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Can the European Union be Considered as a Federal Union of States?

A Comparison Between EU and US with a Focus on Foreign Policy

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Introduction

Scholars have been struggling to identify what the European Union (EU) is and what political system is it based on. There is no agreement on this matter, as it is rather a *sui generis* union of states.[1] Undoubtedly, the EU resembles a dual sovereignty political system, such as federalism. Nevertheless, federalism differs from the EU in several aspects, one of these being its nature. In fact, some states that come together under one government, in this case is called federalism by aggregation, or there is a unified government that because of differences and conflicts between states choose to grant them some autonomy, this case is called federalism by disaggregation.[2]

It is crucial to identify the EU under one single political system. At the same time, it is a difficult task because the EU is constituted by previously independent states that were already strongly affirmed in the international arena. The EU, though, is becoming more important in nowadays geopolitical system, which is a no-one's world that is in-between a shift from a multilateral to a multipolar world.[3] Since the economic crisis of 2008 there has not been a center of world power: the US is still very important but not anymore essential. This no-one's world is characterized by, as mentioned above, a multipolar world threatening the multilateral world of which the EU is the main international actor. The difference between these two worlds is that in the multipolar world, the great powers can be the most influential as a result of their confidence, while, in the multilateral world, the EU is the main actor because of the force of its Member States (MSs) which can speak with a common voice through the EU institutions.

Therefore, the EU is a crucial actor in the current geopolitical system. However, its actions are always perceived as lacking legitimacy and its powers are considered still very dependent on the MSs. It is for this reason that analyzing

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[1] Tömmel, I. (2001). The European Union – A Federation Sui Generis?. In: F. Laursen, ed., *The EU and Federalism Policies and Polities Compared*, New York: Routledge. [online] Available at: https://www.researchgate.net/publication/290630705_The_European_Union_-_A_federation_Sui_Generis, p. 42.

[2] Fabbrini, S. (2007). *Compound Democracies: Why the United States and Europe Are Becoming Similar*. New York: Oxford University Press, p. 88.

[3] Amadio Viceré, M.G. (2018). *The High Representative and EU Foreign Policy Integration. A Comparative Study of Kosovo and Ukraine.* London: Palgrave Macmillan, p. 1-2.

the evolution of the Union following a specific political system would be helpful in increasing its legitimacy, but also its powers. The best way to see if the EU can be defined as a federal union of states is to compare it to a similar case, which the thesis argues the United States (US) is. Thus, the research question to which this thesis will try to find an answer is if the EU can be defined as a federal union of states analyzing, by how the Union has evolved through federal lenses by doing a small focus on the case of foreign affairs, which are treated in a clear manner in the US and is considered a core state power by the European States.

For this purpose, the thesis is divided in three Chapters. The first Chapter is based on the notion of federalism and how it is conceived both in the US and in the EU. In fact, to see if the Union is, or is close, to be a federal union, it is important to define what federalism is and how it is entangled with international law. Moreover, in this Chapter governance systems similar to federalism are also analyzed, to understand how the latter differs from them. The second Chapter is the one focused on the constitutional analyses: it touches upon the US and then the EU, following the main features of federalism regarding the institutional organization and the division of power. Concerning the division of power, a distinction between the vertical and the horizontal one has been done to show how the allocation of power is affected by the existence of two levels of government. For the horizontal dimension, for example, a lot of importance has been given to the system of checks and balances, which is one of the main institutional and constitutional traits of the US that the EU has taken upon. The third and last Chapter, instead, is focused on foreign affairs. This topic is indeed very relevant for the EU in the last decades for the reasons stated above. At the same time, foreign policy has always been pivotal for nation-states and thus it is also for the EU, which is a union of them. In fact, the EU, as Milward stated, was born because a union of the interests of the different Member States was the only way to make them survive modern economic development – that also resembles the reason for which the American States federalized.[4] Moreover, it is considered as a core state power by the MSs and thus it is perfect to see if it is

[4] Milward, S. (2000). *The European Rescue of the Nation-State*. London and New York: Routledge. [online] Available at: https://ereader.perlego.com/1/book/1603992/18, Envoi.

treated differently by the Union in comparison with the US and what are the reasons for such differences.

Through the analysis of the topics of these Chapters, the thesis will try to conclude that the EU has evolved a lot in the last decades taking inspiration from the US as a federation. At the same time, the supranational side of the Union does not still enjoy the powers it needs to be considered a central government of a federal union. Therefore, it should be yet too early to call the EU a federal union, but maybe it can be identified with other political systems that are always based on divided sovereignty.

Chapter I – The Notion of Federalism

1. Different Views on Federalism

a. The Origins of Federalism

Daniel J. Elazar has been one of the greatest contributors to the study of federalism by analyzing its roots and its development through history, but also by analyzing how federalism has helped to bring together very different people. He defined federalism as a mix of shared and self-rule.[5] Nevertheless, it is not easy to find a clear and complete definition of federalism, because this system may vary from country to country in different ways, from the size of regions to the degree of representation of the regions at the national level government. Another important difference, which is the one that often poses the biggest problems at the central government level, is the one of cleavages, both at the regional and local level, that often lead to instability at the federal level.[6]

The most important and clear definition of federalism is the one of Riker that takes into account both its self and shared rule:

> "*a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions*". [7]

Nevertheless, when talking about federalism, there are a lot of types of governance or constitutional systems that come up to mind and that are usually juxtaposed to the EU.

Montesquieu is considered the founding father of the semantics and concept of federalism. He thought that for a republic to be secure it had to be small as by being too large it would collapse because of corruption. At the same time, a state alone would have been too small and irrelevant on the international scene. Therefore, he developed the idea of federative republics, which is based

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[5] Watts, R. L. (2000). Daniel J. Elazar: Comparative Federalism and Post-Statism. *Publius*, [online] Volume 30(4), p. 155-168. Available at: https://www.jstor.org/stable/3330936, p. 161.
[6] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 32-35.
[7] Bay Brzinski, J., Thomas D. Lancaster, T. D., and Tuschhoff, C. (1999). Federalism and Compounded Representation: Key Concepts and Project Overview. *The Journal of Federalism*, [online] Volume 29(1), pp. 1-17. Available at: https://www.jstor.org/stable/3330917, p. 3.

on republics unified through a contract that would make them small and strong enough to survive to monarchies through mutual and reciprocal control.[8] As an example, he used Greek city-states labeling their organization as federative.

Nevertheless, the history of the semantics of federalism goes very back in time and long before Montesquieu. Federalism comes from the word *foedus*, which in Latin means treaty or contract. *Foedus* itself comes from the Latin word *fides*, which means trust. The word *foedus* was already used by the Ancient Roman Empire when treaties were made with populations outside of Italy or with barbarians.[9] In the Middle Ages, instead, the use of this word referred mostly to treaties, mainly for peace, between political entities. In addition, also the word *confederation* was used. In fact, it comes as no surprise that the word *confederatio* came to be used for alliances, like the *Confederatio Helvetica*, which is the name of Switzerland from 1291, and some leagues of the Germanic Holy Roman Empire.[10]

b. Federalism in International Law: An Issue of Sovereignty

Federalism has always clashed with international law as it grants autonomy to entities inferior to the states, on which international law is based and modified the notion of sovereignty.[11] As a matter of fact, international relations for international law are based on the Westphalian model, and thus on nation-states. Federalism, though, counterposes this idea as sovereignty and independence are shared by more than one entity to safeguard the political identity of certain groups. In fact, international law questions the idea of federated states to engage in international relations with other nation-states to see if international agreements done by the central government go against the

[8] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 20.
[9] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 32.
[10] *Ibid*, p. 33.
[11] Rubin, E. L. (2017). The Role of Federalism in International Law. *Boston College International and Comparative Law Review*, [online] Volume 40(2), p. 195-246. Available at: http://lawdigitalcommons.bc.edu/iclr/vol40/iss2/2, p. 195.

MSs because of the delegation of power to an "international institution".[12] Nevertheless, such issues arise only if a second state engages in relations with federated states when national law does not permit the federated states to engage in such. At the same time, federalism should be seen as a solution to intervention in the case of absence of any other remedy by the states as they enjoy autonomy.[13]

For international law, the idea of state sovereignty leaves federalism as a way to describe contractual and international relations between different states. As a matter of fact, confederal unions were identified as international organizations until the 18th century, when the US was born.[14] Before the eighteenth century, there was a strict division between national and international law, the latter being the one of voluntary coordination. In fact, for example, the first Swiss Confederacy, which will be described later, constituted a conceptual problem at that time as state sovereignty was heavily valued.[15] Consequently, such federal unions were either defined as sovereign states or international confederations. For example, the former was the German Empire and the latter was the Swiss Confederacy.[16] Thus, federalism was linked with the international relations of the states.

Moreover, De Vattel's Law of Nations[17] was very influential at that time and described federal republics as:

> "*several sovereign and independent States may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect State. They will together constitute a federal republic: their joint deliberations will not*

[12] Rubin, E. L. (2017). The Role of Federalism in International Law. *Boston College International and Comparative Law Review*, [online] Volume 40(2), p. 195-246. Available at: http://lawdigitalcommons.bc.edu/iclr/vol40/iss2/2, p. 198.
[13] *Ibidem*, p. 195.
[14] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 15.
[15] *Ibid*, p. 17.
[16] *Ibidem*.
[17] Vattel, E. (2011). The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. In: Chitty, J., ed., Cambridge: Cambridge University Press. Available at: https://doi.org/10.1017/CBO9781139095396.

impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements".[18]

Contrarily, in the case in which a state transfers sovereignty to another entity, therefore becoming dominated by it, it stops being a state.[19] In fact, a federal treaty was considered as a mere international pact of voluntary engagements of the different states. Thus, a federal union was considered such until states did not become submitted to a central government with sovereignty.

2. Federalism in Europe

a. The Reasons for the Rise of Federations

Scholars have identified two main reasons for why federations were created: either for security and defense goals, the most common one, or commercial and economic objectives.[20] Riker has stated that there are two different bases for the will to make a union: the expansion – expand territorial control to control an external threat – or military condition – willingness to give up some sovereignty to be protected by or participate to an aggression. In some cases, though, the political factors may outweigh the socio-economic ones.[21] For example, we will look at the cases of Switzerland, Austria, and Germany.

Switzerland was already a league of mutual defense in 1291 when the communities of Uri, Schwyz, and Unterwalden unified. In 1848, it became the second federation in the world, composed of 19 cantons after a story of many wars and the annexation of some French regions and an Italian canton. The creation of the federation came right after the civil war, so it is possible to attribute the cause to the military condition, but it would be wrong to consider only this factor.[22] For example, other factors are the problem of religious cleavages between the cantons, but also economic and external pressures.

[18] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 19.
[19] *Ibid*.
[20] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 76.
[21] *Ibid*, p. 81.
[22] *Ibid*, p. 82

Regarding the economic pressure, the industrialization that hit the cantons in the mid-19th century pressured the state to remove the boundaries that prevented the free circulation of goods between them, and thus their prosperity. In fact, the federal government immediately worked on creating a common economic market. Another reason is the democratization process that started at the end of the 18th century, following the French Revolution, in many cantons. Therefore, there was the need for the government to unify them to overcome their differences.

In addition, Switzerland is also the case of European federation closest to the US. Consequently, just like the US, it is considered a federation by aggregation or union.[23] With the new Constitution, the central government had very limited power as the different states wanted to still be predominant.[24] Again, similarly to the US and the other federations, the Swiss Constitution divided the federal legislature into two chambers: the Council of States (the Senate in the US), representing the different cantons, and the National Council (the HoR in the US), representing the people proportionally. As the central government powers evolved through time in the US, the same happened in Switzerland. The Constitution has been redrafted twice, in 1874 and in 1999. In 1874, some powers like raising an army and developing a common currency were transferred to the central government, but the biggest change has been the need for just a simple majority at the cantonal and national level to change the Constitution.[25] In 1999, instead, the main changes have been that financial and educational powers were transferred from the cantons to the central government. At the educational level though, there is a cooperation between the two levels of government regarding the higher level of education, where the standards are set by the central government and the operational duties are carried out by the cantons.

Austria's federal organization can be traced back to the Holy Roman Empire and the later Austria-Hungarian one. After the Great War, though,

[23] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 96.
[24] *Ibid*, p. 97.
[25] *Ibid*, p. 98.

Austria was a unitary state whose central government in Vienna was not able to keep unchallenged by the regional governments of the countries, leaving a vacuum to the post-war political power.[26] This led to the formation of *lander* in the new Austrian federation between 1918 and 1920, as tensions rose because of the different regional and cultural diversities present in the regions: cities and rural areas, Catholic conservatism and socialist, and industry and agriculture. The Christian-social camps and the socialists put up a Constitution at the end, but not without problems as the cleavages were still very alive. In fact, the executive power of the central government was strengthened in 1929 before getting dismantled again in 1934 after a civil war that instituted an authoritarian clerical regime, which survived until the Nazis took over. After the Second World War, constitutional and political continuity were prioritized with the Allied powers reinstating the 1920 Constitution following the amendments of 1929 and creating the Second Republic of Austria.[27] Thus, we can say that the Austria formation met both the military and expansionary condition. The former is reflected in the fact that it was created after cleavages between the regions. The latter instead can be found in the fact that all the regions of the First Republic agreed to be part of the German Reich.[28]

Lastly, for Germany, just like Austria, the first federal organizations go back to the Holy Roman Empire and later to Prussia's imperial federation. Moreover, the Weimar Republic can be identified as a precursor of the 1949 Federal Republic of West Germany. Of course, not everyone agreed with this new federation, but the weakness, if not the absence, of democracy was a good enough factor to make them accept it. Regarding Riker's conditions for a federal system, he affirmed that the Basic Law of 1949 was much intended for a reunification of West and East Germany (expansion aim).[29] The federal division of Germany into eleven regions was made easier by the fact that occupied Germany after the Second World War was already divided into eleven parts.[30]

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[26] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 93.
[27] *Ibid*, p. 94.
[28] *Ibid*, p. 95.
[29] *Ibidem*.
[30] *Ibid*, p. 96.

b. The European Federal Tradition

The Continental European federal tradition is, together with the Anglo-American one, the oldest known one inside the federalism realm. This tradition merely refers to the French and Germanic federal traditions. The European federal tradition is in some ways similar to the American one as it had to deal with diversities and create strong links between the citizens and the different states. A characteristic of Europe is that the rise of the modern state went hand in hand with the rise of the concept of sovereignty.[31] In fact, the idea of modern state developed in Europe between the 16th and 17th centuries is strictly related to the concept of sovereignty as the state has the sovereign power over physical coercion in a given territory, as Weber said, and it did not allow for any competing authority.[32]

Also Jean Bodin, a French scholar, has linked the state with sovereignty in a very rigid way:

> "*The equation of order and stability with centralised, indivisible and notionally unlimited power yielded a strict hierarchical structure – a single, basic pyramid of command and obedience*".[33]

This link is important as in Germany Bodin's idea was followed even in the 17th century, and thus the idea of a federation in Germany was linked to the idea of an alliance based on interstate relations that enjoyed strong sovereignty. In the 18th century, though, in France, philosophers like Montesquieu and Rousseau started to talk about notions such as popular sovereignty, limited government, individual liberty, and separation of powers. These notions are the ones that have greatly influenced the later Anglo-American federal tradition.

The scholar Patrick Riley has identified many types of federalism before the existing one consolidated. For example, he differentiated between the

[31] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 163.
[32] *Ibid*, p. 164.
[33] *Ibidem*.

national and international ideas of federalism, the latter being at the basis of the first federalist unions.[34] For example, the federal system of the Holy Roman Empire was built on different conceptions of sovereignty and the sovereign nation-state. The scholar Andreas Osiander has compared the European Union (EU) system with the Roman Empire's one. He described the first one as a "*loose, informal regime with few institutions*" and the second as "*a more developed regime with more elaborate institution's, providing a system of governance*".[35] In addition, it is important to highlight the fact that the Continental Europe federal tradition has a heritage of socio-economic and political factors. In fact, already from the Medieval era implications of this kind were important for the unification of states.

Pentland, on the other hand, characterizes the European federal tradition as a principle of social organization, therefore linking it to the theories of pluralism. He says that this tradition focuses mainly on sociological aspects and social reorganization, carefully taking into consideration the diversities of society; and at the basis of the European tradition there are the groups, associations, social unit, and individuals. The only difference between pluralism and federalism is that this last one is based on a firm constitutional structure.[36] Linked to this idea there is Althusius's theory, which emphasizes how these differences shape the federal organization in a bottom-up way so that there is an equal representation of the different states. Lastly, another important characteristic of the European federal tradition is the inclusion of both territorial and non-territorial dimensions. Therefore, for example, households, nationalities but also principles like human dignity and tolerance are considered in these types of federation.[37]

[34] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 166.
[35] *Ibid*, p. 168.
[36] *Ibid*, p. 169.
[37] *Ibid*, p. 177.

c. The Case of the European Union

The EU resembles a federal political system because of its multilevel governance, but the biggest difference with it is that its central government has not as much sovereignty as other federal governments do. This, though, does not mean that the EU bodies have no power at all. The EU could be considered a federation as there is a balance of power between the institutions, but it is not a federal state because the MSs still enjoy huge sovereignty, even if not in the traditional sense, as the powers are allocated between the various levels of government.[38] In fact, even if the MSs do not hold the full public power, they are still the masters of the Treaties and hold the majority of the sovereign rights.[39] Undoubtedly, for what concerns the EU, a good portion of powers has been transferred to the EU institutions. Moreover, the EU lacks a direct rule over the states, as regulations, which are directly applicable, mostly deal with procedural issues of the EU's policy areas. Furthermore, usually in a federal government both levels of the governments are involved in amending the constitution, while in the case of the EU treaties the MSs get the upper hand, as will be furtherly explained in Chapter 2.[40] Therefore, more than a federation we may consider the EU as a federation *sui generis* as it has an inverse distribution of powers, namely, from the bottom to the top.[41]

The adoption of the Lisbon Treaty may seem as changing this idea but, instead, it confirms this conceptualization of the EU as a federation *sui generis* as it does not modify the balance between the European and national levels. While improving the capacity of action of the EU, it has done so by dispersing more powers to different actors, which mostly are under the intergovernmental dimension of the EU. Therefore, it has not eroded the still primary sovereignty of the States.[42]

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[38] Grimm, D. (2015). *Sovereignty*. Columbia University Press. [online] Available at: https://www.perlego.com/book/774371/sovereignty-pdf, Sovereignty in a Time of Changing Statehood.
[39] *Ibid*, Sovereignty Today.
[40] Tömmel, I. (2001). The European Union – A Federation Sui Generis?. In: F. Laursen, ed., *The EU and Federalism Policies and Polities Compared*, New York: Routledge. [online] Available at: https://www.researchgate.net/publication/290630705_The_European_Union_-_A_federation_Sui_Generis, p. 45.
[41] *Ibid*, p. 46.
[42] *Ibid*, p. 53.

3. Federalism in the United States

The main problem for the rise of American federalism is that uniform policies were not going to work because States needed different legislation as they were based on different needs. To solve these issues, which are usually present in every federation, there are three possible systems. A unitary system (used in France and Japan) with most laws done at the national level, even though there is also a local level. Confederations, where the level of decentralization is great and states still enjoy a high level of autonomy. Or, federal systems where there are usually three levels of governments – national, regional, and local – with a significant power-sharing and power-division between, above all, the national and regional levels.[43]

a. The History of American Federalism

During the colonial period, the British granted some autonomy to the colonies in North America because of the slow modes of transatlantic communications of that time. The problem, though, was that the British authoritarian rule did not grant them the most basic rights. This led to the War of Independence from 1775 to 1783, which culminated in the Articles of Confederation of 1781 that were based on strong local sovereignty and thus opposed a strong executive central power. Therefore, the states at that time saw themselves more as an alliance of states than a unified country, despite the feeling of unity that the War of Independence built among them.[44] Each state, in fact, had equal powers in Congress and could veto legislation emanated by it. Even if Congress appointed an officer who was called President, he only performed limited administrative duties.

The first US federal system, thus, was a confederation based on a strong decentralization. This is mainly because the thirteen states who first made up the federation had already suffered the harsh colonization of the British empire and,

[43] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 29-31.
[44] *Ibid*, p. 37.

thus, they needed a high level of autonomy to pose trust in a "supranational" government again. Therefore, as the founding fathers of the US federalism did not have any advice or information on how to build a federal state, they had to base on their experience as colonies.[45]

During the eight years of the Articles of Confederation, the national government was a Congress with neither executive nor judicial power, as they both rested in the states' hands. The national Congress only had powers related to foreign affairs and common defense. Anyway, as the funding was based on the states, they could override any Congress decision through the unwillingness of funding by states, in addition to their freedom of non-compliance. This was even aggravated by the fact that the states did not trust each other and had trade wars between them.[46] Eventually, these are the reasons that led to the draft of a new constitution which replaced the confederation with a federal system with a stronger national government.[47]

Moreover, one of the delegates from the State of Virginia to the Federal Convention identified and explained the weaknesses of the US Confederation by dividing them into five. First, there was the issue of insecurity, as the national government was unable to prevent or support war against foreign invasion, nor it could make the states respect the international agreements it finalized. Second, the Articles of Confederation did not foresee the power to deal with wars between and within the states for the central government. Third, a confederation had many advantages that were not taken by the US one. Fourth, the Confederation had no power to protect itself from the intrusion of constituent states. Lastly, the Articles of Confederation were not enjoying supremacy over the States' Constitutions and thus the Confederation rules were easy to overcome.[48]

As said before, these problems needed a solution, which was found in a Constitutional Convention organized in 1787 in Philadelphia. There, it was

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[45] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 36-37.
[46] *Ibid*, p. 38.
[47] *Ibid*, p. 27.
[48] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 57-58.

understood that a stronger central government was crucial to meet the needs of the states. The disagreement was on the actual strength of the central government and on whether it should be based on nationalism or federalism. The nationalist, like Madison, pushed for a strong central government with executive, legislative, and judicial powers. The federalists, instead, pushed for a high autonomy in a system of independent states arguing that a strong central government would deprive the states of the autonomy they needed. After a few weeks of conventions, the federalists proposed the New Jersey Plan to modify Madison's plan. It was not accepted but the idea of power-sharing between the central and state government that was at the basis of the Plan was, as it is now the basis for the division of competence of the actual US constitution.[49] Finally, the Connecticut Compromise took account of both the nationalists and federalists views, choosing for a bicameral legislature composed by the House of Representatives (HoR) representing the people, as the federalists wanted, and the Senate representing the states, as the nationalists wanted. In the hands of the states, as the federalists pushed for, remained the taxing, militia, and commercial powers.[50]

In the end, the nationalist constitution won, and a federal republic was created with a central government with important powers over the states. This created some disappointments, as not all were in favor of a nationalist constitution, creating a cleavage between the federalists (the ex-nationalist) and the anti-federalists. At the end, also thanks to the *The Federalist* written by important figures like Alexander Hamilton, James Madison, and John Jay, the document of the new Constitution was ratified and entered into force in 1789.

As mentioned before, the new Constitution was a compromise between the two parties. If the federalists won because of the inclusion of a strong central government in the Constitution, the antifederalists won because of the inclusion of the Bill of Rights: the first ten amendments of the US Constitution. These were included because of the fear of the states that a strong central government could undermine their rights. The Bill of Rights protects the rights of the citizens

[49] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 39.
[50] *Ibid*, p. 40.

that are given to them federally.[51] The same is done by the Fourteenth Amendment, which states that:

> "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"[52]

Even though this Article was intended for the abolishment of slavery, some scholars argue that it has been intended also for the protection of the federal rights granted to citizens. For example, the Fourteenth Amendment has been at the base of the decision *Brown v. Board of Education* of 1954 because of its equal protection clause, which holds that the States need to respect the equal application of the laws to all people, which for the US is related to the principle of incorporation explained in Chapter 2.[53]

For what concerns the rights, the civil liberties of the US population have been put at risk in the first years of the Constitution that led also to an argument regarding the powers of the central government. Tensions rose between the republicans and the federalists as the latter accused the former of being allied with the French whose invasion was expected.[54] Because of this, the Alien and Sedition Acts of 1798 were passed by President Adams in the form of four new laws. The Naturalization Act stated that to become a US citizen you had to have residency in the country for fourteen years instead of five. The Allies Enemies Act allowed the government to deport the male citizens of an enemy nation in the case of war. The Alien Friends Act permitted the President to deport non-citizens who were plotting against the US. Lastly, the Sedition Act was the

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[51] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 43.
[52] Legal Information Institute. *14th Amendment*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/constitution/amendmentxiv.
[53] History.com Editors, (2009). *Brown v. Board of Education*. [online] Available at: https://www.history.com/topics/black-history/brown-v-board-of-education-of-topeka.
[54] History.com Editors, (2020). *Alien and Sedition Acts*. [online] History. Available at: https://www.history.com/topics/early-us/alien-and-sedition-acts.

strongest one as it was directed towards the ones that talked against the federalist government.[55]

Undoubtedly, these Acts has hindered the civil liberties of the citizens of the US, and it is for this reason that there were two immediate answers to it by the two States of Virginia and Kentucky: the Virginia and Kentucky Resolutions of 1798. These two Resolutions have been of great importance for the creation of the federation as the States have argued that the central government could not have enacted laws not enlisted by the Constitution.[56] The Virginia Resolutions written by Madison declared the act unconstitutional. On the other hand, the Kentucky Resolutions written by Jefferson were stronger and stated that the central government could not exercise powers not delegated to it as it is a compound between the various states, therefore declaring the Alien and Sedition Act void.[57]

These Resolutions are based on the ideas of the Compact Theory, which has been very important for the US. This theory holds that the US federation has been created through a compact between the states, and thus the central government is a States' creation.[58] Moreover, the Compact Theory has three main conclusions that are based on the idea that the states have the great power to interpret the Constitution: first, the powers remain in the hands of the states unless it is stated otherwise by the Constitution; second, states hold the power to nullify laws of the central government; and third, states have the right to secede for the federation.[59] Nevertheless, the Supreme Court rejected this Theory in *Chisholm v. Georgia* of 1793 stating that the people are the masters of the US Constitution.[60]

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[55] History.com Editors, (2020). *Alien and Sedition Acts*. [online] History. Available at: https://www.history.com/topics/early-us/alien-and-sedition-acts.
[56] *Ibidem*.
[57] The Editors of Encyclopaedia Britannica. (2020). *Virginia and Kentucky Resolutions*. [online] Available at: https://www.britannica.com/event/Virginia-and-Kentucky-Resolutions.
[58] Graber M. A. (2019). *Compact Theory of the U.S. Constitution*. [online] Center for the Study of Federalism. Available at: http://encyclopedia.federalism.org/index.php/Compact_Theory_of_the_U.S._Constitution.
[59] *Ibid*.
[60] Skelton, C. *Chisholm v. Georgia, 2 U.S. 419 (1793)*. [online] Justia US Supreme Court. Available at: https://supreme.justia.com/cases/federal/us/2/419/.

