Comparative Considerations of Rule of Law Backsliding in (quasi)-Federal Legal Systems

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I. Introduction

Comparisons between the United States and the European Union have a long history in the legal and political science scholarship and have been even more prominent recently. Economists, legal scholars, and political commentators frequently compare a specific moment of European integration to a moment of the United States' evolution into a fully-fledged federal nation. So, it happened in 2021, when the European Union, for the first time, took up joint debt in the form of the Next Generation EU Fund.[1] Commentators were fast to point out the comparison to Alexander Hamilton's efforts in mutualising the debt of the newly federated states in 1790.[2] More recently, after the controversial Weiss decision[3] by the German *Bundesverfassungsgericht*, commentators pointed to a *Calhounian Moment* of European integration.[4] Comparing the recalcitrant tendencies in the Member States with Senator John C. Calhoun's nullification theory in 1832-1833 that challenged federal supremacy.[5] While those comparisons can lack accuracy, the comparative method is the most appropriate tool to control for variables, and it enhances the understanding of the current state of the European project.[6] As one commentator has said, "[a]s the E.U. tiptoes in a Hamiltonian direction, it will have to deal with the Calhounian tendency."[7]

On the scholarly side, a wide range of literature compares different aspects of the United States federal legal order with the European Union's quasi-federal legal order. Terrance Sandalow and Eric Stein laid the groundwork when they analysed the role of federal courts in the market building in the E.U. and U.S.[8] Joseph Weiler traced the gradual strengthening of transnational European constitutionalism much like the evolution of American constitutional law.[9] Michel Rosenfeld compared the constitutional review, legal interpretation and reasoning of the Supreme Court and the European Court of Justice.[10] Furthermore, Sergio Fabbrini analysed the

[1] Jim Brunsden, Sam Fleming and Mehreen Khan, 'EU recovery fund: how the plan will work' *Financial Times* (Brussels, Belgium) <https://www.ft.com/content/2b69c9c4-2ea4-4635-9d8a-1b67852c0322>
[2] Barry Eichengreen, 'Europe's Hamiltonian Moment' Milken Institute Review
[3] *Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15 -, Rn. 1-237* Bundesverfassungsgericht (BVerfG)
[4] Charlemagne, 'The EU's Calhounian moment (17 April 2021)' *The Economist* (London, United Kingdom)
[5] Pauline Maier, 'The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina' Januar 1981 The South Carolina Historical Magazine pp. 1
[6] Mauro Cappelletti, Monica Seccombe and Joseph H. Weiler, 'Europe and the American Federal Experience: A General Introduction' in *Integration Through Law* (De Gruyter, Inc. 1985)
[7] Charlemagne,
[8] Terrance Sandalow and Eric Stein, *Courts and Free Markets*, vol Vol. 1 (Clarendon Press 1982)
[9] Joseph Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999)
[10] Michel Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' Vol. 4 International Journal of Constitutional Law pp. 618

functioning of democracies in E.U. and U.S. from a political science perspective.[11] More recently, Daniel Kelemen compared how the European Union is shifting towards a model of American adversarial legalism in its regulatory approach.[12] Federico Fabbrini followed a sectoral approach by comparing fundamental rights protection in both legal systems.[13] Finally, Anu Bradford has compared the regulatory power of the European Union to the United States to prove that the Brussels effect has overtaken the California effect.[14] Therefore, this study builds upon this seminal scholarship of giants in E.U. law and policy and comparative constitutionalism when it compares the highest courts in both legal orders in a moment of the rule of law backsliding in subordinate states.

However, certain caveats need to be observed before engaging in comparative analysis and study of the role of both courts in their respective legal system during a moment of rule of law backsliding. The European Court of Justice was created in the world of post-World War Europe in the 20th century. In contrast, the Supreme Court was created in the 18th century in the newly born American nation. Therefore, while the European Court of Justice, in its judgements, is consistently committed to a substantive post-World War notion of the rule of law, the Supreme Court established the notion of a substantive rule of law only over time. Scholars argued that the Supreme Court's rule of law notion developed over time and only reached its climax with the seminal decision in *Brown v Board of Education.*[15], around the same time that the European Court of Justice was born in the second half of the 20th century.

The United States Supreme Court made terrible decisions during its existence which are clearly against a substantive notion of the rule of law as it is defined in liberal democracies of today. From *Dred Scott*[16] to *Plessy v Ferguson*[17], from *Bradwell*[18] to *Korematsu.*[19] Those decisions show that the Supreme Court's rule of law understanding developed over time and, according to the contemporary substantive understanding of the rule of law, only fully matured in the second half of the 20th century. Today, scholars argue that the Supreme Court is undergoing a reversal period of rule of law decline. Nonetheless, the Supreme Court has, starting with the Civil Rights revolution from the 1960s onwards, developed and upheld a substantive notion and thick notion of the rule of law. Another way of looking at it is that the Supreme Court's thick rule of law case law dates to the 1950s and 60s, whereas the European Court of Justice's rule of law case law emerged around 2010. Taking those differences into account is a

[11] Sergio Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press 2010)
[12] R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2010)
[13] Federico Fabbrini, *Fundamental Rights in Europe (Oxford Studies in European Law)* (Oxford University Press 2014)
[14] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020)
[15] *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al. v Board of Education of Topeka, Shawnee County, Kansas, et al. (1953)* United States Reports Supreme Court of the United States
[16] *Dred Scott v John F. A. Sanford (1857)* United States Reports Supreme Court of the United States
[17] *Homer Adolph Plessy v John Ferguson (1896)* United States Reports Supreme Court of the United States
[18] *Bradwell v The State of Illinois (1873)* United States Reports Supreme Court of the United States
[19] *Fred Toyosaburo Korematsu v United States (1944)* United States Reports Supreme Court of the United States

precondition for a meaningful and fruitful comparative study of both courts dealing with the phenomenon of rule of law backsliding in their legal systems.

Following Rosenfeld's classification of constitutional models, this study will explore the dynamics of the Supreme Court dealing with rule of law backsliding operating in the American constitutional model and compare it with the European Court of Justice dealing with a similar phenomenon operating in the European transnational constitutional model.[20] Thus, this study acknowledges the gradual differences between both constitutional models but aims to yield that a comparative study can still vastly enhance understanding of the current constitutional crisis of the European Union's legal system. Finally, this comparative study seeks to go beyond a one-dimensional comparison of a single moment in legal history. Instead, three different comparative angles will be explored. Those three dynamics are the following: upholding the rule of law via judicial review, upholding the rule of law via federal supremacy, federal guarantees, and federal rights, and upholding the rule of law via conditionality.

II. Methodology

Starting in the late 1980s, the study of European Union law has been increasingly informed by tools and approaches borrowed from comparative political science. This comparative study similarly follows a socio-legal approach in analysing both apex courts dealing with rule of law backsliding. The 'comparative turn' in E.U. law has occurred at conceptual, theoretical, and empirical levels. Ran Hirschl, in his seminal monograph on the renaissance of comparative constitutional law, highlighted the benefits of an interdisciplinary approach to comparative constitutionalism that is methodologically and substantively preferable to merely doctrinal accounts.[21] In this tradition, both the analysis of the European Court of Justice and the institutional structures surrounding it and debates on rule of law backsliding and possible ways ahead gain from comparative analyses of the institutional and constitutional setup of the United States and its functioning.

There are three main theories about the benefits and usefulness of comparative constitutional law. The first argues that constitutional challenges worldwide are similar and, therefore, solutions to them are universal. According to that theory, "legal problems that confront all societies are essentially similar and that their solutions are fundamentally universal."[22] Theorist that argue for this premise are Zweigert and Kötz, and Beatty.[23] The second school of constitutional thought argues the opposite in so far as constitutional challenges are idiosyncratic and, therefore, their solutions are individual. According to that theory, "all legal problems are so tied to a society's particular history and culture that what is relevant in one

[20] Michel Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2010) Chapter 5
[21] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014)
[22] Norman Dorsen and others, *Comparative Constitutionalism: Cases and Materials*, vol Third Edition (West Academic Publishing 2016) p. 30
[23] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, vol 2nd Edition (Oxford University Press 1987), and David M. Beatty, *Constitutional Law in Theory and Practice* (University of Toronto Press 1995)

constitutional context cannot be relevant, or at least similarly relevant, in another."[24] Montesquieu's seminal study of constitutional laws around the world makes that conclusion.[25] Finally, there is a middle ground between both positions to which this study adheres to. "Some believe that the problems confronted by different societies are essentially the same, but that the solutions are likely to be different, owing to varying circumstances that distinguish one society from the next."[26] The present study is informed by the premise that the primary benefit of comparing constitutional issues in different legal systems lies in a better understanding of the fundamental problems and solutions common. Alternatively, and to put it differently, "to compare solutions adopted within different legal systems in response to similar practical or theoretical problems resulting from social, economic and political developments within their respective societies."[27] Mary Ann Glendon has argued for this approach.[28] "[T]he principal benefit of comparative work stems from its ability to highlight specificities that tend to be taken granted, to enhance the knowledge and understanding of one's own system."[29]

Moving from theory to empirical practice, the U.S. Constitution is the oldest written constitution globally and, arguably, the most influential constitutional document ever written.[30] Additionally, the first ten Amendments to the U.S. Constitution, the Bill of Rights, are the principal documents for framing the rule of law in the 20th century. "There can be little doubt, however, of the immediate influence of two prominent instruments of constitutional character: the United States Constitution and its Bill of Rights, now 200 years old, and the International Bill of Rights [the Universal Declaration of Human Rights]."[31] The final arbiter of both documents is the Supreme Court of the United States (Supreme Court). The U.S. Supreme Court is the oldest apex court serving in that function, and it has, in its long stretching history, successfully dealt with rule of law crises in the past. Finally, U.S. federalism has served as the archetype of federalism worldwide. "An example is the adoption of the American type of federalism in Australia or the influence of American First Amendment doctrines on the free speech jurisprudence in Israel."[32] Therefore, when undertaking a comparative constitutional study of the Court of Justice of the European Union (European Court of Justice) dealing with rule of law backsliding in subordinate states, a turn to historical precedents of the U.S. Supreme Court is plausible and enriching.

