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Rights protection across the Atlantic: a comparative analysis of the US Supreme Court and the European Court of Justice

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I. Introduction

For we must consider that we shall be as a city upon a hill.
The eyes of all people are upon us.

John Winthrop [1]

La via da percorrere non è facile né sicura,
ma deve essere percorsa, e lo sarà!

Altiero Spinelli [2]

Although separated by the Atlantic Ocean, the United States of America and Europe share a perpetual and indissoluble union, a bond that encompasses historical, cultural, economic, social and political areas. Yet, the Old Continent and the USA also present enormous and long-lasting differences, displaying contrasting views on several fundamental issues. The aim of this research is to present similarities and dissonances among the two, especially for what concerns the crucial topic of rights protection. The United States will be compared with the European Union, as the specific institutional and political features of the EU make it the perfect candidate for a comprehensive and balanced juxtaposition with the US. The following sections will further demonstrate why rights tutelage perfectly exemplifies the contradicting relationship between the US and Europe. As this work will show, despite sharing the same fundamental values and having been intensely connected throughout all their modern history, their respective legal systems have grown apart. Specifically, the true protagonists of this two-fold comparative analysis will be the masters of each legal system, the US Supreme Court and the European Court of Justice. The two tribunals represent the summit of the legal and institutional structures they are part of, and through a careful observation of their behavior, their rules and, most importantly, of their judgements, it will be possible to better understand how and why the American and European legal systems of rights protection differ.

The US Supreme Court and the ECJ show strong differences on a number of aspects, from the appointment procedures of judges to the political resonance of the courts' decisions. The EU and the USA seem to have developed a completely distinct conception of their highest tribunals. The fact that the USA form a single, sovereign country (contrarily to the EU, which is a *sui generis* regional organization) may explain some of these discrepancies, but are such institutional asymmetries sufficient to justify the heterogeneity concerning the protection of rights? After all, as previously

[1] John Winthrop, A Model of Christian Charity, *A Library of American Literature: Early Colonial Literature*, 1607-1675, Edmund Clarence Stedman and Ellen Mackay Hutchinson, eds. (New York: 1892), 304-307.
[2] "The road ahead is neither smooth nor certain. But we must follow it and so we shall!" Altiero Spinelli, Ernesto Rossi, Per un'Europa libera e unita, 1941.

mentioned, the two geopolitical giants share most of their core principles and values, especially in the fields of justice and human rights protection. It will be argued that the divergences between the EU and the USA can be explained not only by the specific features characterizing each of the two organs, but they are also the consequence of a profoundly different understanding of the role of the Courts.

The European Union and the United States are often thought as being incomparable on the institutional level. Although it is true that the EU cannot be considered as a federal state, this essay will build upon Sergio Fabbrini's work on compound democracies (Fabbrini, 2008) and show how the rivalry between member states and the European institutions is comparable to the struggle between federated states and governmental agencies in the US. Fabbrini defines the model of compound democracy as a political and institutional system based upon the principle of double separation of powers, both horizontal (among institutions) and vertical (between the center of power and the territorial units). This polity is designed with the goal of preventing the formation of permanent majorities and has the division between states as its central cleavage. Only the United States, Switzerland and the European Union fall within this categorization, and they all share one fundamental characteristic: these three democracies are all "the outcome of the aggregation of previously independent and asymmetrical states" (Fabbrini, 2008). Another key feature of this model is the absence of a single center of decision-making: the degree of separation among powers is so high that it could be argued that these systems lack a government. Instead, the respective administrations are composed of autonomous bodies forced to cooperate with each other in order to reach their goals. The compound democracy model is useful to emphasize how important the division among states (EU Member States and US federated States) is in both the US and the EU. Although this cleavage may disguise itself under different forms, such as partisan political clashes in America or economic/cultural divisions among Mediterranean and continental states in the European Union, these manifestations almost always reveal an underlying territorial disjuncture. In the EU, the geographical fracture has become even more severe during the last twenty years. For instance, with the great enlargement of 2004[3] and the subsequent additions of Bulgaria, Romania and Croatia, the center of gravity of the Union shifted eastwards. This entailed important alterations in the political and cultural equilibria within the EU, as these countries carried with themselves their own traditions, beliefs and interests. The "new member states" have not caused a decision-making paralysis within the Union, creating a cluster only on specific policy areas such as climate change and asylum policies (Toshkov, 2017). At the same time, however, threatening signs have come with the process of

[3] 2004 saw the addition of ten countries to the EU: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

enlargement, as a democratic backslide in some of the new member states (Sedelmeier, 2014), the repeated infringement procedures against Hungary[4] or the Polish government's reiterated violations of LGBTQ+ rights.[5] The growing presence of the Visegrád Four[6] in the EU political dynamics symbolizes the emergence of significant geopolitical groups within the European territory. The conclusion that should be drawn from this preliminary analysis is not that Eastern European countries or alliances such as the Visegrád Four represent a threat to the values of the EU, but rather that the decision-making processes of the Union are highly dependent on the existence (or lack thereof) of these territorial blocks.

These elements do not undermine the relevance of the study. In Europe as in the USA, the geographical clusters are highly resilient, and the members of each subgroup tend to have similar inclinations on multiple issues. The same cleavage has manifested under the shape of economy-centered clashes during the Eurozone crisis and the more recent discussions on the Next Generation EU. The territorial fracture in the United States is equally evident, with the results of the 2020 Presidential Elections confirming a persistent trend of geographic polarization among "red" and "blue" states.[7] In conclusion, it can be argued that the symmetrical standing of member states within the European Union has generated very complex dynamics, and inter-state conflicts within the EU are more visible than the ones taking place in America. The analytical framework presented will facilitate the comparison between the two polities. Since a complete observation of the two structures would require in-depth considerations over the political dynamics within each system, the institutional setups, the actors involved, etc., the focus will be kept as much as possible on the judicial mechanisms. As the goal of this paper is "only" to compare the two Unions on the issue of rights protection, a more wide-ranging investigation would risk of missing the main objective of this work.

Throughout this introductory section "rights protection" has been presented as the central element of the study. However, defining the object of the research in such way does not help in narrowing down the field of inquiry. In order to conduct a meaningful and manageable investigation, it will be necessary to select a specific set of elements to take into account. Hence, three main issues will be

[4] Hungary: Facing Fifth Infringement Procedure Related to Asylum Since 2015. European Council on Refugees and Exiles (2020).

[5] Poland Breaches EU Obligations Over LGBT, Women's Rights. Human Rights Watch. Available at: https://www.hrw.org/news/2021/02/24/poland-breaches-eu-obligations-over-lgbt-womens-rights, accessed on 28 March 2021.

[6] The V4, also known as the Visegrád Alliance or the Visegrád Group, is composed of Czech Republic, Hungary, Poland and Slovakia. See: Parola, F. (2019), Il Gruppo di Visegrád, tra boom economico e scontro con l'Ue, *ISPI*. Available at: https://www.ispionline.it/it/pubblicazione/il-gruppo-di-visegrad-tra-boom-economico-e-scontro-con-lue-22479, accessed on 21 May 2021.

[7] Maps showing single-party presidential election voting consistency are useful tools for an immediate understanding of the geographical clustering process in the US. See: States Voting Same Party in Consecutive Elections, 270toWin. Available at: https://www.270towin.com/same-since-electoral-maps/, accessed on 2 June 2021.

observed to carry out the comparison: (a) minority rights protection, (b) abortion rights and (c) constitutional compatibility with international law. These three topics have been thoughtfully selected after a rigorous preliminary investigation of notable case law, and they have been found to be the most suitable for a comparative study among the immense number of examples available. They furthermore reflect the legal traditions of the two systems under scrutiny, as well as the current attention brought to these rights, which remain the object of recent and noteworthy proceedings.

The investigation will be carried out in multiple stages. The discussion will begin from a preliminary observation of the main legal sources. This is an imperative step for every analysis performed in the context of law and jurisprudence, as it permits to familiarize with the main legal texts relevant to the research and to grasp the basic "rules of the game". Then, the two courts will be juxtaposed to compare their main features. Understanding their powers not only *per se*, but most importantly in relation to their contextual legal and institutional systems, will provide the essential tools to comprehend the courts behaviors, their limitations and their decision-making processes. The following section will be dedicated to the historical evolution of the US Supreme Court and of the European Court of Justice. Although it will not be possible – nor pertinent to this study – to provide an all-encompassing chronicle of the courts' history, their contingent characteristics and features will be found to have severe influence on their current powers, on their position within the institutional structures and on their capabilities. Next, the analysis will move to the description of social and civil rights and their relative constitutional guarantees. The constitutional texts and the corresponding jurisprudence will be thoroughly described to show how the structures have evolved throughout the decades. Additionally, a specific section will be dedicated to the complex issue of conflicting jurisdictions, since the two courts sit at the top of extremely sophisticated and multifaceted organizations. Both the US Supreme Court and the ECJ are called to rule upon federal (or *quasi*-federal, in the case of the EU) structures composed of multiple states, entities and competing authorities. The different hierarchies of sources will be observed to see how the conflicts influence the two institutions. Finally, the research will concentrate on the case law analysis. The main section of the whole project will be subdivided into three additional portions, each reserved to a different issue. This will be the chapter in which the theoretical and analytical observations will be employed in a concrete study of rights protection in jurisprudence. The cases selected will demonstrate in practice how the defense of rights is ensured by the two courts and in which ways the Supreme Court of the United States and the European Court of Justice differ.

II. Case law

In order to analyze the US Supreme Court and the European Court of Justice, it is mandatory to begin from the study of the sources of law that constitute each respective legal system. The legal sources represent an invaluable instrument for the observation of the two tribunals, as they define the mandate, composition and jurisdiction of each court.

1. US Supreme Court case law

For what concerns the United States, the issue of legal sources for the Supreme Court appears to be relatively straightforward. Although the observation of the sources of law has to deal with overlapping jurisdictions and even with multiple constitutions, the American judicial structure resembles other "traditional" nation-state systems. However, especially for what concerns the topic of rights' protection, the sophistication and uniqueness of the US legal configuration should not be underestimated. The matter of conflicting jurisdictions will be analyzed in greater detail in a specific section of this work (chapter 6), but it is important to underline from the beginning that the presence of state constitutions and of states supreme courts has an enormous influence over the role and powers of the SCOTUS.

Unsurprisingly, the paramount legal source for the Supreme Court is the Constitution of the United States of America. The Court comes to life through Article 3 Section 1, which provides:

> *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 Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*[8]

In these few, essential lines, the Founding Fathers were able not only to give birth a cornerstone of America's institutional system, but also to lay out many of its essential characteristics. First, the initial sentence confers to the Court the attribute of supreme, immediately introducing it as the zenith of the American judicial hierarchy. Although the judicial power is also distributed to other bodies, as established by the Congress, those other courts are described as inferior, a descriptive (and self-evidently not qualitative) adjective that affirms their subordination to the Supreme Court. Furthermore, through the sentence "[t]he Judges […] shall hold their Offices during good Behaviour", the first section of Article 3 surreptitiously sets out the length of the term of each Justice: since they

[8] U.S. Const. art. 3, § 1.

can only be removed through an impeachment procedure when they are found to have contravened the "good Behaviour" requirement, justices are appointed for life. The final segment, which is presumably not of secondary importance for the Justices, concludes Section 1 of Article 3 by guaranteeing a protected compensation for each Supreme Court judge.

The second section of Article 3 also contains elements of great relevance for the life of the Supreme Court, as well as for the entire judicial system's mechanism. This segment outlines the jurisdiction of the courts in relation to international law, affirms the requirement of jury trials for all crimes – except for impeachment procedures, prerogative of the Congress – and grants the Supreme Court original jurisdiction in cases involving ambassadors, public ministers, consuls and those proceedings in which "a State shall be Party".[9] This clause gained unparalleled importance in the field of American constitutional studies thanks to the cardinal case *Marbury v. Madison*,[10] arguably one the most famous litigations in the history of the US jurisprudence.[11] Finally, the third article of the US Constitution ends with Section 3,[12] which defines the crime of Treason against the United States. Interestingly enough, treason happens to be the only offense explicitly defined[13] within the Constitution (Crane & Pearlstein).

Aside from the provisions included in the Constitution, the Court is also regulated by ordinary sources of law. In particular, Title 28[14] of the United States Code contains a large number of rules aimed at governing the federal judicial system, many of which specifically refer to the Supreme Court. The first six sections of Title 28 set out various organizational features of the SCOTUS, such as the number of judges, the minimum quorum requested, the terms of the Court, the salaries of justices, etc. As it will be shown later on during this research, many key features regarding the Supreme Court's composition have experienced major changes throughout the years. Most notably, the provisions concerning the number of justices have generated historic clashes and conflicts among the branches of government, especially under the presidency of Franklin Delano Roosevelt. Sections 671 to 677 of Chapter 45 deal with the Court's officers and employees. This unit governs the rules of appointment of several personnel members, which include clerks, librarians, counselors and even a

[9] U.S. Const. art. 3, § 2.
[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 1803.
[11] For a detailed analysis of the Supreme Court's original jurisdiction, see: The Original Jurisdiction of the United States Supreme Court, 1959. *Stanford Law Review* 11, pp. 665–719. https://doi.org/10.2307/1226664.
[12] U.S. Const. art. 3, § 3.
[13] "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Ibid.
[14] U.S. Code: Title 28. Judiciary and judicial procedure. LII / Legal Information Institute. Available at: https://www.law.cornell.edu/uscode/text/28, accessed on 22 March 2021.

marshal, which heads the security polices of the SCOTUS. These figures provide an essential support to the justices' daily work.

The two segments highlighted thus far mostly concern practical issues, like the concrete execution of tasks or the technicalities concerning the Court's organization. Similar considerations can be made on Part V (§§ 1651 to 2113), which outlines the procedural rules of the courts. Sections 1251 to 1260 of Title 28, instead, allow for a deeper analysis of the Supreme Court's role. This unit is indeed dedicated to the "jurisdiction and venue" of the tribunals. Chapter 81 essentially involves two issues: the original jurisdiction of the SCOTUS and the writ of *certiorari*. Section 1251 affirms that "(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States; (b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens."[15] This provision is the implementing statute of the aforementioned Section 2 of Article 3 of the Constitution, which first introduced the concept of original jurisdiction of the Supreme Court.

Sections 1254 to 1260 of Title 28, instead, involve the writ of *certiorari*. The *certiorari* is a crucial instrument within the American judicial system, as it allows appellate courts to review previous rulings. In the case of the SCOTUS, it permits parties to ask the Supreme Court to review a lower courts' decision; since parties do not enjoy the right to bring their cases before the Court, they can only seek to appeal by filing this writ. If the Court accepts to review the proceeding, it "grants the *certiorari*" and agrees to hear the case.[16] The importance of the writ of *certiorari* is self-evident, as it essentially created the discretionary power of review of the Supreme Court. Before the Judiciary Act of 1891,[17] the cases were brought in front of the court "as a matter of right". The act, instead, set up the system of courts of appeal (which will be analyzed further in the following chapters) and modified the entire mechanisms of judicial review, allowing Supreme Court justices to choose whether to hear a case or not.

[15] 28 U.S. Code § 1251 - Original jurisdiction. LII / Legal Information Institute. Available at: https://www.law.cornell.edu/uscode/text/28/1251, accessed on 22 March 2021.
[16] Certiorari, LII / Legal Information Institute. Available at: https://www.law.cornell.edu/wex/certiorari, accessed on 22 March 2021.
[17] An act to establish circuit courts of appeals and to define and regulate in certa in cases the jurisdiction of the courts of the United States, and for other purposes. Fifty-first Congress. Sess. II. Chs. 501, 517, 3 March 1891.

2. CJEU/ECJ case law

On the other side of the Atlantic, the intricate and complex structure of the European Union makes the observation of legal sources quite challenging. Efforts to provide one single, universally acceptable classification of the EU have been causing intense debates among politicians, scholars and observers for decades. Should it be addressed as a regional intergovernmental organization? Or is it closer to a federal state? Does its uniqueness make any comparative analysis vain, or could it be approached as other political entities? These questions assume special relevance in the context of constitutional studies. Indeed, the understanding of the EU's founding treaties in relation to the member states' constitutions depends upon the individual perception of the logics of European integration.

Ingolf Pernice offered a useful interpretative tool that may partially solve this dilemma. The reference is to the concept of multilevel constitutionalism (Pernice, 2015), through which the German scholar describes the connection between EU and national sources of law as a functional relationship, rather than a hierarchical one. While the European Treaties, namely the Treaty on European Union (TEU)[18] and the Treaty on the Functioning of the European Union (TFEU)[19], and the national constitutions are autonomous and have followed a polygenist evolutionary path (i.e., they do not share the same origin), they work in symbiosis. The European constitutional system could be described as double-layered: although the European treaties have experienced a process of constitutionalization – also implemented and carried out through landmark judicial decisions by the CJEU, such as Costa v. Enel,[20] van Gen den Loos,[21] Simmenthal,[22] etc. – the Union still has to respect the member states' constitutional identities, as set out in art. 4.2. TEU[23] and as reaffirmed by national courts through rulings such as the *Lissabon Urteil* pronounced by the German Constitutional Court.[24] The issue of constitutional compatibility is particularly complex and somewhat controversial. For this reason, the topic will be examined in detail within a specific chapter of this work.

The Court of Justice of the European Union, which consists of two separate courts, the Court of Justice and the General Court, finds its legal basis in the two European Treaties. The Court of Justice

[18] Consolidated version of the Treaty on European Union, p. 13–390. [hereinafter TEU]
[19] Consolidated version of the Treaty on the Functioning of the European Union, p. 47–390. [hereinafter TFEU].
[20] Case 26-62, Flaminio Costa v E.N.E.L. (1964).
[21] Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (1963).
[22] Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA, (1978).
[23] "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."
[24] 2 BvE 2/2008, judgement of 30 June 2009.

receives its powers and jurisdiction from Article 19 of the TEU,[25] which: sets out its principal task of ensuring interpretation and application of the Treaties (art. 19 (1));[26] outlines its general composition of one judge per member state (art. 19 (2));[27] grants it its competence upon actions brought by MS, interpretation of Union law and other cases provided for in the treaties (art. 19 (3)).[28] The TFEU, instead, offers a more meticulous and exhaustive description of the Court's role, its jurisdiction and its competences, as this treaty generally provides for a more particularized description of the principles laid out in the TEU. The relevant articles, from 251 to 281 TFEU, develop in greater detail the elements referred to in art. 19 TEU. The Treaty also provides for an extensive list of procedures and actions that can be brought before the CJEU, as well as the Court's arsenal of enforcement tools (Kuijper, 2018). Additionally, it should be remembered that the Court also has jurisdiction upon the European Atomic Energy Community, as established in the Euratom Treaty.[29] Finally, the official statute of the Court is represented by the Protocol (No 3) on the Statute of the Court of Justice of the European Union.[30]

The documents presented thus far do not exhaust the vast number of rules concerning the Court. For instance, the rules of procedure of the CJEU[31] include more than two hundred articles, ranging from the court's general organization to the specific rules regulating every step of the judicial process. The rulebook represents an essential aspect of the CJEU's activities, as it governs the mechanisms of allocation of cases and influence the whole decision-making system within the Court.

This introductory segment presented the general framework concerning the European Court of Justice and the United States Supreme Court. Some fundamental features have been found to characterize both polities, most notably their multi-layered structure and the multiplicity of legal sources. The following units will further demonstrate why and how these features deeply influence the functioning of the two systems.

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[25] TEU art. 19.

[26] "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

[27] "The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed."

[28] "The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties."

[29] Treaty establishing the European Atomic Energy Community, 25 March 1957. [hereinafter Euratom Treaty]

[30] TFEU - Protocol (No 3) on the statute of the Court of Justice of the European Union, p. 210–229.

[31] Rules of Procedure of the Court of Justice of 25 September 2012, as amended on 26 November 2019.

III. Roles and Features of the Courts

After having briefly analyzed the legal sources concerning the SCOTUS and the CJEU, the focus will now shift to the observation of the courts' main features and roles. Again, this procedure will be divided into two parts: the first one will carry out an assessment of the institutional frameworks of the two legal systems; the second part, instead, will describe the judges' appointment procedures, a key characteristic that will be found to have enormous repercussions on both courts' powers and decision-making mechanisms.

1. Institutional framework

1.a. US federal judicial system

The US Supreme Court is not only called to play the role of final arbiter in front of an audience of nearly 330 million people,[32] but it is also a key component of one of the largest political and institutional infrastructures that ever existed. The outlays of the United States government reached 4,790 billion of dollars for the fiscal year 2020,[33] as the federal administration keeps growing and expanding. It easy to see that this requires a complex and multi-layered judicial system, as a jury composed of only nine justices could never be able to perform this task alone. The federal justice system is indeed divided into several levels, with the Supreme Court representing only the apex of the American judicial pyramid.

The analysis of the legal sources of the SCOTUS was centered around Article 3 of the United States Constitution. Although, as stated above, the article was able to lay out many important elements in a small number of lines, almost nothing was said regarding the powers and features of the inferior tribunals. This non-secondary task was indeed left to the Congress, which created the federal court system through the Judiciary Act of 1789.[34] The Act represents a milestone in the history of the US justice system, as it set clear boundaries among different levels of jurisdictions and served as the blueprint of the entire legal structure.

The bulk of federal trials takes place in the two sub-levels below the Supreme Court, namely the District Courts and the Circuit Courts. In the Judiciary Act, District Courts are called to act as the

[32] United States Census Bureau, 2019: ACS 1-Year Estimates Data Profiles. Available at: https://data.census.gov/cedsci/table?q=United%20States&g=0100000US&tid=ACSDP1Y2019.DP05, accessed on 7 February 2021.
[33] Budget of The U.S. Government for Fiscal Year 2021, Office of Management and Budget. Table S–1: Budget Totals, p. 109.
[34] An Act to establish the Judicial Courts of the United States. First Congress. Sess. I. Ch. 20. Statute I., 24 September 1789.

general trial courts for cases of federal significance. They deal with both criminal and civil law, enjoying original jurisdiction over several issues such as constitutional disputes, criminal prosecutions brought by the United States and many others.[35] The judicial system includes 94 District Courts,[36] more than 670 district court judges and even some special tribunals with country-wide jurisdiction, such as the US Court of Federal Claims, the US Tax Court or the US Court of International Trade.[37]

District Courts only constitute the first level of this three-layered pyramid. The second stage of judicial protection in the United States is represented by the Circuit Courts (or US courts of appeal) which primarily function as appeal tribunals. The Circuit Courts system works through a sub-division of the country into twelve regions: a federal court is assigned to each one of these areas, while the District of Columbia Circuit Court is exclusively called to review cases brought in the capital city, including those involving governmental agencies and the US Congress. Additionally, the United States Court of Appeals for the Federal Circuit is appointed to review cases concerning patent law, the only circuit tribunal whose authority is limited by subject rather than by geographic boundaries. The stark difference between the number of Circuit Courts and that of District tribunals reveals the much greater importance that former hold within the American judicial system. Since any ruling taken at the district level can be appealed in Circuit Courts, and as the US Supreme Court "only" hears about 100-150 of more than 7,000 cases that is asked to rule upon each year,[38] the second-level tribunals play the role of "constitutional court" or of "court of last resort" in the overwhelming majority of proceedings.

The observation of the institutional framework also needs to consider the multi-dimensionality of the political space under analysis. In order to provide a proper description of such environment, the study cannot limit itself to the assessment of the Supreme Court's hierarchical relationship with lower tribunals. If the examination of the vertical dimension of the federal system has been carried out

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[35] The District Courts' jurisdiction is extensively outlined in the US Code. See: 28 U.S. Code, Part IV, Chapter 85 and 18 U.S. Code § 3231.

[36] 89 in the federal states, 1 in Puerto Rico, 1 in the Virgin Islands, 1 in Guam, 1 in the Northern Mariana Islands. See: United States Courts: Court Role and Structure. Available at: https://www.uscourts.gov/about-federal-courts/court-role-and-structure#:~:text=The%20nation's%2094%20district%20or,to%20decide%20who%20is%20right, accessed on 7 February 2021.

[37] Offices of the United States Attorneys, US Department of Justice. Available at: https://www.justice.gov/usao/justice-101/federal-courts#:~:text=There%20are%2094%20district%20courts,heard%20in%20the%20federal%20system, accessed on 7 February 2021.

[38] United States Courts: About the US Courts of Appeal. Available at: https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals, accessed on 8 February 2021.

through the analysis of the judicial pyramid, it is now necessary to reflect upon the relationship between the Supreme Court and the other branches of government – the horizontal dimension.

As stated above, the Constitution gave great relevance to the SCOTUS, crowning it as the ruler of the American legal kingdom. However, the strength of the Court in comparison with the other government branches remains highly questionable. Although historical development and appointment procedures will be thoroughly described in other sections of this study, it is already necessary to state that the executive, the legislative and the judicial branch have always been involved in a constant struggle for power and relevance, and the imaginary "pendulum" has been swinging back and forth since the birth of the USA.

The controversies arising from this complex relationship were present even before the entry into force of the Constitution, as showed by the Federalist Papers.[39] In particular, the most lucid analysis of the Supreme Court's position within the proposed constitutional arrangement was offered by Alexander Hamilton in the Federalist Paper No. 78,[40] a historic essay in which Publius (Hamilton's pseudonym) responds to the arguments of Brutus (likely Robert Yates).[41] Together with many other Anti-Federalists and "Jeffersonians",[42] Yates repeatedly voiced his concerns over the high level of independence that the Supreme Court would have been granted by the proposed Constitution, as he believed that it would not have been possible to hold justices accountable for their actions under the institutional arrangement envisioned by Hamilton and the other Federalists.[43] Regarding Supreme Court Justices, Yates writes:

> *There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.*[44]

[39] The Federalist or Federalist Papers is a series of essays written between October 1878 and May 1788. Published under the collective pseudonym of Publius by Alexander Hamilton, James Madison and John Jay, the 85 essays were aimed at convincing the people of the state of New York to ratify the proposed United States Constitution. The Federalist Papers are available at: https://guides.loc.gov/federalist-papers/full-text, accessed on 10 February 2021.
[40] Hamilton, A., The Judiciary Department, Federalist No. 78, The Federalist Papers, 1788.
[41] Robert Yates (1738-1801) was an American judge and one of the leaders of the Anti-Federalist group. Yates was also a member of the committee that drafted New York's first Constitution and served as a Chief Judge of the NY State Supreme Court. Biographic information taken from the Albany Rural Cemetery online archive, available at: https://www.albany.edu/arce/Yates5.html, accessed on 10 February 2021.
[42] While Alexander Hamilton was in support of a strong executive with a proactive stance towards the economy, Thomas Jefferson argued for a decentralized state with a weak executive and with a non-interventionist, *laissez-faire* approach.
[43] Brutus XIV, *New York Journal*, 28 February 1788.
[44] Brutus I, 18 October 1789, in Storing, Herbert J., ed. The Complete Anti-Federalist. 7 vols. Chicago: *University of Chicago Press*, 1981.

His fears stemmed from the (alleged) absence of checks and balances designed to limit Supreme Court powers. Yates argued that while "[t]he judges in England are under the control of the legislature, […] the judges under this constitution will control the legislature".[45]

As stated above, Hamilton went on to reject all these criticisms in the 78th paper. The Founding Father here claimed that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution", and ended up dismissing Brutus' considerations with a lapidary comment: "the judiciary is beyond comparison the weakest of the three departments of power".[46] Hamilton's description of the Supreme Court is a reference to Montesquieu's masterpiece "The Spirit of Laws", in which the French philosopher wrote that, within the English political system, "the judiciary is in some measure next to nothing".[47] Aside from the captivating 18th century diatribes, the Federalist Paper No. 78 also allows to reflect upon one of the cardinal doctrines of the American political system, the separation of powers principle. With Hamilton quoting once again Montesquieu, saying that "there is no liberty, if the power of judging be not separated from the legislative and executive powers",[48] it is therefore possible to dive deeper into the analysis of the horizontal dimension of the US institutional space.

