The Rule of Law Crisis within the European Union: Constitutional Challenges in Transatlantic Perspective

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By

Niels F. Kirst, BA, Master en Droit, LL.M.

Research Supervisor:

Professor Dr Federico Fabbrini

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List of Abbreviations

AG	Advocate General of the Court of Justice of the European Union
AFSJ	Area of Freedom, Security and Justice
BVerfG	Bundesverfassungsgericht
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CEE	Central and Eastern Europe
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CMLRev	Common Market Law Review
Council	Council of the European Union
Court of Justice	Court of Justice of the European Union
Commission	European Commission
Conditionality Reg.	Regulation 2020/2092 of the European Parliament and the Council
Congress	United States Congress
CVM	Cooperation and Verification Mechanism
DOJ	United States Department of Justice
EAW	European Arrest Warrant
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECR	European Court Reports
EEOC	Equal Employment Opportunity Commission
EMU	European Monetary Union
ENP	European Neighbourhood Policy
EP	European Parliament
EPP	European Peoples Party
EPPO	European Public Prosecutors Office
ESM	European Stability Mechanism
EU	European Union
Fidesz	Fidesz – Magyar Polgári Szövetség (Hungarian Civic Alliance)
FRA	European Union Agency for Fundamental Rights
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
NGEU	Next Generation EU Fund
NRRP	National Recovery and Resilience Plan
OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
PiS	Prawo i Sprawiedliwość (Law and Justice)
QMV	Qualified Majority Voting
RFF	Recovery and Resilience Facility
Supreme Court	Supreme Court of the United States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U.S.	United States of America
U.S. Constitution	Constitution of the United States
U.S. President	President of the United States

Abstract

The Rule of Law Crisis in the European Union: Constitutional Challenges in Transatlantic Perspective

by Niels F. Kirst, PhD Candidate in European Law at Dublin City University

This dissertation examines the current rule of law crisis within the European Union. It analyses the EU's responses on the judicial-, institutional-, and financial level and places them into transatlantic perspective by drawing from similar constitutional challenges experienced in the United States federal legal order. By identifying common patterns and divergent approaches, this research offers insights into how the rule of law can be safeguarded in the Member States.

The rule of law, a fundamental value of the EU and universal principle of democratic governance, is under threat in several Member States, with Hungary and Poland serving as prominent examples. This research examines the manifestations and implications of the rule of law crisis while drawing comparisons with similar constitutional challenges in the U.S. The impact on the institutional framework is assessed, shedding light on the erosion of democratic values and the challenges faced by the European integration project.

Drawing on transatlantic comparisons, this dissertation explores the similarities and differences between rule of law challenges in the EU and the U.S. by examining constitutional case-law, institutional frameworks, and financial conditionality in both contexts. It provides valuable insights into the broader implications of rule of law backsliding in federal legal systems and its significance for democratic governance. Therefore, this dissertation follows a three-dimensional approach: upholding the rule of law via judicial review through apex courts, upholding the rule of law via the political branches of government, and upholding the rule of law via financial conditionality.

This dissertation provides a nuanced understanding of the constitutional challenges faced, enabling the identification of best practices and potential solutions. By identifying common patterns and divergent approaches, this research offers valuable insights for policymakers, legal scholars, and practitioners working to resolve the rule of law crisis and uphold democratic principles within the EU and beyond.

Introduction: The Rule of Law Crisis in the European Union – A Comparative Federalism Perspective

This doctoral dissertation focuses on the current rule of law crisis within the EU and sets those constitutional challenges into a comparative federalism perspective. The rule of law, a foundational value of the EU, is currently under threat in several Member States.[1] This crisis presents an existential legal challenge for the EU.[2] This dissertation argues that this challenge is not unique to the EU. Instead, similar constitutional challenges have occurred in other federal legal systems before. Therefore, the EU is well advised to look beyond its legal system and explore how similar federal legal systems have dealt with rule of law crises in the past.[3] To do this, the dissertation follows an innovative approach by comparing the current challenges in the EU with previous challenges in the U.S. federal legal order.[4]

[1] This dissertation defines the notion of the rule of law as including the principles of legality; legal certainty; prohibition of arbitrariness; effective judicial protection; separation of powers; and non-discrimination. This definition follows the leading rule of law scholarship and the EU's definition in Article 2 of Regulation 2020/2092. For in-depth works on the principle of the rule of law, see H. L. A. Hart, *The Concept of Law* (Clarendon Press 1961), Lon L. Fuller, *The Morality of Law* (Yale University Press 1964), John Rawls, *A Theory of Justice* (Harvard University Press; Belknap Press 1971), Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1986), and Joseph Raz, 'The Rule of Law and Its Virtue' Vol. 93 Law Quarterly Review pp. 195. For more recent works see Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', Ronald A. Cass, *The Rule of Law in America* (Johns Hopkins University Press 2001), Jeremy Waldron, 'The Concept and the Rule of Law' Public Law & Legal Theory Research Paper Series <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273005>, T. H. Bingham, *The rule of law* (Penguin 2011), and Brian Tamanaha, 'The History and Elements of the Rule of Law' 2012 Singapore Journal of Legal Studies 232.

[2] The rule of law crisis in the EU describes the ongoing rule of law backsliding in some Member States. Most prominently in Hungary (since 2010) and Poland (since 2015). There is ample literature on the rule of law backsliding in Hungary and Poland. See, for example, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), Jakab, Andras and Bodnar, Eszter (2021), 'The Rule of Law, democracy, and human rights in Hungary: Tendencies from 1989 until 2019', in Timea Drinoczi and Agnieszka Bien-Kacala (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2021), R. Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' Vol. 22 Government & Opposition pp. 211, and R. Daniel Kelemen, 'The European Union's Authoritarian Equilibrium' 27:3 Journal of European Public Policy pp. 481.

[3] This dissertation defines the term 'rule of law crisis in a federal legal system' as a significant and sustained erosion or threat to the principle of the rule of law (including legality, legal certainty, non-arbitrariness, access to justice, separation of power, and equality before the law) within the federal legal system emerging from composite states. For further literature on rule of law backsliding as a global phenomenon of the 21st century see Steven Levitsky and Lucan A. Way, 'The Rise of Competitive Authoritarianism' Volume 13 Journal of Democracy, Tom Ginsburg, and Aziz Z. Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press 2018), and Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown Publisher 2018).

[4] NB: This dissertation will not compare rule of law conceptions within the EU and the U.S. Instead, it will analyse how federal legal systems can deal with and respond to rule of law backsliding in composite states. For a comparison of rule of law conceptions in the EU and the U.S., see Ricardo Gosalbo-Bono, 'The Significance of the Rule of Law and Its Implications for the European Union and the United States' Vol. 72 University of Pittsburgh Law Review pp. 229.

Two legal systems are never equal. However, the comparative method is the most appropriate tool for identifying trends and controlling for independent variables.[5] It, therefore, vastly enhances the understanding of the challenges the EU is dealing with in the rule of law crisis. This dissertation aims to use the comparison and examine the rule of law crisis in the EU, considering the U.S. federal experience. The dissertation follows a functional approach to analyse three different aspects of the rule of law crisis in the EU: the judicial dimension of the rule of law crisis before the Court of Justice (Chapter 1), the institutional dimension of the rule of law crisis at the EU institutions (Chapter 3), and, finally, the financial dimension of the rule of law crisis, focusing on the advent of the rule of law conditionality mechanism (Chapter 5).

These three dimensions structure the dissertation into three main parts. Part I – The Judicial Dimension – focuses on the rule of law jurisprudence of the Court of Justice and compares it to that of the Supreme Court in dealing with similar rule of law challenges (Chapter 2). Part II – the Institutional Dimension – focuses on the EU institutional response to the rule of law crisis. It compares it to the U.S. political branches of government responding to rule of law challenges in the federated states (Chapter 4). Part III – the Financial Dimension – compares conditionality in the EU with conditional spending in the U.S. (Chapter 6).

The selection of these three dimensions results from the character of the rule of law crisis in the EU, which plays out on the judicial, political, and, most recently, on the financial level. The analysis will emphasise how the EU rule of law crisis is not exceptional, as the US has gone through similar dynamics, and show lessons to be learned, if any, from the U.S. federal order's responses to rule of law crises in the federated states. At the same time, the analysis will outline why the EU's response to the rule of law crisis is structurally different from the U.S. The three-dimensional approach allows an innovative and original analysis of the rule of law crisis in the EU by isolating specific dimensions of the rule of law crisis and looking at them through a magnifying glass. Given the complexity of the rule of law crisis, this is a beneficial approach to studying them from a comparative perspective.

This work builds on a large body of literature on comparative constitutional law and transatlantic relations. Comparisons between the EU and the U.S. have a long history in legal

[5] See Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' Volume 53 American Journal of Comparative Law, and Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

and political science scholarship.[6] Legal scholars, political scientists, and economists frequently compare a specific moment of European integration to moments of the U.S. evolution into a fully-fledged federal nation. So it happened in 2021, when the EU, for the first time, took up joint debt in the form of the NGEU.[7] Scholars quickly pointed out the comparison to Alexander Hamilton's efforts in mutualising the debt of the newly federated U.S. in 1790.[8] More recently, after the controversial *Weiss/PSPP* judgment[9] by the German *BVerfG*, commentators pointed to a Calhounian Moment of European integration,[10] comparing the recalcitrant tendencies in the Member States with Senator John C. Calhoun's nullification theory in 1832 – 1833 that challenged the concept of federal supremacy in the U.S.[11] This dissertation builds on those works by comparing the EU's response to the rule of law crisis in the Member States with the U.S. response to previous rule of law challenges in the federated states.

Moreover, a wide range of literature supports this dissertation's approach by comparing certain aspects of the EU legal system to the U.S. federal legal order. Terrance Sandalow and Eric Stein laid the foundations in the 1980s with their analysis of the role of federal courts in market building in the EU and U.S.[12] George A. Bermann, in 1994, compared the principle of subsidiarity in the EU with the principles of American federalism.[13] Joseph Weiler, in 1999, traced the gradual empowerment of transnational European constitutionalism much like the evolution of American constitutional law.[14] Kalypso Nicolaidis and Robert Howse, in 2001,

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[6] See the seminal Integration through Law project, which started in the late 1970s. 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), and Francis G. Jacobs and Kenneth L. Karst, 'The "Federal" Legal Order: The U.S.A. and Europe Compared: A Juridical Perspective' in Mauro Cappelletti (ed), *A Political, Legal and Economic Overview* (De Gruyter 1985).

[7] Jim Brunsden, Sam Fleming, and Mehreen Khan, 'EU recovery fund: how the plan will work (21 July 2020)' *Financial Times* (Brussels, Belgium) <https://www.ft.com/content/2b69c9c4-2ea4-4635-9d8a-1b67852c0322>.

[8] See Federico Fabbrini, *EU Fiscal Capacity* (Oxford University Press 2022) Chapter 4 and Barry Eichengreen, 'Europe's Hamiltonian Moment' Milken Institute Review <https://www.milkenreview.org/articles/europes-hamilton-moment>.

[9] *Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15 -, Rn. 1-237* Bundesverfassungsgericht (BVerfG).

[10] See Stanley Pignal, 'Charlemagne Editorial: The EU's Calhounian moment (17 April 2021)' *The Economist* (London, United Kingdom) and Federico Fabbrini and Kelemen R. Daniel, 'With one court decision, Germany may be plunging Europe into a constitutional crisis (7 May 2020)' *The Washington Post* (Washington D.C., United States) <https://www.washingtonpost.com/politics/2020/05/07/germany-may-be-plunging-europe-into-constitutional-crisis/>.

[11] 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.

[12] See Terrance Sandalow and Eric Stein, *Courts and Free Markets* (Clarendon Press 1982).

[13] See George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' Vol. 331 Columbia Law Review pp. 331.

[14] See Joseph Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999).

compared legitimacy and levels of governance in the EU and the U.S.[15] Michel Rosenfeld, in 2006, compared constitutional review, legal interpretation and legal reasoning of the U.S. Supreme Court and the Court of Justice.[16] Further, Robert Schütze, in 2009, analysed the federal philosophy inspiring the structure of EU law by comparing the EU's model of cooperative federalism with the U.S. model of American federalism.[17] Moreover, Sergio Fabbrini, in 2010, analysed the functioning of democracies in the EU and the U.S. from a political science perspective.[18] Around the same time, Daniel Kelemen compared how the EU is shifting towards a model of American adversarial legalism in its regulatory approach.[19] More recently, Federico Fabbrini followed a sectoral approach by comparing fundamental rights protection and fiscal and economic matters in both federal legal systems.[20] Finally, Anu Bradford has compared the regulatory power of the EU to the U.S. to prove that the Brussels Effect has overtaken the California Effect.[21] This dissertation builds on and seeks to join this series of significant comparative works.

Since the dawn of the European integration project, an essential stream of academic work has argued that comparative is the best approach to studying the EU.[22] The Integration through Law project has laid the cornerstone for decades of comparative EU – U.S. studies.[23] This comparative dissertation follows a similar approach and is informed by a comparative federalism methodology in analysing how the EU and the U.S. deal with rule of law backsliding

[15] See Kalypso Nicolaidis and Robert Howse, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001).
[16] See 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.
[17] See Robert Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law* (Oxford University Press 2009); for a more recent analysis in a similar direction, see Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).
[18] See Sergio Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press 2010).
[19] See R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2010).
[20] See Federico Fabbrini, *Fundamental Rights in Europe (Oxford Studies in European Law)* (Oxford University Press 2014), and Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016); for an in-depth analysis of the conflict of rights in the EU legal system see Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009).
[21] See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).
[22] See Ernst B. Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Anthony M. Messina ed, University of Notre Dame Press 1958).
[23] The Integration through Law project (Cappelletti et al.) is a law project and was among the first to compare the EU and the U.S. from a legal perspective. See Cappelletti, Seccombe and Weiler.

in composite states.[24] This 'comparative approach in EU law aligns with a revival of comparative constitutional law. Ran Hirschl highlighted the benefits of comparative constitutionalism that is methodologically and substantively preferable to merely doctrinal accounts.[25] In this vein, the analysis of the judicial dimension (Part I), the institutional dimension (Part II) and the financial dimension (Part III) of the rule of law crisis gains from a comparative analysis of the constitutional and institutional setup of the U.S. and its functioning.

There are three main theories about the benefits and usefulness of comparative constitutional law. The first theory 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."[26] Theorists who argue for this premise are Zweigert and Kötz, and Beatty.[27] The second school 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 constitutional context cannot be relevant, or at least similarly relevant, in another."[28] Montesquieu's seminal study of constitutional laws around the world makes that conclusion.[29] Finally, there is a middle ground between both positions to which this dissertation adheres. "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."[30] The present dissertation is informed by the premise that the primary benefit of comparing constitutional issues in different legal systems is a better understanding of fundamental problems and solutions. To put it differently, comparative law can help "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."[31]

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[24] This dissertation uses the term 'composite states' to generally describe the sub-units of a federal legal system. In the U.S., this would be the 50 federated states. In the EU, it would be the 27 Member States. This dissertation uses the term 'composite states' to choose a neutral term without normative connotations.'

[25] Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*.

[26] Norman Dorsen and others, *Comparative Constitutionalism: Cases and Materials*, vol Third Edition (West Academic Publishing 2016) p. 30.

[27] 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).

[28] Dorsen and others (n 26) (n 26) p. 30.

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

[30] Dorsen and others (n 26) p. 30.

[31] 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

Among others, Glendon has argued for this functional approach of comparative constitutional law.[32] "[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."[33] This dissertation will follow this path to find novel solutions to the rule of law crisis.

Moreover, this dissertation uses the concept of the rule of law throughout its three parts. The rule of law is an essentially contested concept, as Gallie shows.[34] Scholars have argued for centuries over what the rule of law entails.[35] Moreover, it is widely accepted that a procedural (formal) and a substantive notion of it exist.[36] The procedural notion of the rule of law entails that all legal acts are subjected to judicial review. A notion that both the Supreme Court and the Court of Justice established early on.[37] Instead, the substantive notion of the rule of law describes a thicker principle. A principle that encompasses several other sub-principles such as legality, legal certainty, prohibition of arbitrariness, effective judicial protection, separation of powers, and non-discrimination. Numerous legal scholars have defined this thicker notion of the rule of law in the literature.[38] This dissertation uses a substantive, thick, notion of the rule of law, which is inspired by the European legislature, which defines the rule of law in Article 2 of Regulation 2020/2092 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

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).
[32] Mary Ann Glendon, *Comparative Legal Traditions*, vol 2nd Edition (West Academic Publishing 1994).
[33] Dorsen and others (n 26) p. 30.
[34] W. B. Gallie, 'Essentially Contested Concepts' (Meeting of the Aristotelian Society (March 1956)).
[35] For in-depth works on the principle of the rule of law, see Hart, Fuller, Rawls, Dworkin, and Raz. See Craig (n 1), Cass (n 1), Waldron (n 1), Bingham (n 1), and Tamanaha (n 1) for more recent works on the principle of the rule of law.
[36] See Craig (n 1), and Xavier Groussot and Anna Zemskova, 'The Rise of Procedural Rule of Law in the European Union - Historical and Normative Foundations' in A Bakardjieva Engelbrekt (ed), *30 Years After the Fall of the Berlin Wall: Rule of Law in the European Union* (Hart Publishing 2020).
[37] The Supreme Court established a procedural notion of the rule of law in *Marbury v Madison (1803)* and the European Court of Justice in *Les Verts (1986)*.
[38] Fuller, Bingham (n 1), 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).

regards fundamental rights; separation of powers; and non-discrimination and equality before the law."[39]

This is a broad definition of the rule of law, and each legal order subscribing to a substantive notion of the rule of law places a different emphasis upon different sub-principles. This is the case with the EU and the U.S. legal order in which the rule of law can have a different meaning.[40] However, fundamentally, and for the purpose of this dissertation, the EU and the U.S. are seen as abiding by the above-described notion of the rule of law, while marginal differences remain. In comparative constitutional law, the rule of law is a fundamental principle that is a crucial criterion for considering a federal legal system as a liberal democracy.[41] A liberal democracy might be challenged by its sub-units (federated states), resulting in rule of law challenges or a rule of law crisis. This dissertation will use these concepts to analyse the institutional response to rule of law backsliding in composite states from a comparative perspective.

Moving from theory to empirical practice, there are numerous arguments why the U.S. federal legal order can be a suitable comparator for an emerging federal legal system such as the EU. First, the U.S. Constitution is the oldest written constitution globally and arguably the most influential one ever written.[42] Second, the first Ten Amendments to the U.S. Constitution, the Bill of Rights, is one of the principal documents for framing the Western world's rule of law conception 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]."[43]. Third, the Supreme Court is the oldest apex court serving in that function and has, in its long-stretching history, successfully dealt with rule of law crises

[39] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)* (Official Journal of the European Union 2020) Article 2.
[40] See, for example, Cass (n 1).
[41] This dissertation defines the term 'liberal democracy' as a political system combining liberalism and democracy. It is a form of government that emphasises the protection of individual rights and freedoms, adherence to the rule of law and the participation of citizens in decision-making processes. See 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).
[42] Rosenfeld (n 16) p. 622.
[43] Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (1994).

in the past.[44] Fourth and 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."[45] Therefore, when undertaking a comparative analysis of the EU legal system dealing with rule of law backsliding in composite states, a turn to empirical precedents of the U.S. legal order is fruitful, augmenting, and enriching.

However, relevant differences must be considered when comparing the U.S. with the EU legal system. First, the U.S. is a federal state, whereas the federal nature of the EU remains contested.[46] As explained by Rosenfeld: "Although the EU is not a federation, like the United States or Germany, it does possess certain institutional features commonly found in federal systems."[47] Second, the role, competence and power of the Supreme Court are different from that of the 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."[48] Third, the U.S. federal government has the power to enforce federal law and has done so in the past.[49] On the contrary, the Commission does not possess any federal force on the ground and relies on the implementation of regulations, directives, and judgments by the Member States.[50] In fact, the governance systems of the EU and the US are very different – the latter is a presidential democracy, while the former has a still unsettled governance form.[51] Despite these differences, however, the similarities between both systems make a case for the tremendous potential of a comparative analysis of rule of law backsliding addressed through the federal legal system in the EU and the U.S. Therefore, by acknowledging the parallels and differences, this

[44] For example, during the Civil Rights Revolution, the U.S. dealt successfully with rule of law challenges from the federated states. See Bruce A. Ackerman, *We the People 3: The Civil Rights Revolution* (Harvard University Press, De Gruyter 2014).
[45] 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.
[46] For the federal nature of the EU, see, for example, Robert Schütze, 'Two-and-a-half Ways of Thinking about the European Union' Vol. 53 Politique européenne pp. 28, which argues that the notion of the EU as 'sui generis' is misplaced. Instead, "federal thinking provides a rich key to unlocking the nature of the European Union."
[47] Rosenfeld (n 16) p. 622.
[48] Ibid.
[49] For example, President Dwight D. Eisenhower used federal force in 1957 to enforce school desegregation in Arkansas despite the Governor's resistance. See Sam Roberts, 'The Little Rock Nine on 4 September 1957' *The New York Times (Upfront Magazine)* (New York City, United States).
[50] See Pekka Pohjankoski, 'Federal Coercion and National Constitutional Identity in the United States 1776-1861' Vol. 56 American Journal of Legal History pp. 326.
[51] See Schütze (n 46).

comparative dissertation follows a functional approach in comparing the federal legal system's response to rule of law backsliding in composite states in the EU and the U.S.

The structure of the dissertation is as follows. Part I focuses on the judicial dimension of the rule of law crisis and is divided into two chapters. Chapter 1 examines the Court of Justice's jurisprudence during the rule of law crisis to evaluate the Court of Justice's success in dealing with rule of law backsliding in the Member States. Chapter 2 explores the Supreme Court's leading case-law on the rule of law. To do this, the gradual rule of law expansion during the Civil Rights Revolution will serve as a case-study to show how the judicial branch can lead the way for a successful rule of law protection in composite states.

Part II focuses on the institutional dimension of the rule of law crisis and is divided into two chapters. Chapter 3 analyses the EU political branches' response to rule of law backsliding in Hungary and Poland to study the dynamics and effectiveness of the EU institutions dealing with rule of law backsliding in the Member States. Chapter 4 assesses the U.S. political branches' response to rule of law backsliding in composite states to stress their effectiveness in dealing with the same phenomenon.

Finally, Part III focuses on the financial dimension of the rule of law crisis and is divided into two chapters. Chapter 5 analyses establishing the rule of law conditionality mechanism in the EU and the subsequent use of the mechanism to protect the rule of law in Hungary. Chapter 6 examines the historical expansion of conditionality in the U.S. federal legal order and the conditional spending doctrine to validate the success of conditionality in protecting the rule of law in composite states. A final general conclusion with an outlook on future research fields ends the dissertation.

Part I: The Judicial Dimension: Upholding the Rule of Law via Judicial Review

Chapter 1: The Rule of Law Crisis before the Court of Justice

> *"Judicial protection and the rule of law go hand in hand: you can't have one without the other."*[52]

This quote from the *CMLRev*, published in 2007, condenses the theme of Chapter 1 on the Court of Justice during the rule of law crisis in the EU. It captures how the Court of Justice would frame and mobilise rule of law protection in the Member States through the principle of effective judicial protection ten years later. The following chapter will provide an analysis of this judicial evolution and map the Court of Justice's rule of law case-law, which has evolved as a response to the deterioration of judicial independence in the Member States.

Chapter 1 – The Rule of Law Crisis before the Court of Justice – focuses on the Court of Justice during the rule of law crisis in the EU by examining its case-law dealing with the fallout of rule of law backsliding in the Member States. It critically explores the historical background of rule of law protection in the EU, the emergence of rule of law case-law in Luxembourg, the climax of rule of law litigation before the Court of Justice, and the Court of Justice's challenge for judicial supremacy. The seminal case-law of the Court of Justice during the rule of law crisis has heralded a new understanding of the rule of law in the EU. Scholars have coined it as a constitutional moment for EU law.[53] To verify this hypothesis, Chapter 1 analyses the Court of Justice's case-law, including, but not limited to, the developments in Poland.[54]

The Treaty of Lisbon made the EU a union of values. Today, Article 2 TEU defines the EU's values which include human dignity, freedom, democracy, equality, the rule of law, and human rights.[55] However, not all Member States live up to those values. Hungary and Poland have

[52] Alison McDonnell and others, 'Editorial Comments: The rule of law as the backbone of the EU' Vol. 44 Common Market Law Review pp. 875.
[53] In constitutional law scholarship, a 'constitutional moment' refers to a significant period or event in a nation's history that marks a fundamental shift or transformation in its constitutional order. It is a critical juncture where the existing constitutional framework is re-evaluated, and new constitutional principles, structures, or rights are established. See Armin von Bogdandy and others, 'Guest Editorial: A potential constitutional moment for the European rule of law - The importance of red lines' Vol. 55 Common Market Law Review pp. 983.
[54] The chapter will focus on the Polish cases to analyse the climax of the rule of law litigation before the Court of Justice. While a similar, arguably more severe, rule of law crisis is unfolding in Hungary, the ramifications of the developments in Poland before the Court of Justice are more relevant to the present chapter.
[55] For an in-depth reading on Article 2 TEU's genesis see Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values' Vol. 5 European Papers pp. 255.

started undermining those values.[56] The Court of Justice response to this backsliding provides a case-study of the EU's apex court dealing with rule of law crises in the Member States.[57]

The decline of rule of law in Poland commenced in 2015 with PiS's victory in the general elections party, led by Jarosław Kaczyński, and an ensuing reform of the Polish judicial system. Scholars exposed this development as deliberately dismantling significant checks and balances of the Polish state and effectively subordinating Polish courts to the executive branch.[58] Inevitably, it led to a clash with the EU, as Poland infringed upon Article 2 TEU.[59] The overhaul of the Polish judicial system has resulted in a myriad of case-law before the Court of Justice. Through numerous judgments, the Court of Justice has developed a new interpretation of a substantive core EU rule of law principle – the right to effective judicial protection.

The right to effective judicial protection first emerged in the Court of Justice's case-law in the early eighties.[60] In the mid-nineties, the Court of Justice utilised the principle of effective judicial protection as an independent norm to safeguard procedural rights of EU citizens in the Member States.[61] Since the turn of the millennium, effective judicial protection has been recognised in the Court of Justice's jurisprudence as a general principle.[62] The *ASJP* judgment in 2018 marked a pivotal moment as the principle of effective judicial protection was interpreted for the first time as demanding the independence of a national judiciary.[63] In subsequent case-law concerning the overhaul of the Polish judicial system, effective judicial protection emerged as the general principle that the Court of Justice uses to protect the

[56] See Sadurski, *Poland's Constitutional Breakdown* and Andras Jakab and Eszter Bodnar, 'The Rule of Law, democracy, and human rights in Hungary: Tendencies from 1989 until 2019'.
[57] NB: This dissertation focuses on protecting the rule of law in the Member States. It does not analyse the protection of other Article 2 TEU values via the EU institutions. For an in-depth reading on the value protection via the Court of Justice, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023).
[58] See, for example, Sadurski, *Poland's Constitutional Breakdown*.
[59] See Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union'. "[…] backsliding on democracy and the rule of law in Hungary and Poland reminds us that grave democratic deficits can also exist at the national level in member states and that the EU may have a role in addressing them."
[60] *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen (Case 14/83)* European Court Reports Court of Justice of the European Union and *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary (C-222/84)* European court reports Court of Justice of the European Union.
[61] *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten (C-430/93)* European Court Reports Court of Justice of the European Union.
[62] *Unión de Pequeños Agricultores v Council of the European Union (C-50/00 P)* European court reports Court of Justice of the European Union and *Commission v Jégo-Quéré (C-263/02 P)* European court reports Court of Justice of the European Union.
[63] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)* European court reports Court of Justice of the European Union.

independence of the judiciary in the Member States. Therefore, Chapter 1 analyses the judgments on the overhaul of the Polish judicial system as a case-study to highlight the evolution of a substantive rule of law principle in the EU. Scholars even argued that the principle of effective judicial protection has evolved as a new meta-norm in EU law during the rule of law crisis. [64] Chapter 1 critically tests and evaluates this hypothesis.

The chapter is structured as follows. First, it explains the rule of law foundations in the EU legal order, focusing on the seminal *Les Verts* judgment in 1986[65] and analyses the definition of an independent court or tribunal in EU law in the *Wilson* judgment in 2006.[66] Second, it dissects the rule of law deficiencies in the Member States emerging before the Court of Justice by focusing on the *ASJP* judgment in 2018, the *LM* judgment in 2018, and the *Republikka* judgment in 2021.[67] Third, the overhaul of the independence of the judicial system in Poland will come into focus by analysing the four subsequent infringement proceedings of Poland before the Court of Justice.[68] Fourth, the chapter scrutinises the reactions to the new case-law, exploring the opposition of certain Member States in response to the Court of Justice's rulings.

Methodologically, each ruling will be examined through the lens of its background, the Court of Justice's ruling, and the legal significance of the judgment. This will highlight the use of the general principle of effective judicial protection to protect judicial independence as the core of the rule of law in the EU. By providing the context, Chapter 1 sets the stage for the following comparative study of the Supreme Court's dealing with rule of law challenges in Chapter 2.

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[64] "A meta-norm embodies the principal value judgments that actors may refer to when making hard choices in developing the scheme, and which explain these choices." In Volker Roeben, 'Judicial Protection as the Meta-norm in the EU Judicial Architecture' 12 Hague Journal on the Rule of Law pp. 29, P. 30. See also the following articles which support Roeben's argument: Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' Vol. 12 Review of European Administrative Law pp. 35, Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' Vol. 16 European Constitutional Law Review pp. 8.

[65] *Parti écologiste "Les Verts" v European Parliament (Case 294/83)* European Court Reports Court of Justice of the European Union.

[66] *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg (C-506/04)* European court reports Court of Justice of the European Union.

[67] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)*; *LM v Minister for Justice and Equality (C-216/18 PPU)* European court reports Court of Justice of the European Union; *Repubblika v Il-Prim Ministru (C-896/19)* European Court Reports Court of Justice of the European Union.

[68] *Commission v Poland (C-619/18) (Independence of the Supreme Court)* European court reports Court of Justice of the European Union, *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)* European court reports Court of Justice of the European Union, *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)* European Court Reports Court of Justice of the European Union, and *Commission v Poland (C-204/21) (Independence and Privacy of Judges)* European Court Reports Court of Justice of the European Union.

1. Rule of Law Foundations in the European Union

1.1 The Principle of the Rule of Law: *Les Verts (Case 294/83)*

When investigating the rule of law in the EU's legal order, the Court of Justice's *Les Verts* judgment in April 1986 is an essential starting point.[69] In a ruling on the disbursement of funds to European political parties via the EP, the Court of Justice established the first notion of the rule of law in the EU legal order. This notion, however, was merely procedural. In its history, the Court of Justice has made several landmark rulings which would change the trajectory of the EU legal order.[70] The *Les Verts* ruling was one of them during a relatively stagnant period for European integration in the 1980s. Some of the most important judgments of the Court of Justice were already decided in the 1960s, quickly after its inception in 1957. Early on, the Court of Justice laid down its understanding of the EU legal order and its competencies in several rulings which have become landmark judgments of EU law. In *Van Gend en Loos (1963)*[71] the Court of Justice found that EU laws are directly applicable in the Member States and can be invoked by EU citizens – the principle of direct effect, and in *Costa v ENEL (1964)*[72] the Court of Justice asserted that EU laws enjoy primacy over national laws – the principle of primacy. However, it was still unclear if all legal acts of the EU Institutions are subject to judicial review and if all institutions can be sued before the Court of Justice. A seminal decision involving the EP would change that.

The case arose when a French environmental organisation seeking to enter the EP sued several European institutions for the reimbursement practices that favoured parties already in the EP. "In this specific case, the French ecological nonprofit Les Verts […] had initiated a series of actions for annulment against various EU institutions over the allocation of EU funds to reimburse political information campaigns in the context of the European elections in 1984."[73] Therefore, the Court of Justice was tasked to decide whether the acts of the EP were reviewable, as it was not clearly stated in the Treaty at that time. First and foremost, the Court of Justice

[69] *Parti écologiste "Les Verts" v European Parliament (Case 294/83)*.
[70] Joseph Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999).
[71] *Van Gend en Loos v Nederlandse Administratie der Belastingen (C-26/62)* Europen Court Reports Court of Justice of the European Union.
[72] *Costa v ENEL (C-6/64)* European Court Reports Court of Justice of the European Union.
[73] Christian Adam and others, *Taking the EU to Court: Annulment Proceedings and Multilevel Judicial Conflict* (Palgrave Macmillan, Springer Science+Business Media 2020) p. 59.

had to decide whether it had jurisdiction to review the case. "With this application for an annulment of how these funds were allocated, the Court had to consider whether it would even be competent to review the legality of actions by the E.P."[74] It was, therefore, a crucial question for the future of the EU legal order and the value of the rule of law in the EU and before the Court of Justice.

In the proceedings, the EP rejected the view of the applicants and argued that it might not be sued based on the claim if it does not have the clear right to sue the other European institutions. "Interestingly, at the oral stage in the proceedings, the E.P. held that its legal acts could not be subjected to annulment litigation at least as long as the Parliament itself did not have the right to challenge other institutions' legal acts via annulment litigation."[75] However, this limited argument did not bode well with AG and the Court, as both rejected this view. Instead, the EP's actions were subject to judicial review, and the EP had to abide by the rule of law. Two scholars have put it succinctly: "The Parliament cannot claim the benefit of the rule of law when it is a question of safeguarding its own prerogatives, and yet mock the rule of law when others seek to rely on it against the Parliament."[76] Therefore, the Court of Justice affirmed jurisdiction and reviewed the applicant's action.

The *Les Verts* decision would change the absence of a clear commitment to the rule of law in the EU In *Les Verts,* the Court of Justice, 30 years after its inception, affirmed that all EU legal acts are subject to legal review against the Treaty and that the Court of Justice is the ultimate arbiter for this legal review. Furthermore, the Court of Justice, in its ruling, affirmed that the EU is a legal order based upon the rule of law and that all acts adopted by the institutions need to conform with the 'basic constitutional Charter', the Treaty. Put into famous words in the judgment, the Court of Justice stated:

> "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."[77]

[74] Ibid.
[75] Ibid.
[76] Rene Joliet and David T. Keeling, 'The reimbursement of election expenses: a forgotten dispute' Vol. 19 European Law Review pp. 243, p. 266.
[77] *Parti écologiste "Les Verts" v European Parliament (Case 294/83)* para. 23.

Therefore, the *Les Verts* decision was a firm assertion of the Court of Justice that the EU is a federation of States based on the rule of law. In rejection of the EPs' interpretation, enumerated rights – such as the right to judicial review of the acts of all institutions – were present in the EU legal order according to the Court of Justice. The EP could not claim the rule of law only for itself and deny it to outside organisations, such as NGOs. "The rule of law, on which the Community is founded, is indivisible: one cannot, as in an à la carte restaurant, gluttonously devour one item and leave another on one side."[78] This was the main finding of the Court of Justice in this seminal legal case. While the Treaty framework did not foresee the reviewability of all legal acts in the EU legal order, the Court of Justice established this competence, which is a precondition of a rule of law based legal order.

The lacuna in the Treaties that acts of the EP were not explicitly reviewable by the Court of Justice was only subsequently remedied with the Maastricht Treaty in 1993. "With the Maastricht Treaty, the member states followed up on this by formally extending the list of reviewable acts of Article 263 to include acts of the E.P., acts adopted jointly by the E.P. and the Council, and acts adopted by the ECB."[79] So, in this case, the Member States eventually changed the Treaty after a judgment of the Court of Justice established this new competence. Hence, the judiciary pushed ahead with a stringer rule of law protection, and the legislative (the Member States) followed. This development on a judicially active Court of Justice and a rather lagging attitude of the Member States in the Council is a reappearing theme in the history of European integration – the protection of the rule of law is no exception here.

Finally, this first pronunciation of the rule of law via the Court of Justice was merely procedural. The Court did not establish a substantive notion of the rule of law, including a wide range of fundamental rights. Instead, the judgment in *Les Verts* only declared that all legal acts by the European institutions are reviewable against the Treaty by the Court of Justice. In comparative perspective, the *Les Verts* decision of the Court of Justice is comparable to *Marbury v Madison* of the Supreme Court 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

[78] Joliet and Keeling (n 76) p. 266.
[79] Adam and others (n 73) p. 59.

Treaty.[80] In the case of the U.S., that is the Supreme Court and the U.S. Constitution; in the case of the EU, that is the Court of Justice and the Treaty. However, the development of a substantial notion of the rule of law by the Court of Justice would require further judgments of the Court of Justice and a general principle of EU law – the principle of effective judicial protection.

1.2 The Principle of an Independent and Impartial Court: *Wilson (C-506/04)*

When studying the rule of law crisis and understanding the trajectory of the Court of Justice's case-law the *Wilson* decision is immensely important as it defined the Court of Justice's standards for an independent and impartial judiciary.[81] In *Wilson*, the Court of Justice defined the criteria for judicial independence in EU law under Article 267 TFEU (the preliminary ruling procedure) and beyond. What are the criteria a court or tribunal in the Member States must fulfil to be regarded as independent under EU law and call on the Court of Justice for a preliminary reference under Article 267 TFEU. While *Wilson* is not a case directly related to the rule of law crisis, it is nevertheless crucial to the rule of law crisis since the Court of Justice developed the criteria of an 'independent court or tribunal' under Article 267 TFEU, which has subsequently served to assess the independence of national judicial systems in the rule of law crisis and the case-law before the Court. Therefore, the Court is using the criteria in the current rule of law crisis to assess the independence of the Polish judiciary after the Polish Government's judicial reforms.

In *Wilson*, the Court of Justice developed a double-sided coin of judicial independence under EU law. Specifically, the Court defined the criteria for internal and external independence of judicial authorities, which qualify as 'court or tribunal' under Article 267 TFEU. In its judgment, the Court explained the first – external – aspect of judicial independence as follows.

> "The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors

[80] *William Marbury v. James Madison, Secretary of State of the United States (1803)* 1 Cranch Supreme Court of the United States.
[81] *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg (C-506/04)*.

> requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office."[82]

In defining the external aspect of judicial independence, the Court highlights the importance of no interference from the outside onto the judicial arbiter. This interference or pressure can be exercised in many ways. Notably, removal from office or disciplinary proceedings is a forceful tool to pressure judges in a certain way. The importance of this external factor of judicial independence cannot be overstated. The Court stated the following regarding the second – internal – aspect of judicial independence:

> "The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."[83]

In its conception of the internal aspect of judicial independence, the Court highlights that there should be no interest in the outcome of the proceedings by the sitting judges themselves.[84] Instead, the overarching objective should be applying the rule of law. "For reasons of impartiality, the ECJ also held that a level playing field for the parties to the proceedings with respect to the subject-matter of those proceedings must be assured (i.e., internal independence)."[85] The Court of Justice called this aspect the internal aspect of judicial independence.

The Court highlighted in *Wilson* the necessary rules that the external aspect of judicial independence requires.

> "Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the

[82] Ibid.
[83] Ibid.
[84] An interesting aspect is how to qualitatively quantify whether a judge has a particular interest in the proceedings before him or her.
[85] Alison McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' Vol. 56 Common Market Law Review pp. 3, P. 10.

grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[86]

The requirement 'to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body' appears to be the primary 'test' of judicial independence in the Court's case-law of the rule of law crisis. Moreover, the rule of law crisis in the EU challenges national judicial bodies regarding judges' composition, appointment, and dismissal. The test the Court of Justice has developed in its case-law is therefore crucial in the rule of law crisis and efficient regarding the reform of the Polish judiciary.