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[24] Dorsen and others p. 30

[25] Charles de Montesquieu, *Montesquieu: The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone eds, Cambridge University Press 1989)

[26] Dorsen and others p. 30

[27] Graziella Romeo, 'Building Integration Through the Bill of Rights? The European Union at the Mirror' Vol. 47 Georgia Journal of International and Comparative Law pp. 21, p. 23, and Mads Andenas and Duncan Fairgrieve, 'Chapter 2: Intent on Making Mischief: Seven Ways of Using Comparative Law' in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing 2012)

[28] Mary Ann Glendon, *Comparative Legal Traditions*, vol 2nd Edition (West Academic Publishing 1994)

[29] Dorsen and others p. 30

[30] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 622

[31] Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy: Theorethical Perspectives* (1994)

[32] Andrzej Rapaczynski, 'Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the US Constitution Abroad* (Columbia University Press 1990) pp. 96

However, huge differences need to be outlined beforehand when comparing the United States with the E.U. legal system and when comparing both apex courts. First, the United States is a federal union of states, whereas the European Union is a – sui generis – federation of states. As explained by Rosenfeld: "Although the E.U. is not a federation, like the United States or Germany, it does possess certain institutional features commonly found in federal systems."[33] Second, the role, competence and power of the Supreme Court are different from that of the European Court of Justice. "The Supreme Court is a national court operating in a country with a written constitution, whereas the ECJ is a transnational court operating in a legal context that lacks a functioning written constitution equivalent to the U.S. Constitution."[34] Third, the United States federal government possess the ultimate power to enforce federal law and has done so in the past. On the contrary, the European Union does not possess any federal force on the ground and relies on the implementation of Regulations, Directives, and judgements by the Member States. Nonetheless, those facts and the similarities between both systems make a case for the productive potential of a comparative study of rule of law backsliding addressed by the respective apex court in both systems.

Therefore, by acknowledging the parallels and the differences, this comparative study follows a functional approach in comparing rule of law backsliding in both legal systems. Scholars have highlighted that there are functional analogies between both systems, which make a comparative study fruitful. "From a functional standpoint, however, the role of the ECJ in dealing with issues involving the vertical division of powers is analogous to that of the Supreme Court."[35] Finally, as the European Court of Justice serves as a quasi-constitutional court in the E.U.'s rule of law crisis, a functional comparison can be fruitful despite the differences to the fully-fledged federal order in the U.S.. "[N]either its status as a transnational court nor its operating in a treaty-based rather than a constitution-based environment seems to present any serious impediment to its functioning as a court that engages in constitutional adjudication in a federal system."[36]

Why is it fruitful to compare the highest courts in both legal systems in a moment of rule of law backsliding? While their institutional setup is slightly different, many similarities are notable, making a comparative study fruitful. First, both courts are the highest law of the land and enjoy sovereignty in interpreting the constitutional treaty – respectively, the Constitution and the Treaties. Second, both courts are placed above the state courts and serve as the ultimate arbiter in questions of constitutional interpretation. Third, both courts do not invalidate a law but rather set aside or suspend laws at odds with the Constitution or the Treaties. "[A] USSC decision declaring an existing law unconstitutional results in the subsequent nonenforcement of the law but not in its abolition or repeal."[37] Finally, Rosenfeld's seminal study on the

[33] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 622
[34] Ibid
[35] Ibid
[36] Ibid
[37] Dorsen and others p. 195

constitutional review of both courts has highlighted that both have engaged in the constitutionalisation of politics.[38] The present comparative study will underline this evidential finding.

However, there are, of course, also limits to the comparison of both courts. While the Supreme Court is built upon a system of majority and dissenting opinions, the European Court of Justice does not issue opinions but only unanimous judgements. Therefore, the European Court of Justice trades unity in interpretation for interpretative diversity. Supreme Court Justices are nominated by the president and vetted by the legislature. In the E.U., the Member States propose national judges to the European Court of Justice and a special committee vets them.[39] "Finally, the Supreme Court is a national court operating in a country with a written constitution, whereas the [European Court of Justice] is a transnational court operating in a legal context that lacks a functioning written constitution equivalent to the U.S. Constitution."[40]

Finally, this study will use the concept of the rule of law. The rule of law is an essentially contested concept.[41] Many different definitions of it appear in the literature. This study will use it procedurally and substantively. The procedural rule of law means that all legal acts are subjected to judicial review. A notion that both the Supreme Court and the European Court of Justice established early on. Instead, the substantive definition of the rule of law means a much thicker principle. It is a principle that encompasses several other principles such as legality, transparency, legal certainty, prohibition of arbitrariness, effective judicial protection, separation of powers, non-discrimination, and equality. Numerous legal scholars have supported this thicker definition of the rule of law.[42] The definition of the present study is a substantive notion of the rule of law, which is inspired by the European legislature, which defines the rule of law in Article 2 of the Conditionality Regulation as follows:

> "It includes the principles of legality […], accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness […]; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."[43]

This is a broad definition of the principle of the rule of law, and in every legal order that subscribed to that notion, a different emphasis is placed upon the different sub-principles. However, fundamentally, the European Union and the United States can prescribe to this notion

[38] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court'
[39] Article 255 Committee
[40] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court'
[41] W. B. Gallie, 'Essentially Contested Concepts' (Meeting of the Aristotelian Society (March, 1956))
[42] Lon L. Fuller, *The Morality of Law* (Yale University Press 1964), T. H. Bingham, *The rule of law* (Penguin 2011), and Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (ed), *Re-locating the Rule of Law* (Hart Publishers 2008)
[43] *Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget* (Official Journal of the European Union 2020) Article 2

of the rule of law. Moreover, it is a principle that legal and political science scholars subscribe to and require from legal systems to be regarded as some form of liberal democracy.[44]

III. Upholding the Rule of Law via Judicial Review

What are the Dynamics of an Apex Court in a Federal Legal System Upholding the Rule of Law in Subordinate States?

The Supreme Court of the United States (Supreme Court) was born without a clear legal mandate on its role in the newly established United States of America. While the Constitution of the United States defined the legislative and executive branches of government[45], it did not spell out the details about the Supreme Court. It only stated in Article III Section I of the U.S. Constitution that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[46] Legal historian Richard Beeman points out that the framers themselves might be undecided about the specifics of the new Court. "The brevity and vagueness of the of the language […] are similarly a reflection of their relative lack of concern about the judicial branch as well as of their uncertainty about its function in the new federal union."[47]

The exact structure, power and competencies of this new Supreme Court lay in the hands of the First Congress of the United States (Congress). The Congress was the result of the advent of the United States Constitution (U.S. Constitution), which was ratified by the thirteen original states after the U.S. Constitutional Convention in 1787. Subsequently, the Supreme Court's structure and competence were established by Congress via passing the Judiciary Act of 1789, which was designed and formulated under Senator Oliver Ellsworth's leadership of the special judiciary committee.[48] However, the explicit competence of the Supreme Court to invalidate federal and state laws were still unclear. The Supreme Court would not take long to remedy this lacuna in a significant landmark decision.

Two Federal Legal Orders Based Upon the Rule of Law

Marbury v Madison (1803)

The Supreme Court's ruling in *Marbury v Madison (1803)*[49] framed the rule of law in the United States. It affirmed that all legal acts in the United States are subject to legal review. In

[44] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015), and Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014)
[45] Respectively, in Article I and Article II of the U.S. Constitution.
[46] *The Constitution of the United States of America* (Philadelphia Convention 1789) Article III Section I
[47] cf. Richard Beeman, *The Penguin Guide to the United States Constitution* (The Penguin House 2010) p. 47 and p. 179
[48] *Judiciary Act of 1789: An Act to Establish the Judicial Courts of the United States* (Government of George Washington 1789)
[49] *William Marbury v. James Madison, Secretary of State of the United States* 1 Cranch Supreme Court of the United States

the case, “the Supreme Court had to decide how to deal with a contradiction between the Judiciary Act of 1789, adopted by the U.S. Congress, and Article III of the 1787 Constitution.”[50] The Supreme Court, thus, had to decide which of the two legal acts should prevail in solving the legal dispute in the case. Chief Justice John Marshall, who authored the opinion, placed the Court where it belonged – as the viable third branch of the young nation. In his opinion, he first asserted that if two laws conflict with each other, it was the power of the courts to decide which law would prevail.