Obviously, the US Constitution is quite dated. This is also shown by the fact that most of what the central government does today is not included in it. Strikingly, the founding fathers had even reserved the states the right to conduct elections, above all because it was hard for them to think that a central government could be able to organize elections right after the Revolutionary War.[61] In fact, they knew that they could not list all the powers the central government should have had, leaving a vague language in the Constitution of which the Supreme Court took advantage by expanding the federal government's powers. In fact, even if recently the Supreme Court is more reluctant to expand the central government's powers,[62] it has led to important power expansion for the central government like, for example, the necessary and proper close that will be dealt with in Chapter 2.

b. The Federalists and Anti-federalists: the Federation-Confederation Debate

The 1787 US Constitution is important because it marked the shift from confederation to a new political system, referred to as federalism, which is different from the former as the sovereignty of the states is eroded and partly transferred to the national/central government. The new Constitution has done this by eliminating some confederal features and adding some national features.

Furthermore, the articles written by Madison, Hamilton, and Jay in *The Federalist* were very important at that time. Through these articles and above all through Hamilton's critiques, from 1790 the word confederation even obtained a bad connotation because a confederal government was often described as weak, temporary, and highly unstable.[63]

On the other hand, the anti-federalists were mainly concerned with the aspect of liberty in a federal system. In addition, they supported a republican government based on a bill of rights but opposed the taxing power of the central

[61] Rozell, M. J. and Wilcox, C. (2019). *Federalism: A Very Short Introduction*. New York: Oxford University Press, p. 47.
[62] *Ibid*, p. 49.
[63] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 58-59.

government.[64] Moreover, they supported the idea that the federalists had no legitimacy in making a new constitution and above all speak in the name of the people (*We, the people*) instead of the states.[65] In *The Federalist 9*, Hamilton answered to these claims legitimizing the making of the new Constitution:

> "*The laws of a national government operated directly upon the persons and property of individuals rather than solely on the constituent states as they would in a confederation*".[66]

Hamilton further stated that the States were well represented and powerful even in the federal union. This is because they are equally represented in the Senate and there is a division of power where both the states and the central government have exclusive powers.[67]

If we come back to the birth of the United States, we see how the idea at its basis was kind of differentiated from the concept of federalism of the Middle Ages or the one later described by Montesquieu, giving rise to the modern federalist thought.[68] The US, as shown also by *The Federalist No. 15* written by Hamilton, wanted to create a federation that resembled a state and, thus, with a strong central government, which eventually became even more powerful once the American Civil War ended in 1865. Another very important aspect of the modern federalist thought is the one explained by Madison in *The Federalist No. 51*, which touches upon the concept of check and balances that is in place in the American system of governments (which will be further explained in Chapter 2).[69]

The essay written by Martin Diamond and titled "*What Framers Meant by Federalism*" has been pivotal in showing the political strategy undertaken by

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[64] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 60.
[65] *Ibid*, p. 62.
[66] *Ibid*, p. 63.
[67] Fabbrini, S. (2007). *Compound Democracies: Why the United States and Europe Are Becoming Similar*. New York: Oxford University Press, p. 12.
[68] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 40.
[69] *Ibid*, p. 41.

Madison and the federalists. Basically, as explained in the essay, the federalists' political strategy was to show that achieving what the anti-federalists wanted could not be achieved by the (anti-)federalist principle alone. With this, the federalists aimed at leading the anti-federalists to accept that the principle was not irrelevant but inadequate. Once this was done, the Articles of Confederation became indefensible and what the anti-federalists could do was try to get as many federal characteristics as they could in the new Constitution.[70] Diamond, in fact, described the term federalism as a "*middle term between confederal and national government*". The irony here is that what is considered as federal now is a mix of both federal and national characteristics. This is mainly because the federalists had to give in to some requests made by anti-federalists to make them accept the compromise.

c. The American Federal Tradition

The Anglo-American federal tradition is not as recent as it seems and it can be divided into three antecedents: the conventional tradition, the British and American experience, and *The Federalist Papers*.[71] Here, again, we see that the American federal idea has developed hand-in-hand with the idea of state and sovereignty in the 17th and 18th century in Europe. In fact, the Declaration of Independence drafted in 1776 recalled many philosophical ideas of England in the century before such as natural rights, the notion of government, and the state of nature. Furthermore, another important characteristic of the American federal tradition is that, as also emphasized before, it has been the product of practice. This means that many of the things envisaged by the Articles before, and the Constitution then, are the result of decades of English colonialism. Of the British, only the form of government has been kept, which has worked very well for the territory.[72]

Regarding the conventional tradition, it is mostly associated with a sort of biblical perspective, where states are bound together by a pact that sets some

[70] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 65.
[71] *Ibid*, p. 177.
[72] *Ibid*, p. 178.

basic common normative principles and reciprocal trust, toleration, responsibility, and respect.[73] These ideas have then led to the second antecedent under study, which was mostly based on the experience, both constitutionally and politically, that Americans had under the British rule. Of course, in this era, the Americans were subordinated by the British, but the latter were very open to political experiments in the case of need. As a matter of fact, they accepted a higher colonial autonomy, which also enjoyed representation in the Parliament, only after strong protests in the soon-to-be United States, which has led to a kind of federal relationship. In fact, American colonies were given the right to develop their own laws, as long as they did not conflict with the British ones. This was necessary because of the difficulty to travel from Britain to America that led to the need for an administrative capacity by the colonies themselves.[74] Therefore, this higher autonomy was convenient for the British.

Paradoxically, though, it is this new type of autonomy that has led to the breakout of 1776, and it was relatively easy to form a federation as the colonies enjoyed independence already and, as Lutz has emphasized, the intracolonial and colony-mother relationship in America already envisaged the formation of federalism as a solution. Therefore, it is important to highlight the fact that for understanding the Anglo-American political tradition we need to analyze what happened before under English colonialism and thus analyze the political experience of the colonies, which is a factor that is often forgotten.

At the same time, it is impossible to leave out of the picture *The Federalist Papers* as they have greatly influenced the birth of the federal union and, thus, it constitutes the third antecedent that needs to be included to study the Anglo-American federal tradition. In fact, *The Federalist Papers* have contributed to creating the perception that federalism was an instrumental and pragmatic way to set up the new Constitution, which was greatly based on Western liberal individualism.[75]

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[73] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 179.
[74] *Ibid*, p. 183.
[75] *Ibid*, p. 185-186.

To conclude, there is the existence of two forms of federalist tradition – the European and Anglo-American one -, which are though interconnected in the philosophical rise of the conception of state and sovereignty. At the same time, they are different because, as Sobei Mogi has said:

> "*Anglo-American federalism has been far more elaborate and has contributed by its ideas and schemes more to progress than has continental federalism, but at the same time continental federalism is much more inclined to the legal interpretation and the legal form of federalism than the Anglo-American…*".[76]

d. *The Federalist*'s Conception of Federalism

The Federalist are a set of 85 essays written by Hamilton, Madison, and Jay in favor of the US Constitution. When talking about these essays, many think that it describes federalism as it was reported later in the US Constitution, but scholars like Diamond have objected to this idea.[77] In his view, federalism today is different from the one of the eighteenth century. Federalism is now regarded as a unique polity where power is divided between the states and the national government. Contrarily, in the 18th century, federalism was seen more as a confederation, as a political arrangement closer to a league than a real government. This means that federalism in the 18th century was still very considerate of state sovereignty. In fact, the national government had no internal administration capacity and dealt with issues of collective capacity.

After the Constitution was put in place, though, Madison saw the central government as a mixture of both the national and federal Constitutional characteristics. The view changed right after the new constitution was adopted, as he did not perceive the role of the states as right to preserve liberty. In fact, after the first decade of the Constitution, Madison started to think that the government is a real federal one with some enumerated powers, and if it

[76] Burgess, M. (2006). *Comparative Federalism: Theory and Practice*. New York: Routledge, p. 191.
[77] Yarbrough, J. (1985). Rethinking "The Federalist's View of Federalism". *Publius*, [online] Volume 15(1), p. 31-53. Available at: https://www.jstor.org/stable/3329944, p. 31.

oversteps them, the States may act to stop it.[78] This is the reason for which, in *The Federalist No. 9*, Hamilton describes the notion of federalism in a very close way to the present idea of federalism:

> "*an association of two or more states into one state. The extent, modifications, and objects of federal authority are mere matters of discretion. So long as the separate organizations of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy*."[79]

Nevertheless, its view of the Constitution is the one of a mix between the national and federal levels.

At the same time, Hamilton and Madison thought that the states, in the future, would have had more of an administrative role of local issues rather than political.[80] It can be argued though, that even if there was decentralization, there was still a good portion of sovereignty that was in the hands of the states. This is reflected in the fact that a lot of powers of the central government have been attributed to it through case law in the following decades. Thus, at the beginning, the states still retained a lot of powers. This, as Diamond has said, has some logical explanations. Of course, decentralization helps to stabilize the central government by giving more liberty to the local ones but also puts public affairs closer to the citizens. Furthermore, it also allows people to organize politically in the case of encroachments of the central government. Lastly, decentralization makes the government faster in answering the needs of the local communities.[81]

It is important to highlight that this view forwarded by Diamond has been criticized by other scholars who say the exact opposite. For example, Ostrom in his essay[82] thought that, even if federalism was commonly described as a

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[78] Yarbrough, J. (1985). Rethinking "The Federalist's View of Federalism". *Publius*, [online] Volume 15(1), p. 31-53. Available at: https://www.jstor.org/stable/3329944, p. 40.
[79] *Ibid*, p. 33.
[80] *Ibid*, p. 36.
[81] *Ibid*, p. 38.
[82] Ostrom, V. (1985). The Meaning of Federalism in The Federalist: A Critical Examination of the Diamond Theses. *Publius*, [online] Volume 15(1), p. 1-21. Available at: https://www.jstor.org/stable/3329942.

confederation, Madison and Hamilton supported another idea of federalism already from the beginning, which is closer to the one of today. He adds that the modern idea of federalism builds upon the old ones and that each government has its concurrent jurisdictions. Therefore, he supports the idea that *The Federalist* supports the modern idea of federalism. Regarding the decentralization of legislative and administrative capacity to the states, Ostrom thinks that it weakens the states against the federal government, as it increases the control and power of the central government.[83]

At the same time, it is pivotal to remember that the founding fathers have clearly stated that the Constitution was open to interpretations, and this is clearly what happened later with the judgements of the Supreme Court that has greatly expanded the role of the central government.

e. Federalism from the Mid-20th Century

The era of the analytical approach to federalism started in the mid-twentieth century. One of the scholars who studied federalism in that time, Carl Friedrich, is of particular interest as it defined federalism as a process crosscutting the clear distinction between the international and domestic dimension and, therefore, considering their dynamics as "*phenomenons of the same structure*".[84] Thus, he saw federalism more as a dynamic concept:

> "*Federalism is also and perhaps primarily the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions [...] on joint problems, and conversely, also the process by which a unitary political community becomes differentiated into a federally organized whole. Federal relations are fluctuating relations in the very nature of things*" (p.43).[85]

With this definition given by Carl Friedrich, it is possible to understand how he connected the political aspects of the domestic dimension with entering

[83] Yarbrough, J. (1985). Rethinking "The Federalist's View of Federalism". *Publius*, [online] Volume 15(1), p. 31-53. Available at: https://www.jstor.org/stable/3329944, p. 49.
[84] *Ibid*, p. 43.
[85] *Ibidem*.

into an agreement on the international dimension and creating a federation, a new state. Another very crucial aspect of Friedrich's theory is that there is no sovereignty in a federal system as autonomy and sovereignty repeal each other. This theory, of course, has been criticized. For example, it has been deemed as too general and thus not adaptable to the study of specific countries; or it does not explain how a specific policy plays its role in the process.

Another important theory to analyze is the one of Daniel Elazar, who defined federalism as a covenant:

> "*A morally informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent, and established by mutual oaths or promises witnessed by the relevant higher authority*".[86]

He too faded away from the difference between the domestic and international dimensions by attributing to federalism both self and shared rule. Elazar, in addition to Friedrich's theory, also saw a paradigm shift from the state to federalism, as described in one of his essays, that tried to counterbalance the weakening of the state, which became even stronger after the collapse of the Soviet Union. He identified this epoch as the post-modern one.[87]

In that time, another scholar, James Rosenau, studied how the states were weakening in the wake of globalization. This has resulted in a model of *governance without government* where, therefore, regulations were put in place in a political system with no sovereignty.[88]

When talking about federalism, we see that it has both opportunities and risks. On the one hand, it creates opportunities because of the institutional or power organization, on the other hand, it poses the great risk of the mobilization of resources by ethnic nationalists. Moreover, federal states are usually mostly

[86] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 45.
[87] *Ibid*, p. 47.
[88] *Ibidem*.

associated with multicultural polities. For example, countries like India or Spain are federally organized because of their ethnic and linguistic differences.[89]

Alfred Stepan has described two kinds of federalism. The first one is based on William H. Riker concept, which Stepan calls *coming-together federalism*. This is where sovereign states choose to give up, or pull, some of their sovereignty to achieve some goals and improve the common security.[90] This type of federalism recalls a lot the idea of federalism by aggregation, where previously independent states pull part of their sovereignty together in favor of a common federal government, mainly for security reasons. This is of course the case of the US and Switzerland. Nonetheless, the federalization of countries like Belgium, Spain, and India has been born following a different model: the *holding-together federalism*,[91] or federalism by disaggregation as Fabbrini calls it.[92] This model is where political leaders chose to give up some power of the central government to their regions or states, to turn the country into a federation to keep it together despite the ethnic pressures.

4. Governance Systems close to Federalism

a. Multilevel Governance

One of the governance systems close to federalism is for sure multilevel governance. To analyze this system and see its links with federalism, it is necessary to first define the latter. If it is chosen to use a general definition of federalism like an "*arrangement in which two or more self-governing communities share the same political space*",[93] it seems like federalism coincides with any political organization which is not a centralized state. On the other hand, if we use a more specific definition like the one of Daniel Elazar we

[89] Stepan, A. (1999). Federalism and Democracy: Beyond the U.S. Model. *Journal of Democracy*, [online] Volume 10(4), p. 19-34. Available at: https://unpabimodal.unpa.edu.ar/bibliografia/00-A0189/00-A0189.pdf, p. 19.
[90] *Ibid*, p. 20.
[91] *Ibid*, p. 21.
[92] Fabbrini, S. (2007). *Compound Democracies: Why the United States and Europe Are Becoming Similar*. New York: Oxford University Press, p. 88
[93] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 25.

may identify federalism just with one of its components, as this definition states that federalism is:

> "*a broad category of political systems in which [...] there are two (or more) levels of government, combining elements of shared-rule (collaborative partnership) through a common government and regional self-rule (constituent unit autonomy) for the government of constituent units*".[94]

Talking about multi-level governance, the theory has been developed starting from the article written by Gary Marks in 1993 on the regions' involvement in EU decision-making with the creation of the Committee of the Regions. There were mainly three reasons that led to think that he wanted to present the multilevel governance of the EU following a federalist perspective. First, he considered federalization as a process. Second, he saw the EU as a multilevel polity. Third, he made no distinction between the domestic and international dimensions. He did not, though, want to identify multilevel governance as a form of federalism as the EU was still not well seen in federalist lenses and EU federalism was still considered as an objective more than an analysis of present times.[95]

We see the link between federalism and multilevel governance in a model described by Elazar: the matrix model. Here, "*authority and power are dispersed among a network for arenas*" and there is no centralization of power.[96] In this model, the international and domestic dimensions play in the same field, with domestic sovereignty is eroded as more international agreements are binding on the domestic polity. Multilevel governance, as the matrix model, is based on a non-hierarchical system in which decisions are taken interdependently, with no distinction between domestic and international dimensions. Moreover, multilevel governance considers more than two levels of government, just like the matrix model. Therefore, if we think of federalism in a classical way,

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[94] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 26.
[95] *Ibid*. p. 50.
[96] *Ibid*, p. 52.

meaning state-like and in the American sense, we may see that multilevel governance is much broader than classical federalism (p.56). In this sense, multilevel governance can be linked with the last post-statist view of federalism, which tries to make up for the weakening of the states and multilevel governance may be a fertile model on which to build upon.[97]

b. Constitutional Pluralism

Another concept that has been often compared to federalism is constitutional pluralism. This concept has come out from the study of the EU, as it is the biggest challenge to constitutional monism – the state is the sole constitutional authority. The EU, in fact, has started to have constitutional claims already from the Treaty of Rome, which has added the Union to the states as constitutional authorities.[98] Therefore, to fully understand constitutional pluralism we should see constitutionalization and constitutionalism not as a fixed idea but with an open mind.[99] In addition, there are two main criteria to analyze to understand constitutional pluralism: the conceptual and the structural one.

The conceptual criteria mostly explain the contemporary discourse over constitutionalism as today it is not bound by one polity anymore or by the statist view of constitutionalism. We need to stretch the idea of constitutionalism following some sub-criteria of the conceptual one, which makes us understand more types of constitutionalism, being more inclusive. The first one is the constitutive criteria, which divides itself into the development of an explicit constitutional discourse and the foundation of a legal authority that creates sovereignty. The second criterion is the one of governance, meaning that it should have set competences and a body to interpret them, in addition to a regulation, or constitution, of an institutional structure enabling it to govern the polity. The third and last criteria is the social one, which means that a

[97] Lépine, F. (2012). A Journey through the History of Federalism Is Multilevel Governance a Form of Federalism?. *L'Europe en formation*, [online] Number 363, p. 21-62. Available at: https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-21.htm, p. 62.
[98] Walker, N. (2002). The Idea of Constitutional Pluralism. *The Modern Law Review*, [online] Volume 65(3), p. 317-359. Available at: https://www.jstor.org/stable/1097577, p. 337.
[99] *Ibid*, p. 339.

constitutional phenomenon should create a legitimate relationship with the entities that represent the social sphere, or the community, creating a link between the latter and the authority in charge.[100]

The structural criteria, instead, tells us that to understand constitutional pluralism we have to study not only the political processes and polities involved, but also how they interconnect.[101]

If we want to take up the example of the EU to better explain constitutional pluralism, we have to consider three main dimensions. First, there is an explanatory one, which recognizes multiple centers of authority and constitutional discourse that use both the law of international organizations and intergovernmentalism. Secondly, pluralism is associated with a normative dimension that is about political responsibility, which in the EU is based upon the respect and mutual recognition of supranational and national authorities, thus recognizing the pluralist authorities involved in the system.[102] The third dimension is the one called epistemic pluralism. This says that if there are various constitutional sites – in the case of the EU institutions and the MSs -, there is also a variety of knowledge and authority claims coming from them.

c. Multilevel Constitutionalism

Ingolf Pernice, a prominent European scholar, has said that multilevel constitutionalism could save the EU citizens from their mistrust in governments and the crisis of democracy that Europe is living these days.[103] Of course, it is not easy as it is difficult to understand what the EU is as it is not a federal state, nor a state, but it falls between a federation of states and a federal states as it is closer to a federation of states but it enjoys a legal personality.[104] Lately, it has been defined also as a compound of states, but the problem with this term is that

[100] Walker, N. (2002). The Idea of Constitutional Pluralism. *The Modern Law Review*, [online] Volume 65(3), p. 317-359. Available at: https://www.jstor.org/stable/1097577, p. 342-343.
[101] *Ibid*, p. 340.
[102] *Ibid*, p. 337.
[103] Pernice, I. (2015). Multilevel Constitutionalism and the Crisis of Democracy in Europe. *European Constitutional Law Review*, [online] Volume 11, p. 541-562. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/multilevel-constitutionalism-and-the-crisis-of-democracy-in-europe/C759481E968E61585EE42633EE281F56, p.542.
[104] *Ibidem*.

it does not attribute its creation to the people, describing the EU as a matter of the states. This might be favorable for the states, but it is certainly not for the EU whose legitimacy is constantly questioned by the citizens of the Union.[105] In fact, to understand the people we should start directly by the citizens. They are the masters of the treaties as they recognize themselves as citizens of the Union, alongside their national citizenship. Therefore, they make themselves bound by this new legal and political status. Here is where the term multilevel constitutionalism comes into play, which does not necessarily mean that there is a hierarchy of the supranational legal order, but just that there is more than one.[106] Indeed, it is not the case that the EU "constitutional law" is based on the national constitutions themselves. The unity between the two is reflected in the principle of conferral, the principle of supremacy, and other principles, which will be explained in Chapter 2.[107] These principles are a way in which the citizens have organized law both at the national and supranational level, by voting the governments that represent them at the EU levels in the two Council and the Members of the European Parliament (MEPs) that are directly elected by them.

d. Multi-layered Constitutionalism

Multi-layered constitutionalism is defined as:

> "*an intricate web of interactions between traditional constitutional actor ... and supra-national actors which do not necessarily have formal, organizational existence or democratic legitimacy*".[108]

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[105] Pernice, I. (2015). Multilevel Constitutionalism and the Crisis of Democracy in Europe. *European Constitutional Law Review*, [online] Volume 11, p. 541-562. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/multilevel-constitutionalism-and-the-crisis-of-democracy-in-europe/C759481E968E61585EE42633EE281F56, p.543

[106] *Ibid*, p.544.

[107] *Ibid*, p.545.

[108] Sajó, A. and Uitz, R. Multi-layered Constitutionalism, Globalization, and the Revival of the Nation State. In: The Constitution of Freedom: *An Introduction to Legal Constitutionalism*, London: Oxford University Press. [online] Available at: https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198732174.001.0001/oso-9780198732174-chapter-13, p. 447.

The supranational level is seen as a protector of the citizens by the abuses of the sovereign state. At the same time, it is very difficult to identify a leading center of authority and, in fact, this definition does not make difference between the two levels.[109] This is also because, on the one hand, there may be decisions taken at the supranational level but by bodies controlled by the states, and on the other hand, some decisions may be taken solely at the supranational level by independent bodies that thus have no direct links with states.

Multi-layered constitutionalism was born when in the 1990s, after the fall of authoritarian regimes, optimism spread regarding the opening of constitutions to supranational influence. One of the best examples is obviously the EU, which has become more pervasive in the domestic polity at the end of the 20th century and the beginning of the 21st century. Jürgen Habermas has even identified a center of autonomy for the EU, which is neither the state nor the Union, but the people as a political community with its double citizenship. Being a political community, they have common objectives and ideas that lead states to pull their sovereignty in joining forms of supranational "governance".[110]

It goes without saying that today this form of constitutionalism that is largely built on globalization and trust in supranational entities is in crisis and it is one of the most common targets of political attacks. This crisis is mainly due to the fact that it has become harder to overcome national differences, there is a lack of common strategy and common support for a multi-layered system. A possible solution may be using the convergence, if there still is, between the democratic constitutional regimes over some matters of constitutionalism so that they may have an impact through regulations.[111] Therefore, the limit of multi-layered constitutionalism rests in the judgments and willingness of the states vis-à-vis the supranational institutions. In fact, if there is more criticism towards a

[109] Sajó, A. and Uitz, R. Multi-layered Constitutionalism, Globalization, and the Revival of the Nation State. In: The Constitution of Freedom: *An Introduction to Legal Constitutionalism*, London: Oxford University Press. [online] Available at: https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198732174.001.0001/oso-9780198732174-chapter-13, p. 448.
[110] *Ibid*, p. 450.
[111] *Ibid*, p. 454.

supranational body, this will lower its common standards to keep the body working, even if at a minimum pace.[112]

e. Compound Democracy/Republics

The EU has the characteristic of a multi-level system of governance, meaning that the government is organized on a plurality of centers of power. Moreover, the division of power between the EU institutions does not resemble perfectly the one of a federal system when we compare it to other European countries. It can be argued that it has characteristics that resemble a multi-level governance system, such as the plurality of centers of authority that have veto power. However, the vertical federalization – increasing power to the central government - has gone hand-in-hand with a horizontal separation of power. In fact, the EU can be considered a unique case when thought of it at the European level, but not when it is put in comparison with the US, as they both have vertical and horizontal separation of powers. A comparison between the EU and the US, therefore, can be considered as one between similar cases: they were both born as an aggregation of previously independent states, they both have similar institutions and functional logic, they are both based on a liberal democratic system, and they both manage a very vast territory with many citizens.[113]

Fabbrini calls the EU and the US compound republics, or democracies, considering them similar cases even if they are rarely compared because when we talk about the EU usually there is a kind of Eurocentrism that prevent us from looking outside the continent. This is also because the EU follows a post-statist idea of politics, based on a system of governance rather than a system of government.[114]

This compound political system was first defined by Ostrom as:

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[112] Sajó, A. and Uitz, R. Multi-layered Constitutionalism, Globalization, and the Revival of the Nation State. In: The Constitution of Freedom: *An Introduction to Legal Constitutionalism*, London: Oxford University Press. [online] Available at: https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198732174.001.0001/oso-9780198732174-chapter-13, p. 464.

[113] Fabbrini, S. (2005). Is the EU exceptional? The EU and the US in comparative Perspective. In: *Democracy and Federalism in the European Union and the United States: Exploring post-national governance*, New York: Routledge, p. 4.

[114] *Ibid*, p. 4.

> "*concurrent and overlapping units of government … a system of government with multiple centers of authority reflecting opposite and rival interests (…) accountable to enforceable rules of constitutional law".*[115]

Therefore, we may say that this system aims at a non-hierarchical and non-hegemonic republic through a separation of power. In fact, as it was also stated above, the US Philadelphia Constitution aimed at preventing a majority to rule over the country, as it would have been impossible to keep the country together with it.

