters, the Austrian Constitutional Court has usually adopted the option through which it fixed a time limit in which the legislator could intervene in order to modify the current order and correct the unconstitutionality.

Additionally, if not disposed otherwise, the nullification of the legislative ordinance or act also results in the entry into force of the dispositions which were abrogated through the act under consideration – which is not unconstitutional and so is not part of the legal system anymore.

The second point is the *erga omnes* translation of the ruling. In fact, differently from the USA, since in Austria the process of judicial review can be raised both in the abstract and incidentally, the effect of such decision of unconstitutionality does not have effects only on the parties of the disputes (if they exist) but on the legal system in its entirety. In the American model, this expansion of the effect is substituted by the principle of *stare decisis* – standard in legal system of common law. In Austria, all lower courts than the Constitutional Court are directly bound by the ruling.

# 4. Conclusions

## 4.1. The democratic legitimacy of judicial review

The majority of the scholars supporting judicial review as a non-divergent phenomenon from the primary democratic norms rely on diverse rationale, as the doctrine of representation reinforcement [55] by John Hart Ely – under which constitutional adjudication rectifies the inaccuracies of political representation. Other scholars, as Samuel Freeman, argue that judicial review "furthers democratic sovereignty"[56]. All these positive thinkers agree that the judiciary is the most suited organ to carry on the practice of judicial review: judges are able to decide about important questions of public morality which are too crucial to be decided through "normal democratic processes"[57]. For them, even if the means are non-democratic, the protection of core constitutional values justifies such deficiency.

On the other side of this doctrine are those supporting a more restricted power of judicial review, respecting democratic principles: for them, it is the people or its representatives who should decide over important questions of public relevance. But reality is that we are observing two extremes: on one hand, the conclusion is democratic illegitimacy; on the other, it is questionable that all citizens are aware when making their political and corporate decisions about the constitutional significance.

According to Ronald C. Den Otter, the discourse therefore lies "on a false choice"[58] between "two dictatorships"[59], between elitism and full democracy. What we observe nowadays in the practice of judicial review is the main role of judges and their expertise, denying citizens to develop their

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[55] Hart Ely, J. (1980). *Democracy and Distrust: A Theory of Judicial Review*. In: *Harvard Paperbacks*. Cambridge (MA): Harvard University Press.

[56] Freeman, S. (1990). *Constitutional Democracy and the Legitimacy of Judicial Review,* 9(4), pp.327-370. In: *Law & Philosophy*. Berlin: Springer.

[57] Dworkin, R. (1996). *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge (MA): Harvard University Press.

[58] Den Otter, R. C. (2002). *Democracy, Not Deference: An Egalitarian Theory of Judicial Review*. Kentucky Law Journal, 91, p.617.

[59] Tushnet, M. (1988). *Red, White, and Blue: A Critical Analysis of Constitutional Law*. Cambridge (MA): Harvard University Press.

own civic competence[60]. The author enhances the idea that judicial review can be more democratic inasmuch it allows citizens to internalize constitutional norms when making their decisions (as voting).

However, the involvement of citizens in serious thinking about political issues is the new obstacle to overcome. At the time of the constitutional fathers, no mass participation in politics was imagined. That is why now many scholars see in judicial review an actual defense for constitutional values, an organizational setting which limits the power of the majority. Judicial review can be actually said to be antidemocratic, but the goal is legitimate: preserve core principles of the Constitution which must never be undermined.

Judicial review, gives a *de facto* political connotation to the judicial power – which can be said to depart from the initial intentions of the liberal Constitutionalism. In fact, according to the liberal division of powers, the Judiciary should apply in its rulings only pre-given norms. In this confidence lies the certainty of law.

In going contrary to this logic, judicial review attributes to the judiciary a legislative function – when the only reasoning pertaining to this actor should be the normative one: applying the norm, given by an external organ. Constitutional adjudication usually encounters an appointed court which can invalidate an act made by the legislative, the executive or other political characters of the system – who is directly elected by the people. If there is one lesson learnt from the Federalist Paper, it is that the political power "must be dispersed throughout a number of government institutions, resulting in a sort of balance"[61]. This assures that no single organ would be too powerful to become hegemonic. But giving the aforementioned legislative function to the judiciary is not encountered by positive scholars in this same line of reasoning. Of course the liberal American courts of the time, loyal to their ideology, always refused to be included in any discourse different from the one of *neutrality*.