> “It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”[51]

It was, thus, the question in *Marbury v Madison,* what happens, if a law is to be found in opposition to the Constitution. In the ruling, the Supreme Court asserted that it is the ‘very essence of the judicial duty’ for the Supreme Court to decide if the law or the Constitution would prevail.

> “So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of the conflicting rules governs the case. This is of the very essence of judicial duty.”[52]

One of the founding fathers, Alexander Hamilton, had written about this conflict fifteen years before in the seminal *Federalist Papers*. In Federalist No. 78, he stated that "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as the fundamental law. It, therefore, belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[53] He, therefore, highlighted the importance of judicial review through courts and the necessity to regard the Constitution as the fundamental law. Accordingly, the Supreme Court would follow his advice in *Marbury*.

Relying on the supremacy of the Constitution, the Supreme Court then highlighted that the Constitution is always superior to any ordinary act of the legislature and will prevail if the Court finds that a law would conflict with the Constitution.

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[50] Dorsen and others p. 155
[51] *William Marbury v. James Madison, Secretary of State of the United States*
[52] Ibid
[53] Alexander Hamilton, James Madison and John Jay, *Federalist* (J. & A. McLean 1788) Federalist 78

> "If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. "[54]

In *Marbury v Madison* the Supreme Court found that parts of the Judiciary Act of 1789 conflicted with the Constitution. Therefore, the Constitution had to prevail. However, what did the Supreme Court exactly say in *Marbury v Madison*?

For the first time, the Supreme Court struck down a federal law that was contrary to the Constitution according to the Supreme Court's interpretation. Hence, the Supreme Court established that all legal acts in the United States are subject to judicial review and that the Supreme Court had the power to strike down those laws. In addition, Rosenfeld et al. have pointed out that the Constitution phraseology underlines its supremacy against any ordinary law passed by the legislature. "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."[55]

Marbury v Madison was for the Supreme Court, what *Les Verts (1983)*[56] was for the Court of Justice of the European Union (E.U., European Court of Justice). The European Court of Justice was in a similar position as the Supreme Court in its earlier years after its inception in 1952 – it was in an even more unclear position regarding its power and competence. Early on, the European Court of Justice laid down its understanding of its competencies in several rulings which have become landmark judgements of E.U. law. In *Van Gend en Loos (1963)*[57] the European Court of Justice found that E.U. laws are directly applicable in the Member States and can be invoked by E.U. citizens – the principle of direct effect, and in *Costa v ENEL (1964)*[58] the European Court of Justice asserted that E.U. laws enjoy primacy over national laws – the principle of primacy. However, it was still unclear if all legal acts of the E.U. are subject to judicial review as it was in the United States after *Marbury v Madison*.

The *Les Verts* decision would change this absence of a clear commitment to the rule of law. In *Les Verts,* the European Court of Justice, 30 years after its inception, affirmed that all legal acts in the European Union are subject to legal review against the Treaty. The European Court of Justice, in its ruling, affirmed that the E.U. is based upon the rule of law and that all acts adopted need to conform with the 'basic constitutional Charter', the Treaty.

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[54] *William Marbury v. James Madison, Secretary of State of the United States*
[55] Dorsen and others p. 157
[56] *Parti écologiste "Les Verts" v European Parliament (C-294/83)* European Court Reports Court of Justice of the European Union
[57] *Van Gend en Loos v Nederlandse Administratie der Belastingen (C-26/62)* Europen Court Reports Court of Justice of the European Union
[58] *Costa v ENEL (C-6/64)* European Court Reports Court of Justice of the European Union

> "It must […] be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[59]

The *Les Verts* decision was a firm assertion of the European Court of Justice that the E.U. is a Union of States based on the rule of law. The *Les Verts* decision can be compared to *Marbury v Madison* in that both decisions clarify that all laws and legal acts of the polity are subject to judicial review by the highest court against the constitutional Treaty. In the case of the United States, that is the Supreme Court and the Constitution; in the case of the E.U., that is the European Court of Justice and the Treaty. According to the European Court of Justice's President Koen Lenaerts, "[…] the Treaty can essentially be considered the Constitution of the European Community in a substantive, functional sense. Like the U.S. Constitution, the Treaty constitutes a compact among the Member States."[60] Therefore, both decisions allowed the apex court of the legal order to exercise power over the legislative and executive branches of government and uphold the rule of the federal Treaty – i.e. the rule of law. Adding on to that, Judge Lenaerts also counts the Charter of Fundamental Rights to the constitutional status in the European Union. "In the European Union, this means, from a functional perspective, that the E.U. Treaties and the EU Charter of Fundamental Rights, both of which have been democratically adopted by the Member States supported by their populations, enjoy constitutional status."[61] Finally, Lenaerts has underscored that the European Court of Justice has recognised the functional equivalence of the Treaty with a 'constitution' in *Les Verts*. "[…] the functional equivalence between the Treaty and a constitution was recognised more than twenty years ago in *Les Verts* […]."[62]

Finally, both decisions commit the legal order in which they are felled to the rule of law. However, understanding the rule of law in both cases is extremely thin and based upon a procedural understanding. In the United States of the 18th century, the rule of law meant that the Constitution would be supreme to state law, without any substantive meaning or normative concept that the rule of law may entail. Similarly, the decision in *Les Verts* is, first and foremost, an assertion by the European Court of Justice that all acts of E.U. law or in conflict with E.U. law are reviewable. In the context of the rule of law crisis in the European Union, the focus shifted to a more substantive understanding of the rule of law, focusing on effective judicial protection. However, also the Supreme Court would, in the following decades, have to answer questions about a more substantial understanding of the rule of law – focussing on the principle of equal protection before the law.

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[59] *Parti écologiste "Les Verts" v European Parliament (C-294/83)* para. 23

[60] Koen Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' Vol. 41 The International Lawyer pp. 1011 p. 1018

[61] Koen Lenaerts and Stephen Breyer, *Judges As Diplomats in Advancing the Rule of Law: A Conversation with President Koen Lenaerts and Justice Stephen Breyer* (American University Law Review (Vol. 66, Iss. 5, Article 1) 2017) p. 1180

[62] Lenaerts p. 1018

A History of Rule of Law Misuse in the United States

Dred Scott (1857)

Since *Marbury v Madison*, it was formally established that the United States were a federal legal order based upon the rule of law. However, the United States still had a paradox at its core. While the Constitution proclaimed liberty, equality and democracy, many Southern states of the United States relied on slavery in their national economy. A concept which is opposed to a substantial notion of the rule of law. In the infamous *Dred Scott (1857)* decision, the Supreme Court even gave its judicial blessing to the concept of slavery.[63] The Dred Scott decision was only the second time the Supreme Court struck down a federal law after *Marbury v Madison*.[64] However, this time the Supreme Court did not protect the rule of law but undermined a substantive understanding of the rule. As a result, the decision is widely regarded as 'the worst decision in the Supreme Court's history[65] "It was a bad decision not merely because of its dubious constitutional logic […] but, more importantly, because it was rendered on the assumption that nine unelected judges could resolve an issue […] that democratic majorities in the United States Congress had found themselves unable to resolve and that deeply divided the country as a whole."[66]

In the decision, the Supreme Court held that Dred Scott, an enslaved African American man, could not claim citizenship in the United States, and, therefore, Scott could not bring suit in federal court under diversity of citizenship rules. Additionally, he could not reside outside his home state, as this would deprive Scott's owner of his legal property. "By its expansive definition of the right to own slave property, the *Dred Scott* decision opened up the possibility that the right to own slaves could not be constitutionally prohibited in any territory of the United States."[67] The decision was blatantly against what is understood as the concept of the rule of law in liberal democracies, and it entrenched slavery in the United States. It should take a hundred more years since the full equality of races would be established within the United States. According to Justice Breyer, Justice Taney's decision in *Dred Scoot* was made in the hope of stopping the initiating Civil War. However, *Dred Scott* would not stop the Civil War, and the United States would engage in a bloody war against each other between 1861 and 1865, with the northern Union states winning and ending slavery in the United States. Nonetheless, the victory for the Union States would not end racial discrimination.

There is, quite obviously, no equivalence of the *Dred Scott* ruling to be found in the jurisprudence of the European Court of Justice. Neither did the issue of slavery play a role in the post Second World War Europe, nor is there a specific practice in some Member States of the European Union that would break apart and polarise as much as slavery in the early United States.