The case-law of the ECtHR inspired the standards that the Court of Justice developed under Article 6 ECHR. Groussot and Lindholm have praised this 'human rights approach' by the Court of Justice, which is derived from the Opinions of several AGs. "It is common knowledge in the academic literature that the Advocates General (e.g., AG Colomer in *De Coster* or AG Stickx-Hackl in *Wilson*) have often attempted to consider that the criteria of independence and impartiality be assessed considering the ECHR standards, notably Article 6 ECHR. This 'human rights approach' to the definition of independence and impartiality was, *in fine*, clearly adopted by the CJEU in *Wilson*."[87] The ECtHR case-law provides ample resources for the Court of Justice to define its criteria of judicial independence and allows it to refer to an internationally highly respected court. *For exampl*e, the Court of Justice relied on the ECtHR case-law in the Wilson case. "The CJEU relied here [in *Wilson*] on the case law of the ECtHR in relation to Article 6 ECHR, to which Article 47 CFR corresponds, guaranteeing the right to a fair trial 'by an independent and impartial tribunal'. It appears that ECtHR case law is particularly useful for defining and clarifying the scope of the concepts of impartiality and independence."[88] In the rule of law crisis, the Court of Justice could rely on the resourceful ECtHR case-law and use it to its advantage when defining judicial impartiality and independence.

[86] *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg (C-506/04)* para. 53.
[87] Xavier Groussot and J. Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule of Law Stick in the European Union' No 01/2019 Legal Research Paper Series (Lund University), p. 20.
[88] Ibid.

Drawing from the ECtHR definition of judicial independence, the Court developed an autonomous concept of judicial independence in EU law. "In Wilson, [the Court of Justice] already made clear that the notion of 'judicial independence' is an autonomous concept of EU law and that this independence implies that judges must be protected against any external intervention that could jeopardise their independent judgment as regards proceedings before them (i.e. external independence)."[89] Therefore, the Court of Justice took inspiration from the ECtHR to develop its concept of judicial independence, which is, however, very similar to the ECtHR standard and draws from it.

Furthermore, Groussot and Lindholm have argued that the *Wilson* case-law should be reformed since it offers loopholes in protecting Member State courts that are jeopardised by court-packing. "The *Wilson* line of case law is well-known as being mainly connected to assessing the admissibility of references made by quasi-judicial bodies and not focusing on the admissibility of questions put by national courts forming an integral part of the ordinary court system."[90] Namely, if a Member State court does not qualify as independent under EU law and is therefore barred from using the mechanism of Article 267 TFEU. "Therefore, the *Wilson* line of case law should be reformed since a verdict to the opposite would cut the lifeline between the CJEU and the national courts under pressure and fighting for their own independence via the preliminary ruling procedure."[91] Other scholars also highlighted this concern, including suggestions on how the Court of Justice could modify its case-law to include such captured courts in the Member States that are fighting for their own independence.[92]

In conclusion, the independence requirements developed by the Court of Justice in *Wilson* are crucial in the rule of law crisis. The Court of Justice took inspiration from the criteria of impartiality and independence developed in the case-law of the ECtHR to derive an autonomous standard of judicial independence in EU law.

[89] McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' p. 10.
[90] Groussot and Lindholm (n 87) p. 23.
[91] Ibid.
[92] Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, vol Vol. 3 (Swedish Institute for European Policy Studies 2021) Chapter 5.

2. Rule of Law Deficiencies before the Court of Justice

2.1 A Substantive Rule of Law Principle: *Associação Sindical dos Juízes Portugueses (C-64/16)*

The *ASJP* judgment[93] has been highlighted as one of the most transformative judgments in the recent history of the EU legal order.[94] Arriving at the Court of Justice in the aftermath of the Euro crisis and the austerity measures imposed on Member State governments, the case became crucial for protecting the rule of law in the Member States during the rule of law crisis. As Matteo Bonelli and Monica Claes put it, "[w]hile trying to defend their salaries from austerity measures, a group of Portuguese judges may have accidentally stumbled upon a way to judicially safeguard the rule of law and the independence of the judiciary throughout the European Union."[95] Therefore, it is indispensable when understanding the European response to the rule of law crisis to scrutinise the *ASJP* judgment and distil how the Court of Justice developed the new meaning of Article 19 (1) TEU and the principle of effective judicial protection. The case arrived at the Court of Justice in 2016, at a time when the rule of law backsliding in Hungary had already unfolded for six years[96] and the rule of law regression in Poland commenced.[97] So far, the other EU Institutions have failed to adequately address the rule of law backsliding in both Member States.[98] Therefore, the eyes of observers turned to the Court of Justice in the hope of a silver lining to protect the rule of law in the EU legal – the *ASJP* judgment would be that silver lining, as it later turned out.

2.1.1 Background

In the *ASJP* judgment, the Court of Justice had to decide on the issue of salary reduction in the Portuguese judiciary due to European austerity measures after the financial crisis. On the substance, the Court of Justice "ruled that salary reductions applied to the judges of the Tribunal de Contas in Portugal do not infringe the principle of judicial independence."[99] How

[93] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)*.
[94] See Bogdandy and others (n 53).
[95] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' Vol. 14 European Constitutional Law Review pp. 622, p. 622.
[96] Jakab and Bodnar (n 2).
[97] Sadurski, *Poland's Constitutional Breakdown*.
[98] Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).
[99] McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' p. 10.

did the Court of Justice derive that assessment, and how could it establish that a salary reduction of judges in Member State courts involves the principle of judicial independence? The financial austerity measures that provide the backdrop to the case were a corollary to the financial crisis of 2010 in the EU.[100] They were adopted in the framework of the EU financial assistance programme for Portugal after the financial crisis. These measures required the Portuguese State to significantly reduce the salary of public servants in Portugal, among them judges. The Associação Sindical dos Juízes Portugueses (Portuguese Judges Association) argued that the salary reduction would impinge on the independence of the judges in Portuguese courts and infringe on the principle of effective judicial protection in Member State courts. Specifically, "[i]t claimed that EU law imposes requirements concerning the independence of the judiciary on national courts, as they form part of the European judiciary under Article 19 (1) TEU, second sentence, and Article 47 Charter demands judicial independence."[101] The Portuguese Judges Association, therefore, sought to come under the Court of Justice's jurisdiction by invoking the principle of effective judicial protection.

2.1.2 The Court of Justice's Judgment

The Court of Justice delivered its judgment on 27 February 2018. After the AG's Opinion, the stakes were high on whether this case would provide a silver lining in the rule of law crisis or not. The question was whether the Court of Justice would follow AG Øe's Opinion and declare Article 19 (1) TEU as a thin concept of the rule of law or would reject his Opinion and pronounce Article 19 (1) TEU as an encompassing notion which amplifies the value of the rule of law in the EU legal order. The overarching question of this case was whether the Court of Justice would put flesh on the bones of Article 2 TEU and the value of the rule of law referred to therein. Article 2 TEU, which stipulates the Union's values, provides the following:

> "The Union is founded on 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[100] For a more in-depth view of the repercussions of the financial crisis in the EU legal order see Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*.
[101] Bonelli and Claes (n 95) p. 629.

Discussions on the justiciability of Article 2 TEU loom large in the academic literature[102] and reach back to the proposals of the former Commissioner for Justice Viviane Reding.[103] A possible route for operationalising the value of the rule of law enshrined in Article 2 TEU was given by the Portuguese Judges Association in *ASJP*, which invoked Article 19 (1) TEU. Therefore, the preliminary reference by the Portuguese court (Tribunal de Contas) provided the perfect opportunity for the Court of Justice to express its view on Article 19 (1) TEU and the principle of judicial independence as a core component of the value of the rule of law. Accordingly, the Court of Justice rejected AG Øe's thin conception of Article 19 (1) TEU in its judgment and instead held "that Member States are required by Union law to ensure that their courts meet the requirements of effective judicial protection, a concrete expression of the rule of law, and stated that the independence of national courts is essential to ensure such judicial protection."[104]

The Court of Justice, thus, derived the condition of the independence of national judicial systems from the requirement to ensure effective judicial protection in areas covered by Union law. To reach this conclusion, the Court of Justice followed a two-pronged reasoning. First, it defined the notion of the rule of law in the EU legal order flowing from Article 2 TEU as a value common to the Member States. This is because the principle of mutual trust among the Member States, and especially between their courts and tribunals, is based on the premise that the Member States share the common value of the rule of law. Second, the Court of Justice put flesh on the bones of Article 19 (1) TEU. In this regard, the Court of Justice stated:

> "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals."[105]

Judicial review of the Union's legislative acts, the fundamental principle of the EU legal order since *Les Verts,* is entrusted to the Court of Justice and the Member State courts.[106] This, in

[102] See Armin von Bogdandy and others, 'Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States' Vo. 49 Common Market Law Review pp. 489.
[103] See Viviane Reding, *Speech: The EU and the Rule of Law - What next?* (Centre for European Policy Studies 2013).
[104] McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' p. 11.
[105] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)* para. 32.
[106] *Parti écologiste "Les Verts" v European Parliament (Case 294/83)*.

turn, requires Member State courts to fulfil the independence requirements established in *Wilson* to ensure that Union citizens have an effective legal remedy in areas covered by Union law.[107] While effective judicial protection serves first and foremost to invoke Union rights or challenge Union acts, it also requires the independence of Member State courts as a corollary.

The Court of Justice defined the principle of effective judicial protection as the essence of the rule of law in the EU legal order, which has wide-ranging consequences.[108] Notably, the Court of Justice distinguished Article 19 (1) TEU's material scope from Article 47 CFR. "The mere fact of being a court or tribunal with the competence to potentially decide on the interpretation or application of Union law is sufficient to come within the material scope of Article 19 TEU. Thus, there is a sphere of EU law, namely the 'fields covered by Union law', in which EU law applies – in the sense that Member States must ensure effective judicial protection under Article 19 TEU – but the Charter does not."[109] While the CFR only applies when Member States implement EU law, Article 19 (1) applies to fields covered by Union law – a much broader scope. Since Member State courts and tribunals potentially apply Union law, they are covered by Union law. "[…] Member States must ensure that national courts meet the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19 (1) TEU."[110] Thus, Member States must ensure that effective judicial protection is guaranteed via independent Member State courts.

2.1.3 Comment

In conclusion, the Court of Justice in *ASJP* held that Member States must, first, establish a system of legal remedies sufficient to ensure judicial protection in fields covered by Union law.[111] And second, ensure the judicial independence of the bodies that provide legal remedies to the parties.[112] Thus, the Court of Justice builds substantially on its requirements of independence which it developed in *Wilson*. The epochal development was, however, in contrast to *Commission v Hungary (Data Protection Supervisor)*[113], which was a case of 2014

[107] *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg (C-506/04)*.
[108] Cf. *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)* para. 36.
[109] Bonelli and Claes (n 95) p. 631.
[110] McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' p. 11.
[111] Cf. *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)* para. 34.
[112] Cf. Ibid.
[113] *Commission v Hungary (C-288/12) (Independence of the Data Protection Supervisor)* European Court Reports Court of Justice of the European Union.

that concerned the independence of the Hungarian Data Protection Supervisor, the Court of Justice now operationalised the rule of law via Article 19 (1) TEU as a principle which gives the Court of Justice the concrete competence to assess the independence of the national judiciary. This new competence would prove crucial in the subsequent case-law in which the Court of Justice protected the rule of law in the Member States.

In short, *ASJP* marked the transformation of the rule of law value of Article 2 TEU to a justiciable rule of law principle found in Article 19 (1) TEU. "[The CJEU's] interpretation of Article 19 TEU covers the institutional dimension of domestic judicial independence. The European rule of law has thus become justiciable *vis-à-vis* the Member States."[114] Bonelli and Claes have highlighted the constitutional importance of this case for the EU legal order and the new role of the principle of judicial independence. "[T]he court concluded that Article 19 TEU includes an obligation to uphold judicial independence. In other words, judicial independence has now acquired a new role within the EU constitutional order as a primary law obligation."[115]

2.2 The Rule of Law Crisis and the European Arrest Warrant: *LM (C-216/18 PPU)*

The preliminary reference from the Irish High Court in *LM* brought the rule of law crisis's repercussions in the realm of AFSJ to the fore at the Court of Justice.[116] The case concerned judicial cooperation in criminal matters between two Member States of the EU. Specifically, it broached whether a general finding of deficiencies in one Member State's judicial system is sufficient to deny extradition towards that jurisdiction. The backdrop of the case was a Polish citizen in Irish custody and searched via an EAW.[117] The system of the EAW allows for a simplified extradition procedure between Member States of the EU and is based on a Council Framework which entered into force in 2002.[118] In the *LM* case Poland relied on the EAW to

[114] Bogdandy and others p. 985 (n 53).
[115] Bonelli and Claes (n 95) p. 634.
[116] The EU's Area of Freedom, Security, and Justice (AFSJ), created with the Treaty of Amsterdam in 1999, is a policy framework that aims to create a unified space where EU citizens can move freely, while also ensuring their safety, promoting justice, and addressing cross-border challenges such as organized crime, terrorism, immigration, and asylum.
[117] The European Arrest Warrant (EAW) is a legal instrument within the EU that simplifies and expedites the extradition process between member states. It was introduced to replace the traditional extradition process, which often involved complex and lengthy procedures. The primary objective of the European Arrest Warrant is to facilitate the swift surrender of individuals who are wanted for prosecution or to serve a sentence for a serious criminal offense in one Member State but are in another. The EAW applies to a wide range of offenses, including terrorism, organized crime, human trafficking, drug trafficking, and more.
[118] European Council, *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States* (Official Journal of the European Communities 2002).

require the extradition of that Polish citizen from Ireland. The *LM* case signified the importance of the rule of law for the whole EU legal order, as it shows that rule of law deficiencies in one Member State may threaten the whole EU legal system.

2.2.1 Background

In the preliminary reference of *LM,* the Court of Justice was asked to assess the independence of the Polish judiciary against the backdrop of the recently enacted judicial reforms in Poland and the initiated Article 7 TEU procedure by the Commission.[119] The case unfolded in an extradition procedure between the Republic of Ireland and Poland. The Polish criminal suspect foreseen to be extradited argued that the Polish courts do not provide sufficient protection of his procedural rights, specifically, his right to a fair trial derived from Article 47 CFR. Article 47, second subparagraph of the CFR, states the following:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."[120]

The CFR applied to the case at hand since the procedure of the EAW constituted an implementation of EU law. The EAW was the underlying instrument in the case, which enables a simplified extradition procedure among the Member States of the EU. Therefore, the case marked the first appearance of the controversial reforms of the Polish judiciary at the Court of Justice and highlighted the interrelation of criminal procedural law with the principle of effective judicial protection deriving from EU law.

The Irish High Court was hesitant on whether it could extradite the individual under the circumstances of the reform of the Polish judiciary and sent a preliminary reference to the Court of Justice on whether Ireland may refuse to surrender a Polish citizen following an EAW due to systemic deficiencies in the rule of law in Poland. "The referring Irish high Court consider[ed] that the Polish measures breach[ed] fundamental values such as the 'independence of the judiciary and respect for the Constitution' and amount to 'systemic breaches of the rule

[119] In December 2017, the European Commission initiated a procedure under Article 7 in response to the risks to the rule of law and EU values in Poland.
[120] *Charter of Fundamental Rights of the European Union* (Official Journal of the European Union 2012) Article 47.

of law' as well as 'fundamental defects in the system of justice'."[121] For the first time, the scholarly concept of systemic deficiencies in the rule of law was invoked at the Court of Justice. Bogdandy and Ioannidis coined and developed this concept in the academic literature.[122] The case provided an opportunity for the Court of Justice to show its colours on the reform of the Polish judiciary and give a first hint of whether it regarded the reforms of the Polish judiciary as compliant with the rule of law in the EU legal order.

2.2.2 The Court of Justice's Judgment

The Court of Justice delivered its judgment on 25 July 2018. In its judgment it did not take a direct stance on the consequences of the independence of the Polish judiciary following the controversial reforms. Instead, the Court of Justice followed a route in which it declared an instruction that Member State courts should follow when challenged with systemic deficiencies in the rule of law. First, the Court of Justice highlighted its reasoning from *Wilson* that judicial independence encompasses an internal and an external aspect that the executing court must consider. "As a first step, the CJEU considered that the executing judicial authority must verify on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies."[123] This assessment corresponds to the reasoning developed in *Wilson* and *ASJP* concerning judicial independence. Second, if the executing court suspects a systemic deficiency in the system of justice in the specific Member State, it must carry out an individual assessment. "[T]he executive, judicial authority must assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk [the breach of the essence of the right to a fair trial]."[124] Thus, Member State courts have a two-stage test to assess the independence of the court requesting the extradition.

As a consequence of the two-stage assessment, the Court of Justice found that "[…] a judicial authority called on to execute a European Arrest Warrant must refrain from giving effect to it

[121] Bogdandy and others (n 53) p. 991.
[122] See Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done' 51 Common Market Law Review 59.
[123] Groussot and Lindholm (n 87) P. 21.
[124] Ibid.

if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal […]."[125] Member State courts are thus entitled and encouraged to assess whether the requesting court of an EAW fulfils the standards of judicial independence. Furthermore, if that is not the case, Member State courts may, under their motion, refuse to execute an EAW. Additionally, the Court of Justice reiterated that the requirement of judicial independence is part of the essence of the right to a fair trial, which is of cardinal importance to the value of the rule of law.[126] If this essence of the right to a fair trial is affected, Member State courts must refrain from approving the extradition of an accused.

The Court of Justice, thus, used the concepts derived from *ASJP* and *Wilson* in giving the Member State courts a tool to assess the independence of other Member States' courts. Again, the Court of Justice is using the test developed in *ASJP* as to whether reasonable doubts exist regarding the independence of the court or tribunal. The 'reasonable doubts in the minds of individuals' test serve as a benchmark if a court or tribunal can be considered independent.[127] Thus, the Court of Justice broached on the remit of what Member States thought would be their national sovereignty, the procedural organisation of domestic criminal justice. Hence, the Court of Justice placed the principle of effective judicial protection above the principle of procedural autonomy. In conclusion, procedural autonomy is only possible within the guardrails set by the Court of Justice.

Finally, following the Court of Justice's judgment, alleged 'systemic or general deficiencies' in the system of justice of a Member State[128], do not amount to a general ground of non-extradition. Instead, the judicial authority of the executing state is required to assess whether there is a real risk that the individual concerned will be precluded from his/her right to a fair trial.[129] The Court of Justice chose to follow the path of an individual assessment of the executing judicial authority, relying on the competencies and capability of the Member State courts to assess the protection of fundamental rights in other Member States. Thus, the Court of Justice established an indirect peer mechanism between the Member States' judiciaries to protect the right to a fair trial of European citizens.

[125] McDonnell and others, 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' p. 12.
[126] Cf. *LM v Minister for Justice and Equality (C-216/18 PPU)* para. 48.
[127] Cf. Ibid.
[128] See Bogdandy and Ioannidis (n 122).
[129] Cf. *LM v Minister for Justice and Equality (C-216/18 PPU)* paras. 60.

2.2.3 Comment

LM proved to be the first occasion for the Court of Justice to take a stance on the compliance of the judicial reforms in Poland with the concept of judicial independence flowing from Article 19 (1) TEU and Article 47 CFR. However, the jurisdiction of the Court of Justice was limited in the present case due to the nature of the Article 267 TFEU proceeding. Therefore, the Court of Justice gave the Member State court a guidance on how it should assess the independence of another Member State court in the EU legal system. This guidance established a two-step test for the extraditing court. Scholars have criticised it as an ill-advised rule of law test.[130]

On the one hand, Groussot and Lindholm have highlighted the additional competence developed in *LM* that the Court of Justice places upon Member State courts to become an accomplice in upholding the rule of law in the EU legal order. "[…], in the contexts of mutual recognition and the EAW, the CJEU has empowered national courts as executing authorities to carry out a 'rule-of-law check' of the warrant-issuing Member State, by assessing the independence and impartiality of the issuing judicial authorities."[131] On the other hand, the subsequent case-law to the *LM* case has shown that Member State courts are often overwhelmed with the need to assess the independence of courts in a different Member State, and, therefore, the two-step test proves inefficient. Scholars have therefore criticised the *LM* case-law and proposed new standards of review.[132]

2.3 A New Non-Regression Principle: *Repubblika (C-896/19)*

In the *Repubblika* case, the Court of Justice, for the first time, declared that Member States might not go back on its previous achieved rule of law standards.[133] Therefore, the case is a culmination of the Court of Justice's case-law on the rule of law so far. As Pech and Kochenov have put it, with the judgment in *Repubblika* the Court of Justice squared the full circle of the

[130] Cf. Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)' Vol. 58 Common Market Law Review pp. 137, p. 161.
[131] Groussot and Lindholm (n 87) p. 14.
[132] Pech and Kochenov (n 92) Chapter 5.
[133] This section builds upon the author's publication in Niels F. Kirst, *The Court of Justice rules on European standards for national judicial appointments (22 April 2021)* (eulawlive.com 2021). For the *Repubblika* case see *Repubblika v Il-Prim Ministru (C-896/19)* European Court Reports Court of Justice of the European Union.

rule of law protection via the European judiciary.[134] The independence of the judiciary in the Member States has been a primordial occupation of the Court of Justice since 2018.[135] Adding to this line of case-law, the Court of Justice's verdict regarding the preliminary reference from Malta concerning the appointment procedures for judges in the Maltese judiciary supplements an additional element to the rule of law protection in the EU.[136] The following case-note analyses the judgment, highlighting the Court of Justice's reasoning and outlining the broader significance for the independence of the judiciary in Europe.

2.3.1 Background

In 2016, Malta's Government reformed its judicial appointment system. This reform spurred the lawsuit by Repubblika, which was part of a broader movement to promote political change in Malta after the murder of the investigative journalist Daphne Caruana Galizia in 2017.[137] Her murder caused a widespread outcry in Brussels and the wider European public.[138] After three years of investigation, her killing was linked to top government officials[139] and ultimately led to the resignation of Prime Minister Joseph Muscat in January 2020.[140] The 2016 judicial reform established an independent Judicial Appointments Committee (JAC), which would select judges for an appointment but allow the prime minister, in exceptional cases, to bypass the committee if the candidate meets specific professional requirements set out in the Maltese Constitution. Repubblika alleged that Muscat's Government had appointed too many judges who had links to his Labour Party and that this gave rise to the suspicion of political interference in the judiciary. A Venice Commission Opinion on the reform proposals of the Maltese judiciary in 2018 provided further substantiation for Repubblika's claims.[141]

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[134] Pech and Kochenov (n 92).
[135] Laurent Pech and Sébastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' Vol. 55 Common Market Law Review pp. 1836.
[136] *Repubblika v II-Prim Ministru (C-896/19)*.
[137] Juliette Garside, 'Malta car bomb kills Panama Papers journalist (16 October 2017)' *The Guardian* (London, United Kingdom) <https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist>.
[138] 'European Commission 'horrified' by Caruana Galizia murder (17 October 2017)' *Times of Malta* (Valletta, Malta) <https://timesofmalta.com/articles/view/european-commission-horrified-by-caruana-galizia-murder.660635>.
[139] 'Malta charges three over Daphne Caruana Galizia's murder (17 July 2019)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/media/news/malta-charges-three-over-daphne-caruana-galizias-muder/>.
[140] Christopher Scicluna, 'Former Maltese PM brought down by journalist murder quits parliament (5 October 2020)' *Reuters World News* (London, United Kingdom) <https://www.reuters.com/article/us-malta-daphne-muscat-resignation-idUSKBN26Q2RW>.
[141] Venice Commission of the Council of Europe, *On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement in Malta* (2018).

In 2018, the Venice Commission published an Opinion on the Maltese justice system. It stated that 'the constitutional amendments 2016, which introduced the JAC, were a step in the right direction, but fall short of ensuring judicial independence. […] The Prime Minister should not have the power to influence the appointment of Justices and Judges Magistrates'.[142] Remarkably, the Maltese Prime Minister had even more powers regarding judicial appointments before 2016. To conclude its point, the Venice Commission found that 'the wide powers of appointments that the Prime Minister enjoys make this institution too powerful and create a serious risk for the rule of law. Considering the Prime Minister's powers, notably his or her influence on judicial appointments, crucial checks and balances are missing'.[143] The Opinion was thus a wake-up call for the Maltese Government and confirmation for civil society organisations in Malta of their rule of law concerns. It was, therefore, crucial to see if the Court of Justice would follow the assessment of the Venice Commission or deem the judicial appointment process as compliant with EU law.

The preliminary reference was made by the first chamber of the Maltese civil court, which acted as the constitutional chamber. The action was brought as an *actio popularis* that allows civil society organisations in Malta to bring cases for judicial review if their interests are not directly affected. The national action was initiated by an association called Repubblika, which alleged that recently introduced changes to the Maltese legislation for the appointment of judges infringed upon the independence of the Maltese judiciary. Repubblika is a Maltese association promoting the protection of justice and the rule of law in Malta. In its claim, Repubblika was explicitly concerned about the power of the Maltese President to appoint judges and bypass a judicial committee directly.

2.3.2 The Court of Justice's Judgment

The Court of Justice delivered its ruling in *Repubblika* on 20 April 2021.[144] In brief, the Court of Justice found that the legislative changes of 2016 in the Maltese system for the appointment of judges do not infringe on the requirement of effective judicial protection that flows from Article 19(1) TEU. Moreover, all this occurred against an ongoing rule of law backsliding in Poland and Hungary.[145] Therefore, the case was significant for parallel proceedings regarding

[142] Ibid.
[143] Ibid.
[144] *Repubblika v Il-Prim Ministru (C-896/19)*.
[145] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (Cambridge, United Kingdom) [Cambridge University Press] Vol. 19 Cambridge Yearbook of European Legal Studies pp. 3

the executive encroachment on the judiciary in Poland (*Commission v Poland (C-791/19)*[146] and *Commission v Poland (C-204/21*).[147] Undoubtedly, the judgment is being watched and analysed in Brussels, Warsaw, and Budapest. Interventions in the proceedings before the Court of Justice were made by Belgium, Malta, the Netherlands, Poland, and Sweden. The intervention of Poland might be seen as the most significant, as the Polish Government tried to derail the legal proceedings by raising points about admissibility. The Court of Justice dismissed the arguments firmly.[148]

In its analysis, the Court of Justice first considered the applicability of Article 19 (1) TEU and Article 47 of the CFR to the case.[149] Following the reasoning in *ASJP (C-64/16)*[150], the Court of Justice confirmed that national courts that apply EU law are covered under the concept of 'court or tribunal', and, therefore, have to guarantee European standards of effective judicial protection. The case thus fell under the broad scope of Article 19(1) TEU. Regarding Article 47 CFR, the Court of Justice found that Repubblika did not rely on a subjective right and, therefore, it did not apply to the case. It, thus, affirmed the applicability of Article 19(1) TEU but denied the direct applicability of Article 47 CFR to the case.

In its judgment, the Court of Justice confirmed that Article 19 (1) TEU must be read considering Article 47 CFR, thus, creating a bond or a bridge between the Treaty and the CFR.[151] Therefore, it might seem increasingly likely that the concepts under Article 19 TEU and Article 47 CFR overlap. Subsequently, the Court of Justice specified the requirements of Article 19 TEU.[152] In the following analysis, it applied a three-step test to assess the Maltese procedure for the appointment of members of the judiciary. First, the Court of Justice relied on the discretionary concept of 'doubts in the minds of individuals as to the imperviousness of the members of the judiciary'. As shown in a previous section borrowed this concept from the ECtHR.[153]

[146] *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)*.
[147] *Commission v Poland (C-204/21) (Independence and Privacy of Judges)*.
[148] *Repubblika v II-Prim Ministru (C-896/19)* para. 25.
[149] Ibid.
[150] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)*.
[151] *Repubblika v II-Prim Ministru (C-896/19)* para. 40.
[152] Ibid.
[153] For a complete analysis of the ECtHR doctrine, see Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' Volume 15 (March 2019) European Constitutional Law Review pp. 104.

According to the Court of Justice, this concept is built on two secondary requirements: i) the freedom of any direct or indirect influence from the legislature or the executive, and ii) the neutrality of the members of the judiciary to the interests before them. Further, the Court of Justice reiterated that the independence of the judiciary forms part of the essence of the fundamental right to effective judicial protection. Adding to its argumentation based on Article 19(1) TEU, it also referred to Article 49 TEU.[154] Article 49 TEU defines the accession criteria to join the EU.[155] According to the Court of Justice, by joining the EU, States voluntarily agree to the values of Article 2 TEU, including the rule of law, which requires that they do not subsequently amend their judicial system in a way that endangers those values to which they have previously subscribed. This can be somewhat understood as a clear wink to the Polish Government that endangers the independence of the Polish judiciary with full intent.[156]

Finally, the Court of Justice held that the changes to the judiciary in 2016 did not grant the Maltese Prime Minister such power that it would infringe upon the principle of judicial independence in EU law flowing from Article 19(1) TEU.[157]

2.3.3 Comment

The Court of Justice's reasoning was based on three articles. First, Article 19(1) TEU, which established the scope of application; second, Article 47 CFR, which provided further underlying support for the concept of judicial independence developed under Article 19(1) TEU; and third, Article 49 TEU, which according to the reasoning of the Court of Justice, must be read as requiring the Member States to not roll back on the state of the rule of law in their countries at the time of accession. However, the most significant takeaway from the case is the new interpretation of Article 49 TEU. Once a Member State enters the EU according to Article 49 TEU, the same Article requires that this Member State may not backslide on the values of Article 2 TEU. The Court of Justice is, thus, establishing an indirect connection between both Articles. Scholars have already dubbed this a new principle of non-regression in EU law.[158] It will be exciting to see if the Court of Justice follows up on Article 49 TEU as an ultimate

[154] *Repubblika v Il-Prim Ministru (C-896/19)* para. 60.
[155] Article 49 TEU states that 'any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'
[156] Sadurski, *Poland's Constitutional Breakdown*.
[157] *Repubblika v Il-Prim Ministru (C-896/19)* para. 65.
[158] Mathieu Leloup, Dimitry V. Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru' Reconnect Working Paper No 15 - June 2021 <https://ssrn.com/abstract=3875749>.

backstop to value backsliding in the Member States. If it maintains this new principle in EU law, Article 49 TEU could become a panacea for value backsliding in the Member States.

As in *ASJP*, the Court of Justice gave its interpretation of the 'European rule of law' in a case that was not directly connected to the clear instances of rule of law-backsliding in Hungary and Poland. Instead, the Court of Justice's ruling was triggered by a preliminary ruling from a different Member State with the outcome of no violation of EU law. After this judgment, it is even more evident that Member States must respect European standards when they organise their judicial system. They may not change their judicial system in a way that is detrimental to the value of the rule of law as enshrined in Article 2 TEU and operationalised in Article 19(1) TEU.

3. Upholding the Rule of Law via the Court of Justice

3.1 The Independence of the Polish Supreme Court: *Commission v Poland I (C-619/18)*

Commission v Poland (C-619/18, Independence of the Supreme Court) (or Commission v Poland I) provided the first opportunity for the Court of Justice to take a stance on the compatibility of the proposed Polish judicial reforms.[159] The Commission brought the case against the reform of the Polish Supreme Court that lowered the retirement age for judges, thereby allowing the governing PiS party to appoint new judges to the Polish Supreme Court, including a new president of the Supreme Court. Traditionally, the Supreme Court in a liberal democracy is seen as the independent bulwark against any executive overreach. In the present case, the Polish Government sought to remove this barrier to achieve more power and eliminate any constitutional restraints on their legislative agenda. This course of action was at odds with the rule of law and the idea of judicial independence, as it essentially destroyed the independence of the Polish Supreme Court. Consequently, after unsuccessful attempts to engage in a dialogue[160], the Commission initiated an infringement proceeding under Article 258 TFEU against Poland to halt the new law's implementation.[161] The case would prove the first test, whether protecting the rule of law via the Court of Justice would be fruitful. Interestingly, Hungary joined before the Court of Justice in support of Poland. A sign of the closely aligned interest of both Member States in curtailing the competence of the Court of Justice regarding rule of law matters.

3.1.1 Background

After coming into power, the Polish Law and Justice party (PIS) in 2015 rolled out its political agenda, which mirrored the political changes that took place in Hungary after 2010.[162] However, "[t]he European Commission this time seem[ed] more alert, developing in the aftermath of the, by then, lost cause of Hungary's democracy a 'rule of law' mechanism."[163]

[159] *Commission v Poland (C-619/18) (Independence of the Supreme Court)*.
[160] Laurent Pech and Dimitry Kochenov, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation' No. 08/16 University of Groningen Faculty of Law Research Paper Series.
[161] *Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court (2 July 2018)* (European Commission 2018).
[162] Sadurski, *Poland's Constitutional Breakdown*.
[163] Leonhard Besselink and Jan-Herman Reestman, 'Editorial: Talking about European Democracy' 13 European Constitutional Law Review p. 207.

The Commission had grave concerns regarding the political agenda of the Polish Law and Justice Party. Specifically, regarding the reform of the judiciary, which was at odds with the value of the rule of law enshrined in Article 2 TEU. "The Commission's concerns relate[d] primarily to the effective functioning and independence of the Polish Constitutional Tribunal, in particular the appointment of judges, and the effectiveness of an independent and legitimate constitutional review of new legislation."[164] The Commission initiated a rule of law dialogue with the Polish government. However, this process did not yield any substantive results, and the Polish government did not disengage from its previous agenda, which intended a complete overhaul of the judiciary.[165] "In the summer of 2017, the situation in Poland deteriorated with the Parliament's adoption of four legislative acts which, in the Commission's assessment, raise[d] grave concerns about judicial independence and amplif[ied] the systemic threat to the rule of law."[166] As an ultima ratio, the Commission decided to initiate infringement proceedings according to Article 258 TFEU, alleging an infringement of the value of the rule of law via Article 19 (1) TEU.

3.1.2 The Court of Justice's Judgment

The Court of Justice delivered its judgment on 24 June 2019.[167] The judgment commenced by pointing out that according to the two precedent judgments of *ASJP* and *LM,* Article 19 (1) TEU gives concrete expression to the value of the rule of law in Article 2 TEU.[168] Thus, the Court of Justice affirmed that the expressed but – so far – not legally invocable values of Article 2 TEU are mirrored in other Treaty articles. Regarding the material scope of the second subparagraph of Article 19 (1) TEU, and in response to the argument raised by Poland[169], the Court of Justice highlighted that the expression of "fields covered by Union law" is not limited by the material scope of Article 51 (1) CFR.[170] It is not necessary to prove an actual implementation of EU law to invoke Article 19 (1) TEU. Applying Article 19 (1) TEU in *ASJP* was not invoked by the implementation of the EU law of the measure in question. Instead,

[164] Alison McDonnell and others, 'Editorial Comments: About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire' 54 Common Market Law Review pp. 1309, p. 1314.
[165] See Mateusz Morawiecki, *White Paper on the Reform of the Polish Judiciary* (Chancellery of the Polish Prime Minister 2018).
[166] McDonnell and others, 'Editorial Comments: About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire' p. 1314.
[167] *Commission v Poland (C-619/18) (Independence of the Supreme Court)*.
[168] Cf. Ibid.
[169] Poland had argued that the material scope of Article 19 (1) TEU, following the precedent case C-64/16, is only applicable when Member States enact national legislation according to EU law (para. 40).
[170] Cf. *Commission v Poland (C-619/18) (Independence of the Supreme Court)* para. 50.

Article 19 (1) TEU was applicable since the national judicial body could rule on questions of application or interpretation of EU law and therefore fell within the concept of 'fields covered by EU law'.[171]

In brief, the Polish Supreme Court falls under the notion of 'field covered by EU law' since it applies and interprets EU law. Therefore, 'The New Law on the Supreme Court' is potentially liable to impair the independence of the Polish Supreme Court. "That requirement that courts be independent, […], forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance […]"[172] for all rights which individuals derive under EU law. Concerning the lowering of the retirement age of judges at the Supreme Court, the Court of Justice pointed out that there is a requirement for external independence[173], and a requirement for internal independence in EU law deriving from *Wilson*.[174] These independence requirements aim to dispel any 'reasonable doubts in the minds of individuals as to the imperviousness of that body'.[175] In this way, the Court of Justice used a similar concept of a court's independence to the ECtHR case-law.[176] In the present case, the Court of Justice specifically highlighted the significant depreciation of the external independence of judges at the Polish Supreme Court.[177]

In conclusion, the Court of Justice observed that, first, the doubts surrounding the judicial reform could not be dispelled by the arguments brought forward by Poland.[178] Hence, "[t]he Republic of Poland has not demonstrated that the measure being challenged constitutes an appropriate means for the purpose of reducing diversity of age limits […]."[179] Finally, the Court of Justice found that the objective brought forward by Poland was not legitimate. Therefore, it declared a breach of the second subparagraph of Article 19 (1) TEU.

Concerning the discretionary power of the President of the Polish Republic to prolong the service of judges after they have reached the mandatory retirement age, the Court of Justice,

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[171] Cf. Ibid.
[172] Ibid.
[173] Cf. Ibid.
[174] Cf. Ibid.
[175] Cf. Ibid.
[176] The concept of internal and external independence of courts stems from the rich case-law of the ECtHR on judicial independence. See Sillen (n 153).
[177] Cf. *Commission v Poland (C-619/18) (Independence of the Supreme Court)* para. 76.
[178] Cf. Ibid.
[179] Ibid.

once again, pointed to the test of 'reasonable doubts in the minds of individuals as to the imperviousness of that body' which serves as a benchmark to assess judicial independence.[180] While the first measure of 'The New Law on the Supreme Court' aimed to appoint new judges, the second measure aimed to exercise significant influence on the judicial careers of judges at the Supreme Court. The Court of Justice stated that it is up to the Member States to choose such a mechanism in national law. However, the conditions and the procedure must abide by the principle of judicial independence.[181] Such a mechanism must be designed so that judges are protected from potential temptations to give in to external intervention.[182]

The Court of Justice concluded that the mechanism foreseen by the new law did not satisfy these requirements.[183] First, the decision of the President of the Republic is not subject to any judicial review.[184] Second, Poland's argument that the President may follow the advisory Opinion of the National Council of the Judiciary is not sufficient to guarantee the independence of the decision.[185] Finally, the Court of Justice found that the mechanism provided in 'The New Law of the Supreme Court' fails the 'imperviousness test' and, therefore, infringes on the second subparagraph of Article 19 (1) TEU.

3.1.3 Comment

In this first infringement proceeding regarding the independence of the judiciary in a Member State of the EU, the Court of Justice used Article 19 (1) TEU to protect the value of the rule of law in the EU legal order. First, to assume competence over the reform of a national judiciary, the Court of Justice distinguished the competence limitation under Article 51 CFR from the notion of 'fields covered by EU law' under Article 19 (1) TEU. Second, the Court of Justice interpreted Article 19 (1) TEU so that Member States must respect and safeguard the independence of their judicial bodies that apply EU law. Therefore, taking inspiration from the case-law of the ECtHR, the Court of Justice proved to be a vital and resistant body against the Member States' government's judicial power grab.

[180] Cf. Ibid.
[181] Cf. Ibid.
[182] Cf. Ibid.
[183] Cf. Ibid.
[184] Cf. Ibid.
[185] Cf. Ibid.

Interestingly, the Court of Justice and the AG differed in their route to these findings. While the AG denied the applicability of Article 47 CFR in the present proceedings, given the limits of Article 51 thereof, the Court of Justice used the concepts of Article 47 CFR to strike down the contested reform. The Court of Justice linked Article 19 (1) TEU to Article 47 CFR by highlighting that "[i]t follows from all of the foregoing that the second subparagraph of Article 19 (1) TEU required Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law."[186] Thus, the Court of Justice used the concepts of an independent judiciary under Article 19 (1) TEU and Article 47 CFR complementarily.

The Court of Justice used Article 47 CFR to confirm the independence requirements of Article 19 (1) TEU without clearly taking a stance as to whether Article 47 CFR would be applied independently to the proceedings. "To ensure that a body […] is in a position to offer such protection, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, […]."[187] Therefore, the Court of Justice seemed much more willing to apply the concepts and the case-law developed under Article 47 CFR to proceedings under Article 19 (1) TEU. However, the Court of Justice did not provide a clear-cut reasoning of why the concepts of Article 47 CFR should apply under the material scope of Article 19 (1) TEU, despite the limitations of Article 51 CFR.