The Founding Fathers, in order to distance their political project from the British system, chose to create a Union built upon a rigorous separation among the government powers, instead of a mechanism characterized by the fusion of powers (typical of "parliamentary" forms of government). Inspired by the French Illuminists and in particular by Montesquieu (the point of connection with the Federalist Papers), the American system did not replicate the mechanisms of direct legislative control over the executive, but instead eliminated the confidence relationship by making the President directly elected by the citizens, leader of the executive and Head of State all at the same time. The Congress and the Presidency are then two truly distinct and separated institutions, forced to cooperate by mechanisms such as the presidential veto or the legislative control over the federal budget.

Justice Anthony Kennedy's opinion in the case of *U.S. Term Limits, Inc. v. Thornton* offers a marvelous depiction of the USA's federal system and of the separation of powers mechanism:

> *Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state*

[45] Brutus XIV, *New York Journal*, 28 February 1788.
[46] Hamilton, A., The Judiciary Department, Federalist No. 78, The Federalist Papers, 1788.
[47] « Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle. » Baron de Montesquieu, Charles-Louis de Secondat, On the Spirit of the Laws, Book XI, Chapter VI, Of the Constitution of England, 1748.
[48] « Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice ». Ibid.

and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[49]

1.b. EU judicial system

With regards to the judicial system in the European Union, it may be argued that the structure is, at the same time, both simpler and more intricate than the American one. This oxymoron can be quickly justified by presenting the essential differences that characterize the US and the European models. The US Supreme Court sits at the top of a federal judicial system, and it draws such role from explicit instructions set out in the United States Constitution. The Court of Justice of the European Union, instead, simultaneously resembles an international court and national supreme courts. The hybridity of the CJEU has generated a number of perplexities, especially in its first years of existence. Think, for instance, of the judgements in the cases *Costa v. Enel*[50] and *Van Gend en Loos*[51]. The importance of the two rulings comes from the instrumental use that the ECJ was able to make of them: the Court "exploited" the two cases to establish constitutional principles such as Community law primacy over national legislation and the enforceability of individual rights in national legal orders. Within the process that Vauchez described as "Europeanization through case law" (2010), *Costa* and *Van Gend en Loos* represent the two foundational myths of Europe. The shockwaves produced by the two cases reverberated across the entire system, allowing for the emergence of a new judicial theory of Europe and redefining the whole essence of the polity (Vauchez, 2010).

During the presentation of the sources of law relevant to the ECJ, the analysis focused on the observation of the most relevant articles concerning the Court. As these provisions appear to be reasonably clear and unambiguous, it may be puzzling to think that so many controversies have arisen regarding the Court's role and powers. The solution to this apparently naïve question deals with the interpretation of the Treaties and the wider understanding of European Law. Although the European Treaties have been widely recognized as of constitutional significance for the Union by the CJEU itself, some member states have vehemently fought against the consolidation of a Constitution of the European Union, as demonstrated by the failed ratification of the Treaty establishing a Constitution

[49] U.S. Term Limits, Inc v. Thornton, 514 U.S. 779, 838–39 (1995) (concurring).
[50] Case 26-62, Flaminio Costa v E.N.E.L. (1964).
[51] Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (1963).

for Europe between 2004 and 2005.[52] Supporters of intergovernmental integration are on the frontline of this ideological battle, strongly opposing the confederal institutional system (Wyatt and Dashwood, 2011) auspicated by supranationalists.[53] Even if the Treaty of Lisbon is *de facto* a constitution for the EU, not every MS has accepted the increasing delegation of sovereignty in favor of the Union. The most vocal opponent of EU law's constitutionalization has notably been the UK, which even before the 2016 Brexit Referendum represented one of the greatest challenges for supranational integration. The United Kingdom's disapproval was made clear by the adoption of the *European Union Act* of 2011,[54] "which call[ed] even into question the constitutionalization of the EU brought about by the ECJ's decisions of the 1960s on direct effect and supremacy of Community law" (Fabbrini, 2013). As shocking and surprising as it was, Brexit should be understood as the endpoint of a process that the UK had initiated decades before.

Clashes between constitutional courts and the Court of Justice have resurfaced with the Euro financial crisis. In a recent example of this conflict, the *Weiss*[55] case, the *Bundesverfassungsgericht* (BverfG) refused the preliminary ruling of the Court of Justice and ruled as *ultra vires* the Decisions of the European Central Bank concerning the Public Sector Purchase Programme (PSPP). The BverfG explicitly criticized the CJEU, claiming that its judgement upholding the ECB's decisions was arbitrary and poorly reasoned. Hence, the German Constitutional court ruled that the judgement Court of Justice in *Weiss* is inapplicable in Germany, and requested further clarifications concerning the PSPP. The BverfG's position could lead to unprecedented developments in the near future, as non-compliance with the decisions of the ECB (and of the CJEU) may even trigger the activation of an infringement procedure against Germany (Annunziata, 2021).

The presence of both supranational and intergovernmental principles of integration makes the European Treaties extremely hard to classify through conventional typologies without generating debates and controversies. The great level of sovereignty maintained by Member States seems to indicate that the treaties have an international character. At the same time, the unparalleled level of integration, the binding force of European law and its constitutionalization process demonstrate that the Union is much more than a traditional international organization, and it requires *ad hoc* methods

[52] For more on the TCE and its rejection by France and the Netherlands, see: Sap, J.W., (2007), The EU Constitution is Dead, Long Live the Reform Treaty: No early funeral for the institutional innovations in the Constitutional Treaty after being rejected in France and the Netherlands. *Philosophia Reformata* Vol. 72, No. 2, pp. 151–170.
[53] For an in-depth analysis of the logics of the EU decision-making system and the different approaches to integration, see: Schmidt, V. A. (2018), Rethinking EU Governance: From 'Old' to 'New' Approaches to Who Steers Integration*. *JCMS: Journal of Common Market Studies*, 56: 1544–1561.
[54] European Union Act 2011, c.12. Available at: https://www.legislation.gov.uk/ukpga/2011/12/contents, accessed on 17 February 2021.
[55] 2 BvR 859/15, judgement of 5 May 2020.

of analysis in order to be fully understood. The same could be said for the CJEU, which finds itself in a grey area between a federal and an international tribunal. The privilege of ensuring the correct interpretation and application of EU law does not come without burdens and hardships.

While constitutional considerations regarding the Court and the Treaties are essential, the comparative analysis of the US and the EU judicial systems cannot overlook another fundamental factor, partially introduced in the previous section: the relative size of the two systems. Despite the gigantic number of national tribunals that are under the constellation of European law, the EU legal system, at first glance, would seem to be much smaller than the American one. As already mentioned, the CJEU is divided in two sub-elements: (1) the European Court of Justice, the highest judicial entity of the Union, operating as the final court of appeal and as the constitutional court; (2) the General Court, the first-instance tribunal dealing with general EU jurisdiction. From 2004 to 2016, the judicial branch also included the Civil Service Tribunal, which was called to resolve disputes among the Union and its civil service forces. This court however ceased to operate, and its jurisdiction was transferred to the General Court. Although this partition may remotely resemble the American judicial pyramid, the sizes and numbers of the two systems are astronomically different. In 2019, the European courts combined dealt with 1905 cases, leaving 2500 cases pending at the end of the judicial year.[56] On the other side of the Ocean, the numbers of proceedings filed at the federal level is, in comparison, astounding: the records show that 47,977 cases reached the U.S. Courts of Appeals in 2019, with a staggering figure of 376,762 combined cases (i.e., both civil and criminal proceedings) filed in the US District Courts.[57]

The explanation for such pronounced divergence is found in the role of national courts within the EU judicial system. Being called to enforce the Union's legislation, every tribunal wears two hats: national court and European court. As established by the ECJ in the aforementioned cases, European law is directly applicable by national tribunals and within the member states' legal orders. This *escamotage* explains the oxymoron placed at the beginning of the paragraph: despite dealing with the absence of a constitution, with multiple sovereign states and with several independent judicial structures, the EU judicial branch can exploit a thinner court system thanks the filtering action of national tribunals. The direct line that links national courts to the ECJ has severe repercussions on the equilibrium within member states' judicial organs, as lower tribunals can exploit the possibility of

[56] CURIA, The Year in Review, Annual Report 2019. Court of Justice of the European Union.
[57] Federal Judicial Caseload Statistics 2019, United States Courts. Available at: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019, accessed on 15 February 2021.

sending references to the ECJ in order to circumvent or bypass domestic processes of review (Alter, 2000; Conant, 2007).

The scrutiny of the judicial framework will be concluded by assessing the role of the ECJ within the EU decision-making system. Having already introduced the institutional set-up and the mechanism of multilevel constitutionalism in the previous sections, the objective of the next paragraphs will be to evaluate the Court's position it the European Union's ecosystem. The amount of scholarly research on this subject is immense, and only a few elements will be taken into account in this assessment.

First, it is essential to say that the judges of the ECJ are not merely the *bouche de la loi*,[58] using once again one the words of Montesquieu. Indeed, the Court is able to exercise a significant influence over the entire political system of the Union not only through rulings and judgements, but also with its opinions, its case selection powers etc. While the Court's primary task is to ensure the correct interpretation of EU law in every territory of the Union, the judicial branch has often been one of the driving forces of European integration. The ECJ is hence able to shape and influence the decision-making process of the EU. For instance, it may do acting as a procedural agenda-setter, excluding and restricting viable policy options to law makers (Lubow and Schmidt, 2019). Some scholars predicted that the Court's willingness to assert its authority not only would have spurred the ongoing process of judicialization[59] in the Union, but it would have also led to a "Rights Revolution", changing the entire European legal culture and bringing it closer to the pattern of "adversarial legalism" typical of the USA (Kelemen, 2003). Yet, while an actual increase of "Eurolegalism" has been detected in some specific issue-areas such as environmental law (Epstein, 2018), the proliferation of adversarial litigation in the EU has been more modest than originally predicted (Foster, 2020). Others have even described the ECJ as the hero of the European integration process, being responsible for the foundation of an integrated European economy and polity (Burley and Mattli, 1993). At the same time, the judges of are also influenced by the system that they contributed to create. Carruba, Gabel and Hankla have shown how the threat of non-compliance by member states and the possibility of a legislative override (i.e. when a ruling is modified in subsequent legislation or treaty revisions) can impact the ECJ judges' decisions (2012). Although their findings have been contested by other scholars (Sweet and Brunell, 2012), it is safe to say that the underlying argument of their study is

[58] « Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi ; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur. » Baron de Montesquieu, Charles-Louis de Secondat, On the Spirit of the Laws, Book XI, Chapter VI, Of the Constitution of England, 1748.

[59] "The judicialization of politics [is] the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies". From Hirschl, R. (2011) The Judicialization of Politics, The Oxford Handbook of Political Science, *Oxford University Press*.

sound: judges act in a political space, and it would be naïve to imagine that they would not take into account external factors or make wider considerations. For these reasons, it is necessary to look at the Court not only as an interpreter of European legislation, but rather as a sentient actor with autonomous goals, objectives and interests within the EU institutional environment.

2. Appointment procedures

This analysis would not be complete without a thorough assessment of the courts' appointment procedures. The mechanism of selection shows pronounced differences among the American and the European models, and it has an unparalleled impact on their functioning, their composition and their relationship with the other decision-making branches inside the respective institutional frameworks. The comparison will start from the more politicized of the two mechanisms, the American one. The following analysis of the procedures in the EU, meanwhile, will only cover the mechanisms of appointment of the Court of Justice.

The nomination of US Supreme Court justices is a prerogative of the President of the US. The powers of the POTUS are laid out in Article II, Section 2, Clause 2 of the United States Constitution.[60] Some profound differences among the US and the EU systems immediately appear. The divergence between the European Union and the United States is mostly due to the fact that, although the EU is a *sui generis* entity, its member states remain sovereign: they are ultimate masters of the treaties, and their strength inside the Union is much larger than the one of federated states in the US. The President's position within the mechanism has great implications on the federal structure: as in other national systems, the state's sub-units cannot propose a nominee during the process of selection of the candidate, but they can only approve or deny the appointment. In the American case, the sub-units of the federation (i.e., the federated states) are represented in the US Senate, and the Congress' upper chamber is indeed the only actor having a major influence in the process other than the President.

The appointment procedure – unsurprisingly – is started when a bench of the Supreme Court becomes vacant. This situation can arise if either: (1) a justice is removed through an impeachment procedure; (2) a justice retires[61] from his role; (3) a justice passes away. The first scenario, although technically plausible, is one of the rarest occurrences in the history of American institutions. Indeed,

[60] "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments." U.S. Const. art. 2, § 2, cl. 2.

[61] A justice may also resign: this option is extremely similar to a retirement, but the justice in this case is ineligible to receive retirement compensations. See 28 U.S. Code § 371.

an impeachment procedure against a justice of the Supreme Court has been initiated only once.[62] This mechanism is entirely in the hands of the Congress: the House of Representatives has the power to start the process, while the Senate tries and eventually convicts the justice. While the impeachment scenario has almost no statistical significance for this research, the last two cases are much more pertinent and relevant, as they represent the overwhelming majority of situations.

Although the motivating factors at the basis of these possibilities are sensibly different, the death or retirement of a judge have the same effect on the appointment process. Once a vacancy occurs, the President of the US has the duty to nominate a new justice. Neither the Constitution nor other legislation have set specific requirements for the selection of a candidate, and great discretion is left to the POTUS and its staff. The nominees are generally supposed to be men and women of proven excellence in the field of law, with outstanding professional qualifications and of unquestionable integrity and virtue. Besides the inevitable evaluations regarding the character and background of the candidate, the President also selects nominees based upon their political and ideological values, choosing those who better incarnate the principles of the incumbent administration. Hence, politics play an enormous role in the selection of Supreme Court justices, and appointments must be fully understood as policy choices. The nomination of judges follows complex strategic evaluations, with the contingent equilibrium between the forces of government either constraining or expanding the number of options available to the President (Moraski and Shipan, 1999). Other important factors for the nominee's selection may be gender, age, ethnicity, geographic origin, etc. Ultimately, the goal for the POTUS is always to either shift the ideological balance within the Court in his favor or to solidify his advantage to the detriment of the opposing party (Comiskey, 2008). Although the justices do not (or should not) follow political logics when deciding over a case, as they are supposed to be completely impartial and free of prejudices, it is obvious that their opinions and inclinations are well known to the Presidents who nominate them.

The political categorization of judges has received enormous attention in academia: scholars such as Segal and Cover (1989) have been able to successfully identify the justices' ideological positions, showing a strong correlation between their political inclinations and their voting inside the Court.[63] The issue of partisan voting will be analyzed further in the following chapters, during the observation of the decision-making processes regarding the selected case studies, but it is important to underline

[62] The only impeachment of a Supreme Court judge came in 1804 at the expenses of Justice Samuel Chase, which was accused by the House of being politically biased in favor of the Federalist party. However, the vote in the Senate did not reach the required two-thirds majority. Chase was hence acquitted and remained a Justice of the Supreme Court until his death, in 1811.

[63] As stated above, the amount of literature regarding this subject is immense, especially for what concerns the post-WWII Supreme Court formations. Besides the mentioned research, see also: Nagel, S.S., Political Party Affiliation and Judges' Decisions. *The American Political Science Review* 55, 843–850, 1961.

that the nomination of a judge can shape the Court's outlook for decades. This is the reason why, in 2020, President Donald Trump rushed[64] to nominate Amy Coney Barrett to the Supreme Court after the death of Judge Ginsburg: with Barrett being his third appointment in four years, the President was able to secure a strong conservative majority in the Supreme Court.[65]

The final step of the preliminary selection is represented by a series of background investigations, carried out by the Justice Department and by the Federal Bureau of Investigation. These are aimed at scrutinizing each candidate, in order to check his or her public, professional and private record.[66] Once all these evaluations have been completed, the President and his staff submit the nomination to the Senate Judiciary Committee. The committee, in a similar fashion to the Article 255 panel in the EU, issues a non-binding opinion on the candidate after a hearing.[67] Ultimately, the nomination is referred to the US Senate, where the nominee is either confirmed or rejected with a simple majority vote. This whole part of the appointment process falls under the "Advice and Consent of the Senate" clause present in the aforementioned Article 2 Section 2 of the Constitution.[68] While the ECJ appointments rely upon a mixture of formal and informal practices, behind the scenes assessments made by non-elected experts and autonomous choices from member states (as the following section will show), it would not be an exaggeration to say that the American procedure has a "flair for the dramatic". The public Senate Judiciary Committee hearings already tend to generate great debate in the public opinion, but it is the series of debates in the Senate that usually attracts the most attention. Senators argue for weeks on the nominee, evaluating his or her ideology, qualifications, character etc. During the interviews, the candidates generally face what have become known as "litmus test" questions, which can yield crucial information on the nominee's judicial philosophy and political inclinations (Paulsen, 2017). The public hearings in Capitol Hill, which are the final passage preceding the appointment vote, have huge resonance across the political system: they often receive great coverage from the media, may have dramatic twists such as actions of prolonged filibustering[69]

[64] Barrett's nomination was announced on 26 September 2020 and confirmed by the Senate exactly one month later. The appointment generated great controversies, as it came just 35 days before 2020 presidential elections, the shortest period between a nomination to the Supreme Court and an election in the history of the United States. The Democratic Party strongly criticized the appointment also because, in 2016, Republicans blocked the nomination of Merrick Garland 10 months before the following election.

[65] Currently, among the 9 members of the SC, 6 have been appointed by a Republican President, while only 3 have been nominated by the Democratic Party.

[66] McMillion, B.J. (2021), Supreme Court Appointment Process: President's Selection of a Nominee 29, *Congressional Research Service*.

[67] The Supreme Court of The United States, United States Senate Committee on the Judiciary. Available at: https://www.judiciary.senate.gov/nominations/supreme-court, accessed on 28 February 2021.

[68] "[the President,] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, […]". U.S. Const. art. 2, § 2, cl. 2.

[69] Filibustering is the practice of delaying or preventing a vote thanks to the absence of time limitations for Senate debates. This action can be ended through a motion of cloture, which requires a three-fifths majority. With regards to Supreme

or lead to memorable clashes as in the case of the Robert Bork nomination of 1987.[70] The entire process, that can take up to hundreds of days,[71] sees its conclusion with the confirmation vote by simple majority. If the candidate receives the approval of the Senate, it can finally be sworn into office.

This sort of "dramatization" of the procedure, which slightly contrasts with the European method, is mainly due to two factors. First, the justices are appointed for life, according to the previously mentioned "good Behaviour" clause[72] of Article 3, Section 1 of the Constitution. Hence, each appointment has much more long-lasting effects on the Court's internal equilibrium than in the European case (the term of ECJ judges lasts for six years). Secondly, the Supreme Court is composed of only nine members,[73] and this makes every justice capable of reversing or overturning the power balance.

Having completed the observation of the SCOTUS appointment mechanism, the focus should shift over the other side of the Atlantic, in order to look at how the same process takes place in the European Union. At the beginning of the segment, the appointment mechanism of the ECJ was described as "less-politicized" than the American one. This statement will be supported in the next section.

The ECJ's structure is laid out in the Treaties: the Court, as per Article 19 of the TEU, is composed of 27 judges, at least one per Member State. Although this number may look like the logical consequence of the Union's size, it entails a special statistical significance, as the 27 members of the Court of Justice make it the third largest international tribunal or monitoring body in the world, only behind the European Court of Human Rights (47 members) and the International Law Commission (34 members).[74] Additionally, the ECJ is assisted by 11 Advocates-General. The AGs are advisors to the Court and, although they do not take concrete decisions regarding the cases, their opinions often

Court nominations, the filibuster was first used in 1968 to block the appointment of Justice Abe Fortas. The motion of cloture failed (the then-required supermajority was two-thirds), and President Johnson was forced to withdraw the nomination.

[70] The nomination of Robert Bork has arguably been the most contested in the history of the US Supreme Court. Chosen by President Reagan, it first received a negative opinion by 9 of the 14 members of the Senate Judiciary Committee, and then went on to be officially rejected in the Senate with a 58-42 majority.

[71] McMillion, B.J. (2021), Supreme Court Appointment Process: Senate Debate and Confirmation Vote 31, *Congressional Research Service*.

[72] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour". This is the sole limitation of the justices' term.

[73] The number of justices has change repeatedly over time. The Judiciary Act of 1789 originally set the number at 6, before a reduction to only 5 members in 1801. After other modifications, the size of the Court was set to 9 in 1869. It should be noted that, in 1937, President Franklyn Delano Roosevelt planned to "pack" the SC and increase its size to 15 members. FDR's project, however, never came into force.

[74] The Current Composition of International Tribunals and Monitoring Bodies – GQUAL, 14 September 2015. Available at: http://www.gqualcampaign.org/1626-2/, accessed on 24 February 2021.

have great influence on subsequent jurisprudence. The role and number of AGs is described in Article 252 of the TFEU. The Statute of the Court also introduces the figures of President and Vice-President of the Court of Justice, elected from the judges – among themselves – for a renewable term of three years.[75] The judges of the European Court of Justice are elected for a renewable term of 6 years[76] and are partially replaced every 3 years.[77] As the following paragraphs will show, the term's length is one of the most significant discrepancies between the two courts and will prove to be one of the most important intervening variables in this study.

Another significant element of the procedure concerns the technical requirements for the appointment. According to the treaties, the judges need to possess "the qualifications required for appointment to the highest judicial offices in their respective countries" or to be "jurisconsults of recognized competence", as well as being independent "beyond any doubt".[78] This provision is clearly intended to respect and recognize the multiple legal identities within the Union, leaving some leeway to each member state on choosing its candidate. Every state can create its own mechanism of candidacy, using either formal or informal procedures. After the MS has chosen its nominee, in accordance with Article 255 TFEU, the candidate is evaluated by a special panel, which gives an opinion on his or her suitability. Created with the Lisbon Treaty and operational since 2010, the panel is composed of seven experts chosen among former ECJ judges, national supreme courts judges and lawyers of "recognized competence." The President of the Court nominates six of these experts, while the seventh is chosen by the European Parliament.[79] Although its considerations are technically non-binding, the panel has had a remarkable impact upon the appointment mechanism, having even been able to provoke procedural changes in a number of member states (Dumbrovsky, Petkova, van der Sluis, 2014). According to its sixth activity report, of the 190 candidates proposed for both the ECJ and the GC from 2010 to 2019, the panel has issued 42 negative opinions, which all resulted in a withdrawal of the proposal from the member state.[80]

Following the crucial passage in front of the panel, the judges can finally be appointed by common accord of all Member States. It is easy to recognize the interplay between intergovernmental and supranational logics underlying the European appointment mechanism. Although the judges do not act in the name of their MS and the ECJ is a fully supranational institution, the willingness of the

[75] Statute of The Court of Justice of the European Union, art. 9.a.
[76] TEU art. 19.
[77] Statute of The Court of Justice of the European Union, art. 9.
[78] TFEU art. 253
[79] For more on the panel and on the judicial selection in the CJEU, see: Cordelli, C., Judicial appointments to the court of justice of the European Union. *Acta Juridica Hungarica*, 54, pp. 24–39, 2013.
[80] Sixth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 2019.

states to make their presence felt in the nomination process is self-evident. While the primary goal of the procedure is to check the expertise and the curriculum of each candidate, the panel also reinforces the independence of judges from each member state, as its placement in the middle of the appointment mechanism shields the nominees from the direct influence of their national governments. The evaluating panel, in this sense, counterbalances the intergovernmental essence of the appointment procedure. However, the strength of the single member states within the nomination procedure seems to confirm the intergovernmental dimension of the CJEU, at least in its composition. Indeed, for what concerns the process of selection of benches, the Court of Justice bears a resemblance to other international tribunals, in particular to the European Court of Human Rights. Although some procedural differences are present, the two mechanisms of appointment are fairly similar. The judges of the ECtHR are selected by the Parliamentary Assembly of the Council of Europe after a national nomination: each country can propose three candidates, and the Committee on the Election of Judges carries a series of preliminary interviews in order to evaluate each proposal. The committee, which is the ECHR's equivalent of the Art. 255 Panel of the EU, goes on to recommend one of the candidates to the Assembly, and the parliamentarians appoint the judges with a secret ballot vote held in a plenary session.[81] Thus, despite the filtering actions of the two panels, in both the CJEU and the ECtHR the member states play a decisive role in the appointment process, highlighting the international character of both tribunals but also the politicized logics which influence the two court. For this reason, the nomination mechanisms often generate controversies and institutional clashes: in 2020, when the Polish government was requested to select three candidates to fill a vacant seat in ECtHR, several observers, experts and representatives of the civil society expressed their concerns over the selection process implemented by Poland's national authorities, criticizing their lack of transparency and the presence of (potentially) politically biased nominees.[82]

The CJEU mechanism of appointment presents a number of problems and, despite its successes, even the panel has not been free from criticisms. For instance, the assessment of the candidates is carried out in complete secrecy, a practice that hardly complies with the transparency standards of the Union (Battaglia, 2019). Negative opinions from the evaluating panel have created serious technical problems for the Court: as explained by the former Advocate-General Niilo Jääskinen, the blocking of a nomination has occasionally obliged members of the Court "to continue to hold office

[81] Committee on the Election of Judges to the European Court of Human Rights. Available at: https://pace.coe.int/en/pages/committee-30/AS-CDH, accessed on 21 March 2021.
[82] See: Bychawska-Siniarska, D., Jarzmus, K. (2020), Filling the Polish ECtHR judgeship – risking (another) empty seat? Verfassungsblog. Available at: https://verfassungsblog.de/filling-polish-ecthr-judgeship/, accessed on 23 May 2021.

even after the end of mandate", despite the fact that no new cases can be attributed to a judge under a pending substitution procedure.[83]

The elements provided in this chapter thus justify the different level of resonance of the two appointment procedures. Since the American mechanism carries a huge political significance with itself, the process needs to take place within majoritarian institutions and in open fora. As the public opinion needs to participate to the discussion, hearings and votes cannot take place behind closed doors. The opposite happens in the case of ECJ: EU citizens do not see the Court as political actors, but rather as an apparatus of the Union. It may be argued that both politics and mainstream media tend to overlook the impact of the Court's decisions, wrongfully ignoring or neglecting its activity. Things, however, may have started to change in recent years. An example of the slowly increasing politicization of the ECJ appointment mechanism came in 2018, when the Austrian candidate Katharina Pabel decided to withdraw her application after the preliminary hearing before the panel. Although the motivations behind Pabel's decision have not been made public by her national government, Austrian newspapers have reported that her strong anti-abortionist views would have led the panel to issue a negative opinion on the candidacy, and Mrs. Pabel chose to give up in order to avoid a formal rejection from the committee.[84] Once again, however, a well-structured evaluation is made impossible by the lack of official information and of publicly available transcripts of the hearings. If the EU is willing to raise the interest of citizens towards the Union's affairs, it should consider increasing the transparency of its institutional mechanisms and the public opinion's participation within them.

[83] Jääskinen, N., *Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape*, King's College, London, 15 February 2013

[84] Kommenda, B., 2018. EU-Gerichtshof: Rote Richterin geht in Verlängerung, *Die Presse*. Available at: https://www.diepresse.com/5454109/eu-gerichtshof-rote-richterin-geht-in-verlangerung, accessed on 22 March 2021.