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[63] *Dred Scott v John F. A. Sanford (1857)*
[64] cf. Beeman p. 192
[65] cf. Ibid
[66] Ibid
[67] Ibid

The Reconstruction Amendments (1865 – 1870)

Around forty years after *Dred Scott*, a further Supreme Court decision would severely undermine the rule of law in the United States again. In *Plessy v Ferguson (1896)*[68]The Supreme Court decided whether a Louisiana statute requiring separate railway cars for black and white passengers was constitutional. "Though black passengers paid the same train fare as similarly situated white passengers, Jim Crow relegated them to separate train cars. These Jim Crow cars were 'invariably older and less well equipped, and frequently in such a condition as to defy cleaning.' Consequently, many black Americans did not see travel as a leisurely vacation, but rather as a constant reminder of the injustice, oppression, and discrimination imposed upon them by Jim Crow America."[69]

Notably, this decision fell in the Reconstruction Era, a time after the United States Civil War (1861 – 1865), which was fought over the question of slavery. The states of the Union won the bloody Civil War against the Confederacy states and abolished slavery in the United States. To ensure the abolishment of slavery, the XIII, XIV, and XV Amendments were added to the Constitution and ratified by the states – the so-called Reconstruction Amendments. Most importantly for the present study, the Fourteenth Amendment substantiated citizenship rights and prescribed the equal protection of the laws for all U.S. citizens. It reads as follows.

> *"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*[70]

The Fourteenth Amendment is widely regarded as one of the Constitution's most significant and far-reaching amendments. "The Fourteenth Amendment, ratified in the aftermath of [the Civil War], was intended to redress the legacy of slavery by guaranteeing all Americans the equal protection of the laws."[71] The Amendment "has brought the principles of enunciated in the preamble of the Declaration of Independence into the realm of constitutional law."[72] The preamble of the Declaration of Independence of 1776 firmly stated, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these

[68] *Homer Adolph Plessy v John Ferguson (1896)*
[69] Meagen K. Monahan, 'The Green Book: Safely Navigating Jim Crow America' Vol. 20 (Autumn 2016) Green Bag, p. 44
[70] , *The Constitution of the United States of America* Fourtheenth Amendment (1868)
[71] Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve Books 2010) p. 371
[72] Beeman p. 77

are Life, Liberty and the pursuit of Happiness."[73] However, as seen in the *Dred Scott* ruling, the Supreme Court would not live up to those promises to protect those rights.

Further, as Beeman highlights, the Fourteenth Amendment would prove crucial for the Supreme Court to give full legal force to all values promulgated in the Declaration of Independence. "The Fourteenth Amendment's promise that all persons are guaranteed 'equal protection of the laws' would prove an important mechanism by which the Supreme Court, in a series of rulings in the twentieth century, would articulate a uniform standard by which many of the rights spelt out in the Bill of Rights would be guaranteed to all citizens in each of the states."[74]

A comparison to the European Union's Article 2 of the Treaty on European Union (TEU) is inescapable. Similarly, Article 2 TEU spells out the E.U.'s commitment to "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[75] The justiciability of this Article is strongly disputed in the scholarship. Only recently, the European Court of Justice, in a series of seminal rulings, acknowledged the full justiciability of all rights – and, specifically, the rule of law – enumerated in Article 2 TEU.

Plessy v Ferguson (1896)

All three amendments addressed clear rule of law violations of slavery and discrimination against black people in the United States. However, those amendments could not eradicate racial discrimination in the United States. While slavery was abolished, discrimination continued in the form of the so-called Jim Crow laws. Jim Crow laws were state and local laws that enforced racial segregation in the Southern United States – the former Confederacy states. As Bruce Bartlett describes in his book on the democratic party's past, Jim Crow laws were enacted in the late 19th and early 20th centuries by white Southern Democrat-dominated state legislatures to disenfranchise and remove political and economic gains made by black people during the Reconstruction period.[76] *Plessy v Ferguson (1896)*[77] was a corollary of that development and gave the Jim Crow laws the Supreme Court's blessing.

In the late 1890s, the United States was divided between former Union states, which would uphold the principle of equality and citizenship rights and the Southern United States, which would have a myriad of laws that were factually depriving African American citizens of their citizenships right. The question that *Plessy v Ferguson* posed was whether the Supreme Court would uphold the discrimination in the Southern United States against the backdrop of the

[73] Thomas Jefferson and Committee of Five, *The Declaration of Independence* (Second Continental Congress 1776)
[74] Beeman p. 77
[75] *Treaty of Lisbon "amending the Treaty on European Union and the Treaty establishing the European Community"* (Official Journal of the European Union 2007) Article 2
[76] Bruce R. Bartlett, *Wrong on Race: The Democratic Party's Buried Past* (St. Martin's Griffin 2009)
[77] *Homer Adolph Plessy v John Ferguson (1896)*

Fourteenth Amendment, which clearly stated that all citizens should be protected equally under the law.

In *Plessy v Ferguson*, a divided Supreme Court decided against the principle of equality and citizenship rights and upheld the Jim Crow laws in the Southern United States. Justice Henry Billings Brown stated "that the 'enforced separation of the two races' did not necessarily 'stamp the coloured race with a badge of inferiority'"[78]

> "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[79]

Additionally, he stated that segregated railway cars do not necessarily imply the inferiority of African Americans and that segregated schools are a well-known constitutional practice.

> "Laws permitting and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognised as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."[80]

Finally, he rejected the plaintiff's argument that the Fourteenth Amendment would preclude segregation in the state legislatures by stressing that even the District of Columbia runs segregated schools directly following the acts of Congress.

> "Gauged by this standard, we cannot say that a law which authorises or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."[81]

Justice Brown, by his decision, entrenched the discrimination of Black Americans and upheld the ongoing racial segregation in the daily life of the Southern United States. In addition, the

[78] Beeman p. 197
[79] *Homer Adolph Plessy v John Ferguson (1896)*
[80] Ibid
[81] Ibid

ruling established the *'separate but equal' doctrine* in U.S. constitutional law. An infamous legal doctrine that the Supreme Court would later overturn. The decision was a massive setback for the principle of equality and citizenship rights in the United States. Only Associate Justice John Marshall Harlan, in his dissenting opinion, would make the point that the Constitution awarded the same rights to everyone.

> "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[82]

Nonetheless, Harlan's powerful dissent, "the decision in *Plessy* would put into place the doctrine of 'separate but equal,' one that would serve to justify both state-sponsored and privately imposed segregation across a wide range of areas, from restaurants to public accommodations to public schools."[83] Therefore, through its decisions, the Supreme Court in the Reconstruction Era upheld racial segregation – a practice that violated equal citizenship rights, the principle of equality, and the rule of law. Eventually, the Supreme Court needed sixty more years to abandon the practice and to uphold, in a decisive decision, equal citizenship rights, the principle of equality and the rule of law.

Why does this matter compared to the rule of law crisis in the European Union? The European Union is currently facing its biggest constitutional crisis over the issue of the rule of law. While the E.U.'s legislator and executive organs have proven unapt to take hold of these issues, the European Court of Justice has gained a prominent role in this crisis. Thus, like the United States, a significant battle over constitutional and political values of a (quasi)federal legal order is fought at the highest Court of that order. For example, in the United States, a ground-breaking decision of the Supreme Court was needed to abolish the practice of Jim Crow laws in the Southern United States. Similarly, the European Court of Justice recently handed down several ground-breaking decisions against the rule of law backsliding in Hungary and Poland. The following section will look at the Supreme Court's ground-breaking ruling in *Brown v Board of Education* and set it in contrast with recent rulings from the European Court of Justice.

Upholding the Rule of Law via an Apex Court

Brown v Board of Education (1954)

The United State Supreme Court's decision in *Brown v Board of Education (1954)*[84] is 'one of the most momentous decisions ever made by the Supreme Court and 'one of the most far-reaching steps' towards social justice taken by any branch of the federal government.[85] The

[82] Ibid
[83] Ibid
[84] *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al. v Board of Education of Topeka, Shawnee County, Kansas, et al. (1953)*
[85] cf. Beeman p. 201

decision fell in the time after the Second World War and the Nuremberg Trials, hence, a time in which the global rule of law made fast advancements – the United States playing a pivotal role in it. Nonetheless, there was still a paradox at the nation's heart – the discrimination of black American citizens in the Southern states. "The United States had punished German crimes against humanity, yet it was preserving Nazi-style practices at home – and enforcing segregation through its own courts."[86] The influential Supreme Court Justice Robert H. Jackson, who led the Nuremberg Nazi trials, aptly described the American situation: "We have some regrettable circumstances at times in our own country in which minorities are unfairly treated."[87]

1954 would be when the Supreme Court addressed this rule of law abuse in the nation that saw itself as the promoter of a global legal order based upon the rule of law. However, why did the Court have to advance this constitutional change? Why did not any of the other three branches of the state remedy this entrenched rule of law deficiency in the Southern States? Neither the executive nor the legislative branch was willing or able to take on this fight with the Southern states. "The chief impediment to a legislative reversal of segregation was the U.S. Senate. Designed by the Founding Fathers to weaken the power of the national majority by giving equal weight to small and large states, the Senate had developed its own procedures that took the entrenchment of minority veto power much further. […] The Senate's procedures, coupled with the numbers of Southern and Southern sympathising senators, made it all but impossible for Congress to take on the issue of desegregation up through the 1950s."[88]