In the US, for example, the system of compound democracy in place generates decisions without a clear government, as there is no real majority that has all the power in its hands as there is both horizontal and vertical separation of power. Even if the institutions are separated by different electoral legitimacy, they still have to cooperate as they share power with a system of checks and balances, another feature of compound democracy.[116] Therefore, an important characteristic of this system is the fact that there is no clear government, in the sense that there is not a preeminent institution and the power is, more or less, equally shared,[117] creating a system of "*separated institution sharing power*".[118]

As we have said before, the US political system was idealized leaving a lot of powers in the hands of the states. Nevertheless, between the nineteenth century and the Second World War, a lot of endogenous and exogenous forces have shown the need for a stronger central government. As endogenous, for example, we may identify the hard industrialization times that the country has lived, while as exogenous the two Wars are a perfect example. Therefore, for both economic and political factors a nationalization occurred, which led to pulling a good portion of sovereignty from the state towards the central

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[115] Fabbrini, S. (2005). Is the EU exceptional? The EU and the US in comparative Perspective. In: *Democracy and Federalism in the European Union and the United States: Exploring post-national governance*, New York: Routledge, p. 12.
[116] *Ibid*, p. 13
[117] *Ibid*, p. 5.
[118] Fabbrini, S. (2008). Compound Democracies: Why the United States and Europe Are Becoming Similar. [online] Available at: https://www.researchgate.net/publication/283399154_Compound_Democracies_Why_the_United_States_and_Europe_Are_Becoming_Similar; p. 4.

government. This nationalization of power went together with higher democratization of the central government, from the direct elections of the senators to the one of the Electoral College. This led to a centralization of the vertical level and a presidential government at the horizontal one (this will be explained further in Chapter 2), always keeping a good portion of public power in the States' hands.[119] The need for centralization of power in the hands of the President became even more evident during the Cold War, where there was a greater need for fast responses to the Communist threat.

In the EU, though, it is different as nation, democracy, and state do not go together, but its unification and functioning resemble a lot the one of the US. In the EU, in fact, we find a diffusion of power between the various institutions to avoid a majority. It also has a strong judiciary, strong agencies, and parties are made of coalitions of MSs, just like in the US.[120] Nevertheless, economic transformation and social disparities are the big Achilles' heel of the balance of the Union.

[119] Fabbrini, S. (2005). Is the EU exceptional? The EU and the US in comparative Perspective. In: *Democracy and Federalism in the European Union and the United States: Exploring post-national governance*, New York: Routledge, p. 18.
[120] *Ibid*, p. 19.

Chapter II – Division of Powers in the United States and the European Union: A Comparison

This Chapter analyzes the institutional organization and division of power in the EU and the US, as well as the division of competences between the states and the central government. Its purpose is to see the similarities between the US and the EU as federal unions in both the horizontal dimension, or the "supranational" institutions, and the vertical dimension, meaning the organization of competences and powers between the states and the federal institutions. For its purpose, the Chapter will be divided into two main parts: the first describing the two dimensions for the US and the second describing the two for the EU.

These two parts regarding the different dimensions are then divided into sections that represent their main aspects to identify the similarities between the US and the EU also in the more specific aspects of federalism. As far as the horizontal dimension is concerned, the focus is on power allocation, checks and balances, and the overall institutional balance. For the vertical dimension, instead, the focus will be on the various principles that stand at the basis of federalism, like the one of conferral or supremacy, but also how the federal rights are incorporated by the states.

1. The Horizontal Division of Powers in the US

a. Power Allocation and Institutions in the US

In the US, the Constitution was, and still is, the unifying element among the various States. In fact, the US can be considered to have a constitutional type of nationalism: a type of nationalism based on constitutional values and norms. Consequently, the Constitution has provided a multiple separation of powers because of the very fragmented society at that time and the government has been divided into three branches: the legislative, the executive, and the judicial.[121] The legislative branch has the power to make laws, the executive carries out the law,

[121] United States House of Representatives. *Branches of Government*. [online] Available at: https://www.house.gov/the-house-explained/branches-of-government#:~:text=To%20ensure%20a%20separation%20of,%3A%20legislative%2C%20executive%20and%20judicial.

and the judicial has the power to interpret it. Moreover, In the US, the judicial power has been pivotal to increase the power of the President and Congress vis-à-vis the States, as mentioned in Chapter I.

Usually, a clear-cut distinction between the institutions composing the three branches is done as it is the case for the Constitution of the US government. Contrarily, many scholars argue that each power is distributed among more than one institution. To start the analysis, it is important to keep in mind that the US Constitution can be described as a compromise between the federalists and anti-federalists, where the States had to be equally and well represented at the "supra-state" level.

The institutional organization of the US is described in all the seven Articles of the Constitution, which show how the executive and the legislative do not necessarily rely only on one institution, even if it is often thought so.[122] Usually, the legislative power is attributed to Congress, the executive power to the President, and the judicial power to the Supreme Court and the other federal courts. In practice, though, there is a strong interplay between the various institutions. This is governed also by the fact that the three main institutions – The Senate, the President, and the HoR – have a staggered mandate. This means that the institutions are elected in different periods to prevent the building of a clear majority from the same party: the HoR is elected every two years, the President every four, and the Senate every six.

In the Constitution, the three branches are covered by three different Articles. The legislative branch of the US government, as explained by Article 1 Section 1, is mainly composed of Congress. Congress is bicameral, and it is composed of the HoR and the Senate. The HoR represents the people as the members are directly elected with a two-year mandate. Moreover, they represent the population of each state proportionally: the smallest States have one representative and, for example, California has fifty-three (Article 1 Section

[122] USA Gov, (2021). *Branches of the U.S. Government*. [online] Available at: https://www.usa.gov/branches-of-government.

2).[123] The Senate, instead, is the body that clearly shows the importance of equal state representation for the US political system as it is composed of two senators for each state with a six-year term, and each has one vote (Article 1 Section 3).[124] Therefore, in representing the States the Senate respects a principle of equality. Congress, moreover, has the formal power to initiate legislation, which, differently from the EU, rests in the hands of both Houses.[125]

Article 2, instead, is the basis for the executive power and it states:

> "*The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows*
> *Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector*".[126]

Therefore, the executive power rests exclusively in the President's hands, who has a four-year term, just like the Vice President. This part of the Constitution also stresses that the President is elected directly. The people of each state vote for their Great Electors, which are numerically equal to the number of Senators plus the numbers of members of the HoR for each state, and that make up the Electoral College. The College, then, votes for the President based on the will of the people. Moreover, the President is also detached from the legislators as

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[123] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 1 Section 2.
[124] *Ibid*, Article 1 Section 3.
[125] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 2: The Constitutional Politics of the Legislative Branch.
[126] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 2 Section 1.

he/she cannot cover any positions in civil offices.[127] In addition, the Electoral College is detached from the legislature and they usually vote using a winner-takes-all criterium: every state votes only for one candidate.[128]

Moreover, Article 2 attributes three main powers to the President. The first one is that he is the Commander in Chief, which means that the President can make both tactical choices and choices on the deployment of forces, always with the approval of Congress. The second power is the one of making sure that the laws passed by Congress are enforced. Regarding this second power, a controversy has arisen in the situation of enforcing a law by the President when the latter thinks it is unconstitutional. First of all, it must be said that the Constitution is considered above aCongress legislation. Second, a presidential power to refuse to enact a passed legislation, in addition to the veto power, might alter the system of checks and balances present in the US system as it would let the President have two strong powers against Congress. The solution to this problem has been found in a political way. In fact, in such cases, Presidents tend to extend their authority to disregard a legislation but without calling it unconstitutional.[129]

The third, and last, Presidential power stems from the first sentence of Article 2 and it is the one that is supported by the most expansive viewers of the powers of the President. Such viewers think that, because Congress has all legislative powers listed in Article 1, the President shall have all the executive powers considered as such at the time of writing of the Constitution, putting a lot of weight on the foreign affairs' powers of the President.[130]

Regarding the judiciary power, it is described in Article 3 of the Constitution.[131] It is vested in the hands of the Supreme Court and some

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[127] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 1 Section 6.
[128] Fabbrini, S. (2015). *Which European Union? Europe after the Euro Crisis*. Cambridge: Cambridge University Press, p. 237.
[129] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 3: The Constitutional Politics of the Executive Branch.
[130] *Ibidem*.
[131] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 3.

subsidiary courts. In fact, the constitutional review system of the US can be defined as decentralized because also the States' courts have the power to answer to a constitutional question. The Supreme Court, though, also has the power to interpret both legislations and the Constitution (judicial review). In addition, the Court has the power to decided which cases to take, meaning that it can also make "political" choices sometimes.[132] Because of such extensive power of the Court, in the US there is basically a system of judicial supremacy because what the Court says binds agents in the future.

As a matter of fact, the crucial role that the Supreme Court played will be described with some case law related to the various topics throughout the Chapter.

b. The System of Checks and Balances in the US

The three main institutions of the US, as stated above, do not enjoy independence in their powers as there is a system of checks and balances in place in American federalism. Thus, in the United States, there are separate powers with a combination of functions.[133] This system originates from the idea of federalism that Madison pictured in *The Federalist*. As stated in the first chapter, he followed the idea of Montesquieu, who believed that liberty was endangered if all the power of one of the branches was vested in the hands of just one institution. This was considered to prevent a strong concentration of powers by making each institution counteract the ambitions of the others.[134] It is important to notice that the anti-federalists thought that the system of checks and balances put in place by the Constitution did not separate the three powers enough, going against Montesquieu's theory. Contrarily, the federalists argued that a mere separation of powers system, thus without checks and balances, would have

[132] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 4: The Constitutional Politics of the Judicial Branch.
[133] Fabbrini, S. (2007). *Compound Democracies: Why the United States and Europe Are Becoming Similar*. New York: Oxford University Press, p. 58.
[134] Legal Information Institute. *SEPARATION OF POWERS AND CHECKS AND BALANCES*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/constitution-conan/article-1/section-1/separation-of-powers-and-checks-and-balances.

posed the risk of encroachment by others.[135] Nevertheless, Wilson thought that the increase of congressional power in the 19th century was caused by the failure of the system of checks and balances that was considered too weak.

Checks and balances prevents a strong concentration of powers and there are various ways in which this happens. One of them is the bicameral system, which prevents a predominance of only one majority in the legislative mechanism. Also the presidential veto, which is surprisingly considered as a legislative power and not executive, is a safeguard to prevent Congress from overriding the presidential opinion and power. This veto power, to respect the balance between the institutions, is counterposed by the role of advice and consent and treaty-making of the Senate and by the power of impeachment of Congress in case of, between the many, abuse of power, both against the President and the judiciary. Lastly, there is also the strong role of the courts that, with their independence from politics, have the power of judicial review, thanks to the case of *Marbury v. Madison*,[136] through which the Supreme Court can check the work of the various institutions. In fact, in this case, Chief Marshall disapplied the state norm that was going against the Constitution. Simultaneously, Congress checks the Supreme Court through its competences and the number of judges.[137] Therefore, the system of checks and balances is characterized by a reciprocal check of the institutions. As an example, regarding the making of laws, Congress has the power to make them, the President has the power to veto them, and the Supreme Court checks their constitutionality. At the same time, the HoR and the Senate may override the President's veto with a 2/3 majority vote in both chambers.

Another way in which Congress can check the executive power, by limiting it, is through the power of the purse of the HoR, which is the budgetary power together with the power to decide on fiscal policy. In this way, the

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[135] Korn, J. (1996). *The Power of Separation. American Constitutionalism and the Myth of the Legislative Veto*. Princeton: Princeton University Press. [online] Available at: https://ereader.perlego.com/1/book/1809095/27, Chapter 2: The American Separation of Powers Doctrine.

[136] Oyez. *Marbury v. Madison*. [online] Available at: https://www.oyez.org/cases/1789-1850/5us137.

[137] Federico, A. (2020). *Checks and balances nell'ordinamento USA*. [online] DirittoConsenso. Available at: https://www.dirittoconsenso.it/2020/05/27/check-and-balances-ordinamento-usa/.

President cannot spend public money if it has not received congressional authorization. This decision came again from the fact that the colonies had experienced that in England the King had huge spending power and, in this way, had too much liberty to act.[138] The Senate, instead, can check on the power of the executive through a strong role of advice and consent, which will be dealt with in the next Chapter.

It is important to notice that the system of checks and balances is mainly based on the will of the people through the States' political parties. It is through them that the people keep the federal government under control. As a matter of fact, they organize the election of the HoR, as they are representatives of the electoral districts, and they influence the election of the Senate. In addition, they affect the election of the Great Electors through their control of States' legislatures and the organization of their election process. Moreover, in their role as mediators between the Senate and the President, the States' political parties can influence the preferences for the appointment of the judges of the Supreme Court and the lower courts.[139]

The system of checks and balances is strongly connected to the separation of powers principle that the founding fathers followed in writing the Constitution. This is a consequence of their concern that the legislative power would be too much more powerful than the others with universal suffrage. Therefore, they chose to follow a deliberation of the legislative in both Houses to stabilize and equalize the power.[140] In fact, there are many examples of checks and balances between the American institutions. One is the military forces, where the President is the Chief but the legislative chambers have budgetary powers on the policy area and they vote for what concerns the declaration of war. Moreover, the Senate is empowered to agree on peace treaties. In addition, regarding the nomination of officials, the Senate has the power to confirm the President's nominations. Furthermore, each Chamber is entitled to a reciprocal

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[138] History, Art & Archives, U.S. House of Representatives. *Power of the Purse*. [online] Available at: https://history.house.gov/institution/origins-development/power-of-the-purse/.
[139] Fabbrini, S. (2007). *Compound Democracies: Why the United States and Europe Are Becoming Similar*. New York: Oxford University Press, p.59.
[140] Library of Congress. *Full Text of The Federalist Papers*. [online] Independent Journal. Available at: https://guides.loc.gov/federalist-papers/full-text, no. 39.

check in the case of abuse of power.[141] Another example of checks and balances is the election of the President. In fact, if the Electoral College is not able to reach a majority, the president is elected by the HoR, which also enjoys the power of impeachment of federal officials.[142]

Undoubtedly, the system of checks and balances has created a lot of disputes both from the executive and from the legislative point of view. On the executive side, there have been lots of disputes regarding the power of the President. For example, Justice Black argued that the President's powers are only the ones coming from the statute or the Constitution. Contrarily, Justice Robert Jackson, who was a chief prosecutor during the Nuremberg trials, has categorized three types of the President's power:[143] when the powers have been conferred to it explicitly by Congress the president's power prevails, when Congress has not acted and thus the executive figure (the President) has to rely on himself its power starts to decrease, and, lastly, where the President goes against a decision of Congress its power is the weakest.[144]

Another important case regarding the power of the executive is *United States v. Curtiss-Wright Export Corp* of 1936. In this case, the Court ruled that the sale of weapons in a specific country would be illegal "*if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries*".[145] Therefore, in this case regarding foreign policy, Congress was allowed by the Court to delegate power to the President regarding the illegality of some domestic conduct, as in the case of selling weapons to some countries. This goes hand in hand with the

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[141] History.com Editors, (2020). *Checks and Balances*. [online] History. Available at: https://www.history.com/topics/us-government/checks-and-balances.
[142] McCormack, W. (2018). Checks and Balances in the Tripartite US Government. *Journal of International and Comparative Law*, [online] Volume 5(2), p. 437-460. Available at: https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jintcl5&men_hide=false&men_tab=toc&kind=&page=437, p. 438.
[143] *Ibid*, p. 445.
[144] Robert H. Jackson Center. *Concurring opinion, Youngstown v. Sawyer, 343 U.S. 579 (June 2, 1952)*. [online] Available at: https://www.roberthjackson.org/opinion/concurring-opinion-youngstown-v-sawyer-343-u-s-579-june-2-1952/.
[145] Skelton, C. *United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)*. [online] Justia US Supreme Court. Available at: https://supreme.justia.com/cases/federal/us/299/304/, 312.

fact that, regarding foreign affairs, the President is considered the most powerful authority as fast and proper responses to international matters may be needed in the international arena to compete with other powerful countries.[146]

Indeed, the delegation of such power by Congress creates some divergences. The non-delegation argument is based on the idea that Congress is not entitled to delegate its own lawmaking power.[147] Nevertheless, the Court has stated that this delegation is possible as long as the regulatory area has some limits.[148] Opposed to the non-delegation argument there is the unitary executive one, which is a lot more prone to allow the President to have a strong power. In fact, it argues that Congress cannot limit the methods the President follows to implement its powers nor create agencies for which the President has no power to alter the personnel.[149]

Legislatively speaking, the legislative veto and the budgetary control are two very important areas where the interplay of checks and balances is crucial. The legislative veto has been used by Congress to balance the executive power that it has been delegated to both the President and the different agencies, which is important for the checks and balances as Congress sets the guidelines and these agencies are in charge of the details.[150] Through time, in fact, the delegation of power to the agencies has increased and thus Congress has kept the power to review the agency's acts through a kind of legislative veto.[151] This mostly works in this way: agencies send the proposal to Congress and then it may object or not the work. Of course, for legislations proposed by an agency to become law, it still needs to respect the bicameralism and the presentment clause. The first means that it needs to be accepted by both houses, and the

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[146] McCormack, W. (2018). Checks and Balances in the Tripartite US Government. *Journal of International and Comparative Law*, [online] Volume 5(2), p. 437-460. Available at: https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jintcl5&men_hide=false&men_tab=toc&kind=&page=437, p. 444.
[147] *Ibid*, p. 447.
[148] Justia US Supreme Court. *Mistretta v. United States, 488 U.S. 361 (1989)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/488/361/, 372.
[149] McCormack, W. (2018). Checks and Balances in the Tripartite US Government. *Journal of International and Comparative Law*, [online] Volume 5(2), p. 437-460. Available at: https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jintcl5&men_hide=false&men_tab=toc&kind=&page=437, p. 447.
[150] *Ibid*, p. 450.
[151] *Ibidem*.

second that it needs to be approved by the President.[152] Moreover, in the case in which the President delegates administrative functions, Congress still enjoys oversight powers to keep the checks and balances system in place. In fact, agencies often work informally to arrive to an agreement also with Congress to not encounter any formal blocking from the latter, which would be a lot worse.[153]

Regarding budgetary power, one of the ways in which it is controlled is if the President withholds the funds given to it by Congress. Therefore, Congress passed the Impoundment Control Act of 1974, which makes executive decisions concerning the budget dependent on a request to Congress for the modification of the expenditure lines.[154] Moreover, Congress also passed the "line-item veto" where it said that the President could cancel a spending item or tax only if it reduced benefit, if it would not harm essential functions, or if it would not hamper national interest. Nonetheless, this veto was deemed unconstitutional by the *Court in Clinton v. New York of 1998*, where it was argued that the President's act altered the law also because the spending was not agreed by the parties involved in the budget request.[155]

2. The Vertical Division of Powers in the US: From Dual to Cooperative Federalism

The shift from dual to cooperative federalism has been one of the main ways in which US federalism became the one that it is today. This shift has been studied in depth by Corwin. He describes dual federalism as based on four main axioms: the national government only enjoys enumerated powers; there are very few purposes that it can promote constitutionally; the two levels of government enjoy sovereignty, and thus equality, in their respective fields; and the relation

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[152] McCormack, W. (2018). Checks and Balances in the Tripartite US Government. *Journal of International and Comparative Law*, [online] Volume 5(2), p. 437-460. Available at: https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jintcl5&men_hide=false&men_tab=toc&kind=&page=437, p. 451.
[153] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 3: The Constitutional Politics of the Executive Branch.
[154] *Ibid*, Chapter 3: The Constitutional Politics of the Executive Branch.
[155] Skelton, C. *Clinton v. City of New York, 524 U.S. 417 (1998)*. [online] Justia US Supreme Court. Available at: https://supreme.justia.com/cases/federal/us/524/417/.

between the two centers of government is not of collaboration, but rather of tension.[156]

As far as the shift to cooperative federalism is concerned, the figure of Chief Justice Marshall has been of great importance. He was in power of the Supreme Court for thirty years and wanted to establish a strong authoritative Court in interpreting and shaping the new constitutional system. The case *McCulloch v. Maryland* of 1819, in addition to *Marbury v. Madison* already mentioned above, was pivotal in contributing to this objective. Congress created the second Bank of the United States in 1816 but the state of Maryland, with a legislation of 1818, imposed taxes on the bank. This payment was refused by the cashier of the bank in Baltimore, McCulloch, and in a state appeal, the bank was considered unconstitutional because of the lack of constitutional power of the federal government to create a bank. On the contrary, the Supreme Court held that the State of Maryland could not impose taxes on an instrument of the central government that is enjoying constitutional powers.[157]

In addition, the Supreme Court has been identified as the supreme interpreter of the Constitution with the power of judicial review. This decision has been of great importance also for the recognition of the implied powers of the federal government in addition to the enumerated ones. These powers are not enlisted in the Constitution and result mainly from clauses such as the Necessary and Proper Clause (Article 1 Section 8).[158] Moreover, Chief Marshall recognized the powers of the central government as sovereign in respect to the ones of the states, and thus the latter have limited power to go against the federal government.[159] Undoubtedly, this judgement was criticized as it was going against the constitutional division of power, as emphasized by John Taylor of Carolina. Moreover, Hugh Swinton Legaré criticized Chief Marshall's view

[156] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 4.
[157] Oyez. *McCulloch v. Maryland*. [online] Available at: https://www.oyez.org/cases/1789-1850/17us316.
[158] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 1 Section 8.
[159] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 7.

arguing that it turned a system of enumerated powers in an indefinite powers' one.

Therefore, for the US it can be argued that the national government and the States are mutually complementary regarding the legislative power in the United States. The two spheres of government share sovereignty and cooperate as they share both functions and power.[160] In fact, the central government has been pivotal in helping the States in some specific policy areas. In addition, for what concerns the police powers, the central government has assisted the States by making the crimes against them, like racketeering or kidnapping, also against the national government in the case in which who commits the crime goes over state boundaries.[161] Another example of national-state cooperation is the Social Security Act of 1935, which allows that national power of tax-spending to be directed to support States in the allocation of pensions and unemployment insurance, between the many.[162]

The shift from dual to cooperative federalism can be identified also by dividing the history of the United States into three parts: the First Republic, the Middle Republic, and the Modern Republic.[163] The First Republic is the period that goes from the end of the American Revolution (1783) to the beginning of the Civil War (1861). This period is characterized by a very strict interpretation of the powers enlisted in the Constitution and, thus, also of the distribution of powers between the central government and the States. During this Republic, the balance of power favored the States, also in the protection of the rights of the citizens as they were concerned that a too large power of the central government could have unbalanced the federation. As a matter of fact, the principle of conferral was strictly valued as it holds that the central government may only enjoy the powers conferred to it in a semi-direct way by the Constitution

[160] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p.5.
[161] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 20.
[162] *Ibid*.
[163] Rizzoni, Giovanni. Comparative Public Law M042: Federalism USA. Academic Year 2019/2020, University Luiss Guido Carli, Rome. Class Lecture.

(enumerated powers), while the rest should be enjoyed by the States (residual powers).[164] This period is considered the "Age of Dual Federalism".

The Middle Republic period, instead, went from the end of the Civil War (1865) to Franklin Delano Roosevelt's New Deal of 1933. This period was characterized with a reinterpretation of the rights through the Reconstruction Amendments: the abolition of slavery of the 13th Amendment, the equality of all citizens regarding civil rights and the due process of law of the 14th Amendment, and the right to vote for all citizens and the prohibition of discrimination of the 15th Amendment. To ensure the respect of these Amendments a power was given to the central government, and therefore this signed the beginning of a shift regarding the protection of rights from the States to the federal government. In fact, during the Middle Republic, the empowerment of the central government starts. This period is also characterized by the fact that the federal government had the power of competence-competence for the first time.[165] This is a consequence of the unitarization that transformed the federation into a more unitary one where the central government would start not only to rule but also have the competence to choose its own competences. The rise of competence-competence has gone together with the increasing shift of power from the States to the federal government, creating a concurrent federalism more than a dual one.

The last period, identified as the Modern Republic, is the one going from the New Deal to nowadays. The New Deal has been crucial as it gave more importance to the role of the federal government through a robust economic intervention with the aim of restoring the economic situation of the country after the Great Depression of 1929. This led to an expansion of the intervention of the central state also in the case of civil rights protection and in the construction of the welfare state. In fact, this is considered the age of cooperative federalism.

[164] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 4.
[165] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 35.

Therefore, there was a more unitary idea of federalism with stronger cooperation of the States based on common rights.[166]

Today, even if the 10th Amendment includes a residual clause posing the powers not given to the central government directly into the States' hands, the national government has some kind of powers in all matters. This is identified, by Tushnet, as plenary national power, and it is the cause of federalism questions when a state, or a related authority, considers the state to have acted outside of its powers.[167] This plenary power of the central government has increased in history through some landmark decisions regarding the economy. The first case that was pivotal in increasing the power of the central government is *Gibbons v. Ogden* judged by Chief Marshall in 1824 where Congress thought that the regulation of interstate commerce foreseen by the Commerce Clause was more important than the power to regulate navigation by the single States. As a matter of fact, the case involved the power of the central government to issue licenses for ships to travel along the coast, even if the organization of navigation is state power. In fact, for Marshall, commerce was understood in the broader sense, meaning both inter and intra-state commerce, increasing greatly the power of regulation of the central government.[168]

a. The Incorporation Doctrine: Increasing the Central Government's Powers through the Bill of Rights

The interpretation of the Bill of Rights has been another important factor that has contributed to the shift towards cooperative federalism. During the first years of the American Federation, the Bill of Rights was interpreted as a tool to protect the citizens' rights from possible abuses of the federal state. Consequently, the protection of basic rights was considered a duty of each federated state. Over time, considering difficulties rising from the different

[166] Rizzoni, Giovanni. Comparative Public Law M042: Federalism USA. Academic Year 2019/2020, University Luiss Guido Carli, Rome. Class Lecture.
[167] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 5: Federalism and the Reach of National Power.
[168] *Ibid*, Chapter 5: Federalism and the Reach of National Power.

interpretations of the Bill made by each State, the Supreme Court recognized the Bill of Rights as a tool to protect citizens, regardless of the member state to which they belong. This is related to the (selective) incorporation doctrine: a gradual inclusion of civil rights common and binding to all the member states of the federation and, therefore, a power of the central government. This principle, though, was not accepted once and for all in one specific ruling of the Supreme Court but was gradually introduced through a series of rulings.[169] This doctrine started with the Fourteenth Amendment, for which the Court stated that it would have adopted selective incorporation by incorporating the Amendment in parts.[170]

The case that was pivotal to make MSs bound by the Fourteenth Amendment was the *Slaughter-House* case of 1873,[171] where the Supreme Court stated that the States had no right to pass laws that would have diminished the rights of the US citizens, as one against the Fourteenth Amendment, but it had the right to diminish the ones that applied only to state citizenship. From this point onwards, the Court started to apply only parts of the Fourteenth Amendment in the subsequent cases involving the enclosed rights, process which become effective in the 1920s with *Gitlow v. New York* of 1925.[172] On the one hand, Justice Black thought that the Bill of Rights as a whole was to be applied through the Fourteenth Amendment, which he considered to comprehend all of them. Contrarily, Justice Frankfurter was strongly against this idea and thus the Court started to incorporate the other Rights of the Bill of Rights in the Fourteenth Amendment to apply them in all States only from 1962 when Frankfurter died.[173]

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[169] Rizzoni, Giovanni. Comparative Public Law M042: Federalism USA. Academic Year 2019/2020, University Luiss Guido Carli, Rome. Class Lecture.
[170] Legal Information Institute. *Incorporation Doctrine*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/wex/incorporation_doctrine#:~:text=The%20incorporation%20doctrine%20is%20a,applies%20both%20substantively%20and%20procedurally.
[171] Skelton, C. *Slaughterhouse Cases, 83 U.S. 36 (1872)*. [online] Justia US Supreme Court. Available at: https://supreme.justia.com/cases/federal/us/83/36/.
[172] The Free Dictionary. *Incorporation Doctrine*. [online] Available at: https://legal-dictionary.thefreedictionary.com/Incorporation+Doctrine.
[173] *Ibidem*.