[60] Dunn, J. (1979). *Western Political Theory in the Face of the Future*. In: *Themes in the Social Sciences*. Cambridge (UK): Cambridge University Press.

[61] Den Otter, R. C. *Democracy, Not Deference: An Egalitarian Theory of Judicial Review*, cit., p.620.

As C. Schmitt asserted, the American legal system had become a *jurisdictional* state – opposite to the *legislative* states which had developed in Europe – with this practice of judicial review carried out in such a way.

This practice is regarded by many scholars as in contrast with the principle of majority rule[62]. In particular, Lawrence B. Solum[63] defines the counter majoritarian difficulty as:

*When elected judges use the power of judicial review to nullify the actions of elected executives or legislators, they act contrary to "majority will" as expressed by representative institutions. If one believes that democratic majoritarianism is a very great political value, then this feature of judicial review is problematic.*

The critique based on democracy doctrine enhances the fact that the willing of the majority should be respected, even if it means restricting the scope of judicial review – unless the Constitution clearly states principles against such majority will. If there are no precise answers to questions of public importance, maybe it is true that the best option is to leave them to be answered by the people. This step towards a more democratic constitutional adjudication anyway would be a long process, mainly in the hands of the education sector.

Chancellor Pendleton, in the Case of the Prisoners – dating back to Virginia in 1782 – wanted to highlight the difference between the European example given by the United Kingdom and their American position, differentiated by the presence of a written Constitution:

*We… have happily in our hands the certain record of our Constitution containing the Original Social Compact, wherein the people have made their Government to consist of three great branches, the Legislative, Executive and Judiciary, allotting to each, its proper powers, and declaring that they shall be kept separate and distinct, neither exercising those which belong to another. Like all other declared Powers each has its limits, the Legislative as well as the others,*

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[62] Bickel, A. (1986). *The Least Dangerous Branch: The Supreme Court at the Bar of Politics,* 2nd ed. New Heave (CT): Yale University Press.

[63] Lawrence B. Solum is a legal theorist, recognized worldwide for his works on Constitutional theory, procedure and law philosophy. He received his Juris Doctor magna cum laude from Harvard Law School and continuously engages with the public through his Legal Theory Blog, where he posts daily about developments in contemporary normative and positive legal theory.

*which if they Pass, it would seem their Act would be void, as well as that of an Attorney would be, which was not Warranted by his appointment.*

But "*how far this Court in which it has been properly said the Judiciary Powers of the State are concentrated, can go in declaring an Act of the Legislature void, because it is repugnant to the Constitution, without exercising the Power of Legislation, from which they are restrained by the same Constitution?*"

Concluding, Den Otter argues that we can use the concept of *public reason* by Rawls[64] in order to "produce collective decisions that are both democratically legitimate and morally acceptable"[65]. The last writings on democracy of Rawls analyze how people with divergent interest can arrive at terms that are acceptable by everyone regarding the community, respecting the freedom of everyone and counting every citizen as politically equal. Following these terms, citizens should not vote following their preferences but based on the public reason: voting in this way is no more something personal or private, but becomes a collective act and public reason is the only ground justifying the decision of people over fundamental questions – the central constitutional issues. The public, in this discourse, should be ready to become a subject and not a passive object.
Only in this way, the action of the public would be morally acceptable. This awareness of the people, leading them towards deciding with the public reason in mind, would limit the need of courts as dictators of principle in the questions regarding the Constitution.

Nevertheless, the counter-majoritarian debate does not represent the only challenge of the current frame in which judicial review lies. As explained in the next paragraphs, the advent of trans national organs and the development of international law have created new and important lacunae and obstacles: the implementation of a unique understanding and standard for human rights, rule of law, identity and the total new role embodied by domestic courts, which now interpret norms which go far beyond their domestic system and jurisprudence.