3.2 The Independence of the Polish Ordinary Courts: *Commission v Poland II (C-192/18)*

In Commission v Poland (C-192/18, Independence of Ordinary Courts) (or Commission v Poland II) the Commission brought the second infringement proceeding against Poland regarding the overhaul of the Polish judiciary.[188] "The Commission's 'key legal' concern about [the new Polish law on the Ordinary Courts Organization] relate[d] to gender discrimination, as it consider[ed] the introduction of a different retirement age for female judges (60 years) and male judges (65 years) to amount to a breach of Article 157 TFEU and Directive 2006/54

[186] Ibid.
[187] Ibid.
[188] This section builds upon the author's publication in Niels F. Kirst, *The Independence of Judges in Polish's Courts: the CJEU Judgement in Commission v Poland (C-192/18) (19 November 2019)* (Brexit Institute 2019). For the case before the Court of Justice see *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)*.

on gender equality in employment."[189] However, the claim by the Commission was also based upon a general infringement of the independence of the Polish judiciary. "[T]he Commission also raise[d] concerns […] that by giving the Minister of Justice the discretionary power to dismiss and appoint Court Presidents, and to prolong the mandate of judges which have reached retirement age, the independence of the Polish courts will be undermined."[190] The Commission argued that the combination of both measures violated the principle of effective judicial protection according to Article 19 (1) TEU, read in conjunction with Article 47 CFR. The previous judgment in *ASJP* is crucial in understanding this new line of argumentation by the Commission.[191] While the Commission was somewhat hesitant in an earlier case against Hungary (*Commission v Hungary (C-286/12))*[192], despite a similar outset and facts, *ASJP* changed the rules of the game so that the Commission could bring a claim based on effective judicial protection under Article 19 (1) TEU.

3.2.1 Background

After the Polish Supreme Court reform, a modification of the ordinary courts was a second reform proposal on the agenda of the ruling PiS party in Poland.[193] The reform of the ordinary courts was designed quite similarly to the reform of the Polish Supreme Court and would allow the Polish Government to appoint many new judges to the ordinary courts. It was critically assessed by the Council of Europe's Venice Commission[194] and part of the constitutional regression in Poland after the beginning of the PiS government in Poland in 2015.[195] The reform of the ordinary courts was initiated by the Law and Justice government in Poland, with the declared aim to dismantle a legal system that, according to PIS, is corrupt and subservient to post-communist elites.[196] The Commission considered the reform of the ordinary courts as a failure to fulfil obligations under EU law, considering the founding values of the EU. Specifically, the rule of law is enshrined in Article 2 TEU. Therefore, the Commission initiated

[189] McDonnell and others, 'Editorial Comments: About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire' p. 1316.
[190] Ibid.
[191] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)*.
[192] *European Commission v Hungary (C-286/12)* European Court Reports Court of Justice of the European Union.
[193] Sadurski, *Poland's Constitutional Breakdown*.
[194] Richard Barret and others, *Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts* (2017).
[195] Sadurski, *Poland's Constitutional Breakdown*.
[196] See Jakub Jaraczewski, *Age is the limit? Background of the CJEU case C-619/18 Commission v Poland (28 Mai 2019)* (VerfBlog 2019).

a legal dialogue with the Polish Government.[197] However, the ritual exchange of letters between the Commission and the Polish Government did not allow the parties to find a solution.[198] Consequently, the Commission decided to bring a second case against that reform in front of the Court of Justice.

3.2.2 The Court of Justice's Judgment

The Court of Justice delivered its judgment on 5 November 2019.[199] In the proceedings, the Commission challenged the Polish reforms on two grounds. First, on the ground that the new law prescribed mandatory retirement ages for female judges, by the age of 60, and male judges, by the age of 65, whereas those ages were previously set at 67 years for both sexes. According to the Commission, this infringed the principle of non-discrimination based on sex in primary EU law of Article 157 TFEU and secondary EU law as by the 'equal pay for equal work' Directive 2006/54. Second, the Commission challenged the discretionary power of the Minister for Justice to prolong the tenure of judges of the ordinary courts to 65 for female and 70 for male judges. The Commission argued that this discretionary power awarded to a member of the executive amounted to an infringement of the principle of effective legal protection, which derives from Article 19 (1) TEU read in combination with Article 47 CFR. Further, the Commission argued that the discretionary power of the Minister for Justice to extend the tenure of judges without clear criteria, timeframe, motivation, and without the possibility of appeal for the respective judge infringed the principle of judicial independence in EU law.

Regarding the first complaint, the Court of Justice had to analyse if the pension schemes covered by the judges of the ordinary courts fall under the 'concept of pay' within the meaning of Article 157 TFEU.[200] In its analysis of the three factors, the Court of Justice determined that the pension scheme of the Polish judges does fall within the 'concept of pay' in the meaning of Article 157 TFEU and, thereby, followed the arguments of the Commission by declaring Article 157 TFEU applicable to the case. Furthermore, concerning the applicability of Directive 2006/54 to the provisions of the reform of the Polish ordinary courts, the Court of Justice found that the judges of the ordinary courts are considered public servants and therefore fall within

[197] Pech and Kochenov, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation'.
[198] Cf. *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)* para. 31.
[199] Ibid.
[200] Article 157 (1) TFEU provides: "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied." Article 157 (1) TFEU expresses the equal pay for equal work principle in EU law.

the material scope of Chapter 2 of the Directive, which explicitly deals with pension schemes of public servants.[201] In its analysis, the Court of Justice found that the lowering of the retirement age impinges on Article 5 (1) (a) and Article 9 (1) (f) of the Directive, which explicitly prohibit fixing different retirement ages based on sex, and Article 157 TFEU. In its defence, the Polish Government invoked Article 157 (4) and Article 3 of Directive 2006/54 by arguing that the measures of the Polish reform amounted to a positive action of indirect compensation for women. Arguing that the early retirement measure compensates women for the burden of motherhood and raising children, which prevents them from having a comparable successful career to a man. The Court of Justice found that this argument could not succeed and that the measure would further discriminate against women than support their employment or promotion.

The second complaint of the Commission focused on the new discretionary power of the Minister for Justice in Poland to prolong the tenure of judges. The Commission argued that this power given to the Polish Minister for Justice would infringe on the principle of 'effective legal protection', which derives from Article 19 (1) TEU[202] read in conjunction with Article 47 CFR.[203] In its argument, the Commission relied heavily on *ASJP,* in which the Court of Justice used the combined application of Article 19 (1) TEU, 4 (3) TEU and Article 47 CFR.[204] As is known, in *ASJP*, the Court of Justice derived remit to safeguard the judicial independence of the judiciary in the Member States by the combined reading of the three articles. The Commission argued that the mechanism of prolongation of service is not in compliance with the principle of judicial independence, which is inherent in a system of legal remedies ensuring effective judicial protection in EU law.[205] Poland contested the reading of the mechanism by the Commission. On the admissibility of the second complaint, Poland invoked in its defence the principle of procedural autonomy by arguing that the national judicial system does not fall within the competence of the EU law. Therefore, Article 19 (1) TEU does not apply to the case.

[201] Directive 2006/54, or the Equal Treatment Directive, was adopted under the legal basis of Article 157 TFEU and gave further expression to the principle promulgated by that Article. The Directive is comparable to the Equal Pay Act of 1963 in the United States. Specifically, Chapter 2 of the Directive on 'equal treatment in occupational social security schemes' was of crucial importance for the claim of the Commission.
[202] Article 19 (1) TEU, second subparagraph, provides: "Member States shall provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law." In its recent case-law, the Court of Justice has interpreted that Article in the way that it is upon the Court of Justice to safeguard the effective legal protection of the judiciary system within the Member States.
[203] Article 47 CFR provides the 'right to an effective remedy and a fair trial' in EU law. However, the scope of the CFR is limited by Article 51 thereof as it applies only to areas covered by EU law.
[204] See Pech and Platon (n 135).
[205] Cf. *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)* para. 87.

The Court of Justice did not follow the reasoning proposed by the Polish government's agent. First, it treated the applicability of Article 19 (1) TEU to the situation in question. The rationale of the Court of Justice was as follows: since the ordinary courts in Poland potentially apply EU law, they are within the material scope of Article 19 (1) TEU. This requires that the courts meet the standard of effective judicial protection, which the Article requires. The power of the Polish Minister for Justice threatens this effective judicial protection. The Court of Justice found that the mechanism of the Polish Minister for Justice to prolong the tenure of selected judges actively undermines their external and internal judicial independence in the proceedings in front of them. Since the measure "is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might have been intended to enable the Minister for Justice, acting in his discretion, to remove, […], certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post."[206] This threatens the imperviousness of the judge concerned with any external pressure that might influence its internal law-making for future cases.

In conclusion, the Court of Justice followed the Commission's argument entirely and found that the lowering of the retirement age fails to fulfil the obligations arising out of Article 157 TFEU and Directive 2006/54 since it discriminates based on sex and that the mechanism for prolongation by decision of the Minister for Justice fails to fulfil the obligations under Article 19 (1) TEU since it impedes the principle of effective judicial protection.

3.2.3 Comment

In this second case regarding the reform of the Polish judiciary, the Court of Justice affirmed its earlier reasoning in *Commission v Poland (Independence of the Supreme Court)*.[207] The crucial finding, in this case, was that lowering the retirement age combined with the mechanism for the Polish Minister of Justice to prolong the tenure of judges over retirement is within the Court of Justice's jurisdiction, and it infringes on the principle of effective judicial protection. To determine the meaning of Article 19 (1) TEU, the Court of Justice relied on the concepts of Article 47 CFR without actively affirming the applicability of Article 47 CFR to the present proceedings. The Court of Justice is cautious in applying the CFR directly to a rule of law

[206] Ibid.
[207] *Commission v Poland (C-619/18) (Independence of the Supreme Court)*.

proceeding since the scope of the CFR is limited by Article 51 thereof. However, it supports the doctrine of combined reading which allows the Court of Justice to use the concepts CFR as general principles when applying Treaty articles.[208]

The Court of Justice follows this combined reading to find that the mechanism of the Polish Minister for Justice infringes on the principle of judicial independence. The argument is plausible as a judge is under the arbitrary power of the Polish Minister for Justice after he reaches the mandatory retirement age, which will influence his decision-making. Under these circumstances, it is not verifiable if a judge holds independent judgments. As the Commission highlights, "[t]he provision at issue thus undermines the personal and operational independence of serving judges."[209] The Court of Justice, thus, found that the mechanism supports the appearance of a judicial system which only formalistically follows the rule of law while its actually under the influence of the executive branch.

The Polish Government's invocation of the principle of procedural autonomy regarding the reform of the national judiciary fell on deaf ears at the Court of Justice. Instead, it reiterated the principle of effective judicial protection as a cornerstone of the EU legal order, which requires judicial independence from courts which apply EU law. This principle of judicial independence comprises the irremovability of judges, which the Court of Justice further defined as an essential principle but not absolute.[210] Additionally, the Polish judicial reform violated Article (9) (f) of Directive 2006/54 and Article 157 TFEU. Therefore, it was foreseeable that the Court of Justice would strike it down. It should be added that it took almost one year for the Court of Justice to decide on the issue. In the meantime, the Polish legislator re-amended the law after it became aware of this apparent non-compliance with EU law and adjusted the retirement age for both sexes on a unitary basis. This highlights the adaptability, flexibility, and creative compliance of the EU's rule of law backsliding Member States.[211]

[208] For in-depth study of the interrelation between the three fundamental rights sources in the EU (General Principles, CFR, ECHR) see Robert Schütze, 'Three 'Bill of Rights' for the European Union' Vol. 30 Yearbook of European Law pp. 131.
[209] *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)* para. 90.
[210] Cf. Ibid.
[211] Renáta Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU' Bridge Network - Working Paper 7, 2020 <https://bridgenetwork.eu/publication/funding-illiberal-democracy-the-case-for-credible-budgetary-conditionality-in-the-eu/>.

Poland's argument about the role of women as mothers and primary raisers of children reveals a more profound conservative conception of the view on society of the governing PIS party in Poland. Arguing that "the possibility of early retirement, therefore, constitutes indirect compensation for the difficulties that they [women] thus suffer generally [sic]."[212] reveals a conservative picture of society. Notably, in this case, the Court of Justice also protects the rule of law in Poland via the principles of equality law. This shows a further road for the Court of Justice in using the principles of social rights to protect the rule of law.

In the aftermath of the case, one possibility for the Commission would have been to bring a new complaint against Poland since the laws of the polish judiciary have changed after the proceedings at the Court of Justice were commenced. The retirement age has been equalised – and the extension of active service is now decided by the National Court Register rather than the Polish Minister for Justice.[213] Poland is thereby trying to circumvent the restraints of EU law. Further, the Polish Government stated, "[t]he verdict concerns a historical state which does not reflect the current regulations."[214] Therefore, in the case of Poland, the Commission is confronted with rapidly changing laws that make it difficult to bring substantive legal complaints that will allow restoring the status quo.

3.3 No Disciplinary Regime for Polish Judges: *Commission v Poland III (C-791/19)*

Commission v Poland (C-791/19, Disciplinary Regime for Judges) (or Commission v Poland III) was the third infringement proceeding by the Commission against the reform of the Polish judiciary.[215] Initiated by the Commission in October 2019, the focus of the infringement action was on a so-called disciplinary chamber that was erected by the Polish government to sanction and discipline judges for their rulings.[216] This new chamber was at odds with the principle of the rule of law in the EU. The case presented a follow-up infringement proceeding to a similar matter with the Court of Justice had to deal in Miasto Lowicz, a preliminary reference by a

[212] *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)* para. 57.
[213] See Alexandra Brzozowski, 'Poland's 2017 judicial reform broke EU law, bloc's top court rules (5 November 2019)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/justice-home-affairs/news/polands-2017-judicial-reform-broke-eu-law-blocs-top-court-rules/>.
[214] *Position of the Ministry of Foreign Affairs of the Republic of Poland following the judgment of the CJEU in Case C-192/18 Commission v Poland (5 November 2019)* (Polish Ministry of Foreign Affairs 2019).
[215] *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)*.
[216] Thomas Wahl, *Commission Refers New Disciplinary Regime for Polish Judges to CJEU (11 January 2020)* (eucrim.eu 2020).

Polish court.[217] In the Miasto Lowicz judgment the Court had already indicated that it regarded the new disciplinary regime for Polish judges as non-compliant with the principle of the rule of law in the EU. *Commission v Poland III* gave the Court of Justice the chance to declare in an infringement proceeding whether the disciplinary regime would comply with EU law. The infringement procedure, therefore, presented an opportunity to directly address the issues surrounding the disciplinary chamber.

3.3.1 Background

In 2017, Poland implemented a new disciplinary regime that affected judges of both the Supreme Court and the ordinary courts. As part of this reform, a new chamber called the Disciplinary Chamber (Izba Dyscyplinarna) was established within the Supreme Court (Sąd Najwyższy) to handle disciplinary cases involving judges from both the Supreme Court and the ordinary courts. Notably, "[…] the Disciplinary Chamber [was] made up exclusively of new judges who were not already sitting within the Supreme Court, as well as the fact that those new judges benefit from, inter alia, a very high level of remuneration […]."[218] Moreover, the new judges for the Disciplinary Chamber were exclusively selected by the controversial and politically appointed National Council of the Judiciary (Krajowa Rada Sądownictwa).

The Commission contended that by creating this new disciplinary regime, Poland had violated its obligations under Article 19 (1) TEU and Article 267 TFEU and initiated legal action against Poland for non-compliance in October 2019. The Commission argued that considering the specific circumstances in which the Disciplinary Chamber was created, the characteristics of the chamber itself, and the way its members were appointed, it failed to ensure the necessary impartiality and independence required.[219] Notably, five other Member States intervened on the side of the Commission against Poland in the case. "Belgium, Denmark, the Netherlands, Sweden, and Finland support[ed] the European Commission and demand[ed] the Court of Justice declares that the Polish government violates the Union law […]."[220] This showed the gearing up of support among the Member States to not tolerate the rule of law breakdown in

[217] *Miasto Łowicz (C-558/18)* European court reports Court of Justice of the European Union.
[218] *The disciplinary regime for judges in Poland is not compatible with EU law (15 July 2021)* (Press Office of the Court of Justice of the European Union 2021).
[219] Cf. Nuno Piçarra and Sophie Perez, *Summaries of judgments: Commission v Poland (Régime disciplinaire des juges) | Wabe (4 October 2021)* (UNIO - EU Law Journal 2021).
[220] Anna Wojcik, *5 Member States support the European Commission in Case 791/19: what they said (4 December 2020)* (ruleoflaw.pl 2020).

Poland. Moreover, it was a novelty as those Member States had not intervened in the previous two infringement cases on the Polish overhaul of the judiciary.

Notably, this proceeding coincided with a similar case before the ECtHR in which the ECtHR for the first time pronounced its opinion on the Polish reform of the judiciary. The Xero Flor case centred around a complaint from a Polish company seeking compensation from the State for one of its products in proceedings before the Polish courts.[221] In its judgment, the ECtHR found that the election of judges to the Polish Constitutional Court in 2015 was irregular, thus violating the applicant's right to a "tribunal established by law" as guaranteed under Article 6 (1) ECHR.[222] The judges in Strasbourg criticized the fact that a judge occupied a seat on the Polish Constitutional Court despite it having already been legally filled by the old parliament (or Sejm). They highlighted that following the 2015 elections, the authorities disregarded relevant Polish Constitutional Court judgments, thereby encroaching upon the Polish Constitutional Court's role as the final interpreter of the Polish Constitution and the constitutionality of laws. Ultimately, Poland lost the case before the ECtHR. This was a significant development as the Polish government now not only clashed with the Court of Justice's authority but additionally with the ECtHR's.

3.3.2 The Court of Justice's Judgment

On 15 July 2021, the Court of Justice Grand Chamber ruled in the case.[223] In its judgment the Court of Justice found that the disciplinary regime for judges in Poland is not in line with EU law. The Court of Justice upheld all Commission's complaints and found that Poland had failed to fulfil its obligations under EU law. The judgment highlighted several rule of law concerns.

Firstly, it criticizes the lack of impartiality and independence of the Disciplinary Chamber of the Supreme Court, which was established as part of broader reforms affecting the Polish judiciary. The process for appointing judges to the Supreme Court, including members of the Disciplinary Chamber, is seen as heavily influenced by the Polish executive and legislature, raising doubts about its independence.[224] Secondly, the Court raised concerns about the disciplinary regime's potential for political control over judicial decisions and the pressure it

[221] *XERO FLOR w POLSCE sp. z o.o. v. POLAND* European Court of Human Rights.
[222] Cf. Thorsten Wahl, *Poland: Rule-of-Law Developments April – June 2021 (24 June 2021)* (eucrim.de 2021).
[223] *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)*.
[224] Ibid.

may exert on judges. By allowing the classification of judicial decisions as disciplinary offenses, it could undermine the independence of the courts.[225]

Thirdly, the Court of Justice found that the discretionary power of the President of the Disciplinary chamber to arbitrarily designate the disciplinary tribunal with jurisdiction to hear the disciplinary proceedings against judges of the ordinary courts does not meet the requirement of a tribunal established by law.[226] Fourthly, Poland was found to have failed in guaranteeing timely examination of disciplinary cases against judges of ordinary courts and respecting the rights of defence, thereby undermining their independence. Particularly, Polish judges may fear that disciplinary proceedings be brought before them that fail to meet the requirements of a fair trial.[227] Lastly, the Court of Justice noted that national judges face disciplinary proceedings for making references for preliminary rulings to the Court of Justice under Article 267 TFEU. This undermines their right and obligation to seek clarification on EU law matters and hampers the system of judicial cooperation between national courts and the Court of Justice.[228]

Furthermore, the Court of Justice's judgment confirmed the earlier Repubblika ruling and the non-regression principle. "The Member States are […] required to ensure that […] any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges."[229] Overall, the judgment affirms the earlier jurisprudence of the Court of Justice in *Commission v Poland I* and *Commission v Poland II*. As a result of the Court's findings, Poland was required to take necessary measures to rectify the situation and either abolish or align its disciplinary regime with EU law.

3.3.3 Comment

The third infringement proceeding against Poland over its judicial reforms in *Commission v Poland (C-791/19, Disciplinary Regime for Judges)* presents the third victory for the Commission. Judicially, the Court of Justice seem to have fully consolidated its new rule of law jurisprudence based upon Article 19 (1) TEU. "[…], the ECJ seems to have left the stage

[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.

of doctrinal innovation and entered the stage of consolidation and refinement."[230] *Commission v Poland III*, therefore, leaves a legal landscape in which the principle of the rule of law is internalised in the Court of Justice's jurisprudence via Article 19 (1) TEU. However, as the same time this puts the Court of Justice into a clash with the Polish government and the captured Polish judiciary. As Spieker highlights, while the Court of Justice judgment is a legal victory for the Commission, its implementation is not secure. "While these decisions might be applauded as a legal victory for the Union's common values, the struggle will now shift to the level of enforcement."[231]

Pech finds drastic words for the deterioration of the Polish justice system. "[…], Polish authorities and their puppet "courts" have now crossed the Rubicon and under the pretext of defending the Polish Constitution, are now openly refusing to recognise the jurisdiction of both the ECJ and the ECtHR over judicial independence matters."[232] Furthermore, he harshly criticised the Commission for bringing the infringement proceeding too late and overwhelming failing to fulfil its role as guardian of the Treaties. "[…] the Guardian of the Treaties has failed to prevent the progressive emergence of a situation where the independence of the Polish judicial system as a whole has been structurally compromised."[233] Accordingly, the Commission needs to find new ways to address the rule of law backsliding in Poland. While the third infringement proceeding brought the third victory before the Court of Justice the Polish judiciary continues to deteriorate.

As scholars had already anticipated, the Polish government did not fully implement the Court of Justice's judgment in *Commission v Poland III*. "Rather than changing its course, the Polish Government continues to escalate the conflict and instrumentalize its captured constitutional judiciary."[234] Therefore, in September 2021, the Commission launched an Article 260 TFEU proceeding for the non-compliance by the Polish authorities with the judgment. "In a historic move, the Commission is seeking for the CJEU to impose a daily penalty payment on Poland

[230] Luke Dimitrios Spieker, 'The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland' Vol. 59 Common Market Law Review pp. 777, p. 810.
[231] Ibid.
[232] Laurent Pech, *Protecting Polish Judges from Political Control (20 July 2021)* (VerfBlog 2021).
[233] Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)' p. 161.
[234] Spieker, 'The conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland' p. 810.

for as long as the measures imposed by the Court's order are not fully implemented."[235] However, the case has not been referred to the Court of Justice, as the Commission seeks compliance via the milestones and targets of the NGEU.[236]

3.4 The Independence and Privacy of Judges: *Commission v Poland IV (C-204/21)*

In Commission v Poland (C-204/21, Independence and Privacy of Judges)[237] *(or Commission v Poland IV)* the Commission brought the fourth infringement proceeding against Poland for its overhaul of the judiciary.[238] The case centred around Poland's 2019 controversial judicial reforms. In December 2019, the Polish Parliament (Sejm) rushed through the legislative process amendments to the Law on the Common Courts and the Law on the Supreme Court (the Amending Law).[239] Those amendments were a response to rulings by the Court of Justice and the (at that time independent) Polish Supreme Court regarding disciplinary procedures against sitting judges.[240] The amendments introduce a series of new disciplinary offences for judges and prohibit the questioning by another court or judge of the legitimacy of any judge appointed by the President of Poland. Those amendments were in clear contravention of the Polish Supreme Court and the Court of Justice judgments. Critics had called this controversial Polish measure the "Muzzle Law" since it allowed the government to dismiss judges whose rulings it does not approve of and it subjected judges who are criticizing the government's reforms to disciplinary proceedings at a specifically created chamber (the Disciplinary Chamber).[241]

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[235] Renáta Uitz, *The Price of Thrashing the Rule of Law: EC Requests CJEU to Impose Financial Sanctions on Poland (10 September 2021)* (Bridge Network EU 2021).
[236] The Next Generation EU (NGEU) fund, formally known as the Recovery and Resilience Facility (RRF), is a significant financial instrument established by the EU to help Member States recover from the economic and social impacts of the COVID-19 pandemic. The NGEU fund is part of the EU's broader efforts to support economic recovery, strengthen resilience, and promote sustainable growth across the Member States.
[237] *Commission v Poland (C-204/21) (Independence and Privacy of Judges)*.
[238] This section builds upon the author's publication in Niels F. Kirst, *Better late than never: The 2019 Polish Judicial Reform creating a Disciplinary Chamber and enacting a Muzzle Law violated EU Law (7 June 2023)* (dcubrexitinstitute.eu 2023).
[239] Cf. *PACE rapporteurs deeply regret signing into law of controversial amendments to Common Courts and Supreme Court laws (6 February 2020)* (Parliamentary Assembly of the Council of Europe 2020).
[240] Cf. 'Poland: Veto Law Punishing Judges for Criticism (28 January 2020)' *Human Rights Watch* (Budapest, Hungary) <https://www.hrw.org/news/2020/01/28/poland-veto-law-punishing-judges-criticism>.
[241] Laurent Pech, Wojciech Sadurski and Kim Lane Scheppele, *Open Letter to the President of the European Commission regarding Poland's "Muzzle Law" (9 March 2020)* (VerfBlog 2020).

3.4.1 Background

In response to the adoption of the Amending Law in December 2019, the Commission initiated infringement proceedings against Poland, alleging violations of several provisions of EU law. The Commission argued that the Amending Law restricted or excluded access to an independent and impartial tribunal previously established by law, thereby infringing upon individuals' rights under EU law. Additionally, the Commission claimed that the jurisdiction granted to the Disciplinary Chamber of the Supreme Court in matters concerning the status of judges, compromised the independence of those judges. Furthermore, the Commission contended that the requirement for judges to disclose information about their public and social activities, including political party membership, violated their rights to privacy and the protection of personal data as protected via the CFR. Notably, also in this case, as in C-791/19, a group of Member States supported the Commission in its claims before the Court of Justice. It was the same group of Member States consisting of Belgium, Denmark, Netherlands, Finland, and Sweden which showed the heightened awareness and willingness of Member States to confront rule of law backsliding Member States before the Court of Justice.

Notably, an array of international organisation condemned the quickly adopted Amending Law as infringing on the rule of law and the independence of the judiciary. Human Rights Watch described the Amending Law as "draconian restrictions on judicial independence".[242] The Parliamentary Assembly of the Council of Europe (PACE) rapporteurs on Poland "deeply regretted" the signing into effect of the Amending Law.[243] Furthermore the Venice Commission issued a critical Opinion on the Amending Law describing it as "further undermining the independence of the judiciary" in Poland.[244] An opinion by the Organization for Security and Co-operation in Europe (OSCE) stated that the Amending Law "failed to conform to the principles of democratic law-making".[245] Finally, the EP, in an Article 7 TEU resolution, denounced the Amending Law as "abandoning the model of power-sharing between

[242] 'Poland: Veto Law Punishing Judges for Criticism (28 January 2020)'.
[243] *PACE rapporteurs deeply regret signing into law of controversial amendments to Common Courts and Supreme Court laws (6 February 2020)*.
[244] Richard Barrett and others, *Joint Urgent Opinion of the Venice Commission no Amendments to the Law on the Common Courts, the Law on the Supreme Court, and some Other Laws* (2020).
[245] Marta Achler, Andras Sajo and Jan van Zyl Smit, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of December 2019)* (2020).

the President of the Republic of Poland and the judicial community enshrined in Article 183(3) of the Polish Constitution".[246]

3.4.2 The Court of Justice's Judgment

On 5 June 2023, the Court of Justice Grand Chamber followed the AG's Opinion and upheld the Commission's complaint against the Polish judicial reform in its judgment.[247] The judgment shed light on the ongoing conflict between the Polish government's judicial overhaul and the protection of the rule of law and judicial independence enshrined in Article 19 (1) TEU. The Court of Justice structured its findings on the Polish Amending Law in five points:

On the admissibility, the Court of Justice affirmed that the responsibility for assessing a Member State's adherence to values and principles such as the rule of law, effective judicial protection, and judicial independence rests with that Member State itself. However, when exercising their authority in organizing the justice system, Member States must comply with their obligations under EU law.[248] They are therefore obligated to prevent any regression in their judicial system that would undermine the independence of judges, considering the EU value of the rule of law enshrined in Art. 2 TEU.[249] This fundamental value, which is deeply intertwined with the EU's identity, is expressed through legally binding obligations that Member States cannot disregard by relying constitutional provisions or constitutional case-law.[250]

First, the Court of Justice reaffirmed its previous findings of *Commission v Poland III* that the disciplinary chamber at the Polish Supreme Court does not meet the standards of independence and impartiality.[251] The Court of Justice emphasized that even the mere possibility of disciplinary consequences when applying EU law could undermine the independence of

[246] *European Parliament resolution on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM (2017)0835 — 2017/0360R(NLE)) (17 September 2020)* (Official Journal of the European Union 2020).
[247] *Commission v Poland (C-204/21) (Independence and Privacy of Judges)*.
[248] Ibid.
[249] See Leloup, Kochenov and Dimitrovs.
[250] See David Krappitz and Niels F. Kirst, *The Primacy of EU law Does Not Depend on the Existence of a Legislative Competence — Debunking the flawed analysis of the Polish Constitutional Court (20 October 2021)* (eulawlive.com 2021).
[251] *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)*.

national judges and creates reasonable doubts in the minds of individuals about the independence of those judges.[252]

Second, the Court of Justice stated that the provisions of the Polish law were overly broad and vague, creating a risk that they could be interpreted in a way that prevents national courts from seeking preliminary rulings from the Court of Justice. This interpretation would hinder access to an impartial and independent court, which is a fundamental right of EU citizens following Article 47 CFR. The Court of Justice's highlighted the importance of ensuring the ability of national courts to effectively enforce EU rights and seek guidance from the Court of Justice when needed. By failing to ensure this, Poland infringed upon Article 19 (1) TEU in conjunction with Article 47 CFR and Article 267 TFEU.[253]

Third, the Court of Justice examined the Commission's compliant that certain provision of the Amending law deprived Polish courts of the possibility to examine at their own motion whether other courts fulfilled the requirements of an independent and impartial tribunal previously established by law and whether individuals' rights before those courts deriving from EU law had been infringed. The Court of Justice upheld the Commission's complaint and found that Poland infringed not only Article 19 (1) TEU, read in conjunction with Article 47, but also the principle of the primacy of EU law.[254]

Fourth, the Court of Justice identified another violation of EU law in the requirement that only one national court has the authority to assess whether the conditions for effective judicial protection are met.[255] If another national court were to review compliance with EU law, it could be treated as disciplinary proceedings under the provisions of the Amending Law. This control by the Disciplinary Chamber undermined the rights of national courts under Article 267 TFEU.[256]

Fifth and finally, the Amending Law stipulated that Polish judges had to provide a written declaration disclosing their potential affiliations with associations, non-profit foundations, or

[252] *Commission v Poland (C-204/21) (Independence and Privacy of Judges)* para. 91.
[253] Ibid.
[254] Ibid
[255] See Tobias Lock, 'The doctrine of effective judicial protection in CJEU case law (21 June 2021)' (Academy of European Law).
[256] *Commission v Poland (C-204/21) (Independence and Privacy of Judges)* para. 263.

political parties. This information was to be published online. The disclosed data could reveal the religious, political, or philosophical beliefs of the judges, exposing them to the risk of unwarranted stigmatization if the information became freely accessible. The Court of Justice ruled that these provisions violated the fundamental rights of the judges, specifically their right to personal data protection and respect for private life protected by Article 7 and 8 (1) CFR and several provision of the GDPR.[257]

3.4.3 Comment

Overall, the judgment presents a further clarification that the Polish judicial reforms which have been ongoing since 2015 are against EU law. Pech highlights that "the Court's muzzle law judgment is as compelling as it is comprehensive."[258] It marked the fourth time that Poland loose in an infringement proceeding before the Court of Justice in defending its judicial overhaul. Specifically, the changes to the Polish courts and the undermining of direct access to the Court of Justice are clear violations of EU fundamental rights and values. They undermine the fundamental right of Polish EU citizens to access their rights under EU law.

Notably, the Court of Justice's judgment for the first time shifts the focus on indirect threats to judicial independence such as public stigmatization. This is also why the Polish government additionally infringed upon the GDPR with its Amending Law. Leichsenring argues that the Court should further follow this approach. "The focus should now shift to addressing attacks on judicial independence that occur outside the realm of the law, including through measures of public stigmatization. […]. With its clear finding that the publication of judges' personal data can lead to their stigmatization, the ECJ has taken an important initial step in this direction."[259]

However, it is unlikely that this judgment will change the stance of the Polish government in reversing its judicial overhaul. At the time of the judgment, Poland is in ongoing negotiations with the Commission to unlock money from the NGEU).[260] Therefore, in May 2022, Poland

[257] Ibid.
[258] Laurent Pech, *Doing Justice to Poland's Muzzle Law (11 Juni 2023)* (VerfBlog 2023).
[259] Til Leichsenring, *Poland's Extended Disciplinary System (2 July 2023)* (VerfBlog 2023)
[260] See 'Poland passes judiciary, wind farm laws in bid to unlock EU funds (9 February 2023)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/justice-home-affairs/news/poland-passes-judiciary-wind-farm-laws-in-bid-to-unlock-eu-funds/>.

also agreed to abolish the disciplinary chamber[261], in the hope of easing the conflict with Brussels and getting EU funds from the NGEU. To unlock that money Poland must fulfil certain milestones in its national Recovery and Resilience Plan[262], which include a restoration of judicial independence in the Polish judicial system.[263] So far, Poland's €35.4 billion authorized under the Recovery Fund remain frozen.[264]

Moreover, Poland prepares for parliamentary elections in 2023. Therefore, there is a high risk that the incumbent government will use *Commission v Poland IV* to tell a story of us (Poland) against them (EU).[265] Ultimately, Poland is, at the time of writing, heavily criticised for a proposed "Tusk Law"[266] which would undermine the opposition candidate and former European Council President, Donald Tusk, in the upcoming elections.[267] Therefore, the next infringement proceeding by the Commission against Poland is a foregone conclusion.[268]

Finally, the Polish authorities indicated via the Polish National Prosecutor's Office that they would not implement the Court of Justice's ruling and that it infringed upon certain provision in the EU Treaties.[269] Namely, the principle of conferred competences, the respect for the constitutional systems of Member States, and the principle of subsidiarity. This shows that the four infringement proceedings against Poland, while legally important, lacked to be implemented by the Member State. They exacerbated the judicial conflict between Poland and

[261] Daniel Tilles, 'Polish parliament approves abolition of judicial disciplinary chamber at heart of EU dispute (27 May 2022)' *Notes from Poland* (Krakow, Poland) <https://notesfrompoland.com/2022/05/27/polish-parliament-approves-abolition-of-judicial-disciplinary-chamber-at-heart-of-eu-dispute/>.
[262] For an overview of Poland's NRRP see *Laying the Foundations for Recovery: Poland (Factsheet) (June 2022)* (Publications Office of the European Union 2022).
[263] See Alicja Ptak, 'Poland and EU have agreed "milestones" to unblock funds, says Polish government (13 May 2022)' *Notes from Poland* (Krakow, Poland) <https://notesfrompoland.com/2022/05/13/poland-and-eu-have-agreed-milestones-to-unblock-funds-says-polish-government/>.
[264] See Kim Lane Scheppele and John Morijn, *Frozen: How the EU is Blocking Funds to Hungary and Poland Using a Multitude of Conditionalities (4 April 2023)* (VerfBlog 2023).
[265] See Aleks Szczerbiak, 'Can Poland's right-wing ruling party win this year's parliamentary election? (9 February 2023)' *Notes from Poland* (Krakow, Poland) <https://notesfrompoland.com/2023/02/09/can-polands-right-wing-ruling-party-win-this-years-parliamentary-election/>.
[266] See Wojciech Sadurski, *The Law to Take Out Tusk (31 May 2023)* (VerfBlog 2023).
[267] See Jacek Lepiarz, 'Poland: Will Donald Tusk be barred from holding office? (31 May 2023)' *Deutsche Welle* (Warsaw, Poland) <https://www.dw.com/en/poland-will-donald-tusk-be-barred-from-holding-office/a-65780554>.
[268] See Jorge Liboreiro, 'Polish President Andrzej Duda offers changes to law on 'Russian influence' amid growing criticism (3 June 2023)' *Euronews* (Brussels, Belgium) <https://www.euronews.com/my-europe/2023/06/02/polish-president-andrzej-duda-offers-changes-to-law-on-russian-influence-amid-growing-crit>.
[269] *Oświadczenie Prokuratury Krajowej w sprawie wyroku TSUE z 5 czerwca 2023 r (5 June 2023)* (2023).

the EU. This led to a fight for legal supremacy between Poland and the EU and presents a serious challenge to the Court of Justice's supremacy.

4. The Court of Justice Challenge for Supremacy

The Court of Justice's judgments in the rule of law crisis had a strong impact beyond a single Member State and on the entirety of the EU legal order. However, the Court of Justice's judgments are only one side of the coin. The implementation in the Member States is the other. Not always do Member States agree with the Court of Justice's rulings and implement the judgments, and not always do Member State courts comply with the rulings from Luxembourg.[270] "The relationship between national courts and the European Court of Justice is based on their *voluntary* cooperation."[271] This voluntary cooperation can become problematic during rule of law crises in the Member States. Compliance with Court of Justice's judgments is crucial to ensure that the rule of law in the Member States is upheld. In the Court of Justice's history, there have been several judgments from national constitutional or highest courts which opposed the Court of Justice's jurisdiction, jurisprudence, or competence. Three examples stick out. In the Danish *Ajos* case[272], which concerned the area of equal treatment under the EU Employment Directive, the Danish Supreme Court rejected to follow a preliminary reference from the Court of Justice.[273] In the *Taricco* saga[274], which concerned Member States' obligations under Article 325 TFEU to protect the financial interests of the EU, the Italian Constitutional Court unilaterally ended a dialogue with the Court of Justice due to unsatisfactory replies from Luxembourg.[275] Finally, in the *Weiss/PSPP* case[276], which concerned the ECB's quantitative easing program, the BVerfG reaffirmed its infamous ultra-vires control by disagreeing with a preliminary reference from the Court of Justice.[277]

Similarly, Hungary and Poland have commenced opposing the jurisprudence of the Court of Justice as a response to the firm and decisive rulings from Luxembourg in the rule of law crisis. In their view, the Court of Justice is intermingling with the internal affairs of a Member State

[270] This section builds upon the author's publication in David Krappitz and Niels F. Kirst, 'Operationalising the Treaties to Protect Democracy in Times of Emergency' in Daniel Sarmiento and Dolores Utrilla (eds), *EU Law in Times of Pandemic: The EU's Legal Response to Covid-19* (EU Law Live Press 2021).
[271] Robert Schütze, *Introduction to European law* (Cambridge University Press, 2012) p. 151.
[272] *Dansk Industri (DI) acting for Ajos A/S v The Estate of A (Case no. 15/2014)* Danish Court Reports Supreme Court of Denmark.
[273] Helle Krunke and Sune Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' Vol. 3 European Papers pp. 157.
[274] *Sentenza N. 115/2018* Italian Court Reports Constitutional Court of the Republic of Italy.
[275] Chiara Amalfitano and Oreste Pollicino, *Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note (5 Juni 2018)* (VerfBlog 2018).
[276] *Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15 -, Rn. 1-237*.
[277] Miguel Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court (6 Mai 2020)* (VerfBlog 2020).

and thereby overstepping its limited competencies. This was also the case in Polish Constitutional Court judgment, in 2021, in which it found various Treaty articles unconstitutional.[278] In case *K 3/21*, after a special request of the Polish Prime Minister, the Polish Constitutional Tribunal declared three European prerequisites as incompatible with the Polish Constitution.[279] First, it declared that Articles 1 and 4 (3) TEU are "incompatible" with the Polish Constitution. Notably, the ever-closer union clause and the principle of sincere cooperation between the Member States and the European institutions. Second, it held that Article 19 (1) TEU is incompatible with the Polish Constitution. Notably, the Article which allowed the Court of Justice to reign into the rule of law crisis in the Member States. Moreover, finally, it found that Articles 19 (1) and (2) TEU were incompatible with the Polish Constitution due to its overriding nature of Polish constitutional provisions and the Polish judicial appointment process. Therefore, the judgment was an outright rejection of the Court of Justice's case-law in the rule of law crisis. Even though it severely undermined the EU judicial dialogue, the Court of Justice decided not to officially comment on the judgment. However, the Commission in December 2021 decided to launch an infringement proceeding against Poland due to the grave nature of the Polish Constitutional Court's judgment.[280] It based the proceeding on the breach of the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the binding effect of Court of Justice rulings. This infringement proceeding might be the endgame for supremacy in the EU legal order.