The use of this doctrine emphasized the passage from dual federalism, in which both the federal state and the federated states are considered two separated entities, to cooperative federalism, in which federal and federated states act within a common legal framework. The interpretation given by the Supreme Court to this clause was crucial to the distribution of powers between the Member States and the federation.

b. Article 1: The Necessary and Proper Clause, The Power to Lay and Collect Taxes, The Commerce Clause, and the Implied Powers Clause

Article 1 of the US Constitution is of great importance for the division of power between the States and the central government in the United States. A compelling issue of division of power is the Necessary and Proper Clause. It is enclosed in Article 1, Section 8, of the US Constitution, of which clauses like Clause 18 have been of pivotal importance for the shift from dual to cooperative federalism as it has increased greatly the power of the central government compared to the one of the single States:

> "*[The Congress shall have Power …] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*".[174]

Another major way that ensured the passage to a more united federalism regarded the interpretation of some norms of the Constitution, especially three clauses included in Article I Section 8 that define the power of the federations.[175] The flexibility of the American federal system can be understood through the evolution of the interpretation of the Court of both the Bill of Rights and of this Article, which underlines the fact that the changes in the distribution of powers have been done without the modification of the legal texts but through the shift

[174] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 1 Section 8, Clause 18.
[175] *Ibid*, Article 1 Section 8.

in the interpretation of them by the Supreme Court. Consequently, most of this process has been conducted by the jurisprudence of the Supreme Court. Therefore, federalism is not a fixed system, but an everlasting process, oriented by different pressures, coming both from the federal government and from the federated states.

The enumerated powers of the central government were used by the Supreme Court to understand federal power in a larger way. The first of these enumerated powers is the power to lay and collect taxes, which was used to justify the spending power of the federation:

> *"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States".*[176]

This is connected to the power of regulation of commerce with other states and among the different Member States. It was initially limited to the power of regulation, but it was used to justify any kind of economic intervention of the federation. In this Clause, there is also a doubt on what "*provide for ... general welfare*" means. This goes hand in hand with the Necessary and Proper Clause, which vests Congress with the power to legislate on whatever it considers as general welfare and in whatever way it deems necessary and proper.[177]

Another important Clause comprehended Article 1 Section 8 is the Commerce Clause, which comprehends both interstate and external commerce. The Supreme Court, though, has exploited this clause in order to allow Congress to finance expensive programs and economic intervention by the federation. As it has been described above, the case of *Gibbons v. Ogden* judged by Chief Marshall has been of great importance to enlarge the scope of this Clause and

[176] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 1 Section 8.
[177] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 5.

increase the central government's powers. The *Gonzales v. Raich*[178] case of 2005 has increased even further the power of the central government regarding the Commerce Clause. The case involved Raich who grew marijuana in her apartment, and she got a declaration saying that the activity was for non-commercial purposes. Nevertheless, the Court did not agree with such statement stating that the federal government can regulate non-commercial activity if the non-regulation could hamper the regulation of commerce of such good.[179]

The last power which strongly influenced the shift from dual to cooperative federalism is the Implied Powers Clause. Congress, following the development of the interpretation of the Clause, has not only the power to make laws but it also has all the necessary power to carry out its general role. This was and is used to justify the use of powers by the federation that were not literally included in Section 8 of Article 1 and to thus have larger flexibility in the distribution of powers. Therefore, the central government enjoys all the powers that are necessary to execute its functions. The limits to the extension of the implied powers are established by the rulings of the Supreme Court. One of the greatest limits is the Constitution itself.[180] In fact, in the *Fairbank v. United States* case of 1901,[181] Justice Brewer stated that if the Constitution states that the powers of Congress need to be applied in its entirety, also prohibition or limitation to Congress's powers need to be applied entirely to avoid any rule of construction in the Constitution's wording.[182] It has to be highlighted that this works best in the case of expressed powers with expressed limitations. In the case of implied powers with general limitations, the Court has sometimes taken the stance that general powers supersede general limitations, as in the *Juillard v.*

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[178] Oyez. *Gonzales v. Raich*. (online) Available at: https://www.oyez.org/cases/2004/03-1454.
[179] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 5: Federalism and the Reach of National Power.
[180] Dodd, W.F. (1919). Implied Powers and Implied Limitations in Constitutional Law. *The Yale Journal Company*, [online] Volume 29(2), p. 137-162. Available at: https://www.jstor.org/stable/786104, p. 151.
[181] Justia US Supreme Court. *Fairbank v. United States, 181 U.S. 283 (1901)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/181/283/.
[182] Dodd, W.F. (1919). Implied Powers and Implied Limitations in Constitutional Law. *The Yale Journal Company*, [online] Volume 29(2), p. 137-162. Available at: https://www.jstor.org/stable/786104, p. 152.

Greenman case of 1884.[183] Nevertheless, as for taxation power in the *McCray* case, the Court has the right to render an act improper when legislative acts are written violating the fundamental rights, such as freedom or justice, on which the Constitution is based.[184]

Additionally, the Supreme Court must impartially allocate the powers to either the State or the national government. Therefore, the principle of national supremacy, in the case of national government's powers, can be superseded by the discretion of the Supreme Court in designating a state power as a limitation to a certain national one, except for the interstate commerce regulation.[185] The first example of such role of the Supreme Court is, even if from the point of view of the States' power, in the case of the Police Power where States are meant to "*provide for the public health, safety, and good order*"[186]. On such powers, though, the Supreme Court could have the last word even if they are exclusively of the States.

c. The Supremacy Clause and Preemption

Regarding the legislative power of Congress, there is a strong supremacy clause that favors it over the States. In reaching such importance of the supremacy clause, the concept of preemption has been crucial. Preemption can be defined as when "*a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict*".[187] Chief Marshall's opinion on this clause was of great importance in a case called *Gibbons v. Ogden* of 1824.[188] At first, there was a preemption of the States' legislation over the federal one, but with time it became the opposite. The current legislation in the US, in fact, says that States can also legislate on the fields

[183] Dodd, W.F. (1919). Implied Powers and Implied Limitations in Constitutional Law. *The Yale Journal Company*, [online] Volume 29(2), p. 137-162. Available at: https://www.jstor.org/stable/786104, p. 153.
[184] *Ibid*, p. 154.
[185] Corwin, E. (1950). The Passing of Dual Federalism. *Virginia Law Review*, [online] Volume 36(1), p. 1-24. Available at: https://www.jstor.org/stable/1069035, p. 16.
[186] *Ibid*.
[187] Legal Information Institute. *Preemption*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/wex/preemption.
[188] Oyez. *Gibbons v. Ogden*. [online] Available at: https://www.oyez.org/cases/1789-1850/22us1.

considered as enumerated powers of Congress as long as there is no prior legislation at the federal level: it is not preempted by the federal government. As a matter of fact, most areas of law are governed by federal and state concurrent legislations, which rest at the basis of cooperative federalism.

The principle of supremacy is contained in Article 6, Clause 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.*".[189]

Indeed, the principle of supremacy is deeply connected to the preemption clause as it highlights the fact that federal laws generally supersede state laws and constitutions. As a matter of fact, the States are not allowed to interfere with the power given to the federal government by the Constitution. Moreover, state laws cannot be vetoed or reviewed by the federal government before they enter into force.[190] Only once the state law in question enters into force the federal government may ask the state to repeal the law or to render it void in case of conflict. This is the case unless the state law provides higher protection than the federal law, in which case the former supersedes the latter. This, thus, shows how federal law can be considered as a minimum standard.[191] An example can be the antidiscrimination federal law, which does not include the LGBTQ community.[192] In this case, in the different States a gay person could be fired for his sexual orientation, but in the case of Illinois, where there is a higher standard

[189] National Archives, (2020). *The Constitution of the United States: A* Transcription. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article 6, Clause 2.
[190] Legal Information Institute. *Supremacy Clause*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/wex/supremacy_clause.
[191] FindLaw's team, (2017). *The Supremacy Clause and the Doctrine of Preemption*. [online] FindLaw. Available at: https://www.findlaw.com/litigation/legal-system/the-supremacy-clause-and-the-doctrine-of-preemption.html.
[192] *Ibid*.

of protection for LGBTQ individuals, a person fired for such reason can sue the employee for wrongful termination.[193]

The supremacy clause of the US goes back to the founding of the Constitution in the 18th century, and it is related to the expressed powers granted to the federal government by Article 1 Section 8. In addition to these expressed or enumerated powers the central government also enjoys implied powers, as stated by the Supreme Court in the *McCulloch v. Maryland* case of 1819.[194] Therefore, for both the enumerated and implied powers, federal law will enjoy supremacy over state law.

Regarding preemption, there can be two types. Express preemption by Congress is where the legislation contains a specific clause that says that the States cannot legislate on the matter. Implied preemption, instead, is mostly controlled *ex-post* by the Supreme Court and there are three types of implied preemption:[195] conflict preemption, which limits conflict in the case of two norms on the same matter; obstacle preemption, which preempts conflict on policies carried out at two different levels of legislation; and field preemption, which is when Congress wants to occupy all the legislative space to prevent legislations at the state level. Regarding the latter, it can be said that it prevents cooperative federalism in the fields where it is used.

Interesting about preemption is also how the Supreme Court's view over the topic has changed over time. In the beginning, preemption was seen as a direct consequence of the federal entry into a state regulatory field, while today it is mostly a choice of Congress and the Court needs evidence from it (through a clear manifestation) to grant preeminence of the federal legislation vis-à-vis the state one.

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[193] FindLaw's team, (2017). *The Supremacy Clause and the Doctrine of Preemption*. [online] FindLaw. Available at: https://www.findlaw.com/litigation/legal-system/the-supremacy-clause-and-the-doctrine-of-preemption.html.
[194] *Ibid*.
[195] *Ibidem*.

3. The Horizontal Division of Powers in the EU

a. Institutional Organization and Decision-Making Regimes

The institutional organization is important to analyze the horizontal aspect of the division of powers. As far as the EU is concerned, the executive power is represented by the Commission. Moreover, the Commission is elected through a two-level procedure by both the MSs and the EP, and it decides by majority. Arguably, though, it can be said that the executive branch is also composed of the European Council that has the power of agenda-setting and to define the objectives of the Union. The Council, instead, can be considered a lot more like an intergovernmental organ, as it is composed of ministerial representatives for each MS and decides by unanimity (for the most part), even if with the LT also the qualified majority voting has started to be used extensively (55% of the MSs representing 65% of the population). This can be considered a consequence of the always more dominant use of the Ordinary Legislative Procedure (OLP). The OLP is used in most policies under the Union's competences unless it is said otherwise in the treaties. This is the case, for example, of Common and Foreign and Security Policy or all the policies where the Open Method of Coordination is used, like social ones.

Interestingly, the Council, just like the US Senate, has veto power for each that safeguards the States' sovereign equality.[196] Therefore, it may be argued that the EU is very close to the US from a legislative point of view as it also has the resemblances of a bicameral structure with one chamber representing the people (EP) and one the States (the Council).[197] The EP, instead, is composed of representatives of the European political groups, which are made of representative of national parties. They make decisions through a majority system and their members - 705 since Brexit - are elected every five years and are based on a proportional representation.

From the institutional organization point of view, both the institutions that make up the executive branch and the ones that make up the legislative one

[196] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 55.
[197] Fabbrini, S. (2015). *Which European Union? Europe after the Euro Crisis*. Cambridge: Cambridge University Press, p. 243.

have staggered mandate, meaning that the is no will in creating a "magic formula"[198] – the same majority - in neither of the branches. In addition, for what concerns the legislative, the Council formation depends on the domestic elections and this situation creates some uncertainty. Nonetheless, it can be argued that for the single market a quite defined division of powers between the center and the MSs has been created, while, for the traditional state policies, there is more a confusion of powers where legislative and executive roles often overlap.[199]

Notably, the MSs still want to remain the master of the treaties and it is for this reason that the amendment procedures respect an institutional balance with the intergovernmental institutions having a more powerful role. Furthermore, to amend the Treaties the ratification by all MSs is required.[200] The matter of amendment is treated in Article 48 TEU[201], which identifies two procedures: the ordinary revision procedure and the simplified revision procedure (introduced by the Lisbon Treaty (LT) to simplify the ordinary one).

For the first procedure, the governments of the MSs, the European Parliament (EP), or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals, though, may only have the aim of increasing or reducing the competences conferred to the EU by the Treaties. These are then submitted to the European Council by the Council and the national Parliaments shall be notified. The European Council, after consulting the EP and the Commission, adopts by a simple majority a decision in favor of examining the proposed amendments. For this purpose, the President of the European Council shall convene a Convention, but the European Council may decide, by simple majority and after obtaining the consent of the EP, not to convene one should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of

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[198] Fabbrini, S. (2015). *Which European Union? Europe after the Euro Crisis*. Cambridge: Cambridge University Press, p. 244.
[199] *Ibidem*.
[200] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 51.
[201] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 48.

reference for a conference of representatives of the governments of the MSs, and then the MSs and President of the Council determine the amendments. Successively, they shall be ratified by all the MSs in accordance with their respective constitutional requirements. Moreover, the ratification needs to respect a deadline chosen carefully by the MSs.

Regarding the simplified procedure incorporated by the LT, it can only be applied to internal policies of the EU (Part Three of TFEU). In this procedure, the Council is not involved and the European Council is the dominant institution. It chooses what to amend and then votes by unanimity after consulting both the EP and the Commission. In the case of monetary policy amendments, also the European Central Bank needs to be consulted. In addition, for this revision procedure, the amendment enters into force once it is approved by all MSs in accordance with their constitutional requirements.

The institutional dimension of the EU is very complex, above all because of the will of the MSs to not let the Union gain extensive powers. This is also reflected in the decision-making regimes – "*a stable, even if flexible, combination of rules and actors*".[202] In fact, in the EU there are various ways in which decisions are taken and can be divided into two regimes: the supranational and the intergovernmental one. The former deals mostly with issues that have low political importance, such as the internal market, and the supranational institutions (Commission and EP). The latter, instead, deals with the policies that are still categorized as very important by the MSs and, in fact, the intergovernmental institutions (Council and European Council) are the most relevant.[203]

Analyzing more deeply the supranational decision-making regime, it emerges that is based on a quadrilateral set of institutions: the Commission and the European Council, which make up the dual executive, and the EP and the Council, which constitute the two legislative chambers. With regards to this quadrilateral, it shows some features of separation of powers, meaning that no

[202] Fabbrini, S. (2020). Institutions and Decision-Making in the EU. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 54.
[203] *Ibid*.

institution prevails in terms of power as both chambers are not related to the executive in any way. Nevertheless, this quadrilateral becomes a triangle in the Community Method (generally known as the OLP) where the Commission and the two chambers are predominant. There are some specific single market policy areas where the Commission enjoys great autonomy for which it can be argued that the decision-making type is very centralized in the supranational regime. This is the case for competition policy and some areas of the trade one.[204]

The intergovernmental decision-making regime is the one that is used for the core state powers on which the MSs do not want to pull more sovereignty like CFSP, economic policy, and JHA. For these areas, the LT introduced a system of decision-making based on institutional agreements mainly of the two intergovernmental institutions (the Council and the European Council). Such a decision-making regime aims at increasing and easing the voluntary coordination between the MSs regarding such core policy areas.[205] It is in this regime that the confusion of powers is mostly seen: the decisions are taken by the MSs' leaders in the European Council or by Ministers in the Council, who act as both the executive and the legislative. Moreover, they are not subject to any check by the supranational institutions. This, therefore, leaves the only elected body of the EU, the EP, on the sides, which is the exact contrary of how the supranational regime has evolved strengthening the role of the EP.[206]

b. The System of Checks and Balances in the EU

A pivotal feature of the horizontal dimensions of federations like the US, as described above, is the system of checks and balances of institutions. Indeed, this system is present also in the EU. To recall, this is a system of combined distribution of power, as Montesquieu said,[207] where the institutions have in some ways overlapping powers to avoid a too strong concentration of power in one of them. For example, two institutions share legislative functions with the

[204] Fabbrini, S. (2020). Institutions and Decision-Making in the EU. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 63.
[205] *Ibid*, p. 66.
[206] *Ibid*, p. 71.
[207] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 150.

mutual power of rejection while being always overseen by the executive power. This enables the institutions to check one another by sharing powers. In the case of the EU, there is not a clear separation of powers, but more a cooperation of functions.[208] This organization of powers, therefore, stands at the basis of the relation between the main institutions of the Union.[209] In fact, the European Treaties do not refer to the institutions in the realm in one specific governmental function. This is clear in *Parliament v. Council* of 1990, which will be further explained in the next section of the Chapter, where the Court has stated in its judgement that:

> "*The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.*".[210]

In the horizontal dimension of the division of power of the EU, there is an explicit provision regarding the horizontal mutual sincere cooperation between the different institutions in Article 13 (2) TEU[211]:

> "*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.*".[212]

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[208] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 150.
[209] Fabbrini, S. (2015). *Which European Union? Europe after the Euro Crisis*. Cambridge: Cambridge University Press, p. 233.
[210] Case C-70/88 *European Parliament v Council of the European Communities* (1990) ECR I-02041. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0070.
[211] Van Elsuwege, P. (2019). The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law. In: Varju, M., ed., *Between Compliance and Particularism*, Springer Nature Switzerland AG. Available at: https://www.researchgate.net/publication/330961755, p. 286.
[212] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 13.

This Article has three provisions. The first is that every institution needs to act within the powers conferred to them by the Treaties – the institutions need to respect the principle of conferral. This first provision, thus, also explains that an institution cannot unilaterally expand its powers or transfer them unless expressly allowed by the Treaties. As a second provision, the institutions need to respect each other's powers, as emphasized also in the case cited above. Thirdly, the institutions need to respect the procedures written in the Treaties like the OLP, where the EP, the Council, and the Commission play a very important role. Moreover, it is also very important to respect the consultation of institutions as of the Treaties, which represent a pivotal aspect of institutional balance.[213]

The checks and balances between the EU institutions happen above all in the so-called Community Method, or OLP. With the LT, in fact, the Commission has predominant power in comparison with the two chambers as it enjoys the legislative proposal power, and it is independent of MSs.[214] This, though, does not hold for the other policies, as the supranational bodies are marginalized from the decision-making in core state policy areas. Moreover, it is thanks to the safeguards of the checks and balances that the EP and the Council can act by majority, as the Commission can act as a balance between the various political disagreements also thanks to its detachments from the MSs' governments.[215] Moreover, the Commission is the one that ensures that the EU objectives are put as a priority, also through its power of legislative initiative. Therefore, the Commission can be identified as the main political safeguard. In fact, its independence from the MSs also allows the Commission to make

[213] Van Elsuwege, P. (2019). The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law. In: Varju, M., ed., *Between Compliance and Particularism*, Springer Nature Switzerland AG. Available at: https://www.researchgate.net/publication/330961755, p. 286.
[214] Lang, J. (2006). Checks and balances in the European Union: The institutional structure and the community method. *European Public Law*, [online] 12(1), p. 127-154. Available at: https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EURO\EURO2006007.pdf, p. 127.
[215] *Ibid*, p. 134.

international agreements, propose directives to the Council, and bring MSs in front of the CJEU in case of wrongdoing.[216]

Nevertheless, the problem is that this checks and balances system, as emphasized before, only works for supranational decision-making. In fact, for the intergovernmental decision-making regime, the MSs keep all the power in their hands and the Commission is very rarely involved. Therefore, the MSs may also leave out minorities in decision-making methods that require soft/voluntary coordination. This is not good for the EU as some very important policies like CFSP and JHA, are part of it and they are where a uniform view is needed to cooperate efficiently.

For the system of checks and balances, the principle of institutional balance is very important as it governs the equality of power between, above all, the EP, the Council, and the Commission, for which the institutions have to respect the powers conferred to them by the Treaties.[217] This was also the subject of the *Meroni case* of 1956, where the applicant thought that the Commission delegated the powers to another authority in an unlawful way without considering the conditions by which the power had to be exercised as the Treaty conferred the powers directly to the supranational institutions.[218] Therefore, such an act could affect the institutional balance of power inside the EU, above all the public powers.[219] In fact, the CJEU agreed stating that a delegation of power can be done only if the power involved is strictly executive and the supervision by the Commission, in such case, is easier.[220] This is also because delegating a discretionary power, and thus also substituting the institutions who take decisions by putting political choices at stake, indirectly alters the balance of powers ensured by the Treaties. As a matter of fact, the Meroni doctrine came to

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[216] Lang, J. (2006). Checks and balances in the European Union: The institutional structure and the community method. *European Public Law*, [online] 12(1), p. 127-154. Available at: https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EURO\EURO2006007.pdf, p. 136.
[217] EUR-Lex. INSTITUTIONAL BALANCE. [online] Available at: https://eur-lex.europa.eu/summary/glossary/institutional_balance.html.
[218] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 324.
[219] Simoncini, M. (2020). The erosion of a pillar doctrine of EU law. [online] Luiss Open. Available at: https://open.luiss.it/en/2020/02/06/the-erosion-of-a-pillar-doctrine-of-eu-law/.
[220] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 325.

be known as the impossibility of the Union's institutions to delegate discretionary powers to the European Agencies.[221]

As Moskalenko argues, the principle of institutional balance highlights the need to check the powers of the different institutions as the EU evolves, but also whether to legitimize or not new types of power configurations.[222] Nevertheless, with the growth in administrative and technical power of institutional agencies, the Meroni doctrine has in some way eroded as their decisions have an important weight even if they are not binding in their nature.[223] A perfect example is the one of the European Aviation Safety Agency (EASA), which issues regulations-like standards on environmental protection and safety that the MSs often follow.[224] This has been confirmed also in the *UK v. European Parliament and Council of the European Union case* of 2014 where the CJEU has admitted some forms of regulations by agencies as long as it respects the agencies' powers and judicial review of the Court is permitted.[225]

4. The Vertical Division of Powers in the EU

The EU, as stated in Chapter 1, has been and is considered as a *sui generis* legal entity by some scholars as it was neither an international organization, enjoying some sovereignty, nor a federal state as it was not totally sovereign nor independent. Regarding the issue of sovereignty, the "*Maastricht decision*" of the German Constitutional Court has been very important. For this decision the Democracy Principle enclosed in Article 38 of the Basic Law has

[221] The Jean Monnet Center for International and Regional Economic Law & Justice. *B. Regulation and Institutional Doctrine*. [online] Academy of European Law online. Available at: https://www.jeanmonnetprogram.org/archive/papers/01/010301-04.html.
[222] Moskalenko, O. (2016). THE INSTITUTIONAL BALANCE: A JANUS-FACED CONCEPT OF EU CONSTITUTIONAL. *Politeja*, [online] No. 45, p. 125-144. Available at: https://www.jstor.org/stable/10.2307/26213931, p. 125.
[223] Simoncini, M. (2020). The erosion of a pillar doctrine of EU law. [online] Luiss Open. Available at: https://open.luiss.it/en/2020/02/06/the-erosion-of-a-pillar-doctrine-of-eu-law/.
[224] *Ibidem*.
[225] Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (2014) Court Reports. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0270.

been pivotal as it stands at the basis of the idea that the state represents the people and thus its authority should reflect their will: [226]

> *"(1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.*
> *(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.*
> *(3) Details shall be regulated by a federal law".*[227]

It is from this Article, in fact, that the German Constitutional Court starts its case against the Maastricht Treaty because of the EU's lack of the power exercised directly by the people. The Court argued that it would choose whether the EU legal acts are within its powers or not: no competence-competence for the EU.

This problem was overcome by the EU with the increasing use of qualified majority voting in the Council, which was, and still is, the main decision-making body of the EU. As a matter of fact, through majority voting, it was not very difficult to go against the will of Germany. The vote in the Council, a body composed of representatives of the people and elected governments of the MSs, was one of the two ways in which the EU laws enjoyed democratization. The other way was to create a European democracy, and the EU has done this through the direct election of the EP and the creation of European citizenship. Still, the German Constitutional Court recognized EU law as international law, making the MSs the master of the treaties.[228]

The Maastricht decision caused the revival of the European statist tradition that argued that the EU did not have people, did not have a constitution, and thus did not have constitutionalism. This tradition also supports the idea that

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[226] Boom, S.J. (1995). The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?". *The American Journal of Comparative Law*, [online] Volume 43(2), p. 177-226. Available at: https://www.jstor.org/stable/840514, p. 182.
[227] Bundesministerium der Justiz and für Verbraucherschutz. (2019). *Basic Law for the Federal Republic of Germany*. Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0188, Article 48.
[228] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 63.

sovereignty is indivisible and thus it must be either of the MSs or the Union.[229] Therefore, they do not consider it possible for more than one people to live in the same territory. Nevertheless, this characteristic is the one that is shared by all federal unions, just like the operation of two different governments that share constitutional power. Constitutionally speaking, in fact, various features are close to the ones of the US.

a. The Supremacy Clause and Preemption

The EU was initially based on an international treaty. Nevertheless, it is restrictive to just identify it as an international treaty as the treaty was ratified by the national parliaments and, thus, can even be defined as a legislative treaty.[230] The treaties soon became a Treaty-Constitution, and the Court of Justice ruled that EU law enjoyed supremacy over national law.