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[64] Rawls, J. (1993). *Political Liberalism*. New York (NY): Columbia University Press; Id., (2001). *Justice as Fairness: A Restatement*, 2nd revised ed. Cambridge (MA): Belknap Press, Harvard University Press; Id., (1999). *The Idea of Public Reason Revisited*. In: *The Law of Peoples*. Cambridge (MA): Harvard University Press.
[65] Den Otter, R. C. *Democracy, Not Deference: An Egalitarian Theory of Judicial Review*, cit., p.625.

### 4.2. The protection of rights

With the entry into force of the Treaty of Lisbon – on 1st December 2009 – many developments have been provoked. In the field of the protection of human rights, this agreement has paved the way for the accession of the EU to the ECHR (European Convention of Human Rights)[66]. According to some scholars[67], this reality would render the relationship between the national Constitutional Courts and European Courts would be even more complex than it already is – also underlined in the CJEU Opinion 2/13[68].

The complexity of the liaison lies in there being Constitutional Courts, the European Court of Human Rights and the CJEU interplaying in the same fields. This trilateral setting could surely be rendered more efficient through new mechanisms which would improve the essence and excellence of the process at multi-levels of governance. To put it forward, the implication of this interplay is that according to Article 6(3) TEU[69], fundamental rights are to be considered as "general principles of the Union's law" – in the form they are defended by the ECHR. The consequence of this understanding is that not only there is a tangled relationship between Constitutional Courts and the CJEU but also that this composition must be viewed in the wider framework of the Council of Europe and ECHR with its jurisprudence[70]. In addition, it can also be

[66] Article 6 (2) TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."
[67] Dicosola, M., Fasone, C. and Spigno, I. (2015). *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*. German Law Journal, 16(6), p.1322.
[68] In Opinion 2/13 the Court of Justice examined the draft agreement resulted from the negotiations between the EU and the ECtHR. The Court did not find the collaboration between the Member States and their national courts and the ECtHR as positive and applicable, since it undermined EU autonomy and created problems with the principle of mutual trust and the Common Foreign Security Policy. EU particular features had to be protected and written down in the document. It is true that in the EU fundamental rights are protected, but there can be discordance in the case law which will create the same legal difficulties which arise by non-accession to the Convention.
[69] Article 6 (3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the Constitutional traditions common to the Member States, shall constitute general principles of the Union's law."
[70] Id., p.1324.

underlined that the increase in the number of Constitutional Courts in general due to the enlargement policy of the European Union has not simplified the mechanisms of this legal space.

The fact that only 9 Constitutional Courts out of 18[71] in the EU have taken part in the preliminary reference procedure (Article 267 TFEU) can be a matter of concern – even if we must understand the difficulty of the new set up Court to enter the mechanisms of the system. It is true that, regarding the field of human rights, many more questions on validity (and not only interpretation) have been asked to the CJEU by Constitutional Courts– since the Charter of Fundamental Rights entered into force.

In the reaching of the value goal of the protection of rights, the countries whose constitutions enhance such protection have also provided for a mechanism which allows citizens for a direct complaint procedure. Normally, citizens lack the power to file for a violation of fundamental rights in the abstract; but in this case – and if they have already exhausted all other legal means – they can refer to the Constitutional Court directly. In this case, it is the citizens who choose the arguments of the claim against the regular judiciary or the administration. Examples of countries accepting this procedure are Austria, Germany and Spain. The most likely scenario is a constitutional complaint which calls for a violation of fundamental rights caused by a mistaken interpretation or application of provisions (not on the provision itself, which would mean go against the legislature in general).[72]

Despite this positive role and interplay, the real challenge and key turning point in these relationships regards the readiness of Constitutional Courts to accept the jurisprudence of European Courts – namely of the CJEU – on the *substance*[73] of law of the European Union. Only in this way, being the Constitutional Courts' decisions binding on the inferior courts of their countries, can the mechanism become more efficient. Namely, at that point in time, the CJEU would have to judge only a minor number of case law and it could for sure deepen its reasoning

[71] Austria, Belgium, France, Germany, Italy, Lithuania, Poland, Slovenia and Spain. This counting takes into account only those Constitutional Courts which have been established as independent from the judiciary and with the precise scope of carrying out the task of judicial review.

[72] De Visser, M. (2014). *Constitutional review in Europe – a comparative analysis*. Oxford: Hart Publishing, pp.142-143.