As this judgment and the response of the European institutions show, it boils down to national sovereignty which is recurringly invoked by Hungary and Poland in the rule of law crisis. The 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 EU. "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."[281] However, not only compliance with the constitutional Treaty is necessary, according to Lenaerts. Additionally, there needs to be a societal commitment to the rule of law,

[278] 'Poland's top court rules against primacy of EU law (10 July 2021)' *Deutsche Welle* (Bonn, Germany) <https://www.dw.com/en/polands-top-court-rules-against-primacy-of-eu-law/a-59440843>.
[279] *K 3/21* Polish Court Reports Constitutional Tribunal of Poland (Trybunał Konstytucyjny).
[280] *Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal (22 December 2021)* (European Commission Press Office 2021).
[281] 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).

democracy, and fundamental rights. "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."[282] One example of a democratic order without a societal and political commitment to those values might be the Weimar Republic in the first half of the 20th century.[283] The EU, with its supranational safeguards for democracy and fundamental rights, was an attempt to foreclose national developments such as the former.

In some Member States, forces are in power that seeks to establish an illiberal democracy or illiberal legality of some kind.[284] However, as Member States are bound by the Treaty, they need to follow the EU laws and legislation. Moreover, ultimately, they also need to align with the EU values enshrined in Article 2 TEU. The U.S. constitutional history is full of examples when politicians, state legislatures, and state judiciaries challenged the judicial supremacy of the Supreme Court. Lenaerts highlighted that the EU is facing a similar moment where the judicial supremacy of the 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 EU 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."[285] He, therefore, reiterated the importance of the cohesiveness of the European project. "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."[286] The case-law of the Court of Justice in the rule of law crisis has shown how serious the European judiciary regards the developments in Hungary and Poland and how it seeks to prevent the backsliding in those Member State. However, only time will tell whether the Court of Justice's approach to the rule of law crisis will be successful.

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[282] Ibid.
[283] For further readings on the Weimar constitutional experience see Matthias Goldmann and Agustín José Menéndez, *Weimar Moments: Transformation of the Democratic, Social and Open State of Law* (MPIL Research Paper Series, 2022), and David Dyzenhaus, 'Legal Theory in the Collapse of Weimar: Contemporary Lessons?' Vol. 91 American Political Science Review pp. 121.
[284] Timea Drinoczi and Agnieszka Bien-Kacala, 'Illiberal legality' in Timea Drinoczi and Agnieszka Bien-Kacala (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary Within the European Union* (Routledge 2021).
[285] Lenaerts (n 281).
[286] Ibid.

5. Conclusion

> *"In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. […] The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe."*[287]

Chapter 1 focused on the Court of Justice during the rule of law crisis. It examined the evolution of the rule of law in its case-law, explored the progression of the rule of law from a procedural to a substantive principle, analysed the rule of law crisis before the Court of Justice, and examined its challenge for judicial supremacy. A key-part of the chapter focused on the case-law relating to the independence of the judiciary in Poland and the conflict between the Commission and Poland before the Court of Justice. The case-study of the infringement proceedings showed that the Court of Justice is on a trajectory to judicialise the value of the rule of law enshrined in Article 2 TEU via Article 19 (1) TEU and, more specifically, via the principle of effective judicial protection. The following conclusion will highlight three key-aspects of the study of the Court of Justice case-law during the rule of law crisis.

First, the Court of Justice has commenced a doctrinal evolution during the rule of law crisis. Through its judgments, it has built a solid jurisprudence transforming the (non-justiciable) value of the rule of law enshrined in Article 2 TEU into an enforceable principle of the rule of law via Article 19 (1) TEU.[288] To do this, the Court of Justice has, in the words of Roeben, transformed the principle of effective judicial protection into a constitutional meta-norm for the EU legal order, enabling it to protect the independence of the judiciary in the Member States.[289] "[…] the EU judicial architecture is faced with unprecedented structural challenges at Member States level. […] these challenges are being addressed, also, through the meta-norm of judicial protection."[290] During the rule of law crisis, the Court of Justice has utilised the

[287] Advocate General Bobek in *Prokuratura Rejonowa w Mińsku Mazowieckim (Joined Cases C-748/19 to C-754/19) (AG Opinion)* European Court Reports Court of Justice of the European Union.
[288] See also Spieker, *EU Values Before the Court of Justice*, in which he argues that the Court of Justice has mobilised the values of Article 2 TEU into justiciable legal principles.
[289] Roeben (n 64).
[290] Ibid.

principle of effective judicial protection to safeguard the independence of the Polish judiciary. Therefore, the Court has emerged as a strong responder to rule of law challenges in the Member States and has taken centre stage as guardian of the rule of law in the EU legal order. However, its jurisprudence fails to be implemented and realised in the Member States.[291]

Second, the Court of Justice's doctrinal evolution could mark a constitutional moment for the EU. Similar to other leaps of the European project that embarked from the Court of Justice, such as the primacy of EU law in *Costa v ENEL*, *ASJP* could mark a new transformative shift in the European project. The rule of law crisis could be a leap of integration and a potential constitutional moment for the EU. Such a constitutional moment "indicat[es] a situation that deeply impacts on the future path of a constitutional order without formally amending it."[292] Bogdandy's observation of a potential constitutional moment in EU law implies that the Treaty is seen as a 'living constitution' interpreted by the Court of Justice.[293] Therefore, the evolution of the case-law on judicial independence is emblematic of the Court of Justice's willingness to develop new Treaty interpretations.[294] Similarly, the evolution of the principle of effective judicial protection in the Court of Justice's case-law unfolds an impact that goes beyond Article 19 (1) TEU and amplifies the EU's growing constitutional oversight over Member States.[295] The Court of Justice's case-law in the rule of law crisis "[i]s a way […] of detaching regulatory and executive national authorities from their domestic political environment, thereby releasing them from national constraints and hierarchies, and making them loyal to the law and objectives of the EU. Independent courts are the main vectors of EU law authority and legitimation."[296] Due to its cooperative federalism structure, the EU is crucially dependent on independent Member States' courts to enforce EU law. "National courts are the primary

[291] Magdalena Gwozdz-Pallokat, 'Poland vows not to pay any EU court fines (28 October 2021)' *Deutsche Welle* (Bonn, Germany) <https://www.dw.com/en/poland-vows-not-to-pay-any-eu-court-fines/a-59654600>.
[292] Bogdandy and others (n 53) p. 984.
[293] The idea of a "living constitution" refers to the concept that a constitution should be interpreted and applied in a way that evolves and adapts to society's changing needs and values over time. According to the concept of living constitutionalism, the constitution is not a static document but rather a living and dynamic instrument that should be flexible enough to address new challenges and reflect societal progress.
[294] The constantly changing nature of the interpretation of constitutional articles is a feature seen at many apex courts in federal systems. See, for example, the U.S. Supreme Court: Eric J. Segall, 'Constitutional Change and The Supreme Court: The Article V Problem' Vol. 16 University of Pennsylvania Journal of Constitutional Law pp. 443.
[295] See also Maarten Stremler, *Constitutional Oversight of the Member States by the European Union* (Tilburg University 2021), in which he argues that the EU has increased its constitutional oversight of the Member States during the rule of law crisis.
[296] Alison McDonnell and others, 'Editorial Comments: Hungary's new constitutional order and "European unity" Vol. 49 Common Market Law Review pp. 871, p. 879.

enforcers of European law."[297] With its powerful rulings, which emphasised Member State courts' independence, the Court of Justice has created a new judicial oversight function.[298]

At the time of writing, however, it is too early to assess whether the Court of Justice jurisprudence in the rule of law crisis signifies a constitutional moment for the EU and whether the *ASJP* judgment will rank in line with judgments as *Van Gend en Loos, Costa v Enel,* and *Internationale Handelsgesellschaften.* Instead, the more evident finding is that the rule of law crisis started a process that shifted the balance of power between the EU and the Member States towards the EU institutions and the Court of Justice. Moreover, with *ASJP*, the Court of Justice gained new competencies in the formation and design of national judiciaries – a new oversight function to preserve the independence of the judiciary in the Member States.

Third, the Court of Justices' judgments on the regression of judicial independence in Poland show that the conflict over the rule of law crystallises as a conflict over national sovereignty and EU supremacy. An apex court of a federal legal system is only as strong as the implementation of its judgments. In the case of the Court of Justice, the judgments are not always implemented by the Member State in question.[299] This leads to a situation in which the EU judicial branch is increasingly dependent on the EU political branches.[300] The failing implementation of the Court of Justice's judgments has shown that the EU judiciary cannot solve the rule of law crisis alone.[301] The resolution of the rule of law crisis will ultimately depend on a shared understanding, commitment and respect for the EU values enshrined in the Treaties. Only through a concerted institutional effort can the EU overcome the challenges posed by the rule of law crisis and regain a resilient legal framework that safeguards the rule of law in the Member States.

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[297] Schütze, *Introduction to European law* p. 151; For an in-depth analysis of the EU's system of cooperative federalism, see Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law*.
[298] See Stremler (n 295).
[299] Gwozdz-Pallokat (n 291).
[300] The role of the EU's political branches of government during the rule of law crisis will be extensively discussed in Chapter 3.
[301] See also the argument in Michael Blauberger and R. Daniel Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' Vol. 24 Journal of European Public Policy pp. 321. "[…] despite their importance, judicial safeguards alone – whether existing ones or novel proposals – will not suffice to stop democratic backsliding by a determined national government: if the Union is to rein in such attacks on its core values, heads of government and other EU leaders will have to intervene politically as well."

Chapter 2: Comparative Perspectives: Rule of Law Challenges before the Supreme Court

> *"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."*[302]

This quote from Chief Justice John Marshall's majority opinion in *Marbury v Madison* highlights the importance of judicial supremacy exercised through an apex court in a federal legal order. Judicial supremacy is an essential prerequisite for the functioning of a federal legal order and for ensuring that the rule of law is respected throughout that legal order. *Marbury v Madison* established the principle of judicial review in the U.S. This power of judicial review has ever since played a crucial role in preserving the rule of law and upholding constitutional rights in the U.S. federated states.

Chapter 2 – Comparative Perspectives: Rule of Law Challenges before the Supreme Court – examines the Supreme Court as a case-study to analyse a powerful apex court in a federal legal system dealing with rule of law challenges in federated states. This chapter will analyse the rule of law foundations in the U.S. legal order in *Marbury v Madison,* scrutinise rule of law deficiencies before the Supreme Court in *Dred Scott v. Sandford* and *Plessy v Ferguson*, and then shift to the Supreme Court upholding the rule of law in *Brown v Board of Education*. Finally, it will discuss the Supreme Court's challenge for judicial supremacy in *Cooper v Aaron*. This structure allows a functional comparison of the Supreme Court and the Court of Justice during rule of law challenges in composite states and allow to draw comparative conclusions on safeguarding the rule of law in composite states via apex courts.

Both, the Supreme Court, and the Court of Justice, have been confronted with rule of law crises in their jurisdictions. Ackerman described in his seminal trilogy, *We the People,* how the Supreme Court successfully steered the U.S. constitutional order during times of rule of law crisis and constitutional transition.[303] For the present comparative study, the Supreme Court's

[302] *William Marbury v. James Madison, Secretary of State of the United States (1803).*
[303] Bruce Ackerman's trilogy focuses on three pivotal moments for the U.S. federal legal system: the founding period in the 1780s, the Reconstruction period in the 1860s, and the Civil Rights Revolution in the 1950s, which he describes as constitutional moments for the U.S. federal legal order. See Bruce A. Ackerman, *We the People*

role during the Civil Rights Revolution is specifically pertinent.[304] Similarly, as Chapter 1 has shown, the Court of Justice steered the EU legal order during the rule of law crisis in the EU. With pivotal judgments in *ASJP*[305], *Commission v Poland I*[306] and *Repubblika*[307], the Court of Justice established new standards of rule of law protection in the Member States. To contrast and evaluate the Court of Justice's efforts, Chapter 2 will examine how the Supreme Court dealt with rule of law crises in the federated states.

Due to its structural and functional similarities, the Supreme Court is uniquely suited to serve as a comparator and benchmark to the Court of Justice in the rule of law crisis. The Supreme Court is the highest court in the U.S. federal judiciary – analogous to the Court of Justice in the EU legal order. However, differences remain. Three examples highlight how features of both courts are alike but not entirely the same. First, the Supreme Court has ultimate appellate jurisdiction over all U.S. federal courts that involve federal points of law, whereas in the EU, no federal courts besides the Court of Justice and the General Court exist. Instead, the highest court in each Member State is individual to that Member State's legal system. The EU is based on a system of cooperative federalism in which lower courts in the Member States can refer a novel point of interpretation of EU law to the Court of Justice under Article 267 TFEU.[308] Second, the role of the Supreme Court in dealing with the vertical division of powers in the U.S. legal order is comparable to the Court of Justice's role as the judicial branch in the EU legal order. However, as Rosenfeld remarks, the Court of Justice's vertical division of powers is more fragile than that of the Supreme Court.[309] Third, the Supreme Court has authority over state governments in questions of interpretation of federal law, and the U.S. national government may bring a state before the Supreme Court in case a state breaches federal law.

1: Foundations (Belknap Press of Harvard University Press 1991), Bruce A. Ackerman, *We the People 2: Transformations* (Belknap Press 1998), and Ackerman, *We the People 3: The Civil Rights Revolution*.

[304] The Civil Rights Revolution refers to a period of profound social and political change in the U.S. during the mid-20th century, particularly in the 1950s and 1960s. It encompasses the collective efforts and struggles of various civil rights movements to combat racial discrimination, segregation, and inequality to secure equal rights and opportunities for all individuals, regardless of race or ethnicity. It was primarily driven by the African American civil rights movement, which sought to challenge and dismantle the systemic racism and segregation that had long pervaded American society.

[305] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-64/16)*.

[306] *Commission v Poland (C-619/18) (Independence of the Supreme Court)*.

[307] *Repubblika v Il-Prim Ministru (C-896/19)*.

[308] *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* European Court Reports Court of Justice of the European Union; see also Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law*.

[309] Cf. Rosenfeld (n 16) p. 633.

This is comparable but not entirely similar to the Commission's role of bringing Member States that infringe EU law before the Court of Justice under Article 258 TFEU.

Therefore, Chapter 2 has comparative limitations due to the structural differences between both courts. First, the Court of Justice operates as the highest court in a union of sovereign states, whereas the Supreme Court operates in a fully-fledged federal union. Even though the Supreme Court did not always operate in a well-developed federal union. In the 18th century, the constitutional form and coherence of the U.S. was disputed, and in the 19th century, the Civil War showed the fragility of the U.S. Second, the Supreme Court enjoys complete authority in the U.S. and is widely recognised. The Court of Justice does not have the same authority and visibility in the EU legal order. It is less known among EU citizens, and the backslash from national politicians and state legislatures is widespread. Nevertheless, looking back in history, the 19th century Supreme Court did not enjoy the same authority it has today and has only, through time, risen to its current role. Third, the 20th-century Civil Rights Revolution was a unique moment in U.S. history which channelled the demand for complete racial equality in the U.S. The rule of law crisis in the EU is a moment of rule of law deterioration in some Member States, manifested by a regression in civil and political rights in those states. Both instances are unique and not fully comparable. However, both sparked a decisive rule of law response by the apex courts in their legal order. Therefore, Chapter 2 will follow a functional approach and focus on the structural similarities, which allows for drawing conclusions from the Supreme Court's precedents for the Court of Justice in the rule of law crisis.

Chapter 2 is structured as follows. First, the Supreme Court's rule of law foundations will be discussed, starting with the seminal judgment in *Marbury v Madison* in 1803.[310] Second, rule of law deficiencies will be assessed by focussing on the judgments in *Dred Scott v. Sandford* in 1857 and *Plessy v Ferguson* in 1896.[311] Moving on, the rule of law turn of the Supreme Court in *Brown v Board of Education* in 1953 takes centre stage to analyse the Supreme Court's rule of law evolution.[312] Fifth, and finally, the Supreme Court's quest for judicial supremacy will be analysed in the seminal ruling in *Cooper v Aaron* in 1958.[313] Overall, this will provide the backdrop for comparative conclusions between the Supreme Court and the Court of Justice.

[310] *William Marbury v. James Madison, Secretary of State of the United States (1803)*.
[311] *Dred Scott v John F. A. Sandford (1857)* United States Reports Supreme Court of the United States; *Homer Adolph Plessy v John Ferguson (1896)* United States Reports Supreme Court of the United States.
[312] *Brown v. Board of Education (1953)* United States Reports Supreme Court of the United States.
[313] *Cooper v. Aaron (1958)* United States Reports Supreme Court of the United States.

1. Rule of Law Foundations in the United States

1.1 The Advent of a Powerful Court

The Supreme Court was born without a clear legal mandate regarding its role in the newly established U.S. While the U.S. Constitution defined the legislative and executive branches of government, it did not spell out the details about the judicial branch.[314] 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."[315] Beeman points out that the framers themselves might have been 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."[316]

The exact structure, power and competencies of this new Supreme Court lay in the hands of the first Congress. The bicameral Congress was the result of the advent of the U.S. Constitution, which was ratified by nine of the thirteen 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.[317] However, the explicit competence of the Supreme Court to invalidate federal and state laws was still unclear. The Supreme Court would not take long to remedy this lacuna with a significant landmark decision.

1.2 The Principle of Judicial Review: *Marbury v Madison (1803)*

The Supreme Court's ruling in *Marbury v Madison (1803)* framed the rule of law in the U.S.[318] It affirmed that all legal acts in the U.S. are subject to legal review. In the case, "the Supreme

[314] Respectively, in Article I and Article II of the U.S. Constitution.
[315] *The Constitution of the United States of America* (Philadelphia Convention 1789) Article III Section I.
[316] Cf. Richard Beeman, *The Penguin Guide to the United States Constitution* (The Penguin House 2010) p. 47 and p. 179.
[317] *Judiciary Act of 1789: An Act to Establish the Judicial Courts of the United States* (Government of George Washington 1789).
[318] *William Marbury v. James Madison, Secretary of State of the United States (1803)*.

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."[319] 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."[320]

It was, thus, the question in *Marbury v Madison,* what happens, if a law is to be found in opposition to the U.S. 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 U.S. 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."[321]

One of the founding fathers, Alexander Hamilton, had written about this conflict fifteen years earlier 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."[322] He, therefore, highlighted the importance of judicial review through courts and the necessity

[319] Dorsen and others (n 26) p. 155.
[320] *William Marbury v. James Madison, Secretary of State of the United States (1803)*.
[321] Ibid.
[322] Alexander Hamilton, James Madison and John Jay, *Federalist* (J. & A. McLean 1788) Federalist 78.

to regard the U.S. constitution as the fundamental law. Accordingly, the Supreme Court would follow his advice in *Marbury v Madison*.

Relying on the supremacy of the U.S. Constitution, the Supreme Court then highlighted that the U.S. 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 U.S. Constitution.

> "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. "[323]

In *Marbury v Madison* the Supreme Court found that parts of the Judiciary Act of 1789 conflicted with the U.S. Constitution. Given the supremacy of constitutional law over state law, the U.S. Constitution had to prevail. For the first time, the Supreme Court struck down a federal law that was contrary to the U.S. Constitution according to the Supreme Court's interpretation. Hence, the Supreme Court established that all legal acts in the U.S. 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 U.S. 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."[324]

[323] *William Marbury v. James Madison, Secretary of State of the United States (1803)*.
[324] Dorsen and others (n 26) p. 157.

2. Rule of Law Deficiencies before the Supreme Court

2.1 Undermining the Rule of Law: *Dred Scott v. Sandford (1857)*

Since *Marbury v Madison*, it was formally established that the U.S. were a federal legal order based upon the rule of law. However, the U.S. still had a paradox at its core – slavery. While the U.S. Constitution proclaimed liberty, equality and democracy, many Southern U.S. 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 v. Sandford (1857)* decision, authored by the controversial justice Roger B. Taney, the Supreme Court even gave its judicial blessing to the concept of slavery.[325] The *Dred Scott v. Sandford* decision was only the second time the Supreme Court struck down a federal law after *Marbury v Madison*.[326] 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'.[327]

Beeman questions the democratic authority and legitimacy of the decision of the Supreme Court in 1857. "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."[328] Moreover, Farber highlights the errors in the ruling of the Supreme Court. "The decision's authority was impaired in several ways. It was made by a divided court and seemingly tainted by partisan bias. It was inconsistent with prior government practice., It was based on historical error."[329] Overall, the contentious decision fell in a highly politicised time at the eve of the Civil War in the U.S., and it was one of the factors that exacerbated the tensions between the North and the South.

In the decision, the Supreme Court held that Dred Scott, an enslaved black man, could not claim citizenship in the U.S., and, therefore, Scott could not bring suit in federal court under

[325] *Dred Scott v John F. A. Sandford (1857)*.
[326] Cf. Beeman (n 316) p. 192.
[327] Cf. Ibid.
[328] Ibid.
[329] Daniel A. Farber, *Lincoln's Constitution* (University of Chicago Press 2003) p. 178.

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 v. Sandford* decision opened up the possibility that the right to own slaves could not be constitutionally prohibited in any territory of the United States."[330] 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 U.S. It should take a hundred more years since the full equality of races would be established within the U.S. during the Second Reconstruction. According to Justice Breyer, Justice Taney's decision in *Dred Scoot* was made in the hope of stopping the initiating Civil War.[331] However, *Dred Scott v. Sandford* would not stop the Civil War. Instead, it exacerbated the situation, and the U.S. would engage in a bloody Civil War between 1861 and 1865, with the northern Union states emerging triumphant and the result of formally ending slavery nationwide. Nonetheless, this victory of the rule of law and fundamental rights would not end racial discrimination in the U.S.

2.2 The Reconstruction Amendments

Around forty years after *Dred Scott v. Sandford*, a further Supreme Court decision would severely undermine the rule of law in the U.S. again. In *Plessy v Ferguson (1896)*.[332] 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.'"[333] Jim Crow laws, therefore, entrenched injustice, oppression, and discrimination into American live in the Southern U.S. states. "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."[334]

[330] Beeman (n 316) p. 195.
[331] Cf. 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).
[332] *Homer Adolph Plessy v John Ferguson (1896)*.
[333] Meagen K. Monahan, 'The Green Book: Safely Navigating Jim Crow America' Vol. 20 (Autumn 2016) Green Bag, p. 44.
[334] Ibid.

Notably, this decision fell in the Reconstruction Era, a time after the 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 U.S. To ensure the abolishment of slavery, the XIII, XIV, and XV Amendments were added to the U.S. Constitution and ratified by the states – the so-called Reconstruction Amendments. Most importantly for the present dissertation, 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."*[335]

The Fourteenth Amendment is widely regarded as one of the U.S. 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."[336] The Amendment "has brought the principles of enunciated in the preamble of the Declaration of Independence into the realm of constitutional law."[337] 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 are Life, Liberty and the pursuit of Happiness."[338] However, as seen in *Plessy v Ferguson*, 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

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[335] *The Constitution of the United States of America* Fourteenth Amendment (1868).
[336] Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve Books 2010) p. 371.
[337] Beeman (n 316) p. 77.
[338] Thomas Jefferson and others, *The Declaration of Independence* (Second Continental Congress 1776).

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."[339] However, the Reconstruction period was short lived, ended in the 1870s and was replaced by the Jim Crow era.

2.3 Undermining the Rule of Law II: *Plessy v Ferguson (1896)*

All three constitutional amendments addressed clear rule of law violations of slavery and discrimination against black people in the U.S. However, those amendments could not eradicate racial discrimination in the U.S. While slavery was abolished, discrimination continued in the form of the so-called Jim Crow laws. "[…], the 1890s and early twentieth century witnessed the full implementation of what came to be called the Jim Crow system."[340] Jim Crow laws were state and local laws that enforced racial segregation in the Southern U.S. states – the former Confederacy states. As 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.[341] *Plessy v Ferguson (1896)* was a corollary of that development and eventually gave the Jim Crow laws the Supreme Court's blessing.[342]

In the late 1890s, the U.S. was divided between former Union states, which would uphold the principle of equality and citizenship rights and the Southern U.S., which would have a myriad of laws that were factually depriving black Americans of their citizenship rights. One of those laws was a Louisiana act over railroad cars that had to be racially separated. "In 1890, Louisiana enacted a law directing railroad companies to provide 'equal but separate accommodations' for white and black passengers."[343] A newly formed civil rights group decided to challenge the act up to the Supreme Court. The question that the Supreme Court had to decide in *Plessy v Ferguson* was whether discriminatory state laws in the Southern U.S. states were constitutional against the backdrop of the Fourteenth Amendment, which clearly

[339] Beeman (n 316) p. 77.
[340] Eric Foner, *The Second Founding: How the Civil War and Reconstruction remade the Constitution* (First edition. edn, W.W. Norton & Company, Inc. 2019) p. 160.
[341] Bruce R. Bartlett, *Wrong on Race: The Democratic Party's Buried Past* (St. Martin's Griffin 2009).
[342] *Homer Adolph Plessy v John Ferguson (1896)*.
[343] Foner (n 340) p. 160.

stated that all citizens should be protected equally under the law. "[The plaintiff's] core argument […] echoed [Justice John Marshall] Harlan's dissent in the *Civil Rights Cases* – the Fourteenth Amendment had created national protection for an entire array of rights, old and new, against invidious racial discrimination."[344]

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 U.S. Thus, giving the Democrat-led state legislatures in the South a free ticket to continue the disfranchisement of black Americans. Justice Henry B. Brown wrote the majority opinion in the Supreme Court case, while ignoring the main arguments of the plaintiffs. "The decision, written by Justice Henry B. Brown, a specialist for admiralty law who hailed from the social elite of Massachusetts, did not confront most of [the plaintiff's] arguments but simply blamed blacks for being oversensitive."[345] According to him, "the 'enforced separation of the two races' did not necessarily 'stamp the coloured race with a badge of inferiority'"[346]

> "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."[347]

Additionally, he stated that segregated railway cars do not necessarily imply the inferiority of black 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

[344] Ibid.
[345] Ibid.
[346] Beeman (n 316) p. 197.
[347] *Homer Adolph Plessy v John Ferguson (1896).*

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."[348]

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."[349]

Justice Brown, with his decision, entrenched the discrimination of black Americans and upheld the ongoing racial segregation in the daily life of the South. In addition, the ruling established the *'separate but equal' doctrine* in U.S. constitutional law. An infamous legal doctrine that the Supreme Court would later overturn in *Brown v Board of Education*. The decision was a massive setback for the principle of equality and citizenship rights in the U.S. Only Associate Justice John Marshall Harlan, in his lone dissenting opinion, would make the point that the U.S. 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."[350]

Nonetheless, Justice 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

[348] Ibid.
[349] Ibid.
[350] Ibid.

accommodations to public schools."[351] The decision, thus, further entrenched racial discrimination in the South. "Harlan correctly predicted that the decision would unleash a flood of statues segregating ever realm of southern life."[352] Therefore, through its decision in *Plessy v Ferguson*, the Supreme Court upheld racial segregation – a practice that violated equal citizenship rights, the principle of equality, and the rule of law. At the time, however, the decision received little to non-public attention for being a discriminatory ruling. "[I]t attracted little attention, and what coverage it did receive generally treated it as a 'railroad case' rather than one about citizens' rights."[353] Eventually, the Supreme Court needed sixty more years to abandon the practice and uphold, in *Brown v Board of Education*, equal citizenship rights, the principle of equality and the rule of law.

[351] Ibid.
[352] Foner (n 340) p. 163.
[353] Ibid.

3. Upholding the Rule of Law via the Supreme Court

3.1 Upholding the Rule of Law: *Brown v Board of Education (1954)*

The Supreme Court's decision in *Brown v Board of Education (1954)*[354] 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.[355] The decision occurred after the Second World War and the Nuremberg Trials. The Nuremberg Trials being the epitome of a global rule of law standard asserted by the Western allies.[356] At the same time, it was the onset of the Cold War and the U.S. – USSR competition. With the Nuremberg trials and the Cold War, the U.S. has positioned itself as the defender of the rule of law and the Western way of life globally. Nonetheless, there was still a paradox at the nation's heart – the discrimination of black American citizens in the South. "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."[357] 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."[358] Thus, leading U.S. jurists identified the rule of law violations in the federated states and sought to address them.

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. As neither the executive nor the legislative branch was willing or able to take on this fight with the Southern states, the Supreme Court took the lead. "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

[354] *Brown v. Board of Education (1953)*.
[355] Cf. Beeman (n 316) p. 201.
[356] See for example Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (Knopf Publisher 2016).
[357] Feldman (n 336) p. 372.
[358] *Minutes of Conference Session of July 23, 1945* (The Avalon Project, Yale Law School 1945).

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."[359]

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."[360] They were aware of the stalled political situation surrounding them and the persistent injustices present in the South. They knew that "[a]ny steps to improve America's reputation by counteracting segregation would have to come from the Court."[361] At the same time, "[a] Supreme Court ruling that segregation was unconstitutional would be the most aggressive piece of judicial activism in American history."[362]

Brown v Board of Education 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 U.S. 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."[363]

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

[359] Feldman (n 336) p. 373.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] *Brown v. Board of Education (1953)*.

reluctant to overturn the long-standing precedent of *Plessy v Ferguson* to join a unanimous ruling."[364]

Brown v Board of Education was a turning point for the principle of equality, citizenship rights and a substantive understanding of the rule of law in the U.S. 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 U.S. 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."[365]

Feldman highlights the importance of *Brown v Board of Education* as a constitutional enabler of rule of law protection for all citizens in the U.S. "*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."[366] Moreover, the judgment became emblematic for the Supreme Court's living interpretation of the U.S. Constitution. "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."[367]

Further, Justice Breyer stresses *Brown v Board of Education's* overarching importance for the rule of law and justice in the U.S. "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."[368]

However, *Brown v Board of Education* 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

[364] Beeman (n 316) p. 201.
[365] Dorsen and others (n 26) p. 91.
[366] Feldman (n 336) p. 406.
[367] Ibid.
[368] 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."[369] 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."[370] This backlash could mainly be seen by the fierce resistance of state officials and the state's legislatures against the ruling.

3.2 Repercussions of the Brown Judgment

After *Brown v Board of Education*, nothing would substantially change in the South 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 by 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."[371] 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.[372] 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

[369] Beeman (n 316) p. 202.
[370] Ibid.
[371] Pohjankoski (n 50) p. 338.
[372] *United States v. Richard Peters (1795)* United States Reports Supreme Court of the United States.

> 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."[373]

However, Pennsylvania would still not follow the Supreme Court's order. Instead, then-President James Madison, dubbed the father of the U.S. 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.

> "[…] 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."[374]

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 v Board of Education*. The precedent for the executive branch's intervention in a state can be found in the history of the early U.S.

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 Supreme Court invalidated the conviction under a Georgian statute of a non-Cherokee man living on the territory of the Cherokee Nation.[375] Interestingly, the Supreme Court found that "the law under which he was convicted was *ultra vires* the State of Georgia."[376] 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.'[377] 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 v*

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[373] Ibid.
[374] *Register of Debates in Congress (1824-1837)* (Gales & Seaton's Register, 1825).
[375] *Worcester v Georgia (1832)* United States Reports Supreme Court of the United States.
[376] Dorsen and others (n 26) p. 995.
[377] Cf. Linda Greenhouse, *The U.S. Supreme Court* (Oxford University Press 2012) p. 68.

Board of Education, there would have been no prospects for implementing the Supreme Court's ruling.

The response by the Southern states against *Brown v Board of Education* was equally solid and manifold. First, the affected states passed legislative resolutions condemning the Supreme Court's judgment in *Brown v Board of Education*. 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."[378] Finally, Southern states refused to implement the decision and went as far as closing schools altogether.

[378] Ibid.

4. The Supreme Court's Challenge for Supremacy

The standoff between the federal government and the state of Arkansas in Little Rock Nine resulted in other seminal case-law at the Supreme Court. The case *Cooper v Aaron (1958)* gave the Supreme Court the possibility to, once and for all, assert its position on the U.S. federal legal order.[379] The case was a follow up to *Brown v Board of Education* and a corollary to the backlash by the South against abolishing segregation. In the *Brown v Board of Education*, 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 *Brown v Board of Education* 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 U.S. District Court for the Eastern District of Arkansas, urging the suspension of its desegregation plan. When the case came before the Supreme Court, the main question was whether state officials were bound by federal court orders mandating desegregation? In an amicus curiae brief by the Legal Defence Fund, the Fund's lawyers 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.'"[380]

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 U.S. Constitution. Then, in a second step, the Supreme Court forcefully held that the precedential ruling in *Brown v Board of Education*

[379] *Cooper v. Aaron (1958)*.
[380] Christopher W. Schmidt, 'Cooper v. Aaron and Judicial Supremacy' Vol. 41 University of Arkansas at Little Rock Law Review pp. 255 p. 269.

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.[381] "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 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.'"[382] Moreover, Farber argues in the same vain that *Coper v Aaron* settled the constitutional issue forever. "The Court's opinion was unique – not only unanimous but signed by each justice to emphasize the Court's unity. The Court asserted that its pronouncements were 'the supreme law of the land,' binding on all state officials under the supremacy clause. Under *Marbury v Madison*, the Court said, it was not only authorized to interpret the Constitution, it also was 'supreme in the exposition' of the Constitution."[383]

In later days, the decision in *Cooper v Aaron* was 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 U.S. Constitution by the Supreme Court – are only binding upon the parties before the Court but not on other branches of the government.[384] "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."[385] Therefore, he rejected the *erga omnes* effect of the Supreme Court's judgments.

In a speech at Tulane University, he outlined the core of his argument against *Cooper v Aaron.* Thus, challenging the interpretative authority of the Supreme Court over the U.S. Constitution. "The logic of *Cooper v. Aaron* was, and is, at war with the Constitution, at war with the basic

[381] *Cooper v. Aaron (1958)*.
[382] Dorsen and others (n 26) p. 163.
[383] Farber (n 329) p. 180.
[384] Edwin Meese, 'The Law of the Constitution' Vol. 61 Tulane Law Review pp. 979.
[385] Rosenfeld (n 16) p. 631.

principles of democratic government, and at war with the very meaning of the rule of law."[386] Interestingly, 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 EU, where Member State officials use the rule of law to challenge the authority of the 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 Supreme Court over constitutional interpretation.

Finally, the bigger picture after *Brown v Board of Education* and *Cooper v Aaron* was that the Supreme Court had safeguarded the rule of law in the federated states, and the executive had 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."[387] Specifically, the Voting Rights Act of 1965 proved to be a powerful instrument to supervise the Southern states. "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."[388] According to Halberstam, a similar mechanism would be desirable for the repeated rule of law offending Member States in the EU.[389]

[386] Edwin Meese III, *The Law of the Constitution, Speech at the Tulane University (21.10.1986)* (Tulane University 1986).
[387] Daniel Halberstam, *Rule of Law in Europe: A Conversation with Daniel Halberstam and Paul Nemitz* (EU Law Live 2021).
[388] Ibid.
[389] Daniel Halberstam and Werner Schröder, *In Defense of Its Identity: A Proposal to Mainstream the Rule of Law in the EU (17 February 2022)* (VerfBlog 2022).

5. Conclusion

> *"Our Constitution is colourblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."*[390]

Chapter 2 analysed the Supreme Court's rule of law evolution through the lens of its jurisprudence. It focussed on the evolution of the rule of law in the case-law, starting with the procedural rule of law foundations in *Marbury v Madison* in 1803[391], over the infamous and discriminatory rulings in *Dred Scott v. Sandford* in 1857[392] and *Plessy v Ferguson* in 1896[393], to the doctrinal revolution in the 1950s, which culminated in the landmark decisions of *Brown v Board of Education* in 1954[394] and *Cooper v Aaron* in 1958.[395] This analysis showed that the substantial notion of the rule of law evolved gradually in the case-law of the Supreme Court and took a revolutionary turn with *Brown v Board of Education*. Several aspects of the doctrinal revolution in the 1950s are functionally analogous to the Court of Justice's revolution in its case-law during the rule of law crisis.[396] The following conclusion highlights three aspects that emerged by analysing the Supreme Court dealing with rule of law crises in federated states.

First, Chapter 2 showed the Supreme Court's transformation from an endorser of rule of law violations in the federated states to a protector of the rule of law nationwide. This transformation is a significant milestone in U.S. constitutional history and shows the transformability of the highest court. The Supreme Court's decisions in cases such as *Dred Scott v. Sandford* and *Plessy v. Ferguson* demonstrated a failure to uphold the principles of the rule of law in the federated states. However, the Supreme Court's landmark decision in *Brown v. Board of Education* marked a turning point in its approach. It demonstrated a commitment to upholding the rule of law in the federated states. More recently, the Supreme Court's decisions have even further expanded the scope of civil rights protections, including voting

[390] Associate Justice John Marshall Harlan in *Homer Adolph Plessy v John Ferguson (1896)*.
[391] *William Marbury v. James Madison, Secretary of State of the United States (1803)*.
[392] *Dred Scott v John F. A. Sandford (1857)*.
[393] *Homer Adolph Plessy v John Ferguson (1896)*.
[394] *Brown v. Board of Education (1953)*.
[395] *Cooper v. Aaron (1958)*.
[396] For example, as described in Chapter 1, during the rule of law crisis in the EU, the Court of Justice takes centre stage in protecting the rule of law via its judgments and expanding from a merely procedural to a substantive notion of the rule of law.

rights, gender equality, LGBTQ+ rights, and affirmative action.[397] The transformation of the Supreme Court reflects the power of legal interpretation and living constitutionalism exercised by an apex court in a federal legal system.

Second, the Supreme Court's doctrinal evolution during the Civil Rights Era constitutes a constitutional moment for the U.S. legal order. Scholars have repeatedly stressed the interpretative power of the Supreme Court, which can lead to de-facto constitutional changes.[398] "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]."[399] Chapter 2 demonstrated that such a constitutional moment was the judicial developments surrounding the Civil Rights Revolution and the judgment in *Brown v Board of Education*.[400] Therefore, the history of rule of law evolution at the Supreme Court in the 20th century serves as an archetype of constitutional change via an apex court in a federal legal system.

Third, the Supreme Court continuously fought for judicial supremacy in the U.S. federal legal system. In the early U.S., those supremacy contestations by the federated states were more successful (*Worchester v Georgia*) than in the consolidated U.S., where a robust constitutional identity had emerged (*Cooper v Aaron*). Only in the mid-20th century judicial supremacy was ultimately decided with *Cooper v Aaron*.[401] *Cooper v. Aaron* marked a pivotal moment in the Supreme Court's assertion of its authority and commitment to upholding the rule of law in the federated states.[402] The Supreme Court's assertion of judicial supremacy has helped protect civil rights, promote equality, and ensure a substantial rule of law principle in the federated states. These challenges present the epitome of the continuous fight of an apex court operating in a large (and politicised) federal legal system for judicial supremacy.

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[397] Regarding gender equality, the Supreme Court established the principle that gender-based classifications are subject to intermediate scrutiny in *Reed v Reed* (1971). On LGBTQ+ rights, the Supreme Court recognised a constitutional right to sexual privacy in *Lawrence v Texas* (2003), paved the way for federal recognition of same-sex marriages in *United States v. Windsor* (2013), and established a nationwide right to marriage equality in *Obergefell v. Hodges* (2015). Concerning affirmative action, the Supreme Court recognised that diversity in higher education is a compelling state interest in *Grutter v. Bollinger* (2003). Recently, the Supreme Court rolled back some of those rights.

[398] In his trilogy on the Supreme Court, *We the People*, Ackerman demonstrated that several judicial revolutions occurred at the Supreme Court, leading to constitutional moments for the U.S. legal order.

[399] Dorsen and others (n 26) p. 89.

[400] *Brown v. Board of Education (1953)*.

[401] *Cooper v. Aaron (1958)*.

[402] See Schmidt (n 380).