A very similar situation is seen in the European Union's chief legislative organ – the Council. Due to the Council's rules of procedure and the unanimity requirements in many essential areas, such as the Article 7 TEU procedure, the Council's decision-making power is stalled on upholding the rule of law in Hungary and Poland. Feldman highlights that the American courts were the only place civil rights lawyers would turn as the legislative branch was unable to act and the legislative branch was incapable of acting. "With the president's power limited and Congress's doors closed to them, civil rights activists turned to the courts – the only branch of the federal government left."[89] The situation in the E.U. is comparable, with the Council unable to act and the Commission incapable of acting. Therefore, scholars have argued that the European Court of Justice stepped in to protect the rule of law in the E.U.[90] In the U.S., it was not clear whether the Supreme Court was willing to take such wide-ranging decisions on social justice and equality rights. "The judiciary had no legacy of protecting racial or other minorities. At no time in history of the United States had a judicial body stood in the vanguard of promoting progressive social change."[91]

[86] Feldman p. 372
[87] *Minutes of Conference Session of July 23, 1945* (The Avalon Project, Yale Law School 1945)
[88] Feldman p. 373
[89] Ibid
[90] Laurent Pech and Sebastien Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case' Vol. 55 Common Market Law Review pp. 1827
[91] Feldman p. 373

However, the Justices at the Supreme Court were clear about the case's significance before them. "The nine men [the Supreme Court Justices] who heard five hours of oral argument on December 9, 1952, […], knew that *Brown v Board of Education* would be the most important case they ever decided."[92] They were aware of the stalled political situation surrounding them and the persistent injustices present in the Southern states. They knew that "[a]ny steps to improve America's reputation by counteracting segregation would have to come from the Court."[93] At the same time, "[a] Supreme Court ruling that segregation was unconstitutional would be the most aggressive piece of judicial activism in American history."[94]

Similarly, the recent decisions of the European Court of Justice to protect judicial independence in the Member States are essential for the future of the European constitutional order. The recent political developments in Hungary and Poland had a devastating effect on the rule of law in both Member States. Those developments brought cases to the European Court of Justice, which concerned the independence of the judiciary and basic democratic principles since the Council and the Commission were unable to remedy that issue. Most certainly, the European Court of Justice judges are aware of the significance of their decisions in *ASJP* and in the rule of law cases concerning Hungary and Poland.

The decision in *Brown* was a unanimous decision authored by the newly appointed Chief Justice Earl Warren. Chief Justice Warren's Opinion reads like a robust defence of the principles of equality and equal citizenship rights enshrined in the Constitution. He stresses that segregation creates an entrenched feeling of inferiority in the people subjected to it, directly opposing Chief Justice Brown in the *Plessy v Ferguson* precedent.

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. […] We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[95]

Given its political significance, it may have been no incident that a former politician, Chief Justice Warren, who previously to becoming a Justice on the Supreme Court served as the Governor of California, manoeuvred the decision behind the scenes. "The newly appointed chief justice, former Californian governor Earl Warren, was well aware of the political and social implications of the case. He not only wrote the opinion in the case, but, by careful political manoeuvring behind the scenes, persuaded even those justices who may have been reluctant to overturn the long-standing precedent of *Plessy v Ferguson* to join a unanimous ruling."[96]

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[92] Ibid
[93] Ibid
[94] Ibid
[95] *Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel, et al. v Board of Education of Topeka, Shawnee County, Kansas, et al. (1953)*
[96] Beeman p. 201

Brown v Board was a turning point for the principle of equality, citizenship rights and a substantive understanding of the rule of law in the United States. The Supreme Court judicially enforced those rights in all states of the U.S. Therefore, scholars have argued that the Supreme Court factually introduced an amendment to the Constitution via a court ruling. "[…], in 1954, the constitutionality of state-sponsored racial segregation in public education was abolished not by a constitutional amendment but by a unanimous Supreme Court decision reversing nearly 60 years of contrary interpretation."[97]

Similarly, the decisions by the European Court of Justice have the gravity of constitutional amendments to the Treaty. Not around racial equality but around the protection of an independent judiciary and fundamental democratic principles. In those decisions, the European Court of Justice has stated that the principle of effective judicial protection requires an independent judiciary in the Member States, enabling effective recourse for all E.U. citizens. In that sense, the significance of *Brown v Board* for the American constitutional order is mirrored by the constitutional importance of the cases about judicial independence in the E.U. Additionally, both courts' constitutional dynamics and the broad constitutional reasoning in those cases are comparable. The courts have adopted a broad interpretation of a constitutional clause in both instances. In the case of the U.S., of the equal protection clause of the Fourteenth Amendment, in the case of the E.U., of the effective judicial protection clause in Article 19 of the TEU.

Feldman highlights the importance of the decision in *Brown* as a constitutional enabler of rule of law protection for all citizens in the U.S., and for the emblematic legacy, it meant for the Supreme Court. "*Brown v Board of Education* changed the constitutional universe. Once and for all, the Supreme Court came to be seen as rightly devoted to protecting minorities – a conception that continues to be shared by many in the United States and increasingly by constitutional judges in other countries across the world. Despite the criticism to which the case was subjected almost immediately, it also became an emblem for the Constitution in general and the Court in particular."[98]

Further, Justice Breyer stresses *Brown's* overarching importance for the rule of law and justice in the United States. "The racial integration that the Court demanded in Brown v. Board of Education of Topeka, 349 U.S. 294 (1955), for example, is not simply a logical conclusion drawn from the constitutional provision that insists upon 'equal protection of the laws.' It is also an affirmation of the value that underlies that provision; it is an affirmation of justice itself."[99]

However, *Brown v Board* was not readily accepted by the offending states. "The Brown decision was the beginning, but hardly the end, of the movement not only to dismantle

[97] Dorsen and others p. 91
[98] Feldman p. 406
[99] Stephen Breyer, 'The Supreme Court of the United States: Power and Couter-Power' Vol. 2 Groupe d'Études Géopolitiques pp. 80

segregation but also to ensure equal opportunity to minorities in all aspects of American life."[100] Specifically, not by the States that fiercely fought for keeping up the practice of segregation and racial discrimination. “The Brown decision could not be implemented by judicial edict alone, and many Southern states resisted integrating their schools for many years thereafter.”[101] This backslash could mainly be seen by the fierce resistance of state officials and the state's legislatures against the ruling.

Enforcing the Rule of Law via the Executive Branch

After the *Brown* decision, nothing would substantially change in the Southern states during the following three years, and racial segregation would continue. The essential question was whether the executive branch would implement the Supreme Court’s decision in the affected states? Moreover, if met by the state's resistance, would it enforce the Supreme Court's decision, even through force. Therefore, the question was twofold: first, did the federal government have the competence to enforce Supreme Court decisions invalidating state law, and second, did the federal government have the willingness to enforce Supreme Court decisions in recalcitrant states. The U.S. constitutional history provides empirical precedents for both.

When drafting the U.S. Constitution at the Constitutional Convention in 1787, it remained unclear whether the federal government had a coercive force to enforce judgments that invalidate state laws. "[I]t remained unclear to what extent the federal executive would be able to coerce a recalcitrant state to comply with the decisions of federal courts holding a state law unconstitutional."[102] The Supreme Court’s decision in *United States v Peters* in 1795 would provide the first instance of a clash between a state’s legislature and the Supreme Court.[103] The Pennsylvania legislature passed a law that invalidated the Supreme Court's decision in *Peters. However,* Chief Justice Marshall rejected that attempt by a state legislature on the ground of the Supremacy Clause with firm words.

> “[i]f the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.”[104]

However, Pennsylvania would still not follow the Supreme Court's order. Instead, then-President James Madison, dubbed the father of the Constitution, had to step in when he wrote to the Governor of Pennsylvania that the federal government is entitled to enforce any Supreme Court decision.

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[100] Beeman p. 202
[101] Ibid
[102] Pekka Pohjankoski, ‘Federal Coercion and National Constitutional Identity in the United States 1776-1861’ Vol. 56 American Journal of Legal History pp. 326, p. 338
[103] *The United States v. Richard Peters* United States Reports Supreme Court of the United States
[104] Ibid

> "[…] the Executive of the United States is not only unauthorised to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it."[105]

It was, thus, established that the federal government, via the Supremacy Clause, had the power to enforce Supreme Court decisions. However, a further open point was whether it had the willingness to do so in the case of *Brown*. The precedent for the executive branch's intervention in a state can be found in the history of the early Union.