[73] By the word substance it is intended the general enforcement of the Charter of Fundamental Rights and the protection of the rights enumerated by it, being part of the national values as well.

and comprehension of it, producing significant judgments. Furthermore, in this way the Constitutional Court will be present in the affiliation between single judges and CJEU, leaving its role of non-speaker.

The culture of judicial review and the culture of human rights are profoundly affiliated. The question today regards *devoirs* and responsibility: the individual is projected as having those fundamental rights and more, while the public powers are the only ones endorsed with duties. Placing the individual at the center as a "victim" is in this outlook harmful for the social. In this outline, judicial review plays the essential role of restoring collective responsibility in a time of crisis both at the economic and social level, the latter being exemplified by modernized societal fractures. The provisions of the Constitution are not only to be read in the classical "individual v. society" but also as a representation of a collective culture and of the identity of the state itself.
The dilemma about identity is not linked to the discourses we are used to listen to in the current news – dialogues about nationalism, populism and political confronting. National identity should not mirror a negative comprehension of the word, but a positive gathering of the responsibilities of the citizens combined with the solidarity among each other – even if the issue of identity could be abused in order to protect the internal order. The new sensibility on issues of identity was surely the manifestation of migratory crisis, economic difficulties and geopolitics (im)balances. This is what Constitutional courts are ready to protect as well.

This is the current question, exemplified by the statement of the president of the Constitutional court of Russia, Valey D. Zorkin: "*The main problem, which the Constitutional Court of Russia has faced within its work, is the need of simultaneous fulfilment of two not always well-combined tasks: harmonizing Russia's legal system with the all-European legal expanse, on the one hand, and protection of its own Constitutional identity, on the other*".

### 4.3. Judicial review in the contemporary world: second and third waves

The vision Cappelletti had about judicial review entailed believing in a superior law, which we acknowledge effectively in the Constitution – whose main content is the protection of citizens

through the recognition of fundamental rights – and in courts as the perfect actor to perform a defense of such superior law.

Today, a democracy cannot be defined as such if it lacks the tool of Constitutional adjudication of legislation and administrative law. The current understanding finds judicial review as an enhancement of democracy itself. In addition, what we can look at today is a legal word in which the judiciary is engaged in so many forms of action and most of all at so many different governmental levels: national, international, transnational. This is the consequence of the birth of new regimes in the global sphere and also the development of national regimes towards new frontiers, magnetized by the international framework. The legal production of the cited interconnected spheres is not only wide, but most importantly often conflicting and not coordinated.

Following the reasoning of Doreen Lustig and J.H.H. Weiler[74], we can conceptualize judicial review as happening in three waves.

The first of three waves is characterized by the emergence of Constitutional adjudication in national states. It is usually identified with the case "Marbury v. Madison" (1803), which was discussed in the previous chapters. Only after one century there would be a diffusion of such mechanisms outside the American Constitutional borders.

The second one has at its center the birth of new transnational systems of law within Europe, as the European Union. The most influential point in this area is the use of international norms by domestic courts, which consider the latter as higher law and so include them in their jurisprudence and also in the practice of judicial review. This integration of international norms happens even if the domestic legal system has not technically embraced such principles. Such an operation makes clear the enormous importance of national courts, also thanks to their proximity and availability for the public – even if the second wave is about the transposition on the international level. National courts are ready to alter or challenge in general the multi-level existing legislation at the international level. National courts in this way not only ensure the Constitutionality of domestic

[74] Lustig, D. and Weiler, J. H. (2018). *Judicial review in the contemporary world – Retrospective and prospective*. International journal of Constitutional law, 16(2), pp.315–372.

legislation but also of international acts. At the same time, they make sure that their state respects the internationally set standards – particularly if these standards regard human rights.

The other level at which the second wave takes place is the scrutiny applied by the judicial actors at the international level over the domestic decisions: an international "Constitutional" adjudication. The historical points of reference in this field is the end of WWII, when many international institutions were born. Examples are the United Nations, the GATT[75], the World Bank and the ECtHR.