The Supreme Court's role as the final arbiter of constitutional interpretation underscores the significance of its decisions in shaping the legal landscape of the U.S. It is through a delicate balance of supremacy and legitimacy that the Supreme Court seeks to fulfil its crucial role in safeguarding the principles and values upon which the nation was founded. However, in recent years, it is possible to identify a shift in the Supreme Court's rule of law notion anew. Commentators have voiced concerns about the Supreme Court's approach to civil rights and its potential failure to protect the rule of law.[403] Several decisions and shifts in the Supreme Court's composition have raised questions about its commitment to upholding the progress made in advancing civil rights and the rule of law in the U.S.[404] It becomes increasingly evident that the Supreme Court's conservative majority is more inclined to limit civil rights protections, favouring individual liberties or states' rights over broader principles of equality and justice. Scholars have argued that this new shift in the Supreme Court's case-law undermines the rule of law by diluting the safeguards previously established.[405]

[403] See Timothy Noah, 'America Is Backsliding, and All of Us Will Pay for It (27 June 2022)' *The New Republic* (New York City, United States) <https://newrepublic.com/article/166908/supreme-court-abortion-guns-america-economy>. On voting rights, the Supreme Court weakened the federal government's ability to address ongoing voting rights issues in *Shelby County v. Holder* (2013). Concerning affirmative action and college admission, the Supreme Court made it more difficult for universities to consider race as a factor in admissions in *Fisher v. University of Texas at Austin* (2016). It struck down race-based affirmative action programs in college admissions in *Students for Fair Admissions v. Harvard* (2023). Regarding workers' rights, the Supreme Court weakened the power of unions to advocate for workers' rights in *Janus v. AFSCME* (2018). Regarding LGBTQ+ rights, the Supreme Court allowed religious exemptions to override anti-discrimination laws and hinder LGBTQ+ individuals' equal access to public accommodations in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018).

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[405] See Sam Hanel, '5 Ways the Supreme Court Could Roll Back Rights and Damage Democracy (31 May 2023)' *Center for American Progress* (Washington DC, United States) <https://www.americanprogress.org/article/5-ways-the-supreme-court-could-roll-back-rights-and-damage-democracy/>.

Part I: Comparative Conclusions

The preceding Part I – The Judicial Dimension: Upholding the Rule of Law via Judicial Review – highlighted the similarities and differences between the Court of Justice and the Supreme Court in dealing with rule of law backsliding in composite states. In summary, Chapter 1 analysed the foundation of the rule of law in the EU legal order (*Les Verts*) and the Court of Justice's case-law during the rule of law crisis (*ASJP, LM, Repubblika*). The chapter concentrated on rule of law crisis in Poland and the related infringement proceedings (*Commission v Poland I, II, III, IV*). Chapter 2 analysed the foundations of the rule of law in the Supreme Court's case-law (*Marbury v Madison*) and explored the Supreme Court's jurisprudence before (*Dred Scott v. Sandford, Plessy v Ferguson*) and during the Civil Rights Revolution (*Brown v Board of Education*), showing the pivotal change in the Supreme Court's case-law and the decisive role it played to safeguard the rule of law in the federated states.

This comparative analysis of both courts reveals differences and similarities in dealing with rule of law backsliding in composite states and revealed three findings. First, both courts transformed the rule of law from a procedural to a substantive notion in their case-law. Second, both courts grew into the task of safeguarding a substantive rule of law notion in composite states. Third, both courts were continuously confronted with challenges to their judicial supremacy. Finally, the Supreme Court's experience shows that safeguarding the rule of law in composite states via an apex court is crucially dependent on institutional support by the other branches of government. Support which is lacking in the case of the Court of Justice.[406]

From a Procedural to a Substantive Rule of Law

First, both apex courts have contributed to a shift from a procedural to a substantive and rights-based notion of the rule of law. In the U.S., the Supreme Court established a procedural principle of the rule of law in the landmark case of *Marbury v Madison*. Similarly, the Court of Justice echoed the same principle in the EU in *Les Verts*.

Both decisions clarified that the polity's laws and legal acts are subject to judicial review by the highest court for conformity with the 'constitutional Treaty' and that the polity is based on

[406] More recently, financial rule of law conditionality, exercised through Regulation 2020/2092, could be interpreted as a form of institutional support to enforce the Court of Justice's judgments in the Member States.

the rule of law. In the case of the U.S., the Supreme Court exercises judicial review against the Constitution. In contrast, in the case of the EU, the Court of Justice exercises judicial review against the Treaties. Notably, the Court of Justice's President Lenaerts underscored that "[…] the functional equivalence between the Treaty and a constitution was recognised more than twenty years ago in *Les Verts* […]." When it comes to upholding the rule of law in composite states, "[…] 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." Comparing the rule of law foundations in both legal orders affirms these similarities.

The Supreme Court's understanding of the rule of law pronounced in *Marbury v Madison* and the Court of Justice's in *Les Verts* was thin and procedural. In the 19th century U.S., the rule of law meant that the U.S. Constitution was supreme to state law without further substantive meaning or normative concept. However, in the 20th century, the Supreme Court would shift to a substantive rule of law – focusing on the principle of equal protection before the law. Similarly, the assertation by the Court of Justice in *Les Verts* is a declaration that all EU legal acts and Member States' legal acts in conflict with EU law are subject to judicial review. In the context of the rule of law crisis, the Court of Justice's jurisprudence shifted to a substantive rule of law, originating from the principle of effective judicial protection.

The Court of Justice played a pivotal role in shaping the understanding of the rule of law within the EU, as described in Chapter 1. Through its jurisprudence, the Court of Justice has established the procedural rule of law (*Les Verts*), emphasised the importance of fundamental rights (*Stauder v City of Ulm*), and established the substantive rule of law via the principle of effective judicial protection (*ASJP*). During the rule of law crisis, the Court of Justice radically transformed the EU legal order with its judgment in *ASJP*. This pivotal judgement enshrined judicial independence as a fundamental precondition for all EU courts in the Member States. Subsequently, the Court of Justice promoted the value of democracy (*Repubblika*), a fair and independent trial (*LM*), and judicial independence (*Commission v Poland I, II, III, and IV*). Doing so ensured the application of a substantive rule of law across all Member States. The Court of Justice has transformed the rule of law's scope and content within the EU legal order.

Similarly, the Supreme Court played a pivotal role in expanding the understanding of the rule of law in the U.S., as highlighted in Chapter 2. The Supreme Court has gone a long way from

a procedural rule of law in *Marbury v Madison* to a substantive rule of law, encompassing full racial equality, in *Brown v Board of Education*. This transformation was not without its dark moments. The Supreme Court issued horrendous rulings such as *Dred Scott v Sandford* and *Plessy v Ferguson*, effectively endorsing rule of law violations in the federated states. The Court of Justice, by contrast, never issued judgments that endorse rule of law violations in the Member States. Nevertheless, during the Civil Rights Revolution, the Supreme Court interpreted the U.S. Constitution to safeguard fundamental rights and ensure equal legal protection. Through its landmark decision in *Brown v Board of Education*, the Supreme Court advanced principles of equality, non-discrimination, and due process, expanding the scope of the rule of law to protect marginalised groups and uphold their constitutional rights. These interpretations have been crucial in transforming the rule of law in the U.S.

Both apex courts transformed the notion of the rule of law over time from a procedural-based towards a substantive, rights-based principle. This indicates that the rule of law is an evolving notion for federal apex courts. In both cases, the development of the notion was progressive by establishing more rights under the principle of the rule of law.[407] During rule of law crises in composite states, both courts served as guardians of the rule of law, ensuring that legal principles and individual rights were protected. By expanding the rule of law to encompass substantive rights and values, both courts contributed to advancing democracy, fundamental rights, federalism, and the principles of justice within their respective legal systems.

Evolving into a Guardian of the Rule of Law

Second, both courts were confronted with rule of law crises in composite states in the past: the Supreme Court during the Civil Rights Revolution and the Court of Justice during the rule of law backsliding of Hungary and Poland. Consequently, both courts grew into the task of becoming a guardian of the rule of law in the federal legal system by upholding the rule of law in their jurisprudence. The Supreme Court successfully safeguarded the rule of law in composite states during the Civil Rights Revolution. The outcome regarding the Court of Justice is uncertain due to structural, institutional, and judicial supremacy issues. Undeniably,

[407] Scholars and commentators have recently argued that the Supreme Court took a U-turn in its case-law and started a trend of democratic backsliding itself. See Kim Eckart, 'Rolling back abortion rights is 'democratic backsliding,' UW political scientist says (3 May 2022)' *UW News* (Seattle, United States) <https://www.washington.edu/news/2022/05/03/rolling-back-abortion-rights-is-democratic-backsliding-uw-political-science-expert-says/>, and Noah.

the situation in which the Court of Justice operates is more complex than that of the Supreme Court, as three aspects highlight.

First, as Rosenfeld has pointed out, unlike the Supreme Court, the 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 EU'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."[408] The lack of constitutional identity makes it harder for the Court of Justice to maintain and defend its judicial authority. Second, the Court of Justice lacks the institutional and historical standing that the Supreme Court had when it issued *Brown v Board of Education.* At that time, it had a well-established 165-year history of constitutional and public legitimacy. The public awareness of European constitutional and individual rights, as exemplified by the CFR, and the public awareness of the Court of Justice itself is just fragmental of the situation in the U.S. during the Civil Rights Revolution. Therefore, the Court of Justice's judgments during the rule of law crisis stand on a much more delicate footing. Third, as Bermann stressed, the Court of Justice misses two crucial features that the Supreme Court enjoys, making it extremely difficult to act similarly during a rule of law crisis. It lacks consensus over the supremacy of EU values across all Member States as well the absolute supremacy of the Court of Justice. "[T]here is not even any EU consensus over the institutional question as to which court – the supreme or 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."[409] These constraints significantly hamper the Court of Justice's ability to master the rule of law crisis successfully compared to the Supreme Court.

Nevertheless, "[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."[410] Rosenfeld has pointed out that the reasons for the Court of Justice's success can 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 EU was at stake, and that if its decision were not accepted, the court's very precariousness might preclude its remedying the irreparable damage

[408] Rosenfeld (n 16) p. 640.
[409] George A. Bermann, 'Marbury v. Madison and European Union 'Constitutional' Review' Vol. 557 George Washington International Law Review, p. 565.
[410] Rosenfeld (n 16) p. 650.

that could ensue to the EU and, derivatively, to the member states were its decisions not recognised."[411] During the rule of law crisis, the Court of Justice was confronted with systemic rule of law deficiencies in the Member States with existential consequences for the European project. Similar to the Supreme Court's challenges during the Civil Rights Revolution.[412] As a consequence, the Court of Justice evolved into a guardian of the rule of law in the EU legal order. However, Member States opposed the Court of Justice's jurisprudence for their political gains.[413] This is evident in the open contestation of the Court of Justice's judicial supremacy.[414]

A Continuous Challenge for Judicial Supremacy

Third, maintaining judicial supremacy is a continuous challenge for both the Supreme Court and the Court of Justice. While the Supreme Court holds significant power in shaping constitutional interpretation in the U.S., the Court of Justice is crucial in interpreting the Treaties. Despite their different origins and mandates, the comparative analysis underscores the significance of powerful apex courts in upholding the rule of law in composite states.

As the ultimate arbiter of EU law, the Court of Justice's pursuit of defending the rule of law has led to tensions between national sovereignty and the Court of Justice's jurisdiction. Some Member States' governments argue that the Court of Justice's expansive approach encroaches on their autonomy and sovereign decision-making.[415] Similarly, the Supreme Court's decisions are subject to intense political scrutiny and public debate. Its composition, appointment process, and the potential for ideological shifts among its members contribute to the constant contestation of its authority. Throughout its history, state challenges against its power have been well-documented. As it seems, with its decision in *Cooper v Aaron*, the Supreme Court enshrined judicial supremacy once and for all.

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[411] Ibid.
[412] See Feldman (n 336) and Ackerman, *We the People 3: The Civil Rights Revolution*.
[413] Lorant Csink, 'Rule of Law in Hungary: What can law and politics do?' in Timea Drinoczi and Agnieszka Bien-Kacala (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2021).
[414] See the judgment in *K 3/21* and earlier cases in Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' Vol. 10 European Constitutional Law Review pp. 54.
[415] Alicja Ptak, 'Poland's Kaczynski says primacy of EU law undermines sovereignty (18 September 2021)' *Reuters* (London, United Kingdom) https://www.reuters.com/world/europe/polands-kaczynski-says-primacy-eu-law-undermines-sovereignty-2021-09-18/, and *PM Orbán: We must find a delicate balance between national sovereignty and European unity (12 May 2023)* (About Hungary 2023).

There has not yet been a *Cooper v Aaron* decision in the EU. However, the Court of Justice's press release after the *Weiss/PSPP* ruling by the German *BverfG* is remarkable.[416] In response, the Court of Justice manifested itself as the ultimate arbiter over EU law. However, it also shows that the Court of Justice feels threatened by those challenges to its judicial authority, particularly by the judgments of powerful national courts such as the *BVerfG.* Notably, this judgment was welcomed by rule of law backsliding Member States in Warsaw and Budapest, as it questioned the Court of Justice's supremacy.[417] Subsequently, the Polish Constitutional Tribunal has used the *BVerfG's* arguments to defend and bolster its EU-critical stance.[418]

Court of Justice President Lenaerts has drawn parallels between the Supreme Court's ruling in *Cooper v Aaron* and the Court of Justice's intention to create a complete system of effective legal remedies under EU law.[419] Indeed, the Court of Justice's evolving case-law around effective judicial protection seeks to safeguard the rule of law in the Member States against backsliding. However, it has, so far, faced strong resistance in some Member States and could not develop the same effect as *Brown v Board of Education* or *Cooper v Aaron.* As a result, the ongoing struggle between the Court of Justice and the rule of law backsliding Member States continues. Eventually, it could take the same turn as in the U.S., or the Court of Justice's approach could fail due to the shortcomings of the EU's constitutional architecture.

The comparative analysis of the Court of Justice and the Supreme Court made apparent that an apex court never operates alone in a constitutional system. Instead, it is interlinked and dependent on the other institutions in the constitutional system. Mutual institutional support is specifically crucial during times of rule of law crises. Therefore, the following Part II will compare the EU political branches of government dealing with rule of law backsliding in the rule of law crisis and the U.S. political branches dealing with the same phenomenon in the U.S.

[416] *Press Release No 58/20 (8 May 2020)* (Court of Justice of the European Union 2020).
[417] See Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' Vol. 21 German Law Journal pp. 1104.
[418] *K 3/21*.
[419] 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.

Part II: The Institutional Dimension: Upholding the Rule of Law via Political Branches of Government

Chapter 3: The EU's Political Branches during the Rule of Law Crisis

> *"[…], at a moment of challenges to the rule of law in our own member states, I addressed the need to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights."*[420]

This quote of former Commission President José Manuel Barroso highlights one of the core dilemmas of the institutional dimension of the rule of law crisis in the EU. The primary instrument for safeguarding the rule of law – Article 7 TEU – was (and still is) considered a nuclear option that will never be used.[421] Consequently, the EU's political branches have (so far) failed to find a solution to the rule of law backsliding in the Member States.

Chapter 3 – The EU's Political Branches during the Rule of Law Crisis – analyses the institutional dimension of the rule of law crisis in the EU. After considering the judicial branch, namely the Court of Justice, in Chapter 1, the following Chapter 3 will focus on two types of political branches in the EU's institutional system – the legislative (EP and Council) and the executive (Commission and European Council). Judicial institutions never operate in isolation from political developments.[422] Therefore, an analysis of the EU's central political branches is indispensable to get the full picture of the EU's response to the rule of law crisis within the Member States. To do this, this chapter will analyse the use of legislative instruments[423] by the political branches and evaluate whether the EU's central political branches operated within their legal competencies and institutional roles.[424] The analysis will focus on the actions of the EP, the Council, the Commission, and the European Council.

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[420] José Manuel Durão Barroso, *José Manuel Durão Barroso President of the European Commission State of the Union 2012 Address Plenary session of the European Parliament/Strasbourg 12 September 2012* (European Commission Press Office 2012).

[421] With the nuclear option, Barroso refers to the Cold War rhetoric of pushing the nuclear button. During the Cold War, the global superpowers of the U.S. and the Soviet Union had adopted a strategy of mutually assured destruction, by which attacking the enemy would lead to the destruction of the attacker. Suggesting or the enemy perceiving one might be willing to 'press the nuclear button' had considerable consequences.

[422] See, for example, Paul A. Freund, *On Understanding the Supreme Court* (Little, Brown and Company 1949).

[423] This chapter will omit an analysis of the most recent instrument available in the rule of law crisis, the Conditionality Regulation. Instead, the Conditionality Regulation will be the focus of Chapter 5 of this dissertation. See also Niels F. Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union' Vol. 6 European Papers Insight pp. 101.

[424] NB: The judicial branch of the EU, the Court of Justice, is discussed in Chapter 1.

The scholarly literature on the EU's political response to the rule of law backsliding in the Member States is manifold. Konstadinides explored the institutional dimension of the rule of law in the EU.[425] Hegedüs, with his analysis of the institutional actors in the rule of law crisis, explored the dynamics from a political science perspective.[426] Moreover, many authors have written on the application of specific instruments by the EU institutions. Closa has analysed the role of the Commission in applying the Article 7 TEU procedure.[427] Besselink has explored the dynamics of the EU institutions under the Article 7 TEU procedure.[428] Kochenov and Pech assessed the Commission's role in applying the Rule of Law Framework.[429] Closa and Kochenov published an edited book on strategies to reinforce institutional rule of law oversight in the EU.[430] With his edited volume on strengthening the rule of law in Europe, Schröder provided views on the institutional implication of implementing the rule of law.[431] Recently, Schepple analysed the Commission's failing role as guardian of the Treaties.[432] In the same vein, Kelemen and Pavone could show the rise of political forbearance at the Commission.[433] The following chapter builds on this essential research by leading scholars.

Chapter 3 aims to demonstrate that the responses by the political branches of the EU to the rule of law crisis within the Member States have so far been ineffective.[434] Therefore, the chapter will identify the dynamics and roles of the different political branches, the framework in which they operate, and how this fits into the larger picture of an evolving federal legal order dealing with a rule of law crisis in its Member States. This analysis will identify the obstacles to a viable rule of law protection in the Member States. Finally, this chapter aims to give a comprehensive overview of the institutional responses to the rule of law crisis in the EU.

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[425] Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (2017).
[426] Daniel Hegedüs, 'What Role for the EU Institutions in Confronting Europe's Democracy and Rule of Law Crisis?' March 2019 The German Marshall Fund Policy Paper pp. 1.
[427] Carlos Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' Journal of European Public Policy pp. 696.
[428] Leonard Besselink, 'The Bite, the Bark, and the Howl - Article 7 and the Rule of Law Initiatives' Vol. 1 Amsterdam Centre for European Law and Governance Working Paper Series.
[429] Pech and Kochenov, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation'.
[430] Closa and Kochenov (n 98).
[431] Werner Schröder (ed) *Strengthening the Rule of Law in Europe* (Hart Publishing 2016).
[432] Kim Lane Scheppele, 'The Treaties Without a Guardian: The European Commission and the Rule of Law' Vol. 29 Columbia Journal of European Law pp. 93.
[433] Supranational political forbearance is understood as the deliberate under-enforcement of the law. See R. Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' Vol. 74 World Politics.
[434] See Closa and Kochenov (n 98), and Kelemen, 'The European Union's Authoritarian Equilibrium'.

The legal analysis will, however, not happen in isolation. As done in Part I, the subsequent Chapter 4 will focus on the U.S.'s institutional experience of dealing with rule of law backsliding. While the EU's institutional landscape and legal framework are unique, the circumstances of a federal legal order dealing with rule of law backsliding are not.[435] The EU, operating under cooperative federalism, and the U.S., operating under American federalism, face similar challenges from composite states.[436] Therefore, the findings of Chapter 3 will be contrasted in Chapter 4 with the institutional dimension of the U.S. legal order. Finally, both chapters together will provide an overview of the similarities and differences in addressing rule of law crises in federal legal systems.

Chapter 3 is structured as follows. First, it will analyse the legal instruments available in the rule of law crisis, with a focus on the Article 7 TEU procedure and the infringement proceeding of Article 258 TFEU — the two primary instruments to deal with rule of law backsliding in the Member States.[437] Second, it will consider the EU's legislative branches, emphasising the EP's actions and the Council's ambiguity. Third, it will focus on the EU's central executive branches. Therefore, the Commission and the European Council will be analysed against their constitutional mandate during the rule of law crisis. Overall, this chapter will examine the EU's political branches and their role in the rule of law crisis. It will assess each institution's role, significance, and legal actions during the crisis and their use of the existing instruments. In conclusion, this chapter will provide a comprehensive overview of the institutional dimension of the rule of law crisis and provide the backdrop for the comparative study of instruments and mechanisms in the U.S. constitutional framework.

[435] See, for example, Mark Tushnet, 'Enforcement of National Law against Subnational Units in the US' in Dimitry Kochenov and Andras Jakab (ed), *The Enforcement of EU Law and Values: Ensuring Member State's Compliance* (Oxford University Press 2017).
[436] For the EU's system of cooperative federalism, see Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law*.
[437] This chapter will omit an analysis of the most recent instrument available in the rule of law crisis, the Conditionality Regulation. Instead, the Conditionality Regulation will be the focus of a chapter in the following part of this dissertation. See also Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union'.

1. Legal Instruments in the Rule of Law Crisis

This section analyses the most important legal instruments available in the rule of law crisis in the EU. Therefore, it will primarily focus on the Article 7 TEU procedure, its legislative history, rationale, and effectiveness. It will commence chronologically by analysing the Article 7 TEU procedure, inserted into primary law during the Treaty of Amsterdam in 1997.[438] Thereafter, the standard treaty enforcement mechanism, the Article 258 TFEU infringement proceedings, will come into focus. Finally, ancillary legal instruments in the rule of law crisis will be discussed. Most of the instruments touched upon are anchored in the Treaties. They are, therefore, considered binding legal instruments. Other so-called soft law instruments developed during the rule of law crisis – as the Rule of Law Framework and the Rule of Law Reports – by the EU institutions (mainly, by the Commission) will be discussed in following section.

At the time of writing, the EU's instruments have proven ineffective in preventing rule of law backsliding in the EU. According to Closa, the absence of coercive instruments is the reason for the EU's ineffectiveness in the rule of law crisis.[439] He calls this the rule of law paradox of the EU institutions. Specifically, the EU lacks an action of last resort, a coercive threat to enforce the rule of law in the Member States.[440] Instead, the EU relies on national compliance, which then, in turn, impedes firm action by the institutions on the rule of law. "This poor performance reveals a crucial paradox on rule of law compliance: the EU is a community of law that lacks the last enforcement mechanism, i.e., coercion. It depends on the member states' commitment to rule of law for effective compliance."[441] With this assessment, Closa has encapsulated the core of the rule of law dilemma on the institutional level. Therefore, this section will analyse the Treaty mechanisms available and provide a comprehensive picture of the EU's institutional mechanism.

Before engaging in a detailed analysis of the main instrument's application, it is essential to map the main instruments available in the EU which refer to upholding the rule of law as their main objective. At the time of writing, the Article 7 TEU procedure, the Article 258 TFEU

[438] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Nice).
[439] Carlos Closa, *Paradoxes and Dilemmas in Compliance and Enforcement* (VerfBlog 2020).
[440] Contrary to the US legal framework, the EU lacks the instrument of federal coercion see Pohjankoski (n 50).
[441] Closa, *Paradoxes and Dilemmas in Compliance and Enforcement*.

infringement procedure, the Rule of Law Framework[442], the Rule of Law Reports[443], and the rule of law Conditionality Regulation[444] are the most powerful legal instruments in the rule of law crisis. The first four will be analysed in this chapter, while the Conditionality Regulation will be the subject of Chapter 5. Additionally, the EU has other legal instruments linked to the rule of law at its disposal. These instruments are grounded in other areas of EU law. They do not have the protection of the rule of law as their primary objective, but they still play a part in protecting the rule of law in the Member States – they will be discussed as ancillary legal instruments.

[442] *Communication from the Commission to the European Parliament and the Council: A new Framework to Strengthen the Rule of Law (March 2014)* (European Commission 2014).
[443] The Rule of Law Report runs under the header of Rule of Law Mechanism in the Commission's vocabular. However, given that the Rule of Law Reports are the main substantive new instrument under the "Rule of Law Mechanism" this dissertation will refer to the former.
[444] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.

1.1 The Political Enforcement Procedure: Article 7 TEU

Rule of law backsliding in the Member States is not a new phenomenon for the EU. Instead, there are previous instances, before the rule of law crisis in Hungary and Poland commenced, in which the EU had to deal with the threat of a rule of law backsliding Member State. This was before the EU enlargement to CEE countries and became known as the "Haider affair" in Austria in the academic literature.[445] In 1999, Jörg Haider, a far-right politician from Carinthia, formed a government with the Christian-conservatives in Vienna. This led the other Member States to enact bilateral sanctions as they saw the values of the EU threatened in Austria. In this earlier instance, the Member States resorted to bilateral sanctions outside the Treaty framework to prevent rule of law backsliding in one of the Member States. This was since the Article 7 TEU procedure proved to be unworkable at that time[446] and, as the following analysis will show, still is.

Introduced with the Treaty of Amsterdam, in 1997, the Article 7 TEU procedure has the primary aim to ensure that rule of law and democratic values are upheld in all Member States. At the time of the first threat of rule of law backsliding in the Member State of Austria, the Article 7 TEU included solo the ex-post procedure (existence of a serious and persistent breach), while the ex-ante procedure (a clear risk of a serious breach) was only introduced into Article 7 TEU with the Treaty of Nice (2001). The extension of the article with the Treaty of Nice was made considering the new-joining Member States from the CEE countries who had just escaped the Iron Curtin and enjoyed their newly gained democratic freedoms and political scientist argued that Western democracy and the rule of law had won over Soviet authoritarianism.[447] However, as the rule of law crisis in Hungary and Poland shows, this proved to be an overly optimistic assessment.

The Article 7 TEU procedure is a Treaty instrument designed to address serious breaches of the EU values enshrined in Article 2 TEU.[448] It provides for the possible sanctioning of

[445] See Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement and Jorg Haider' Vol. 16 Columbia Journal of European Law pp. 385.
[446] Kim Lane Scheppele and Laurent Pech, *Didn't the EU Learn That These Rule-of-Law Interventions Don't Work? (9 March 2018)* (VerfBlog 2018).
[447] Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).
[448] Article 2 TEU states that "The Union is founded on 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

Member States in which a serious and persistent breach of those values is determined.[449] It is a binding mechanism enshrined in primary EU law. The Article 7 TEU procedure came to light in the Treaty of Amsterdam in 1997 as an *ultima ratio* in case of democratic backsliding in the Member States.[450] Subsequently, the Treaty of Nice in 2001 reformed the EU's institutional structure to withstand any centrifugal forces of the EU's subsequent eastward expansion. The initiative to expand the article from a solo ex-post procedure to ex-ante feature was taken considering the significant enlargement of the EU to former communist States in the subsequent years. The intention behind the provision was to create a deterrent function. However, the article was never applied in the following decade, although instances arose in the Member States of France and Romania in which it could have proven adequate.[451]

The Article 7 TEU consists of several stages. The first stage is the triggering of the procedure enshrined in Article 7 (1) TEU. The procedure can be initiated by the Commission, the EP, or one-third of Member States. They can raise concerns about the risk of a Member State's breach of EU values, such as the rule of law, human rights, or democracy. So far, the first stage of the procedure was reached two times. First, by initiative of the Commission against Poland in 2017 and second, by initiative of the EP against Hungary in 2018. With the triggering of the procedure an intermediate stage starts in which regular hearing on the situation in the Member States are held in the Council. Both, Hungary, and Poland are currently in this intermediate stage. To move on, a four-fifths majority vote in the Council, excluding the Member State being assessed, is required.

The second stage is triggered by a four-fifths vote in Council: The Council, representing the Member State's government, examines the concerns raised and determines if there is *"a clear risk of a serious breach by a Member State of the values referred to in Article 2"*. However, so far, the second stage of the Article 7 TEU procedure has never been reached. Neither in the case of the rule of law backsliding in Hungary nor in the case of the rule of law crisis in Poland. Although, it does not bear direct penalties for the Member State in question.

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minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[449] For a historic and purposive analysis of Article 7 TEU, see Besselink (n 428).

[450] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Nice).

[451] Stephen Castle, 'E.U. Casts Legal Doubt on French Roma Expulsion (1 September 2010)' *The New York Times* (New York City, United States) https://www.nytimes.com/2010/09/02/world/europe/02roma.html, and 'EU slams Romania (18 July 2012)' *Deutsche Welle* (Bonn, Germany) <https://www.dw.com/en/eu-slams-romania-for-undermining-rule-of-law/a-16108792>.

Moreover, the third stage of the procedure is the determination of *"the existence of a serious and persistent breach by a Member State of the values referred to in Article 2"* enshrined in Article 7 (2) TEU. If the Council, by unanimity, concludes that there is a serious and persistent breach of EU values by the Member State, it can issue a formal decision. This decision is made after giving the Member State the opportunity to present its case. Following the third stage, the Council in a fourth stage can vote on sanctions by qualified majority. These sanctions can include the suspension of certain rights, such as voting rights in the Council, but do not entail the Member State's withdrawal from the EU. Notably, the Article 7 TEU procedure requires a high threshold for sanctions to be imposed, as they necessitate a unanimous decision by all Member States, excluding the Member State concerned. Overall, the mechanism is heavily focussed on the Council and on unanimity voting. Two features which made the mechanism unworkable in the past and will continue to make it unusable in the future.

In 2012, then Commission President Jose Manuel Barroso famously described the mechanism as the 'nuclear weapon of EU law'.[452] Closa, in retrospect, criticised this wording as inadequate, arguing that the deterrence effect that a nuclear weapon typically creates for offenders was undermined by the extremely high threshold for activating the final stages of the Article 7 TEU procedure: "In this respect, Barroso misinterpreted the notion of "nuclear" option of article 7. The basis of nuclear doctrine was deterrence: a party would avoid any aggression if it thought that the resolve to respond of its opponent was unquestionable."[453] However, as it would later turn out, the resolve of the EU institutions to enforce Article 7 TEU is minor and even non-existent.

This 'nuclear weapon' of EU law has been activated twice by two different institutional actors, in the case of Poland by the Commission[454] and in the case of Hungary by the EP.[455] Both times, the procedure was blocked at the Council level and did not yield the desired outcome. As regards Poland, "[t]he Commission in December 2017 put a proposal based on Article 7 (1) TEU to the Council, stating in particular that the constitutionality of laws in Poland could 'no

[452] Barroso (n 420).
[453] Closa, *Paradoxes and Dilemmas in Compliance and Enforcement*.
[454] *European Commission's reasoned Proposal in Accordance with Article 7 (1) of the Treaty on European Union Regarding the Rule of Law in Poland (20.12.2017)* (Official Journal of the European Union 2017).
[455] *European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (12 September 2018)* (Official Journal of the European Union 2018).

longer be verified and guaranteed by an independent constitutional tribunal.' "[456] Thus, declaring the Polish constitutional tribunal as de-facto captured court. Finally, regarding Hungary, the EP triggered the Article 7 TEU procedure after a long period of inaction by the Commission. "On 12 September 2018, the EP adopted a resolution invoking Article 7 and calling on the Council to consider the risk of a serious breach of foundational EU values by Hungary."[457] This parliamentary Resolution was based upon the Sargentini Report. Provided by a member of the EP, Judith Sargentini, who gathered information on the rule of law backsliding in Hungary.[458] However, both initiatives on the Article 7 TEU procedure have petered out and did not yield any significant changes in the two concerned Member States. As a result, the deterioration of the rule of law continued as before in both Member States.

In the late 2010s it became increasingly clear that the Article 7 TEU procedure was unsuited in the EU's current constitutional and institutional setup to uphold the rule of law. First, the requirement for unanimity in the European Council, according to Article 7 (2) TEU, has proved unworkable in an EU of 27 Member States. "The application of Article 7 has a high threshold (unanimity) and depends on the willingness of member states to take firm action."[459] Second, the lack of a streamlined process and the complexity of its procedure have further hampered its process: "Because the procedure is exceptional by nature, action-forcing deadlines have not been adopted."[460] Besselink, in his analysis of Article 7 TEU and its inherent relationship to the values expressed in Article 2 TEU, called out the over-politicised decision-making process under the Article, which has followed as a corollary to its uselessness.[461] All this has resulted in an increased incapacity of the EU's institutions to deal with rule of law backsliding Member States and has forced the EU to rethink its approach to this phenomenon. Finally, Krajewski highlights that "[n]one of the governments of backsliding Member States have come back on the rule-of-law path due to a threat of Article 7 TEU sanctions, in the imposition of which they do not seem to believe."[462] Therefore, the threat of actual sanctions under the Article 7 TEU

[456] Molly O'Neal, 'The European Commission's Enhanced Rule of Law Mechanism' Stiftung Wirtschaft und Politik (SWP) <https://www.swp-berlin.org/10.18449/2019C48/>.
[457] Ibid.
[458] Judith Sargentini, *Report on a proposal calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (Sargentini Report)* (European Parliament 2018).
[459] O'Neal (n 456).
[460] Ibid.
[461] Cf. Besselink (n 428).
[462] Michal Krajewski, 'Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges' Vol. 14 European Constitutional Law Review.

procedure was too weak to convince backsliding Member States governments to return to rule of law standards.

In conclusion, Article 7 TEU has remained a blunt sword in the arsenal of the Commission and the Council. In the mid-2000s, the possibility of activating Article 7 TEU was debated, but official recommendations were never made. Events for which activation of Article 7 TEU was debated included the French government's expulsion of thousands of Roma in 2009[463] and the political struggle in Romania between Traian Băsescu and Victor Ponta in 2012.[464] In 2017, Article 7 TEU was for the first time triggered against Poland by the Commission.[465] Subsequently, in 2018, it was triggered against Hungary by the EP.[466] However, the mere triggering of Article 7 TEU has led to no substantive results in the respective Member States. Instead, the autocratic backsliding continued or accelerated in the following years. What is the reason for Article 7 TEU's missing impact? It seems that the article's design is too complex, involves too many (or the wrong) institutional actors, and suffers from the unanimity requirement for activating the second stage of the mechanism under Article 7 (2) TEU. In short, the overly strong procedural competencies of the Council in bringing the procedure under Article 7 TEU forward, suspends any meaningful impact that it could have made.

[463] Castle (n 451).
[464] 'EU slams Romania (18 July 2012)'.
[465] *European Commission's reasoned Proposal in Accordance with Article 7 (1) of the Treaty on European Union Regarding the Rule of Law in Poland (20.12.2017)*.
[466] *European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (12 September 2018)*.

1.2 The Legal Enforcement Procedure: Article 258 TFEU

Besides the Article 7 TEU procedure, the infringement proceedings under Article 258 TFEU have become the EU's primary legal instrument to halt and reverse rule of law backsliding in the Member States. "Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission may file an action to obtain from the Court of Justice of the European Union (CJEU) a judgment finding that a member state has failed to comply with EU law."[467] Article 258 TFEU is the standard treaty enforcement procedure and has a long history in EU law. It is used by the Commission to address violations or non-compliance of EU law by Member States. While Article 7 TEU is a political instrument to uphold the rule of law in the Member States, Article 258 TFEU is a legal instrument to uphold the rule of law in the Member States.

The Article 258 TFEU infringement proceeding involves several stages. In the first stage, after the Commission found an alleged infringement of EU law in a Member State a letter of formal notice is sent to the Member State concerned. In this letter, the Commission outlines the alleged breach of EU law and request a response within a specified timeframe. If the member state fails to address the concerns raised, the Commission issues a reasoned opinion and thereby activate the second stage. The reasoned opinion, then, provides a detailed explanation of the alleged breach and requests the Member State to take corrective measures within a specified period.

If the Member State still not remedies the issues found and fails to comply with the reasoned opinion, the Commission can, in the third stage, lodge a complaint before the Court of Justice. In this case, the Court of Justice examines the case and, after hearing both sides, delivers a judgment on whether the Member State has violated EU law in the specific instance. If the Court of Justice rules that a Member State has breached EU law, it is obliged to take necessary actions to comply with the judgment. Failure to do so may result in financial penalties under Article 260 TFEU or further legal consequences. Poland has been subjected to high financial penalties due to the non-implementation of lost infringement cases before the Court of Justice.[468]

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[467] Olivier De Schutter, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Right in the European Union* (2017) Executive Summary.

[468] Vlad Makszimov, 'EU high court fines Poland €1 million a day for non-compliance (27 October 2021)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/justice-home-affairs/news/eu-high-court-fines-poland-e1-million-a-day-for-non-compliance/>.

When a Member State violates EU law or undermines the rule of law, the Commission can initiate infringement proceedings to address and rectify the situation. Therefore, infringement proceedings can contribute to protecting the rule of law in the EU. Additionally, there are several reasons why infringement proceedings can be specifically useful to address the rule of law backsliding in the Member States. "In contrast to Article 7 TEU procedures or the delivery by the CJEU of preliminary rulings, infringement proceedings depend neither on political support from the member states, nor on the cooperation of domestic courts."[469] By enforcing EU law and protecting the rule of law through infringement proceedings, neither political cooperation from the other Member States nor cooperation of domestic courts in necessary. Therefore, infringement proceedings serve as a less political instrument than the Article 7 TEU procedure, and a less domestic-court dependent instrument than the preliminary ruling procedure. Infringement proceedings send a clear message that adherence to EU law and the rule of law is essential for all Member States. The proceedings demonstrate that no Member State is above the law and that violations or abuses will be addressed through a legal process.

Importantly, the infringement proceeding is a formal process aimed at resolving legal disputes between the Commission and the Member States – it is not per se an instrument to remedy rule of law deficiencies. It serves to ensure the uniform application and enforcement of EU law in the Member States. In the case of the evolving rule of law crisis in Hungary and Poland the Commission has started to use infringement proceedings more regularly to address the rule of law deficiencies in the Member States from 2017 onwards.[470] Scholars have argued that infringement proceedings have been one of the most successful instruments in the rule of law crisis so far. "[…] neither the "nuclear option" of Article 7 TEU […] nor the case-by-case approach relying on the filing of individual claims before domestic courts and the subsequent referral to the CJEU, are adequate substitutes for a more robust use, by the European Commission, of infringement proceedings."[471] However, infringement proceedings are not a panacea for protecting the rule of law within the Member States.

[469] Schutter (n 467) Executive Summary.
[470] See *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland (14 June 2017)* (European Commission - Press Release 2017), *European Commission launches infringement against Poland over measures affecting the judiciary (29 July 2017)* (European Commission 2017), and *Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court (2 July 2018)*.
[471] Schutter (n 467) Executive Summary.

In infringement proceedings, the Court of Justice, acts as an independent arbiter between the Commission and the Member States. Determining whether the Member State did comply with the EU law in a specific circumstance – even ex-ante before entering into force of a specific national legislation. "Infringement proceedings, moreover, are specific in that they can be filed even prior to the adoption of individual measures applying general rules or policies to specific situations: they can operate preventively, forcing a State to comply with the requirements of EU law before specific measures are adopted that might affect individuals."[472] The Court of Justice judgments provide authoritative interpretations of EU law and serve as a check on Member States' compliance. However, infringement proceedings are primarily focused on specific violations of EU law rather than comprehensive oversight of the rule of law within member states. Therefore, their impact in the rule of law crisis has been limited. The EU has been exploring additional mechanisms to address broader rule of law concerns, such as the Rule of Law Framework[473], the Rule of Law Reports[474], and the Conditionality Regulation.[475] These initiatives aim to address systemic threats to the rule of law and provide a more comprehensive framework for protecting it.

The role of the Commission in the infringement proceedings in unique as the Commission, according to Article 17 TEU, is supposed to act as guardian of the Treaties to uphold EU law in the Member States. Only the Commission can activate the procedure under Article 258 TFEU. Therefore, it plays the central role in the EU's infringement proceedings. Its primary responsibility is to ensure that EU law is correctly applied and respected by Member States. First, only the Commission has the authority to initiate infringement proceedings against a Member State that it believed to has violated EU law. This can be done following a complaint, through its own investigations, or by monitoring member states' compliance with EU law. Second, it is the Commission that must carefully examine complaints and gathers relevant information to assess whether there has been a violation of EU law by a Member State. It analyses the facts, legal arguments, and applicable EU legislation to form its position.

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[472] Ibid.

[473] *Communication from the Commission to the European Parliament and the Council: A new Framework to Strengthen the Rule of Law (March 2014)*.

[474] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report, The rule of law situation in the European Union (30.09.2020)* (Official Journal of the European Union 2020).

[475] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.