In 1832, Supreme Court cases coming from the state of Georgia over the use of land of native Americans would test the boundaries of the federal's willingness to enforce a Supreme Court decision. In *Worcester v. Georgia,* the U.S. Supreme Court invalidated the conviction under a Georgian statute of a non-Cherokee man living on the territory of the Cherokee Nation.[106] Interestingly, the Supreme Court found that "the law under which he was convicted was *ultra vires* the State of Georgia."[107] However, President Andrew Jackson declined to enforce the Supreme Court's decision in the state of Georgia, which deprived the state of Georgia of jurisdiction over the land of the Cherokee Indians. Allegedly, President Jackson said, 'Justice Marshall has made his decision. Now let him enforce it.'[108] Therefore, *Worcester* set a very unpromising precedent for the executive's willingness to enforce Supreme Court rulings in recalcitrant states. If President Dwight D. Eisenhower had taken the same stance in *Brown,* there would have been no prospects for implementing the Supreme Court's ruling.

The response by the Southern states against the *Brown* decision was equally solid and manifold. First, the affected states passed legislative resolutions condemning the Supreme Court's decision in *Brown*. Second, Southerners in Congress aimed at stripping the Supreme Court of jurisdiction over school segregation cases. "Southerners and other conservatives in Congress responded to the decision of the Warren Court by introducing bills to strip the Court of jurisdiction over school segregation, state legislative apportionment, and anti-Communist loyalty and security matters."[109] Finally, Southern states refused to implement the decision and went as far as closing schools altogether. The following section will look at the legislative rejection by those states and the federal response to it.

Resolution by the General Assembly of Virginia (1956)

In 1956, in response to the Supreme Court's decision in *Brown*, several state legislatures adopted legislative resolutions to express their rejection of the Supreme Court's decision and their intent not to follow and implement the decision. As an illustrative example, the General

[105] *Register of Debates in Congress* (Gales & Seaton 1825)
[106] *Worcester v Georgia* United States Reports Supreme Court of the United States
[107] Dorsen and others p. 995
[108] cf. Linda Greenhouse, *The U.S. Supreme Court* (Oxford University Press 2012) p. 68
[109] Ibid

Assembly of Virginia stated in January 1956 that the *Brown* decision "[…] constitutes an unlawful and unconstitutional assumption of power which does not exist. An agency created by a document to which sovereign states were parties cannot lawfully amend the creating document when that document clearly specifies in Article V thereof the manner of Amendment. […] until such time as the Constitution of the United States may be amended in the manner provided by that Constitution, this commonwealth is under no obligation to accept supinely an unlawful decree of the Supreme Court of the United States based upon an authority which is not found in the Constitution of the United States nor any amendment thereto. Rather this commonwealth is in honour bound to act to ward off the attempted exercise of a power which does not exist lest other excesses be encouraged."[110]

Resolution by the General Assembly of Georgia (1956)

However, the Virginia legislature was not on its own in rejecting the *Brown* decision by the Supreme Court. The Georgia General Assembly took a similar position in a legislative Resolution in 1956. "[I]t is clear that [the Supreme] Court has deliberately resolved to disobey the Constitution of the United States, and to flout and defy the Supreme Law of the Land[...]."[111] However, the rejection came not only from state legislatures. Also, the federal legislature, in the form of Congress, rejected the Supreme Court's decision in *Brown.* "The most prominent challenge to Brown and to the authority of the Court came in what became known as the Southern Manifesto, the March 1956 statement signed by almost all southern members of Congress, which denounced the Supreme Court's 'clear abuse of judicial power' in Brown."[112] The question was how the executive, in the form of the President and the federal agencies, would respond to this challenge of federal supremacy. The following year would provide the background to one of the most anticipated challenges between the federal government and a state's governor.

Little Rock, Arkansas (1957)

In Arkansas, the state's governor Orval Faubus strongly rejected the Supreme Court's decision in *Brown* and had no intent to implement that decision in his state and end racial segregation in schools. However, things changed in 1957, when a federal court from the Eastern District of Arkansas ordered the implementation of the decision. "In 1957, however, a federal trial court judge in Little Rock, Arkansas, ordered the State to enrol nine black students at Central High, an all-white school."[113] This court decision required the state to enrol black students at all-white schools. The town of Little Rock, Arkansas, would become the epicentre of the battle between the federal government and the state's government over implementing a Supreme Court decision over the rule of law.

[110] *Act of January 11, 1956 by the Virginia General Assembly* (Virginia General Assembly 1956)
[111] *Reg. Session* (1956)
[112] Christopher W. Schmidt, 'Cooper v. Aaron and Judicial Supremacy' Vol. 41 University of Arkansas at Little Rock Law Review pp. 255 p. 266
[113] Breyer

Parts of the population in Little Rock supported their governor and demonstrated against the opening of white schools for black kids. Similarly, the state's governor would use his power over the police force to bar the entry of black students into the school. “At the time of the school's September opening date, a large hostile crowd surrounded the school. The Governor, Orval Faubus, announced his opposition to integration and sent state police to prevent the nine black students from entering the school. A standoff lasted several days."[114]

In the federal administration of Dwight D. Eisenhower, a dispute emerged on how to deal with the recalcitrant governor of Arkansas and the opposition to the Supreme Court decision in Little Rock. On the one hand, some of the President's advisors argued that the federal government should stay out of the fight about school segregation as it would risk ‘a second reconstruction’. “James Byrnes, Governor of South Carolina, former Supreme Court Justice, wartime economic administrator, and a "moderate" on race, advised President Eisenhower to do nothing. He told the President that if he sent troops to Arkansas, there could be violence. He might have to occupy the South, and he would have a second Reconstruction on his hands. At best, the South would close all its schools.”[115] On the other hand, the Attorney General and highest legal advisor to the President advised Eisenhower to take action to uphold the rule of law. “Herbert Brownell, the Attorney General, took the opposite position. He told the President he must send troops, at the least to protect the ‘rule of law.’”[116] President Eisenhower would follow his Attorney General and send federal troops to enforce the court order. “In the end, the President decided to send 1 000 parachutists, members of the 101st Airborne Division.”[117]

Interestingly, President Eisenhower was doubtful about his final decision to send federal troops as he stated just months earlier that we would rule out ever sending federal troops to enforce a court order. “Just two months before, the President had declared that he could not ‘imagine any set of circumstances that would ever induce me to send federal troops […] into any area to enforce the orders of a federal court. […]’”[118] However, his opinion changed throughout the events in Little Rock and the advice of his Attorney General. "Now, Eisenhower felt compelled to use his power to enforce school desegregation in Little Rock. On September 24, he called in Army troops to restore order and allow the desegregation plan to go forward.”[119]

The nine black school kids became known as the Little Rock Nine in American history books. While in the foreground, Little Rock Nine was about a President who protected school children to safely enjoy education, in the background, the incident marked the enforcement of the rule of law via the federal government. If Eisenhower had not supported the implementation of the court order, he would have actively undermined the authority of the Supreme Court and the rule of law. Therefore, Little Rock Nine was a success for the rule of law in the United States.

[114] Ibid
[115] Ibid
[116] Ibid
[117] Ibid
[118] Schmidt p. 260
[119] Ibid

It showed that the executive was willing to support the judiciary in protecting and maintaining the rule of law in subordinate states.

However, while the federal government eventually enforced the decision, the much bolder decision and the pivotal role was played by the Supreme Court before. The Supreme Court stepped forward out of the three branches of government to protect the rule of law in subordinate states with the *Brown* decision, while the legislative and executive branches were slow to act or did not act at all. Civil rights leader Vernon Jordan later highlighted the role of the Court in the following way. "[…] the Court had been critically important. Congress, after all, had done nothing. At the very least, the Court had provided a catalyst. With the help of others, it had succeeded in dismantling a significant pillar of, if not racism, at least racism's legal face. The Court had played not the only role, but an essential role in ending legal segregation."[120]

Quite similarly, in recent months, Hungary and Poland have also commenced opposing the jurisprudence of the European Court of Justice. The European Court of Justice's President Koen Lenaerts has highlighted the dangers of this development and stressed the importance of the independence of the judiciary and the rule of law. According to him, the due respect for the values of Article 2 TEU by the Member States is an essential feature necessary for the survival of the E.U. "Courts must deliver their judgments without fear nor favour. Formally, the power of courts is grounded in a basic text, be it a Constitution or a Treaty. However, it is ultimately a society's commitment to the rule of law, democracy and fundamental rights that gives force to that document and thus to judicial decisions. Without respect for those values, a Constitution or a Treaty is no more than a piece of paper."[121]

The President of the European Court of Justice highlighted recently that the E.U. is facing a similar moment where the ultimate judicial supremacy of the European Court of Justice and the bindingness of its judgments is challenged. "The authority of the Court of Justice has been challenged in various Member States, as has the primacy of E.U. law, not only by politicians and the press, but also before and even by national courts, including certain constitutional courts. This is an extremely serious situation and it leaves the Union at a constitutional crossroads. I believe it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake."[122]

Michel Rosenfeld has highlighted the shortcomings of the European Union in implementing and enforcing judgements in the Member States. “[W]hereas the U.S. federal government was able to send federal marshals to force resisting state officials to implement Supreme Court desegregation decisions, nothing comparable exists within the E.U. to back up the ECJ, if

[120] Breyer
[121] Koen Lenaerts, *Opening Speech of the XXIX FIDE Congress by Koen Lenaerts - Constitutional Relationships between Legal Orders and Courts within the European Union (3 November 2021)* (XXIX FIDE Congress 2021)
[122] Ibid

needed."[123] This predicted shortcoming is not widely visible in the E.U.'s rule of law crisis. The European Court of Justice has, in its jurisprudence from 2010 onwards, upheld the rule of law in several Member States against the opposition of Member State governments. Consequently, Member State governments and legislatures have increasingly challenged the European Court of Justice's authority. However, the legislative and executive organs of the E.U. have failed to protect, defend, and implement the judgments of the European Court of Justice in those Member States. One possible solution for this is the highlighted incomplete federal architecture of the European Union. Where in the U.S., the federal government was able to implement federal court decisions in the states in the E.U., the Commission or the Council lacks such powers.