Going deeper in the analysis of this cornerstone – not only for the practice of Constitutional law and in general of the legal field but also for governance and governability – different grounds are found for this second wave. First of all, the promotion of human rights at the international level, in compatibility with the domestic character. Secondly, the realistic understanding would read this development as a path towards hegemony: the most powerful countries could use such interconnection to impose themselves together with their own standards. At the institutional level, the embracing of higher norms could be sustained in order to compel private actors to respect specific technical requirements.

The third wave of judicial review can be recognized in the effort run by national courts to fill the gaps of rule of law, identity and democracy in the multi-level governance setting of today's world. This push at the domestic level is a response towards a better control over the international adjudication.

The new issue and challenge is about the recognition of the impact of the international and multi-level governance sphere over the domestic identity and the finding and design of clear democratic legitimacy features in the process. Where does accountability lie in the application of such international norms and governance which are authorized by entities which are not accountable to any *demos*? This weakens the legitimacy of international law and the level of compliance of the required standards. That is why the new wave is born on the push of a sensitivity towards the

[75] General Agreement on Tariffs and Trade, 1947: international agreement signed in Ginevra by 23 countries in order to enhance trade by removing tariffs and quotas, barriers to commerce. It will be succeeded in 1994 by the WTO, World Trade Organization.

lacking rule of law in the circuit of transnational governance. Who should be the actors to correct the shortcomings? One hypothesis is that national organs should work on the uniformity of norms. Yet perhaps what should be researched is a system of checks and balances.

In this context, what becomes a really vital tool is the dialogue between judges. Such conversation is part of the horizontal effects and affiliation between democracies which have endorsed a Constitution with judicial review – the same horizontal influences were the reason of the adoption of Constitutional adjudication as a practice in the first place. The aforementioned dialogue entails the proliferating quotation and remark by domestic courts to decisions of other Constitutional courts, in a comparative and enriching perspective. In this case we recognize a double step process: firstly, the transfer of the practice *per se*; secondly, the migration and share of the *corpus* of the subject, its very essence represented by the judgments and resolutions.

*"In this postwar paradigm courts are the special guardians of foundational Constitutional principles, including the rule of law, the separation of powers, the democratic function, and the specific rights that the Constitution guarantees – but, despite this broad mandate, they do not encroach upon political prerogatives, but restrain their elected bodies to their electoral mandate, whose limits are set in the Constitution."*[76]

[76] Lustig, D. and Weiler, J. H. *Judicial review in the contemporary world – Retrospective and prospective*, cit., p.323.

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**Summary**

*Il Controllo di Costituzionalità delle Leggi negli Stati Federali*
*I Modelli Austriaco ed Americano a Confronto*

Ciò che la presente tesi finale si propone è uno studio comparato dei due modelli principalmente noti e contrapposti di controllo giudiziale delle leggi negli Stati Federali. Escludendo in questo modo i controlli sulla legislazione e sugli atti esecutivi effettuati da organi non giudiziari, come il *Conseil Constitutionnel* francese, il discorso si incentra sull'analisi del modello americano e di quello austriaco.

Prima di tutto, è necessario sottolineare che l'accettazione della costruzione su "modelli" non è avvenuta senza accoglierne allo stesso tempo la criticità. Infatti, l'uso dei modelli come punto di partenza non è privo di dissensi nel mondo accademico. La necessità di classificare e di organizzare il diritto positivo è chiara a livello intellettuale ed è identificata con il bisogno di semplificazione e di comprensione del soggetto.
Ad oggi, la contrapposizione a due tra modello americano e modello austriaco viene messa in discussione sia sul piano empirico che su quello teorico. Innanzitutto, la critica parte dalla presenza di modelli ibridi – che incrociano le caratteristiche affidate ad uno o all'altro modello in maniera univoca e specifica. Inoltre, la presenza geografica dei due tipi non rispetta quella che sarebbe una divisione continentale: paesi dell'America Latina si legano ad alcune caratteristiche austriache, mentre paesi europei accolgono pienamente il modello cosiddetto americano (Danimarca, Svezia, Finlandia, Norvegia). Sul piano teorico, invece, Guillame Tusseau ci parla di una "illusione": in realtà gli attori della Costituzione scelgono le loro istituzioni confrontandosi con l'esempio degli altri stati ed in base a ciò che maggiormente si adatta alla loro nazione.
I modelli risultano ben costruiti, ma c'è mancanza di riscontro reale. Inoltre, come ogni ricerca che tenta di andare sempre più nel dettaglio ed in profondità, il risultato di un tale approfondimento rende la classificazione meno rigorosa. Rimane certa la spinta e la ricchezza derivati dallo studio comparato, in cui la riduzione a principi è una tendenza inconfutabile.