The supremacy principle (*principio del primate*) of the EU law over national law was codified by crucial jurisprudence of the CJEU. Moreover, such principle holds true for all the binding acts of the Union. This principle has been codified by the CJEU's case of 1964 *Costa v. ENEL*.[231] The case went before the Italian Constitutional Court before going by the Court, which supported the principle of *lex posterior derogate priori* referring to the 1962 nationalization of the electricity law over the incorporation of the Treaty of Rome in the Italian system, which happened in 1958. The ECJ, though, stated otherwise. It first recognized the EU legal system as a different legal order and thus detached it from international law. In addition, the Court even added that, since the EU law fits with the national one, the States need to apply it. Interestingly, when national law goes against EU law is not nullified but just disapplied, no matter when the national law is emanated. Furthermore, even the national courts need to respect communitarian law by applying it also in the case where it goes against national

[229] The Editors of Encyclopaedia Britannica. (2020). *Sovereignty*. [online] Available at: https://www.britannica.com/topic/sovereignty.
[230] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 48.
[231] Case 6-64 *Flaminio Costa v E.N.E.L* (1964) ECR 00585. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006.

law.[232] In fact, the Italian Constitutional Court, though, has changed its point of view on the matter with the pivotal *Granital case* of 1984. This case has changed the relationship between EU and national Italian law as the Court has recognized that direct communitarian law prevails over a possible conflicting law, no matter the date.[233]

Another important case regarding this principle is the *Taricco case*, of which decisions in the CJEU started in 2015. Here the Court wanted to safeguard the Union's financial interests by assuring the correct transposition of Article 325 (1) and (2) TFEU. In fact, the CJEU stated that the national law needs to be disapplied where the VAT fraud is grave and verified in different cases or if the national law is less strict than the one of the EU regarding the limitation periods.[234] Therefore, also in this case, the law needs to be disapplied by the Courts, which is strongly related to the supremacy principle. At the same time, this disapplication does not have to hamper fundamental human rights.[235] Additionally, it is interesting that the CJEU highlighted that Article 325 TFEU is applicable only if the national courts deem that it is compatible with the constitutional national identity, and it is up to the state to undertake such analysis.[236]

This existence of a supremacy clause already emphasizes the existence of two political orders that form a federalist structure. Another important factor that proves that there is a federal government is that the citizens of the 27 MSs enjoy European citizenship in addition to their national one. As a matter of fact, the MSs need to extend national rights also to the citizens of other European

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[232] EUR-Lex. *Il primate del diritto europeo*. [online] Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=LEGISSUM%3Al14548.
[233] Fierro, M., Nevola, R. and Diaco, D. (2017). I Diritti Fondamentali Nell'Ordinamento Giuridico Comunitario e Negli Ordinamenti Nazionali. *Corte Costituzionale*, (online) Available at: https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_306_Diritti_fondamentali_2017.pdf.
[234] Case C-105/14 *Criminal proceedings against Ivo Taricco and Others* (2015) Court Reports. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62014CJ0105, part 58.
[235] Amalfitano, C. (2017). *La vicenda Taricco e il (possibile) riconoscimento dell'identità nazionale quale conferma del primato del diritto dell'Unione europea*. [online] Eurojus.it. Available at: http://rivista.eurojus.it/la-vicenda-taricco-e-il-possibile-riconoscimento-dellidentita-nazionale-quale-conferma-del-primato-del-diritto-dellunione-europea/.
[236] *Ibid*.

States (horizontal implication of European citizenship), and the EU grants civil and political rights to all its citizens (vertical implication of European citizenship). Moreover, with the creation of the Treaty-Constitution, it can be argued that the States have lost the competence-competence power as they are not able anymore to decide their competences for themselves because they also have to rely on the other MSs and the European Union. Nevertheless, also the EU is bound to the MSs to change the Treaties and thus it does not have the possibility to increase its competences alone.

As for the US, also in the EU the concept of legislative preemption is related to the principle of supremacy because the EU has the power to preempt national law, even if preemption is not expressly cited as it is for the US. As it has been described above, there are three types of preemption. Field preemption is abstract and it provides that the Court just excludes the MSs from legislating in a field saying that the Union has covered all that specific legislative space.[237] Obstacle preemption, instead, is based on material conflict when the Court affirms that a specific national law precludes the EU law from functioning correctly. Therefore, any national law that can potentially collide with EU law may be attacked by the Court.[238] The last type of preemption, rule preemption, is the clearest one as it happens when a national law is averse to a European norm. It goes without saying that if a national law does not go against a European norm, it is not preempted.

Regarding preemption, the EU may clearly express (express preemption) the extent to which national law is preempted. Differently, if express preemption is absent, the Court must imply the extent of preemption intended. This, it can be said, is based on the federal theory of interpretation which stands at the basis of any federal union. This theory means that when there is an interpretation of a legislation in a federal union, separation of powers between the dimensions – vertical and horizontal – will be involved.[239]

Very interesting is the way in which Arena talks about preemption in the EU, conceptualizing it in two ways: constitutional and legislative. The former

[237] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 135.
[238] *Ibid*, p. 136.
[239] *Ibid*, p. 138.

conception of preemption refers to the idea that, because of the existence of an EU competence foreseen by the Treaties, the MSs are prevented from legislating on the matter. The latter, instead, refers to the idea that EU preemption starts when the Union legislates on some matter that is part of the concurrent or shared competences, being the exclusive ones already directly subject to preemption.[240]

Lastly, talking about preemption, it has been said above that the EU can choose how much it wishes to preempt, but there are some limitations: there is a difference on whether a regulation or directive is used and the type of competence on which the EU is legislating. Regarding regulations, there is a false myth that they automatically preempt the state to legislate on the same matter of the regulation. This is not the case as the regulation is only directly applicable and, therefore, it is mostly considered as a minimum standard for MSs and they do not automatically field preempt.[241] For a directive, instead, the analysis is quite similar as they leave some room for the States but at the same time, even if the state enjoys some freedom regarding the methods and form to transpose it, the directive does not necessarily mean that they have certain freedom regarding the policies over the matters treated.[242]

b. Direct Effect

The direct effect doctrine is related to the principle of supremacy. It means that some legal acts of the Union are directly applicable in every MSs.[243] The discussion on this topic started with the *Van Gen den Loos case* in 1963,[244] where the Court stated that the EU legal order was a new one and that MSs could invoke it in the national tribunals and courts. The Court also stated that the European law would be directly applicable and thus that individual rights and

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[240] Arena, A. (2013). *Il Principio della Preemption in Diritto dell'Unione Europea. Esercizio delle Competenze e Ricognizione delle Antinomie tra Diritto Derivato e diritto Nazionale*. Napoli: Editoriale Scientifica s.r.l., p. 32-35.
[241] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 140.
[242] Prechal, S. (2005). *Directives in EC Law*. London: Oxford University Press, p. 73.
[243] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Article 288.
[244] Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 00001. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026.

obligations were directly derivable from the EU law. The direct applicability of Community law is a different and wider concept than the direct effect. The direct applicability applies to all legal acts and is related to their internal effects within the legal order of the MSs. It means that the EU law is valid in the national legal order without a validating national act.[245] On the other hand, the direct effect is the individual effect of a specific norm in certain cases.[246] This mostly refers to the power of law to execute itself.

For what concerns the direct effect of a provision, in the past there was a test based on three criteria: there had to be a prohibition, which was both unconditional and clear,[247]but it was loosened by the CJEU. Now, a provision has a direct effect when it can be applied by a national court and when the direct effect produces a subjective right.[248] Moreover, the codification of the direct effect of EU law on national legal systems also codified the monistic approach of the EU, where the Community law becomes part of the national legal order because of its direct applicability, just like a national law.

The Articles of the Treaties, regulations, and decisions enjoy a direct effect on the national legal order, while for directives the situation is more complicated. A directive, as for Article 288 TFEU, is binding on the MSs to which it is addressed but the States can choose how to transpose it into the domestic legal system.[249] Therefore, it is not binding within States but on States and thus it enjoys neither direct applicability nor direct effect as it needs to be incorporated by the national authorities. Consequently, the directive has been identified as having an indirect effect and it started to be considered as an indirect EU law. Nevertheless, the Court accepted the direct effect of directives in the *Van Duyn v. Home Office case* of 1974.[250] Here the Court affirmed that such direct effect could rise if the MSs failed to transpose the directive into domestic

[245] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 91.
[246] *Ibid*, p. 81.
[247] *Ibid*, p. 84.
[248] *Ibidem*, p. 86-87.
[249] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Article 288.
[250] Case 41-74 *Yvonne van Duyn v Home Office* (1974) ECR 01337. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61974CJ0041.

law and only with regards to the national authorities. In this case, the Court also affirmed that it would go against Article 288 if an act part of it would not be enforceable in national courts by an individual (horizontal direct effect). Moreover, a non-direct effect would go against the binding effect of this EU act and against the idea that national courts may ask for a preliminary reference on directives to the CJEU, but only if these are applicable in national courts.[251] These three arguments lacked legal basis and thus the Court identified a fourth argument that became known as the estoppel argument: when a MS fails to transpose the directive in the prescribed period, it cannot use such failure as a defense and individuals become entitled to use the directive against the state.[252] This also works if the directive is not implemented correctly by the state in question. Therefore, there is a temporal and a normative limitation: the first is referred to the direct effect coming only after the failure to implement the directive by the state, and the second referred to the use of the direct effect only against the state.[253]

The *Taricco saga* is again of great importance for the principle of direct effect too. As emphasized by Gallo, direct effect of EU legislation takes place when it is directly applicable, and its application has a positive impact on the individual.[254] This, of course, leads to the disapplication of the national norm, which happens because of the supremacy of communitarian law over the national one, such as in *Taricco*. Nevertheless, the direct effect has not been cited in such case as the reason for the disapplication of the national norm. The EU jurisprudence, in fact, does not often talk about direct effect when a national norm is disapplied, attributing the cause mostly to the supremacy of the EU law. This was the case of *Taricco*, where direct effect was not cited as Article 325 TFEU is not precise and clear and expressly favors an individual.[255]

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[251] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 97.
[252] Case 148/78 *Criminal proceedings against Tullio Ratti* (1979) ECR 01629. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0148.
[253] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 98.
[254] Gallo, D. (2019). Effetto Diretto del Diritto dell'Unione Europea e Disapplicazione, Oggi. *Osservatoriodellefonti.it*, [online] Number 3/2019. Available at: https://www.osservatoriosullefonti.it/archivi/archivio-saggi/fascicoli/3-2019/1477-effetto-diretto-del-diritto-dell-unione-europea-e-disapplicazione-oggi, p. 4.
[255] *Ibid*, p. 35-34.

c. The Principle of Conferral and Enumerated Powers

The EU enjoys enumerated powers. In fact, just like for the US, there are exclusive powers of the Union, concurrent (or shared in the case of the EU) powers, and residual powers of the MSs. The exclusive power is where only the EU has full sovereignty and are listed in Article 3 of the Treaty on the Functioning of the European Union (TFEU):

> "*1. The Union shall have exclusive competence in the following areas:*
> *(a) customs union;*
> *(b) the establishing of the competition rules necessary for the functioning of the internal market;*
> *(c) monetary policy for the Member States whose currency is the euro;*
> *(d) the conservation of marine biological resources under the common fisheries policy;*
> *(e) common commercial policy.*
> *2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*."[256]

Regarding these competences, the EU can issue different kinds of legislation: regulations, directives, and decisions.[257] Regulations are a set of legally binding acts, which enjoy a general application, and are directly applicable in all MSs, and do not need transposition. A regulation is enacted when the EU countries intend to harmonize the legal basis of a policy area, like for the internal market. Directives are binding in terms of goals but the way to achieve them is up to the MSs, and they do so through a transposition. Directives, if not transposed respecting the time limit, may lead to infringement procedures

[256] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, article 3.
[257] Fabbrini, S. (2020). Institutions and Decision-Making in the EU. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 57.

by the Commission. Decisions, instead, are binding in their entirety, but only addressed to certain MSs, natural or legal persons. From the executive point of view, instead, there is an indirect community administration, meaning that the Union relies on the MSs to implement and apply the Community law. Nevertheless, it enjoys a supremacy principle which leads to the nullification of state law in the case of conflict with EU law (*Costa v. Enel*).

Within this context, it is crucial to mention the principle of conferral, which stands at the basis of the federation by aggregation. This principle is the one that explains how the MSs are the ones that conferred – through a transfer (and pull) of powers and sovereignty – the powers to the Union. In the LT it has been codified in Article 5 TEU:

> "*The limits of Union competences are governed by the principle of conferral … 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 …*".[258]

Therefore, the principle of conferral poses limits to the powers of the EU as it can only exercise the powers that were conferred to it by the Treaties. This can be considered as the vertical principle of conferral, which mostly works for primary legislation, but there can also be a horizontal principle of conferral, which protects the institutional balance of powers of the Union. This is based on the Court's review of secondary legislation where it decides if the delegated institution has acted within the scope of the power and has not violated the limits imposed by the principle of conferral.[259]

The principle of conferral is a very important limit, but many scholars today think that the scope of the general competences of the EU has enlarged to the extent that such principle has almost disappeared – also thanks to the shift

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[258] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 5.

[259] Schütze, R. European Union Law T007: Legislative Powers. Academic Year 2017/2018, University Luiss Guido Carli, Rome. Class Lecture.

from dual to cooperative federalism. Article 114 and 352 TFEU have been the basis for the scholars who support this argument.[260]

The first states:

> "*…The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. …*".[261]

This Article has a very large scope because there is a lot that goes under the umbrella of the approximation or harmonization of laws with the aim of establishment and functioning of the internal market. In *Spain v. Council* of 1995, the Court stated that if the national legislation is against an EU law on this matter, the Union is entitled to act anyways, meaning that there is an unlimited scope function for the EU. A limit to it, though, has been put in the *Tobacco Advertising case* of 2000. Germany argued that the EU was not entitled to adopt the legislation to prohibit the advertisement of tobacco products and it was banned to improve public health within the EU. The EU adopted the legislation citing Art 114 but even the ECJ was against it because this legislation did not harmonize competition between States nor the internal market as it, in fact, prohibited a service in the single market. The ECJ, therefore, stated that if there is a principle of conferral there should be some limits to Art 114:

> "*If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114] as a*

[260] Schütze, R. European Union Law T007: Legislative Powers. Academic Year 2017/2018, University Luiss Guido Carli, Rome. Class Lecture.
[261] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Article 114.

legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.".[262]

Article 352 TFEU[263] may have a very large scope too (as it will be analyzed later regarding the EU's necessary and proper clause) and it is in a way connected to the erosion of the principle of conferral. It is interesting to highlight that, because of its extensive use, the MSs have put a limit to it by introducing a parliamentary authorization mechanism: before the Council of Ministers can vote there should be a legislative act that allows such vote.[264]

There are two principles that govern and limit the Union's competences: the principles of subsidiarity and proportionality. Together with the principle of conferral, they are enlisted in Article 5 TEU:

> *"... 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 ... 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. ...*".[265]

The principle of subsidiarity means that the EU should only act if the MSs are not themselves able to solve any kind of problem. It was introduced in the 70s and then in the 80s there was its outburst through the Maastricht Treaties. Therefore, for the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing

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[262] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (2000) ECR I-08419. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0376.
[263] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Article 352.
[264] Schütze, R. European Union Law T007: Legislative Powers. Academic Year 2017/2018, University Luiss Guido Carli, Rome. Class Lecture.
[265] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 5.

with efficiently. The EU, though, can act only if there is the pass of the national insufficiency test: where the objectives of the proposed action could not be sufficiently achieved by MSs. Thus, the Union can legislate only if the MSs lack some elements. Because of the importance it has for MSs, the principle became a general principle of EU law. Moreover, there are two ways in which the principle is interpreted: one is that the Union acts where the MSs are not able to act, the other instead says that the Union is entitled to act when by comparing its action with the one of the MSs the former is the best.

The application of the principle, though, has created various problems. In *United Kingdom v. Council* of 1994,[266] the CJEU also touched upon the principle of subsidiarity, in addition to the one of conferral, saying that such principle could not be invoked by MSs in the case of harmonization, which is an exclusive "competence" of the EU. Because of the hard comprehension of its use, a "*Protocol on the application of the principles of subsidiarity and proportionality*"[267] was created, where in Article 6 the yellow card mechanism is explained. This mechanism ensures that any draft legislative act passes through the national parliaments before being adopted, and in the case in which at least one-third of the national parliaments think that there is a violation of the principle of subsidiarity, it can ask the Commission to review the draft. If the Commission decides to keep it, it must justify the reason for this choice.[268]

On the other hand, when there are at least half of the national parliaments that object the draft legislation, the orange card mechanism is started. Here the Commission can again decide whether to keep, amend or withdraw the proposal. Contrarily to the first mechanism, if it chooses to keep or amend the proposal,

[266] Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (1996) ECR I-05755. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0084.
[267] Protocol (No 2) on the application of the principles of subsidiarity and proportionality (2008) OJ C 115. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02.
[268] EU Monitor. *Yellow card (subsidiary control mechanism)*. [online] Available at: https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/viommjbhi6ha.

then the EP and the Council vote on whether to continue or not the legislative proceeding.[269]

The principle of proportionality, the other pivotal principle part of Article 5 TEU that governs and limits the Union's competences, was first instituted in the Single European Act (SEA) of 1986. It looks more into the outreach of the Union's action saying that its form and content should not go over what is strictly necessary to get to the objectives.[270] Therefore, even when the Union is better than the MSs in legislating on that specific matter, it should not act unnecessarily or beyond what is needed to solve the issue. In the past, the Court even applied a proportionality test based on a tripartite structure: suitability (to achieve a given objective), necessity (the act adopted represents the least restrictive means to achieve a given object), and proportionality (whether the burden imposed on an individual is excessive or not). This test is of course not easy to apply, nonetheless, the Court has granted the Union a wide margin of appreciation wherever it enjoys a sphere of discretion. Therefore, the Court will go against the Union's action only if the measure is explicitly inappropriate.

An example of a disproportional union act can be found in the CJEU's *Kadi case*.[271] The Union had adopted a regulation for the fight against terrorism for the EU to freeze the assets of suspected terrorists associated with the terrorist organization of Al-Qaida. Kadi, in this case, thought that the Union had restricted his property right in a disproportional way by freezing his assets. The Court found that the right to property could be restricted as it was not absolute, but as long as the restriction plays the public interest of the EU and it is not an intolerable and disproportionate interference with the right. This means that there must be a balance between the public interest of the EU and the right of the individual and if this balance is not met, the Union's act shall be annulled.

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[269] EU Monitor. *Orange card (subsidiary control mechanism)*. [online] Available at: https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vio3okw0mozw#:~:text=If%20half%20of%20the%20national,maintain%20or%20amend%20the%20proposal.

[270] European Commission. *Proportionality*. [online] Available at: https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality#:~:text=Proportionality%20regulates%20how%20the%20European,needs%20to%20and%20no%20more.

[271] 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) ECR I-06351. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402.

In the *Kadi case*, in fact, the Court concluded that the fair balance was not met and thus the Union act had to be annulled.[272]

The Kadi saga has been pivotal in showing how EU law was autonomous by all means and how there is strong protection of fundamental rights in the Union.[273] In fact, these were the justifications that the EU has used to intervene in such a crucial case from the geopolitical point of view alluding, thus, to peculiar and constitutional nature of the Union.[274] Very interesting is the fact that the Court for the first time talked about some principles of EU law of constitutional nature that lead to an intervention of the Union. This can be read in paragraph 303 of *Kadi I* referring to Article 307 EC:

> "*Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union*".[275]

d. Duty of Sincere Cooperation and the Necessary and Proper Clause of the EU

Another important principle for the vertical dimension of the division of power in the EU is the duty of sincere cooperation, which can be found in Article 4 (3) TEU:

> "*3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

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[272] Schütze, R. (2015). *European Union* Law. Cambridge: Cambridge University Press, p. 353-355.
[273] Martinico, G. (2016). Building Supranational Identity: Legal Reasoning and Outcome in Jadi I and Opinion 2/13 of the Court of Justice. *Italian Journal of Public Law*, [online] Volume 8(2), p. 235-267. Available at: http://www.ijpl.eu/assets/files/pdf/2016_volume_2/2.Martinico.pdf, p. 243.
[274] *Ibid*, p. 246.
[275] 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) ECR I-06351. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402, par. 303.

> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*.".[276]

This principle aims at ensuring reciprocal assistance for what concerns the tasks of the Treaties. The CJEU has invoked this Article to ensure close cooperation between the MSs and the EU regarding most tasks but also for international organizations and conventions. Therefore, it may be concluded that this principle is of general application inside the EU legal order.[277] The duty of sincere cooperation is a mix of both positive and negative obligations for MSs. For the former, "*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*.".[278] For the latter, "*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*".[279] Thus, it can be stated that the duty of sincere cooperation is a constitutional safeguard for the interest of the Union, even if it is not unlimited as it cannot go against the other pivotal principles of EU law.

The EU Necessary and Proper Clause can be found in Article 308 EC, while the Commerce Clause is in Article 94. The former states that:

> *"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*

[276] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 4.
[277] Van Elsuwege, P. (2019). The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law. In: Varju, M., ed., *Between Compliance and Particularism*, Springer Nature Switzerland AG. Available at: https://www.researchgate.net/publication/330961755, p. 285.
[278] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 4.
[279] *Ibidem*.

unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".[280]

This Article, thus, has two criteria of which there is no clear definition and thus leading to a case-by-case analysis: the meaning of "necessary" and what are the objectives of the EU. Regarding the latter, there are two views.[281] The first one is from a stream of the 70s, which recognized the objectives of the EU as the ones filling the gaps of the exclusive competences of the EU. These gaps can be found by comparing the legal concession to the actual specific aim of the Union on that subject. The second view, though, has a wider understanding of the objectives based on the enumeration principle. It argues that Article 308 fills any gap between the treaty powers and its aims: the Community's competence was the sum of its objectives.[282]

The *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH*[283] has been pivotal in identifying the objectives, which the Court has recognized in the activities enlisted in Article 3 EC[284] when talking about Article 308 EC. This Article has been allowed to be used to attain the objectives in Article 2 EC.[285] Even though there is an extensive scope of Article 308 EC, there are three limits. The first one was instituted by the SEA, which prohibited Article 308 to be used for institutional changes in the economic and monetary policy.[286]

The second limit was instituted by the TEU that separates the Union objectives from the CFSP and the JHA pillars to limit the Union's jurisdiction.[287]

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[280] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001) OJ C80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12001C%2FTXT, Article 308.
[281] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 136.
[282] *Ibid*, p. 137.
[283] Case 8-73 Hauptzollamt Bremerhaven v Massey-Ferguson GmbH (1973) ECR I -00897. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0008.
[284] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts
(2001) OJ C80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12001C%2FTXT, Article 3.
[285] *Ibid*, Article 2.
[286] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 140.
[287] *Ibid*.

The third limit, instead, is the one instituted with Opinion 2/94[288]. This Opinion of the Court was on whether the EU could access the European Convention on Human Rights (ECHR) without an amendment of the treaties. The Court based the Opinion on the residual powers of the EU, which are supposed to fill the gap when there is no specific provision on powers conferred to the Union in the Treaties. For the specific case of the accession to the ECHR, the Court said that such action would change fundamentally the institutional organization of the EU and therefore it would exceed the scope of Article 308.[289]

Article 94 and 95 EC represent the EU equivalent of the US Commerce Clause. At the European level, this was based on the harmonization of laws, of which EU competences are in those two Articles, based on a deregulation that would have led to a re-regulation at the Community level. Article 94 allows the Council to act on MSs' law when the state law affects the "*the functioning of the common market*" only after its unanimous vote.[290] This is very close to Article 308, but Article 95 EC changes the cards on the table allowing the Council to proceed without the consent of all MSs to attain the objectives of Article 14 EC related to the internal market[291].

Because of the extensive scope of the European Commercial Clause, though, the Court jurisprudence poses some limits to it.[292] The internal limits can be seen in the *Spain v. Council* case, where it is said that the EU can harmonize following Article 95 EC to prevent obstacles in the future or the possible

[288] *Ibid*, p. 141; Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1996) ECR I-01759. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CV0002.
[289] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 142.
[290] Treaty establishing the European Community (Consolidated version 1997) (1997) OJ C340. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E%2FTXT, Article 94.
[291] *Ibid*, Article 14; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001) OJ C80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12001C%2FTXT, Article 95.
[292] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 144.

fragmentation of the single market.[293] An inner limit to Article 95, instead, is the introduction of the *appreciable* limit by the CJEU in the *Tobacco Advertising* case. Here the Court stated that the ban of tobacco advertising by the German federal law did not distort in an "appreciable" way the competition in the EU single market, and thus the EU could not use its harmonizing power repealing the related German law.[294]

Regarding the external limits to the use of the EU harmonization power, there is the fact that the MSs can violate the free movement of goods based on, for example, "*public morality, public policy or public security*"[295]. Also, the MSs amended the treaties to protect specific areas from the harmonization powers of the Union. For example, the health sector where the EU only has the power to adopt incentive measures to better human health, and not powers of harmonization of laws.[296]

5. Conclusion

The US and the EU, when compared, can be considered similar cases. As a matter of fact, they share many features of a federal union. For example, the institutional analysis of the EU has shown that the Union is international in its formation but it has a federal, or constitutional, status that has been codified with the 2009 LT. Therefore, as it is for the US, the EU is characterized by a mix of both national and international features. Examples of an international feature are the Senate in the US and the Council in the EU, as they are both composed of fairly independent States' representatives. At the same time, it is clear that the US has a very powerful executive figure, the President, while the EU has more of a double executive composed of both the Commission and the European Council.

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[293] Case C-350/92 *Kingdom of Spain v Council of the European Union* (1995) ECR I-01985. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0350.
[294] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (2000) ECR I-08419. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0376.
[295] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001) OJ C80. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12001C%2FTXT, Article 30.
[296] *Ibid*, Article 152.