IV. Historical development of the Courts

This chapter will be dedicated to the description of the US Supreme Court and of the European Court of Justice throughout history. To understand the position of the two tribunals in their systems of reference, it is necessary to look at how they have evolved through the decades and which factors led them to change over time. Since the aim of this research is not to depict the entire historical background of the courts, but rather to explain how they function in relation to rights protection, only a few elements will be considered. In particular, this section will try to describe the processes that have led to the present power equilibria between the judicial and the other branches: through the analysis of the courts within the wider institutional frameworks, it will be possible to outline their trajectories and to understand how they were able to take their current roles.

1. The US Supreme Court

Created with the Constitutional Convention of 1787 and formally established by the already mentioned Judiciary Act of 1789, the Supreme Court of the United States was instituted to address one of the most severe shortcomings of the Confederation: "the lack of a steady judicial body, endowed with real powers of adjudication, in the last instance, of controversies provided for by the law, without the necessity of obtaining the consent of the parties to its jurisdiction" (Wagner, 1959). Although the Court's importance is now undisputed, throughout the long history of the USA this has not always been the case. As pointed out by McGuire, while a governmental organization such as the US Supreme Court may have formal responsibilities, other actors may still not consider it as a valuable or legitimate player (2004).

In its early days, the Court did not possess the current relevance and political weight. While the justices are now some of the most revered figures in America, it took a long time for the SCOTUS to establish itself and gain its voice within the institutional system. Think, for instance, of the practice of "circuit riding": originally, the six justices not only had to deal with the cases coming before the Supreme Court, but they were also required to sit on the Circuit Courts (which were only three at the time) and preside over them at least twice a year. Because of the absence of modern infrastructures and means of transportations, justices had to travel all across the country by horse or steamboat for months, spending little time in Washington.[85] The situation became more and more unbearable as the

[85] According to a Senate inquiry in 1838, two Justices traveled more than 2,500 miles each, while Justice John McKinley affirmed to have traveled "an even 10,000 miles" in the previous twelve months. McKinley spent so much time on the road that he missed an entire session of the SCOTUS in Washington. See: Rehnquist, W.H. (1986), The Changing Role of the Supreme Court, *Florida State University Law Review* Volume 14, Issue 1.

nation's territory expanded westwards and new circuits were added. Circuit riding, which was absolutely despised by judges, was progressively reduced in the 19th century and finally abolished in 1911 (Stras, 2007). Moreover, until 1935, the Court did not even have its own permanent and separate building,[86] a clear sign that its status was not yet fully recognized by the other institutions within the government. These examples suggest that, during the first years of its existence, the justices did not enjoy the same privileges of other high governments officials. McGuire's research shows that the degree of institutionalization of the Supreme Court (calculated by the level of autonomy, constraints, burdens such as circuit riding, etc.) remained extremely low throughout the 19th century, but began to grow rapidly after the end of the Civil War. This improvement is not only attributable to a change of spirit within the institutions following the conflict, but also to an important modification of the federal judicial system. Because of the ever-increasing number regulatory laws passed by the Congress, the Supreme Court's caseload became unmanageable for a single tribunal. For this reason, in 1891, the US Congress created the federal courts of appeal (at the time called "circuit courts of appeals"). The arrival of this appeal courts marked the beginning of a new era for the Supreme Court: the highest judicial body of the country, that up until that moment was forced to review an immense number of appeals, could now cherry-pick cases based upon their importance and relevance (Rehnquist, 1986). This allowed the Supreme Court to deal with a much smaller docket, as it could discretionarily select cases among those already reviewed by the circuit courts of appeal.

The Supreme Court had begun to increase its influence and expand its scope already during the tenure of Chief Justice John Marshall, in the beginning of the 19th century. Under Marshall, the Court issued landmark rulings as in the famous case *Marbury v. Madison*, with which the SCOTUS affirmed its power of carrying out the judicial review of legislation. However, it could be argued that the first, true turning point in the historical evolution of the Court came in 1868, with the ratification of the Fourteenth Amendment.[87] Not only did this amendment overrule the infamous *Dred Scott* ruling of 1857,[88] but it also paved the way for the constitutional revolution of the Reconstruction era. The most important innovations of the Fourteenth Amendment are laid out in its first section, which contains the Citizenship Clause, the Due Process clause, the Privileges or Immunities Clause and the Equal Protection Clause.[89] Although, after nearly 150 years, many of its promises are yet to be fulfilled

[86] From 1810 to 1860, the Court resided in the Old Supreme Court Chamber in the US Capitol, before moving to the Old Senate Chamber for the following 75 years. In 1935, it finally moved to the newly constructed Supreme Court Building in the Northeast quadrant of Washington D.C.

[87] U.S. Const. amend. XIV.

[88] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). With this notorious decision, the Supreme Court refused to recognize citizenship rights to African Americans.

[89] "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

(Chemerinsky, 1992), it is also undeniable that after the ratification of the 14th Amendment, the Supreme Court entered into a new stage. The Court, which until that moment had mostly played the role of arbiter over intra-state disputes, clashes regarding federal regulations and so on, had the opportunity to transform itself into the guardian of fundamental freedoms of the American people.

More broadly, the growth of the Court's importance reflects the expansion of the government's role, to the detriment of the single states. In other words, as in a directly proportional relationship, the more the federal government grew, the more the Supreme Court powers increased. It would be a mistake, however, to consider the Court as an ally of the federal government. Conflicts among branches of government became more and more frequent as the stakes were being raised, and the tension between the SC and the executive exploded in the 1930s, after the appointment of Franklin Delano Roosevelt as President of the United States. As FDR tried to push forward his ambitious series of reforms, known as the New Deal, the newly elected president came into a direct confrontation with the justices of the Supreme Court. Led by four conservative judges (nicknamed "the Four Horsemen")[90], the Court quickly began to strike down several New Deal proposals. For instance, the National Industrial Recovery Act of 1933, aimed at regulating industrial prices and wages, was ruled unconstitutional by the Court with the *Schechter Poultry v. United States*[91] decision. In an even more controversial judgement, the SC then struck down the central provisions of the Agricultural Adjustment Act with the *United States v. Butler*[92] ruling. In the 1936 *Tipaldo case*, [93] the Court went on to consider unconstitutional a statute that required the payment of a minimum wage for female employees, a decision that drew outrage from the public opinion and was harshly criticized even by conservative commentators.

Roosevelt became so frustrated with the Court that, in 1937, he proposed the Judicial Procedures Reform Bill to the Congress, an act that would have allowed him to "pack" the SCOTUS and appoint "an additional justice for any member of the court over age 70 who did not retire" (Leuchtenburg, 2005). The reform, that would have empowered FDR to nominate 6 additional Supreme Court justices and 44 other federal judges, was turned down by the Senate on 22 July 1937. However, although Roosevelt's plan of reforming the Supreme Court failed, the New Deal survived thanks to a surprising

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." U.S. Const. amend. XIV, §1.

[90] The Conservative block was composed of justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter. The Liberal minority was instead nicknamed "The Three Musketeers", and saw justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone supporting the New Deal reforms. Finally, Chief Justice Charles Evans Hughes and justice Owen Roberts represented the two crucial swing votes.

[91] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[92] United States v. Butler, 297 U.S. 1 (1936).

[93] Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

string of favorable judgements. Because of the switch of position of justice Owen Roberts[94] and of the increasing pressures from the public opinion, the Court ruled in favor of minimum wage laws in *Hotel Co. v. Parrish*[95], sustained the National Labor Relations Act and ruled in favor of the Social Security statute, one of the most important acts of the entire New Deal.

The turmoil of the 1930s was an early indication of the Court's upcoming evolution. After the second world conflict, the justices embraced their role of rights defenders, a shift that was reflected by questions involved in the landmark rulings of this age. The Warren Court (1953-1969) dealt with issues such as the legality of search and acquisition of evidence (*Mapp v. Ohio*),[96] the rights of accused persons (*Miranda v Arizona*),[97] privacy (*Katz v. United States*),[98] the secularity of the state (*Engle v. Vitale*)[99] and many other central topics. The most important ruling issued in this period, the famous *Brown v. Board of Education*,[100] will be one of the main case studies of this research. The subsequent Supreme Court formation, the Burger Court (1969-1986), applied a more conservative interpretation of the constitutional provisions and mechanisms of rights protection, but it also provided some fundamental decisions. One of the Burger Court's landmark rulings will be given a central role within this study: the *Roe v. Wade*[101] judgement of 1973 on abortion and privacy.

This short overview of the Supreme Court's historical evolution highlighted three main turning points: the Fourteenth Amendment ratification, the New Deal era and the Civil Rights revolution. Although its formal powers and characteristics have remained similar to the ones set out in the 18th century, the Court's role has evolved dramatically through the years. The days in which justices had to travel by stagecoach to reach distant circuit tribunals are long gone. The judicial branch has slowly turned into a major player within the Washington power dynamics. Now, the SCOTUS is a full-fledged political actor able to influence the entire American institutional system and the life of its citizens.

2. The European Court of Justice

The Court of Justice of the European Communities was established in 1951 by the Treaty of Paris, with the goal of serving as the judicial organ of the European Coal and Steel Community. Its jurisdiction was expanded with the Treaty of Rome of 1957, when the newly created Euratom and

[94] Robert's change of position was at the time labeled "The switch in time that saved nine". See: Barrett, J.Q. (2020), Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine." *Oklahoma Law Review* 73, pp. 229–242.
[95] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[96] Mapp v. Ohio, 367 U.S. 643 (1961).
[97] Miranda v. Arizona, 384 U.S. 436 (1966).
[98] Katz v. United States, 389 U.S. 347 (1967).
[99] Engle v. Vitale, 370 U.S. 421 (1962).
[100] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[101] Roe v. Wade, 410 U.S. 113 (1973).

European Economic Community (EEC) both fell under its authority. From the juxtaposition of the European Court and the US Supreme Court, one striking difference immediately emerges: while the historical evolution of the SCOTUS has taken place throughout a period of nearly 230 years, the study of the ECJ covers a much smaller timeframe. Despite the significant disparity, the comparison between the two is anything but futile. Indeed, although the European Court is much "younger" than its American counterpart, it has experienced a swift and rapid evolution that requires a careful observation.

Before its establishment, the founding fathers of the European project had envisioned several possible configurations for the judicial branch of the ECSC. Jean Monnet and the French delegation initially considered to involve the International Court of Justice as a last resort tribunal, or to appoint judges to specialized courts when necessary; Belgium, Luxemburg and the Netherlands preferred a permanent tribunal, but with the characteristics of a purely international tribunal; Germany, instead, pushed for the creation of a constitutional court on the blueprint of the US Supreme Court (Arnull, 2020). Although Monnet's initial proposal did not obtain the approval of the other states, the Parisian influence on the CJEU remained unparalleled. An often overlooked aspect is, for instance, the linguistic component and its impact over the Court's work: the mere fact that CJEU uses the language of Molière as its official system of communication represents an enormous soft-power in favor of France (Bobek, 2015). The French influence is also visible in the institutional model adopted for the creation of the Court, which closely resembles the *Conseil d'État* and has inherited many of its key features, such as the figure of Advocate General.

The first years of life of the Court were relatively uneventful, and the first decade of work did not produce significant or remarkable cases. Quietude, however, did not last for long, as the 1960s proved to be one of the most intense and important periods of the history of European jurisprudence. The first case able to earn the prestigious label of "landmark" is, without any doubt, *Van Gend en Loos*[102] of 1963. Under the leadership of two judges, the French Robert Lecourt and the Italian Alberto Trabucchi, this seemingly unexciting dispute over tariff imports on formaldehyde was turned into an event of historic proportions. The Court, claiming that the Treaties had created "a new legal order of international law", affirmed that EC law had direct effect over both MS and its citizens: according to the judges, the article in question, art. 12 EC, "created rights that national citizens could pursue before national courts" (Rasmussen, 2014). This decision represented the beginning of a legal revolution in the Old Continent, and it was quickly followed by other major rulings, which are now universally

[102] Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (1963).

considered as the foundational jurisprudence of European law. After *Van Gend en Loos*, the ECJ did not waste any time, and completed the first step of its groundbreaking transformation with *Costa v. ENEL,*[103] in which it established the principle of primacy of European legislation over domestic law. Despite their incredibly innovative character, the Court did not produce these decisions out of the blue: prominent figures of the legal service of the High Authority (and later of the EEC) such as Michel Gaudet had been promoting a similar constitutionalization of European law for years. Furthermore, the constitutional reforms of the 1950s in the Netherlands had already introduced the concept of primacy of international law over the national one[104] (Panhuys, 1953). Still, as brilliantly shown by Antoine Vauchez, these judgements marked a crucial turning point in the history of European jurisprudence (2010).

In the following years, the number of remarkable judicial decisions from the ECJ increased exponentially: only between 1974 and 1979, the judges ruled over other crucial cases such as *Nold,*[105] *Dassonville,*[106] *Simmenthal,*[107] or *Cassis de Dijon,*[108] just to name a few. Although it would not be pertinent to this research to discuss the impact of all these rulings, some important considerations can still be made about the tribunal's activism and its role in the European integration project. First of all, the speed at which the ECJ was able to establish itself within the Communities' institutional structure is striking. Stone Sweet underlined that the Court's initial scope was basically limited to the control of the legality of the High Authority's activities (2010) but, in less than 15 years after its birth, it was able to transform itself into a driving force of integration, while other organs were being caught in conflicts such as the Empty Chair crisis of 1966[109] and struggled to be recognized by institutions and member states. Secondly, even if it is disputable whether the Court has been able to push forward integration in autonomy or if it has always required the support of national governments to do so (Garrett, Kelemen and Schulz, 1998), it seems that the judges' courage and boldness have often surpassed those of member states. Finally, it must be emphasized that the ECJ does not always follow the *logiques communautaires,* and that the Court has at times issued rulings which have upheld the national standards of rights protection vis-à-vis treaty provisions. For instance, in *Omega*[110] the Court

[103] Case 26-62, Flaminio Costa v E.N.E.L. (1964).
[104] The relevant articles are currently in Chapter 5 of the Constitution. See: The Constitution of the Kingdom of the Netherlands 2018, Chapter 5.2, Articles 90-94.
[105] Case 4/73, J Nold, Kohlen- und Baustoffgrosshandlung v the Commision (1974).
[106] Case 8/74, Procureur du Roi v Benoît et Gustave Dassonville (1974).
[107] Case 106/77, Amministrazione Delle Finanze dello Stato v Simmenthal Spa (1978).
[108] Case 120/78, Rewe-Zentral v. Bundesmonopolverwaltung (1979).
[109] The Empty Chair crisis refers to the dispute that broke out in 1965 between France and the Commission over the common agricultural market. Charles de Gaulle, strongly opposed to the supranational essence of the proposal, recalled the French representative in the Council of Ministers. While the crisis was solved six months later with the Luxembourg compromise, it initially risked of jeopardizing the entire European project.
[110] Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (2004).

stated that "[T]he competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty",[111] and reiterated that "the Court draws inspiration from the constitutional traditions common to the Member States."[112]

Shifting to the observation of the Court's composition and general arrangement, in the European case no outrageous restructuring projects or revolutionizing plans can be recalled. While the SCOTUS has experienced a multitude of modifications and turbulent periods, the ECJ size and structure has consistently reflected the development of the EU. The number of judges of the Court has always corresponded to the size either of the Community or of the Union,[113] and the same is true for the length of their mandate, for the partial substitution of benches every three years and for the duration of the President's tenure.[114-115]

An interesting difference between the Supreme Court and the European Court of Justice concerns the chambers subdivision. As written in art. 16 of the Statute,[116] the ECJ hears cases in three different configurations: as a small chamber (3 or 5 judges), as a Grand Chamber (15 judges) or as a full court (27 judges). Only cases of exceptional relevance or those which directly involve member states require the last two formations. On the contrary, the vast majority of cases sees the Court sitting with either five or three judges. Furthermore, decisions are under the collegiality principle, meaning that the ruling generally expresses the consensus of all judges, and dissenting opinions are not included in the final judgement. Both these characteristics are inconstant with the American tribunal: the chambers subdivision is absent in the SCOTUS, which always sits as a full court, and dissenting opinions are a crucial part of the judgements, often acquiring exceptional importance in subsequent jurisprudence.

Another element that deserves consideration is the role of precedents. The ECJ has been able to strategically exploit its own case law to protect itself from the accusation of overstepping the mandate set out in the Treaties (Boin and Schmidt, 2021). Thanks to the landmark cases of the 1960s, the Court has kept leaning on its rulings to continue is project of fostering integration. The role of precedent, together with the continued support of national courts, has proved to be one of the main reasons why the Court has been able to "widen and deepen" its scope. However, although the ECJ obviously tries

[111] Ibid., § 31.
[112] Ibid., § 33.
[113] It should be noted that, originally, the Court was made of seven judges, while the founding members were only six. The seventh judge not only served to avoid possible deadlocks, but also to grant representation to the trade union movements. The "seventh" would indeed be chosen among those jurists particularly concerned with workers' rights and interests. See: Arnull, A. (2020), The many ages of the Court of Justice of the European Union, *European University Institute*.
[114] Treaty establishing the European Coal and Steel Community, 18 April 1951. Chapter IV, Articles 31-32.
[115] Treaty establishing the European Economic Community, 25 March 1957. Section quatrième, Articles 164-168.
[116] Statute of The Court of Justice of the European Union, art. 16.

to remain as consistent as possible with its previous decisions, the European system remains profoundly different from the Anglo-Saxon culture, which sees the principle of binding precedents at the core of its judicial philosophy. Arnull (1993) argues that the Court is diffident in dealing with precedents because of its unwillingness to accept decisions as sources of law: while common law sees the doctrine of *stare decisis* as a foundational aspect of its system, civil law courts do not consider decisions as legal sources, and tribunals are called to ensure the correct application of the provision even if this means departing from earlier rulings.[117] The entire issue is perfectly summarized in the 1998 opinion of Advocate General La Pergola, who wrote:

> *[T]he rule* stare decisis *has not been incorporated in the Community judicial system. The Court does not of course fail to ensure that its case-law displays continuity and that its judgments are logically compatible and not contradictory with each other. However, the Court is not technically bound by its earlier judgments, and may therefore […] give a different answer to a preliminary question dealt with in an earlier decision, if such a result is justified by new matters brought to its attention in the later proceedings*.[118]

On the contrary, the rule of *stare decisis* is the heart of the American judicial culture. This is reflected on many aspects of the legal system, most notably regarding the constitutional review of legislation. In its *ex-post* or *a posteriori* review, the Supreme Court issues a retroactive judgement based on a concrete case, and through its decision it expresses an evaluation over the constitutional compatibility of the norm under scrutiny. This does not mean that the SCOTUS is entirely forbidden from overruling past cases, as the Court is encouraged to reverse a previous judgement if clear mistakes were committed. Basically, a substantial justification is generally required to overrule past decisions, but overruling is found to be rather frequent when the case law involves strongly ideological issues. For instance, controversies arose during the Warren era, where the progressive majority within the Supreme Court felt the need to disregard some of the precedent jurisprudence in order to reflect the changing values of society. The excuse of an evolution in the society's values did not exempt the Court from criticisms, as this justification was deemed insufficient by many. In short, the justices cannot ignore precedents simply because they do not agree with past rulings.[119] The doctrine of binding precedents will be a central element in the analysis of the case studies.

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[117] The separate interpretation of the binding precedent doctrine also entails some important differences in the essential features of the decisions: while the common law system requires particular attention to the distinction between *obiter dicta* and *ratio decidendi*, in the European law this difference loses its significance.

[118] Opinion of Advocate General La Pergola delivered on 12 February 1998 in Case C-262/96, Sema Sürül v. Bundesanstalt für Arbeit, ECR (1999) I-2685, § 36.

[119] Wermiel, S. (2019), SCOTUS for law students: Supreme Court precedent, SCOTUS blog. Available at: https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent/, accessed on 10 March 2021.

V. Constitutional Guarantees: Social and Civil Rights

Before moving on to the examination of the jurisprudence, a few remaining elements need to be analyzed. More specifically, it is mandatory to observe the constitutional guarantees of social and civil rights, a fundamental step that will help to better understand the mechanisms of rights tutelage in the two structures. This chapter may be interpreted as an extension of the segment dedicated to the legal sources. Contrarily to the previous units, however, this section will restrict its focus and concentrate only upon the documents and the key provisions that involve the protection of fundamental rights, with particular attention to those relevant to the selected case studies.

1. Constitutional rights protection in the US

For what concerns the United States, the discussion needs to start from the Bill of Rights.[120] This is the name given to the first ten amendments to the US Constitution, which were adopted *en bloc* in 1791. This comprehensive collection of rights and obligations is divided as follows: (1st) freedom of religion, speech, press, assembly and right to petition the government for a redress; (2nd) right to keep and bear arms; (3rd) prohibition for the government to transform private domiciles as homes for the soldiers; (4th) prevention of unreasonable search and seizure of individuals or of their property; (5th) prohibition to carry out prosecutions without due process, to try a subject twice for the same facts (double jeopardy), protection against self-incrimination, obligation to issue just compensation if a private property is seized for public use; (6th) right for the accused to have legal representation, to enjoy a speedy and public trial by an impartial jury, to be confronted with the witnesses against him and to have witnesses in his favor; (7th) right to a jury trial in civil cases; (8th) prohibition to set excessive bail, fines or punishments; (9th) the specific rights listed in the Constitution do not deny or disparage other rights; (10th) all powers not delegated to the federal government are reserved either to the states or to the people.[121]

In drafting this set of provisions, the Founding Fathers took direct inspiration from the two central documents of the Anglo-Saxon judicial culture, the *Magna Carta Libertatum* of 1215 and the British Bill of Rights of 1689. The US Bill of Rights was also influenced by the 1776 Virginia Declaration, an extraordinary text written by George Mason and other prominent figures of that time, such as future president James Madison. More broadly, is should be noted that the decades following the

[120] Engrossed Bill of Rights, September 25, 1789; General Records of the United States Government; Record Group 11; National Archives.
[121] The Constitution, The White House. Available at: https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/, accessed on 12 March 2021.

American Revolution witnessed the production of an impressive number of historic declarations on human freedom all across the Western hemisphere, especially between 1776 and 1801[122] (Helderman, 1941).

The direct link between the US Constitution and the English judicial tradition becomes evident once some of the key provisions of the Magna Carta are singled out. For instance, clause 20 of the charter states that crime punishments must be proportional to the offence committed; clauses 39 and 40 introduce the doctrines of rule of law and due process; clauses 12 and 14 are thought of having indirectly instituted the principle of "no taxation without representation", which will become the slogan of the US Revolution. Every one of these clauses finds its corresponding reproduction in the American text.[123] The impact of the English *corpus juris* pervades every aspect of the United States' legal culture. Many pilgrims may have not been pleased – to say the least – with the British society and colonists would eventually go on to violently withdraw their allegiance from the Crown. However, the settlers inherited all the rights, duties and historical traditions of the British people, as they remained Englishmen throughout all the centuries that preceded the Revolution. Think to the Massachusetts Body of Liberties, the legal code ratified in 1641 by the puritan colonists of New England. John Winthrop,[124] arguably the most famous among the drafters of the act, argued that the law of the land should directly reflect the basic characteristics of the Magna Carta, as well as respecting the divine word as written in the Bible. In its effort to create a set fundamental rights for the citizens of the land, the Body of Liberties "echoed the spirit" of the Magna Carta and transformed it into a codified text that could be enforced by the courts of New England (Hazeltine, 1917). The Body of Liberties spurred many of the other colonies to draft their own fundamental laws in the

[122] Helderman cites the Virginia Declaration of Rights (1776), the Declaration of Independence (1776), the Massachusetts Bill of Rights (1780), the Virginia Statute for Religious Freedom (1786), the Northwest Ordinance (1787), the French Declaration of the Rights of Man and the Citizen (1789), the Bill of Rights (1791) and Jefferson's First Inaugural Address (1801). Several other important documents could be mentioned, such as the Massachusetts Circular Letter (1768) or the Declaration and Resolves of the First Continental Congress (1774). There are also examples of notable books or treatises that went on to influence constitutions and legal texts, such as Cesare Beccaria's *Dei delitti e delle pene* (On Crimes and Punishments) of 1764, in which the Italian philosopher argued against the death penalty. This era, which introduced the modern conception of human rights, reflects the philosophical revolution brought forward during the Enlightenment period. The discussion would also have to include the works of antecedent thinkers such as Bodin, Hobbes, Locke, Grotius, Rousseau and many others. In this sense, the United States (as well as post-revolutionary France) could be understood as the concrete manifestation of centuries of philosophical and political evolution.

[123] Edwards, D. (2019), Magna Carta Influence in the U.S. Constitution, Libertarianism. Available at: https://www.libertarianism.org/columns/magna-carta-influence-us-constitution, accessed on 13 March 2021.

[124] John Winthrop (1588-1649) was an English Puritan lawyer, theologist and settler. After having moved to New England, he became governor of Massachusetts and was one of the most influential figures in the colony. He is the author of the famous lay sermon "*A Model of Christian Charity"*, quoted at the beginning of this essay.

following years, and several provisions of the US Bill of Rights are thought of having been inspired by the Massachusetts code.[125]

In addition to the Magna Carta and the Bill of Rights of 1689, two other documents need to be considered in the analysis of Constitutional guarantees under the British tradition: the Petition of Right of 1627 and the Habeas Corpus Act of 1679. Under the former, the English Parliament, led by Sir Edward Coke, declared three[126] basic principles: no taxation without parliamentary consent (a recurring theme in the Anglo-Saxon constitutional history); the *habeas corpus* principle; the prohibition for the government to seize private houses in order to quarter soldiers.[127] All these provisions later came to be incorporated in the American constitution: for instance, the clause concerning the billeting of troops appears in both the Petition of Right and the Third Amendment. Particular attention is also required for what concerns the *habeas corpus*, which is of course the core element of the Habeas Corpus Act of 1679.[128] This document codified standards of rights protection that were already present in the English judicial tradition since the 13th century, but that lacked specific regulations and implementation force. The Act, which greatly influenced the Fourteenth Amendment's Due Process clause, became a key instrument in the fight against unlawful imprisonment and restriction of personal liberties. Some of the most important principles related to the *habeas corpus* are the prohibition of arbitrary detention, abuse of power and unlawful prosecution.[129]

Coming back to the American system of protection of individual rights, the analysis should not limit itself to the provisions within the Bill of Rights. As already mentioned in the previous chapters, the Reconstruction era also represents a crucial moment in the US history, as the amendments of this age (the 13th, 14th and 15th) abolished slavery, granted citizenship rights to every person born in the United States, guaranteed equal protection to former slaves and prohibited the denial of voting rights to persons of color. Despite the apparent ambitiousness and revolutionary scope of the Reconstruction Amendments, African Americans still had to wait decades before obtaining a full formal recognition of their rights: the enforcement of segregation continued until 1965 with the application of Jim Crow laws,[130] endorsed by the "separate but equal" doctrine. According to this perverse interpretation of

[125] Massachusetts Body of Liberties, Massachusetts Government. Available at: https://www.mass.gov/service-details/massachusetts-body-of-liberties, accessed on 13 March 2021.
[126] In addition to the three principles mentioned, the Petition also called to revoke martial law in peacetime.
[127] Petition of Right 1627. Available at: https://www.legislation.gov.uk/aep/Cha1/3/1, accessed on 18 March 2021.
[128] Habeas Corpus Act 1679. Available at: https://www.legislation.gov.uk/aep/Cha2/31/2/introduction, accessed on 18 March 2021.
[129] The provisions regulating the writ of *habeas corpus* are now contained in 28 U.S. Code Chapter 153.
[130] The term Jim Crow law indicates any provision which enforced segregation in the United States between 1877 and the late 1950s. The name derives from the 19th century minstrel shows of Thomas Dartmouth "Daddy" Rice, in which a

the Fourteenth Amendment, segregation practices did not violate the Constitution, since "separate treatment did not imply the inferiority of black people."[131] This principle will be the cardinal element of the discussion on the case *Brown v. Board of Education*,[132] which in turn will be compared with the infamous *Plessy v. Ferguson* ruling of 1896.[133]

The last documents to consider for the sake of this research are the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Both these laws are subsequent to *Brown I*, and neither of them applies to *Roe v. Wade* or other cases that will be analyzed in the next sections. However, any observation of rights tutelage would be incomplete without at least mentioning these two acts, which hold unparalleled importance in the contemporary development of rights protection in the United States, as they marked the end of centuries of racial discrimination – at least from a formal standpoint. The two documents, which were ratified in the midst of the Civil Rights Movement era and in the dramatic years that followed the Kennedy assassination, respectively prohibited segregation practices in public facilities and expanded the protection of voting rights. The VRA, in particular, abolished literacy tests, poll taxes and several other instruments that were instrumentally used to disenfranchise minorities and prevent them from voting.[134] The CRA, instead, forbade any form of discrimination on the basis of race, color, gender, sex, etc., ending the era of segregation in the United States.[135] This act re-adopted and expanded the provisions contained in the Civil Rights Act of 1875, a law that was struck down by the Supreme Court in 1883 again under the "separate but equal" doctrine.[136] Although the CRA and the VRA are not part of the constitution, it could be argued that their impact on the judicial system has been comparable to that of the Reconstruction Amendments or of other constitutional provisions.