Asserting Absolute Judicial Supremacy

Cooper v Aaron (1958)

The standoff between the federal government and a subordinate state in Little Rock Nine resulted in other seminal case law at the Supreme Court. The case *Cooper v Aaron* in 1958 gave the Supreme Court the ability to, once and for all, assert its position on the U.S. federal legal order.[124] The case was a follow up to the decision in *Brown* and a corollary to the backlash by the Southern states to abolish segregation. In the *Brown* decision, which emerged from the state of Kansas, the Supreme Court had argued that Kansas's law mandating racial segregation in public schools was unconstitutional. The Governor of Arkansas, Orval Faubus, argued that the Supreme Court's decision holding Kansas's law mandating racial segregation in public schools to be unconstitutional did not apply to Arkansas, as it was not a party to the Kansas litigation. He, therefore, disputed the *erga omnes* effect of the *Brown* decision towards other states. The Supreme Court would vehemently reject his claims in *Cooper v Aaron.*

In February 1958, five months after the crisis involving the Little Rock Nine, members of the Little Rock school board filed suit in the United States District Court for the Eastern District of Arkansas, urging the suspension of its desegregation plan. The Supreme Court had to answer in this case whether state officials were bound by federal court orders mandating desegregation? In its unanimous decision, the Supreme Court first asserted that the Supremacy Clause of Article VI made the U.S. Constitution the supreme law of the land, and *Marbury v. Madison* made the Supreme Court the final interpreter of the Constitution. Then, in a second step, the Supreme Court forcefully held that the precedential ruling outlined in *Brown* was the supreme law of the land and was therefore binding on all the states, regardless of any state laws contradicting it. *Cooper v Aaron,* therefore, established the ultimate judicial supremacy of the Supreme Court.[125] "In rejecting the governor's argument, a unanimous USSC stressed that *Marbury* had established 'the principle of that the Federal judiciary is supreme in the exposition

[123] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 627
[124] *William G. Cooper et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al. v Aaron (1958)* United States Reports Supreme Court of the United States
[125] Ibid

of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system.'"[126]

In an amicus curiae brief by the Legal Defence Fund, the Fund argued that the case was of overarching importance for the future of the rule of law in the U.S. "The LDF lawyers defined the issue in their brief as 'a national test of the vitality of the principles enunciated in Brown v. Board of Education.' But the issue also transcended the school desegregation struggle, they wrote. It involved 'not only vindication of the constitutional rights declared in Brown, but indeed the very survival of the Rule of Law.'"[127]

Arguably, there has not been a *Cooper v Aaron* decision in the European Union yet. However, the European Court of Justice's press release after the *Weiss/PSPP* ruling by the German Federal Constitutional Court (GFCC, or *BVerfG*) is remarkable.[128] In its press release, the European Court of Justice states that "In order to ensure that E.U. law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an E.U. institution is contrary to E.U. law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the E.U. legal order and to detract from legal certainty."[129] This statement comes very near to an assertation of absolute judicial supremacy, and clearly, the European Court of Justice feels threatened in its position as ultimate arbiter over E.U. law. Moreover, indeed, the *BVerfG* judgment was welcomed in the rule of law backsliding Member States Hungary and Poland since it challenged the ultimate authority of the European Court of Justice. Further, the arguments of the German Constitutional Court have been subsequently used by the Polish Constitutional Tribunal.

Back in the U.S., the decision in Cooper v Aaron was later criticised as judicial activism and a Supreme Court that has gone a step too far. Specifically, under Ronald Reagan's administration, the seating Attorney General Edwin Meese III rejected the ruling in *Cooper v Aaron* prominently. He presented an alternative solution to the Supreme Court's decision in *Cooper v Aaron* by arguing on several occasions that the three branches of the government are coequal in interpreting the U.S. Constitution. Additionally, he contended that constitutional law – interpretations of the Constitution by the Supreme Court – are only binding upon the parties before the Court but not on other branches of the government.[130] "Meese's central argument was that though all three branches of the federal government were equally bound by the Constitution, Supreme Court decisions and precedents made up "constitutional law" which was not binding on the executive or legislative branch."[131] Therefore, he rejected the *erga omnes* effect of the judgments of the Supreme Court.

[126] Dorsen and others p. 163
[127] Schmidt p. 269
[128] *Press Release No 58/20 (8 May 2020)* (Court of Justice of the European Union 2020)
[129] Ibid
[130] Edwin Meese, 'The Law of the Constitution' Vol. 61 Tulane Law Review pp. 979
[131] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 631

In a further speech that he held at Tulane University, he outlined the core of his argument against the ruling in *Cooper v Aaron,* challenging the interpretative authority of the Supreme Court over the Constitution. “The logic of *Cooper v. Aaron* was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law.”[132] Interestingly, in his speech, Meese uses the concept of the rule of law to defend his arguments over the coequality of the three branches of government over the interpretation of the U.S. Constitution and the lacking *erga omnes* effect of the judgments of the Supreme Court. Similar arguments can also be seen within the E.U., where Member State officials use the rule of law to challenge the authority of the European Court of Justice. Nonetheless, Meese's arguments remain a minority view in U.S. constitutional law scholarship, and *Cooper v Aaron* is today an established and widely accepted Supreme Court precedent on the ultimate authority of the Court over the constitutional interpretation.

Finally, the bigger picture after *Brown* and *Cooper v Aaron* was that the Supreme Court had safeguarded the rule of law in subordinate states, and the executive has enforced the Supreme Court's judgments against recalcitrant state officials. The 1960s would bring sweeping federal rights legislation under the government of Lyndon B. Johnson, which would transform many areas of American life. However, the Southern states would remain under observance for their past rule of law abuses. Halberstam has pointed out that, as a corollary of the challenge to the rule of law in the Southern states, the federal government has placed them under special oversight. "Confronted with constantly shifting voting restrictions to suppress the black vote in states evading judicial challenges by switching to new measures that would take years to adjudicate and fix, the solution was to place those offending states under continual federal observation. What the Voting Rights of 1965 did was, in effect to reverse the burden of proof. No new voting restriction could take effect in those offending states without the new voting rule being cleared first with the federal government."[133] According to Halberstam, a similar mechanism would be desirable for the repeated rule of law offending Member States in the E.U.

European Court of Justice’s President Koen Lenaerts highlighted the similarities between the Supreme Court’s ruling in *Cooper v Aaron* with the European Court of Justice’s intention to create a complete system of effective legal remedies under E.U. law. "That is why, paraphrasing the U.S. Supreme Court in Cooper v. Aaron, primacy and direct effect must 'make constitutional ideas into living truths,' that is, E.U. rights must be accompanied by effective remedies."[134] Indeed, the European Court of Justice's evolving case law around effective judicial protection safeguards the rule of law in the Member States against backsliding tendencies. However, while a functional comparison is helpful and germane, the European

[132] Edwin Meese III, *The Law of the Constitution, Speech at the Tulane University (21.10.1986)* (Tulane University 1986)
[133] Daniel Halberstam, *Rule of Law in Europe: A Conversation with Daniel Halberstam and Paul Nemitz* (EU Law Live 2021)
[134] Koen Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’ Vo. 33 Fordham International Law Journal pp. 1338 p. 1376

Court of Justice's case law is, so far, met with strong resistance in some of the Member States and could not develop the same effect as *Brown* or *Cooper v Aaron* in the Member States. Therefore, it might be better characterised as an ongoing struggle between the Court, the Member States, and the Commission, which will eventually take the same turn as in the U.S. Or, will fail due to the shortcomings of the E.U.'s constitutional architecture. Therefore, the rule of law crisis might be well described as a stress test for the E.U.'s constitutional fabric.

Conclusion

What does this tell about the prospects of the European Court of Justice in safeguarding the rule of law in the Member States?

The preceding section has shown that the substantial notion of the rule of law evolved gradually in the case-law of the Supreme Court and that many characteristics of this evolution can be functionally compared to the European Court of Justice's current struggle over the rule of law in the E.U.