An important characteristic of federal unions is the existence of two levels of government. This can be seen in the division of powers, where both the central government and the states have exclusive and shared competences, as it is for the EU and the US. This has been confirmed also by the already-cited case of the Maastricht decision, where Germany argued that the Maastricht Treaty could not give more powers to the Union as it was not controlled directly by the people. In fact, Germany argued that sovereignty was indivisible and could not be shared, even if this is the idea at the base of any federal union and it is evident both in the US and the EU. The existence of two levels of government can be seen also through how the citizens' rights have been incorporated from the top to the bottom. For example, how the Bill of Rights has been included following partial incorporation from the central government to the various States in the US and how in the EU the rights stem from both the Community and the States.

The US and the EU are very similar also because their unions are based on similar principles, such as the ones of conferral (which also explains the existence of two political orders), supremacy, and the system of checks and balances. It is very interesting to see that they also share similar preemption rules, and the federal law may sometimes also be seen as a minimum standard. This is applicable for regulations in the case of field preemption for the EU and in the case in which the States have higher protection regarding certain rights for the US. Another crucial clause that is shared by both is the Necessary and Proper Clause, which for the EU is represented by Article 94 and 305 EC, as explained in the specific part of the Chapter that deals with the vertical dimension of the EU.

In conclusion, there are many characteristics shared by the US and the EU that make the Union very close to a federal union. In fact, because of the many constitutional and practical similarities, and the fact the EU is in continuous transformation by giving more powers to the supranational bodies and increasing the areas on which it can act, the EU and the US may be included in the same category.

In fact, the EU is becoming always more powerful in the international and continental sphere overstretching its powers and enlarging its scope of

competences, above all from the LT and the Eurozone crisis. European integration is expanding too, also in areas commonly belonging to national sovereignty like borders, money, and security.[297] For example, the EP has become a lot more powerful in the decades and is composed of independent representatives of States that do not have any national mandate.[298] For this institution, the Maastricht Treaty has been pivotal as it increased drastically its power with the co-decision procedure and the LT expanded the use of such decision - the OLP – in many areas, some that are even close to core state interests. Moreover, the LT has also increased the competences of the EP as its consent is now required to conclude international agreements in areas where its consent is applied or the OLP is required. In addition, the Treaty treats the EP on the same level of the Council for what concerns the supervision of amendments of or supplements to legislation. For what concerns the budget, the power of the EP for the Multiannual Financial Framework is the one of consent adopted by the Council.[299] Also through the financial crisis, right after the LT, the EP has enlarged its power in the decision-making of economic and fiscal policy as the regulations passed after 2009 to tackle the crisis needed to be adopted through the OLP, where the EP was able to increase its role through the power to review the draft regulation right after the Commission.[300] On the soft coordination side, the EP has made itself pivotal in suggesting how to improve the European Semester to foster economic coordination. What the EP said was that any organizational change made by the Council or the Commission had to be reported to the EP for the purpose of democratic legitimacy and accountability

[297] Schmidt, V. A. (2020). Rethinking EU Governance: From 'Old' to 'New' Approaches to Who Steers Integration. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 107.
[298] Garzón Clariana, G. (2017). The Shifting Powers of the European Parliament: Democratic Legitimacy and the Competences of the European Union. In: Garben, S. and Govaere, I., ed., *The Division of Competences between the EU and the Member States. Reflections on the Past , the Present and the Future*, Oxford and Portland, Oregon: Hart Publishing. Available at: https://ereader.perlego.com/1/book/809034/292.
[299] Ibidem.
[300] Fasone, C. (2014). European Economic Governance and Parliamentary Representation. What Place for the European Parliament?. *European Law Journal*, [online] Volume 20(2), p. 164-185. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12069, p. 171.

to the latter.[301] Nevertheless, its decision-making power has still a lot of room for growth.

Another perfect example is the one of Mario Draghi's actions during the eurozone crisis, where he overstretched the competences of the European Central Bank (ECB). In fact, at the beginning of the crisis (2007) the ECB made lending money easily to put more money in the market it was insufficient. Nevertheless, all the weaknesses of the fiscal coordination of the MSs came about as this policy area is in the hands of the national authorities, together with banking supervision. Because of such lack of coordination, there was no immediate EU answer and thus States started to act unilaterally.[302] The ECB started acting in autumn 2008, stretching its mandate from the beginning. What it did was to apply non-standard measures to help national banks maintain their liquidity to make monetary policy transactions have the impact on the economy that the ECB wanted.[303] Moreover, after the debt of certain countries increased too much, the Bank was also buying up some debts of countries to provide them with the funds they were needing and assisted countries with such problems since it was part of the Troika with the Commission and the International Monetary Fund. Through these roles, the ECB played a pivotal role in stabilizing the European market.[304] But it was not enough, and some institutional changes were needed. Consequently, in 2012 it started to set the basis for a banking union, and because of the speculations of the collapse of the European market it made another huge step in summer 2012 with the program named Outright Monetary Transaction (OMT). The OMT was a mechanism of the ECB that threatened countries because the Bank stated that it was entitled to buy "*unlimited quantity of bonds (less than three years maturity) from a country that has a debt market that appears not to function because of financial*

[301] Fasone, C. (2014). European Economic Governance and Parliamentary Representation. What Place for the European Parliament?. *European Law Journal*, [online] Volume 20(2), p. 164-185. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12069, p. 172.
[302] Verdun, A. Political Leadership of the European Central Bank. *Journal of European Integration*, [online] Volume 39(2), p. 207-221. Available at: https://www.researchgate.net/publication/313480344_Political_leadership_of_the_European_Central_Bank, p. 209-210.
[303] *Ibid*, p. 211.
[304] *Ibid*, p. 213.

speculation".[305] This mechanism was not used, but the threat was enough to stabilize the markets. What is striking during the years of crisis is that the ECB has become a lot more powerful both through actions and speeches, and this position is holding through time since the ECB now is playing a crucial role in the economic governance of the EU.

For what concerns the Commission, its role has arguably become more political, as Juncker pointed out stating that its Commission was a highly political one.[306] This has resulted not only from organizational purposes, but also because there is a strong prioritization of policies and a top-down application. In fact, the Commission has become very politically sensitive and important decisions must come from democratically elected individuals.[307] Nevertheless, the Commission's nature is still technocratic, but with the dimension of its decisions it is having strong political spillovers and, arguably, powers. An example could be the adoption of the Green Deal that, despite promoting the well-being of the Union, it is a political decision in the matter.

Also general competences of the EU are increasing. In fact, in 2017 the Commission has released the European Pillar of Social Rights. This has been considered as a very important step as social rights have always been considered as strongly national areas and, in fact, the Treaty's Social Chapter has rarely been used. This Pillar has helped the entering in force of some Directives, like the Work-Life Balance one, but it cannot do a lot more as it is dependent on the transposition into national law.[308] The problem of the Social Pillar is that it is not legally binding but, at the same time, the CJEU is free to use it in its case law. This lack of direct enforceability, therefore, renders the Pillar a bit less powerful in the legal sense as it needs implementation tools to be transposed at

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[305] Verdun, A. Political Leadership of the European Central Bank. *Journal of European Integration*, [online] Volume 39(2), p. 207-221. Available at: https://www.researchgate.net/publication/313480344_Political_leadership_of_the_European_Central_Bank, p. 214.
[306] Russack, S. Institutional Rebalancing: the 'Political' Commission. *CEPS*, [online] Available at: https://www.ceps.eu/ceps-publications/institutional-rebalancing-political-commission/, p. 4.
[307] *Ibid*, p. 5.
[308] Garben, S. (2018). The European Pillar of Social Rights: Effectively Addressing Displacement?. *European Constitutional Law Review*, [online] Volume 14, p. 210-230. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/european-pillar-of-social-rights-effectively-addressing-displacement/162B548D38A7D7385F4C8FF0A19C61CF, p. 224.

the national level. The strength of the Pillar, therefore, will depend on whether it will be implemented or not. Additionally, another huge problem of the Pillar is that it has a limited scope, which is directed only for MSs of the Euro area. This is questionable from a rule of law perspective, above all because of the importance of the rights included in it. At the same time, it has to be said that the enlargement of the EU has made legislating on social issues harder.[309]

[309] Garben, S. (2018). The European Pillar of Social Rights: Effectively Addressing Displacement?. *European Constitutional Law Review*, [online] Volume 14, p. 210-230. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/european-pillar-of-social-rights-effectively-addressing-displacement/162B548D38A7D7385F4C8FF0A19C61CF, p. 218-222.

Chapter III – The Case of Foreign Policy

Relations between countries have always played a crucial role in the stability of a state. Arguably, foreign policy was created in the 17th century, with the emergence of the modern state, and became even more important in the 18th century, when politics have started to be affected in a greater way by the public as a consequence of the creation of strong boundaries. Today, the concept of foreign policy is very much linked to modern aspects of the states such as embassies, the ministry of foreign affairs, and national interests.[310]

For the purpose of this thesis, I chose to analyze the case of foreign policy and how it is institutionally and constitutionally organized to see the differences in nature between the US and the EU. The difficulty lies in the fact that foreign policy, in its broad sense, is something that is attributed to sovereign states, which the EU is most likely not. In fact, foreign policy is mostly defined as "*the policy of a sovereign state in its interaction with other sovereign states*".[311] Furthermore, because of the importance of foreign policy for nation-states, being the EU a union of them, implies that it should have one representing the common political interests of the states. Moreover, for the sake of this Chapter, what I mean by foreign policy, in addition to the above-mentioned definition, is also the policy of intervention and security.

1. Foreign Policy in the US

a. Institutions and Bodies

Foreign policy in the United States is controlled at the federal level because states gave up this competence to build a more unitary and cohesive country on the international sphere. Being a presidential republic, the President of the United States is the main figure for what concerns this policy area, as the Constitution points out in Article 2:

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[310] Leira, H. (2019). The Emergence of Foreign Policy. *International Studies Quarterly*, [online] Volume 63, p. 187-198 p, 187-188. Available at: https://academic.oup.com/isq/article/63/1/187/5307236.

[311] Merriam-Webster. *foreign policy*. [online] Available at: https://www.merriam-webster.com/dictionary/foreign%20policy.

> "*... 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 ...*".[312]

Therefore, the executive has been given a great power of treaty-making and appointment in foreign policy. Nevertheless, for the sake of checks and balances, the "advice and consent" of one of the Chambers, in this case the Senate, is present also in this policy area. Contrarily, this passage of the Constitution does not give a predominant power to the President, and this is the reason for which the early presidents tried to establish precedence, with the help of the Supreme Court, to increase their foreign policy power. It is important to note that treaty-making in the years has become always more important as international cooperation and globalization have led to the treatment of more domestic areas by the treaties. Therefore, the treaty-making power that the President has often affects domestic politics too and it is considered by American constitutionalism as an independent power delegated to the President.[313]

Contrarily, John Marshall stated that "*The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.*".[314] The reason for this, though, was to support President Adams in his actions: turning to England a person charged with murder. This was not well seen as it was considered as a measure that would weaken the US position towards England. Instead, the President was only following Article 27 of the Jay Treaty, of which aim was to decrease tensions between the two countries after the war:

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[312] National Archives, (2020). *The Constitution of the United States: A Transcription*. [online] Available at: https://www.archives.gov/founding-docs/constitution-transcript, Article II Section II.
[313] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 109.
[314] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 1.

"*... all Persons who being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other ...*".[315]

This was important also for the fact that Treaties are considered as the supreme law of the United States, and thus the President was making sure that it was executed correctly. At the same time, Treaties are made with the consent of the Senate, and thus he was not executing the Treaty in his own interest, but in the interest of the country as a whole.

Talking more about the sole organ doctrine, it "*appears to support a plenary, exclusive and inherent authority of the President in foreign relations and national security, an authority that overrides conflicting statutes and treaties*".[316] This doctrine can be recalled also to Chief Sutherland's ideas that the President enjoyed full powers in foreign affairs. Moreover, this doctrine follows greatly the teachings of Montesquieu who, even if he supported a separation of powers, attributed foreign policy mainly to the executive power. The reason for such attribution is that he linked war and foreign policy to the law of the nations, which he linked with the executive.[317] Nevertheless, the framers of the Constitution gave the power of declaring war to Congress, together with some powers advice and consent, to prevent the executive to be too dominant in foreign policy.

Thomas Jefferson too seemed to support the idea that the President enjoys full powers in foreign policy, except for the case in which powers are attributed specifically to the Senate. But in this case, Jefferson mainly spoke about the President's full powers in transactions with foreign nations, which could be linked to communications that is also the idea behind the "sole organ" of Marshall. This means that Congress and the President work together to choose on foreign policy, even if the President may start it on its own in some cases, but

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[315] Yale Law School Lillian Goldman Law Library. *British-American Diplomacy The Jay Treaty; November 19, 1794*. [online] Available at: https://avalon.law.yale.edu/18th_century/jay.asp, Article 27.
[316] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 2.
[317] *Ibidem*.

the decisions are communicated and executed mainly by the latter. Jefferson, furthermore, recognized in Congress the only institution that could declare war.[318] Therefore, what both Marshall and Jefferson thought was that foreign policy was made by both the executive and the legislature in the form of statutes and treaties. Chief Marshall even stated in 1804 that when a proclamation of the President went against a congressional statute in time of war, the latter prevailed.[319]

The relation between the legislative and the executive in foreign policy is not always easy. One perfect example is the refusal by Congress to adopt the Agreement for the US to enter the League of Nations right after WWI and did not even ratify the Treaty of Versailles of 1919. In contrast, President Wilson was one of the fathers of such League as he thought that the policy of isolationism would not be helpful and wanted to export American politics to prevent future conflicts.[320] Here, thus, we can see how Congress has a strong power to limit the executive's prerogatives in international affairs. Nevertheless, because the President is intended to be the strongest institution in foreign policy, the US has tended to prefer executive only agreements. These agreements are constitutionally weaker than a treaty with other nations and do not need ratification by the Senate. Many have been used in times of emergencies to circumvent a possible negative vote by the Senate for the ratification of treaties. Of course, these are done exclusively following the powers of the President foreseen by the Constitution or given by Congress through previous statutes or treaties. In fact, the Court agreed that executive agreements have the same weight as treaties as long as they are in conformity with federal law and the

[318] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 10.
[319] *Ibid*, p. 11.
[320] History.com Editors, (2009). *Wilson embarks on tour to promote League of Nations*. [online] Available at: https://www.history.com/this-day-in-history/wilson-embarks-on-tour-to-promote-league-of-nations.

Constitution.[321] This was highlighted first in *United States v. Pink*[322] and then in *Reid v. Covert*[323].

The Secretary of State is another figure of importance for the realm of foreign policy in the US – what would be called the Ministry of Foreign Affairs in Europe - on which the President still enjoys great power through its appointment (with the consent of the Senate). This figure is the adviser of the President for what concerns foreign policy and even carries out many tasks himself for the Foreign Service and the Department of State.[324] Its job has become very challenging as foreign policy has started to encircle a lot of other policy areas where international coordination is pivotal like climate change or human rights. In addition, he is also responsible for the communication between the MSs and the federal government in certain areas such as the extradition to or from other countries of fugitives.[325]

b. Appointment and Treaty-making Powers

Regarding the appointment section of Article 2, called the Appointment Clause, the most important controversy is the one concerning the removal of officers. The Supreme Court has played a crucial role in resolving such issue, stating that Congress could not affect the removal of an officer where it had advice and consent power.[326] The only power it has to remove officers is the power of impeachment dealt with in the previous Chapter. Nevertheless, Congress has limited the removal of officers by the President following a level of good cause. The first example has been illustrated by the Supreme Court in *Humphrey's Executor v. United States* case of 1935. Humphrey was a commissioner for the Federal Trade Commission, or FTC, and President

[321] Legal Information Institute. *The Domestic Obligation of Executive Agreements*. [online] Cornell Law School. Available at: https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/the-domestic-obligation-of-executive-agreements.
[322] Oyez. *United States v. Pink*. [online] Available at: https://www.oyez.org/cases/1940-1955/315us203.
[323] Oyez. *Reid v. Covert*. [online] Available at: https://www.oyez.org/cases/1955/701.
[324] U.S. Department of State. *Duties of the Secretary of State*. [online] Available at: https://www.state.gov/duties-of-the-secretary-of-state/.
[325] *Ibid*.
[326] Oyez. *Myers v. United States*. [online] Available at: https://www.oyez.org/cases/1900-1940/272us52.

Roosevelt asked for his resignation because he was considered a conservative controlling many issues of the New Deal. The problem was that the FTC Act allowed for the removal of an officer only because "*inefficiency, neglect of duty, or malfeasance in office*". The Court has reasoned that the President has never been given unlimited power of removal and because the FTC Act of Congress was constitutional, the removal of the commissioner was not lawful.[327]

Treaty-making is one of the most important powers for foreign policy, and in the US the President is considered as the sole organ that can conclude Treaties. In fact, the role of the Senate has not been interpreted as a constitutionally mandated one for advising the President in negotiations, but just of advice.[328] A bigger controversy has risen for what concerns the termination of treaties by the President without the consent of the Senate. The perfect example is the termination of the treaty of mutual defense between the US and China that President Carter terminated in 1978. This decision went first before the District of Columbia's Court of Appeal, which deemed that the President could terminate the Treaty as it was in conformity with it.[329] Then, with *Goldwater v. Carter* of 1979, the case went before the Supreme Court, which did not judge on the case as some considered it a political issue on how the country chose to do foreign policy and others thought that there was no real case because Congress did not counterpose such actions formally.[330] Even if this case was resolved, there is still a dispute, under the umbrella of Supremacy Clause, between the weight of the President's power and the weight of the Treaty. The reason is that if the President wants to terminate a treaty, it cannot do it if such action goes against the treaty itself as they are considered, together with the Constitution, the supreme law of the US.

Treaties are often considered the only way in which agreements with other countries can be done by the US, or better by the President. Nevertheless,

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[327] Oyez. *Humphrey's Executor v. United States*. [online] Available at: https://www.oyez.org/cases/1900-1940/295us602.
[328] McGinnis, J. O. and Shane P. M. *Article II, Section 2: Treaty Power and Appointments*. [online] National Constitution Center. Available at: https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346.
[329] *Ibid*.
[330] Oyez. *Goldwater v. Carter*. [online] Available at: https://www.oyez.org/cases/1979/79-856.

there is also another tool that is used by Congress to do agreements with other countries, and it is called congressional-executive agreements. These are often used for trade agreements, such as NAFTA, enacted by statutes. In fact, Congress has few enumerated powers in foreign policy that majorly deal with the regulation of commerce with other countries.[331] A problem is that, since such agreements are binding agreements with other countries and thus, they are composed of two parties, some issues may come up that simple legislation does not cause. For this reason, in *Foster & Elam v. Neilson* case of 1829,[332] Chief Marshall made a difference between treaties that do not need a means of transposition (self-executing) to be usable in Courts and others that do not (non-self-executing). The former, though, needs to be explicitly stated in the body of the treaty.

Moreover, legislative powers entangle with treaty-making powers, that are mainly associated with Congress. The former, in fact, could be described as internally divided while the latter are united.[333] Many argue, though, that the treaty-making power has in itself a political safeguard for the State as the advice and consent of the Senate is needed. It is interesting, though, how the Supreme Court in the ruling of *Cuyler v. Adams* of 1981 has agreed that a state cooperative agreement could be turned into a federal agreement, which is a derogation from the Compact Clause enclosed in Article 1 Section 10 Clause 3 of the Constitution that prohibits the States from entering into any agreement or compact with other states. The Court stated in Cuyler v. Adams:

> "*... where Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause ...*".[334]

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[331] McGinnis, J. O. and Shane P. M. *Article II, Section 2: Treaty Power and Appointments*. [online] National Constitution Center. Available at: https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346.
[332] *Ibid*; Justia US Supreme Court. *Foster & Elam v. Neilson, 27 U.S. 253 (1829)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/27/253/.
[333] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 112.
[334] Justia US Supreme Court. *Cuyler v. Adams, 449 U.S. 433 (1981)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/449/433/.

The treaty-making power of the executive also increases the legislative one of the same branch because the federation would have the power to implement the treaty through legislation in the case it is needed.[335] When, instead, the States may legislate on an internal affair it is different. An example is the case of *Hines v. Davidowitz* (1940) [336] where Pennsylvania required the registration of aliens residing into a state, but this clashed with a federal registration act that was done because of World War II. The Court here stated that the relationship of the state legislation with the national one is of subordination of the former to the latter because foreign affairs is an executive policy. In addition, (field) preemption is relevant in such cases where the federal institutions have legislated on the topic with their superior authority.[337]

c. Powers Related to War

In addition, Congress is called to authorize military operations that the President may call upon. In fact, war powers are foreseen for both the President and Congress: Congress has the power to declare war but the president can start the use of force on their own, even if congressional authority should be needed, and it is empowered to direct armed forces as commander in chief.[338] For years after WWII, the President has enjoyed expansive powers in foreign policy as the Cold War needed a President that could immediately respond to Soviet threats. This enjoyed a general consensus until the Vietnam War's involvement increased drastically.[339] Even before the Vietnam War, during the Korean one,

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[335] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 117.
[336] Justia US Supreme Court. *Hines v. Davidowitz, 312 U.S. 52 (1941)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/312/52/.
[337] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 117.
[338] Masters, J. (2017). *U.S. Foreign Policy Powers: Congress and the President*. [online] Council on Foreign Relations. Available at: https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president.
[339] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 3: The Constitutional Politics of the Executive Branch.

in fact, the first limits were put on the powers of the President by the Supreme Court in the Steel Seizure case of 1952.

The *Youngstown Sheet & Tube Company v. Sawyer*[340] of 1952 - also called the Steel Seizure Case - is, together with the previous one of *United States. v. Curtiss-Wright Export Corporation*[341] of 1936, have been pivotal to have a clearer picture on the power on the President in foreign policy. Chronologically speaking, the case of 1936 concerned the selling of weapons to Bolivia by the cited corporation during its war with Paraguay. Such action was deemed by the US as contrary to a Joint Resolution wanted by Roosevelt, but that was accepted by both Houses. The company, though, argued that Congress could not delegate such broad power intended for the legislature to the executive – the President – violating the non-delegation doctrine. Therefore, the issue was whether Congress could delegate legislative power in a broader way for foreign policies than domestic ones. The Court stated that since the President enjoyed a very broad scope of foreign policy powers, Congress agrees on a certain degree of power given to the President concerning the foreign policy effect of a certain domestic policy, even if Congress does not explicitly grant such power over that policy area.

Nevertheless, even if this has expanded the powers of the President, it was not following the sole organ doctrine as the case was not talking about independent presidential power.[342] But for what concerns the decision of the Court, the view of Justice Sutherland has been pivotal. He differentiated between external and internal affairs, and regarded the Curtiss-Wright case as purely external. For this purpose, he said that the power of external affairs of the Declaration of Independence was intended for the States as a whole represented by the United States' executive, and not the single States. He thought, in fact, that the President was independent in his foreign policy powers as they were

[340] Oyez. *Youngstown Sheet & Tube Company v. Sawyer*. [online] Available at: https://www.oyez.org/cases/1940-1955/343us579.
[341] Oyez. *United States v. Curtiss-Wright Export Corporation*. [online] Available at: https://www.oyez.org/cases/1900-1940/299us304.
[342] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 13.

inherent and did not depend on a statute of Congress, putting the emphasis on some degree of discretion that the President has in foreign affairs that it would not have in domestic ones because of the different type of negotiation that it has.[343]

The Steel Seizure case, instead, concerned the executive order by President Truman to the Secretary of Commerce Sawyer to operate and seize the steel factories directly in order to prevent a strike during the Korean War. Here, the Court posed a limit on the powers of the President stating that he could not issue such an order as there was no congressional statute granting him the power to take on private property. Moreover, the Court even added that his military powers are not intended to be expanded to labor disputes. To conclude, it may be said that the President's power in foreign policy, but also in general, depends greatly on congressional grant. This was also pointed out by Justice Jackson in the Steel Seizure case: when the President acts following congressional authorization, he has maximum authority as he can act following his powers in addition to the ones granted by Congress; when the President has neither a congressional authority nor a denial then he can only base himself on his own powers; lastly, when the President acts against Congress, it has the least powers.[344]

The allocation of power between Congress and the President was questioned, as explained before, during the Vietnam War when Congress enacted the War Powers Resolution, or Act, in 1973.[345] Its main goal was the one of limiting the length of conflict in the absence of a prior declaration of war after the case of the very long Vietnam War. In fact, as foreseen in Section 4 of the Resolution, the President must notify Congress at all times once armed forces are deployed by also stating the length and the scope of their involvement.

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[343] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 18-19.

[344] Masters, J. (2017). *U.S. Foreign Policy Powers: Congress and the President*. [online] Council on Foreign Relations. Available at: https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president.

[345] Yale Law School Lillian Goldman Law Library. *War Powers Resolution*. [online] Available at: https://avalon.law.yale.edu/20th_century/warpower.asp.

This Act aims at establishing the judgement of both the President and Congress every time troops are deployed. As a matter of fact, the President has the duty to consult Congress in every way possible before deploying troops.[346] This has been included in the Resolution because many Presidents were deploying troops without consulting Congress. For example, Truman deployed troops in Vietnam following the UN police action, therefore without consulting Congress, and the following Presidents like Johnson and Nixon did not do anything. The same Nixon vetoed the War Powers Act saying that it was unconstitutional and could put in danger the President's role as Commander in Chief, but his veto was overridden by Congress.[347] Even if the legislation was put in place, many Presidents have not followed it. For example, President Obama deployed troops in Libya in 2011 without priorly asking for congressional authorization, and the same has happened in Syria. The cases of misconduct by the Presidents have often been presented to the Supreme Court, but the latter has always refused to judge on them.

Regarding the example of Libya, President Obama's action to intervene without congressional authorization has been often talked about not only from a constitutional point of view, but also in newspapers' articles. Therefore, it goes without saying that congressional authorization in such cases of deployment of troops is something that is interesting for the public too. In the specific case of Libya, Obama has consulted with Congress leaders but has not actually waited for formal authorization. Actually, the absence of an authorization even went against what he stood for when he ran for President in 2007 when he stated: "*The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation*".[348] In this case, he did not even consider Gaddafi as a threat of such case. Concerning the authority it needed to deploy troops, he argued that instead of congressional authorization he was authorized by the UN

[346] History.com Editors, (2019). *War Powers Act*. [online] Available at: https://www.history.com/topics/vietnam-war/war-powers-act.
[347] *Ibid*.
[348] Curry, T. (2011). *Obama, Libya and the authorization conflict*. [online] NBC NEWS. Available at: https://www.nbcnews.com/id/wbna42201792.