Esplicando i contenuti, lo studio comincia con un'analisi sulle origini della revisione di costituzionalità delle leggi negli Stati Federali. Prima di tutto, la nascita della Costituzione vista

come *lex superior* – un processo che parte dal bisogno di principi sempiterni, non legati all'evoluzione della popolazione nel suo sistema sociale, e che arriva alla rigidità del documento come garanzia per la supremazia nelle fonti.
La nascita delle corti costituzionali, a cui viene assegnato tale compito di revisione, viene affrontato storicamente insieme alla dottrina della separazione dei poteri. È così chiara la sottile linea che divide il funzionamento di una Corte Costituzionale, capace di controllare la costituzionalità delle leggi, e il principio democratico secondo cui il popolo ha il diritto di essere governato dai propri rappresentanti tramite i loro atti.
Il principio della pratica della *judicial review* viene legato storicamente al caso americano Marbury vs. Madison, giudicato dalla Corte Suprema nel 1803. Le implicazioni di tale caso cambieranno per sempre la storia costituzionale americana e anche quella di tutti i sistemi che ne traggono esempio. La *ratio* utilizzata alla base della giurisprudenza della corte dichiarava che i poteri legislativi derivano la loro autorità dalle elezioni, tramite cui gli attori vengono delegati dal popolo. Ciò avviene tramite le norme costituzionali e per tale ragione se un atto legislativo creato dai delegati va oltre i limiti imposti dalla fonte primaria del diritto, esso è un atto senza alcun valore giuridico.

L'esercizio del suddetto controllo va inserito nella cornice dei sistemi giuridici che lo ospitano, ed in particolare del sistema americano e di quello austriaco – su cui si concentra l'analisi di questo elaborato. Seguendo l'introduzione del caso capostipite della *constitutional adjudication*, viene introdotto prima il sistema americano e gli Stati Uniti come stato federale e poi il sistema austriaco, con la sua centralizzazione e assetto.
L'assetto federale, con la sua complessità e molteplicità, ha portato i due sistemi a distinguersi in modo univoco nell'applicazione della dottrina di controllo giudiziale delle leggi: da un lato, si verifica un sistema diffuso in cui la certezza giuridica è garantita grazie alla pratica del *precedent*; dall'altro, un sistema centrato, affidato ad un'unica e specifica corte.
Vengono inoltre messi a confronto gli effetti di un giudizio di incostituzionalità, che possono avere ripercussioni sia solamente sulle parti incluse nel caso portato a giudizio, come accade negli Stati Uniti data l'incidentalità del processo; sia conseguenze cosiddette *erga omnes* nel caso austriaco, dove tale controllo non è solamente in azione ma anche in via principale e ha effetto non retroattivo. La retroattività è invece una caratteristica del sistema americano, dove però i giudici

hanno il diritto di dichiarare che non intendono imporre tali effetti alla loro decisione – comprendendo le implicazioni di una risoluzione *ex nunc*.

Il processo attraverso il quale entrambi i testi costituzionali furono adottati dai due paesi è esplicato nei primi paragrafi dei capitoli a loro singolarmente dedicati, evidenziando quanto la sfida federale abbia influito nella scelta di cosa inserire e di cosa, invece, lasciare in mano ai successivi protagonisti della storia. La divisione dei poteri, da cui nasce poi l'interessante posizione e studio del controllo di legittimità costituzionale delle leggi, è in entrambi i casi – come in ogni Costituzione adottata dopo le Grandi Guerre – esposta in maniera primaria.
Il ruolo giocato dai padri costituzionali è argomentato prendendo in considerazione anche alcune antitesi, tra cui la teoria secondo la quale non furono i progetti di Kelsen ad inserire la pratica protagonista di questo studio all'interno dell'ordinamento giuridico austriaco ma già corti precedenti a livello federale si occupavano di ciò in modo analogo. Sulla stessa rima, viene presentato il parere di alcuni autori americani secondo cui non fu il caso Marbury vs. Madison a dare vita alla *judicial review* nell'ordinamento americano – e poi globale – ma il processo di controllo aveva già dei precedenti nella storia giuridica americana, per cui non fu una sorpresa assoluta la dichiarazione del giudice Marshall.