2. Constitutional rights protection in the EU

The issue of rights protection in the European Union requires a different method of observation, since the primary guardians of individual rights in the EU were initially its member states and their national constitutions, and not the Union. This was mostly due to the initial aim of the organization,

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blackface character called "Jump Jim Crow" was used to mock African Americans. See: Urofsky, Melvin I., "Jim Crow law". Encyclopedia Britannica, 12 Feb. 2021. Available at: https://www.britannica.com/event/Jim-Crow-law, accessed on 12 March 2021.

[131] Separate but Equal, Cornell Law School, LII / Legal Information Institute. Available at: https://www.law.cornell.edu/wex/separate_but_equal, accessed on 12 March 2021.

[132] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[133] Plessy v. Ferguson, 163 U.S. 537 (1896).

[134] Voting Rights Act of 1965. Available at: https://www.archives.gov/files/historical-docs/doc-content/images/voting-rights-act.pdf, accessed on 18 March 2021.

[135] Civil Rights Act of 1964. Available at: https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf, accessed on 18 March 2021.

[136] Chambers Jr., H.L (2008), Civil Rights Act of 1964, in *Encyclopedia of the Supreme Court of the United States*, D. Tanenhaus ed., Macmillan.

which was set up with an economic scope. Both the early Coal and Steel community and the later European Communities saw as their main goals the proliferation of inter-state trade and the economic prosperity of the member states, and protection of individual rights was originally left out of their set of competencies. Indeed, on the "meso" level, the member states' constitutions already served this purpose, as most of them were considered the key instruments for providing sufficient level of protection to the rights of their citizens. Only in 1969 the ECJ began to make reference to fundamental rights tutelage at the European level, in the well-known cases of *Stauder*[137] and, one year later, of *Internationale Handelsgesellschaft.*[138] With these rulings, the Court affirmed that human rights are "enshrined in the general principles of Community law",[139] and that the protection of those rights "whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[140] Therefore, the Court recognized for the first time that the constitutional principles of each MS have contributed to the creation of a core of fundamental rights of the Community, and that it was mandatory for the EC to respect such identities. This was also reflected in the *Nold*[141] judgement of 1974, where the ECJ ruled that "the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States."[142] These cases were particularly important as while stressing the need to respect national constitutions, the European judges also established the capacity of the EC legal order in ensuring the protection of rights.

The importance of the states' constitutional values was also remarked by the German Constitutional Court, one of the most strenuous defenders of national traditions in the EU, with the rulings *Solange I*[143] of 1974 and *Solange II*[144] of 1986. In *Solange I,* the German Constitutional Court argued that the transfer of sovereignty which took place with the treaties did not allow the Community

[137] Case 29/69, Erich Stauder v City of Ulm – Sozialamt (1969).
[138] Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970).
[139] "Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court." Case 29/69 Erich Stauder v City of Ulm – Sozialamt (1969), Grounds of Judgement § 7.
[140] "However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system." Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970), Grounds of Judgement § 4.
[141] Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (1974).
[142] Ibid., § 13.
[143] 37 BVerfG 271, judgment of 29 May 1974.
[144] 73 BVerfG 339, judgement of 22 October 1986.

to infringe the principles of the Basic Law, and the ECJ at that moment could not guarantee the protection of constitutional rights (Lanier, 1988). Twelve years later, however, the BverfG recognized the significant progresses made at the Community level for what concerned rights tutelage, and decided that as long as the ECJ and the EC continued to protect fundamental rights adequately, it would not exercise its jurisdiction "to decide on the applicability of secondary Community legislation", nor "to review such legislation by the standard of the fundamental rights contained in the Basic Law."[145] As shown with the aforementioned *Weiss* case, the BverfG's conflictual rapport with the ECJ continues to be newsworthy, and the issues between national and European courts are far from being resolved.

The German Constitutional Court rulings serve to show that the relationship between national and European courts on this very crucial issue has always been turbulent. Many other cases could be brought up, such as the famous *Melloni*[146] case concerning the different levels of human rights protection among the member states and the Union. The most important consideration that can be drawn from the analysis of constitutional traditions is that, in the EU, fundamental rights are protected with a bottom-up mechanism: the Union created its castle of duties and freedoms using the national constitutions as its building blocks. On the contrary, the United States inherited an external judicial tradition, the English one, and rejuvenated it in order to make it their own. It is true that some of the colonies had already drawn sketches of their bill of rights before 1789, as in Virginia or Massachusetts. However, the US Constitution automatically became the foundational document of every component of the American federation, especially for those states which were created from scratch during the US territorial expansion. This goes to show that, on the matter of rights tutelage, the relationship between the federation and the states follows a top-down direction. Instead, the EU has never been the primary source of constitutional values for its member states, as every one of its components carried with itself a centuries-old tradition at the moment of accession to the Union.

The protection ensured by the member states constitutes the "meso" level element of this study. On the "macro" dimension instead, the presence of two additional players relieved the European Communities of their duties: the United Nations and the Council of Europe. The UN has the merit of

[145] "As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safe-guard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) Basic Law for those purpose are therefore inadmissible." Available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572, accessed on 17 March 2021.

[146] Case C-399/11, Stefano Melloni v Ministerio Fiscal (2013).

having created a general blueprint for multilateral cooperation, turning what was considered to be a utopia into a concrete international organization. This goal was achieved not only within the restricted framework of the United Nations, but also through the creation of a multitude of affiliated specialized agencies (like the International Labour Organization, ILO) and the adoption of parallel Conventions and Treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which allowed the UN to increase the number of instruments available at the international level to ensure the tutelage of fundamental rights. Although the work of the UN and its partner agencies should not be underestimated, the Council of Europe has been able to provide less-abstract instruments for the protection of individual rights. In particular, in 1950 the CoE drafted the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention of Human Rights. The ECHR has had an enormous impact on the protection of rights in international law, because this human rights treaty is applicable at the national level, offers to individuals direct access to a court to redress human rights' violations and states are legally obliged to respect its provisions and protocols.[147] The European Union, and in particular the ECJ, recognizes the Convention as a paramount source of inspiration and has repeatedly used the ECtHR jurisprudence as a source for its rulings on rights' protection. However, the EU is not part of the ECHR, and the Convention is only applicable to single member states, not to the Union itself.

The TEU offers a clear indication on the relationship between the EU and the Convention: as written in the sixth article of the Treaty, "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."[148] Here, both the national and the international mechanism of rights protection are merged in order to create a single system of tutelage applicable throughout the Union. It is necessary to underline the fact that every member of the EU (or of the Communities) has always been a signatory of the Convention. For this reason, the drafters of the Treaty correctly assumed that the provisions of the ECHR constituted a set of shared values common to every member state. Furthermore, the same article also states that "Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".[149]

[147] However, it has to be underlined that there exists a significant problem of implementation of ECtHR judgements. See: Stafford, G. (2019), The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1: Grade Inflation; and Part 2: The Hole in the Roof. EJIL: Talk! Available at: https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-1-grade-inflation/ and https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/, accessed on 23 May 2021.

[148] TEU art. 6 section 3.

[149] Ibid., section 2.

Since the late 1970s, the European Commission had indeed proposed on several occasions the accession of the Community to the ECHR, believing that this move would have strengthened the protection of rights within the organization. The ECJ, however, stated that the EC had no competence to enter into the ECHR framework, considering the accession incompatible with the treaties.[150] The impasse was broken only with the Treaty of Lisbon, where Article 6 TEU[151] seemed to have removed the main obstacle between the EU and the accession to the ECHR (i.e., the requirement of a legal basis). The same willingness to overcome some significant hurdles was also shown by the CoE, since membership for regional organizations was not foreseen in the text of the ECHR. Yet, after an agreement between the two international organizations had been reached, the judges once again put a halt to the accession procedure, arguing that the deal was "liable adversely to affect the specific characteristics and the autonomy of EU law".[152] The opinion of 2014 did not discourage the supporters of accession within the Union, as negotiations resumed in 2019 in order to address the questions raised by the Court.[153]

But why should the EU enter in the ECHR if all its member states are already part of the Convention? The issue involves the formal enclosure of the provisions within the Union's legal system: although both the treaties and the Court's jurisprudence have recognized its importance within the judicial mechanism of rights protection, the Convention is not formally considered as a legal source by the Union's institutions cannot as such be the subject of applications to the European Court of Human Rights (the Court), although "issues relating to Community law have been raised regularly with the Court and the former European Commission of Human Rights".[154] Therefore, the CJEU and the EU are not strictly bound to respect the letter of the law, but rather to take it into account when dealing with matters such as human rights protection (Craig and Búrca, 2011). The accession would also allow European citizens to bring the EU before the ECtHR, since within the ECHR framework individuals are entitled to directly file proceedings against a state that has ratified the Convention.[155] At this moment, no complaint can be lodged against the Union before the ECtHR, since the EU falls outside of the Court's jurisdiction. The European Union is also free from the scrutiny and the oversight procedures carried out by the specialized organs of the Council of Europe.

[150] Opinion of the Court 2/94, "Opinion pursuant to Article 228(6) of the EC Treaty".
[151] TEU art. 6 section 2: "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."
[152] Opinion of the Court 2/13, "Opinion Pursuant to Article 218(11) TFEU".
[153] The protection of fundamental rights in the EU, Fact Sheets on the European Union, European Parliament. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu, accessed on 15 March 2021.
[154] Factsheet – Case-law concerning the EU, Council of Europe (2021).
[155] ECHR art. 6

Another key document to take into account in the overview of rights tutelage in the EU is the Charter of Fundamental Rights of the European Union. Ratified in 2000, the CFR represents the attempt of all member states to consolidate their common values and principles into a single text. The adoption process of the Charter was remarkable: the CFR was drafted in the European Convention of 1999 by representatives of MS governments, European Commission, European Parliament and also of national parliaments. The presence of parliamentary delegates was a crucial part of the drafting procedure, as the MPs ensured a strong of majoritarian component within a decision-making mechanism that, in analogous circumstances, had often taken place behind closed doors. Since the states did not reach an agreement on whether the proposed Charter would have binding force on the European legal system, the CFR initially could not be regarded as constraining. However, as argued by former European Commissioner for Justice and Home Affairs António Vitorino, both the ECJ and several national constitutional courts immediately started to make reference to the Charter in their rulings, despite the CFR had yet to become a binding juridical text.[156] Eventually, after the failed project of the European Constitution, the Charter of Fundamental Rights became part of the formal judicial legal sources of EU law with the ratification of the Treaty of Lisbon, which gave the CFR the same force of the other European Treaties (article 6 TEU).

The Charter of Fundamental Rights may very well be understood as the Bill of Rights of European Law.[157] In their effort to create an ever-closer union, the European governments laid out a series of provisions that encompasses a wide range of topics, as the right to life (art. 1), the freedom to conduct a business (art. 16), the principle of environmental protection (art. 37) or the rights of the elderly (art. 25). More precisely, the Charter is divided in seven chapters: dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions. It is important to stress that the Charter does not define in great detail neither the concepts nor the implementation methods suggested for its enforcement, and it also suggests a distinction between rights and principles. This differentiation, which has not been fully embraced by some scholars (Hilson, 2008), indicates that "in contrast to rights, principles require implementation and are only justiciable as far as the legality or interpretation of their implementing acts is concerned" (Lock, 2019).

Coming back to the comparison between the two texts, the CFR is found to have a much wider scope than the European Convention of Human Rights. The ECHR indeed has mostly avoided references to social and economic rights, focusing much more on the so-called "negative rights" such

[156] Antonio Vitorino in « Histoire : La Charte des droits fondamentaux de l'UE », 2013.
[157] The protection of fundamental rights in the EU, Fact Sheets on the European Union, European Parliament. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu, accessed on 16 March 2021.

as the prohibition of torture, freedom of speech, right to life etc. It would be a mistake to state that positive rights are absent from the ECHR, as human rights very often entail positive obligations for the member states. At the same time, the CFR generally offers a more extensive level protection, while the ECHR "is intended to function as a floor but not necessarily as a ceiling" (Anderson Q.C. and Murphy, 2011). As stated in article 52 of the CFR:

> *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*[158]

In other words, the ECHR represents the minimum benchmark for any form of legislative provision or system of rights protection adopted in Europe, while the CFR appears as a more courageous and extensive set of fundamental rights The substantial differences between the two texts are clearly explained by the contingent characteristics of the respective institutional systems, with the EU being a much more restricted and integrated structure than the CoE. Nevertheless, it must be emphasized that the Charter of Fundamental Rights only applies in the context of EU law (although this includes also domestic provisions falling within the scope of the EU law and of the CFR, since even national acts can be subject to the ECJ's review if found to be incompatible with the Charter's provisions).[159] This means that the CFR generally requires the presence of another EU legal act applicable in the specific situation under scrutiny. As put by Gabriel N. Toggenburg, "[t]he Charter is likely to be the worlds' most modern and encompassing legally binding human rights document". At the same time, however, the author argues that its limited scope makes the Charter an "illusionary giant", as "it looks great from far away but shrinks once one takes a closer look" (2018).

This segment has outlined the main characteristics of the most relevant legal texts in Europe and America. Rights protection, as shown above, is ensured through a complex system of overlapping judicial frameworks, constitutional documents, charters, treaties and conventions. The courts, both the national and the supranational ones, have the daunting task of understanding which texts apply and to what extent, balancing both individual and public rights.

[158] Charter of Fundamental Rights of the European Union, article 52
[159] e-Booklet on the Use of the Charter of Fundamental Rights of the EU, European Commission Justice Programme (2019).

VI. Conflicts of competence in the USA and in the EU

The very last topic to discuss before the case law analysis concerns the conflicts of competence between the states and the central authorities, represented by the EU and US institutions. The goal of the section will be to describe to what extent the imaginary tug-of-war between the states and the two unions influences the respective judicial branches. The previous chapters have displayed the complexity and sophistication of both the American and the European structures, and it has been shown how the two judicial structures have been tailored to meet the peculiar characteristics of federalism (or quasi-federalism in the case of the EU). Thanks to the decentralized nature of these two polities, local authorities are endowed with a significant amount of power and independence, playing a fundamental role within the structure. Hence, the analysis will explain how the decision-making processes that take place within each legal system are influenced by the conflicts between the states and their superior authorities.

1. US: the states versus the federal government

In the units dedicated to the study of the US federal system, the American structure was portrayed as multi-layered. While this description is fundamentally sound, a more accurate definition was offered Morton Grodzins. In 1960, Grodzins wrote that "[t]he American form of government is often, but erroneously, symbolized by a three-layer cake. A far more accurate image is the rainbow or marble cake. […] As colors are mixed in the marble cake, so functions are mixed in the American federal system."[160] So, although the image of a perfectly designed mechanism with fixed borders is helpful to grasp the general functioning of the federal architecture, the interplay between the various actors actually takes place in a much more interlaced and knotted space. This means that the boundaries separating the states and the national jurisdictions are often blurred, and that authorities are often forced to compete in order to protect or expand their status.

In order to find out how the relationship between the Union and the states is regulated, it will be necessary to return once again to the study of the constitution. The basic provision to take into consideration is Clause 2 of Article VI, also known as the "Supremacy Clause."[161] This article is essential to complete the observation of the American judicial system, because it lays out the principle

[160] Morton Grodzins (1960), "The Federal System," in Goals for Americans (Englewood Cliffs, NJ: Prentice Hall), as cited in: Marble Cake Federalism, Center for the Study of Federalism. Available at: http://encyclopedia.federalism.org/index.php/Marble_Cake_Federalism, accessed on 24 March 2021.

[161] U.S. Const. art. 6, § 2. "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."

of supremacy of federal law over state legislation. By affirming that the constitution, the treaties and the laws of the United States are the "supreme law of the land", the Union prohibits states to interfere with its exercise of federal powers, even when states' constitutions are found to be incompatible with the proposed federal statutes.

In spite of the clear and unambiguous wording of the clause, it would be a mistake to picture the states as subjugated by the federal government. On the contrary, it could be argued that at least until the Civil war, the member states were the ones "in charge". Congress was forced to remain within the strict boundaries of its enumerated powers, and it was constrained by the states' legislatures to respect the principle of separation of competences. This age was characterized by the doctrine of "dual federalism", in which the states and the Union were seen as two separate entities that could not interfere with each other nor invade each other's realm. The Supreme Court was repeatedly called to rule upon cases regarding conflicts of competences and, despite the landmark rulings of *McCulloch v. Maryland*[162] and *Gibbons v. Ogden*,[163] both of which saw the Court reaffirming the supremacy of federal legislation, the national government remained unable to expand its powers. The most notable demonstration of the states' strength came in 1833, with the case of *Barron v. Baltimore*,[164] a dispute involving a wharf owner and the municipal administration. The plaintiff argued that the city's decision to divert the natural course of water streams away from the harbor constituted a violation of the Fifth Amendment and his right to property. As the forced deviation of water generated massive sand accumulations, these deposits had reduced the depths of Barron's waters, eventually leading to a dramatic reduction of his profits. The Court, however, affirmed that it had no jurisdiction over the dispute, since the provisions contained in the Bill of Rights could only be applied to the federal government. In the words of Marshall, "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States."[165] Therefore, the states could not be held liable for violating rights enshrined in the amendments.

The Reconstruction era proved to be, once again, a crucial turning point in the history of the American judicial system. As demonstrated in the segments dedicated to the historical overview of the Supreme Court, the post-Civil War age radically modified the relationship between the states and the Union. The text of the Fourteenth Amendment, in order to erase any doubt on its scope, explicitly made reference to the states, stating that "[n]o state shall make or enforce any law which shall abridge

[162] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[163] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
[164] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[165] Ibid., Opinion of Chief Justice John Marshall.

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."[166] The Due Process clause of the 14th Amendment allowed for the creation of the incorporation doctrine, by which the Supreme Court was progressively able to apply the Bills of Rights provisions to the states.[167] However, although the balance had seemingly started to shift in favor of the federal powers, the member states continued to successfully defend their autonomy and exclusive competence against the central government. First, in 1873, the SCOTUS issued a strongly controversial decision in the *Slaughter-House Cases*:[168] in a dispute involving monopolies and the rights protected by the 13th and 14th amendments, the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment did not force states to guarantee equal economic privileges to their citizens, but only prevented them from enforcing racial discrimination. As the two amendments were ratified with the goal of granting equality to former slaves, they could not be applied on wider bases. Hence, only the rights "which owe their existence to the Federal government, its national character, its Constitution, or its laws"[169] could be protected by the Clause. Another blow to the process of federal integration was dealt in 1905, in the case *Lochner v. New York*.[170] A New York baker claimed that a state law meant to regulate the maximum working hours, the Bakeshop Act, was in violation of the Fourteenth Amendment, thus unconstitutional. The Supreme Court went on to rule in favor of Mr. Lochner, affirming that the act was incompatible with the principle of freedom of contract.[171] This ruling represented the beginning of the so-called "Lochner era", a period in which the Conservative majority within the Supreme Court was able to strike down a great number of federal legislation and to protect the states' privileges.

The long period of domination of the states over the federal institutions came to an end with the New Deal. The end of the Lochner era represents the juncture between the historical evolution of the Supreme Court, as described in earlier sections of this work, and the wider political scenario of American politics at that time. As the explained in previous chapters, Franklin Delano Roosevelt was able to revolutionize the entire federal system with its ambitious plan of reforms, and despite his

[166] U.S. Const. amend. XIV.
[167] The 9th and 10th amendments have not been incorporated, since the former has almost no use as a legal source and the latter deals directly with the separation of powers between the states and the Union. Furthermore, for different reasons, two other amendments have not been subject to the process of incorporation: the third amendment, dealing with the quartering of troops, is generally considered to be obsolete; the seventh, concerning the right of trial by jury, never required any incorporation from the states. For a short analysis of the 3rd amendment obsolescence, see: Horwitz, M.J. (1991), Is the Third Amendment Obsolete, *Valparaiso Law Review*, Vol. 26, No. 7., pp. 209-214.
[168] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
[169] Ibid., 79.
[170] Lochner v. New York, 198 U.S. 45 (1905).
[171] Moreover, because the primary aim of the law was to protect the health of laborers, the Court claimed that longer working hours did not represent a threat to health, as the bakery business was not found to be dangerous or harmful.

failure to change the outlook of the Supreme Court, the National Labor Relations Act of 1935 marked the end of over one hundred years of state predominance. Roosevelt's presidency represented the birth of yet another age, known as the period of cooperative federalism. Since then, the federal government and the states are seen as two complementary pieces of the same puzzle. Many areas of law now see the concurrence of the two typologies of legislation, and Congress can effectively pre-empt states from acting in specific subjects, defining fields as of exclusive competence of the federal government. The power relation between the two entities continues to be in constant evolution, as the views and powers of each President may lead the pendulum to oscillate in one direction or another. Even the integration of the amendments continues to this day: in 2019, in the case *Timbs v. Indiana*,[172] the Supreme Court unanimously ruled that the Eighth Amendment's excessive fines clause is to be considered as incorporated against the states, being "deeply rooted in this Nation's history and tradition".[173] The entire American institutional structure, including the judicial system, is strongly influenced by this constant struggle for power. Therefore, analyzing the Supreme Court first requires a deep understanding of the precarious and often conflictual relationship between states and federal institutions.

2. EU: the states versus the European institutions

Although the EU is not a federal state, earlier segments have demonstrated how its peculiar characteristics do not make a comparison with the USA futile or completely impractical. The conflicts between the European institutions and the territorial entities are obviously at the heart of the power dynamics of the EU, as national interests remain the main concern of member states despite the efforts of supranationalists to move towards a more integrated and quasi-federal union. Since the question of supremacy of European law over national legislation has already been discussed in previous chapters, the discussion should now shift towards a wider consideration over the general principles of federalism present in the EU treaties. The provisions regulating the division of competences between the EU and the MS follow similar logics to those present in the United States. Hence, the parallel between the European and the American mechanisms will put the two entities on a level playing field, setting the stage for the jurisprudential comparison. However, as these segments will demonstrate, there is a certain fuzziness surrounding the competence demarcation among member states and European institutions, and it will be necessary to clear the fog before comparing the two systems.

[172] Timbs v. Indiana, 586 U.S. ___ (2019).
[173] Ibid., pp. 7-9.

The fundamental element to take into account when dealing with the European "federal" standards is Article 5 TEU. As set out in the first section of this article, "[t]he limits of Union competences are governed by the principle of conferral", and "[t]he use of Union competences is governed by the principles of subsidiarity and proportionality."[174]

The principle of conferral, which can be found in the second paragraph of Article 5, sets the boundaries to the competences of the EU. According to this principle, the Union's competences are limited to those voluntarily conferred to it by the member states through the Treaties. Yet, the principle of conferral should not lead to have an excessively restrictive interpretation of the EU competences. For instance, the existence of "flexibility clauses" such as Article 352 TFEU allows the EU "to act in areas where EU competences have not been explicitly granted in the Treaties but are necessary to the attainment of the objectives set out in the Treaty".[175] Nevertheless, in general terms all the issue-areas that have not been delegated to the Union remain under the jurisdiction of national governments.[176] This provision echoes the first article of the United States constitution, with sections eight to ten outlying the enumerated powers of the federation, and even more clearly the tenth amendment, which states that "[t]he 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".[177] Obviously, the degree of delegation between the two systems is severely different, as the countries within the European Union ultimately remain sovereign entities, contrarily to the federated states in America. On the issue of conferred competences, the EU polity appears to resemble the characteristics of a confederation, in which independent states voluntarily form an institutionalized association within themselves in order to achieve a common goal, the same political model adopted by the American Colonies between 1781 and 1789. This does not mean that the confederal model perfectly suits the European Union in all its aspects, as many of the EU's characteristics are incompatible with some of the basic features of this political system. For instance, the Union showcases a massive executive machinery, and its scope is much wider than the one traditionally conferred upon the governments of a confederation.[178]

While the principle of conferral establishes the limits of the EU competences, subsidiarity and proportionality deal with their application. Subsidiarity is a fundamental criterion not only for the

[174] TEU art. 5 section 1.
[175] The Role of the 'Flexibility Clause': Article 352, European Commission.
[176] TEU art. 5 section 2: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."
[177] U.S. Const. amend. X.
[178] Heslop, D.A. (2020), Political system - Confederations and federations. Encyclopedia Britannica. Available at: https://www.britannica.com/topic/political-system, accessed on 1 April 2021.

European Union, but for all federal structures. Paragraph 3 of Article 5 states that, with the exception of the EU's exclusive competences,[179] the Union should act only when "the objectives of the proposed action cannot be sufficiently achieved by the Member States", and an action taken at the EU level would prove to be more effective.[180] This principle is reminiscent of Article VI of the US constitution, in which the supremacy clause established the doctrine of federal preemption. Subsidiarity can represent a great limitation for the European institutions, as their actions have to be justified by the inability of national, regional or local actors to properly carry out a specific task. The last paragraph of Article 5 TEU, the proportionality rule, follows a similar rationale: simply put, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[181] Specific indications regarding these principles are listed in the Protocol on the Application of the Principles of Subsidiarity and Proportionality,[182] which serves as a rulebook for EU institutions to carry out their functions in accordance with the two tenets.

As in the case of the US, the EU's harmonic interplay between central and territorial authorities has been shaped in no small part by the jurisprudence of the CJEU. However, one problem arises during the observation of the judicial decisions related to the question of competences: as pointed out by Timmermans, the Court has not developed a single interpretative approach to deal with this issue. Regarding agricultural market rules for instance, in the *Bollman*[183] case judges adopted a strict, dogmatic attitude regarding the conflict between national and communitarian measures, affirming that states "must refrain from taking any unilateral measure, even if that measure is likely to support the common Community policy" (Timmermans, 2014). In other instances, the Court has struck down measures simply because they were in clear conflict with the communitarian measures, while in other cases it has chosen to intervene only if the Member States' actions were found to have failed a

[179] It is essential to underline that this principle does not apply to the exclusive competences of the Union, in which the EU has freedom of action. The Treaties recognize the existence of several typologies of competences, namely: exclusive, shared, coordinating, complementary and supportive. See TFEU articles 2-6.
[180] TEU art. 5 section 3: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."
[181] TEU art. 5 section 4.
[182] Consolidated version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the application of the principles of subsidiarity and proportionality, p. 206–209.
[183] Case 40/69, Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann (1970), para. 4-5. "To the extent to which Member States have transferred legislative powers in tariff matters with the object of ensuring the satisfactory operation of a common market in agriculture they no longer have the powers to adopt legislative provisions in this field. [...] This article [14] does not therefore permit Member States to adopt any internal measures affecting the scope of the regulation itself."