Resolution of the Security Council identifying Gaddafi as a humanitarian threat. Obama also stated that his actions where in conformity with the Commander in Chief role described in the War Powers Act because the situation in Libya was of foreign policy and national security relevance for the US. Nevertheless, following the War Powers Act, if Congress has not declared war the President can deploy military forces only when there is an attack on the US, and this was not the case.[349]

The *United States. v. Curtiss-Wright Export Corporation* case has been very important to expand the President's power, but there is a more recent claim by the Office of Legal Counsel (OLC) that has increased the power of the President even more. In 1996, the OLC considered a bill directed at the Intelligence Community as unconstitutional as the President was considered as the sole organ that could entertain foreign relations. In fact, the OLC after 9/11 wrote that the President had been given full authority over military forces by the Constitution, above all in times of emergency like after the Twin Towers' attack.[350] This reasoning of the OLC is the same for the role of the President as Commander in Chief and it is referred to as the sole organ doctrine.

d. Factors that Affect the Balance of Foreign Policy Powers

The balance power of the President and Congress in foreign affairs depends greatly also on the presence of a divided government or not. A divided government is when the President and Congress, or one of the chambers, are from two different political parties. As a matter of fact, when there is a divided government the interests of the parties play a crucial role and Congress and the President try to block each other's will. Here is where internal legislative rules, like congressional hearings, play a very important role in limiting the power of the other institution. Undoubtedly, the President's role is slightly advantaged in this situation as it needs less political resources than Congress to get what he

[349] Curry, T. (2011). *Obama, Libya and the authorization conflict*. [online] NBC NEWS. Available at: https://www.nbcnews.com/id/wbna42201792.
[350] Fisher, L. (2007). "The Law": Presidential Inherent Power: The "Sole Organ" Doctrine. *Presidential Studies Quarterly*, [online] Volume 37(1), p. 139-152. Available at: http://www.jstor.org/stable/20619299, p. 2.

wants, and for this reason it may often prevail in contests arising from a divided government. It is a mistake, though, to think that the President always has the advantage in the presence of a divided government because of its political and institutional importance. Nevertheless, in case of emergencies, he can have a lot more powers in foreign policy because of the need of immediate responses. It goes without saying that in the case in which the party controlling Congress is the same of the President gets what he asks.[351]

The distinction between external and internal powers done in the *Curtiss Wright* case has been pivotal in supporting the exceptional case of foreign affairs as it is often considered, as stated before, as a plenary power in a divided sovereignty system. As a matter of fact, another crucial case on which the Supreme Court has judged changing the power of the executive in the realm of foreign affairs is *Zschernig v. Miller* in 1968.[352] Here, the Court stated that foreign policy was an independent matter and the Constitution attributed such field to the executive. Moreover, when a law affects international relations, it can be constitutionally excluded even if it does not go against a treaty directly but just hampers foreign affairs.[353] Nevertheless, this has not been always followed, above all in foreign commerce where States still enjoy sovereignty where there is no preemption. At the same time, the central government is usually favored in such field.

Also the House of Representatives enjoys some powers that may affect foreign policy, and these mostly stem from its internal budgetary powers: the power of the purse. Because a lot of foreign policy is based on military interventions and thus a lot of spending, this power has a huge impact on US's foreign policy. It has been used by the HoR to decrease the power of the executive also in foreign affairs. The most famous example of the usage of such power in foreign affairs is at the end of the Vietnam War. Here, Congress,

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[351] Tushnet, M. (2009). *The Constitution of the United States of America. A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing. [online] Available at: https://ereader.perlego.com/1/book/391484/10, Chapter 3: The Constitutional Politics of the Executive Branch.

[352] Justia US Supreme Court. *Zschernig v. Miller, 389 U.S. 429 (1968)*. [online]. Available at: https://supreme.justia.com/cases/federal/us/389/429/.

[353] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 119.

through the HoR, passed the Foreign Assistance Act of 1974, which put a stop to the funding of the military aid, and all related actions, to South Vietnam. The Act, in fact, has been recognized as the one that has ended the presence of the US in the Vietnam War.[354]

It can be argued, thus, that the President enjoys a kind of supremacy in foreign policy because of the strong role of the US in the international arena. At the same time, Congress enjoys some powers of advice and consent and others on war following the War Powers Act and, above all, the Senate has powers for what concerns conflict management, human rights, and the ratification of treaties. The HoR, instead, has the huge power of the pursue that can limit the powers of the President in foreign affairs.

2. Foreign Policy in the EU

a. Institutions, Bodies, and Division of Powers

Foreign policy is typically considered a core state power by the MSs of the EU, and, in fact, it is still controlled mostly by them through the Minister of Foreign Affairs. In the last decades, though, the EU has become of larger importance in the international arena and, therefore, the European institutions can influence the states' individual foreign policy. This has started with the fall of the Berlin Wall, where the EU started to be more active on regional affairs concerning foreign policy because of what started to happen between the countries around the Union, such as the Balkans.[355] The MSs have let the Union guide them in areas like climate change and sustainability because, for the individual States, collective foreign policy is the best way to address such common issues. Nevertheless, this does not stand for cases such as conflict management where the interests of Stats play a crucial role.

The growth of the EU as an international agent has been institutionalized with the Maastricht Treaty where foreign policy was considered a special

[354] 93rd Congress (1973-1974). S.3394 - Foreign Assistance Act [online] Available at: https://www.congress.gov/bill/93rd-congress/senate-bill/3394.
[355] Howorth, J. (2020). The CSDP in Transition: Towards 'Strategic Autonomy'?. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 312.

competence of the EU based voluntary coordination. In the case of the Maastricht Treaty, though, there was the difficulty of the Pillars where the decision-making regimes differed. If the matters of foreign policy entangled with the first pillar, the Commission took the lead with development tools also because in such case decisions are taken following a qualified majority voting and thus it's easier to arrive at the threshold. If the matters fell under the CFSP, instead, the Council was in charge and in this case the MSs tried to politicize the role of the EU too.[356] With the LT, the Pillars were abolished but the substance remains the same and the CFSP is still based on voluntary coordination between the different governments of the MSs. In addition, there is still a limitation on legislating on the matter for the EU and the Court has limited jurisdiction. Moreover, the LT stated clearly the EU enjoyed a new legal personality under international law, even if it lacked sovereignty. Of great importance for the EU foreign policy is the Foreign Affairs Council (FAC), part of the Council of Ministers, which is the closest institutional configuration to the states' Ministers of Foreign Affairs and it is presided by the High Representative (HR) of the European Union for Foreign Affairs and Security Policy, who is also a Vice President of the Commission.

The figure of the HR was created by the Amsterdam Treaty of 1997 and initially only supported the FAC in its tasks and was the Council's Secretary General. To give more autonomy to the HR both from the intergovernmental and the supranational side, its role was modified by the LT by giving to it the presidency of the FAC and the Vice Presidency of the Commission. With such changes, the aim was to foster the role of the EU and the coordination between the MSs on the international sphere but even so, the role of the HR is limited by the intrusion of the Council driven by the interests of its rotating presidencies. On the one hand, the HR functions as a bridge of consensus between the two

[356] Sicurelli, D. and Fabbrini, S. (2014). An institutional approach to foreign policy-making: the EU, the USA and crisis management in Africa. *Journal of Transatlantic Studies*, [online] Volume 12(1), p. 41-61. Available at: http://dx.doi.org/10.1080/14794012.2014.871433, p. 57.

intergovernmental Councils and, on the other, s/he wants to enhance the role of the Commission through the promotion of more integrated policies.[357]

Moreover, the HR takes care of the CFSP and is the representative of the EU abroad, together with the President of the European Council and of the Commission, also overlooking the external actions.[358] For the sake of external representation, the President of the European Council represents the EU for CFSP, while the President of the Commission is pivotal for the representation of the EU on issues concerning, for example, the internal market or JHA.[359] Just like the President of the US, he also takes care of ensuring the right implementation by the MSs of the decisions taken by both the Council and the European Council, which usually follow its proposals.[360] In addition, the HR is of great importance, as mentioned earlier, to create coherence and coordination within the Commission but also between the institutions, above all the Commission and the Council to have an integrated approach among the MSs. Therefore, both these Presidents, together with the HR, make up the three-headed executive that lead the institutional structure of the CFSP.[361]

The creation of the figure of the HR had the aim of increasing inter-institutional coordination and the general foreign policy of the EU, together with the establishment of a permanent president of the European Council.[362] Moreover, the European Council is becoming a prominent actor in CFSP not only because of its representative role, but also because it defines the general

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[357] Amadio Viceré, M.G. and Fabbrini, S. (2017). Assessing the High Representative's Role in Egypt during the Arab Spring. *The International Spectator*, [online] Volume 52(3), p. 64-82. Available at: https://doi.org/10.1080/03932729.2017.1330021, p. 68.
[358] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 18(4).
[359] Amadio Viceré, M.G. (2016). From Brussels, With Love? A Comparative Institutional Study of Values and Principles in the Foreign Policy of Compound Democracies. In: Sciso, E., Baratta, R. and Morviducci, C., ed., *I Valori dell'Unione Europea e l'Azione Esterna*, Turin: G. Giappichelli Editore, p. 41.
[360] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 27(1).
[361] Amadio Viceré, M.G. (2018). *The High Representative and EU Foreign Policy Integration. A Comparative Study of Kosovo and Ukraine.* London: Palgrave Macmillan, p. 93.
[362] Sicurelli, D. and Fabbrini, S. (2014). An institutional approach to foreign policy-making: the EU, the USA and crisis management in Africa. *Journal of Transatlantic Studies*, [online] Volume 12(1), p. 41-61. Available at: http://dx.doi.org/10.1080/14794012.2014.871433, p. 44.

guidelines and principles for foreign policy, it implements foreign policy, and it may decide unanimously to recommend to MSs to adopt a common strategy of defense.[363] The European Council, thus, is probably the most important institution in EU's foreign policy and it has the power to decide on the need of missions of security and defense like PESCO (Permanent Structured Cooperation) in 2016. Furthermore, the President has increased its importance on the international arena as many still think that the EU does not have the authority and the credibility to do foreign policy alone.

Nevertheless, the coordination between the MSs is becoming tighter because the way of doing foreign policy ensured by the LT gives a stronger voice to the European MSs, but it is still very much based on the individual states' interests. Furthermore, the FAC and the HR are advised by the Political and Security Committee (PSC) that has the power of issuing strategic directions and opinions, as of Article 38 TEU.[364] This body is the one that deals with the political direction of foreign policy as instructed by the countries, since the members of the PSC are mainly ambassadors from the various States.[365] Additionally, it is in this body where the States can reach an agreement and it is here that decisions are taken "within the Council" for foreign policy.

Article 3(5) TEU is very important to explain the goal of foreign policy for the EU as it states that:

> "*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens …*".[366]

[363] Pavy, E. (2021). *The European Council*. [online] European Parliament. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/23/the-european-council.
[364] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 38.
[365] Howorth, J. (2020). The CSDP in Transition: Towards 'Strategic Autonomy'?. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 318.
[366] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 3.

Moreover, Article 21 TEU says that, in addition to the promotion of values on the international sphere, the values – enclosed in Article 2 TEU - that have contributed to the creation of the EU should also inspire foreign policy. Furthermore, consistency is important in EU foreign policy, but the complex institutional architecture poses difficulties to ensure it.

The institutional organization of the Union is based on multiple separation of powers, which is both vertical and horizontal complicating the synergies of the institutions and the consistency of foreign policy.[367] Horizontally, this division is reflected in how foreign policy powers are divided between both the supranational and intergovernmental institutions. For the executive, the HR is a very important figure together with the Council, the European Council, and the Commission.

Another very important institution for the EU foreign policy is the European External Action Service (EEAS), of which task is explained in Article 27(3) TEU:

> "*In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States* …".[368]

The EEAS does a crucial job in supporting the HR in fulfilling its internal and external roles. What it mostly deals with is high foreign policy issues, while lower ones are controlled by, for example, the Commission DGs, as it is for the

[367] Amadio Viceré, M.G. (2016). From Brussels, With Love? A Comparative Institutional Study of Values and Principles in the Foreign Policy of Compound Democracies. In: Sciso, E., Baratta, R. and Morviducci, C., ed., *I Valori dell'Unione Europea e l'Azione Esterna*, Turin: G. Giappichelli Editore, p. 37.
[368] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 27(3).

external representation of the Union. For instance, it is the Commission that controls the financial availability for foreign policy actions.[369]

Vertically, MSs still do foreign policy independently with both other nations and international organizations. Moreover, the States are not bound to respect what the EU decides on the coordination of foreign policies, as explained greatly by both Declaration 13 and 14 attached to the LT.[370] Nevertheless, vertical coordination is essential to further the Union foreign policy, both because of its lack of an independent military force and because the EU is not represented in important organizations like the UN. Moreover, the LT prohibits the CJEU to have jurisdiction on CFSP as it is considered as an important state power and the States want to keep this policy mostly under the intergovernmental institutions of the Union to not be forced to do something against their will.[371] At the same time, the Court has been given the powers to delimit the areas of foreign and security policy like whether a policy dossier falls under such area or not.

b. Appointment and Treaty-making Powers

An important power for foreign policy is the treaty-making one, as already seen in the sections dedicated to the US. For what concerns the EU, this power was already envisaged by the Treaty of Rome in 1957 where the Union could conclude international agreements under the Common Commercial Policy. Nevertheless, the treaty-making power of the EU, as many other powers, has been strengthened by the Court following the parallel power doctrine.[372] This

[369] Amadio Viceré, M.G. (2016). From Brussels, With Love? A Comparative Institutional Study of Values and Principles in the Foreign Policy of Compound Democracies. In: Sciso, E., Baratta, R. and Morviducci, C., ed., *I Valori dell'Unione Europea e l'Azione Esterna*, Turin: G. Giappichelli Editore, p. 41.
[370] Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon (2007). [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_5&format=PDF.
[371] Amadio Viceré, M.G. (2016). From Brussels, With Love? A Comparative Institutional Study of Values and Principles in the Foreign Policy of Compound Democracies. In: Sciso, E., Baratta, R. and Morviducci, C., ed., *I Valori dell'Unione Europea e l'Azione Esterna*, Turin: G. Giappichelli Editore, p. 42.
[372] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 290.

doctrine states that the EU can make treaties or agreements also on topics that fall under its competence, but it is not explicitly said that can be the matter of international agreements. Such doctrine was not present directly in the Treaty of Rome but was present in the Euratom Treaty.[373] Then, the ERTA (European Road Transport Agreement) judgement of the Court in 1971 completely changed the view on external competences of the EU. The case involved five of the six MSs that were involved in negotiations for an accord on road transports.

The Commission thought that such Agreement was going against legislations of the EU and its scope was too wide as it applied also to third countries' truck drivers. Therefore, it asked the Court to stop proceedings in the Council and thought that the EU had enough powers to conclude the ERTA agreement on its own.[374] In addition, the Commission argued that it was unreasonable to do such an extensive agreement on transports without letting the EU take the needed measures on foreign policy. The supranational institution even affirmed that the Community's competence on such matter was not exclusive but became so in the moment where it legislated on it.[375] The Council response was that the Union could only act following what the Constitution stated and if any matter were to be accepted by Article 75 of the Treaty of Rome to conclude international agreements it would be so both for the EU and the MSs: external powers would be parallel to internal ones but without giving exclusivity. The Court, in this case, agreed with the Commission stating that external powers could stem from internal ones or previous internal legislations, as long as their purpose is the accomplishment of the objectives enclosed in the Treaties.[376]

The ERTA judgment of the Court has inevitably led to two different interpretations: the conceptual-federalist and the pragmatic one.[377] The former

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[373] Consolidated version of the Treaty establishing the European Atomic Energy Community (2012) OJ C327/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012A%2FTXT, Article 101.
[374] Verellen, T. (2015). The ERTA Doctrine in the Post-Lisbon Era: Note Under Judgment in Commission v Council (C-114/12) and Opinion 1/13. *Columbia Journal of European Law*, [online] Volume 21(2), 383-410. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/coljeul21&div=18&g_sent=1&casa_token=, p. 388.
[375] *Ibid*, p. 389.
[376] *Ibid*, p. 390.
[377] *Ibid*, p. 391.

argues that the only question is the scope of the competence of the EU, but there is no doubt that when the Union has competence on a certain field it is exclusive. Therefore, this is a more dualist conception with separate and mutually exclusive competences and, in fact, preemption is very important for such conception. The latter, instead, conceptualizes competences in a less exclusive way stating that MSs have concurrent power, as long as their actions do not come into conflict with the EU ones. This is closer to cooperative federalism where there is a coordination and collaboration on policy fields. However, in the case of conflict preemption is used anyways.[378] Generally, the ERTA judgement falls more into the first conceptualization.

The parallel power doctrine, though, was finally accepted only with the Court's Opinion 2/91.[379] What the CJEU stated was that the parallel power doctrine existed because treaty-making power goes alongside internal legislative powers enlisted in Article 3. These external powers of the Union are generally not identified with the parallel power doctrine but are described as implied external powers. In fact, the treaty-making power stemming from internal powers is mostly an instrument that the Union has at its disposal to act in the most complete way possible in the policy field falling under its competence.[380] The parallelism between internal and external competences has even been included in the LT now. For example, Article 3(2) TFEU now states:

> "*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of*

[378] Verellen, T. (2015). The ERTA Doctrine in the Post-Lisbon Era: Note Under Judgment in Commission v Council (C-114/12) and Opinion 1/13. *Columbia Journal of European Law*, [online] Volume 21(2), 383-410. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/coljeul21&div=18&g_sent=1&casa_token=, p. 393.

[379] Opinion 2/91 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work (1993) ECR I-0106. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CV0002.

[380] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 299.

the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".[381]

In addition, also Article 216(1) clearly recognizes the parallel doctrine:

"*The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*".[382]

Regarding the functioning of the ERTA doctrine, the case is different when we talk about complementary competences for which the EU tries to set common standards. In such case, as explained by the Opinion of the Court 2/91, the Community allows MSs to set stricter standards, also through international agreements as long as conflicts of norms were prevented.[383] This is not the case where Article 94 and 95 TEU, explained in Chapter 2, are applied and there is a harmonization of measures. In this case, the States cannot enter into international agreements on the matter as the Community has legislated greatly on it already and, thus, an agreement on the matter would have to be taken inside the framework of the Union.[384]

The Opinion of the Court that has completely explained how the parallel doctrine works is Opinion 1/94.[385] The Opinion was about whether the EU had exclusive external power regarding the Word Trade Organization (WTO)

[381] Consolidated versions of the Treaty on the Functioning of the European Union (2012) OJ C326/01. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Article 3 (2) TFEU.
[382] *Ibid*, Article 216 (1) TFEU.
[383] Opinion 2/91 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work (1993) ECR I-0106. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CV0002.
[384] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 332.
[385] Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty (1994) ECR I-05267. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CV0001.

matters. In this case, the Court found that the fields ruled by the WTO were under the internal exclusive competence of the EU. What the Opinion concluded is that the MSs would lose the right to make agreements with non-state actors only in the case in which the EU has legislated internally on the matter or has got to a complete harmonization.[386] Therefore, there is some room for the States to make international agreements as long as they do not come into conflict with EU legislation or do not hamper its uniform application.

There are some agreements that do not necessarily fall under one specific competence of MSs or the Union. In such cases, the EU has pressured on doing mixed agreements where both MSs and the EU could sign. They have become very used for both an internal reason and an external reason.[387] The internal reason is that states inside the EU can have a common, and thus stronger, voice or attachment with third states of common interest. Another internal reason is that often the EU makes agreements on heterogeneous competences that are not always so clear in terms of their nature. The external one, instead, is that the States can function as a guarantor of the Union because under international law there were some doubts about non-state actors' treaty-making powers and thus this was a way to ensure legal security. Today, though, the purpose of mixed agreements has changed, and it is mostly political: even if matters fall under Community's competences (shared), the MSs still want to participate with their own name to remain visible internationally speaking.[388]

For the EU, as it is not considered a state actor in the international sphere, it was difficult to overcome the difficulties of international law and make Community law legitimately supreme over the international law governing the EU. What it did was thus to bring MSs far from international law.[389] First of all, the EU concluded that decisions between the representatives of MSs in the Council were not unilateral acts, but international agreements. The legality of such decisions was based on the fact that these agreements fell outside the

[386] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 333.
[387] *Ibid*, p. 308.
[388] *Ibid*, p. 309.
[389] *Ibidem*, p. 314-315.

Union's competences to overcome the difficulties posed by the enumeration principles. Moreover, in the ERTA doctrine a very important statement was made by the Court that limited greatly the power of the States on international agreements. Basically, when the scope of the Treaties of the Union covers a certain field and they want to conclude an *erga omnes* agreement related to it, the MSs are obliged to go through the Community's means to arrive at an accord. This is also the case when international actions of the single MSs may affect internal legislations of the Union.[390]In such cases, the actions of the States may even be subject to the Court. This has not only limited the powers of the MSs, but also increased the ones of the Union.[391]

At the same time, the fact that MSs inside the EU still retain treaty-making powers poses some difficulties as some agreements with third countries may conflict with one done by the EU or the Treaties directly. The EU has three main mechanisms to deal with such issue. The first is an *ex-ante* checking mechanism, which would require the MSs to ask authorization to the EU before doing an agreement. This was first inserted in the Treaty of the European and Steel Community regarding CCP. This previous checking mechanism is not accepted for every field because of political issues, but in certain fields like air service (transport) is accepted with the purpose of not harming the common transport policy of the Union.[392]

The second mechanism is a strategy built around the exclusive powers and thus on the dual federalism doctrine. This strategy states that where there is an exclusive competence of the Union the MSs should refrain from doing international agreements as they could potentially come into conflict with both

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[390] Van Elsuwege, P. (2019). The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law. In: Varju, M., ed., *Between Compliance and Particularism*, Springer Nature Switzerland AG. Available at: https://www.researchgate.net/publication/330961755, p. 13.

[391] Opinion 2/91 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work (1993) ECR I-0106. [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CV0002.

[392] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 321-322.

present or future Community legislation on the matter.[393] The most used mechanism in the last two decades, though, has been the one linked to the supremacy doctrine: MSs can conclude international agreements even on matters falling under the Union's competences, but they will be treated as unilateral acts of the MSs. Therefore, the latter will be hierarchically lower than community legislation while the agreements concluded by the EU will be above it.[394]

c. Power of Intervention and Factors Affecting the Union's Power

The EU has an approach to foreign policy which is highly based on economy, civilian instruments, diplomacy, and negotiation. This also stems from the fact that decisions differ if taken by supranational or intergovernmental institutions because even if foreign policy is mostly controlled by the intergovernmental side, the supranational authorities may enjoy some independence. Conflict management by the EU, in fact, has depended greatly on the institution dealing with it. The initiatives fostered through the competences of the Union have seen the Commission as the agenda-setter, but in the field of human rights the EP has been the leader. Contrarily, the conflict management initiatives done within the CFSP have been controlled by the MSs directly through the Council.[395] In fact, for what concerns this policy area, unanimity is still required in the Council.

The problem at the institutional level is that the EU and the MSs want to treat matters in different ways. For example, for conflict management in Africa, the Commission has favored an approach led by development tools. Differently, the MSs wanted to treat this matter keeping their individual historical ties as a priority and thus tried to keep this matter in the framework of the CFSP. In this way, the interests of the single states are prioritized. Therefore, on the one hand, the Commission would like a more neutral role in foreign affairs for the EU while the MSs want to bring forward their political agenda through the Council.

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[393] Schütze, R. (2009). *From dual to cooperative federalism*. London: Oxford University Press, p. 323.
[394] *Ibid*, p. 324.
[395] Sicurelli, D. and Fabbrini, S. (2014). An institutional approach to foreign policy-making: the EU, the USA and crisis management in Africa. *Journal of Transatlantic Studies*, [online] Volume 12(1), p. 41-61. Available at: http://dx.doi.org/10.1080/14794012.2014.871433, p. 44.

This has inevitably hampered the active role of the EU in Africa, also because the most important MSs, like France and the United Kingdom, act unilaterally above all for the case of Africa where there are very important historical partners.[396]

For example, following the Arab Spring protests that hit Egypt in 2011 the HR, Ashton at that time, immediately asked Mubarak to answer to the people's demands in a peaceful way. Nevertheless, the UK, France, and Germany took the upper hand in leading the response of the Union first unilaterally, which convinced President Mubarak, and then through the Council.[397] It needs to be stated that for the case of the Arab Spring there was the lack of an immediate EU coordinated response at the beginning and thus many States started to act in a unilateral manner. Here, the UK soon allied with the US in support of a military-led transition government, while the rest of the MSs were pressuring the EU, through the Council, to use its tools in favor of a government formed in a democratic manner. The different priorities of the States were the reason for which the HR did not reach a consensus in the FAC meeting on the matter in February 2011.[398]

For the case of Libya's Arab Spring protests of 2011, instead, the different priorities of States started to become a problem because a military intervention was put on the table. Before this, the first response by the EU came again from the HR Ashton who condemned the violence by Gaddafi to shut down protests, followed by both the President of the European Council Rompuy and of the Commission Barroso. The military intervention was not supported by the HR, who favored a more peaceful approach, while many States, like the UK and France supported it. France, in addition, also departed from the stance of the Union supporting the Transitional National Committee (TNC) as the legitimate representative of the Libyans. Regarding the intervention, Italy, was against

[396] Sicurelli, D. and Fabbrini, S. (2014). An institutional approach to foreign policy-making: the EU, the USA and crisis management in Africa. *Journal of Transatlantic Studies*, [online] Volume 12(1), p. 41-61. Available at: http://dx.doi.org/10.1080/14794012.2014.871433.
[397] Amadio Viceré, M.G. and Fabbrini, S. (2017). Assessing the High Representative's Role in Egypt during the Arab Spring. *The International Spectator*, [online] Volume 52(3), p. 64-82. Available at: https://doi.org/10.1080/03932729.2017.1330021, p. 68.
[398] *Ibid*, p. 69.

intervention because of its strong interests in Libya. All this has contributed in complicating the achievement of a common European strategy. In such case, the matter was further complicated by the UN Security Council Resolution No. 1973 which authorized military intervention even if Germany abstained as it thought that the benefits were less than the risks. Nevertheless, France first, and the UK and US later, launched a military intervention in Libya following the Responsibility to Protect. This huge disagreement between the EU MSs, therefore, prevented the use by the EU of a Common Security and Defense Policy (CSDP) strategy and even the evacuation of the Libyans was controlled by the single States.[399]

The problem of the agreement between MSs has been identified as the dilemma of collective action: States are not yet able to speak with one voice through the Union.[400] Such dilemma is rooted in many issues with which the EU institutions are faced in foreign policy. First of all, the cost and benefits of conflicts are not equally shared between the MSs. This goes together with the second issue, which is that States have different priorities and thus their individual preferences often do not align, indirectly giving more power to the most powerful states.[401] All this has consequences on the institutional equilibrium of foreign policy as, because of the misalignment of the preferences of the States, the European Council takes the lead driven by its composition. Another reason for such lead of the European Council has also been identified, by Howorth, as supranational intergovernmentalism: the agencies of the European Council are adopting always more a strategy of consensus based on the defense of national interest.[402] In this way, there is a lack of democratic accountability because the role of the EP is very marginal, and the choices made at the Council level are communicated only once they are done.