Third, it is the Commission that is sending formal notices to the Member State in question. Giving the Member State adequate time to respond to its concerns. Fourth, and as a follow-up, it is the Commission that issues a reasoned opinion if the Member State has failed to allay the concerns. Fifth, it is the Commission that has the power to refer a case to the Court of Justice if the Member State fails to comply with the reasoned opinion. Now it is upon the highest judicial authority in the EU to decide the case on the merits. Sixth and finally, it is the Commission that is tasked with ensuring compliance and enforcement of the ruling by the Court of Justice. As outlined earlier, the Commission may even request the imposition of financial penalties under Article 260 TFEU or pursue further legal action if necessary. In summary, the Commission has a lot of power in its hand when it comes to infringement proceedings. Its role includes investigating alleged violations, initiating proceedings, issuing formal notices and reasoned opinions, and referring cases to the Court of Justice for judgment. Therefore, it is problematic that the Commission's record when it comes to using the instrument of infringement proceedings is mixed.

Empirical legal research by Kelemen and Pavone highlight that the Commission's infringement proceedings have plummeted after 2004.[476] "The number of infringements launched by the Commission plummeted. Between 2004 and 2018, infringements opened by the Commission dropped by 67%, and infringements referred to the ECJ dropped by 87%."[477] Arguably, this has opened a gap and allowed Member States from 2010 onwards to implement their domestic autocratic agenda undermining the rule of law in the Member States. When the Commission woke up to the developments in the Member States it was too late. Even then, in 2016, the Commission regarded infringement proceedings only as action of last resort. "Since December 2016, the Commission has made it explicit that it would make more "strategic" use of its powers under Article 258 TFEU: infringement proceedings shall be filed only as a last resort, in cases that shall be carefully selected, and only where no agreement can be reached with the member state who is suspected of failing to comply with their obligations under EU law."[478] By underenforcing EU law and the rule of law towards Member States, the Commission has not made use of is special and unique powers under Article 258 TFEU. Therefore, it facilitated rule of law backsliding in the Member States of Hungary and Poland. Only at the turn to the

[476] Kelemen and Pavone (n 433).
[477] Ibid.
[478] Schutter (n 467) Executive Summary.

2020s, the Commission restarted to effectively initiated infringement proceedings against both Member States. This came at a stage where the damage had already been done.

Ultimately, the infringement proceedings not only suffer from a weak and mixed strategy by the enforcer, the Commission, but also by the deliberate undermining by the addressee of the action – the Member States in question. At the time of writing, there have been eight rule of law-related infringement proceedings by the Commission against Hungary (most of them initiated in the last five years).[479] At the same time, there were five rule of law-related infringement proceedings against Poland before the Court of Justice.[480] While in all cases the Commission won against the rule of law offending Member State, the success on the ground has been very limited. Notably, it is the Commission that is tasked with ensuring compliance and proper enforcement of the ruling by the Court of Justice in the Member State. However, its hands are somewhat tied as the Commission has no personal on the ground to ensure the proper implementation of the judgment, and, therefore, relies on the Member State government and authorities. However, in many cases, there is no interest to implement the Court of Justice's judgments on rule of law related cases. This is due to several reasons. Primarily, the simple disregard for the judgments and authority of the Court of Justice. To avoid fines, Member States use creative compliance while not really implementing the Court of Justice's judgment.[481]

[479] *Commission v Hungary (C-286/12) (Retirement Age of Hungarian Judges)* European Court Reports Court of Justice of the European Union, *Commission v Hungary (C-288/12) (Independence of the Data Protection Supervisor)*, *Commission v Poland, Hungary and the Czech Republic (C-715/17, C-718/17 and C-719/17, Asylum Relocation Decision)* European Court Reports Court of Justice of the European Union, *European Commission v Hungary (C-66/18, Hungarian Higher Education Law)* European Court Reports Court of Justice of the European Union, *European Commission v Hungary (C-78/18, NGO Law)* European Court Reports Court of Justice of the European Union, *European Commission v Hungary (C-808/18, Hungarian Asylum Law)* European Court Reports Court of Justice of the European Union, *Commission v Hungary (C-821/19) (Stop Soros Law)* European Court Reports Court of Justice of the European Union, and *Commission v Hungary (C-769/22) (Hungarian LGBTQ Law)* European Court Reports Court of Justice of the European Union.

[480] *Commission v Poland, Hungary and the Czech Republic (C-715/17, C-718/17 and C-719/17, Asylum Relocation Decision)*, *Commission v Poland (C-619/18) (Independence of the Supreme Court)*, *Commission v Poland (C-192/18) (Independence of the Ordinary Courts)*, *Commission v Poland (C-791/19) (Disciplinary Regime for Judges)*, *Commission v Poland (C-204/21) (Independence and Privacy of Judges)*.

[481] Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU'.

1.3 Ancillary Legal Instruments

Besides the Article 7 TEU procedure (the political instrument) and the Article 258 TFEU infringement proceedings (the legal instrument), the EU has other oversight instruments at its disposal to protect the rule of law in the Member States. Followingly, the EU's Justice Scoreboard and the work of DG Reform will be discussed. Thereafter, the EU's agencies dealing with rule of law will come into focus, by discussing OLAF, the EPPO and the FRA.[482] From there, the European Fiscal rules come into focus as they provide an additional avenue how the rule of law can be protected in the Member States. Finally, the European budgetary instruments will be discussed and the CVM mechanism. This will provide an overview about the ancillary legal instruments in the rule of law crisis.

The EU Justice Scoreboard[483] is an assessment instrument that is part of the Commission's rule of law toolbox. A comparative instrument to assess the independence, quality, and efficiency of national justice systems in the EU, it provides the Commission with independent data on the independence of the judiciary in the Member States. It presents an annual overview of indicators of justice systems' efficiency, quality, and independence. Its purpose is to assist the Member States in improving the effectiveness of their national justice systems by providing objective, reliable and comparable data. However, the EU Justice Scoreboard has no binding character nor binding features and is, therefore, limited in its impact in the rule of law crisis. The Commission merely uses it for evidence and fact-finding on rule of law backsliding Member States.

Additionally, and rooted in an EU's economic framework, the Commission's Structural Reform Support Service (DG REFORM)[484] is a Commission Directorate-General that offers

[482] OLAF stands for the "European Anti-Fraud Office" (Office européen de lutte antifraude in French). It is an independent office of the EU responsible for combating fraud, corruption, and any illegal activities that affect the financial interests of the EU. OLAF was established to safeguard EU funds and ensure that they are used for their intended purposes, without being misappropriated, misused, or subject to fraudulent activities; The European Public Prosecutor's Office (EPPO), is a significant development in judicial cooperation and criminal law enforcement within the EU. It was established to combat and prosecute crimes affecting the financial interests of the EU, such as fraud, corruption, and other offenses involving EU funds; The European Union Agency for Fundamental Rights (FRA), is an important institution within the EU that plays a crucial role in promoting and protecting human rights and fundamental freedoms across the Member States. It serves as an independent advisory body providing expertise, data, and guidance to EU institutions and member states on matters related to fundamental rights.

[483] *Communication from the Commission on the 2020 EU Justice Scoreboard* (European Commission 2020).

[484] Valdis Dombrovskis, *Speaking points of Vice-President Dombrovskis on the Commission's new Structural Reform Support Service* (European Commission Press Office 2015).

the service to "provide [...] technical support for structural reform in the Member States, including in areas relevant to strengthen respect for the rule of law such as public administration, the judicial system, and the fight against corruption."[485] It helps Member States to design and implement reforms as part of their efforts to support job creation and growth. As economic growth benefits enormously from a rule of law-based order, it encourages Member States to engage in structural reforms that promote a robust rule of law framework. However, its direct contact points with rule of law promotion in the Member States are limited since it is mainly focused on economic reform and reduction of bureaucracy.

Furthermore, two other European agencies link their tasks directly to upholding the rule of law in the Member States, the OLAF[486] and the EPPO.[487] The latter creates a supranational law enforcement system targeting cross-border crimes, and the former establishes a supranational criminal justice enforcement system. OLAF "investigates fraud, corruption and other offences affecting the EU financial interests and issues recommendations that allow the national authorities to start administrative or judicial procedures."[488] All Member States are subjected to oversight by OLAF, and Hungary has consistently scored the most indication for cases of corruption and cronyism.[489] The EPPO, which recently (June 2021) became operable, has "the power to conduct criminal investigations and prosecute criminal offences affecting the Union's budget [...]."[490] However, regarding the EEPO, Member States must specifically opt into the agency based upon enhanced cooperation and Article 86 TFEU. Hungary and Poland have not yet acceded to the EEPO and are unwilling to do so.[491]

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[485] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)* (European Commission 2019).
[486] Commission Decision (1999/352) establishing the European Anti-fraud Office (OLAF).
[487] *Council Regulation (2017/1939) implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) (12 October 2017)* (Official Journal of the European Union (OJ L 283/1) 2017).
[488] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)*.
[489] Eszter Zalan, 'Hungary heads EU anti-fraud investigation list - again (11 September 2020)' *EU Observer* (Brussels, Belgium) <https://euobserver.com/rule-of-law/149405>.
[490] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)*.
[491] Edit Inotai and others, 'Democracy Digest: Hungary and Poland Refuse to Join EU Justice League (4 June 2021)' *Balkan Insight* (Bratislava, Slovakia; Budapest, Hungary; Prague, Czech Republic; Warsaw, Poland) <https://balkaninsight.com/2021/06/04/democracy-digest-hungary-and-poland-refuse-to-join-eu-justice-league/>.

Additionally, the FRA, based in Vienna and inaugurated in March 2007, seeks to promote fundamental rights across Europe. It was established by a Council Regulation and is thus rooted in EU secondary law.[492] In 2022, the FRA's mandate was modified by amending the founding Regulation 168/2007. The revised Regulation strengthens the Agency's mandate. In addition, it introduced changes to how FRA operates and how it is governed. According to its self-portrayal, FRA is an "[...] independent centre of reference and excellence for promoting and protecting human rights in the EU. We help make Europe a better place to live and work. We help defend the fundamental rights of all people living in the EU."[493] However, FRA's impact in the rule of law crisis has been extremely limited, as it has no executive authority and issues solely advisory opinions.

Increasingly the EU's fiscal framework is used by the EU institutions to uphold the rule of law in the Member States. The main component of the EU's fiscal framework is the European Semester.[494] The European Semester is an umbrella term for a "yearly cycle of economic, fiscal and social policy coordination that provides country specific analysis and makes recommendations for structural reforms encouraging growth."[495] The European Semester was established in 2011 as an annual economic and fiscal policy coordination cycle.[496] It provides the central framework within the EU's economic governance of the Member States. Moreover, it is a core component of the Economic and Monetary Union (EMU)[497] and annually aggregates different processes of control, surveillance, and coordination of budgetary, fiscal, economic, and social policies. Finally, it offers a space for discussions and interactions between the EU institutions and the Member States. While the European Semester is not primarily to uphold the rule of law in the EU, it is still important as it refers to the rule of law as being essential to create favourable economic conditions in the Member States. For example, the country-specific

[492] *Council Regulation (168/2007) establishing a European Union Agency for Fundamental Rights (15 February 2007)* (Official Journal of the European Union (OJ L 53/1) 2007).
[493] European Fundamental Rights Agency, 'About FRA' (*European Fundamental Rights Agency (FRA)*, 2019) <https://fra.europa.eu/en/about-fra/>.
[494] *Council Regulation (1175/2011) on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (16 November 2011)* (Official Journal of the European Union (OJ L 306/12) 2011) and for a deeper analysis of the EU's economic governance framework see Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*.
[495] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)*.
[496] The European semester consists of three elements: the Six-pack, the Two-pack and finally, the Fiscal Compact, also referred to as Treaty on Stability, Coordination and Governance, and numerous EU secondary legislation.
[497] The EU's EMU is a group of policies aimed at converging the economies of the Member States. Only once a Member State participates and fulfils all criteria in the EMU the Member States is permitted to adopt the euro as its official currency.

recommendations of the European Semester specifically focus on rule of law reforms in the Member States.[498] Increasingly, the EU using the country-specific recommendations to force rule of law reforms in the Member States and freeze EU funds until those recommendation are implemented.[499]

Moreover, also the MFF (the EU's budget)[500] is used as a lever by the EU institutions to target rule of law backsliding Member States. Two examples are the European Structural and Investment Funds (ESI Funds, ESIFs)[501] and the funds supporting Justice and Security policies in the Member States.[502] Both are financial instruments of the MFF governed by a common rulebook to implement the regional policy of the EU, as well as the structural (financial) policy pillars of the CAP and the CFP.[503] Both provide for targeted financial support "to strengthen public administration and the judiciary as well as enhance the Member States' capacity to fight corruption."[504] As part of the conditions for dispersing such funds, the Commission has applied an ex-ante conditionality via the Common Provisions Regulation.[505] The Common Provision Regulation is an instrument that governs eight EU funds whose delivery is shared with Member States and regions (common and shared management). In addition, the newly established Conditionality Regulation is applicable to the funds under MFF and can be used by the Commission and the Council to restrict the dispersal of those funds.[506] Budgetary instruments

[498] See, for example, *Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary (23 May 2022)* (Official Journal of the European Union 2022) and *Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland (23 May 2022)* (Official Journal of the European Commission 2022).
[499] Scheppele and Morijn (n 264).
[500] The Multiannual Financial Framework (MFF) is the EU's financial budget. It is a seven-year framework regulating its annual budget. It is laid down in an unanimously adopted Council Regulation with the consent of the EP. See, for example, the most recent MFF Regulation: *Council Regulation (2020/2093) laying down the multiannual financial framework for the years 2021 to 2027 (17 December 2020)* (Official Journal of the European Union (OJ L 433 I/11) 2020).
[501] The European Structural and Investment Funds consist of five funds that support economic, social, and territorial cohesion: the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development (EAFRD), and the European Maritime and Fisheries Fund (EMFF).
[502] *Regulation (2021/1149) establishing the Internal Security Fund (7 July 2021)* (Official Journal of the European Union (OJ L 251/94) 2021).
[503] The Common Agricultural Policy (CAP) is the agricultural policy of the EU. It implements a system of agricultural subsidies and other programs. The Directorate General AGRI administers its policies in Brussels; the Common Fisheries Policy (CFP) is the EU's fisheries policy. It sets quotas for which member states are allowed to catch each type of fish and encourages the fishing industry through various market interventions.
[504] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)*.
[505] *Common Provisions Regulation* (Official Journal of the European Union 2013) see Article 11.
[506] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.

have been increasingly used to promote rule of law reforms in the Member States and freeze EU money until sufficient reforms are enacted.[507]

When the latest EU enlargement, in 2007, the EU established a mechanism that was envisioned to allow the EU to track the reform progress in newly joined Member States – the CVM.[508] The EU, therefore, established some form of a post-accession conditionality. This mechanism however applies only to the two Member States that joined the EU during the 2007 enlargement – Bulgaria and Romania. The mechanism is part of the Accession Agreement of both Member States and, therefore, a binding instrument rooted in EU law. However, the mechanism works only with incentives and not with sanctions. "The CVM, which was supposed to work by incentives, in particular peer pressure, did not provide for sanctions is no progress was made."[509] The lack of credible sanctions was a significant impediment to its success.

Substantially, it requires those Member States to undertake specific reforms to strengthen the rule of law domestically. "This mechanism is a transitional measure with the goal of closing it once the defined benchmarks have been satisfactorily fulfilled. The experience gained is relevant when addressing rule of law challenges in all Member States."[510] The CVM has been partly successful in Bulgaria and Romania. However, different rule of law crises in both Member States after their accession show that it is no panacea for dealing with rule of law deficiencies.[511] Finally, Romania was relieved of the mechanism after fifteen years in November 2022. "In November 2022, after fifteen years of slow progress punctuated by backtracking by the various governments in power in Bucharest, the Commission considered that Romania's progress was "sufficient" and proposed to close the CVM."[512] It remains to be seen if Romania will continue this progress path even after the CVM has ceased to apply.

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[507] Scheppele and Morijn (n 264).
[508] *Commission Decision (2006/929) establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (13 December 2006)* (Official Journal of the European Union (OJ L 354/58) 2006), and *Commission Decision (2006/928) establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (13 December 2006)* (Official Journal of the European Union (OJ L 354/56) 2006).
[509] Eric Maurice, 'Rule of law: the uncertain gamble on conditionality (14 March 2023)' Vol. 660 Fondation Robert Schuman, European Issues.
[510] *Communication from the Commission to the European Parliament, the European Council, the Council: Further Strengthening the Rule of Law within the Union - State of play and possible next steps (April Communication)*.
[511] See 'EU slams Romania (18 July 2012)'.
[512] Maurice (n 509).

All instruments mentioned in the preceding paragraphs focused on the rule of law as one of their objectives, however, the rule of law is not the main reason for their existence. The comprehensive picture is that promoting, upholding, and protecting the rule of law has become a key priority and main occupation for the EU. This is visible in many policy areas, from internal budgetary policy to external neighbourhood policies. Conclusively, it shows a trend towards rule of law mainstreaming through different policies, regulations, and directives.[513]

[513] Halberstam and Schröder (n 389).

2. Legislative Actors in the Rule of Law Crisis: European Parliament and Council

This section analyses the EU's legislative actors in the rule of law crisis. In the EU legal framework, the legislative actors play a crucial role in the development and adoption of regulations and directives. The main legislative actors in the EU are the EP and the Council. The former representing the interests of EU citizens and the latter of Member State governments. Collectively, both actors contribute to the formulation, amendment, and adoption of EU laws. While both do not respond to the rule of law backsliding in the Member States on an executive level, they still form and frame the EU's policy agenda and public discourse. Analysing the legislative actors in the rule of law crisis, is crucial for a holistic analysis of the EU's response to the rule of law crisis in the Member States.

In EU institutional framework, the EP represents the EU citizens and is directly elected by them.[514] It shares the power to legislate with the Council. The EP reviews, amends, and adopts legislative proposals put forward by the Commission.[515] It also plays a role in shaping EU policies and exercises democratic oversight over other EU institutions. Moreover, the EP has been the institution that was the earliest and most active in pointing out the rule of law crises in the Member States.[516] This is visible by four parliamentary reports on the rule of law backsliding in Hungary (the Tavares -, in't Veld -, Sargentini-, and Delbos-Corfield Report)[517], the triggering of the Article 7 TEU procedure against Hungary in 2018[518] and the continuous calls for action on the rule of law towards the other institutions – mainly towards the

[514] While the EP is directly elected by the European citizens, there are still different voting procedures in each Member State and commentators have joined the call for transnational list to create a true European democracy.
[515] NB: the EP does currently not have a right of initiative to propose legislation itself, despite that this was announced to be changed under the Von der Leyen Commission.
[516] R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' Vol. 21 Cambridge Yearbook of European Legal Studies pp. 59 and Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (The Hague, Netherlands) [Springer; Asser Press] Hague Journal on the Rule of Law.
[517] Rui Tavares, *Report on the situation of fundamental right: standards and practices in Hungary (Tavares Report)* (European Parliament 2013), Sophia in't Veld, *European Parliament Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (in't Veld Report)* (European Parliament 2016), Sargentini (n 458), and Gwendoline Delbos-Corfield, *Report on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (Delbos-Corfield Report)* (European Parliament 2022).
[518] *European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (12 September 2018)*.

Commission.[519] However, at the same time, it was hampered by party dynamics within the EPP Group.[520] Those developments will be assessed and analysed in the following section.

As second EU legislative institution, the Council represents the Member States and is composed of government ministers from each Member State. It shares the legislative power with the EP. The Council reviews and amends legislative proposals from the Commission in collaboration with the EP through a process known as co-decision or ordinary legislative procedure. The Council meets in various forms and its compositions depending on the policy area under consideration. In the rule of law crisis, the Council takes a focal point with its actions which did undermine the efforts of other EU institutions to protect the rule of law.[521] Therefore, the Council takes the opposite end of the spectrum to the EP, by abstaining from promoting the rule of law and serving as a body that protracts rule of law protection in the Member States.

[519] Petri Sarvamaa and others, *European Parliament Resolution on the application of Regulation 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)) (10 June 2021)* (European Parliament 2021).
[520] Hegedüs (n 426).
[521] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance', and Hegedüs (n 426).

2.1 The European Parliament

The EP, with its institutional role defined in Article 14 TEU, assumed a vital role in the rule of law crisis.[522] The EP was critical in scrutinising the other institution's actions on the rule of law. In subsequent steps of the rule of law saga, the EP acted as the frontrunner in trying to protect the rule of law in the EU legal order – most notably during the continuous rule of law deterioration in Hungary since 2010. The most significant developments are the *Tavares Report* in 2013[523], the *n't Veld Report* in 2016[524], the *Sargentini Report* in 2018[525] which led to the triggering of Article 7 TEU, and the *Delbos-Corfield Report* in 2022.[526] The following section will analyse the main stages of the EP's actions and initiatives to evaluate its record during the rule of law crisis.

In 2013, the EP produced a first report on the rule of law situation in the Member State of Hungary. This was after Hungary, under the new supermajority of the Fidesz party, quickly introduced several legislative changes and a new Basic Law in January 2012 (i.e., a new constitution).[527] As a reaction, the EP intervened via a report on the state of fundamental rights in the Member State of Hungary. As a result, member of the EP (MEP) Rui Tavares was appointed rapporteur of the subsequently established committee. He presented the results of the committee's investigation in a report during a plenary debate in June 2013.[528] The report became subsequently known as the *Tavares Report*.[529] The report expressed fears that fundamental rights were not being respected, that too much concentration of power was being created and that Hungary's rule of law was in decline. In the report, the EP further "[…] called on the Commission to 'respond appropriately to a systemic change in the constitutional and legal system and practice of a member state' and 'to adopt a more comprehensive approach to addressing any potential risk of serious breaching of fundamental values.'[530] The EP's report was thus an early warning sign for the rule of law backsliding happening in the Member States

[522] Article 14 (1) TEU states that "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission".
[523] Tavares (n 517).
[524] Veld (n 517).
[525] Sargentini (n 458).
[526] Delbos-Corfield (n 517).
[527] McDonnell and others, 'Editorial Comments: Hungary's new constitutional order and "European unity".
[528] Tavares (n 517).
[529] Ibid.
[530] Hegedüs (n 426) p. 7.

of Hungary. However, it was largely neglected by the other institutions, specifically by the Commission, which would be the responsible institution as guardian of the Treaties. "The Commission largely neglected the political support and window of opportunity that was provided by the Parliament with the report."[531] At this stage, there was neither will nor support in either the Commission or the Council to embrace the initiative by the EP.

In 2016, in a second EP report was produced by a different MEP highlighting the ongoing constitutional destabilisation within the EU due to the continuous rule of law backsliding in Hungary. MEP Sophie in 't Veld presented the results of her report on the state of the rule of law in Hungary in October 2016 to the plenary and proposed the introduction of a Union Pact for democracy, the rule of law and fundamental rights. "In 2016, the European Parliament adopted the 'in't Veld Report' on the introduction of a comprehensive 'Union Pact for democracy, the rule of law and fundamental rights' (DRF Pact)."[532] Her report became known as the *in't Veld Report*.[533] However, other EU institutions, including the Commission, widely ignored this initiative by the EP. Notably, the EP's initiative to find an inter-institutional agreement on democracy, the rule of law, and fundamental rights was not supported by the responsible Commission's Vice-President Fran Timmermans at that time.[534] He argued that "[…] a long institutional debate on new mechanisms is the last thing we [the EU] need right now. We have a range of existing tools and actors that already provide a set of complementary and effective means to address rule of law issues. Duplication of existing mechanisms is something I think we should avoid […]."[535] Thus, during a plenary debate, the Commissioner did not follow the lead of the EP and instead warned of a duplication of mechanisms which should be avoided.[536]

In 2018, a third report by the EP was produced on Hungary's deteriorating rule of law situation. This report, compiled by MEP Judith Sargentini, led to the triggering of Article 7 (1) TEU by the EP: "In September 2018 the Parliament adopted the Sargentini report on Hungary, and triggered Article 7 (1) to determine the existence of 'clear risk of a serious breach' of EU

[531] Ibid.
[532] Ibid.
[533] Veld (n 517).
[534] Frans Timmermans, *EU mechanism on democracy, the rule of law and fundamental rights (debate) (25 October 2016)* (European Parliament Press Office 2016).
[535] Ibid.
[536] Ibid.

fundamental values by the country's government."[537] Her report subsequently became known as the *Sargentini Report*.[538] Once again, however, the report was not supported by the other EU institutions. In this case, the Council tried to undermine the EP's initiative by legal means. "Following an opinion of its Legal Service, it looked like Council was not going to accept the report as a 'reasoned proposal', the official document the Council hearing is based on, […]."[539] In the end, however, the Council had to accept the report as the triggering event of the Article 7 TEU procedure since the competence of the EP in this regard was undisputedly laid down in Article 7 (1) TEU of the Treaty.[540] However, the EP could not do much more than trigger the Article 7 TEU procedure, as the EP's procedural rights under the procedure are minimal. This hindered its ability to drive the procedure forward.

Finally, in 2022, the EP adopted a fourth report on the rule of law situation in Hungary. In the Delbos-Corfield Report, gathered by MEP Gwendoline Delbos-Corfield, it is pointed out that Hungary can no longer considered a democracy and has developed towards a hybrid regime of an electoral autocracy.[541] The report highlights that "[…], taken together, the facts and trends mentioned in Parliament's resolutions represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof; […] the lack of decisive EU action has contributed to turning Hungary into hybrid regime of electoral autocracy, according to the relevant indices."[542] The report was widely discussed in the press and received attention in the European public sphere.[543] However, outside of the European sphere the report had limited impact and it did not lead to any legal changes in the treatment of Hungary on the European level. Overall, while the Delbos-Corfield Report was already the fourth explicit EP report on the deterioration of the rule of law in Hungary, it did not make a difference in resisting rule of law challenge. Instead, it also highlights the EP's helplessness in advancing legal actions.

Nevertheless, the EP can use its leverage to put pressure on the other institutional actors in the EU. The EP has increasingly done so since the entering into force of the Conditionality Regulation in 2021. For example, the EP positioned itself in opposition to the European

[537] Hegedüs (n 426) p. 7.
[538] Sargentini (n 458).
[539] Hegedüs (n 426) p. 7.
[540] NB: The EP falls short of having a formal role in anything but the triggering of the Article 7 TEU procedures. As soon as the procedure is triggered, the responsibility of bringing the procedure forward shifts to the Council.
[541] Delbos-Corfield (n 517).
[542] Ibid.
[543] *MEPs: Hungary can no longer be considered a full democracy (15 September 2022)* (European Parliament 2022).

Council when it demanded the immediate application of the rule of law Conditionality Regulation from 1 January 2021 onwards.[544] Additionally, the EP has increased the pressure on the Commission by threatening to trigger Article 265 TFEU proceedings for a failure to act.[545] These developments demonstrate the increased self-confidence the EP has gained recently. With the increasing power and self-confidence of the EP, also the EP's awareness of upholding the rule of law in the Member States has grown. In the new constitutional set-up, the EP assumes the role of an engaged actor that encroaches on previously reserved competencies for the Council. Regarding the Commission, the EP assumes the role of scrutinising the Commission for its actions and inactions.[546] These are developments of a broader significance which are, however, epitomised in the developments regarding the rule of law crisis.

Renáta Uitz describes one of the reasons for the parliamentary activism as inherent in its set-up, which promotes the voice of national opposition parties, which may no longer have the possibility to voice their opinions in their national frameworks due to the restraining actions of an incumbent government. "This explains why the Parliament is so insistent on the sanctioning of illiberal governments: the Parliament is the one EU institution where voices from the democratic opposition of illiberal democracies are still present and have support from their European allies."[547] For example, MEPs of Hungarian opposition parties can raise their voices during plenary debates on the European level. This is a significant feature of the European's multilevel parliamentary field as described by Crum and Fossum.[548] Hegedüs highlights that the EP, despite its variety of political parties, acts as a lighthouse when it comes to the protection of the rule of law in the Member States and, thereby, depositions itself from the muted approach of the Commission and the Council. "[T]he European Parliament has been at the forefront of the protection of democracy and rule of law in the EU compared to the Commission and the Council."[549] However, and more recently, scholars such as Pech have criticised the EP as it does not live up to its credentials and denies full support to activist NGOs

[544] *European Parliament Resolution on the Multiannual Financial Framework 2021-2027, the InterInstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (16 December 2020)* (European Parliament 2020).
[545] Sarvamaa and others (n 519).
[546] NB: This is the role a parliament traditionally occupies in a constitutional framework towards the government. From the perspective of the EP, the Commission serves as the European government.
[547] Renáta Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU'.
[548] Ben Crum and John E. Fossum, 'The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU' Vol. 1 (2) European Political Science Review pp. 249.
[549] Hegedüs (n 426) p. 11.

in the rule of law crisis.[550] In conclusion, the early actions of the EP were potent in naming and exposing the rule of law backsliding in Hungary – earlier than any other institution in the EU legal framework. However, between 2016 and 2020 the activism of the EP has petered out due to the complex political group structure in the EP, which led to the situation that many initiatives and decisions were blocked within the EP. However, more recently, the EP has found its old strength in pointing out rule of law deficiencies in the Member States.[551]

2.2 The Council

The Council, with its competencies rooted in Article 16 TEU, has in several instances failed to safeguard the rule of law in the Member States.[552] Regarding the Article 7 TEU procedure, in which the Council is the main actor, it has failed to bring the procedure forward and to protect the rule of law in the Member State. Up until the time of writing, the Council has held several Article 7 TEU hearings throughout the years but has not yet triggered a vote under Article 7 (2) TEU. [553] While such a vote is likely to fail due to its unanimity requirements, it would however increase the pressure on the rule of law backsliding Member States. The Council has further actively undermined the Commissions' and the Parliaments' actions in advancing the Article 7 TEU procedure over the years. "[T]he Council refused to reflect on the Commission's Rule of Law procedure against Poland until Article 7 (1) was finally activated in December 2017 […]."[554] Instead of a pursuing a proactive stance, the Council demonstrated an obstructive and undermining attitude towards bringing the Article 7 TEU procedure forward. Neither did the Council engage with other institutions to create a common institutional rule of law front. One of the reasons for the Council's hesitancy is that at the highest echelons of political power (the meeting of the government ministers) none of the Member States governments is credibly interested in protecting the rule of law. Instead, most of the national governments have national priorities and political agendas. Thus, the rule of law, initially a legal principle, is turned into a political proxy at the Council level endorsed or opposed depending on political alliance and allegiances.

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[550] Jasmine Faudone and Elettra Bargellini, *Event Report: NGEU: Furthering Economic, Legal and Fiscal Integration (REBUILD Annual Conference) (25 January 2023)* (Rebuild Centre EU 2023).
[551] Delbos-Corfield (n 517).
[552] Article 16 (1) TEU states that "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties."
[553] For example, *Hearing Note: Values of the Union - Hungary - Article 7 (1) TEU Reasoned Proposal - Report on the hearing held by the Council on 10 December 2019* (Official Journal of the European Union 2020).
[554] Hegedüs (n 426) p. 6.

As regards the Rule of Law Framework, a soft-law initiative which was established by the Commission in 2014, the Council did actively undermine it. "Following the introduction of the Commission's Rule of Law Framework in 2014, the Council heavily criticised this and claimed that it violated the principle of conferral, […]."[555] In addition, and to voice further critique, an Opinion from the Council Legal Service undermined the Commission's efforts to establish the soft law framework to protect the rule of law in the Member States.[556] According to the Council Legal Service, the Rule of Law Framework was an encroachment on the Council's powers under Article 7 TEU by the Commission.[557] Hegedüs notes that the Council, therefore, delegitimized the initiatives by the Commission. "Based on the restrictive interpretation of its legal service claiming that Article 2 issues can be handled exclusively in the frame of the Article 7 procedure, the Council has sharply opposed and partly delegitimized the Commission's two key initiatives."[558] This highlights the political cleavages between the different EU institutions. Moreover, the initially independent Council Legal Service, became instrumentalised in a cross-institutional battle over the rule of law. In this vein, scholars have criticised the Council Legal Service as being too politicised and influential.[559]

A consistent legal conflict over the rule of law between the Commission, as the integrative body of the EU, and the Council, as the intergovernmental body of the EU, can be identified. Borrowing Hegedüs terminology, a legal duopoly exists between the Council and the Commission. Both Institutions claim for themselves the ultimate authority to interpret the Treaties. This leads to much uncertainty and a divided institutional front when it comes to protecting the rule of law in the Member States. This can be seen in the widely diverging opinion of each legal service. The Council Legal Service "supports largely conservative and restrictive legal interpretations and blocks legal innovations."[560] The Commission Legal Service on the other hand started an effective judicial campaign at the Court of Justice to protect the rule of law within the Member States since 2018.[561] Looking at EU law history, the Commission Legal Service is well known for favouring European integration, while the same

[555] Ibid.
[556] *Opinion of the Legal Service: Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties* (Council of the European Union 2014).
[557] Ibid.
[558] Hegedüs (n 426) p. 6.
[559] Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021).
[560] Hegedüs (n 426) p. 3.
[561] Pech and Platon (n 135).

cannot be said about the Council Legal Service. Methodologically, the Council Legal Service supports a literal interpretation of the Treaties. Whereas the Commission Legal Service sustains a purposive interpretation of the Treaties. In the rule of law crisis, this leads to a situation in which the EU administration seems to be divided on a core topic of the EU legal order and this actively undermines the rule of law protection in the Member States.

The Council's blockages of effective rule of law protection in the Member States did not end with the obstruction of the Article 7 TEU procedure and the Rule of Law Framework. In the case of the EAW which is subject to a strain of case-law at the Court of Justice in the rule of law crisis (see the Court of Justice's *LM* judgment[562]), the Council has failed to suspend the EAW for Poland and Hungary because of rule of law backsliding. Krajewski points out that this inability highlights the Council's dual nature when it comes to the rule of law insight and outside the EU. "Leaving the decision to suspend the EAW mechanism to the European Council and the Council – political bodies whose members may have a natural tendency to prioritise their own interest rather than the rule of law – seem doubtful in light of EU commitment to fundamental rights and the rule of law."[563] The Council's record of not defending the rule of law contradicts the EU's commitment to it.

In 2020, the Council also started hearings on the rule of law situation in particular Member States within the framework of the Rule of Law Mechanism which was introduced in 2020.[564] The second pillar of the Rule of Law Mechanism is an annual Rule of Law Review Cycle in the Council. While the first pillar – the Rule of Law Reports – puts the Commission at its centre, the second pillar focuses on the Council as the intergovernmental discussion forum about the rule of law. The proposal for such an annual review cycle was first advanced by the German and Belgium foreign ministers in a joint initiative in April 2019.[565] On 11 November 2020, the first peer-review session on the rule of law was held in the Council under the German

[562] *LM v Minister for Justice and Equality (C-216/18 PPU)*.
[563] Krajewski (n 462).
[564] *Communication from the Commission to the European Parliament, the European Council, the Council, The European Economic and Social Committee and the Committee of the Regions: Strengthening the Rule of Law Within the Union, A Blueprint for Action (July Communication)* (European Commission 2019).
[565] Alexandra Brzozowski, 'Belgium, Germany make joint proposal for EU rule of law monitoring mechanism' *EurActiv* (19 March 2019) <https://www.euractiv.com/section/justice-home-affairs/news/belgium-germany-make-joint-proposal-for-eu-rule-of-law-monitoring-mechanism/>.

Council Presidency.[566] While this new format yields potential, its design includes many shortcomings from the start. First, the deliberations in the Council are not public. Second, only four Member States are reviewed each year. Third, it is solely dialogue based and does not issue binding recommendations. Therefore, the rule of law review cycle as a feature of the rule of law mechanism seems like a further mismatch between the causes of rule of law backsliding and the solutions chosen.

Overall, this section has shown that the Council, as powerful but at the same time secretive EU institution, has not lived up to safeguarding the rule of law in the Member States. The inherent weakness of the Council to protect the rule of law are grounded in the Member States' reluctance to act as a controller of each other's behaviour. Member State governments are the main actors and drivers within the Council, and they have less incentive to act against each other and thus weaken their collective position. Members of an intergovernmental body are not likely to sanction each other as this could result in a situation in which they would be sanctioned themselves in the future. The institutional design of the Council presents the prime paradigm for such a situation.

[566] Linda Ravo, 'EU governments' upcoming rule of law peer review: better get off on the right foot (9 November 2020)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/justice-home-affairs/opinion/eu-governments-upcoming-rule-of-law-peer-review-better-get-off-on-the-right-foot/>.

3. Executive Actors in the Rule of Law Crisis: European Commission and European Council

This section analyses the EU's executive political branches in the rule of law crisis. To do this, the legal actions of the Commission and the European Council will be discussed to identify how the executive institutional actors advanced or undermined efforts to protect the rule of law in the Member States. The executive actors play a significant role in implementing and enforcing EU laws and policies and are, therefore, crucial to a successful rule of law protection in the Member States. Both executive actors collectively contribute to the implementation, enforcement, and administration of EU laws and policies. They play a crucial role in ensuring the effective functioning of the EU legal framework and the achievement of the EU's objectives in areas such as economic integration, internal market, environment, and fundamental rights protection.

The section will commence with the Commission, as one of the most important institutions in the EU legal framework and the primordial guardian of the rule of law in the EU legal system. The Commission is the heart chamber of EU policy making and, therefore, occupies and immensely important role in the rule of law crisis. The Commission advanced a number of rule of law initiatives as a response to the rule of law backsliding in Hungary and Poland. First, the Rule of Law Framework established in 2014 under the Barroso II Commission and applied for the first time by the Juncker Commission.[567] Second, the Rule of Law Reports initiated by the Juncker Commission and subsequently implemented during the Von der Leyen Commission.[568] However, overall, those initiatives were non-successful. Additionally, the Commission's number of infringement proceedings has shrunk throughout the years.[569] These are indication of the Commission's failure in the rule of law crisis. To assess this failure, the Commission's actions will be critically analysed through the lens of EU constitutional law. Furthermore, the European Council will be discussed as the most political EU institution.

[567] *Communication from the Commission to the European Parliament and the Council: A new Framework to Strengthen the Rule of Law (March 2014)*.
[568] *Rule of Law: First Annual Report on the Rule of Law Situation Across the European Union* (European Commission Press Office 2020).
[569] Kelemen and Pavone (n 433).

The European Council is, besides the Council, the other intergovernmental EU institution and defines the general political direction and priorities of the EU. Since the Lisbon Treaty, it has become the most prominent and most powerful EU institution. It is composed of the Heads of State of the Member States, the European Council President, and the Commission President. Finally, the HR/VP also takes part in its meetings. While its primary role is shaping EU policies and providing strategic guidance, the European Council also plays an executive role by making important decisions on issues such as economic coordination, security, and foreign affairs. In the rule of law crisis, the European Council has not shown a strong rule of law record and has issued controversial declarations that periled a successful rule of law protection in the EU.[570]

[570] Alberto Alemanno and Merijn Chamon, *To Save the Rule of Law you Must Apparently Break It (11 December 2020)* (VerfBlog 2020).

3.1 The European Commission

The Commission's record during the rule of law crisis is deplorable. Despite the Commission's large competencies defined in Article 17 TEU, the institution could not safeguard the rule of law in the Member States.[571] The Commission's record fluctuated between tentative success and complete failure depending on its enforcement priorities.[572] During the rule of law crisis, the Commission was led by different Commission Presidents, and different Commissioners were responsible for the rule of law portfolio. The different personnel impacted the Commission's enforcement priorities, its activeness as an enforcer and its approach to the rule of law crisis. In the early 2000s, rule of law backsliding in the Member States often happened without a specific policy response by the Commission. Only with the aggravation of rule of law crisis from 2015 onwards, the Commission commenced developing new soft-law instruments. Those instruments emerged under the Barroso II Commission (2009-2014) and were fully implemented during the Juncker Commission (2014-2019). From 2020 onwards, the incoming Von der Leyen Commission engaged in new rule of law instruments such as the conditionality regime linked to the EU budget.[573] Notably, those instruments came into force years after rule of law backsliding in Hungary started around 2010.[574] This section will analyse the Commission's role during the rule of law crisis, highlighting the changing variables (in form of different personal at the Commission's helm) and evaluate its success in safeguarding the rule of law in the Member States.