In his seminal work on the U.S. Constitution and the Supreme Court, Bruce Ackerman demonstrated that several constitutional revolutions happened during the history of the Supreme Court's existence, which the Court itself partly initiated.[135] To use Ackerman's term, some of those 'constitutional moments' were, in fact, constitutional amendments without the process of amending the Constitution. "Ackerman has maintained the view that certain transformative decisions of the USSC have resulted in structural amendments of the Constitution without use or invocation of Article V [the formal Article to amend the Constitution]."[136] Similarly, the recent case law of the European Court of Justice protecting judicial independence in the Member States via Art. 19 TEU could be described as a Treaty change without amending the Treaties.

Scholars have repeatedly stressed the interpretative power of the Supreme Court, which can lead to de-facto constitutional changes. "In the U.S., the near impossibility of adopting significant amendments is mitigated by the breadth and flexibility of the Supreme Court's powers of interpretation in constitutional cases."[137] The history of the rule of law evolution at the Supreme Court describes such a change of interpretation over time. Similarly, the European Court of Justice has changed the rule of law paradigm over time. From a merely procedural definition in *Les Verts* to a substantive definition in *ASJP*. Therefore, the European Court of Justice follows the example of the Supreme Court in interpreting the Treaties as a living document. Sartori has pointed out that the American example shows that constitutions undergo interpretative changes over time. According to him, "[…] the American experience goes to show, if anything, that written constitutions can endure despite the anti-historical assumption upon which they have been conceived."[138]

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[135] Bruce A. Ackerman, *We the people. 3, The Civil Rights Revolution* (Harvard University Press, De Gruyter 2014)
[136] Dorsen and others p. 89
[137] Ibid
[138] Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' Vol. 56 American Political Science Review

The preceding section has also shown that disagreements over the rule of law are an ever-repapering theme in a federal union with a strong apex court. However, what made the Supreme Court relatively successful in dealing with those challenges to the rule of law? According to Supreme Court Justice Stephen Breyer, the Supreme Courts' expanding definition of the rule of law up to *Brown* has strengthened the appreciation of the rule of law itself in American society. The ability to endure differences of opinion is vital to this. He argues that the Civil Rights Revolution at the Supreme Court "describe[s] a history in which the American people gradually adopted customs and habits that led them to respect the rule of law even when the "law" included judicial decisions with which they strongly disagreed. The history [is] that of a Court that gradually expanded its authority to protect an individual's basic constitutional rights, […]."[139] Additionally, he stresses that "the Court should reject approaches to interpreting the Constitution that consider the document's scope and application as fixed at the moment of framing. Rather, the Court should regard the Constitution as containing unwavering values that must be applied flexibly to ever-changing circumstances."[140]

However, the situation that the European Court of Justice seems to find itself seems to be more complex than that of the U.S. Supreme Court. Michel Rosenfeld has pointed out that, in contrast to the Supreme Court, the European Court of Justice works in an evolving federal legal order without an explicit European constitutional identity. "[T]he ECJ has to "speak" the law to promote its own and the E.U.'s authoritativeness, as if the latter were a stable, long-established republic when, in fact, it is an evolving work in progress without a fixed constitutional identity."[141] Furthermore, it critically lacks the institutional and historical standing that the Supreme Court had when it issued the *Brown* decision. The public awareness of European constitutional and individual rights, for example, provided via the Charter, and the public awareness of the European Court of Justice itself is just a fragment of the situation in the U.S.

George A. Bermann has underscored this point and pointed out that the European Union and the European Court of Justice miss certain features that the Supreme Court possesses, making it extremely difficult for the European Court of Justice to act likewise. The first is the missing consensus over the supremacy of E.U. values. "[T]here is still largely missing in the European Union any consensus, such as the consensus which has long prevailed in the United States, that Member State constitutional values must, as a matter of substantive principle, yield to national constitutional values to the extent of conflict between them."[142] The second is the missing consensus over the absolute supremacy of the European Court of Justice. "[T]here is not even any E.U. consensus over the *institutional* question as to which court – the supreme or

[139] Breyer
[140] Stephen Breyer, *Making Our Democracy Work* (Knopf Doubleday Publishing Group 2010)
[141] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 640
[142] George A. Bermann, 'Marbury v. Madison and European Union 'Constitutional' Review' Vol. 557 George Washington International Law Review, p. 565

constitutional court of the participating Member State or the European Union's own supreme court – is the final arbiter on any such substantive questions of law."[143]

The success of the European Court of Justice in advancing European integration so far is remarkable given its precarious standing.[144] "[I]t is remarkable that the ECJ has had so much success thus far, given the precariousness of its position and the boldness of its jurisprudence."[145] Rosenfeld has pointed out that the grounds for the European Court of Justice's success could be rooted in the consequentialism of its judgments for the future of European Integration. "It is as if the ECJ communicated, in each of its cases, that the basic architecture of the E.U. was at stake, and that if its decision were not accepted the court's very precariousness might preclude its remedying the irreparable damage that could ensue to the E.U. and, derivatively, to the member states were its decisions not recognised."[146] However, that has arguably changed. Nowadays, Member States governments might have less interest in a functioning European Union and are incentivised to openly oppose the European Court of Justice's jurisprudence.

The U.S. experience in dealing with rule of law backsliding in subordinate states has shown three main comparative findings. First, the Supreme Court adopted its definition of the rule of law from a merely procedural one (*Marbury v Madison*) to a substantive one (*Brown v Board*). Similarly, but much faster, the European Court of Justice took the same steps (from *Les Verts* to *ASJP*). Second, for successful protection and enforcement of the rule of law, a Supreme Court relies on the support of the other two branches of government. In the U.S., the Supreme Court took the lead (Brown v Board) and was followed by the executive (Little Rock Nine) and the legislative branch (Civil Rights Legislation). In the E.U., the Court took the lead; however, the executive branch is too slow (Commission) or not willing (Council) to follow up, and the legislative branch lacks the competencies of acting (European Parliament). Third, and finally, the U.S. experience has shown that a solid and present constitutional identity is necessary to enforce the rule of law in subordinate states. In the early United States, rule of law challenges by subordinate states were more successful (*Worchester v Georgia*) than in the consolidated United States, where a robust constitutional identity had emerged (*Cooper v Aaron*). In comparison to the E.U., it becomes apparent that the E.U. is a relatively young constitutional project (65 years) and, therefore, eventually lacks the constitutional identity needed to deal with a rule of law challenge that currently emerges from several Member States. Constitutional identity is critical for every constitutional order to gain public support and acceptance for the rule of law. However, it remains debated if the E.U. and the European Court of Justice garnered enough of it to master the current rule of law crisis. In its judgments, the

[143] Ibid
[144] Weiler
[145] Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' p. 650
[146] Ibid

European Court of Justice has recently pivoted towards a language of constitutional identity.[147] The question remains if the other branches of E.U.'s institutional architecture will follow.

Table I: Evolution of the Protection of the Rule of Law in the United States

Year	Supreme Court Ruling	Holding	Executive Response
1803	*Marbury v Madison*	Section 13 of the Judiciary Act of 1789 is unconstitutional to the extent it purports to enlarge the Supreme Court's original jurisdiction beyond that permitted by the Constitution. Congress cannot pass laws contrary to the Constitution, and it is the judiciary's role to interpret what the Constitution permits.	Acceptance
1832	*Worchester v Georgia*	Worcester's conviction is void because states have no criminal jurisdiction in Indian Country.	President Andrew Jackson denies the enforcement of the Supreme Court judgement via federal troops in the state of Georgia
1857	*Dred Scott*	Persons of African descent cannot be and were never intended to be citizens under the U.S. Constitution. Therefore, the plaintiff is without standing to file a suit. The Property Clause applies only to lands	Rejection in the northern states

[147] Matteo Bonelli, *Has the Court of Justice embraced the language of constitutional identity?* (Diritti Comparati 2022)

		possessed during the Constitution's ratification (1787). As such, Congress cannot ban slavery in the territories. Therefore, the Missouri Compromise is unconstitutional. The Due Process Clause of the Fifth Amendment prohibits the federal government from freeing enslaved people brought into federal territories.	
1861 – 1865	The American Civil War, caused by the secession of southern states over the issue of slavery – won by the states of the Union (abolishment of slavery, adding of the Reconstruction Amendments)		
1865 – 1870	The Reconstruction Amendments, as an immediate follow-up to the Civil War, Congress passes three amendments to ensure the abolishment of slavery in all the United States		
1896	*Plessy v Ferguson*	The "separate but equal" provision of private services mandated by state governments is constitutional under the Equal Protection Clause.	Rejection in the northern states
1954	*Brown v Board of Education*	Segregation of students in public schools violates the Equal Protection Clause of the Fourteenth Amendment because separate facilities are inherently unequal. District Court of Kansas reversed.	President Dwight Eisenhower orders federal troops to enforce the judgment in the state of Arkansas (Little Rock Nine)
1958	*Cooper v Aaron*	This Court cannot countenance a claim	

		by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution in Brown v. Board of Education (1954).	

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