"compatibility test".[184] To make matters even more complicated, the ECJ has occasionally chosen to refer to all these three approaches at the same time, as in the 1986 ruling in the case *Le Campion*.[185]

The ambiguity on the topic of conflicting competences extends to the distinction between supremacy of European law and pre-emption. In the previous units, it has been shown how supremacy refers to the hierarchical superiority of EU provisions vis-à-vis national law. On the other hand, pre-emption denotes the actual degree to which the legal space available to national law will be limited in favor of European law.[186] The line between the two principles, however, remains blurred, in no small part because of the Court's refusal to take a definitive stance on the matter (Schütze, 2018; Timmermans, 2014). The matter becomes even more complex if we consider that the Union has seen the development of three different categories of pre-emption,[187] and that this power can be limited either by the typology of legal instrument adopted or by different constitutional standards (Schütze, 2018). In conclusion, the continuing competition between Member States and the Union institutions precludes any clear definition of the competences within the EU. For instance, while the European competence is not supposed to be "self-generating", states had voiced their concerns over an excessive use of the residual powers by the Union through Article 308 ECT,[188] accusing the EU institutions of circumventing the conferral principle (Conway, 2010). Even with some modifications, the replacing provision (the aforementioned Article 352 TFEU) and the set of conditions required to apply it[189] were not sufficient to shield the EU from criticisms.

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[184] See, for example, Case C-507/99. Denkavit Nederland BV v Minister van Landbouw, Natuurbeheer en Visserij and Voedselvoorzieningsin- en verkoopbureau (2002), para. 32; Joined cases 36 and 71/80 Irish Creamery Milk Suppliers Association and others v Government of Ireland and others; Martin Doyle and others v An Taoiseach and others (1981), para. 15.

[185] Case 218/85, Association comité économique agricole régional fruits et légumes de Bretagne v A. Le Campion (1986), para. 13: "In order to reply to the question raised by the national court it is therefore necessary to ascertain whether and to what extent Regulation No 1035/72 precludes the extension of rules established by producers' organizations to producers who are not members, either because the extension of those rules affects a matter with which the common organization of the market has dealt exhaustively or because the rules so extended are contrary to the provisions of Community law or interfere with the proper functioning of the common organization of the market."

[186] Schütze, R. (2018) European Law II, in: European Union Law. Cambridge University Press, Cambridge, pp. 138.

[187] Field pre-emption, obstacle pre-emption and rule pre-emption. The first entirely prohibits national laws on a given topic (or legislative field); the second makes inapplicable the state measures which interfere with the Union's goals and activities; the third strikes down laws which explicitly contradict one or more European rules. See: Schütze, R. (2018), European Law II, in: European Union Law. *Cambridge University Press*, Cambridge, pp. 119–149.

[188] ECT article 308: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[189] The four basic requirements are: "(a) the action by the Union must be necessary, (b) the relevant measure must fall within the framework of policies as defined by the Treaties, (c) it must be aimed at attaining one of the objectives of the Treaties, (d) and the necessary powers for the accomplishment of this action must not be provided elsewhere in the Treaties." See: Niotis, S. (2018), The Birth of the EMF. Integrating the ESM into the EU Legal Order: 'Constitutional' Challenges. Maastricht Center for European Law Master Working Paper.

This chapter has tried to shed light on a controversial and somewhat vague issue. Despite the complexity of setting clear boundaries between the competences of the EU and those of the Member States, this passage represents the symbolic final piece of the puzzle, as it competes the theoretical considerations necessary to approach the selected cases. The issue of conflicting competences, as the jurisprudential analysis will show, represents indeed a central element for the understanding of the judicial mechanisms in the US and in the EU.

VII. ECJ and SCOTUS case law on fundamental rights

The stage is ready for the three-fold analysis of the relevant case law. Before diving right into the comparative analysis of the courts' jurisprudence, it is necessary to present the motivations that led to the selection of these cases. As indicated in the introductory chapter, this work will focus upon three different issues: the protection of minority rights in education; the right to abortion; and the relationship between constitutional principles and contrary or conflicting provisions of international law. For each of these subjects, two cases – one for the US Supreme Court and one for the European Court of Justice – will be discussed in order to show how the courts try to guarantee the protection of rights in their respective systems.

The reasons that led to selection of these topics are many. First of all, during the preliminary phase of research design, it became evident that the population of case studies within the field of rights protection is immense. Thus, it was necessary to choose three topics sufficiently different among themselves, in order to carry out a feasible analysis covering as much "space" as possible. Selecting profoundly diverse cases offers a broader observation of the courts' decision-making procedures and of their reasonings. This type of assessment would not be possible if the focus and the scope of the analysis were restricted to only one issue-area. Furthermore, most of the cases chosen are among the most famous and important proceedings ever taken up by the SCOTUS and by the ECJ, and any study of the two courts seems to require at least a brief examination of these rulings.

The inspiration for the case selection also came from the latest developments in European and American politics. For instance, the appointment of conservative justices during the years of the Trump administration has re-ignited debates over the right to abortion, and the Supreme Court could soon reverse its decision in *Roe v. Wade*. Termination of pregnancy remains one of the most debated topics also in Europe, and the study of the *Grogan* case will reveal the existence of a huge fracture between member states within the EU. Similarly, an analysis of the *Brown* case was made necessary by the world-wide protests against racial discrimination and the increasing presence of this topic in the public discourse. The comparison between *Brown* and *CHEZ* will be useful to remember that Europe is far from immune to the virus of racism, as the Roma community continues to be the victim of unacceptable discriminatory practices. Finally, *Medellín* and *Kadi* allow to reflect upon key issues of constitutional and international law, dealing not only with the issue of death penalty and with the fight against terrorism, but also (and primarily) with the problem of enforcement of international acts/judgements.

1. Minority rights protection

The first case of this unit will be *Brown v. Board of Education*. As mentioned in previous sections, its importance in the modern history of the American judicial system is arguably unmatched, as it symbolizes the end of centuries of legalized racism and discriminatory practices. *Brown* will be compared to a more recent ECJ case, *CHEZ*. This proceeding, which concerns unfair practices targeting Roma people, represents a true milestone in the field of racial discrimination jurisprudence,

1.a. Brown v. Board of Education

Topeka is the capital city of the state of Kansas. The name of this midwestern town is of uncertain origin, but it is generally believed that in the native Dhegihan languages of the region, "Topeka" either meant "smoky hill" or "a good place to dig potatoes".[190] Despite the city's ordinary and unexciting appearance, every American became familiar with its name during the 1950s, all because of a 7-year-old girl named Linda Brown.

Linda, the daughter of Leola and Oliver Brown, had to travel more than two miles each day to reach the Monroe Elementary school where she studied. One morning, however, her father decided to take her by the hand and bring her to Sumner School, just a few blocks away from their house. Rev. Brown entered the building and went straight to the principal's office, but he was told that Linda could not join the other boys and girls studying at Sumner. The rejection had nothing to do with Linda's grades, behavior or intelligence. The problem was that Linda Brown and her family were African Americans, and Sumner School was an all-white facility.

The events of that morning of September 1950 snowballed into one of the most important judicial cases in the US' history. The National Association for the Advancement of Colored People (NAACP) was able to convince an initially reluctant[191] Rev. Brown to go to court and sue the Topeka Board of Education, in a seemingly hopeless effort to strike down the laws which enforced segregation in the United States. The lawyers of the NAACP had been relentlessly looking for a case that would allow them to challenge racially discriminatory statutes in front of the Supreme Court, and they found in the dispute between Brown and Topeka the perfect occasion to do so. The Legal Defense Fund of the NAACP could have chosen among several similar cases across the country, with analogous controversies coming up from everywhere in the USA, from South Carolina to Delaware. However, one key element separated the case *Oliver Brown et al. v. The Board of Education of Topeka, Kansas*

[190] "Topeka". *Encyclopedia Britannica*, 11 June 2020. Available at: https://www.britannica.com/place/Topeka, accessed on 14 April 2021.
[191] Cheney, C. (2019), The Brown v. Board of Education case didn't start how you think it did, *PBS NewsHour*. Available at: https://www.pbs.org/newshour/education/the-brown-v-board-of-education-case-didnt-start-how-you-think-it-did, accessed on 15 March 2021.

from all the other disputes: the quality of Monroe Elementary School. The all-black facility indeed had nothing to envy to its white counterpart, as Linda Brown herself confirmed:

> *I remember Monroe School, the all-black school that I attended, as being a very good school as far as quality is concerned. The teachers were very good teachers. They set very good examples for their students and they expected no less of the students. I remember the facility being a very nice facility, being very well-kept. I remember the materials that we used being of good quality. As I said, this was not the issue of that time, quality education, but it was the distance that I had to go to acquire that education.*[192]

By the beginning of the 1950s, some high schools and graduate schools had already been forced to accept black students,[193] but segregation was still enforced in every south-eastern state, from Texas to Virginia. The lawyers of the NAACP, led by Thurgood Marshall,[194] understood that elementary schools represented one of the last barriers separating races, and if blacks and whites would have started to live in desegregated environments since the infanthood, the institutionalized racism enforced through the Jim Crow laws would have collapsed soon afterwards. Since the quality of Monroe Elementary School was very similar to that of the white schools in the city, Marshall and his team challenged the foundational principles of segregation. The problem for the black students in Topeka was not the lack of good books, high-quality teachers or safe facilities. What was harming them and their families was racial discrimination itself, as segregation was damaging both for the black community and for the American society as a whole.[195] Twelve other African American families tried to enroll their children in all-white schools across Topeka during the autumn of 1950, and the Legal Defense Fund decided to join all the lawsuits in a single class action in the Kansas District Court.

The three-judges panel of the District Court ruled in favor of the Topeka Board of Education: although they recognized that the impossibility to enroll in white schools created discomfort to black families and to their children, the facilities in Topeka respected the "separate but equal" requirements

[192] Interview with Linda Brown Smith (1985), Eyes on the Prize, Washington University in St. Louis, Blackside, Inc.
[193] See: Murray v. Pearson, Md. Court of Appeals (1936); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).
[194] By 1950, Thurgood Marshall (1908-1993) had already become a household name within the NAACP. He was the lawyer chosen to represent the association in Murray v. Pearson of 1936, which led to the abolition of segregation in Maryland' higher education facilities. Before *Brown v. Board of Education*, Marshall had already argued 12 cases before the United States Supreme Court.
[195] It is important to note that, because of the good quality of the all-black schools in the city, many African Americans living in Topeka were against desegregation in education. A 1941 poll revealed that approximatively 65% of the black parents were in favor of "dual education", and several members of the black community of Topeka later resented the NAACP lawyers working on *Brown*. See: Cheney, C. (2011), Blacks on Brown: Intra-Community Debates over School Desegregation in Topeka, Kansas, 1941-1955. Western Historical Quarterly, *Oxford University Press*, Vol. 42, No. 4, pp. 481–500.

that the Supreme Court set out in 1896 in the ruling of *Plessy v. Ferguson.*[196] The Court brought up, as an example, the issue of transportation: while black boys and girls had to travel much greater distances than their white counterparts, buses transported African-American kids to and from school free of charge, a service that was not offered to children attending white facilities.[197] The District Court judges hence found that, although separate, the schools were fundamentally equal in quality, and for this reason they dismissed the plaintiffs' requests. By 1952, every one of the four separate lawsuits filed in South Carolina, Delaware, Virginia and in the District of Columbia had been decided by the respective tribunals, resulting in an almost total defeat for the Legal Defense Fund.[198] The NAACP, however, did not give up, and appealed to the United States Supreme Court. In June, the SCOTUS announced that it would hear the cases of *Brown* in the upcoming October term, and then consolidated all the other proceedings into a single case, *Brown v. Board of Education*. The arguments in front of the Supreme Court first started on December 9, 1952. The NAACP legal team was led by Thurgood Marshall and other notable figures such as Robert Carter, George E. C. Hayes and James M. Nabrit. Their adversaries, representing the states, were captained by the veteran and former presidential candidate John W. Davis, one of the most famous and renowned constitutional lawyers in America.[199] Marshall and the LDF based their argument on the Fourteenth Amendment, claiming that racial segregation was incompatible with the Equal Protection clause. On the contrary, Davis contended that education fell under the discretionary powers of the states, and that the *Plessy v. Ferguson* rule of separate but equal represented a valid benchmark to assess the "constitutionality" of facilities. Furthermore, the Fourteenth Amendment did not need to follow the integration process, as the states' legislatures were already doing their best efforts to make black facilities equal to the white ones.

Although Davis proved to be a formidable adversary, the Legal Defense Fund had a secret weapon in its arsenal: dolls. During the trials, the plaintiffs exploited the testimony of African American psychologist Kenneth Clark, which was asked to present to the Court his studies on racial self-perception among children. In the 1940s, Dr. Clark and his wife Mamie had developed a series of studies on race, published in the article "Racial Identification and Preference in Negro Children".[200] The research revolved around an experiment known as the "Doll Test", in which black children were

[196] Plessy v. Ferguson, 163 U.S. 537 (1896). The case has already been mentioned in the section dedicated to the analysis of constitutional guarantees in the USA.
[197] U.S. District Court for the District of Kansas - 98 F. Supp. 797 (D. Kan. 1951).
[198] The other cases were Belton v. Gebhart (Delaware); Bolling v. Sharp (Washington D.C.); Briggs v. Elliot (South Carolina); Davis v. County School Board of Prince Edward County (Virginia).
[199] Brown represented Davis' 140th appearance before the Supreme Court over the course of his illustrious career. See: Ely Jr., James W. (1974), Lawyer's Lawyer: The Life of John W. Davis, Michigan Law Review, Vol. 72, N. 7.
[200] Newcomb, T. M. and Hartley, E. L., Readings in Social Psychology, New York, Henry Holt and Company, 1947, pp. 169-78. (Clark, K. B., and M. P., "Racial Identification and Preference in Negro Children").

presented with two dolls, one dark-skinned and one light-skinned. The interviewers would go on to ask the children a set of eight questions,[201] such as "which doll is best" or "which doll looks bad". Finally, the children would then be asked to self-identify, as the interviewer asked would say "give me the doll that looks like you" (Bizarro, 2020). As the vast majority of black children showed a strong preference for the doll with white skin, while attributing all the negative qualities to the dark-skinned doll, Clark argued that the experiment proved that segregation had an undeniably negative impact on the psyche of black people, perpetuating a racial bias.[202] Clark's testimony turned out to be exceptionally persuasive, as the justices and the audience received concrete examples of the detrimental effects of segregation. Yet, despite Clark's and Marshall's best effort, the situation was hanging in the balance, as the Court seemed to be profoundly divided. According to reports, John W. Davis was heard saying that he had won the case "five to four, or even six to three".[203] While it is hard to say for sure how the justices would have voted, some were undoubtedly leaning towards ruling in favor of the states, including Chief Justice Fred M. Vinson. As it stood, it seemed impossible for the justices to reach a unanimous decision, something that many felt to be necessary in order to avoid dissent and non-compliance. Since the Court's yearly term was winding down, on June 8, 1953, the bench chose to follow the suggestion of justice Frankfurter and decided that the case would be reargued in December. The Court also went on to submit five questions to the parties, asking them to analyze further the issue of compatibility of the Equal Protection clause with segregation in educational facilities.[204]

In the middle of an impasse, a cruel twist of fate changed the destiny of *Brown*: Chief Justice Vinson died of a heart attack on September 8, 1953, forcing President Eisenhower to replace him with Earl Warren, at the time Governor of California.[205] The arguments resumed on December 7,

[201] The questions were: (1) Give me the doll that you like to play with — like best; (2) Give me the doll that is a nice doll; (3) Give me the doll that looks bad; (4) Give me the doll that is a nice color; (5) Give me the doll that looks like a white child; (6) Give me the doll that looks like a colored child; (7) Give me the doll that looks like a negro child; (8) Give me the doll that looks like you.

[202] It has to be pointed out that the studies of Kenneth and Mamie Clark did not suggest that children living in northern states had a batter self-perception than their southern counterparts. On the contrary, many children in non-segregated environments had even stronger feelings of inferiority towards themselves. This meant that the discriminatory mechanisms of the whole American society were responsible for the psychological damages inflicted upon blacks, and desegregation alone would not have solved the problem.

[203] Kluger, R. (1976), Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, *Alfred A. Knopf*, New York, p. 581. Cited in: Whitman, L.L., Hayes, M., 2014. Lou Pollak: The Road to "Brown v. Board of Education" and Beyond. Proceedings of the American Philosophical Society 158, pp. 31–60.

[204] See: Thompson, S. (1996), John W. Davis and His Role in the Public School Segregation Cases - A Personal Memoir. Washington and Lee Law Review, Vol. 52.

[205] Although he did not make his opinion public, President Eisenhower allegedly wanted the Court to uphold *Plessy v. Ferguson*, as he believed that it would have been better to begin desegregation from less sensitive areas, and only then move towards the integration of schools. Eisenhower thought that Warren would have shared his moderate views on the issue, but the former Governor instead turned out to be one of the most enthusiastic supporters of a unanimous decision in favor of the Brown. Referring to his appointment of Warren, Eisenhower was later quoted saying: "It was the biggest

1953, and the lawyers of the Legal Defense Fund and John W. Davis squared off once again in the second round of arguments. The duel provided many remarkable moments, but one passage in particular deserves to be mentioned. In the rebuttal of the *Briggs* proceeding, Thurgood Marshall convincingly argued that the states' blatant intention to discriminate against blacks was undeniable, as well as the existence of racial prejudices at the heart of the statuses:

> *[…] [T]here must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes; and we submit the only way to arrive at that decision is to find that for some reason Negroes are inferior to all other human beings. […] The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.*[206]

On May 17, 1954, in front of a packed courtroom,[207] Chief Justice Earl Warren began to deliver the opinion on *Brown v. Board of Education*. On behalf of the entire United States Supreme Court, Warren pronounced these memorable words:

> *We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.*[208]

With an historic, unanimous decision, the Supreme Court declared that segregation in education violated the principles of the Constitution. *Plessy v Ferguson* and the "separate but equal doctrine" were overturned. The ruling essentially put an end to the Jim Crow era and marked a groundbreaking victory for the NAACP. Warren's ability to convince all his fellow justices to rule against segregation made the success resounding, but the battle for equality was far from over.

One crucial problem remained: how could the Court's decision be executed in the South, with an uncompromising Congress and without the support of the White House? The judgement had only

damned-fool mistake I ever made". See: Beyond Brown: Pursuing the Promise, PBS. Available at: https://www.pbs.org/beyondbrown/history/fullhistory.html, accessed on 18 April 2021.

[206] Rebuttal argument of Thurgood Marshall, esq. on behalf of appellants, Harry Briggs, Jr, *et al*. Tuesday, December 8, 1953.

[207] Reports show that the atmosphere inside and outside of the Supreme Court building was electric, as First Street was crowded with hundreds of spectators and journalists. See: A Nation of Liberties, The Supreme Court, PBS (2007).

[208] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

stated that segregated schools were unconstitutional, but it did not provide any concrete instrument for implementation. This deficiency required another ruling from the Supreme Court, known as *Brown II*,[209] which placed the onus on the local school authorities and on the lower courts, asking them to enforce the decision in *Brown I* and to take all necessary steps towards a full integration. The complexity of the situation and the tensions which followed the previous ruling, however, prevented the Court from taking another bold step. The NAACP requested the Supreme Court to force states to comply immediately, but the bench's decision went in a different direction. Knowing full well that southerners would resist desegregation with all means necessary, the Court, under the advice of Justice Frankfurter, eliminated the term "forthwith" (suggested by the Legal Defense Fund) and chose to say that the implementation would take place "with all deliberate speed".[210] These few words, in the eyes of Robert Carter, "compromised the Court's integrity".[211] The justices hoped that the more cautious approach would facilitate the South' acceptance of desegregation, but in practice it undermined and castrated the decision of *Brown I.* Whites often chose to react with violence to the imposed integration with blacks, but even when they avoided vehement opposition to the federal orders, states authorities would simply go on to ignore the directives, as when Sen. Byrd launched the "Massive Resistance" campaign in Virginia: since public schools were forced to integrate, the states simply shut them down and cut off their funds; boards were empowered to assign students to specific schools; tuition grants were given to allow families to enroll their children in private schools.[212] The victory of *Brown* almost started to sound like a defeat for the NAACP, as segregation continued to be the enforced in the South. However, despite years of defiance of the Court's decisions, something truly had started to change. *Brown* marked the beginning of a new era in the United States, and can be considered as the first great victory of the Civil Rights Movement.

Brown v. Board of Education only reached its true conclusion in 1964, when one of the original consolidated cases, *Griffin v. School Board of Prince Edward County,*[213] reappeared on the docket of the Supreme Court.[214] With a 7-2 decision, the Court held that closing public schools "with the express purpose of denying education to a group of children based on race" violated the principles of the Fourteenth Amendment, and called upon the district courts to order the local authorities to collect

[209] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
[210] Ibid.
[211] A Nation of Liberties, The Supreme Court, PBS (2007).
[212] Massive Resistance was a political project created in 1956 by Virginia Senator Harry F. Byrd Sr. It was intended to prevent integration in the South following *Brown*. See: Massive Resistance, Virginia Museum of History & Culture. Available at: https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive, accessed on 20 April 2021.
[213] Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964).
[214] The Virginian county had continued to resist integration even after *Brown I* and *II*.

the necessary taxes to reopen public schools.[215] Finally, three years later, on June 13, 1967, time came for President Johnson to make his second nomination to the SCOTUS. Johnson chose to appoint a well-renowned lawyer by the name of Thurgood Marshall, which became the first African American to sit in the United States Supreme Court.

1.b. CHEZ v. Komisia za zashtita ot discriminatsia

During World War II, both European citizens and their governments got to witness the devastating effects of racism from up-close, and after the end of the conflict, with a sort of "collective epiphany" most of these societies started to project themselves as post-racist (Lewis, 2013; Orsini, 2021). The states' leaders which came out on the winning side of the war convinced the public opinion that racism, xenophobia and discrimination belonged to the defeated regimes, and had no place in the new liberal Europe. The question of race almost disappeared from the political discourse, as if that horrendous plague had made its last victim in a Berlin bunker in 1945. But the seed of hate remained hidden under the soil, and it survived the waves of decolonization and the socio-cultural evolutions which were taking place in America. Although states turned a blind eye to the issue of discrimination, racism was never fully eradicated from the Old Continent. Coherently with the position of most of its Member States, the European Union did not seem to consider race as a primary concern. The issue, which until the late 1990s did not belong to the field of competence of the EC/EU, was mostly left to the ECHR.

At the end of the millennium, as the public discourse begun to focus on the problem of race and institutionalized racism, the EU slowly started to pay more attention to the subject. The increased awareness by the European institutions was demonstrated in 2000 by the adoption of the Racial Equality Directive (RED)[216] and of the Employment Equality Directive,[217] which strengthened and enlarged the scope of EU anti-discrimination laws on a variety of grounds (sex, ethnicity, disability, sexual orientation, age, etc.). Despite these developments, the fight against discrimination in the EU continues to be carried out to promote market integration,[218] and it is no coincidence that the preamble of the Racial Equality Directive ties the anti-discrimination effort of the Union to the necessary conditions "in the context of the access to and provision of goods and services"[219] and for "a socially inclusive labour market",[220] confirming the latter's unparalleled importance within EU law. While

[215] Griffin v. School Board of Prince Edward County, Oyez. Available at: https://www.oyez.org/cases/1963/592, accessed on 20 April 2021.
[216] Directive 2000/43/EC.
[217] Directive 2000/78/EC.
[218] Handbook on European non-discrimination law, European Agency for Fundamental Rights, 2018.
[219] Ibid., § 4.
[220] Ibid., § 8.

the Charter of Fundamental Rights also became an incredibly important document for rights tutelage in the European Union, the selected case study will primarily concern the effects of the Directive 2000/43.

The dispute at the heart of the *CHEZ* case[221] took place 2008 in the Bulgarian town of Dupnitsa. Ms. Nikolova, owner of a grocery store, lived in the district of Gizdova mahala, mainly inhabited by people of Roma origin. Between 1999 and 2000, the energy supply company CHEZ Razpredelenie Bulgaria AD (CHEZ) had installed the electricity meters of the district on concrete pylons at heights ranging from six to seven meters, making them incredibly hard to access for consumers. In other parts of the town, instead, the same devices had been installed on the walls of the consumers' properties at approximatively 1.7 meters high. Nikolova, frustrated by the fact that she could not monitor her electricity consumption to control whether she was being overcharged in the energy bills, decided to sue the company. She argued that CHEZ had put the meters at such an inconvenient height because of the ethnic origin of the majority of the inhabitants of the neighborhood, and that she and the other people of the Gizdova mahala district were being discriminated on the basis of their nationality (although Ms. Nikolova herself was not part of the Roma community). CHEZ did not deny of having adopted specific measures in the area, but claimed that the actions were justified by "the vast number of unlawful connections and of cases of damage and meter tampering".[222]

The plaintiff lodged an application with the *Komisia za zashtita ot diskriminatsia* (Commission for Protection against Discrimination, KZD), which in 2010 concluded that CHEZ's practices "constituted prohibited indirect discrimination on the grounds of nationality".[223] One year later, however, the Supreme Administrative Court annulled the KZD's judgement, primarily because "the KZD had not indicated the other nationality in relation to the holders of which Ms. Niklova had suffered discrimination".[224] Hence, the Commission was asked to consider whether nationality was the right discrimination ground, and this time it ruled that Ms. Nikolova had suffered from direct discrimination because of her "personal situation". CHEZ appealed the decision before the Administrative Court of Sofia, and while the court ruled that the ethnic origin of the district's inhabitants was the most appropriate discrimination ground of the case, it also requested a preliminary ruling of the European Court of Justice, submitting a set of ten specific questions concerning the Racial Equality Directive.[225]

[221] Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015).
[222] Ibid., § 36.
[223] Ibid., § 24.
[224] Case Summary CHEZ Razpredelenie Bulgaria AD v Komisia, Equal Rights Trust (2015).
[225] Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015), § 37.

On July 16, 2015, the European Court of Justice gave its judgement on the case *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*. The ECJ began by dealing with one of the arguments of the Bulgarian firm, which claimed that, since the EU had not set out rules related to the location of electricity meters or to their visual access, the dispute fell outside of the scope of the Directive 2000/43. The Court quickly dismissed such argument, as Article 3(1)(h) of the provision "makes general reference to access to and supply of goods and services which are available to the public".[226] As the installation of electricity meters is an integral part of the supply of the good offered by the company, the dispute did concern EU law, and thus directive was fully applicable to the circumstances.

The Court then went on to address the ten questions submitted by the Administrative Court of Sofia, condensing its answer into five points. First, the Court analyzed the principle of equal treatment[227] and the interpretation of the concept of "ethnic origin". The judges exploited the definitions offered by the Charter of Fundamental Rights[228] and by the ECHR, stating that "the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community".[229] Offering a clear-cut definition of ethnicity is *per se* a daunting task, but the issue was made even more complex by the fact that, as mentioned above, Ms. Nikolova was not of Roma origin. To avoid any problem of interpretation on whether the practices carried out by CHEZ accounted for direct or indirect discrimination, the Court stated that the directive had to be intended as "to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds".[230] The fifth question instead involved the Paragraph 1(7) of the Supplementary Provisions of the Law on protection against discrimination (ZZD), which described an "unfavourable treatment" as any act which directly or indirectly prejudices "rights or legitimate interests".[231] The Court found this provision to limit the scope of the Directive, since it contained a condition (the one of prejudicing rights or legitimate interests) which was not present in the text of the RED. Since the Directive 2000/43 requires a non-

[226] Ibid., § 41.
[227] Directive 2000/43/EC, art. 2(1).
[228] "(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited; (2) Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited". Charter of Fundamental Rights of the European Union, art. 21.
[229] Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015), § 46.
[230] Ibid., § 56.
[231] Ibid., § 61.

restrictive interpretation and it represents a set of minimum requirements that MS legislations can only expand and integrate, the definition offered by the ZZD did not respect its parameters.