3.1.1 Barroso I and II Commission

When José Manuel Barroso arrived at the Commission helm in 2004 his political aim was to restart the engine of EU integration and economic growth. To do this, he compromised legal principles with dialogue and concessions. "Privileging conciliatory political dialogue over

[571] Article 17 (1) TEU states that "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements."

[572] For a background reading on the Commission's increasing role as executive enforcer post-Lisbon and its limitations see Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' Vol. 47 Common Market Law Review pp. 1385.

[573] Ursula von der Leyen, *A Union that strives for more: My agenda for Europe* (Candidate for President of the European Commission Ursula von der Leyen 2019).

[574] Jakab and Bodnar (n 2).

rigorous law enforcement. Essentially, the Commission worked to safeguard its political role as the engine of integration by partially sacrificing its legal role as the guardian of the Treaties."[575] Therefore, during his first tenure as Commission President, the Commission shifted from an enforcement-based approach to a dialogue-based approach – to the detriment of the protection of the rule of law in the Member States. This was, however, not done without outside political pressure from the Member State governments. "By 2004, the new Commission President – José Manuel Barroso – had received clear signals from member governments in the European Council that reducing infringements would attract their support."[576] To attract Member States support and achieve his political aims he shifted the enforcement strategy of the Commission to a much softer approach. "This strategy succeeded in its political aim: Governments in the Council responded as hoped, becoming broadly supportive of the Commission and its softer enforcement approach."[577] With this strategy, Barroso ensured that his first term as Commission President was a success in the eyes of the Member State governments on which he was dependent on for his re-election.

Legally, the establishment of the EU Pilot Procedure turned the Commission based enforcement on its head by emphasizing dialogue and de-prioritizing enforcement.[578] "Touted publicly as a 'problem-solving' tool, privately EU Pilot was understood to promote a shift in the Commission's enforcement approach by replacing many infringement procedures with conciliatory political dialogues with national governments."[579] Scholars, such as Kelemen and Pavone, have strongly criticised the introduction of the EU Pilot Procedure as it led to lower infringement proceedings and a trend of Member States flouting EU rules. However, politically the EU Pilot Procedure was a huge success for Barroso, as it ensured him the continuous political support by the Member State governments. "[…] the primary function of EU Pilot was not legal, but political. And as a political project designed to cultivate intergovernmental support for the Commission's policy agenda, forbearance was a success."[580] Overall, Member State governments were extremely happy that they were confronted with less infringement procedures and, therefore, much less negative press domestically. "Member states' enthusiastic

[575] Kelemen and Pavone (n 433).
[576] Ibid.
[577] Ibid.
[578] The EU Pilot Procedure, established under the Barroso Commission, is a mechanism for the exchange of information between the Commission and the Member States related to possible problems arising from incorrect or missed application of EU law. During the Barroso Commission it was applied as a pre-step before an infringement preceding at the CJEU was started.
[579] Kelemen and Pavone (n 433).
[580] Ibid.

response to EU Pilot confirm that forbearance achieved its desired political effect."[581] Barroso, therefore, completely deprioritised law enforcement via the Commission for political reasons. "Barroso quickly came to view law enforcement as an impediment to rekindling intergovernmental support for his policy priorities."[582] This was to the detriment of rule of law protection in the Member States when the rule of law crisis in Hungary started to unfold during his second term as Commission President.

The rule of law backsliding in Hungary that started in 2010[583] occurred during the second tenure of Commission President Barroso (Barroso II).[584] Notably, the Commission detected the rule of law backsliding in Hungary and started the first institutional actions in this field. "During the Barroso (EPP) Commission, Commissioner Redding (EEP) led action in the justice field, seconded by [Commissioner] Rehn (ALDE), who cut financial assistance because of the erosion of central bank's independence, and [Commissioner] Kroes (ALDE), who acted against the Hungarian media laws."[585] However, the Commission failed to find a holistic response to the rule of law backsliding in Hungary. It failed to trigger the Article 7 TEU procedure to protect the core values of the EU, and it only selectively engaged in infringement proceedings under Article 258 TFEU. "Concerning Hungary, [the Commission] followed a selective and legalist strategy, launching five infringement proceedings due to the violation of certain provisions of EU law with relevance to Article 2 values. However, it refrained from triggering the Rule of Law Mechanism [the Rule of Law Framework] or the Article 7 procedure […]."[586] This selective strategy before the Court of Justice was doomed to fail. Although the infringement proceedings were partly successful, with the highest profile cases being about the dismissal of the Hungarian Data Protection Supervisor[587] and the retirement age of Hungarian judges[588], the Hungarian government avoided compliance with the judgments by finding creative solutions which circumvented the Court of Justice's rulings – so called creative compliance.[589] Arguably, the Barroso II Commission severely underestimated the scale and

[581] Ibid.
[582] Ibid.
[583] Jakab and Bodnar (n 2).
[584] José Manuel Barroso, *Political guidelines for the next Commission (3 September 2009)* (European Commission Press Office 2009).
[585] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 705.
[586] Hegedüs (n 426) p. 3.
[587] *Commission v Hungary (C-288/12) (Independence of the Data Protection Supervisor)*.
[588] *Commission v Hungary (C-286/12) (Retirement Age of Hungarian Judges)*.
[589] Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU'.

seriousness of Hungary's rule of law backsliding, or it was just not interested in a full-out confrontational response to Hungary.

As leading research by Kelemen and Pavone has shown, during the Barroso Commission the number of infringement proceedings against the Member States dropped dramatically. "Yet the swearing-in of a new Commission headed by former Portuguese Prime Minister José Manuel Barroso in 2004 coincided with a striking shift. Since 2004, the number of infringements have plummeted to lows not witnessed since the early 1980s, with as few as 643 letters of formal notice served in 2018 and only 34 referrals to the ECJ in 2016."[590] Therefore, the Commission's strategy change of deprioritising enforcement coincided with the accelerating rule of law backsliding and constitutional regression in Hungary.[591] The Commission's lacking incentive to pursue infringement proceedings, therefore, strengthened the resolution of the Hungarian government to challenge European values and standards and pursue a semi-autocratic agenda domestically. This strategy of dialogue instead of enforcement was also visible regarding the (non-)application of the Article 7 TEU procedure.

Instead of activating the Article 7 TEU procedure regarding Hungary, the Commission tried to find other – less severe – options to protect the rule of law in the Member States via tentative infringement proceedings and a newly invented Rule of Law Framework. "This in [Commissioner] Reding's opinion justified finding an alternative Framework for the Commission to engage in political debate on its own initiative."[592] During Barroso's incumbency, the Commission's approach to safeguarding the rule of law in the Member States was dialogue based. "Barroso argued that the preservation of the RoL should be achieved by establishing dialogue with the Member States concerned to find solutions."[593] The responsible Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding supported Barroso's tentative attitude towards rule of law backsliding during her tenure by introducing a new soft-law instrument, the Rule of Law Framework.[594] The Framework was effectively a substitute for the politically unfeasible Article 7 TEU procedure. "The Commission justified its framework, arguing that the threshold for activating both mechanisms of Article 7 TEU

[590] Kelemen and Pavone (n 433).
[591] Pech and Scheppele (n 145).
[592] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 706.
[593] Ibid.
[594] *Communication from the Commission to the European Parliament and the Council: A new Framework to Strengthen the Rule of Law (March 2014)*.

[Article 7 (1) and Article 7 (2)] are very high and underline the nature of these mechanisms as last resort."[595] However, the Rule of Law Framework did not have the same enforceability as the Article 7 TEU procedure, let alone the same public attention and impact on the Member State. "Reding argued that engaging and dialoguing was precisely the aim of the RoL mechanism [Rule of Law Framework], drawing inspiration from the way competition law works."[596] The comparison to competition law by Commissioner Reding underlines the incorrect interpretation of the value of the rule of law, given its importance for the whole legal system of the EU. Overall, the record of the Barroso I and II Commissions when it comes to the rule of law is, therefore, highly critical as the Commission de-prioritised enforcement and failed to adequately respond to rule of law backsliding early on. The following section will take a closer look onto the Rule of Law Framework – the first soft-law instrument in the rule of law crisis.

3.1.2 From Barroso to Juncker: The 2014 Rule of Law Framework

After the unworkability of the Article 7 TEU procedure became apparent, the Commission searched for other mechanisms to uphold the rule of law in the backsliding Member States. The main initiative that the Commission proposed was the Rule of Law Framework establishing a 'pre-stage' to the Article 7 TEU procedure.[597] The framework is an early warning instrument adopted by the Commission in March 2014, allowing it to intensify dialogue with a Member State in the hope of addressing systemic threats to the rule of law and to prevent escalation in the form of the Article 7 TEU procedure. The mechanism was established at the initiative of the Commissioner Reding under the Barroso II Commission. "The Barroso Commission established this framework in March 2014 in response to its frustration that the EU lacked adequate instruments to check democratic backsliding in cases such as Hungary."[598] The framework is dialogue-based between the Commission and the respective Member State and is described as an early warning instrument to rule of law backsliding. So far, the framework has only been deployed once by the Commission against Poland in 2016.[599] Albeit, with minimal success. "[…], Poland has been the sole test case of the Rule of Law Framework of 2014, beginning with the launch [of the framework proceedings] in early 2016 of consultations

[595] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 706.
[596] Ibid.
[597] Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' EUI Working Papers <https://cadmus.eui.eu/handle/1814/35437>.
[598] Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union'.
[599] *Rule of law in Poland: Commission starts dialogue (13 January 2016)* (European Commission 2016).

on the status of judges elected to the Constitutional Tribunal by the outgoing Sejm (parliament) in 2015."[600] In January 2016, the Commission commenced the Rule of Law Framework Procedure against Poland.[601] This was then followed by a Commission Opinion in June 2016[602], a Commission Recommendation in July 2016[603] and a complementary Commission Recommendation in December 2016[604] in which it demanded that Poland would take back its laws threatening the independence of the Polish judiciary. However, Poland did not change its stance, and the overhaul of the Polish judicial system resulted in significant levels of case-law at the Court of Justice.[605] Instead, in a statement issued by the Polish Ministry of Foreign Affairs the Polish Government threatened the Commission with an annulment action under Article 263 TFEU in case the EU interference would threaten other EU values such as subsidiarity and national identity.[606] Therefore, the envisioned "constructive" dialogue under the Rule of Law Framework was effectively dead. The conflict between the Commission and Poland later culminated in the triggering of the first stage of the Article 7 TEU procedure by the Commission in December 2017.[607] Therefore, in the only case, when it was applied, the Rule of Law Framework has proven inept in dealing with a rule of law backsliding Member State.

Notably, the Rule of Law Framework was never applied to Hungary. This failure is partly to blame on the Juncker Commission, which did not take decisive actions regarding Hungary's rule of law backsliding. A decisive factor in the Commission's inaction was Commission President Jean Claude Juncker's partisan ties with the leading party in Hungary - Fidesz. "In June 2015, when the European Parliament passed a resolution condemning Orbán's statements on the death penalty and his migration consultation and calling on the Commission to launch the Rule of Law Framework procedure against Hungary, only parties of the left voted in favour

[600] O'Neal (n 456).
[601] Frans Timmermans, *Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016 (13 January 2016)* (European Commission Press Office 2016).
[602] *Commission adopts Rule of Law Opinion on the situation in Poland (1 June 2016)* (European Commission Press Office 2016).
[603] *Rule of Law: Commission issues recommendation to Poland (27 July 2016)* (European Commission Press Office 2016), and *Commission Recommendation 2016/1374 of 27 July 2016 regarding the rule of law in Poland (27 July 2016)* (Official Journal of the European Union 2016).
[604] *Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374 (21 December 2016)* (European Commission Press Office 2016).
[605] For a detailed analysis of the Court of Justice's case-law in the rule of law crisis, see Chapter 1.
[606] *Ministry of Foreign Affairs Statement on Polish Government's Response to Commission Recommendation of 27.07.2016* (Polish Ministry of Foreign Affairs 2016).
[607] *European Commission's reasoned Proposal in Accordance with Article 7 (1) of the Treaty on European Union Regarding the Rule of Law in Poland (20.12.2017)*.

and the EPP leadership publicly defended the Orbán government."[608] As Kelemen has analysed, the voting behaviour in the EP yields that the EPP, to which Juncker belonged, was firmly on the side of Orbán, as Fidesz was a member of the parliamentary group. As a result, "[t]he Juncker Commission ultimately refused to launch the procedure against the Orbán government. Certainly, the Commission did not admit that this was based on partisan considerations, but Commission President Jean-Claude Juncker and the majority of commissioners were EPP members who owed their dominance of the EU's executive to the support they enjoyed from the EPP group in the European Parliament."[609] Following Kelemen's arguments, it becomes clear that the political will to go after Hungary's rule of law deficiencies was lacking among the EU's executive branch.[610] "Closa, in his research, explores the reasons for the Commission's cautious attitude regarding the activation of the Rule of Law Framework against Hungary,[611] highlighting that "[…] members of the same EP group tolerate RoL backsliding if the offenders belong to the same group but will act against if they belong to a different EP group."[612] He, therefore, underlines the party considerations which Kelemen stresses as the main reason for the Rule of Law Framework's non-activation against Hungary.

In conclusion, the Rule of Law Framework initiated by Commissioner Reding (2010-2014) was a nice-to-have initiative that lacked any substantive legal teeth and thus entirely failed to have any meaningful impact on rule of law backsliding Member States. Member States ignored the mechanism or used the mandatory letter exchange to delay enforcement. It factually only created a non-binding pre-stage for the Article 7 TEU procedure.[613] Detrimentally, the Council's legal service also saw the framework as a rivalling initiative to the Article 7 TEU procedure and thus undermined it from the beginning with its legal opinion.[614] In a legal order which builds upon joint institutional efforts in key policy areas, an institutional dispute is one of the worst things to happen to a new instrument. However, with the newly proposed Rule of Law Reports of 2020, the Commission seems to have partly abandoned this policy instrument and has substituted it for other alternatives. In short, the framework lacked the support of other

[608] Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union'.
[609] Cf. Ibid.
[610] See the arguments in Kelemen, 'The European Union's Authoritarian Equilibrium'. "[…] the EU's half-baked system of party politics and its ingrained reluctance to interfere in the domestic politics of its member states help shield national autocrats from EU intervention".
[611] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance'.
[612] Ibid.
[613] Kochenov and Pech (n 597).
[614] *Opinion of the Legal Service: Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties*.

institutions from the beginning – specifically, by the Council – and was later not followed up by the subsequent Commissioners such as Frans Timmermans (2014-2019). Therefore, the Rule of Law Framework can be considered a failed initiative in the Commission's rule of law record.

3.1.3 Juncker I and II Commission

Following the Barroso II Commission, Jean Claude Juncker became his successor in 2014.[615] Juncker's College of Commissioners quickly acknowledged the issue of the rule of law backsliding in Hungary, which deepened during their tenure. "During the Juncker Commission, Timmermans, Moedas (EPP) and Oettinger (EPP) joined Juncker (EPP) in loudly voicing their criticism of Orban's measures against the Central European University."[616] However, the Juncker Commission failed to activate Article 7 TEU against Hungary. Hegedüs believes that the failure to activate Article 7 TEU in the case of Hungary is grounded in partisan bias and external pressure on the Commission. "[P]artisan bias in the Commission was able to block it taking actions in certain cases, but it was not powerful enough to mobilise the Commission for positive action. It contributed to the failure to act in the Hungarian case […]."[617] Closa contrasts this assessment by underlining that "[f]ormer Commissioner Reding even argued that she resisted partisan pressures from the EP and the Council, while Timmermans declared that the Commission is politically colour blind when it comes to the RoL."[618] Partisan pressure and influence from the Member State governments continued to play a huge role in the weighing of decision at the College of Commissioners. Concerning infringement proceedings, the Juncker Commission had to re-prioritize enforcement as it had been phased-out during the Barroso Commission. "Though the Juncker Commission did manage to restore the use of infringements to some extent, the politicization of enforcement spearheaded by the Barroso Commission continued to provoke a chilling effect."[619] The Juncker Commission kept the EU Pilot Procedure but did not use it as the default anymore. It, therefore, further politicised the procedure between the Commission and the Member States as it was now a discretionary decision of the College of Commissioners to activate the EU Pilot Procedure. "In other words, the Juncker Commission did not desire to return to the pre-2004 status-quo of unsupervised

[615] Jean-Claude Juncker, *A new start for Europe: My agenda for Jobs, Growth, Fairness and Democratic Change (15 July 2014)* (European Commission Press Office 2014).
[616] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 705.
[617] Hegedüs (n 426) p. 11.
[618] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 706.
[619] Kelemen and Pavone (n 433).

law enforcement by civil servants. Rather, it wanted to enhance the Presidency's political discretion to wield forbearance more selectively."[620] This can be seen as part of Juncker's 'Political Commission' approach.

In 2015, after a change of the Polish government and a connected constitutional crisis, Poland became the second explicit case of a government-orchestrated rule of law backsliding within the EU.[621] In the following two years, the Polish Government enacted 13 laws affecting the entire structure of the Polish justice system. Consequently, the Juncker Commission increased its scrutiny of the developments in Poland. The Juncker Commission became more active in rule of law enforcement in Poland than in Hungary. On 20 December 2017, the Commission activated Article 7 (1) TEU for the first time against Poland.[622] Hegedüs notes that the Commission pursued a different strategy regarding the rule of law backsliding in Poland: "The guardian of the treaties was rather effective and straightforward in addressing the challenge to the rule of law in Poland."[623] Potentially, this can be explained by the rapidness of the rule of law backsliding in Poland and the 'lost case' argument due to the Commission's inaction regarding Hungary.

The Commission Vice-President and Commissioner for the Rule of Law, Frans Timmermans, advanced a more articulated stance calling out rule of law issues in the Member States. However, he still supported dialogue as the preferred means to deal with the rule of law backsliding in the Member States. "Timmermans […] also frequently endorsed the Commission's preference for dialogue with the aim of finding solutions without necessary punishing."[624] Hegedüs further notes that while Timmermans was very articulated on the rule of law in the EP and the media, he demonstrated little action in enforcing the rule of law in the Member States. "Timmerman's strategy appear[ed] to be mostly based on the enforcing of symbolic compliance and maintaining dialogue with governments of Hungary and Poland. He only opt[ed] for coercive measures, […] when these superficial goals [could not] be fulfilled anymore."[625] Therefore, Timmermans can be characterised as much more active about the rule

[620] Ibid.
[621] Sadurski, *Poland's Constitutional Breakdown*.
[622] *European Commission's reasoned Proposal in Accordance with Article 7 (1) of the Treaty on European Union Regarding the Rule of Law in Poland (20.12.2017)*.
[623] Hegedüs (n 426) p. 4.
[624] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 709.
[625] Hegedüs (n 426) p. 12.

of law than his predecessor Reding. However, when it comes to enforcement, he did not have a record of being more active in rule of law enforcement.

It becomes evident that the Juncker Commission's attitude was overwhelmingly characterised by dialogue instead of vigorous rule of law enforcement on the Member State level. Conclusively, Closa finds in his elite interview-based research that "the Commission anticipate[d] that engagement with national authorities rather than enforcement via article 7 secures better compliance."[626] Additionally, Hegedüs underscores that the Commission, in most cases, accepted symbolic compliance by the Member States. "The European Commission's inability to address substantial (and not only procedural) breaches of fundamental values and its tolerance of symbolic compliance constitute one of the main challenges for the safeguarding of democracy and the rule of law in the EU."[627] Scholars have argued that the Commission's role in the rule of law crisis is characterised by a too little too late approach.[628] Krajewski emphasises that a legal framework for a stringent rule of law enforcement exists but that the Commission fails to use it. "[T]he main deficiency of the EU with regard to its ability to deal with rule-of-law backsliding crises lies not in the limited nature of its law, but in the overly careful approach espoused by the Commission and other Institutions."[629] As all instruments of the rule of law toolbox are built upon an interplay between the different institutions, the Commission espoused a hesitant and dialogical approach towards safeguarding the rule of law in the Member States. This can be seen as a symptom of broader institutional illness regarding rule of law enforcement. "[The] Commission's reluctance to activate article 7 because of the perception of lack of Council's support may be detrimental to the whole functioning of and foundation of the EU legal order."[630] Drawing on Closa's research, it appears that the Juncker Commission was hampered by and dependent on the Council in its actions. Therefore, it could not fulfil the role it is legally foreseen to meet according to Article 17 TEU. However, with the transition from Juncker to Ursula von der Leyen as Commission head in 2020, rule of law protection on the EU level gained new steam.

[626] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 708.
[627] Hegedüs (n 426) p. 5.
[628] Cf. Pech and Kochenov, 'Better Late than Never? On the Commission's Rule of Law Framework and its First Activation'.
[629] Krajewski (n 462).
[630] Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' p. 711.

3.1.4 Von der Leyen I Commission: The 2020 Rule of Law Mechanism

When the Von der Leyen Commission started in December 2019, it implemented a new array of rule of law instruments, which were part of a wider communication strategy to remedy rule of law deficiencies in the Member States. Notably, the Rule of Law Mechanism, including annual Rule of Law Reports, and the rule of law Conditionality Regulation. The first designed as a soft-law instrument, and the latter designed as leveraging the EU budget to protect the rule of law in the Member States. The Rule of Law Reports exist and function independently, but at the same time, they accompany the legally more significant rule of law Conditionality Regulation, which allows to cut funding and is legally binding for the Member States. The primary function of the former is to provide knowledge about the state of the rule of law in the Member States: "Its main goal is to provide fact-based analysis on the state of the rule of law in all member states, to allow an objective comparison among them, and to facilitate discussion on best practices for maintaining solid rule-of-law standards."[631] Subsequently, the findings of the Rule of Law Reports were used by the Commission in its procedures under the Conditionality Regulation. This section will focus on the first Rule of Law Report published under the Von der Leyen Commission in 2020, while the rule of law Conditionality Regulation, as a financial instrument, will be discussed in the following Chapter 4.

The Rule of Law Mechanism is a yearly cycle with an annual Rule of Law Report at its centre. The Rule of Law Mechanism builds upon an inter-institutional dialogue which shall be conducted between the Commission, the Council, the EP, national Parliaments, and civil society actors. "A core objective of the European Rule of Law Mechanism is to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles."[632] It can, therefore, be seen as a further soft law instrument in the Commission's toolbox in the rule of law crisis. Complementing the 2014 Rule of Law Framework. However, it aims to overcome the older Rule of Law Framework by emphasising a comprehensive dialogue between all stakeholders involved in the rule of law, specifically civil society actors and national parliaments. Moreover, by putting an annual Rule of Law Report at its centre, it provides scientific knowledge about the state of the rule of law in the

[631] Daniel Hegedüs, 'The European Commission's Missed Rule-of-Law Opportunity' The German Marshall Fund (GMFUS) <https://www.gmfus.org/news/european-commissions-missed-rule-law-opportunity>.
[632] European Commission, 'What is the rule of law mechanism?' (*European Commission*, 2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en>.

Member States, which can later be used for follow-up litigation under Article 258 TFEU or an Implementing Decision under the rule of law Conditionality Regulation.

The first Rule of Law Report was published by Vice-President of the Commission for Values and Transparency Vera Jourova and Commissioner for Justice Didier Reynders, the new incoming Commissioners responsible for the rule of law portfolio, in a Commission Communication in September 2020.[633] One of the notable developments under the Von der Leyen Commission was the establishment of a dedicated portfolio for "Values and Transparency," with Commission Vice-President Jourova responsible for this area. This signalled a clear intention to prioritize and address issues related to the rule of law and fundamental values within the EU. The 2020 Rule of Law Report presented a synthesis of the rule of law situation in the EU and an assessment of the situation in each Member State. The Report contained 27 country chapters in which each Member State is graded on different parameters in four different areas.[634] By providing an annual assessment of the rule of law situation in each Member State, the Commission tried to establish a long-term view of the rule of law situation in the EU. Besides the Rule of Law Report, the Von der Leyen Commission also enacted the rule of law Conditionality Regulation in 2021. Potentially, a much more effective and powerful instrument in the rule of law crisis. The rule of law Conditionality Regulation came into force in January 2021 and has since then been activated once again Hungary in April 2022. Its history, activation and impact will be analysed in the following Chapter 5 on the financial dimension in the rule of law crisis.

Overall, the Von der Leyen Commission's record of safeguarding the rule of law in the Member States remains mixed. Besides the Rule of Law Mechanism and the Conditionality Regulation, the Commission has initiated infringement proceedings against Member States, including Poland and Hungary, for actions undermining the rule of law. It has taken legal action in response to concerns over judicial reforms, restrictions on media freedom, and other issues that undermine the independence of national institutions and the rule of law. The effectiveness and impact of the Von der Leyen Commission's efforts in safeguarding the rule of law have been subject to criticism. Scholars have pointed out that the progress made has been limited, and

[633] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report, The rule of law situation in the European Union (30.09.2020)*.
[634] Ibid.

there are concerns about the slow pace and effectiveness of the enforcement mechanisms in place.[635]

[635] See, for example, R. Daniel Kelemen, 'Appeasement, ad infinitum' Vol. 29 Maastricht Journal of European and Comparative Law pp. 177, which criticises the Von der Leyen Commission for political appeasement to Hungary and Poland. "The capacity of the von der Leyen Commission (and of Commissions before it) to contrive excuses for refusing to enforce the EU rule of law norms that all Member States have committed to respect is something awesome to behold. The excuses keep changing, but the procrastination and appeasement are consistent."

3.2 The European Council

The European Council's record during the rule of law crisis is highly controversial. Being the intergovernmental body of the EU, which developed incrementally, and which still lacks formal processes rooted in EU law, the European Council is the dark horse in the rule of law crisis. Despite its elusive competencies defined in Article 15 TEU, the European Council has developed into the centre of EU politics and has taken this role away from the Commission.[636] "Today, scholars agree that member state governments have worked to limit the power of the Commission and to transfer the reigns of political leadership to the intergovernmental European Council – which has become the 'new centre of EU politics'."[637] The decisions of the European Council are extremely difficult to anticipate and depend on political brokerages at the highest echelons of political power. Often, rule of law impasses in the EU are solved in a last-minute European Council meeting in which the Heads of State find a last-minute deal to get a package of legislation, decisions, and measures over the line – so it happened in December 2020 with the rule of law Conditionality Regulation, and in December 2022 with the Hungarian NRRP.[638]

In December 2020, the European Council found agreement on the NGEU and the Conditionality Regulation in a package deal.[639] However, to get this deal over the line, amid the vital resistance by Hungary and Poland, the European Council adopted obstruse Council Conclusions which would dictate the Commission to hold off with any proceedings under the Conditionality Regulation until it survived a challenged before the Court of Justice.[640] With these conclusions, the European Council it clearly overstepped its mandate, as it has no formal

[636] Article 15 (1) TEU states that "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."; Uwe Puetter, 'The European Council – the new centre of EU politics' Swedish Institute for European Policy Studies <https://www.sieps.se/en/publications/2013/the-european-council---the-new-centre-of-eu-politics-201316epa/>.
[637] Kelemen and Pavone (n 433).
[638] The National Recovery and Resilience Plans (NRRP) are a key component of the EU's response to the economic and social challenges posed by the COVID-19 pandemic. These plans are part of the larger initiative known as NGEU, which is a temporary recovery instrument designed to help Member States overcome the economic and social impacts of the pandemic and ensure a more sustainable and resilient recovery.
[639] Daniel Hegedüs, 'The rule-of-law deal that saved Merkel's legacy (14 December 2020)' *EU Observer* (Brussels, Belgium) <https://euobserver.com/opinion/150365>.
[640] *European Council meeting (10 and 11 December 2020) – Conclusions* (European Council Press Office 2020).

power to dictate any instructions to the Commission.[641] Overall, and as shown by this instance, the European Council undermines the effective protection of the rule of law in the EU.

While the European Council has acknowledged the importance of the rule of law and expressed concerns over its deterioration in certain Member States, criticisms have been raised regarding the speed and decisiveness of its responses. Some argue that political considerations and diverging national interests may influence the European Council's ability to take strong and swift actions against rule of law backsliding. Historically, the European Council has failed to complement and reinforce other institutional efforts. Furthermore, the European Council's role in initiating Article 7 TEU proceedings, which can lead to the suspension of Member States' rights, has faced criticism for its limited application. The second step of the process, Article 7 (2) TEU, requires the high threshold of unanimity among Member States, making it challenging to reach a consensus and take decisive action.

Overall, the effectiveness of the European Council in protecting the rule of law is negative. The complexity of intergovernmental dynamics, and the role of national interests contribute to this negative record.

[641] Kim Lane Scheppele, Laurent Pech and Sébastien Platon, *Compromising the Rule of Law while Compromising on the Rule of Law (13 December 2020)* (VerfBlog 2020), and Alemanno and Chamon (n 570).

4. Conclusion

> *"As one political community, the EU has outer and inner boundaries. Where liberal democracy and the rule of law cease to function, there Europe ends."*[642]

Chapter 3 has analysed the main legal instruments and their use through the EU's political branches of government during the rule of law crisis. Focus was laid upon the two primary instruments in the rule of law crisis: the political Article 7 TEU procedure and the standard treaty enforcement instrument, Article 258 TFEU. Additionally, the chapter tracked the gradual evolution of the Commission's soft-law instruments in the rule of law crisis, from the Rule of Law Framework to the Rule of Law Mechanism and the Rule of Law Reports. Furthermore, the chapter sheds light on the legislative and executive actors by analysing each through the prism of available instruments and the institutional actions taken. Ultimately, this served as the framework to analyse the EU's political branches of government during the rule of law crisis. Therefore, this chapter provided the institutional dimension of the rule of law crisis.

Three findings are specifically noteworthy. First, the EU faces an enforcement dilemma on the political side. While having the instruments available to counter rule of law crisis, the EU's political branches fail to use them. Second, the EP emerged as the most active institution in the rule of law crisis. However, it was hindered by its limited competencies. Third, the Commission's politicised nature led to political forbearance in the rule of law crisis, which poses significant obstacles to upholding the rule of law in the Member States.

First, the EU faces a political enforcement dilemma. The inter-institutional interplay in the EU legal framework has proven ineffective in safeguarding the rule of law in the Member States. Instead, as described by Kelemen, it has generated a self-amplifying authoritarian equilibrium.[643] Rather than adopting a unified approach, the four leading (non-judicial) institutions obstructed one another. As shown in this chapter, the Commission failed to follow up on leads provided by the EP, while the Council actively sought to undermine the Commission's initiatives. The European Council did not advance the Article 7 TEU procedure

[642] Jan-Werner Müller, *Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order*, vol No. 3 (The German Marshall Fund of the United States 2013).
[643] Kelemen, 'The European Union's Authoritarian Equilibrium'. "While the EU professes a commitment to liberal democracy, in recent years it has allowed some member governments to backslide toward competitive authoritarianism. The EU has become trapped in an 'authoritarian equilibrium' […]."

to a meaningful stage or, at least, increase the pressure on rule of law backsliding Member States through hosting hearings and increasing public awareness. Consequently, the different EU institutions neutralised each other in their effort to protect the rule of law within the Member States. Unsurprisingly, this underscores the weaknesses of the EU's incomplete federal legal framework, facilitating rule of law backsliding in the Member States. However, this dynamic could change after the substantial financial efforts made available through the NGEU, which has introduced a new conditionality dimension in the rule of law crisis.[644]

Second, the EP's limited competencies pose significant obstacles to upholding the rule of law via legislative means in the Member States. The EP acknowledged the ongoing rule of law backsliding in Hungary and Poland early on and was active in tackling the regression. Through its reports on the state of the rule of law in Hungary, the EP has proven to be a vital actor in monitoring rule of law backsliding in the Member States.[645] However, the other EU institutional actors have impeded the EP's initiatives throughout the years. For instance, the other institutions merely ignored the 2013 Tavares Report and the call for a new rule of law mechanism in the 2016 in't Veld Report.[646] Instead, the Commission enacted a different soft-law mechanism that granted the EP only minimal rights.[647] The 2018 Sargentini Report successfully triggered the Article 7 TEU procedure regarding Hungary. However, with the EP's limited procedural rights under the procedure, it stalled quickly afterwards in the Council and has not led to any meaningful outcome.[648] In 2022, the EP's Delbos-Corfield Report found that Hungary could not be considered a full democracy anymore.[649] However, once again, no other institutional actors followed up on this devastating finding. Overall, the chapter has shown that the EP's limited competencies hindered its initiatives. A legislative branch with full parliamentary powers would have likely had a more meaningful impact in the rule of law crisis.

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[644] Tobias Tesche, 'Pandemic Politics: The European Union in Times of the Coronavirus Emergency' Vol. 60 Journal of Common Market Studies pp. 480.

[645] NB: While the EP's actions merely favour a strong rule of law protection in the Member States, recently, the EP failed to show support for the rule of law in the EU. For example, the EP failed to swiftly bring a lawsuit against the Commission for the non-application of Regulation (2020/2092). See Jakob Hanke Vela, 'European Parliament drops bid to force EU action on rule-of-law (2 August 2022)' *Politico Europe* (Brussels, Belgium) <https://www.politico.eu/article/european-parliament-drop-rule-law-case-against-eu-commission/>. Moreover, the EP did not join a lawsuit by NGOs against the Commission's approval of the Polish NRRP, despite obvious rule of law deficiencies in the Member State. See Faudone and Bargellini.

[646] Tavares (n 517), and Veld (n 517).

[647] Under the Conditionality Regulation, the EP has minimal rights. For example, it only has the right to be informed under Article 8 of the Regulation. This is despite its efforts in drafting and adopting the Regulation to gain more substantial procedural rights.

[648] Sargentini (n 458).

[649] Delbos-Corfield (n 517).

Third, the Commission, as a leading institution both institutionally and legally, has failed in its duty to safeguard the rule of law in the Member States. Despite being institutionally conceived as the guardian of the Treaties, the Commission did not sufficiently act to uphold the rule of law in the Member States from 2010 onwards.[650] With the constitutional challenges in Hungary from 2010 onwards and in Poland from 2015 onwards, the Commission did not respond adequately due to years of increasing supranational political forbearance.[651] This has undermined and aggravated the rule of law crisis in the EU. This rise of supranational forbearance can be explained by the politicisation of the Commission and the principle of the rule of law. Overall, the Commission has not lived up to its legally assigned position in the EU legal order by failing to adequately protect the EU's fundamental values enshrined in Article 2 TEU in the Member States. The institutional instruments, such as the Article 7 TEU procedure and the Article 258 TFEU infringement proceedings, were not used effectively to tackle systemic infringements of the rule of law in the Member States. At the same time, soft-law instruments such as the Rule of Law Framework and the Rule of Law Reports had nearly no impact on the ground.[652] Consequently, from 2020 onwards, the Commission has focused its attention on financial conditionality towards rule of law backsliding Member States. Therefore, the advent of the rule of law Conditionality Regulation in 2021 started a new chapter of the Commission's rule of law protection in the Member States.[653] As a result of the Commission's previous inaction, it is now dependent on the rule of law Conditionality Regulation, which is discussed in Chapter 5.

[650] See Kelemen and Pavone (n 433) and Scheppele (n 432).
[651] Cf. Kelemen and Pavone (n 433).
[652] See also R. Daniel Kelemen, 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools' Vol. 45 Journal of European Integration pp. 223, which argues that the EU has, instead of using its instruments effectively spend time on creating useless new ones. "The EU has used this excuse repeatedly to justify engaging […] a new instrument creation cycle – reacting to attacks on democracy and the rule of law not by deploying existing tools but by wasting time creating new ones."
[653] Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union'.

Chapter 4: Comparative Perspective: Upholding the Rule of Law via the U.S. Constitution, Congress, and the Presidency

> *"Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."*[654]

This sentence, published in Federalist No. 10 and written by Alexander Hamilton, highlights the advantages of a well-constructed Union to deal with domestic faction and insurrection. Hamilton argues that a strong federal government, as established by a constitution, is necessary to prevent the harmful effects of factions on the stability and functioning of a democratic republic. His main point is that a large and diverse republic, combined with a representative government, can effectively counteract harmful effects of factions, and preserve the stability and functioning of a democratic society. In this vein, rule of challenges in the federated states have consistently challenged the U.S. legal order.

Chapter 4 – Comparative Perspective: Upholding the Rule of Law via the Constitution, Congress, and the Presidency – analyses the U.S. political branches of government to derive comparative insights into addressing rule of law backsliding in the federated states. After studying the EU's legal instruments, political branches of government and inter-institutional relations during the rule of law crisis in the previous chapter, Chapter 4 shifts the focus to the U.S. By adopting a functional comparative approach. This chapter explores how the U.S. political branches of government have utilised constitutional instruments to uphold the rule of law in the federated states and whether these experiences could yield potential lessons for the EU legal order. By exploring these comparative perspectives, this chapter sheds light on potential lessons and inspirations that could inform the EU's effort to safeguard the rule of law.

This comparative exercise will concentrate on three elements of the U.S. constitutional framework: the Guarantee Clause, the U.S. legislative branch (Congress), and the primary U.S. executive branch (Presidency). Structurally, this chapter follows the preceding chapter by studying significant constitutional and institutional challenges, this time within the U.S. legal

[654] Alexander Hamilton in Federalist Papers No. 10 (1787), see Hamilton, Madison, and Jay.

framework. Additionally, it will analyse the prospects of dealing with rule of law backsliding through political branches of government, using the U.S. as a case-study.

The U.S. legal order provides ample grounds for comparison with the rule of law crisis in the EU, as it has endured several constitutional crises throughout its history.[655] Historically, the U.S. political branches of government have, in many cases, successfully resolved rule of law challenges in federated states through constitutional means.[656] To disambiguate, upholding the rule of law is referred to as the federate state's respect for the rule of the federal constitution and laws.[657] Thus, the following chapter will examine instances where the U.S. political branches of government safeguarded the rule of law in the federated states.

The chapter adopts a threefold structure as follows. First, it will scrutinise the U.S. Guarantee Clause, in Article IV, Section 4 of the U.S. Constitution, as a constitutional instrument to uphold the rule of law in the face of backsliding in the federated states.[658] The clause ensures that every state within the U.S. maintains a republican government and is protected against domestic violence. By analysing relevant Supreme Court case-law and legal scholarship, the section will investigate the clause's effectiveness, functionality, and justiciability. Ultimately, it seeks to reveal insights into how the Guarantee Clause can serve as a constitutional mechanism to address threats to the rule of law.

Second, the U.S. legislative branch of government, Congress, will be analysed against rule of law challenges in the federated states. As the federal government's legislative branch, Congress wields critical oversight and law-making powers that contribute to maintaining the rule of law. Therefore, the section will examine Congresses' laws and actions in three historical instances: the Jeffersonian Era, the First Reconstruction, and the Second Reconstruction.

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[655] Edgar McManus and Tara Helfman, *Liberty and Union*, vol 1st Edition (Routledge 2014) and Beeman (n 316).
[656] Pohjankoski (n 50).
[657] Due to the limited space, Chapter 4 will not consider cases where a composite state would act according to the rule of law and protect fundamental rights against a federal entity that drifts towards authoritarianism. One such example is the 1932 Prussian coup d'état or Preußenschlag, in which the authoritarian German federal government dismantled the democratically elected government of the Free State of Prussia and restricted fundamental rights. See Dyzenhaus.
[658] The Guarantee Clause in Article IV, Section 4 of the US Constitution states that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Third, the Presidency, the U.S. main executive branch of government, will be examined during rule of law crisis in the federated states. As the head of the executive branch, the Presidency plays a significant role in ensuring the faithful execution of laws and upholding constitutional principles. To assess whether this has been the case and how the Presidency can safeguard the rule of law, this section will look at the Andrew Jackson Presidency, the Presidency during the First Reconstruction, and the Presidency during the Second Reconstruction. Collectively, this analysis will provide ample ground for comparison, allowing to identify prospects for safeguarding the rule of law in composite states.

By comparing these perspectives from the U.S. with the EU, this chapter aims to provide a broader understanding of the institutional mechanisms and legal frameworks that contribute to preserving the rule of law. Through this comparative analysis, the chapter will generate insights that may inspire potential reforms or adaptations within the EU legal system, thereby contributing to ongoing efforts to address rule of law challenges and maintain the integrity of democratic principles within the EU.