Le conclusioni si pongono poi come obiettivo l'esame degli attuali ostacoli e sfide che la *constitutional adjudication* oggi vive, a partire dalla questione democratica. Stiamo parlando della cosiddetta *countermajoritarian difficulty*, dove il controllo esercitato da una Corte Costituzionale o Suprema nei confronti di una legge emanata dai rappresentanti eletti dal popolo in veste di potere legislativo porta all'annullamento di quest'ultima in caso di incostituzionalità. Può dunque un organo giuridico compiere tale azione? Va ciò interpretato come un andar contro il volere della maggioranza?
Tale dubbio viene esplicato nel corso dell'intero elaborato, in cui non solo le Corti Costituzionali come organi vengono presentati ma anche gli espedienti utilizzati per far sì che i loro membri siano di rango tale da rivestire un ruolo unicamente di controllo e garanzia, non di potere. Inoltre, come da secondo paragrafo conclusivo, le basi di tali decisioni spesso si legano a temi di suprema importanza per i cittadini – come la difesa dei diritti. Decisioni improntate sul volere della maggioranza potrebbero compromettere le minoranze nei loro diritti fondamentali, difesi in questo

modo dalla Costituzione e dalla Corte Costituzionale come suo garante. Ad oggi, la difesa dei diritti dell'uomo è un tema centrale nelle corti supreme e supranazionali, come per l'European Court of Human Rights. Le nuove identità che viviamo – cittadino italiano, europeo e sempre di più globale – creano delle instabilità nel mondo del diritto e del confronto tra le corti, che ora si trovano rivestite col ruolo essenziale di ristabilire la responsabilità collettiva. Tale compito diventa complesso se si inquadra nella necessità da un lato di inserirsi nel quadro europeo nella sostanza e dall'altro di preservare la propria identità costituzionale.

Ad oggi, un regime democratico non può essere definito tale se viene a mancare lo strumento di controllo di legittimità costituzionale delle leggi. A questo quadro vanno aggiunti i tanti livelli con cui si confronta il potere giudiziario nel mondo contemporaneo: nazionale, internazionale, transnazionale. Per questo, la judicial review può essere metaforicamente compresa come avvenuta in tre differenti onde. La prima, con l'emergenza del fenomeno all'interno dello stato nazionale – ricongiunta solitamente con il caso Marbury vs. Madison. La seconda ha come protagonista la nascita dei sistemi legali transnazionali in Europa, come l'Unione Europea. Centrale in questa seconda fase è l'uso da parte delle corti a livello nazionale di norme internazionali, che vengono integrate nella giurisdizione e nella pratica di controllo delle leggi. Allo stesso tempo, gli attori internazionali valutano le decisioni a livello interno, costruendo così una "*international constitutional adjudication".* Questa azione era alla base della promozione dei diritti umani.
La terza ed ultima onda può essere riconosciuta nello sforzo delle corti nazionali di colmare il divario esistente tra i vari livelli di *governance* del mondo contemporaneo nella *rule of law*, nell'identità e nella democrazia. Questa spinta interna è un tentativo di controllo nei confronti dell'aggiudicazione internazionale, che manca di rendicontazione ad un *demos*. Ecco che diventa chiara la necessità del circuito interno di influenzare il circuito transnazionale.
In questo contesto, sempre più intrecciato e ricco di attori, il dialogo tra i giudici diventa uno strumento vitale. Sempre più corti menzionano nelle loro decisioni altre Corti Costituzionali, in una dimensione di affiliazione orizzontale e di arricchimento nella sfera del diritto comparato. Tali influenze orizzontali furono proprio quelle che portarono all'adottamento della pratica di controllo di legittimità costituzionale delle leggi nel primo momento. Quindi, dopo la condivisione della pratica, oggi osserviamo la condivisione anche del *corpus* del soggetto, la sua essenza, rappresentata dalle risoluzioni e sentenze dei giudici.