After having assessed these preliminary elements, the Court moved to the central question of the case, whether the behavior of CHEZ constituted a form of direct discrimination or not. The Court noted that such determination must be made by the competent national tribunals, as art. 267 TFEU does not allow the ECJ to apply EU law to the specific case, but nevertheless allows it to provide elements to carry out such assessment. Consequently, the Court went on to underline a series of fundamental aspects of the dispute which could demonstrate the existence of a less favorable treatment on the grounds of ethnicity. First, the judges specified that the presence of non-Roma people within the district was not sufficient to rule out the fact that the practice under scrutiny was designed in light of the ethnic origin of the majority of the inhabitants, as it was only implemented in predominantly "Roma" districts. Additionally, the company had suggested on various occasions that it believed the tampering of electricity meters was being perpetrated "mainly by Bulgarian nationals of Roma origin". The Court found such claims to be based on dangerous ethnic prejudices and stereotypes, as CHEZ failed to produce evidence to sustain such assertions, suggesting instead that they are "common knowledge".[232] The fact that the practice had been applied for nearly three decades to all the district's inhabitants – whether or not the meters had actually been tampered – made the firm's behavior even harder to justify. Thus, to respond to three of the questions submitted by the Bulgarian Court, the ECJ stated that if the national tribunal were to find that such measures had been taken on the grounds of the ethnic origin of the neighborhood's inhabitants, the practice would have to be interpreted as a form of direct discrimination.[233]

Moving on to the sixth, seventh and eight questions, the ECJ considered an alternative scenario in which the national court would have judged the actions of CHEZ not to be directly discriminatory. The Court hence tried to determine whether the definition of indirect discrimination could also be applied to the case. The ruling explains that when a "difference in treatment" is carried out "for reasons relating to racial or ethnic origin", the measure represents without any doubt a form of direct discrimination.[234] The indirect typology, instead, does not necessitate such *a priori* motivations, and it only requires the effect of putting persons of a certain ethnic origin at disadvantage (Benedi Lahuerta, 2016). For these reasons, even if the "apparently neutral practice" did not directly disadvantage the ethnic group, it would have still infringed upon the rights protected by the Directive,

[232] Ibid., §§ 82-83.
[233] Ibid., § 91.
[234] Ibid., § 95.

and it would have to be considered as an indirect form of discrimination.[235] Finally, the judgement addressed the legitimacy of the company's objectives, as CHEZ claimed to have put the measures in place only to avoid illegal doings (such as tampering), to protect the life of those who had been carrying out such unlawful activities and to ensure the correct distribution of electricity to users. While such aims were considered legitimate by the Court, they were also found to be insufficient to justify such practices. Since the burden of proof had shifted upon the company,[236] CHEZ had tot demonstrate the existence of a major risk of tampering, and it failed to do so. While it was up to the national court to determine the existence of less restrictive means that could achieve the same aims, the ECJ pointed out that the measures taken by CHEZ were disproportionate, and their overall features could not be justified.[237]

The *CHEZ* ruling is remarkable for a variety of reasons. Together with its previous judgement in *Firma Feryn*,[238] the Court stressed the importance of a non-restrictive interpretation of the provisions contained in the Racial Equality Directive, and clarified the fundamental difference between direct and indirect forms of discrimination. The ruling also symbolizes an increasing attention to the concept of ethnicity within the context of EU Law, an issue that had largely been ignored until the early 2000s. The difficulties in dealing with racial discrimination in Europe can be attributed to a variety of factors. For instance, countries such as the UK, France, Portugal or Spain have been forced to deal with anti-discrimination law primarily in the context of immigration from their former colonies (Hepple, 2006), a complex situation which requires discussions over the concepts of nationality, ethnicity, citizenship and even moral dilemmas regarding colonial compensation. Europe also has a more gruesome background of religious discrimination (especially, but not only, the Jewish community), which was experienced on the majority of the continent throughout the last two millennia and that eventually culminated in the Holocaust. In the United States instead, although discrimination on the grounds of nationality or religion certainly does exist, the issue has historically revolved more on phenotypical

[235] Ibid., § 109.
[236] While the burden of proof generally belongs to the victims, the Racial Equality Directive requires the alleged perpetrators to prove that they did not carry out discriminatory practices. The rule does not apply to criminal cases and MS can choose whether to exclude its application in administrative proceedings. Once the victims have convinced the competent authorities that they had suffered discrimination, the burden of proof automatically shifts to the defendants. This provision is aimed at making the lodging of complaints regarding discriminatory practices easier, as it would be otherwise hard to provide evidence under normal circumstances. See: Handbook on the racial equality directive, Euractiv (2020).
[237] Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015), § 127.
[238] Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (2008).

aspects such as the skin color. In America, the label of "colored" was sufficient to trigger the "difference in treatment", although such definition lacks any logical sense.[239]

CHEZ can also be seen as an example of the effort of the European Union to address the issue of Roma integration within its society. Although the Roma represent the largest ethnic minority in the continent,[240] the community lacks cohesiveness and structure. For this reason, although several organizations such as the European Roma Rights Centre have been trying to combat the anti-Roma discrimination practices, many members of the group are not aware of the judicial means at their disposal, of their rights or of the entities which can represent them in legal proceedings (Benedi Lahuerta, 2016).

Despite the progresses made in the last decades, European Union Law still appears to be only partially capable ensure the protection of minority rights. In *Brown v. Board of Education*, the US Supreme Court justices focused in large part on the morality of the issue at stake, with the cultural, psychological and social effects of segregation proving to be decisive factors for overturning *Plessy v. Ferguson*. The ECJ, instead, is comparatively more constrained than its American counterpart by the boundaries set in the Treaties, which essentially reduce the scope of anti-discrimination laws to market-related disputes. In addition, the Court is also limited by the fragmented and decentralized nature of the EU judicial system (Farkas and Gergely, 2020). The competence on racial and ethnic discrimination remains in the hands of the Member States, and when proceedings acquire a "European" dimension, the matters are almost always brought before the ECtHR. The amount of cases referred to the Court of Justice regarding discrimination on the grounds of ethnicity is meager, with *Firma Feryn* and *CHEZ* being among the few – if not the only – notable rulings issued by the ECJ on the topic until today (de Búrca, 2016). Additionally, although the Court has called for a non-restrictive interpretation of the Racial Equality Directive, many commentators have pointed out that the judges have wasted significant opportunities to further develop a substantive understanding of racial discrimination (Atrey, 2018). The most notable example is the *Jyske Finans* case,[241] where bank requested additional proof of identity to a Danish citizen born in Bosnia and Herzegovina and

[239] The number of examples that can be brought to demonstrate the lack of sense behind color-based distinctions is incalculable. One of the most interesting cases of racial discrimination in the USA is that of Italian Americans, which were considered "colored" up until the late 19th century. See: Staples, B. (2019), How Italians Became 'White.' *The New York Times*.

[240] Rustem, R. (2016), Europe's largest ethnic minority continues to face intolerable discrimination and unequal access to vital services, Council of Europe. Available at: https://www.coe.int/en/content/europe-s-largest-ethnic-minority-continues-to-face-intolerable-discrimination, accessed on 29 April 2021.

[241] Case C- 668/15, Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic (2017).

not his Danish-born partner.[242] In its decision, the ECJ refused to recognize the practice as a form of direct discrimination, because in the judges' view the RED requires the identification of a specific ethnic group as the victim of discrimination, and since the measure supposedly targeted everyone born outside of the EU-EFTA area, it did not produce a particular disadvantage to a single ethnic group. The justification offered by the court that "a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group"[243] seems inadequate, to say the least. While *Jyske Finans* may be considered as a misstep by those willing to see a more proactive Court in the field of minority rights protection, the courage demonstrated in *CHEZ* should give reasons to be fairly optimistic. The RED, the CFR and the rulings of *Firma Feryn* and *CHEZ* show that the EU as a whole has been trending in the right direction, and it should continue to do so in the near future.

[242] Ismar Huskic was a Danish citizen born in Bosnia and Herzegovina. The bank did not ask for additional proofs of identity to his partner, born in Denmark. Mr. Huskic was unfairly suspected of money laundering just because of his place of birth, and it thus could be argued that he did indeed suffer from discrimination because of his Bosnian origins.
[243] Ibid., § 20.

2. Right to abortion

The discussion will now move to the controversial topic of abortion rights, with the analysis of *Roe v. Wade* in the United States and *Grogan* in the EU. *Roe* is one of the most debated cases ever ruled upon by the US Supreme Court, having generated an enormous number of political and legal battles which continue to the present-day. The Supreme Court is still constantly asked to review its constitutionality because of its great importance. The *Grogan* proceeding can be considered as *Roe*'s European counterpart, and it is undoubtedly one of the most discussed cases of the last decades within the landscape of EU law (despite the Court's unwillingness to explicitly rule upon the right to terminate a pregnancy). Recent developments in states such as Poland and Ireland make this case extremely relevant for the study of rights protection in the EU.

2.a. Roe v. Wade

Norma McCorvey was only 21 years old when, in 1969, she discovered she had become pregnant for the third time. Norma, who had already given up for adoption two children, sought to terminate her pregnancy, but the laws of the state of Texas – in which she resided – allowed abortion only when the mother's life was at risk. After having unsuccessfully pursued illegal ways to terminate the pregnancy, McCorvey was referred to two Texas attorneys, Linda Coffee and Sarah Washington, which had been seeking to challenge the constitutionality of the state's restrictive regulations on abortion. With their help, Ms. McCorvey (under the pseudonym of Jane Roe) filed a lawsuit against the District Attorney of the Dallas County, Henry Wade. The case *Roe v. Wade* was heard by the US District Court for the Northern District of Texas by a three-judge panel. In her suit, Roe was joined by Doctor James Hubert Hallford and by a married couple, John and Mary Doe. Dr. Hallford was a Texas physician that had been prosecuted for violating the state's laws on abortion. He argued that the regulations prevented him from fulfilling his duty to ensure sufficient medical care to his patients. Additionally, Hallford claimed that the statute did not provide sufficient warnings for doctors to know which actions were criminally punishable. The Does, instead, argued that the Texas legislation infringed the women's right to health, as Mrs. Doe claimed that a pregnancy would have put her well-being at risk. The court decided that both Roe and Hallford had standing to bring the lawsuit,[244] while the Does were dismissed since they failed to demonstrate the existence of a real controversy.

On June 17, 1970, the District Court ruled in favor of Roe and Hallford, stating that "[t]he fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment", and "[t]he Texas Abortion

[244] Dr. Hallford was accepted as an intervenor.

Laws infringe upon this right."[245] The judges hence declared that the abortion laws of the Lone Star State were unconstitutional, as they violated the right to choose whether to have children. The court found this to be a constitutionally protected right, as the Ninth Amendment[246] expressly stated that fundamental rights cannot be limited to those enumerated in the first eight amendments.[247] Furthermore, the vagueness of the statute was found to be in violation of the Due Process Clause of the Fourteenth Amendment.[248] Both the US Supreme Court and the California Supreme Court had already issued influential rulings on the matters of abortion and use of contraceptives. In its judgment over the case *People v. Belous*, the California SC wrote:

> *The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a `right of privacy' or `liberty' in matters related to marriage, family, and sex*.[249]

Despite the ruling in her favor, the case resulted in a Pyrrhic victory for Norma McCorvey. Although the Texas District Court struck down the statute, it refused to issue an injunction to allow her to carry out the abortion, since federal courts have to refrain from directly interfering with state criminal laws.[250] For this reason, Ms. McCorvey (after giving birth for a third time) decided to appeal the denial of injunction to the United States Supreme Court,[251] with Henry Wade also cross-appealing against the grant of declaratory relief by the District Court. *Roe v. Wade* thus reached the Supreme Court in 1971, and the case was consolidated with a similar proceeding, *Doe v. Bolton*,[252] which concerned the abortion regulations of the state of Georgia. The case was argued for the first time on December 13, 1971 in front of only seven justices, since Hugo Black and John Marshall Harlan II

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[245] Roe v. Wade, US District Court for the Northern District of Texas - 314 F. Supp. 1217 (N.D. Tex. 1970), conclusions of law §§ 3-4.

[246] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

[247] In their reasoning, the judges made reference to the concurring opinion of Mr. Justice Goldberg in the 1965 case Griswold v. Connecticut: "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.[…] The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." See: Griswold v. Connecticut 381 U.S. 479 (1965).

[248] On this issue, the ruling contains a reference to the Supreme Court case Connally v. General Construction, in which the SCOTUS stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law". See: Connally v. General Construction Co., 269 U.S. 385 (1926).

[249] People v. Belous, 80 Cal. Rptr. 354 (1969).

[250] Also, Ms. McCorvey was already six months pregnant by the time the court issued its judgement, way past the usual deadline set approximatively at three months.

[251] The proceeding skipped past the US Court of Appeal (Fifth Circuit). The direct appeal to the SCOTUS was allowed by a specific congressional provision which applied to three-judge panel decisions either granting or denying injunctions. See: Weiner, M.H. (2016), Roe v Wade Case (US). Max Planck Encyclopedia of Comparative Constitutional Law, Democracy Collection.

[252] Doe v. Bolton, 410 U.S. 179 (1973).

had retired a few months prior. Their substitutes, William Rehnquist and Lewis Powell,[253] joined the court in January of the following year, and felt unable to contribute to the judgement, having missed a significant part of the debate. For this reason, the case was re-argued on October 11, 1972. Sarah Weddington represented Roe, while Robert Flowers argued for Wade and the state of Texas.[254] The Supreme Court, led by Chief Justice Warren Burger and in its full nine-members formation, reached a decision on January 22, 1973, delivered by Justice Blackmun. With a 7-2 majority,[255] the Supreme Court of the United States declared the Texas criminal abortion laws unconstitutional, recognizing a woman's right to voluntarily terminate her pregnancy.

First, the Court addressed the issue of *locus standi*. Contrary to Flowers' claim that Roe did not have standing to sue since her pregnancy had already ended naturally (i.e., she had given birth), the justices found that the termination did not make the case "moot", as pregnancy is capable of repetition. Litigations over pregnancy issues are hence exceptions to the rule that an "actual controversy must exist at review stages".[256] Dr Hallford was instead dismissed from the case since he could not demonstrate that his federal rights were being violated in the ongoing state prosecutions, and because federal courts must refrain from enjoining pending state courts proceedings.[257] After having acknowledged that Roe had the right to bring the suit before the Court, the justices came to address the central topic of discussion, the right to abortion. The bench immediately underlined that it was fully aware "of the sensitive and emotional nature" of the controversy, which made the decision extremely problematic. The Court then provided an historical overview of the regulations on abortion, discussing a variety of provisions such as ancient Persian law, the Greek and Roman statutes, common-law tradition etc. In substance, the justices claimed that, up until the 19th century, under many legal systems women "enjoyed a substantially broader right to terminate a pregnancy"[258] than in most of the American states.

The articles of the Texas Penal Code under scrutiny were articles 1191-1194 and 1196, which considered abortion a criminally punishable offense under all circumstances, with the only exception

[253] The addition of Rehnquist and Powell is noteworthy, because they both held conservative views (they were appointed by Republican President Richard Nixon). In their 1989 article on the assessment of ideological values of Supreme Court justices, Segal and Cover designed a scale ranging from -1.0 (extremely conservative) to +1.0 (extremely liberal). Rehnquist received a score of -.91, while Powell was given a value of -.67. See: Segal, J.A., Cover, A.D. (1989), Ideological Values and the Votes of U.S. Supreme Court Justices, *The American Political Science Review* 83, pp. 557–565.

[254] Flowers substituted Jay Floyd, who represented for Wade in the original argument.

[255] The decision in favor of Roe, delivered by Blackmun, was joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell. Burger, Douglas and Stewart filed concurring opinions. Instead, Justices White and Rehnquist did not join the majority, and Rehnquist filed a dissenting opinion.

[256] Roe v. Wade, 410 U.S. 113 (1973), pp. 123-129.

[257] This principle was emphasized in several cases, such as Younger v. Harris, 401 U.S. 37 (1971).

[258] Roe v. Wade, 410 U.S. 113 (1973), pp. 140.

being situations in which the mother's life was at risk. As already mentioned during the analysis of the dispute before the District Court, Roe claimed that the statutes were in violation of the Fourteenth Amendment's Due Process Clause, since they infringed upon the principle of personal liberty, and of the Ninth Amendment, which recognized the existence of fundamental rights not enumerated in the Constitution. Among these rights, the appellant made specific reference to the right of personal marital, familial, and sexual privacy, which the SCOTUS had already acknowledged in the case *Griswold v. Connecticut.* Although the Constitution does not explicitly mention the right to privacy, it was found to be one of the cardinal rights protected by the Fourteenth Amendment.[259] The Court argued that privacy encompassed a woman's freedom to decide to terminate her pregnancy. At the same time, the justices recognized the necessity to balance the mother's personal liberty with the state's interest in protecting potential life. Hence, the right to abortion cannot not be considered as an absolute one and it must be subject to limitations, since the mother's privacy is not "isolated" or limited just to herself. It is also important to underline that the justices chose to avoid the question of "when does life begin",[260] but specified that the constitutional conception of "person" could not be applied to unborn children. This discussion was particularly important for Wade's argument, since Texas claimed that life begins at the moment of conception. For the reasons presented above, the Court provided a general framework based on the temporal stage of the pregnancy, setting a "compelling point" at three months, since medicine had established that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth".[261]

Abortion statutes would then have to respect a three-fold set of guidelines. Within the first three months, the physician and the patient would have the freedom to choose whether to terminate the pregnancy without interference from the state. After this point, each state would have the option to regulate abortion as to protect the mother's health. On the contrary, after the stage of "viability",[262] each statute could choose to proscribe abortion, with the exception of those cases in which the mother's life would be at risk.[263] The absence of any sort of distinction between early and late stages

[259] Ibid., pp. 153-154.
[260] "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Ibid., pp. 159.
[261] Ibid., 163.
[262] Viability is defined as "the capability of a fetus to survive outside the uterus". See: "Viability." *Merriam-Webster.com Dictionary*, Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/viability, accessed on 8 April 2021.
[263] "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.; (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. 113 (1973), pp. 164-165.

of the pregnancy was considered by the justices as one of the most unacceptable features of the Texas statute. For the reasons shown above, the Court found the legal text to be incompatible with the constitutional principles of the Fourteenth Amendment (concerning the Privileges or Immunities, Due Process and Equal Protection clauses) and of the Ninth Amendment (recognizing the existence of fundamental rights not enumerated in the Constitution), and hence struck it down. It is important to point out that the joint case of *Doe v. Bolton* also played a significant role in the decision. The most important impact of *Doe* concerns one specific feature of the ruling: since the two judgements had to be "read together",[264] the Court could not use the argument of "vagueness" to rule upon *Roe*, as the Georgia statute contained specific indications regarding abortion prohibitions (Weiner, 2016).

Roe v. Wade allows for a variety of considerations. For instance, as noted by Stephen Gardbaum, the degree of divergence among states in America is rather unique for a federal system. Gardbaum indeed points out that in federal systems such as Germany, Canada and Switzerland, abortion generally falls under criminal law, which is regulated at a federal level. Even in Australia, where criminal law is not one of the enumerated powers of the central government and thus abortion regulations differ across states and territories, the divergences are nowhere near those present in the United States (2007). The lack of harmonization of criminal law at the federal level, along the other peculiar characteristics presented in the previous chapters, make the US system quite exceptional. The comparison with the European Union on the issue of abortion will prove to be instrumental for a broader understanding of the two structures. As analogous case will show, although different institutional and political variables have influenced the proceedings, the EU as well is forced to manage the great divergences among its component states on this delicate topic.

The decision in *Roe v. Wade* has had an enormous impact not only on the specific subject of termination of pregnancy, but also on women's rights and privacy, and it is universally considered as one of the most important rulings ever issued by the Supreme Court. Nevertheless, it would be naïve to think that the debate over abortion could be resolved by a single judicial decision, and indeed the discussions and conflict on this subject continue to this day.

From a purely legal standpoint, the fundamental problem of *Roe* is related to the multiplicity of interpretative doctrines applicable to the Constitution. For instance, the decision and the subsequent rulings upholding it were strongly criticized by Justice Antonin Scalia, which joined the Supreme Court in 1986. In his dissenting opinion in the case *Planned Parenthood v. Casey*,[265] Scalia contested the justices' unwillingness to overrule *Roe*, famously expressing is discontent with the sentence "The

[264] Ibid., 165.
[265] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Imperial Judiciary lives".[266] The passionate disagreement was motivated by the fact that, in his view, the right to abortion had been fabricated by the Supreme Court. The Constitution contains no explicit mention of the right to terminate a pregnancy, and for this reason the power to regulate this matter has to be exercised by the states' legislatures, which can ensure democratic accountability (Cassidy, 2016). The federal government cannot interfere with this prerogative, let alone the unelected justices of the Supreme Court. Scalia's criticism of *Roe* comes from its Originalist and Textualist judicial philosophy,[267] which requires jurists to adhere to the original text of the Constitution.

The emphasis on Antonin Scalia's interpretation of *Roe* is not accidental. Amy Coney Barrett, the latest justice appointed to the Supreme Court, has often been described as the heir to the late judge.[268] Barrett has confirmed her ideological connection to Scalia on numerous occasions. At her confirmation hearing in 2020, Barrett said: "Justice Scalia was obviously a mentor, […] and his philosophy is mine too."[269] The Supreme Court's decision to hear a case concerning a Mississippi statute prohibiting abortions after the 15th week of pregnancy,[270] one of the dozens of anti-abortion statutes introduced by Republican legislatures in the last few months, represents an enormous threat to abortion rights in the United States.[271] With a new conservative majority in the Court, the hypothesis of a potential overruling of *Roe v. Wade* does not seem too far-fetched.

2.b. SPUC v. Grogan

The story of the *Grogan* case begins in 1983, neither in a court of law nor in a medical facility, but in the polling stations of Ireland. The coalition government of the Christian center-right, led by Garret FitzGerald, had proposed a constitutional amendment, and the Irish people endorsed it with a nearly 67% majority through a referendum held on September 7, 1983.[272] The Eight Amendment simply consisted in the addition of a subsection to Article 40 of the Constitution. It read:

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[266] Ibid.

[267] Originalism, like Textualism, is a doctrine under which the Constitution has to be interpreted with the original meaning intended at the time of its drafting and ratification. Contractualism instead looks at the document as a contract, which judges are obliged to respect. For Scalia then, if a right is not present within the constitutional contract, as in the case of abortion, it cannot be exercised by the federal government.

[268] Tarm, M. (2020), Scalia "heir" Barrett may be open to reversing Roe v. Wade, *AP News*. Available at: https://apnews.com/article/donald-trump-amy-coney-barrett-us-supreme-court-courts-antonin-scalia-0f1f64e9da312cb60312b6795b196de8, accessed on 9 March 2021.

[269] Amy Coney Barrett SCOTUS confirmation hearings. *PBS NewsHour*, 13 October 2020. Available at: https://www.youtube.com/watch?v=HiAC4EXPR0c&ab_channel=LastWeekTonight, accessed on 9 March 2021.

[270] Mississippi abortion: US Supreme Court to hear major abortion case, *BBC News*, 18 May 2021. Available at: https://www.bbc.com/news/world-us-canada-57148278, accessed on 23 May 2021.

[271] Franz, J., With dozens of anti-abortion bills introduced this year, states aim to chip away at Roe v. Wade. *USA Today News*. Available at: https://www.usatoday.com/story/news/politics/2021/02/23/states-anti-abortion-bills-2021-set-sights-roe-v-wade/4561634001/, accessed on 9 March 2021.

[272] Kelly, F. (2018), Poll to introduce Eighth Amendment in 1983 had 53.7% turnout, *The Irish Times*. Available at: https://www.irishtimes.com/news/ireland/irish-news/poll-to-introduce-eighth-amendment-in-1983-had-53-7-turnout-1.3508753, accessed on 9 March 2021.

> *The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.*[273]

While abortion had always been illegal in the country, these few lines gave Ireland the most restrictive set of abortion rights in Europe (Vauchez, 2010). In spite of this "remarkable" achievement, not everyone was pleased with the near total prohibition of abortion in the Emerald Isle, and several groups started to challenge the regulation. Among these groups, some students' organizations stood out, namely the Union of Students in Ireland (USI), the University College Dublin Students Union (UCDSU) and the Trinity College Dublin Students Union (TCDSU). These associations began to spread information regarding abortion clinics in the UK, in order to assist pregnant women who wished to terminate their pregnancies. They shared the locations of the facilities, arranged travels and distributed the contacts of the centers. These data were also included in the monthly or annual guidebooks published by the same student groups, although they never actively encouraged, promoted or advocated abortion.[274]

The actions of the student groups were considered unlawful by a pro-life organization, the Society for the Protection of Unborn Children (SPUC), which in 1989 filed lawsuits against the associations' representatives in order to stop them from facilitating abortions. The SPUC had already been part of an important proceeding just four years earlier, in 1985, the *Open Door* case.[275] The defendants, the counselling clinics known as "Open Door", were brought before the High Court by the SPUC because they had been presenting abortion as a possibility in case of unwanted pregnancies, and occasionally referred patients to specialized facilities in the United Kingdom. The clinics based their defensive argument on two elements: first, a "gag injunction" would infringe upon the right to expression guaranteed by the ECHR; second, abortion was a lawful service provided by another Member State of the European Community. Restricting relevant information or limiting travel would automatically hinder the women's right to benefit from such service, violating Articles 59 and 60 of the EEC Treaty (De Búrca, 1993). These arguments were considered insufficient by the Irish tribunals, as both the High Court and the Supreme Court held that the actions of the defendants were in violation of Article 40.3.3 of the Constitution (the Eight Amendment). The judges affirmed that the right to life prevails over the freedom of expression, and even the distribution of information on abortion would be in breach of the constitutional principles of Ireland. The two clinics did not concede defeat and decided to lodge an appeal before the ECHR. After having obtained a favorable opinion of the Commission,

[273] Eight Amendment of the Constitution Act, 1983.
[274] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others (1991).
[275] Advocate General (SPUC) v Open Door Counselling Ltd and Dublin Well Woman Centre Ltd (1988).

which found the appeal to be admissible,[276] the European Court of Human Rights held that the rulings of the Irish Courts were in violation of Article 10 of the Convention. The demands of the SPUC would have infringed upon the right to freedom of information and were considered disproportionate by the ECtHR.[277] The ruling of the European Court of Human Rights, however, only came in 1992, three years later the controversy between the SPUC and the students' groups accused in *Grogan*. Hence, at the time of *SPUC v. Grogan* only the rulings of the High Court and of the Supreme Court had been issued, and both were in favor of the pro-life organization.