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[399] Fabbrini, S. (2014). The European Union and the Libyan Crisis. *International Politics*, [online] Volume 51(2), p. 177-195. Available at: http://docenti.luiss.it/protected-uploads/701/2017/11/20171114182022-Fabbrini-The-European-Union-and-the-Libyan-Crisis.pdf, p. 185.
[400] *Ibid*, p. 178.
[401] *Ibid*, p. 189.
[402] Howorth, J. (2020). The CSDP in Transition: Towards 'Strategic Autonomy'?. In: Coman, R., Crespy, A. and Schmidt, V. A., ed., *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press, p. 319.

Nevertheless, in addition to the MSs that strongly limit the actions of the EU in the international arena, there is the problem of budgetary powers also in the EU. As a matter of fact, the EP has huge power in foreign policy because of its direct inclusion in the budgetary procedure. The EP, thus, needs to approve, together with the Council and under the guidance of the Commission, both the annual budget for CFSP but also the Multiannual Financial Framework on the same matter.[403] Nevertheless, the Commission is the institution entitled to the implementation of such budget and also has some room of maneuver in adapting it to the current needs. In implementing it, the division of the budget for the different operations is taken up by the Service for Foreign Policy but under the monitoring of the Council[404] who, as it has been described above, is often guided by the States' interests in foreign policy.

3. Conclusion

Undoubtedly, the interests of the single MSs and, thus, the intergovernmental institutions make foreign policymaking at the European level very hard. A lot of the policies at the foreign level done by the EU in the last two decades have been based on structural stability. This strategy was first mentioned by the Commission in 1996 and it is based on coordination between MSs, which is the greatest aim of the EU. This theory is based on the idea that states are more willing to cooperate with one another when they are from a similar socio-political background.[405] Institutionally, the EU lacks the principle for organizing the difficult separation of powers of the Union's external policies, which results in a dispersion of power both between the various EU institutions and the different MSs.

Moreover, the EU was very keen on conflict prevention through development cooperation, above all in Africa because of how close it is to the

[403] Padurariu, A. (2021). *Common foreign and security policy*. [online] European Parliament. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements.
[404]European Commission. *Common foreign and security policy*. [online] Available at: https://ec.europa.eu/fpi/what-we-do/common-foreign-and-security-policy_en.
[405] De Vries, M. S. (1988). Foreign Policy Coordination Among Small European States. *Cooperation and Conflict*, [online] Volume 23(1), p. 43-52. Available at: https://www.jstor.org/stable/45083651, p. 43.

European continent. The EU has been very focused on stabilizing the African continent because of the many migrants that reached the European coasts. In fact, the EU is considered mainly as an economic giant that uses non-military tools because of its lack of military and values soft powers.[406] Another problem in the Council, and in the EU in general, is that the strongest States have a bigger voice and thus the power to alter the position of the EU.

On the other side of the Atlantic, instead, the US has mostly focused on the fight against terrorism. This has started well before the tragedy of 9/11, but from then it has increased greatly. Above all, the way in which the US has acted is very different from the one of the EU as it has always favored military interventions while the Union is more of a civilian/economic power. But the difference between the approach used by the EU and the US differs also because of their institutional decision-making structure in foreign policy and the political leadership.

A perfect example to show that the EU has a totally different approach than the US in dealing with conflict management is the Egyptian crisis. In fact, the Egyptian crisis also had an important effect on the ENP (European Neighborhood Program) for the North African area, which was consequently revised. The main focus was on how to deal with the waves of migrants that were to reach the European shores as a consequence of the Arab Spring in the MENA region. In the end, the ENP review of the HR and the Commission of 25 May 2011 concentrated more on the provision of scholarships and funding based on money, market, and mobility ("3 Ms").[407] This conclusion, though, has had controversial analysis as some think that this revised ENP was done to counteract the lack of clear EU policy guidelines on the democratization of the MENA region. This perfectly shows the different approach that the EU uses because of its lack of policymaking power and because of the still strong power of the

[406] Sicurelli, D. and Fabbrini, S. (2014). An institutional approach to foreign policy-making: the EU, the USA and crisis management in Africa. *Journal of Transatlantic Studies*, [online] Volume 12(1), p. 41-61. Available at: http://dx.doi.org/10.1080/14794012.2014.871433, p. 43.
[407] Amadio Viceré, M.G. and Fabbrini, S. (2017). Assessing the High Representative's Role in Egypt during the Arab Spring. *The International Spectator*, [online] Volume 52(3), p. 64-82. Available at: https://doi.org/10.1080/03932729.2017.1330021, p. 70.

States. As a matter of fact, the ENP was mostly based on the civilian aspect rather than the military.

For the EU, a solution to bring the MSs together has been tried with the development of the role of the HR. This, though, has not paid off as the European Council has often taken the lead in foreign policy becoming the main actor in such area. Moreover, it also had a huge role in controlling other institutions through its agenda and strategy-setting power. This shows perfectly that when there is a lack of policy convergence between the MSs, the HR has little room to act and bring the FAC and the Commission closer as the latter needs to follow the guidelines set by the European Council. Such issues have prevented the HR from working as an autonomous actor and undertake all the roles it has because its work is dependent on the will of the MSs to coordinate, which is complicated by the EU as it tolerates unilateral actions by the MSs on the external sphere. Moreover, the LT does not clearly define the relationship between the President of the European Council and the one of the Commission, making coordination between the two EU institutions, and thus the intergovernmental and supranational sides, harder.[408]

Nevertheless, the EU has tried to limit the sovereignty and the power of the MSs in CFSP with the LT. In fact, in Article 28(2) TEU the Union clearly states that the decisions taken in the framework of the CFSP "*shall commit the Member States in the positions they adopt and in the conduct of their activity*".[409] Moreover, there is also a loyalty principle for MSs to respect in such policy framework and it is enclosed in Article 24(3) TEU:

> "*The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action*

[408] Amadio Viceré, M.G. (2016). From Brussels, With Love? A Comparative Institutional Study of Values and Principles in the Foreign Policy of Compound Democracies. In: Sciso, E., Baratta, R. and Morviducci, C., ed., *I Valori dell'Unione Europea e l'Azione Esterna*, Turin: G. Giappichelli Editore, p. 46.
[409] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 28(2).

which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.".[410]

The wording of such Article is quite strong (*shall*) and it summarizes perfectly how the EU would like the MSs to act: the MSs shall support the EU's actions in CFSP, comply with them, coordinate between one another, and at the same time refrain from any actions that might conflict with the EU's ones in such framework.[411]

[410] Consolidated versions of the Treaty on European Union (2012) OJ C326/15. [online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF, Article 24(3).
[411] Van Elsuwege, P. (2019). The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law. In: Varju, M., ed., *Between Compliance and Particularism*, Springer Nature Switzerland AG. Available at: https://www.researchgate.net/publication/330961755, p. 4.

Conclusion

Because of its uniqueness, the European Union has always been very hard to define as a political and governance system. Many scholars have tried to find a definition, but there is no general agreement on how to label the EU. Nevertheless, what is sure is that the Union is neither a state nor an international organization. A state, to be considered such, has to have a territory, a population, but also the power of coercion, which the EU lacks as law enforcement is still a competence of the MSs. Furthermore, it cannot be considered an international organization as its decisions have a direct legal effect on the MSs and are taken by the EU institutions directly. In addition, the Treaties of the Union are considered to form a new legal entity, and this is not generally the case for international organizations.

Understanding what the EU is has never been more important. As a matter of fact, in the last two decades, the Union has become a crucial international actor thanks to the multilateral world we live in. Therefore, defining the EU would give a clearer picture of what the Union represents and would increase its legitimacy and, thus, the effects of its actions and its diplomacy at the international level.

The EU and the US can be considered similar cases both for their nature and for their governance organization. They both formed after an aggregation of previously independent states. In addition, both promote unity while accepting diversity leaving a part of sovereignty in the MSs' hands. As a matter of fact, the European federal tradition and the American one have developed the capability to deal with diversity by fostering unity on common grounds for the different citizens. For example, the EU has developed a system of multilevel governance to overcome the differences between the different States. On the one hand, the Union can be identified as a federation because of the accurate balance of powers between the institutions. On the other hand, it cannot still be called a federal state because the MSs still enjoy huge power in many matters and are still the masters of the Treaties – differently from the States of the US. In fact, the powers of the Union are not given from the top to the bottom as in the US but are given following an inverse distribution. Even if the Lisbon Treaty has given more

powers to the EU in terms of its capacity, the matter has not changed as the powers have been distributed to actors falling under the intergovernmental side of the EU and, therefore, are still controlled by the States.

As far as federalism is concerned, a very important aspect is the existence of self and shared rule meaning that, even if many powers are centralized, there is still a division of them between the central and the regional governments. This is of course present in the EU, but its federalization process is still uncompleted. This has been shown in the second Chapter, where the thesis has tried to provide a comparison between the traits that are for the most part common to both the US and the EU. For example, both the US and the EU have international and national features. The former could be the Senate in the US and the Council in the EU, which are both composed of representatives of the States. At the same time, there is a strong executive which in the US is made up mainly by the President and in the EU is shared by the Commission and the European Council.

Furthermore, it is clear that two levels of government exist in both the US and the Union. In fact, the federal government enjoys exclusive competences as well as shared ones with the States. These two levels stem also from the fact that the citizens enjoy rights that come both from their States and the EU directly, and they have dual citizenship.

The factor that differentiates the EU and the US from other political systems is that they are organized as a governance system more than a government one, and, most importantly, there is a strong division of powers both horizontally and vertically. In fact, there are various principles that they share (as explained in Chapter 2) for both dimensions. A pivotal one for the horizontal division of power is checks and balances that is present in both even if treated in different ways. Another principle that is emblematic of both their nature and their organization of power is the principle of conferral, which is at the basis of the sovereignty gained by the central government through enumerated powers given by the states. In addition, they also have similar preemption characteristics and may use legislations to set minimum standards. This is the case for regulations in the EU, which are only directly applicable, and of state law that foresees only minimum protection, such as the one for the protection of the

LGBTQ community in the US. Moreover, both central governments enjoy a strong principle of supremacy on States' legislations.

Another huge similarity for what concerns the division of power is the existence of a Necessary and Proper Clause in both the US and the EU. In the former, it is very important as it has greatly increased the power of the legislator with an increasing admissibility of implied powers by the Court. Also in the EU there is such a Clause and it is included in Article 94 and 305 EC. Therefore, the EU and the US can be considered similar cases, but can they be both included under the umbrella of federal unions?

What is sure is that the power of the central government of the US is very strong and has the largest power except for health and social issues. For the purpose of this thesis, focus has been put on the case of foreign policy and how it is treated differently in the US and in the EU. For the US, foreign affairs are mainly controlled by the President, and thus the executive. The powers of the President in this policy area have even increased through judgements of the Supreme Court. For example, the President is now able to control internal policies that may affect external ones, like foreign commerce that usually belongs to the States. Moreover, Congress has increased its powers in foreign policy limiting the ones of the President with the War Powers Act of 1973. At the same time, the Senate has an advice and consent role, and the House of Representatives can stop the President's actions with its power of the purse, which, arguably, has been used to put an end to the US involvement in the Vietnam War.

For the EU, the situation is a bit different. Since the Maastricht Treaty, the importance of foreign affairs for the EU has increased greatly as it needed to be affirmed in the international arena. The parallel power doctrine, explained in Chapter 3, has been pivotal in increasing the treaty-making power of the Union as an internal competence corresponds to an external one for the EU. Being Common Foreign and Security Policy (CFSP) under the intergovernmental regime of the Union, coordination between the MSs in the Foreign Affairs Council (FAC) is crucial. The FAC is presided by the High Representative (HR), which is one of the most important figures in CFSP and is also a Vice President

of the Commission. Thus, it functions as a bridge between the intergovernmental and the supranational institutions. This, though, is also a huge limit for the HR who is very dependent on the institutions to do its work. In this way, his/her hands are tied as it needs the approval from the MSs, but also from the European Council and the Commission that make part the executive of foreign affairs together with the HR. Therefore, there is the need for an agreement between the States to act in a coordinated way, and this poses a difficulty to find immediate responses to the crisis. It is for this reason that MSs, above all the strongest, still act unilaterally with other nations and international organizations.

Another important fact for foreign affairs in the Union is that it lacks a military, and, in fact, its foreign policy is very much based on civil and economic aspects while for the US on military intervention and aid. Thus, even if foreign policy powers have been gradually centralized, States still enjoy the greater powers and huge sovereignty on the matter. Moreover, they can even conclude international treaties without any constitutional limitation from the EU unless it is under a Union competence or there is already a treaty concluded by the Union on it.

To conclude, even if there are some practical differences between the EU and the US, they can be considered similar cases, but under which political system? The US is for sure a federal union, being probably the most famous example of it. The EU, though, cannot still be called a federation as it is not perfectly in line with a federal political system. The first thing that comes to mind is that MSs are still the master of the Treaties. Moreover, also their amendment is completely dependent on the States, while for federal systems it should not be like this. Moreover, the EU lacks fiscal competences, which instead for the US stands in Congress's hands. Maybe, the best way to put them under the same umbrella is with the compound democracy system. This is based on a non-majoritarian political system that combines states' self-government and federal government. Compound democracy, thus, is not only based on a dual vertical government like federalism but is based on a separation of powers that is both vertical and horizontal. In fact, there is a balance that needs to take into account both the territorial and functional aspects of the different institutions.

This is the case for both the EU and the US, where territorial and functional interests play a crucial role and, in fact, a fusion of powers at the institutional level is not possible because of the interplay between these two types of interests.

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Summary

For decades we have lived in a multilateral world where the EU has become one of the most important actors, but now it is evolving into a multipolar world where the great powers are the most influential. During the former, the Union has been able to increase its importance in the international arena and it has been seen as a guide on many issues. At the same time, it has been criticized because of its lack of legitimacy and of a precise description of what political system it is. Therefore, it is important to find a definition to increase its credibility within the international arena and also its powers on the Member States (MSs). For sure, it is neither a state nor an international organization, and the political system that it resembles is for sure one where sovereignty is shared by different levels of government.

This thesis has analyzed the development of the EU from the lenses of federalism by comparing it with the US. The latter has been chosen as the element of comparison because federalism can have differences in nature. In fact, a union of states can happen both by aggregation, like the US, and disaggregation, like Belgium. Therefore, the US and the EU can be considered similar cases as they have been created with the unification under a common supranational/central government of previously independent states. Moreover, the creation of both Unions stem from the will of the States to survive. On the one hand, the colonies that created the United States did so to keep existing and to maintain their autonomy. On the other hand, the MSs of the EU chose to unite so that nation-states could survive modern economic development by having a stronger voice through a Union representing their interests, as Milward stated.

It is for this last reason that I chose to analyze the complex case of foreign affairs to see how it is treated differently in the two similar cases. In addition to its importance for the EU, as explained above, foreign affairs have always been very important for nation-states since the birth of the modern state. Therefore, it is also for the Union to bring forth the interests of its MSs in the international arena. In fact, for MSs it is pivotal to still be visible to foreign nations and active in the international sphere. This is also the reason for which MSs do mixed agreements with the EU, in addition to the fact that the EU concludes agreements

on heterogeneous competences (internal reason) and the fact that States function as guarantors for the EU, which is a non-state actor (external reason).

To see how the EU has evolved compared to a federal process and define what political system it is based on, I have divided the thesis in three Chapters. The first one is based on what federalism is and how it is conceived in the US and in the EU. This Chapter also analyzes other political systems close to federalism to see its difference with them. The second Chapter focuses on a more constitutional analysis of the federal traits that are included in both the Unions. The analysis is based both on the institutional organization and the division of powers between the two levels of government. In fact, it is divided into the horizontal, thus institutional aspect, and the vertical dimension, the one dealing with the division of powers between MSs and the central government. The third and last chapter, instead, analyzes how foreign affairs are treated in both Unions.

For the first Chapter, the analysis of federalism starts from Riker's definition that takes into account both the self and shared rule traits of federalism:

> "*a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions*".[412]

Then, an analysis of how federal unions are classified under international law has been done. As a matter of fact, the first unions of such type created some conceptual problems for international law because before the US was born only nation-states were subject of international law. In fact, federal unions were conceived in different ways: the Swiss Confederacy was seen as an international confederation while the German Empire was seen as a true sovereign state. At the same time, it is clear that federations were born because of mainly two reasons that work for both federations by aggregation or disaggregation: either defense and security or economic and social condition.

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[412] Bay Brzinski, J., Thomas D. Lancaster, T. D., and Tuschhoff, C. (1999). Federalism and Compounded Representation: Key Concepts and Project Overview. *The Journal of Federalism*, [online] Volume 29(1), pp. 1-17. Available at: https://www.jstor.org/stable/3330917, p. 3.

The European Federal tradition emerged together with the concept of modern state and sovereignty. In fact, the Continental European tradition has traits that follow territorial and non-territorial dimensions, but also social, economic, and political factors. Moreover, just as the Anglo-American one, it emerged to deal with diversities by creating links between citizens and states, which for the EU is mostly political through the Constitution, while for the EU it is more economic.

As we know, federalism in the United States was born with the Constitution of 1789. In fact, the first Articles of Confederation were more based on local sovereignty to avoid an executive concentration of power because the colonies were scared of living what just ended with the War of Independence. As of the Articles, the union of States was more like an alliance than a new state and had equal powers in Congress and could veto legislations. At the same time, the Articles were considered to be lacking some important characteristics like supremacy over States' Constitutions and the inability to prevent war. For this reason, the federalists and anti-federalists tried to reach a compromise for a new Constitution that would make the latter the supreme law of the land with the executive having the power to prevent wars between and within states. In addition, the Constitution created two legislative Chambers that would allow both the people of the US to be represented as a whole – the House of Representatives - and the States to be represented individually – the Senate.

The US Constitution, moreover, has been largely based on the Compact Theory: a compact between the States has created the US federation, and thus the central government is a States' creation. Therefore, at the base of this theory there is the fact that States are the master of the Constitution. Nevertheless, the Court has rejected this argument in *Chisholm v. Georgia* of 1793 attributing such power to the people. In fact, it goes without saying that the American federation has evolved a lot through the Court and, initially, also through *The Federalist*, as explained in the first Chapter of this thesis.

The second Chapter describes federalist traits in the US and sees how they are present in the political system of the EU. These traits are described following the two dimensions present in both political systems: horizontal and

vertical. For the horizontal part, the power allocation to the various institutions is described. For the US, the Constitution allocates one power to one institution: Article 1 allocates legislative power to Congress, Article 2 vests the President with executive power, and Article 3 deals with the judiciary power of the Supreme Court and the other subsidiary Courts. Undoubtedly, the most important aspect for this dimension is checks and balances, which is a crucial trait of the US political system that the EU has taken upon. For the US, this system is based on the teaching of Montesquieu, from whom the founding fathers of the Constitution took inspiration, who thought that if one power belonged only to one institution liberty was at stake.

There are many ways in which the Constitution prevents a strong concentration of power. For example, there is a bicameral legislature and its power is also limited by a presidential veto. Moreover, the President, the HoR, and the Senate have staggered mandates to avoid that a single party has the majority in both houses and the presidency. On the other hand, Congress has the power of impeachment against the President and the Senate enjoys advice and consent and treaty-making powers. At the same time, the Supreme Court, following the *Marbury v. Madison* case, has got the power of judicial review while it is controlled by Congress that decides its competences and number of judges. In addition, Congress can control the powers of the executive through the power of the purse, or budgetary powers, of the HoR.

This system of checks and balances is also present in the EU. In fact, such a system prevents the concentration of power in one institution or in one dimension of the Union. The EU is composed of intergovernmental (European Council and Council of Ministers) and supranational institutions (Commission, EP, CJEU). This balance of power between the various institutions can be seen by how legislations are adopted following the Ordinary Legislative Procedure: the Commission drafts a law as it enjoys a legislative proposal power, following the guidelines of the European Council, that then will need to be approved by both the EP and the Council. It can be said, thus, that the European Council and the Commission make up the executive while the EP and the Council make up the legislative with a staggered mandate. At the same time, more than a

separation of powers there is a combination of functions. In fact, in the Treaties the powers of the institutions are not allocated following a specific branch of government and there are overlapping functions.

Moreover, the institutions need to respect the provisions of horizontal mutual sincere cooperation envisaged in Article 13(2) TEU. This provision ensures that the institutions follow the powers conferred to them by the Treaties and respect the powers of other institutions. Another factor to add to the system of checks and balances in the EU is the principle of institutional balance that needs to be respected as an institution cannot be stronger than another. This is connected to the Meroni doctrine, explained in the Chapter, which states that an institution cannot delegate discretionary power to an agency to not alter the balance of powers envisaged by the Treaties.

If from the horizontal dimension the US and the EU share the system of checks and balances, from the vertical one they share important characteristics too. The vertical division of power clearly shows how both political systems are characterized. This has been confirmed also by the Maastricht decision explained in the second Chapter, where Germany stated that the Maastricht Treaty could not directly give more power to the Union as it was controlled by the people. In fact, Germany had a very strict view of sovereignty, which it thought was indivisible and thus could not be shared.

Vertically, the US and the EU are very similar because their Unions are based on similar principles. One of them is the principles of conferral, which is a consequence of the fact that they formed because of an aggregation of previously independent states that conferred some powers to the central government. Moreover, this also explains how the powers of both the central governments are based on enumerated powers foreseen by the states – Article 3 for the US and Article 3 TFEU for the EU. In addition, the fact that dual sovereignty exists implies that there is a principle of supremacy that in the US (Article 6, Clause 2) is enjoyed by federal law, the Constitution, and treaties. In the US all the powers of the federal government stemming from the Constitution, like implied powers, enjoy supremacy over States' ones. In the EU, the supremacy principle is based on the idea that EU law is above states' legislation,

and this holds true for all binding acts. For the EU, the *Costa v. Enel*, *Granital* and *Taricco* cases have been analyzed on the matter. The principle of supremacy is highly connected to preemption, which is present in both the US and the EU in a similar way as it may be seen as setting minimum standards in some cases. For example, this is the case for field preemption in the EU and in the case in which the States have higher protection regarding certain rights for the US. Another very important clause that is shared by both is the Necessary and Proper Clause, which for the EU is represented by Article 94 and 305 EC.

In the second Chapter of the thesis, thus, it can be argued that there are constitutional traits that are present both in the US and in the EU, even if treated differently in some cases, that make them very similar as political systems. In fact, it can be argued that the EU has considered the US as a model to follow in its federalization process.

Nevertheless, this process is still not complete. For example, the EU cannot be considered a federal state because the MSs are still the masters of the Treaties and, moreover, the EU has no competence in fiscal policy. In addition, as explained in the third Chapter, foreign policy is not centralized at all. In many federations, like the one of the US, it is and in others, such as Germany, it is not that centralized and States can enter in international agreements but with constitutional limitations. In the US, the powers of the President have even increased through judgements of the Supreme Court. As a matter of fact, the President can even control internal policies under its competence in foreign affairs if such policies affect external ones. One example is foreign commerce, which is usually a competence that is under the States' jurisdiction. At the same time, Congress has increased its powers in this policy area with the War Powers Act of 1973, which also limits the President's ones. In addition, the Senate enjoys an advice and consent role, and the HoR can control the actions of the President through its power of the purse, which, arguably, has been used to put an end to the US involvement in the Vietnam War.

For the EU, as stated above, the situation is a bit different. Nevertheless, as explained in the third Chapter, the EU has started to become more important in the international arena at the end of the 20th century and, in fact, a lot of

importance has been put on foreign affairs with the Maastricht Treaty. In addition, the parallel power doctrine developed with the ERTA judgement has been crucial in increasing the Union's treaty-making power: an internal competence corresponds to an external one. Since Common Foreign and Security Policy (CFSP) is under the intergovernmental regime of the Union, coordination between the MSs, in this case in the Foreign Affairs Council (FAC), is pivotal. The FAC is presided by the High Representative (HR), which is one of the most important figures in this policy area and is also a Vice President of the Commission. Therefore, it connects the intergovernmental and the supranational institutions and this is a great power that the HR enjoys. At the same time, though, it is also a huge limit as it is very dependent on the institutions to do its work. Thus, his/her hands are tied from the MSs, but also from the European Council and the Commission, part of the executive of foreign policy together with the HR. Therefore, an agreement between States is needed for the EU to act in a coordinated way. Being this not easy, it is difficult to find an immediate response to a crisis. For this reason, MSs, above all the strongest, continue to act unilaterally with other nations and international organizations.

Another crucial factor that differentiates the EU from the US and other countries, is that it lacks an independent military force. In fact, the Union's foreign policy, contrary to the US, is largely based on civilian and economic intervention. Thus, in foreign policy States still enjoy the greater powers and huge sovereignty even if they are bound to respect the EU under the loyalty principle on the matter present in Article 24(3) TEU.

To conclude, the US and the EU share many constitutional traits and there is a federalization process in the latter that resembles the one of the former. At the same time, there are some practical differences that are mostly stemming from the fact that the EU is made by States that have been present for centuries and are already largely affirmed on the international arena. They are for sure unions of states and the US is for sure a federal union but, at the same time, it is still too early to consider the EU a federation. Perhaps, for now, the best political system to categorize these two similar cases under the same umbrella is the one of compound democracy. The latter, in fact, encloses perfectly the multiple

separation of powers both from the vertical and horizontal dimension, and the non-majoritarian nature of the two political systems. In addition, compound democracy takes into account both the territorial and the functional aspects of the two governance systems.