Contrarily to the *Open Door* case, in *Grogan* the High Court of Ireland decided to refer the question to the ECJ through Article 177 of the EEC Treaty.[278] The decision to ask for a preliminary reference represented a crucial turning point for the whole proceeding, because it directly made the matter of communitarian significance, calling into question the validity of the Irish regulations in relation to the EEC's laws. Before reaching the European Court of Justice, the proceeding took a tortuous path. Once the High Court raised the preliminary references procedure to the ECJ and denied the injunction against the students, the SPUC decided to appeal to the Supreme Court. The judges of the SC permitted the High Court to bring forward their request for an ECJ judgment, but also granted a temporary injunction as requested by the SPUC. Finally, the Supreme Court allowed the parties to apply once again to the High Court with the aim of modifying their requests according to the ECJ's ruling.[279] It is also important to highlight that, in its decision, the Supreme Court suggested that even if the ECJ would have found Irish regulations to be incompatible with European law, it would have refused to subordinate a constitutional principle in favor of communitarian rules. Although this position would have gone against some of the cardinal principles of European law, most notably its supremacy over national legislation, justice Walsh claimed that only the Supreme Court of Ireland could determine the relationship between amendments to the constitution, in this case the Third, which allowed the country to join the EC, and the Eight Amendment (Colvin, 1991).

The dispute thus reached the European Court of Justice, as the case concerned the interpretation of Community law. Three were the questions asked to the ECJ: (1) Does abortion qualify as a "service" as defined by art. 60 of the EEC treaty?;[280] (2) Can a Member State prohibit the distribution of information regarding clinics performing abortions in another Member State?; (3) Does a person

[276] Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 14 EComHR Dec. & Rep. 131 (1991).
[277] Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 246 ECtHR, (1992).
[278] Now Article 267 TFEU.
[279] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others (1991).
[280] "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions." This definition is now found in art. 57 TFEU.

in Member State A have the right to distribute information on such clinics operating in Member State B, if abortion is prohibited in Member State A but lawful (under certain conditions) in Member State B?[281]

Regarding the first question, the Court immediately affirmed that legal abortions, since they are generally performed in exchange for remuneration, constitute medical activities falling under the definition of "services".[282] SPUC had contested this interpretation, claiming that abortions could not been considered services since they were "grossly immoral" and led to the destruction of life. However, the Court refused such argument since morality did not influence in any meaningful way the definition of the practice. The ruling also added that "it is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally".[283]

In order to answer to the second and third questions, the Court's focus shifted over Article 59 of the Treaty, which prohibited restrictions on the freedom to supply services. The judges found that the link between the activities performed by the students organizations and the clinics in which abortions were performed was "too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty".[284] In other words, the Court stated that the connection between the actors involved was too weak to trigger the application of EC law, and by consequence the prohibition could not be regarded as a barrier to the free movement of services. Although the information spread by the defendants could not be protected by provisions relating to an economic activity, it could be regarded as a manifestation of their freedom of expression. For this reason, the Court moved to answer the third and final question, whether an injunction would have violated Article 10 (1) of the European Convention on Human Rights. Having reached the heart of the whole ruling and with the chance of delivering a historic decision on abortion rights in Europe, the ECJ chose to back down. Since the case did not fall under EEC law, as Article 59 was not applicable, the Court could not pronounce itself on the compatibility of the Irish regulation with the fundamental rights protected by the Convention. Therefore, the judges ruled that:

> *[…] [I]t is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary*

[281] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others (1991).
[282] The court had already established that medical activities should have to be considered as economic services. See: Joined cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro (1984), p. 16.
[283] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others (1991), p. 20.
[284] Ibid., p. 24.

termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.[285]

The Court's unwillingness to take a stance on abortion rights was met with disappointment, and the decision of the European Court of Human Rights to rule in favor of the counseling clinics in the *Open Door* case one year later made the ECJ appear even weaker. However, as pointed out by Stéphanie Hennette-Vauchez, it would be too simplistic to depict the ECtHR as the champion of abortion rights in Europe while condemning the ECJ's decision as an act of cowardice. This narrative only focuses on the final outcomes of the two judgements, but disregards their rationale (Hennette-Vauchez, 2017). It is important to stress the fact that the ECtHR did not rule upon a question regarding reproductive rights, but rather on a violation of the freedom of expression. On a certain sense, abortion is merely a background actor in the *Open Door* ruling of the ECtHR, while the protagonist's role is given to Article 10(1) of the Convention. A careful observation of the *Grogan* ruling instead reveals a number of elements that should not be overlooked or underestimated. For instance, while the Court found that the link between the students' groups and the clinics was insubstantial, it implicitly suggested that a stronger connection between the parties would have led to a different outcome (Mercurio, 2003). Even more importantly, by recognizing abortion as a service, the judges affirmed its relevance at the European law level. Despite these necessary considerations, the *Grogan* case still demonstrates the stringent jurisdictional boundaries which limit the CJEU (both the ECJ and the GC) when dealing with this complex issue-area, as further confirmed by later proceedings involving the use of stem cells from human embryo (see, for instance the *Brüstle*[286] and *Puppinck*[287] cases).

Termination of pregnancy remains an extremely controversial topic in Europe, and the jurisprudence on this issue continues to evolve. The ECtHR remains particularly active on this matter, having dealt with notable cases such as *A., B. & C. v. Ireland*[288] or *R.R. v. Poland,*[289] but it has not yet been able to issue a decision with the same magnitude and importance of *Roe v. Wade*. The same is true for the European Court of Justice. Despite the ratification of the Charter of Fundamental Rights and the innovations brought by the Treaty of Lisbon, pluralism still prevails in the European Union on abortion regulations (Fabbrini, 2011). This troublesome heterogeneity has been confirmed on numerous occasions: Ireland obtained a special protocol to the Maastricht Treaty in 1992, underlining that nothing in the treaties "shall affect the application in Ireland of Article 40.3.3. of the Constitution

[285] Ibid., p. 32.
[286] Case C-34/10, Oliver Brüstle v Greenpeace eV (2011).
[287] Case C-418/18 P, Patrick Grégor Puppinck and Others v European Commission (2019).
[288] A., B. & C v. Ireland, Application no. 25579/05, ECtHR (2010).
[289] R.R. v. Poland, Application no. 27617/04, ECtHR (2011).

of Ireland".[290] Similarly, Protocol 30 to the CFR guaranteed Poland and the UK that "[t]he Charter does not extend the ability of the [ECJ], or any court or tribunal of Poland or of the [UK], to find that the laws, regulations or administrative provisions, practices or action of Poland or of the [UK] are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."[291]

Today, only two Member States still enforce severely restrictive laws on voluntary terminations of pregnancies, Poland and Malta.[292] Ireland does not figure anymore in this list because, after to the popular backlash which followed the death of Savita Halappanavar in 2012,[293-294] the country held a referendum to repeal the Eight Amendment. The referendum – and the 36th Amendment to the Irish Constitution[295] – allowed the Oireachtas[296] to legislate on abortion. The Health (Regulation of Termination of Pregnancy) Act of 2018 now permits abortions generally until the twelfth week of gestation.[297]

[290] Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities, 7 February 1992.
[291] Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 26 October 2012.
[292] European Abortion Law: A Comparative Overview, Center for Reproductive Rights. Available at: https://reproductiverights.org/european-abortion-law-comparative-overview-0/, accessed on 13 April 2021.
[293] Woman dies after abortion request "refused" at Galway hospital, *BBC News*. Available at: https://www.bbc.com/news/uk-northern-ireland-20321741, accessed on 13 April 2021.
[294] Specia, M., 2018. How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign. *New York Times*. Available at: https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html, accessed on 13 April 2021.
[295] Thirty-sixth Amendment of the Constitution Act 2018.
[296] The Irish Parliament.
[297] Health (Regulation of Termination of Pregnancy) Act 2018, section 12.

3. Constitutional principles and international law

The study will finally deal with the complex issue of constitutional compatibility with international law through the juxtaposition of *Medellin v. Texas* and *Kadi v. Commission*, which will demonstrate the degree of "permeability" of the two systems. This comparison will show that, despite the substantial differences at the heart of the two proceedings, the approach of the two courts towards this topic is much more similar than general knowledge would suggest.

3.a. Medellín v. Texas

The issue of international norms' compatibility with national legal systems has always generated controversies. However, between 2004 and 2008, the conflict between the two spheres of law reached a new dimension when the state of Texas chose to challenge the President of the United States, the Mexican Government and even the International Court of Justice. This gigantic clash took place when a Mexican national named Jose Medellín was sentenced to death for the murder and rape of two young girls in the city of Houston. Medellín had confessed his heinous crimes in June 1993, and his conviction for capital murder was confirmed on appeal in 1997. Yet, although Mr. Medellín was correctly given the *Miranda* warning[298] at the time of his arrest, the law enforcement officers committed a serious violation: they did not inform Medellín that he had the right to contact the Mexican consulate. As established in article 36 of the Vienna Convention on Consular Relations, authorities of the receiving state[299] are obliged to inform a detainee of his right to get in contact with a national consul.[300] This seemingly straightforward provision has generated countless interpretation and enforcement problems in the United States, as American courts have often admitted of having disregarded, ignored or violated this norm (Kadish, 1997).

After his conviction, Medellín tried to appeal the decision of the first instance court and later of the Texas Criminal Court of Appeals, claiming that his rights under the Vienna Convention had been violated by the Texan authorities. Both courts, however, rejected his petition for postconviction relief, holding that the claim should have been presented either on trial or on direct review. Additionally,

[298] As established by the Supreme Court in the landmark decision Miranda v. Arizona, 384 U.S. 436 (1966), police forces are required to make sure that a suspect put under arrest is aware of his constitutional rights. The officers are thus required to inform the detainee that he has the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent. See: Miranda Warning, LII / Legal Information Institute. Available at: https://www.law.cornell.edu/wex/miranda_warning, accessed on 1 May 2021.

[299] I.e., the state in which the foreign national is arrested.

[300] Vienna Convention on Consular Relations, article 36(1)(b): "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

the Texas Criminal Court of Appeals argued that Medellín did not demonstrate that the non-notification of his national authorities had in any way affected the validity of his conviction.[301] Even the Federal District Court denied his subsequent writ of *habeas corpus*, as the tribunal reiterated that the procedure had automatically defaulted because of the appellant's failure to raise the claim during trial. While Medellín desperately tried to avoid the death sentence by lodging appeals in both state and federal courts, two more actors joined the stage: Mexico and the International Court of Justice. In 2003, Mexican authorities brought the United States in front of the ICJ, accusing the USA of having infringed upon norms enshrined in the Vienna Convention on Consular Relations. In the lawsuit, which became known as the *Avena* case,[302] Mexico contested 54 convictions and trials carried out by American authorities against Mexican nationals, arguing that the US had failed to respect the obligations of article 36 of the convention by not informing the suspects or detainees of their right to diplomatic protection. On March 31, 2004, the Court held that the United States had violated the norms contained in article 36 of the Vienna convention in 51 of the cases under scrutiny. The ICJ ruled that, as US authorities did not inform their Mexican counterparts promptly, they had deprived Mexico of its right to provide consular assistance. Therefore, the Court decided that the United States were obliged to provide "review and reconsideration of the convictions and sentences",[303] as the Convention guaranteed individually enforceable rights. One of these 51 Mexican nationals entitled to further judicial review was José Ernesto Medellín Rojas.

The decision of the ICJ came while a certificate of appealability from Medellín was pending before the Court of Appeals of the Fifth Circuit. Similarly, this court also went on to deny Medellín his writ of *habeas corpus*, as the judges unequivocally concluded in the proceeding *Medellín v. Dretke*[304] that "[a]rticle 36 of the Vienna Convention does not create an individually enforceable right".[305]

The United States Supreme Court eventually decided to grant the writ of *certiorari* in 2005, with the case *Medellín I,*[306] but the journey of this controversial proceeding was once again altered before reaching the courtroom. On February 28, President (and former Texas governor) George W. Bush[307] issued a Memorandum for the Attorney General in which he ordered all state courts to comply with

[301] Application for Writ of Habeas Corpus in Ex parte Medellín, No. 675430–A (Tex. Crim. App.), pp. 25–31.
[302] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004.
[303] Ibid., § 153(9).
[304] Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004).
[305] Ibid.
[306] Medellín v. Dretke, 544 U. S. 660, 661 (2005).
[307] A few days after the Memorandum, on March 7, 2005, the US withdrew from the Optional Protocol of the Vienna Convention. The decision was notified to the UN Secretary-General Kofi Annan by the US Secretary of State Condoleeza Rice, acting on behalf of the American Government. The withdrawal, however, did not have a direct impact upon the *Medellín* case.

the ICJ's decision in the *Avena* case.[308] The presidential directive pushed Medellín to file a second request[309] for an *habeas corpus* before the Texas Court of Criminal Appeals, which was again dismissed. The state court held that "the ICJ *Avena* decision and the Presidential memorandum do not constitute binding federal law",[310] affirming – in other words – that the President did not have the constitutional authority to tell state courts to apply a decision.[311] After the SCOTUS granted a second *certiorari,* on October 10, 2007, *Medellín v. Texas* was finally argued before the Supreme Court. The United States also joined the proceeding as *amicus curiae*, supporting Medellín's petition to oblige state courts to enforce the *Avena* decision and the presidential memorandum, while the state of Texas acted as the respondent. On March 25, 2008, with a 6-3 majority decision, the Supreme Court ruled in favor of Texas and upheld the decision of the Court of Criminal Appeals.

The court was faced with two main questions: first, whether state courts are constitutionally obliged to enforce international treaties and rulings of the ICJ; second, if the President of the United States can oblige states to comply with such decisions or treaty obligations. The Supreme Court began by addressing the issue of direct enforceability of the ICJ judgement. Medellín argued that the *Avena* ruling constituted a binding decision for state and federal courts, as treaties (such as the Optional Protocol) are automatically transformed into law through the Supremacy Clause.[312] Hence, in the plaintiff's view, the ICJ ruling created a pre-emptive norm which prohibited "contrary state limitations on successive *habeas* petitions".[313] Although the Court recognized the fact that the decision of the ICJ had created an *international law* obligation, it refused to acknowledge it as a binding piece of *domestic law*. Citing its previous decision in *Igartúa-de la Rosa v. United States*,[314] the US Supreme Court underlined how some treaties "are merely aspirational and not law in any sense. Others may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms".[315] Since the Optional Protocol, the ICJ Statute and

[308] Memorandum for the Attorney General, 28, 2005: "[…] I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."
[309] Meanwhile, the SCOTUS dismissed its first request for a *certiorari*.
[310] Ex Parte Medellín, 223 S.W.3d 315, § 352 (Tex. Crim. App. 2006).
[311] Denniston, L. (2007), Argument preview: Medellin v. Texas, SCOTUSblog. Available at: https://www.scotusblog.com/2007/10/argument-preview-medellin-v-texas/, accessed on 2 May 2021.
[312] U.S. Const. art. 6, § 2: "[…] 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, anything in the Constitution or laws of any State to the contrary notwithstanding."
[313] Medellín v. Texas, 552 U.S. 491 (2008).
[314] Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005).
[315] Ibid., § 150.

even the UN Charter lacked the required implementing legislation, the Court concluded that the *Avena* judgement could not be considered as a directly-binding domestic law. Furthermore, although the USA had agreed to accept the authority of the ICJ under the Vienna Convention, "submitting to jurisdiction and agreeing to be bound are two different things," and the Protocol itself neither describes the effect of an ICJ decision nor does it commit signatories to comply its rulings.[316] Additionally, the commitment to enforce the ICJ rulings is set out in article 94 of the UN Charter, which the Supreme Court considered as a further demonstration of the non-directly binding character of the decisions. The SCOTUS stressed how in the first section of the article[317] each Member State "undertakes to comply" with the decisions of the ICJ, a wording that implicitly shows how such norms require actions from national governments. As the following paragraph of the same article indicates the referral to the UN Security Council as the (only) remedy for non-compliance,[318] the Court concluded that the Charter "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."[319] Another crucial element considered by the justices in the first part of the ruling concerned the nature and the essential characteristics of the ICJ. In the case *Sanchez-Llamas v. Oregon*,[320] the SCOTUS had already underlined how the International Court of Justice has to be intended as an organ which settles disputes between national governments, and individuals have no standing before such tribunal. The fact that Medellín himself was one of the persons listed in the *Avena* case did not make him a party to the proceeding, and ICJ decisions only have binding force "between the parties and in respect of [the] particular case."[321] Finally, the Court pointed out that none of the State parties to the Protocol or to the Vienna Convention have ever treated the ICJ rulings as binding, self-executing norms. Hence, the justices concluded that:

> *Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections."*[322]

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[316] Medellín v. Texas, 552 U.S. 491 (2008).
[317] Charter of the United Nations, Chapter XIV, art. 94(1): "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".
[318] Ibid., (2): "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."
[319] Medellín v. Texas, 552 U.S. 491 (2008), citing Head Money Cases, 112 U.S. 580 (1884).
[320] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006). This case, decided shortly after *Avena*, is closely related to the ICJ judgement although it did not directly involve any of the individuals included in the analogous proceeding. The Supreme Court's ruling in *Sanchez-Llamas* was in clear contrast with the ICJ's, as it established that the Vienna Convention on Consular Relations did not preclude the application of default rules in legal proceedings.
[321] Statute of the International Court of Justice, art. 59.
[322] Medellín v. Texas, 552 U.S. 491 (2008).

The Supreme Court then moved on to the second argument, which required a double response because of the slightly different observations brought forward by Medellín and by the United States. Medellín claimed that the *Avena* judgement had acquired binding force *also* thanks to the President's Memorandum (but the ruling already had such effect *per se*), while the US government argued that the POTUS could establish rules preempting contrary state legislation, although the ICJ decision did not have an automatic power to repeal rules of procedural default.[323] Regarding the United States' argument, the Court the made reference to the Youngstown tripartite test.[324] While the President claimed that the treaties implicitly gave him the authority to implement their obligations, the justices affirmed that "converting a non-self-executing treaty into a self-executing one"[325] is an exclusive responsibility of the Congress. The POTUS has the constitutional prerogative of making a treaty,[326] but once its domestic effect is determined as indirect, the legislative branch gains the exclusive responsibility of making the required implementing laws. Finally, the ruling dismissed the last argument proposed by Medellín, which claimed that the Memorandum fell under the "Take Care" power of article 2 of the Constitution.[327] The majority concluded that this provision could only be applied by the President to execute legislation, not to make it. Hence, as the Court had already determined that the ICJ decision was not domestic law, this constitutional provision could not be applied. For all the reasons above, the Supreme Court of the United States upheld the judgment of the Texas Court of Criminal Appeals. On August 5, 2008, after a final request for another appeal before the SCOTUS,[328] José Ernesto Medellín was executed in Huntsville, TX.

Medellín v. Texas not only offers the opportunity to observe how the American Constitution interplays (and conflicts) with international law, but also serves as a great case study for the analysis of Supreme Court's reasonings. The ruling has been criticized by analysts and jurists because of the Court's obstinate use of a textual interpretation.[329] As pointed out by Jan Klabbers, this approach can be extremely problematic in cases involving international law. In his words, "the Supreme Court relied heavily on 19th century sources (or even older ones, such as the Federalist Papers) to suggest

[323] This seemingly small detail represents an important point of disagreement between Medellín and the US. Solicitor General Paul D. Clement made clear that, in the opinion of the US, the ICJ ruling would not have gained binding force on the state courts without the President's intervention. See: Denniston, L. (2007), Analysis: How to say no to the President? SCOTUSblog. Available at: https://www.scotusblog.com/2007/10/analysis-how-to-say-no-to-the-president/, accessed on 5 May 2021.
[324] Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952). The scheme, proposed by Justice Jackson, describes the directly proportional relation between congressional authorization and the President's authority. The more Congress supports or explicitly delegates a power to the executive, the more the exercise of such power is legitimate.
[325] Medellín v. Texas, 552 U.S. 491 (2008).
[326] U.S. const. art. 2, § 2.
[327] Ibid., § 3: "[…] [The President] shall take Care that the Laws be faithfully executed".
[328] Medellin v. Texas, 554 U. S. ____ (2008).
[329] The Court itself responded to the criticisms towards the textualist approach within the ruling, saying that "[g]iven our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue."

that the USA never meant to give domestic effect to international judgements – blissfully ignoring the circumstance that international tribunals hardly existed in the 19th century" (Klabbers, 2013). Similar observations have also been presented by Justice Breyer in his dissenting opinion, in which he wrote: "the majority looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."[330] Critics have also underlined how the Court's decision essentially ignores the essence of the Supremacy Clause (Monson, 2012), while others have highlighted the ruling's coercive interpretation of law, which it confuses the concepts of bindingness and enforcement (Paulus, 2009).

Yet, although *Medellín* appears to be controversial from an international law perspective, its deficiencies are related to the wider problem of "impermeability" of US domestic law. It is hard to single out any blatant mistakes in the Court's reasoning, and although the textualist approach may not be a *panacea*, it remains a valid and generally accepted interpretative doctrine within American constitutional law. Additionally, the extensive use of precedents – albeit ancient ones – is an integral part of Anglo-American judicial tradition,[331] and the Court cannot be asked of disregarding past jurisprudence in order to adapt the country's legal system. Such modernization process, in the sense of an increased compatibility with international law, would require a multi-partisan effort that far outweighs the powers of the SCOTUS. The comparison with the *Kadi* case will also demonstrate that the US Supreme Court is not alone in its resistance to international norms. With this being said, *Medellín v. Texas* certainly raises some legitimate question on the United States' observance of treaty obligations and international commitments.

3.b. Kadi v. Commission

The story of the *Kadi* case is well-known among scholars (and students) of European law. In 1999, as the tensions in Afghanistan were rapidly escalating with of the emergence of al-Qaeda and its leader, Osama bin Laden, the Security Council of the United Nations issued a number of resolutions[332] condemning the terrorist groups in the region. The penalties imposed by the Sanctions Committee included the freezing of funds and assets of all the individuals and entities associated with the terrorist organization. The European Community took the necessary steps to implement the UN resolutions, and one of the people present in the list of persons subjected to the restrictive measures

[330] Breyer, J., dissenting, Medellín v. Texas, 552 U.S. 491 (2008).
[331] The strongly dualist interpretation of international and domestic law is another important point of contact between the UK and the US legal systems. In British law, according to "constitutional orthodoxy" the two legal spheres are separated entities and, for this reason, the implementation of international obligations depends upon domestic law. See: Mance, J. (2017), International Law in the UK Supreme Court.
[332] Specifically, Resolution 1267 (1999) and Resolution 1333 (2000).

of Regulation (EC) No 467/2001[333] was Al-Qadi, Yasin, also known as Kadi, a Saudi national with several assets in Europe. Mr. Kadi contested the sanctions before the Court of First Instance of the EC (the General Court, now replaced by the Tribunal) and sought the annulment of all the measures directed towards him.[334]

The complaint against the Council and the Commission was built upon three grounds of annulment. Kadi argued that the regulations infringed upon his right to be heard, violated the right to property and of the principle of proportionality, and finally that they breached his right to effective judicial review.[335] The CFI, however, rejected Kadi's arguments. The court established not only that the European Treaties provided the EC sufficient authority to issue the regulations, but even more importantly that the obligations arising from the Security Council and the UN system prevailed over domestic and even treaty law. Thus, although the EC is not party to the UN Charter, the primacy principle enshrined in article 103 made Security Council decisions binding even for the European Community.[336] A couple of aspects of the CFI decision are definitively worth mentioning. First of all, the court refused to accept the dualist conception of European and International law presented by the applicant in his argument. The CFI ruled that the EC's legal order had to be considered as subject to the norms set by the international community, and the European Community was indirectly bound from obligations stemming from the United Nations Charter. At the same time, however, the court affirmed that the *jus cogens*[337] constituted a set of imperative norms which even the Security Council was forced to respect. The CFI hence stated that if Security Council regulations were to found to be in violation of one of these peremptory laws, "they would bind neither the Member States of the United Nations nor, in consequence, the Community".[338] For this reason, the court unexpectedly concluded that under extraordinary circumstances it had the right to review the compatibility of SC resolutions with *jus cogens* norms, although such form of judicial review would not have been permitted in case of a violation of rights only protected by the EC (de Búrca, 2017). Still, the CFI refused to accept the request of the applicant, and Mr. Kadi appealed the decision before the European Court of Justice.[339]

[333] His name was actually added in the list through the amending Commission Regulation (EC) No 2062/2001 of 19 October 2001.
[334] He also filed requests for his delisting in the US, the UK and Switzerland,
[335] Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (2008).
[336] Case T-315/01, Kadi v. Council & Commission (2005).
[337] "The body of higher rules of public international law binding on all subjects of international law". Ibid., § 226.
[338] Ibid., § 230.
[339] The case was joined with another proceeding, *Al Barakaat*.

Before moving to the observation of the ECJ ruling, it is necessary to take a look at the Opinion issued by AG Maduro in assisting the Court, as his words proved to be rather influential over the decision.[340] The Advocate General argued that the ECJ had the duty to protect the fundamental rights of the Community, such the right to judicial remedy or the principle of due process, even though it is always required to pay attention to the international context in which it operates.[341] Thus, Maduro claimed that the restrictions imposed infringed upon Kadi's fundamental rights, and since the United Nations lacked of a "genuine and effective mechanism of judicial control by an independent tribunal"[342] that could review such measures, the Court had the duty to annul the regulations imposing disproportionate and insufficiently motivated sanctions.[343] Concerning the analysis of the interplay between European and International law, Maduro was very clear in stating that the legal order of the EC represented a unique and distinct legal sphere. The Treaties have created a set of constitutional obligations which must be respected in spite of the Community or the Member States' international commitments:

> *[I]t would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community*.[344]

Maduro's analysis of the relationship between communitarian and international law became a key ingredient of the ECJ judgement, as on September 3, 2008, the Court ruled in favor of Mr. Kadi and decided to annul the relative sanctions contained in the Council Regulations 881/2002 and 467/2001. While the Court did not share the opinion of Maduro *in toto*, it justified the reversal of the CFI ruling by stating that the measures adopted by the Security Council violated the fundamental rights of the Union. Sharing the AG's dichotomic interpretation of the two legal orders, the Court concluded that "principles of liberty, democracy and respect for human rights and fundamental freedoms"[345] could not be subject to any derogation. Even though the judges confirmed the primacy of international law over communitarian norms, they affirmed that provisions conflicting with the constitutional principles of the EU could not enjoy immunity from jurisdiction. Hence, not even the implementation

[340] Opinion of Advocate General Maduro delivered on 16 January 2008 in Case C-402/05 P, Kadi v. Commission (2008).
[341] Ibid., § 44.
[342] Ibid., § 54.
[343] Ibid., § 53.
[344] Ibid., § 24.
[345] Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (2008), § 303.

of UN provisions could benefit of immunity if found to be in violation of a cardinal principle of the Community such as respect of the rule of law (Simoncini, 2009). Although the European Court of Justice has no authority to review a resolution issued by the Security Council, it does have the power to rule upon EU regulations. With its judgement, the ECJ addressed and overturned some problematic aspects of the CFI ruling, especially regarding the hierarchical position of the UN Charter vis-à-vis European constitutional principles. The ECJ did not deny the preponderance of the UN Charter in comparison to other legal orders, nor did it refuse to acknowledge its special importance within the European system of law. Nevertheless, the Court concluded that no external force could jeopardize or hinder the protection of fundamental rights within the European Union (Schütze, 2018), and that the respect of the rule of law requires institutions to provide substantial evidence to support their actions (Larik, 2014).

The stage is almost set for the comparison between the Court's judgement and the *Medellín* ruling, but the analysis first requires looking at how *Kadi* intertwines with other notable cases in EU jurisprudence. The overall rationale of the ECJ decision closely resembles the interpretative method applied in *Nold*,[346] in which the Court established that any measure adopted at the community level was bound to respect the constitutional traditions and fundamental principles of the Member States. Widening the scope of the analysis, the *Kadi* decision also inherited the constitutional principles affirmed in the *Bosphorus* case,[347-348] which the appellant referred to by stating that "Community law requires all Community legislative measures to be subject to the judicial review carried out by the Court, which also concerns observance of fundamental rights, even if the origin of the measure in question is an act of international law such as a resolution of the Security Council".[349] It may be surprising, though, to realize that the reasoning of the European Court of Justice also seemed to echo the line of thinking of the German Constitutional Court in the *Solange*[350] rulings. With an interesting switch of roles from the part of the European Court of Justice, a *Solange*-like approach can be detected in several aspects of the *Kadi* decision. First, the ECJ assumed a "domestic-court position", addressing the issue from the same standpoint occupied by the BverfG in 1974 and 1986.

[346] Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (1974).
[347] Case C-84/95, Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others (1996).
[348] The proceeding came before both the ECJ and the ECtHR. The latter affirmed that parties to the ECHR remain responsible for actions falling under the scope of their international obligations, and "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer [of sovereignty] would be incompatible with the purpose and object of the Convention". See: Case 45036/98 Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland (2005).
[349] Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (2008), § 255.
[350] 37 BVerfG 271, judgment of 29 May 1974 and 73 BVerfG 339, judgement of 22 October 1986.

Furthermore, with an argument also used by AG Maduro in his preliminary opinion,[351] the Court motivated its decision by highlighting the absence of an adequate mechanism of judicial review at the UN level. While the AG was fairly explicit in raising the *Solange* formula (suggesting that the revision of measures would have been justified until the Security Council would have put in place a system of revision), the ECJ however did not clearly state that new procedural guarantees would have led it to change its decision. Even the Court of First Instance had adopted a very similar reasoning (although opposite in its effect) in its ruling, when the tribunal affirmed that the review of UN measures would not have been permitted as long as the Security Council did not violate *jus cogens* norms.[352]

Despite the favorable decision of the ECJ in 2008, the story of the *Kadi* case did not end with the Court's ruling. Fearful of "irreversibly prejudicing the effectiveness of the restrictive measures",[353] the ECJ did not immediately annul the effects of the regulation, but left it in place for three months in order to allow the European authorities to remedy the infringements.[354] Shortly thereafter, the Commission obtained the authorization from the Sanctions Committee to inform Mr. Kadi of the reasons which motivated the listing. Certain of having respected its procedural obligations, the Commission hence confirmed Kadi in the list of individuals subjected to restrictive measures in Regulation No. 1190/2008. It took another five years for the "Kadi saga" to end. In 2010, he appealed to the General Court, which held that the Commission and the Sanctions Committee had continued to violate the appellant's fundamental rights.[355] The Council, the Commission and the UK brought the matter again before the ECJ. On July 18, 2013, with Kadi having already been delisted by the Sanctions Committee thanks to the intervention of the UN Ombudsperson Office,[356] the ECJ finally closed the proceeding (this time referred to as *Kadi II*) by dismissing the arguments of the appellants and upholding the GC decision. Twelve years after having listed – and without receiving any compensation for the moral and financial damages suffered – Mr. Kadi finally obtained justice (Fontanelli, 2013; Savino, 2011).

The fascinating aspect of the comparing *Medellín* and *Kadi* is that these cases are really two sides of the same coin, so similar and yet so extraordinarily diverse. The issues at stake, for the actors

[351] For instance, in paragraph 54 of the opinion, the underlying argument of the AG could be interpreted as: so long as the UN lacks a judicial control mechanism, the ECJ is allowed to carry out the review of the regulations infringing upon fundamental rights.
[352] Case T-315/01, Kadi v. Council & Commission (2005), § 231.
[353] Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (2008), § 373.
[354] Ibid., § 375.
[355] Case T-85/09, Yassin Abdullah Kadi v European Commission (2010).
[356] Created in 2009, the office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committees reviews the requests for delisting of people associated with the two terrorist organizations.

involved, are fundamentally opposite. In *Medellín*, the dispute saw the international community and the federal government asking the Member State to respect the individual rights of the plaintiff. By ruling in favor of Texas, the Court put the constitutional identity and traditions of the USA ahead of its international obligations. The judgement of *Kadi* had a very similar flavor, although the judgement was the result of the combination of a completely different receipt. Indeed, the individual rights of Kadi were being violated – and not protected – by the international commitments of the member states and EU institutions. The ECJ relied on the constitutional tradition and on the set of fundamental values enshrined in the Treaties to guarantee the protection of due process principle and the right to judicial remedy.

From an international law perspective, the cases had almost identical results: both the EU and the US ended up disregarding their commitments to the international community and, through a dichotomic interpretation of the legal regimes, the courts put the respective constitutional obligations at the top of the judicial hierarchies. European observers may have a slightly biased view on the two proceedings, as *Kadi* is often regarded as an example of the courageous and progressive attitude of the ECJ, while *Medellín* receives a generally bad press outside of the US because of the commentators' personal feelings towards the death penalty (Weiler, 2008). Although it would not be too hard to agree with these opinions, an objective jurisprudential analysis indicates that the cases are much more similar than the final outcomes would suggest. The resemblance is certainly shocking, especially since the EU is often considered as one of the greatest promoters of multilateralism and compliance with international law, while the USA have often been criticized for their "insular" mentality on this topic (de Búrca, 2017). Yet, as this investigation has shown, different roads sometimes lead to the same castle.[357]

[357] Martin, George R. R. (1996). A game of thrones. New York: *Bantam Books*.

VIII. Conclusions

In 1892, former US President Rutherford B. Hayes wrote in his diary: "One of the tests of the civilization of people is the treatment of its criminals."[358] This sentence, occasionally attributed with different wordings to Voltaire or Dostoevsky, conveys a powerful idea that explains the true meaning of this work. If the message is extended to the broader concept of justice, it could be argued that the study of a judicial system can tell a lot about a political structure. This kind of observation becomes ever more effective when two entities are juxtaposed and confronted one with the other. In this research, the meticulous description of the US and EU legal mechanisms represented an attempt to better understand the "soul" of these two giants by looking at how they carry out one of the primary functions of any political structure, the protection of rights. The United States and the European Union are not only two heavyweights of the current international scene, but most importantly they are globally perceived as guardians of the rule of law, which they promote within, as well as outside, their respective territories. This essay, therefore, has tried to underline the main strengths and weaknesses of both the US and EU judicial structures by focusing on the most prominent representatives of each system, the Supreme Court of the United States and the European Court of Justice, with the intention of understanding the dynamics that constantly shape their processes of rights tutelage.

The research has shown how the work of American and European courts is affected by a myriad of elements. Factors such as the balance of power between institutions, the judicial culture and tradition, the interpretative doctrines adopted by judges and the appointment rules have all been found to have great influence on the decision-making procedures of both tribunals. As argued in the previous chapters, judges are not simply the *bouche de la loi*, and their rulings are not the mechanical products of automatons. Additionally, even if it may represent the endpoint of decades of political and social struggles, the fate of a landmark case can occasionally be decided by accidental and unforeseen events such as the death of a justice, as in the case of *Brown v. Board of Education*. In other instances, the opportunity for a court to identify a principle of its legal order may only arise because of the individual decision of an applicant to bring a case before a tribunal, as in *Kadi* or *CHEZ*. Hence, one of the main takeaways from this analysis is that the result of a groundbreaking judicial proceeding is always the product of an intricate concatenation of factors.

With this in mind, it is time to draw some final conclusions on the cases observed. The first two proceedings outlined, *Brown* and *CHEZ*, dealt with the complex issue of racial discrimination, and

[358] Diary and letters of Rutherford Birchard Hayes, vol. 5, 1891-1892, 30 October 1892.

were instrumental to understand the ways in which the judicial systems of the United States and of the European Union have been trying to address this problem. The cases present obvious differences on a number of key features: the historical context, the actors involved and even the severity of the racially discriminatory practices under scrutiny. In *Brown*, the Court felt compelled to make a courageous move by overruling the precedent set in *Plessy v Ferguson*. Although the case is widely considered as one of the most impressive successes in the history of the American Civil Rights Movement, *Brown v Board of Education* has also demonstrates that a judgement alone can only have a limited impact on its surrounding political and cultural environment: the enormous problems of enforcement and implementation that followed the two Supreme Court rulings prove that justice can never be truly achieved if the responsible political actors do not transform the words of the tribunal into concrete remedies. Additionally, *Brown* is an example of the great symbolic importance of unanimous decisions in the SCOTUS jurisprudence, an element which does have the same significance within the work of the ECJ. *CHEZ*, instead, was useful to examinate much more recent anti-discrimination instrument such as the Racial Equality Directive of 2000. The decision of the ECJ shed light on the difference between direct and indirect forms of discrimination, stressed the importance of non-restrictive interpretations of anti-discriminatory laws and also demonstrated that the difference between concepts such as citizenship, race and ethnicity can have a decisive impact on the outcome of a legal proceeding (think, for instance, of the *Jyske Finans* case). Finally, *CHEZ* allowed to reflect upon the limited jurisdiction of the Court, to familiarize with some of the instruments at its disposal and to observe some of the differences between the ECJ and the ECtHR.

The second issue-area analyzed concerned the right to abortion. Arguably the most divisive topic observed during the entire examination, voluntary termination of pregnancy remains extremely problematic in both the US and the EU because it involves multiple fundamental rights at the same time: right to health, right to life, right to privacy and, as shown by the *Open Door ca*se, it has even concerned freedom of speech. *Roe v. Wade* has revealed the importance of interpretative doctrines within the decision-making mechanisms of the US Supreme Court. Justices and legal experts are still divided on the issue because the constitution does not offer a single, univocal answer to the question "is abortion a constitutional right?". On the contrary, the opinions of justices can widely vary depending upon the approach they adopt. This does not mean that the matter is entirely in the hands of the Supreme Court, nor that justices can freely decide over abortion cases according to their personal views. The judgement of the SCOTUS in *Roe* was certainly convincing, well-reasoned and supported by strong constitutional evidence. Nevertheless, it has to be recognized that some of the objections raised by conservative justices such as Antonin Scalia are not unsubstantiated, and the latest developments in the American political environment seem to indicate that, in the near future,

the fight over abortion rights will reach another pivotal moment. In the European Union, instead, countries appear to be on a common path, despite the persisting heterogeneity among member states. Although the EU legislation is far from being harmonized, the events in Ireland after the *Grogan* case, the increasingly proactive approach of the ECJ and the influential presence of the ECtHR suggest that most EU member states are slowly converging towards a similar set of abortion laws. Countries such as Poland and Malta, however, are still actively resisting the process of homogenization of domestic rules on terminations of pregnancies, and a liberal turn in these nations is far from a foregone conclusion.

Lastly, the comparative study of the *Medellín* and *Kadi* cases revealed that, while the Supreme Court and the European Court of Justice present a countless number of differences, the two courts are far more similar than a superficial analysis would suggest – at least when it comes to their interpretation of constitutional rights vis-à-vis international law provisions. In *Medellín*, the SCOTUS openly ignored the acts of both the International Court of Justice and of the President of the USA, allowing Texas to execute a prisoner despite the flagrant infringement of the United States' treaty obligations under the Vienna Convention. While the matter of contention in *Kadi* did not concern the application of an ICJ judgment, but rather a Security Council resolution, the ruling of the ECJ from an international law perspective was fundamentally equivalent: the Court of Justice put the constitutional principles of the Union before its duties towards the international community, and it affirmed that no provisions conflicting with the fundamental values of the EU (as the right to a fair trial and to judicial review) could be considered lawful.

Having thus completed the overview of the selected case law, it is time to outline some potential avenues for future research. The objective of this study was to make a clear description of the US Supreme Court and of the European Court of Justice by observing their behavior in some noteworthy legal proceedings. However, the elements discussed in essay are just the tip of the iceberg. Only three issue-areas were taken into account among an infinite number of possible topics, and the cases selected obviously do not exhaust the courts' jurisprudences on these matters. For instance, regarding anti-discriminatory law, the analysis was limited to racial intolerance. In order to make the examination complete, it would be necessary to expand the study to other grounds of discrimination, such as age, gender, religion or even economic status. The same goes for the two other topics presented, as an even more thorough observation could encompass additional abortion statutes (both in the US and in the EU) or other notable cases of conflict between domestic and international norms. The *Kadi* case could also be useful to open a discussion on anti-terrorism activities and on the related sanctions targeting individual and entities suspected of financing such activities. EU institutions,

together with the international community, have adopted a vast number of counterterrorism provisions over the last few decades, but they have been repeatedly criticized for having failed to respect some fundamental rule of law principles, especially in the field of preventive measures (Mitsilegas, 2021). Because of the complexity of the topic, the fight against terrorism seems to offer interesting points of reflection within the macro-area of fundamental rights tutelage.

The analysis of decision-making procedures could also benefit from the adoption of other methodological approaches. American scholars have already produced a rich body of academic research in this context, describing how the Supreme Court can be influenced by actors such as the public opinion (Handberg, 1984), by lower courts (Corley et al., 2011) or even by its own internal patterns, as consensus norms (Epstein et al., 2001). Similar approaches have been used for the observation of EU organs, especially for institutions such as the Commission or the Council (Novak, 2013). However, the study of the ECJ has been primarily focused on its relationship with other players, as the Court's agenda-setting powers within the decision-making structure of the Union (Lubow and Schmidt, 2019). In order to fully comprehend the everyday dynamics that shape the ECJ, it would be useful to carry out a detailed analysis of its internal mechanisms and to compare the results with other analogous courts.

Finally, the basic characteristics of this research encourage the addition of a third term of comparison. For a variety of reasons, one of the best candidates for this role seems to be the Supreme Court of India. Three main elements would justify the inclusion of the SCI: (1) India is among the biggest players in the global geopolitical scenario; (2) the country is technically a union of states, and it features a peculiar form of federalism that differs from both the US and the EU; (3) the Supreme Court of India, the highest judicial body of the Union, heads a multifaceted compound system of state courts. By incorporating a court like the Supreme Court of India in the investigation, the research would escape from a "Western-centric" view and gain a more global significance. However, the SCI is just one of the many viable options that could reinforce this comparative analysis. If the intention is to maintain the focus on the Atlantic/European area, other suitable candidates would be the Supreme Court of the United Kingdom and the Federal Constitutional Court of Germany. Otherwise, moving towards a more intergovernmental and supranational understanding of fundamental rights protection, even courts such as the European Court of Human Rights or the International Court of Justice would represent intriguing alternatives.

As these final considerations show, the possibilities to enlarge and strengthen this research are virtually infinite. Therefore, future studies will be called to deepen the discussion in order to better understand which mechanisms can better ensure the protection of fundamental rights.

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X. Summary

The United States of America and the European Union are among the most prominent actors of the contemporary political scenario. In order to understand their structure and their fundamental characteristics, this research juxtaposes the two polities by looking at one crucial aspect, their mechanisms of rights protection. More specifically, the essay focuses on the US Supreme Court (SCOTUS) and the European Court of Justice (ECJ), and through the observation of the two tribunals it attempts to describe the main elements characterizing the American and European legal systems. While both their political structured and their legal cultures present severe divergences, the study of the two courts reveals that the United States and the European Union are much more similar than a superficial evaluation would suggest. The two polities share values, traditions and principles, despite the significant differences that their institutional arrangements show. This comparative analysis demonstrates that the US and EU systems have much in common, especially for what concerns the conflicting relationship between member states and central authorities (the federal government in the case of the US, the European institutions in the case of the EU). The purpose of the observation of the SCOTUS and of the ECJ is not only to provide a description of the two judicial branches, but its also seeks to understand the essential characteristics of the institutional structures.

In order to achieve such goals, the scope of the research is not restricted to the examination of the tribunals *per se*. In the second chapter, the essay introduces the main sources of law of each legal system. This section presents the key legal texts used in the study, an essential task that helps to familiarize with the instruments at the disposal of each court. For what concerns the Supreme Court, the emphasis is put on both constitutional and ordinary sources of law. In particular, the unit contains a careful analysis of Article 3 of the US Constitution and on Title 28 of the US Code. While the Constitution sets out the essential characteristics of the Court (its position in the hierarchical structure of the American judiciary system, the length of the justices' terms, etc.), the Code contains more specific provisions, such as the number of judges, their salaries and the minimum quorum required to issue a decision. Additionally, this section outlines the SCOTUS' original jurisdiction and regulates the use of the *writ of certiorari*, that allows the appellate courts to review previous rulings. Regarding the European Court of Justice, instead, discussion revolves around the concept of multilevel constitutionalism (Pernice, 2015), an interpretative approach that describes the connection between European and national legal sources as a functional relationship, and not as a hierarchical one. Afterwards, the section shows the fundamental features of the ECJ by looking at the two European Treaties (the TEU and the TFEU) and at the Court's rules of procedure.

The following unit, Chapter 3, dives deeper into the analysis of the two tribunals by illustrating the peculiarities of their surrounding legal systems. The segment presents the American judicial pyramid as a three-layered structure composed of District Courts, Circuit Courts and the Supreme Court. The description of the framework in which the SCOTUS operates relies upon the examination of two main sets of documents, the Judiciary Act of 1789 and the Federalist Papers. As the chapter shows, these texts are essential to understand the reasons that led the Founding Fathers to design a structure featuring different levels of jurisdictions and a strict separation among the government's branches. The following section of the chapter moves to the analysis of the EU institutional arrangement, a complex apparatus characterized by the simultaneous presence of supranational and intergovernmental principles of integration. Through a brief presentation of the core constitutional principles of communitarian law (such as the primacy over national legislation and the direct enforceability of individual rights in national legal orders), the unit discusses some of the problems caused by the concomitant presence of domestic courts and of the CJEU (composed of two sub-elements, the ECJ and the General Court). The final segment of Chapter 3 is dedicated to the appointing procedures of the SCOTUS and of the ECJ. The mechanisms designed to nominate judges present a very high degree of divergence between the two courts. In the Supreme Court's case, the procedure appears to be extremely politicized, with the President of the USA having an enormous influence over the selection of candidates. For what concerns the ECJ, instead, the appointment process is much more "technical" and obscure, and its lack of transparency has been the subject of criticisms. The evaluation of the two appointment procedures hence sheds light on some of the most controversial aspects of each system, the excessive politicization of Justice in the US and the overly technocratic approach adopted in the EU.

Chapter 4 looks at the two court's historical developments. By adopting a diachronic approach, the research presents the evolution of the SCOTUS and the ECJ over time, observing how they have progressed in relation to the institutional environments they belong to. This chapter heavily relies on the study of some landmark cases in order to demonstrate how and to what extent the courts have changed through the decades. The Supreme Court became a powerful political and institutional actor only in the 19th century, after years of political marginalization. Events such as the end of the Civil War, the ratification of the Fourteenth Amendment and the increase of regulatory laws, together with some substantial modifications to the Court's powers (most importantly, the possibility to cherry-pick cases based upon their importance), propelled the American judicial system into a new age. Yet, the Reconstruction era is only the first of three main turning points in the history of the US Supreme Court. The years of the New Deal and the Roosevelt's presidency are presented as the second crucial moment in the SCOTUS' evolution, as the Court had to adapt to the immense challenges posed by

the Great Depression during the 1930s. The third and final juncture, the age of the Civil Rights Movement, is explored in greater detail within the sections dedicated to the case law analysis (especially in relation to *Brown v. Board of Education*). On the other side of the Atlantic, although the timeframe considered is sensibly shorter, the evolution of the CJEU is presented as a remarkable example of institutional development. This section concentrates in particular on the landmark cases of the 60s and 70s (such as *Costa v. ENEL, Van Gend en Loos* or *Nold*), which left an indelible mark on the history of the European Communities. Thanks to the observation of the Court's jurisprudence, it is possible to discover some key differences between the ECJ and the SCOTUS for what concerns the use of interpretative doctrines, which significantly influence each judicial decision. The size of the courts (27 members in the ECJ, only 9 in the SCOTUS), the presence of the collegiality principle in the European Court of Justice and the importance of the *stare decisis* rule in the American legal tradition are just some of the elements that influence the decision-making processes of the two tribunals.

The fifth chapter comes back to the study of legal sources and expands the analysis by outlying the constitutional guarantees of social and civil rights. This section is of paramount importance because it observes in great detail the relationship between the courts and the constitutional principles of their institutional and political systems. The part dedicated to the United States looks at the Constitution within the wider context of the Anglo-American legal tradition. Indeed, the fundamental set of norms that lie at the heart of the US judicial culture are not only limited to the Constitution's articles and amendments, but they also encompass British texts such as the Magna Carta, the Bill of Rights, the Petition of Right and the Habeas Corpus Act. Regarding the European Union, the research instead explores the controversial relationship between EU treaties and constitutional principles of member states. Through the observation of some relevant case studies, such as the *Solange* rulings of the German Constitutional Court, the unit presents the instruments used to protect fundamental rights at the European level (including the European Convention on Human Rights), as well as the tensions that may arise when these values conflict with those enshrined in the constitutions of the member states. The framework analysis of the two legal systems is completed in Chapter 6, which builds upon the previous segment and examines the conflicts of competences between the states and the central authorities. The clash is described as a perpetual tug-of-war between the states and the two unions, a competition for power that influences both judicial branches. The unit compares the effects of the US provisions, such as the Supremacy Clause contained in Article 6 of the Constitution, with their EU counterparts, presenting the principles of conferral, subsidiarity and proportionality.

Finally, chapter 7 carries out the comparative analysis of the SCOTUS and of the ECJ by focusing on six selected case studies. These proceedings belong to three different issue-areas: minority rights protection, right to abortion and compatibility of domestic constitutional principles with international law.

For the first topic, the proceedings selected are *Brown v. Board of Education* for the US and *CHEZ v. Komisia za zashtita ot discriminatsia* in the EU. The *Brown* case, which consolidated five separate lawsuits, concerns the infamous practice of racial segregation in the USA. *Brown* represented a pivotal moment in the history of Civil Rights Movement in America, as it marked the end of the "separated but equal" doctrine that the Supreme Court had established in the *Plessy v. Ferguson* decision of 1896. The applicants argued that racially discriminatory practices were inherently unequal, and that segregation violated their constitutional rights enshrined in the Equal Protection clause of the Fourteenth Amendment. On the contrary, the Topeka Board of Education and the other states' authorities involved claimed that the facilities reserved to black children respected the requirements set out by the SCOTUS in *Plessy v. Ferguson*. In 1952, with a historic unanimous decision, the Supreme Court decided to overrule the judgements of the District Court of Kansas and declared that segregation in education violated the principles of the Constitution. Although it took nearly a decade to overcome the huge problems of implementation caused by the resistance of segregationist states, *Brown* is rightly considered as one of the most important cases ever ruled upon by the Supreme Court of the US. In the European Union, the analysis focused on the *CHEZ* proceeding, a case which related to ethnic discrimination against Roma people. The applicant contested the practices of its electric energy supplier, which had adopted specific anti-tampering measures in neighborhoods primarily inhabited by Roma, despite the company had no evidence that individuals of such ethnic group had been actually carrying out illicit activities. These preventive measures were considered to be discriminatory by the European Court of Justice, which based its decision upon the Charter of Fundamental Rights of the EU and on the Racial Equality Directive (RED) of 2000. The ECJ's ruling is particularly interesting because, by answering to the questions posed by the Administrative Court of Sofia, the judges offered insights on the difference between indirect and direct forms of discrimination, on the concept of ethnic origin and on some of the peculiar characteristics of the RED, such as the shift of the burden of proof on the alleged perpetrators of discrimination.

The second part of the case law assessment focuses on abortion rights, and it compares the famous *Roe v. Wade* with its European counterpart, *SPUC v. Grogan*. The first proceeding, *Roe*, represents a true milestone in the history of the United States Supreme Court. The case concerned a statute

regulating voluntary terminations of pregnancies in Texas, a set of laws which allowed abortions only when the mother's life was at risk. In 1973, the Supreme Court upheld a previous ruling of the District Court of Texas and declared the Texas criminal abortion laws unconstitutional. The SCOTUS argued that the abortion laws were incompatible with the constitutional principles contained in the Fourteenth Amendment (the Privileges or Immunities, Due Process and Equal Protection clauses) and in the Ninth Amendment (recognizing the existence of fundamental rights not enumerated in the Constitution). The Court, decided to strike down the statute and rule in favor of the applicant, but the justices also set out some limitations in order to balance the mother's personal liberty with the state's interest in protecting potential life. The judgement indeed contains a set of guidelines based on a temporal framework: within the first three months, states would be prohibited from interfering with the physician and the patient's decision on whether to terminate a pregnancy or not. Each state would instead have the possibility to regulate abortion after the first trimester, while after the stage of "viability", every statute could choose to forbid abortions (with the exception of those cases in which the mother's life would be at risk). The study of *Roe v. Wade* is not only useful to reflect upon abortion rights, but also because it serves as a perfect example of how different interpretative doctrines impact the decision of justices. *Roe* continues to be at the center of debates in the United States to this day, and the presence of a new conservative majority in the Court could even lead to its overruling in the near future. The *Grogan* case, instead, involved the termination of pregnancy rules in Ireland, which at the time had one of the most restrictive sets of abortion laws in the European Union. The Society for the Protection of Unborn Children (SPUC) accused some students' organizations of facilitating and encouraging abortions, which were severely prohibited in Ireland (especially after the ratification of the Eight Amendment in 1983). As the case went before the ECJ, the judges were called to rule on whether abortion qualifies as a "service" (as defined the treaties), whether a Member State can prohibit the distribution of information abortions in another Member States and, finally, whether a person has the right to distribute information on the activities of such operations in a country which prohibits abortions. Although the European Court of Justice recognized lawful terminations of pregnancies as "services", the connection between the organizations and the clinics was considered to be too weak to trigger the application of EC law, and the ECJ refused to pronounce itself on the compatibility of the Irish laws with Article 10 of the European Convention on Human Rights. The observation of the *Grogan* case is particularly interesting because it exemplifies the lack of harmonization within the EU on some crucial topics. Nevertheless, subsequent developments (most notably the repeal the Eight Amendment in 2018) also prove that EU member states are slowly converging towards similar sets of abortion laws.

Finally, the comparison between the *Medellín* and *Kadi* cases shed light on the conflicts between constitutional principles and international law provisions. In *Medellín v. Texas*, Texan authorities violated the Vienna Convention on Consular relations by not informing a Mexican national (who had been arrested for rape and murder) of his right to contact the Mexican consulate. However, state courts rejected Mr. Medellín's appeals and ruled that the non-notification had not affected the validity of the conviction, and that the claim should have been presented either on trial or on direct review. Despite the ruling of the International Court of Justice in the *Avena* case, in which the ICJ declared that the United States were obliged to provide review and reconsideration of the conviction and sentence, the courts of Texas refused to comply with the judgment and even with a following Presidential Memorandum in support of the ICJ's ruling. The justices of the Supreme Court eventually agreed with the interpretation of the Texan courts: the SCOTUS ruled that, although the decision of the ICJ had created an international law obligation, the lack of a corresponding piece of domestic law prevented the Vienna Convention from having direct binding force over American tribunals, as treaties are not self-executing and require an act of Congress. While the background story of *Kadi v. Commission* is certainly different from the *Medellín* case, the research reveals that the substance of the ECJ's decision is not too dissimilar from the judgement of the SCOTUS. In *Kadi*, the European Court of Justice ruled that the restrictive measures imposed upon Mr. Kadi (accused of terrorist activities) by the UN Security Council did not respect the core values of the Union, as the UNSC did not provide substantial evidence to support Kadi's listing. Therefore, the ECJ affirmed that affirmed that no provisions could violate the fundamental values of the EU, and even acts of the United Nations would have to be considered as unlawful if in contrast with the constitutional principles of the Union and with the set of cardinal values enshrined in the Treaties (in this case, due process principle and the right to judicial remedy).

In conclusion, the essay explores the topic of fundamental rights protection with the objective of understanding the essential features of the US and EU. The study of the American and European judicial systems illustrates how political, institutional and cultural factors can influence the decision-making processes of the tribunals. Furthermore, the research also reveals that every ruling is the product of complex concatenations of factors, with several intervening variables colliding at once in a single legal proceeding.