1. Constitutional Design: Upholding the Rule of Law via the Guarantee Clause

When the U.S. Constitution was drafted in 1787 in Philadelphia, the founding fathers were aware of tendencies within the states that would threaten the initial (republican) form of government of the Union and in each individual state.[659] The potential for illegalities in the states concerned the founding fathers.[660] Therefore, they envisaged an institution, a mechanism or a clause that would protect the republican form of government.[661] One way to limit the power of the executive in bending the rule of law was to give a decisive role to the judiciary, as discussed in Part I of this dissertation. Another safeguard was to enshrine a republican form of government clause into the U.S. Constitution to ensure that this form of government would be upheld and protected from any attempts to modify it. This safeguard is today known as the Guarantee Clause of the U.S. Constitution. Article IV, Section 4 of the U.S. Constitution states the following:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[662]

James Madison explained the meaning of the clause in Federalist No. 43 as follows. "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations."[663] Accordingly, the framers of the U.S. Constitution intended to ensure that the U.S. Constitution was shielded against autocratic tendencies arising out of state governments. Madison highlighted the importance of maintaining the initial form of government – a federal republican union. "The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the

[659] Beeman (n 316).
[660] Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press 2016).
[661] Jamelle Bouie, 'Madison Saw Something in the Constitution We Should Open Our Eyes To (12 November 2021)' *The New York Times* (New York City, United States) <https://www.nytimes.com/2021/11/12/opinion/gerrymandering-guarantee-clause.html>.
[662] *The Constitution of the United States of America* Article IV.
[663] Hamilton, Madison, and Jay Federalist 43.

greater right to insist, that the forms of government under which the compact was entered into, should be substantially maintained."[664] By analysing the Supreme Court's case-law on the Guarantee Clause the following section will evaluate its justiciability, enforceability, and effectiveness in the U.S. legal order.

[664] Ibid.

1.1 *Luther v Borden (1849)*

Madison's intention by inserting the Guarantee Clause into the U.S. Constitution was to "defend the system against aristocratic or monarchical innovations." However, despite this intent, the Supreme Court has declared the Guarantee Clause as non-justiciable in leading rulings. The Supreme Court's first judgment on the justiciability of the Guarantee Clause is *Luther v Borden (1849)*. The case concerned the Rhode Island government's authority that operated under a royal charter. In the Supreme Court's opinion, authored by Chief Justice Roger B. Taney, the Supreme Court decided that whether a state government is a legitimate republican one is a political question to be decided by Congress and therefore, Article IV, Section 4 is non-justiciable.

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not."[665]

With this ruling, the Supreme Court established the 'political question doctrine', which limits the Supreme Court's jurisdiction in political matters. Comparatively, the EU Court of Justice has limited jurisdiction under Art. 269 TFEU. This limits the EU's highest court's jurisdiction in the political Article 7 TEU procedure.[666]

1.2 *Pacific States Telephone & Telegraph Co. v Oregon (1912)*

63 years later, the Supreme Court affirmed *Luther v. Borden* in *Pacific States Telephone & Telegraph Co. v. Oregon (1912)*. In a unanimous opinion, authored by Chief Justice Edward Douglass White, the Supreme Court rejected the company's argument that the Guarantee Clause forbade Oregon's citizens' initiative process. The Supreme Court cited and reaffirmed the finding in *Luther v. Borden* that claims based on Article IV, Section 4 of the U.S. Constitution present a political question and are thus non-justiciable.

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[665] *Luther v Borden (1849)* United States Reports Supreme Court of the United States.
[666] For an in-depth read on the limitations of the Article 7 TEU procedure see Besselink (n 428).

> "It is not novel, as that question has long since been determined by this court conformably to the practise of the Government from the beginning to be political in character, and therefore not cognisable by the judicial power, but solely committed by the Constitution to the judgment of Congress."[667]

In the case, the Supreme Court upheld an Oregon state law that regulated telephone rates. The Supreme Court found that the state had the authority to regulate rates for public utility services, including telephone companies, if the rates were not confiscatory or unreasonable. The ruling affirmed the state's power to regulate public utilities in the interest of protecting the public and ensuring fair rates, while it confirmed the Guarantee Clause's non-justiciability.

1.3 *Plessy v Ferguson (1896)*

Beside those two-leading ruling on the Guarantee Clause, there are also other findings by single Supreme Court justices. In *Plessy v Ferguson*, which is discussed in Chapter 2, Justice John Marshall Harlan presented a derogatory finding on the Guarantee Clause in his lone dissenting opinion on the Jim Crow Laws in Louisiana. "The lone dissenter, John Marshall Harlan, wrote an opinion that would come to be recognized as a classic statement of constitutional egalitarianism."[668] According to Justice Harlan, the Guarantee Clause forbade the Jim Crow laws in the South.[669]

> "Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each state of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to

[667] *Pacific States Telephone & Telegraph Co. v. Oregon (1912)* United States Reports Supreme Court of the United States.
[668] Foner (n 340) p. 162.
[669] Justice Harlan additionally argued that the Louisiana law violated the Thirteenth and the Fourteenth Amendment as well.

maintain the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding."[670]

This is an extremely interesting interpretation of the Guarantee Clause as it utilises the clause for safeguarding the rule of law in the federated states. However, this interpretation is a minority view at the Supreme Court and was not taken up during the Second Reconstruction.

Moving from racial discrimination in the states to partisan gerrymandering, the Guarantee Clause has been repeatedly triggered in partisan gerrymandering cases.[671] Constitutional scholars debate whether this phenomenon falls under the jurisdiction of the Supreme Court or whether it is a political question doctrine.[672] The most important Supreme Court case-law on the justiciability of political questions is *Baker v Carr (1962)*.

1.4 *Baker v Carr (1962)*

In *Baker v Carr,* a case about partisan gerrymandering in Tennessee, the issue was whether the Supreme Court had jurisdiction over questions of legislative apportionment. In this case, the Supreme Court laid out the principles of the political question doctrine in the following way.

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision

[670] *Homer Adolph Plessy v John Ferguson (1896)*.
[671] Partisan gerrymandering refers to the practice of manipulating the boundaries of electoral districts for political gain. It occurs when the party in power, typically through the state legislature, redraws district boundaries in a way that favors their own party and disadvantages opposing parties. The primary goal of partisan gerrymandering is to give one political party an advantage in elections by strategically dividing and grouping voters based on their political preferences.
[672] See, for example, Sara Tofighbakhsh, 'Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party' Vol. 120 Columbia Law Review pp. 1885.

already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[673]

Therefore, cases that involve purely political questions cannot be decided by the Supreme Court. As Finn states: "The political question doctrine holds that some questions, in their nature, are fundamentally political, and not legal, and if a question is fundamentally political [...] then the court will refuse to hear that case. It will claim that it doesn't have jurisdiction. And it will leave that question to some other aspect of the political process to settle out."[674] However, ultimately, the Supreme Court held that under certain conditions redistricting constituencies is not a purely political question and that it is justiciable.

1.5 *Rucho v Common Cause (2019)*

In more recent Supreme Court jurisprudence, the political question doctrine has been increasingly resurfaced to deny jurisdiction of the Supreme Court. Recently, the Supreme Court placed odds on the holding in *Baker v Carr* and instead reaffirmed *Luther v Borden* in *Rucho v Common Cause* in 2019. While *Rucho v Common Cause* is technically consistent with *Baker v Carr*, it nevertheless signals a direction of the Supreme Court to restrict the use of the equal protection clause.[675] Therefore, *Rucho v Common Cause* is a case, in which the Supreme Court, under Chief Justice John Roberts, held that partisan gerrymandering claims are not justiciable and explicitly excluded an argumentation from the applicants that relied on the Guarantee Clause. According to the Chief Justice, "[t]his Court has several times concluded, however, that the Federal Guarantee Clause does not provide the basis for a justiciable claim."[676] Thus, as it stands today, the Guarantee Clause is non-justiciable and had, therefore, only limited impact in safeguarding the rule of law in the federated states.

[673] *Charles W. Baker et al. v Joe C. Carr et al. (1962)* United States Reports Supreme Court of the United States.
[674] John E. Finn, *Civil Liberties and the Bill of Rights* (2006).
[675] Technically, *Rucho v Common Cause* is not inconsistent with *Baker v. Carr* which used the Equal Protection Clause to address gerrymandering that was racist in kind. *Rucho v Common Cause* implies that gerrymandering based on political affiliation is not in violation of equal protection.
[676] *Robert A. Rucho, et al. v Common Cause, et al. (2019)* United States Reports Supreme Court of the United States.

2. Legislative Actors: Upholding the Rule of Law via Congress

In the U.S. constitutional framework, the main legislative actor is the bicameral Congress, consisting of the Senate and the House of Representatives. Congress is responsible for making laws, and its members are elected by the U.S. citizens. Moreover, Congress takes an important role during times of rule of law challenges from the federated states. The following section will discuss and analyse three instances of those challenges: the Kentucky and Virginia Resolutions, the First Reconstruction, and the Second Reconstruction.

This section will look at three instances of legislative protection of the rule of law via Congress. The Kentucky and Virginia Resolutions, the First Reconstruction, and the Second Reconstruction. All three instances highlight how Congress acted to protect or not protect the rule of law in the federated states. This provides a benchmark for the actions of the EU's legislative actors in the rule of law crisis. Notably, it also highlights the differences that exist between the legislative power, competencies, and duties in both systems. Finally, it allows to draw insight into the role of the legislative branch during times of rule of law challenges in a federal legal system.

The Kentucky and Virginia Resolutions were political statements adopted in 1798 and 1799 respectively, which challenged the constitutionality of the Alien and Sedition Acts, passed by Congress, and signed into law by U.S. President John Adams. These resolutions asserted that states had the right to declare federal laws unconstitutional and to nullify them within their own borders. The adoption of these resolutions by the two states raised concerns about the potential for nullification to undermine the rule of law in the U.S.

The First Reconstruction occurred after the Civil War, aimed to rebuild the South, and establish civil rights for African Americans. The legislative branch during this period, particularly the Republican-dominated Congress, played a crucial role in upholding the rule of law by passing several landmark laws and amendments. For example, the Civil Rights Act of 1866 granted citizenship and equal rights to African Americans.[677]

[677] However, despite these legislative efforts, the rule of law was soon under attack again. Southern states implemented discriminatory laws such as poll taxes and literacy tests to prevent African Americans from voting and participating in civic life. Later on, the federal government did not always enforce these laws, and the Supreme Court also made decisions that limited the scope of these protections. See also Part I, Chapter 2 of this thesis.

The Second Reconstruction, in connection with the Civil Rights Movement of the 1950s and 60s, aimed to address the ongoing discrimination and segregation faced by African Americans. Again, the legislative branch played a crucial role in upholding the rule of law by passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These laws helped to dismantle Jim Crow segregation and ensure equal civil and voting rights for African Americans.[678]

[678] Despite these legislative achievements, the rule of law was not always upheld in practice. The Supreme Court decision in *Shelby County v. Holder (2013)* struck down a key provision of the Voting Rights Act, leading to new restrictions on voting rights in some states. Racial disparities in the criminal justice system and other areas of society continue to be a challenge for upholding the rule of law in the US today. See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2012).

2.1 Congress during the Jeffersonian Era

Eleven years after the U.S. Constitution's adoption, the Fourth Congress would face a significant challenge of the rule of law from the federated states during the Jeffersonian Era[679]. In 1798, the Fourth Congress under U.S. President John Adams passed the Alien and Sedition Acts to anticipate an upcoming war with France.[680] The four acts aimed to enhance internal security laws by restricting aliens in the U.S. and curtailing the excesses of an unrestrained press. The lawmakers in Kentucky and Virginia opposed those federal laws and issued resolutions in 1798 and 1799 which declared the federal acts to be void and of no force within Kentucky and Virginia.[681]

Later, it became known that they were anonymously drafted by the later U.S. Presidents Thomas Jefferson (Kentucky Resolution) and James Madison (Virginia Resolution).[682] The Kentucky Resolution, written by Thomas Jefferson, argued that the federal government had exceeded its constitutional powers and that states had the right to nullify unconstitutional laws. The Virginia Resolution, written by James Madison, stated that the Alien and Sedition Acts were unconstitutional because they violated the First Amendment's protection of free speech and the press. Both resolutions were an open challenge to Congress's law-making power and eventually to the Supremacy Clause.[683]

Most remarkably was the assertion of both states on the relationship between Congress, the states, and the U.S. Constitution. "[Virginia and Kentucky's legislatures] asserted that since the federal Constitution was a compact among the individual and states, it was the states themselves that had ultimate authority to determine the constitutionality of a federal law and, in the case of a federal law that threatened to interfere with the liberties of the people of the states, to 'interpose' themselves as a means of 'arresting the progress of evil.'"[684] Thus, both

[679] The Jeffersonian Era, also known as Jeffersonian Democracy or the Age of Jefferson, refers to the period in American history associated with the political and ideological ideas of Thomas Jefferson, who served as the third U.S President from 1801 to 1809. Jefferson opposed a strong central government and supported a strict interpretation of the U.S. Constitution, emphasizing the importance of states' rights.
[680] *Act Concerning Aliens of 1798* (Library of Congress 1798).
[681] James Madison and Thomas Jefferson, *Kentucky and Virginia Resolutions of 1798* (Library of Congress 1798).
[682] Farber (n 329) Chapter 3.
[683] The Supremacy Clause is found in Article VI, Clause 2 of the U.S. Constitution. It establishes that the federal laws and the U.S. Constitution are the supreme law of the land, and they take precedence over conflicting state laws or provisions.
[684] Beeman (n 316) P. 185.

state resolutions declared the states the ultimate arbiters over the U.S. Constitution, not the Supreme Court. "By the reasoning of the resolutions, the individual states, not the Supreme Court […], were the ultimate arbiters of the constitutionality of federal law."[685] This assertation was in stark contrast to the Supremacy Clause.

The resolutions' adoption by the two states raised concerns about the potential for undermining the rule of law in the U.S.[686] Congress response to the resolutions was divided. While the Federalists viewed the resolutions as acts of defiance and an attempt by the states to undermine the authority of the federal government, the Democratic-Republicans, who were in the opposition party, supported the principles expressed in the resolutions. The reactions in Congress did not lead to any significant legislative action directly addressing the resolutions. However, the debates and discussions surrounding the resolutions contributed to a broader national conversation about the balance of power between the federal government and the states. Congress also allowed the Alien and Sedition Acts to expire after their expiration date, indicating that they were not intended to be permanent laws. The instance shows that the issue of nullification continued to be a point of contention between states' rights advocates and supporters of federal power in the years leading up to the Civil War. Overall, the resolutions sparked debates and discussions within Congress and across the nation about the scope of federal power, states' rights, and the proper balance between the two.

While the resolutions were ultimately political pamphlets and remained without direct, immediate effect on the constitutional architecture of the U.S., the resolutions still had a damaging long-term effect. They remained the precedent for further challenges to federal supremacy in the U.S. Chernow describes that the resolutions planted the seed for further challenges to federal supremacy and that their damage to the young Union had a lasting effect. "[The] damage of the Kentucky and Virginia Resolutions was deep and lasting. [...] This was a clear recipe for calamitous dissension and ultimate disunion."[687] Therefore, the resolutions would inspire future challenges from the federated states to the rule of law in the U.S. [688]

[685] Ibid.
[686] Ultimately, the Supreme Court's decision in *Cooper v. Aaron (1958)* firmly established the principle of federal supremacy and rejected the idea of nullification; see *Cooper v. Aaron (1958)*.
[687] Ron Chernow, *Alexander Hamilton* (Penguin Books 2005).
[688] For further reading on the impact of the resolutions, see William J. Watkins, *Reclaiming the American Revolution: The Kentucky and Virgina Resolutions and their Legacy* (London, United Kingdom 2004).

2.2 Congress during the First Reconstruction

The First Reconstruction provides a useful background to analysing the U.S. legislative branches approach to deal with rule of law deficiencies in the federated states.[689] During the First Reconstruction the legislative branch of the U.S. government enacted seminal legislation to promote the rule of law in the federated states. The following section will analyse Congress in enacting the Civil Rights Act of 1866.

The Civil Rights Act of 1866 is the first federal law that provided African Americans the right to genuine freedom. The history of the act can be traced back to the context of the American Civil War and the abolition of slavery. During the Civil War (1861-1865), the issue of slavery and the treatment of newly freed slaves became central to the conflict. The Emancipation Proclamation, issued by U.S. President Abraham Lincoln in 1862, declared the freedom of slaves in Confederate-held territories. Later on, the Union victory led to the passage of the Thirteenth Amendment to the U.S. Constitution in 1865, which officially abolished slavery throughout the U.S. However, even with the abolition of slavery, there was a pressing need to secure the civil rights and protections of the newly freed slaves, who faced significant social, economic, and political challenges. The act emerged as a legislative response to these challenges and sought to establish legal protections for the rights of African Americans in the states. The act was introduced in Congress by the Radical Republicans, a faction of the Republican Party who advocated for more aggressive policies to ensure the rights of African Americans. They believed that legislative action was necessary to address the discrimination and violence faced by African Americans in the South. Essentially, the debate in Congress was about the meaning of racial equality in the U.S. "All these questions would soon arise with regard to the Fourteenth Amendment, but they were discussed at greater length in connection with the Civil Rights Act."[690] Thus, the act provided the backdrop for important constitutional debates in Congress.

The act aimed to confer certain rights on all citizens, regardless of race or colour, including the right to make and enforce contracts, sue, and be sued, give evidence in court, and inherit,

[689] The First Reconstruction refers to a historical period in the U.S. following the American Civil War and lasting from approximately 1865 to 1877. It was a significant era of social, political, and constitutional change, aimed at reconstructing the South that had seceded from the Union and addressing the aftermath of slavery.
[690] Foner (n 340) p. 66.

purchase, lease, sell, hold, and convey property. It also provided for equal protection under the law and the punishment of anyone who violated these rights. The act faced opposition from Democrats and moderate Republicans who were concerned about the potential expansion of federal power and the infringement on states' rights. Nonetheless, the act was eventually passed by Congress and enacted into law on 9 April 1866, overriding U.S. President Andrew Johnson's veto. This was a significant development as it marked the victory of the legislative branch over the executive branch. While Johnson sought to maintain the status quo in the South, the progressive Congress passed the act and thereby promoted the rule of law in the South.

The passage of the act marked an important step in the ongoing struggle for civil rights and equality in the U.S. However, the act left some questions unanswered, as Foner describes. "It remained unclear what would happen if states enacted laws that made no mention of race but were administered in a discriminatory manner."[691] Eventually, this would become an issue with the subsequent enactment of Jim Crow laws in the South. Moreover, the act's enforcement mechanism was designed after the Fugitive Slave Act of 1850.[692] "Ironically, the laws enforcement mechanisms were modelled on the infamous Fugitive Slave Act of 1850."[693] Cases arising of discriminatory laws in the states would be heard in federal court to ensure independent judicial proceedings. "Like that statute [Fugitive Slave Act] it allowed cases to be heard in federal court and envisioned the employment of the army, navy, militia, and U.S. marshals, as well as bystanders, to enforce its execution."[694] Therefore, both acts had functional and structural similarities. "Both laws were efforts to use federal power to secure a constitutional right and to punish public officials and private citizens who interfered."[695] Foner highlights the morbid similarities between both acts. "In 1850 it was the right of an owner to the return of their runaway slave; in 1866 the right of African Americans to genuine freedom."[696] However, there was still the issue how the political branches could enforce the act in the federated states.

[691] Ibid.
[692] The Fugitive Slave Act of 1850 was a law passed by Congress as part of the Compromise of 1850, a series of legislative measures aimed at resolving tensions between the Northern and Southern states over the issue of slavery. The act specifically addressed the escape of enslaved individuals from Southern states to free states or territories.
[693] Foner (n 340) p. 67.
[694] Ibid.
[695] Ibid.
[696] Ibid.

In this context, the issue of state neglect arose curing the discussion in Congress. "Already, moreover, some congressmen were speaking of what would come to be called the doctrine of "state neglect" – that the failure of the state government adequately to protect the rights and safety of inhabitants was itself a form of action that could trigger federal intervention."[697] However, it was highly questionably if the federal government would have the resource, capacities and willingness to intervene in the federated states. "The federal government in 1866 was hardly equipped to intervene continuously in local affairs to protect the right of citizens."[698] Finally, this led to a situation in which Congress enacted a landmark piece of civil rights legislation but could not enforce it in the states. This created a highly problematic situation, as the executive branch was not interested in enforcing it against state's will. Overall, the Civil Rights Act 1866 laid the foundation for subsequent civil rights legislation and was later bolstered by the passage of the Fourteenth Amendment in 1868, which provided further protections against state infringement on individual rights. However, while the act's content was clear and powerful, the federal government lacked the means and motivation to enforce it throughout the states. This led to a situation which would enable the enactment of Jim Crow laws in the South.

2.3 Congress during the Second Reconstruction

2.3.1 The Civil Rights Act of 1964

The Second Reconstruction provides a suitable backdrop to analysing the U.S. legislative branches approach to deal with rule of law deficiencies in the federated states.[699] During the First Reconstruction, Congress had to reintegrate the South into a new legal framework that established rights of African Americans. During the Second Reconstruction, Congress was tasked with dealing with Jim Crow laws which were widespread in the South and displayed a new form of racial discrimination in the U.S.[700] With two seminal acts, Congress, together with

[697] Ibid.
[698] Ibid.
[699] The Second Reconstruction refers to a period in American history that followed the Civil Rights Movement of the 1950s and 1960s. It was a time of significant social and political change aimed at addressing racial inequality and advancing civil rights for African Americans. The Second Reconstruction can be seen as a continuation and expansion of the goals and efforts of the First Reconstruction era, which took place after the Civil War. The Second Reconstruction was marked by a series of legislative and judicial actions that sought to dismantle racial segregation and discrimination and secure equal rights for African Americans.
[700] Jim Crow laws were a system of state and local laws in the U.S. that enforced racial segregation and discrimination against African Americans. These laws were enacted primarily in the Southern states between the late 19th century and the mid-20th century, following the Reconstruction period after the Civil War. Under Jim Crow laws, African Americans were subjected to racial segregation in public facilities, including schools, parks,

the executive branch, protected the rule of law in the South.[701] The following section will analyse these two acts passed by Congress: the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[702] Therefore, the legislative acts of the Second Reconstruction completed the unfinished business of the First Reconstruction.

The history of the Civil Rights Act of 1964 can be traced back to the Civil Rights Movement in the U.S., which sought to address systemic racial discrimination and segregation that prevailed in many aspects of American society. Under Jim Crow laws, African Americans were subjected to racial segregation in public facilities, including schools, parks, restaurants, theatres, and transportation. They were required to use separate facilities designated for "coloured" individuals, which were often inferior in quality and resources compared to those designated for white individuals. This enforced segregation perpetuated social, economic, and political disparities and led to increasing social unrest in the 1950s. One significant milestone was the landmark Supreme Court decision in *Brown v. Board of Education* which is discussed in Chapter 2. The Supreme Court ruled that racial segregation in public schools was unconstitutional, overturning the "separate but equal" doctrine established by *Plessy v. Ferguson*. "A burgeoning civil rights movement-which Brown helped to propel-culminating in the Civil Rights Act of 1964, set the stage for the Court's ultimate total rejection of Jim Crow legislation."[703] This decision showed the support of the judicial branch and laid the foundation for challenging racial segregation via legislative means. The legislative answer to this inequality in society and the efforts of the Civil Rights Movement was the Civil Rights Act of 1964.[704] "Congress responded to the social turmoil by adopting the Civil Rights Act of 1964, which superseded state civil rights laws by prohibiting discrimination based on race, color,

restaurants, theatres, and transportation. They were required to use separate facilities designated for "colored" individuals, which were often inferior in quality and resources compared to those designated for white individuals. This enforced segregation perpetuated social, economic, and political disparities between the races.

[701] In both legislative acts, the executive branch, in from of President Lyndon B. Johnson, played a pivotal role. However, in this section, they are considered through the lens of the legislative actor (Congress).

[702] The Civil Rights Act of 1964 outlawed racial segregation and discrimination in public accommodations, employment, and federally funded programs. It provided legal protections against racial discrimination and established the EEOC to enforce these provisions. The act aimed to ensure equal treatment and opportunity for African Americans and other marginalized groups; The Voting Rights Act of 1965 addressed the systemic disenfranchisement of African Americans in the South. It included provisions that eliminated discriminatory voting practices, such as literacy tests and poll taxes, and established federal oversight of election processes in areas with a history of racial discrimination. The act was instrumental in expanding African American voter registration and participation.

[703] Ruth Bader Ginsburg, 'Speaking in a Judicial Voice' Vol. 67 New York University Law Review, p. 1207.

[704] The Civil Rights Movement was a social and political movement that took place in the U.S. from the mid-1950s to the late 1960s. It aimed to end racial segregation and discrimination against African Americans and secure their civil rights and equal treatment under the law. The movement emerged in response to the racial inequality and systemic racism that persisted in many parts of the country, particularly in the South.

religion, or national origin; […]."[705] In itself a landmark piece of legislation, the act aimed to prohibit racial segregation and discrimination, particularly in public accommodations, employment, and education.

The act was introduced in Congress shortly after U.S. President Lyndon B. Johnson took office and faced significant challenges in the legislative process. "[…], the anti-humiliation theme played a central role as congressional leaders made their case for the Civil Rights Act 1964, The Senate was the central forum for this national great debate."[706] Southern Democrats, who opposed desegregation and civil rights reform, mounted a filibuster to block the bill. However, with the help of a bipartisan coalition and the efforts of civil rights leaders, the bill eventually overcame these obstacles. After months of intense debate and negotiation, the act was signed into law by U.S. President Johnson on 2 July 1964. It outlawed racial discrimination in public accommodations, employment, and federally funded programs, and it established the EEOC to enforce the law.[707] Notably, it established conditionality for federal funding via so-called crosscutting requirements.[708] "Title VI of the Civil Rights Act of 1964 was the first post-World War II statute to use a crosscutting requirement."[709] Title VI of the Civil Rights Act 1964 specifies the following:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance."

Under Title VI, recipients of federal funds have an obligation to comply with the non-discrimination requirements and take proactive steps to eliminate any discriminatory practices.

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[705] Robert Jay Dilger, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* (Congressional Research Service (CRS) Report, 2015) p. 21.
[706] Ackerman, *We the People 3: The Civil Rights Revolution* p. 136.
[707] Under the Civil Rights Act of 1964, the Equal Employment and Opportunity Commission (EEOC) was granted several powers and responsibilities to enforce provisions related to employment discrimination. If the EEOC finds evidence of discrimination during its investigation and conciliation process, it can initiate legal action against employers on behalf of aggrieved individuals. The EEOC has the power to file lawsuits in federal court to enforce the provisions of the act.
[708] Crosscutting requirements refer to legal provisions that apply across different programs, agencies, or areas of government. These requirements are designed to ensure consistency, coordination, and accountability in the implementation of various federal laws and policies. They are intended to address specific issues or goals that cut across multiple programs or agencies, rather than being limited to a single area of law. For example, a crosscutting requirement is non-discrimination or equal opportunity provisions. These requirements mandate that federal funds cannot be used in a way that discriminates based on factors such as race, gender, religion, or national origin. They apply to a wide range of federal programs, from education and healthcare to housing and employment.
[709] Dilger (n 705) p. 27.

The conditionality dimension of upholding the rule of law in composite will be further discussed in Chapter 6. Notably, the act was, quickly after its enactment, challenged before the Supreme Court in *Heart of Atlanta Motel, Inc. v U.S.*[710] However, the Supreme Court affirmed the constitutionality of the act. "The Supreme Court quickly upheld the power of Congress to adopt this law - not as an enforcement of the fourteenth amendment but as a regulation of interstate commerce."[711] Interestingly, the Supreme Court relied on the Commerce Clause instead of the Reconstruction Amendments to uphold the act.[712] "[…], in affirming the constitutionality of the Civil Rights Act 1964 barring discrimination by business of all kinds, the Court relied not on the Reconstruction amendments but on the Constitution's Interstate Commerce Clause."[713] It would be the start of the extensive use of the Commerce Clause to uphold Congress's legislative competence.[714]

Overall, the Civil Rights Act of 1964 reflects the legal victories that dismantled segregation, and the political will to address systemic racial discrimination. It stands as a milestone in the struggle for equality and played a pivotal role in shaping the modern civil rights landscape in the U.S. Ackerman highlights that the act stands as a testament of the U.S. living Constitution. "Fifty years after its passage, the Civil Rights Act 1964 remains a centrepiece of the living [U.S.] Constitution; […]."[715] For the matter of this comparison, the act shows how the U.S. legislative branch used its powers to uphold the rule of law in the federated states by a comprehensive piece of legislation including a conditionality dimension.[716]

[710] *Heart of Atlanta Motel, Inc. v. United States (1964)* United States Reports Supreme Court of the United States.
[711] Jacobs and Karst (n 6) p. 229.
[712] The Commerce Clause is a provision in Article I, Section 8 of the U.S. Constitution that grants Congress the power to regulate commerce among the states. It is one of the enumerated powers of Congress and has played a significant role in shaping federal authority over economic activities. The Commerce Clause states that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Over time, the interpretation and application of the Commerce Clause have evolved, shaping the scope of federal power and its role in regulating economic activities. The Supreme Court has played a crucial role in defining the limits of congressional authority under the Commerce Clause through various landmark decisions.
[713] Foner (n 340) Epilogue.
[714] For further readings on the rise and limitations of the Commerce Clause see, for example, Molly E. Homan, 'United States v Lopez: The Supreme Court Guns Down the Commerce Clause' Volume 73 Denver University Law Review (Denv U L Rev) pp. 237and Deborah Jones Merritt, 'Reflections on United States v Lopez: COMMERCE!' Volume 94 Michigan Law Review (Mich L Rev) pp. 674.
[715] Ackerman, *We the People 3: The Civil Rights Revolution* p. 18.
[716] The conditionality dimension of upholding the rule of law in the U.S. will be further discussed in Chapter 6.

2.3.2 The Voting Rights Act of 1965

The history of the Voting Rights Act of 1965 can be traced back to the long struggle for voting rights by African Americans in the U.S., particularly in the face of systemic racial discrimination and efforts to suppress their political participation. After the introduction of the Fifteenth Amendment in 1870, which mandated a negative right to vote (i.e., outlawing race restrictions), the Southern states would use other methods to restrict the voting of the black population in the coming decades. It took until 1965, until the federal legislator would put an end to this. "The poll taxes, literacy tests, and other voting restrictions that sprang up would endure for nearly a century until the federal government definitively intervened again with the Voting Rights Act of 1965."[717] The act addressed and eliminated barriers to voting, particularly in the South where African Americans faced widespread voter suppression, intimidation, and discriminatory practices.

An important previous milestone was the passage of the Civil Rights Act of 1964. This act outlawed racial segregation and discrimination in various areas, including public accommodations and employment. While it did not specifically address voting rights, it set the stage for subsequent legislation that would tackle this issue. Inspired by grassroots activism and public outcry, Congress responded by introducing the Voting Rights Act of 1965. "[…], in 1965, finally relying on the enforcement powers set by the Fifteenth Amendment, Congress enacted the Voting Rights Act (VRA) aiming at ensuring effective participation at the polls for all US citizens."[718] Constitutionally, the act was based on the Fifteenth Amendment as Fabbrini and Foner highlight. "[the Fifteenth Amendment] did provide constitutional sanction for the Voting Rights Act of 1965, which restored the suffrage to millions of black southerners, as well as the more modest voting provisions of the Civil Rights Acts of 1957 and 1964."[719] Thus, the act used the enforcement powers set by the Fifteenth Amendment enacted 95 years prior.

The Voting Rights Act, much as the Civil Rights Act was a coproduction of the legislative and executive branches. On 15 March 1965, U.S. President Johnson proposed the Voting Rights Act to Congress in an address. The DOJ followed suit by submitting the draft bill to Congress on 18 March 1965. The proposal included wide ranging measures. "The administration's

[717] Felix B. Chang, 'Conditionality and Constitutional Change' Vol. 368 Faculty Articles and Other Publications (University of Cincinnati College of Law).
[718] Fabbrini, *Fundamental Rights in Europe (Oxford Studies in European Law)* p. 118.
[719] Foner (n 340) Epilogue.

proposal targeted the worst Southern states for extraordinary treatment – suspending literacy tests and authorizing federal registrars to intervene and register blacks for full participation in both state as well as federal elections."[720] The bill faced significant opposition from Southern lawmakers who sought to maintain discriminatory voting practices, leading to a contentious legislative process. "With images of the first Reconstruction burning bright, congressional debate focused on the dangers and rewards of direct federal intervention in the South."[721] However, with U.S. President Johnson's unwavering support, and bipartisan backing from lawmakers, the act was passed by Congress and signed into law on 6 August 1965.

The act eliminated discriminatory voting practices, particularly in states with a history of voter suppression. To do this, the DOJ would take a key role. "[…], like any good regulatory statute, the VRA looked beyond the present to provide the Justice Department with tools for overcoming the new forms of institutional resistance as they emerged over time."[722] It introduced significant provisions such as the preclearance requirement, which mandated federal oversight of changes to voting laws and practices in jurisdictions with a history of discrimination. "The VRA […] empowered the federal Department of Justice to oversee election administration and provided that selected states and local governments with a history of racial discrimination must obtain federal authorization before implementing changes in voting rules."[723] Finally, the act also authorized federal examiners to register voters in areas with low African American voter registration rates.

Therefore, the act allowed the federal government to rein into states' voting rules. Ackerman highlights that the act meant a strong power shift from the state to the federal level when it comes to voting rules. "[…], the statute stripped the offending states of any pretense at sovereignty. They could no longer change the rules regarding their own electoral system. They were instructed to seek the prior approval of a panel of federal judges before their election law changes could go into effect."[724] Generally, it meant that the federal government would decide whether states voting rules were adequate and it significantly altered U.S. federalism. "Nothing like this shattering assault on federalism had been since the days of the Reconstruction."[725]

[720] Ackerman, *We the People 3: The Civil Rights Revolution* p. 95.
[721] Ibid.
[722] Ibid.
[723] Fabbrini, *Fundamental Rights in Europe (Oxford Studies in European Law)* p. 118.
[724] Ackerman, *We the People 3: The Civil Rights Revolution* p. 95.
[725] Ibid.

Therefore, once again, Congress's legislative efforts irreversibly changed federalism in the U.S. by shifting power to the federal government.

The act reflects the exposure of racial discrimination in voting, and the political will to address systemic disenfranchisement. The act remains a crucial piece of legislation that has helped protect and expand voting rights for marginalized communities in the U.S., while transforming the executive branch to become a protector of citizens' rights in the states. "With a series of civil rights acts, most prominently the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the Congress enlisted the Executive Branch to become forceful protectors of rights."[726] Ultimately, it allowed the federal government to rein into states' voting laws and thereby safeguard the rule of law in the federated states.

Recently, there have been judicial challenges to the Voting Rights Act of 1965. Notably, in *Shelby County v Holder* the Supreme Court shifted powers back to the state level.[727] "The Court invalidated the Voting Rights Act's requirement that certain jurisdictions with long history of racial discrimination in voting obtain prior federal approval before changing voting rules."[728] Unfortunately, from a rule of law perspective, the ruling had negative consequences on the state level. "As anyone with a deeper understanding of American history would have predicted, Alabama immediately took the decision as a green light to enact laws meant to restrict the voting population."[729] Foner has criticized the decision as it showed no understanding how the Second Founding has altered U.S. federalism. "In affirming a commitment to federalism, the *Shelby County* decision took no note of how the Second Founding had altered the original federal system."[730] It remains to be seen whether the Supreme Court will strike down further sections of the act and thereby undo achievements of the Second Founding.

[726] Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J. Dunhoff and J. Trachtman (eds), *Ruling the World? Constitutional, International Law and Global Government* (Cambridge University Press 2008).
[727] *Shelby County v. Holder (2013)* United States Reports Supreme Court of the United States.
[728] Foner (n 340) p. 170.
[729] Ibid.
[730] Ibid.

3. Executive Actors: Upholding the Rule of Law via the US Presidency

The main executive actor in the U.S. constitutional framework is the Presidency. Additionally, there are various executive departments and agencies under his/her command. The Presidency is responsible for implementing and enforcing the laws passed by Congress. Therefore, the Presidency has a decisive role in safeguarding the rule of law in the federated states. The following section will discuss and analyse the Presidency during rule of law challenges from the federated states. Three periods of rule of law crisis are evaluated: the Nullification Crisis (1832 – 1833), the Presidency during the First Reconstruction and the Presidency during the Second Reconstruction. At all three instances the Presidency proved to be pivotal to the rule of law in the federated states. This will provide a benchmark for the EU executive branches' actions in the rule of law crisis.

First, it will discuss the U.S. executive branches reaction to the Nullification Challenge. The idea that states could nullify federal laws they deemed unconstitutional, was a major challenge to the rule of law in the early 19th century. U.S. President Andrew Jackson's authority was challenged by the states with the idea that they had the power to nullify federal law – this became known as the theory of nullification. While Jackson was sympathetic to states' rights, he firmly rejected the notion of nullification and instead upheld the supremacy of federal law. In his Proclamation to the People of South Carolina in 1832, he declared that "the Constitution and the laws of the United States, made in pursuance thereof, are the supreme law of the land."[731] He went on to state that any attempt to nullify federal law was "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed."[732] The Nullification Challenge, therefore, provided an early stress test for the rule of law in the U.S. federal legal system.

Second, it will analyse the U.S. executive during the First Reconstruction in upholding the rule of law. During the First Reconstruction, U.S. Presidents Abraham Lincoln and Ulysses S. Grant worked to ensure that the rule of law was upheld, and newly enfranchised African Americans were able to exercise their rights. Lincoln issued the Emancipation Proclamation, an executive

[731] *Proclamation to the People of South Carolina by Andrew Jackson, President of the United States (December 10, 1832)* (Library of Congress 1832).
[732] Ibid.

measure, which declared that all slaves in Confederate territory were to be set free. He strongly supported the 13th Amendment, a legislative measure, which abolished slavery nationwide. Grant, as U.S. President during the tumultuous years of reconstruction, worked to enforce the Lincoln's legacy and ensure that the newly formed governments in the South were able to function effectively and according to the rule of law.[733]

Third, it will look at U.S. executive pivotal role in enforcing the rule of law in the federated states during the Second Reconstruction. During the Second Reconstruction, U.S. President Dwight D. Eisenhower used executive power to send federal troops to enforce desegregation in schools and other public facilities in the face of violent resistance.[734]

Overall, the U.S. executive branch has played a vital role in upholding the rule of law in the face of constitutional challenges, both in rejecting attempts to undermine federal authority and in advancing the cause of civil rights and equal protection under law. Therefore, the following three sections will analyse three instances of executive rule of law protection in the U.S.

[733] President Ulysses S. Grant also signed the Civil Rights Act of 1875, which guaranteed African Americans equal treatment in public accommodations and transportation.
[734] Roberts (n 49).

3.1 The Jackson Presidency and the Nullification Challenge

The Nullification Challenge in the early 19th century provides a suitable backdrop to analyse the U.S. executive branch in dealing with rule of law challenges from the federates states. Between 1828 and 1833, a political crisis emerged between the federal government under U.S. President Andrew Jackson and South Carolina over the Tariffs of 1828 and 1832.[735] South Carolina declared the federal Tariffs of 1828 and 1832 unconstitutional and, therefore, null and void within the sovereign boundaries of the state. The Nullification Crisis was triggered by the opposition of South Carolina to federal tariffs, which were perceived as detrimental to the South Carolinian economy while favouring the Northern states. "The Nullification Crisis, which escalated in South Carolina following the 1828 'Tariff of Abominations', had its roots both in the economic depression of the 1820s as well as the beginnings of the national abolitionist movements."[736] Thus, the Nullification Crisis provided the first stress test for the rule of law in the U.S. federal legal system.

Senator John C. Calhoun from South Carolina was the leading advocate of the theory of nullification. "[A doctrine that promulgated] the right of a state to render 'null and void' any statute that was in that state's judgment unconstitutional."[737] Calhoun relied on the Kentucky and Virginia Resolutions of 1798 to declare that "[a]ny laws passed by Congress, under powers not delegated to it, should be declared null and void."[738] There were some merits to his argument, as the U.S. Constitution gives the federal government limited and enumerated powers. Any law of Congress that is not within those powers is null and void. Calhoun, however, deemed the states to be the ultimate arbiter to draw the line between federal and state powers and not the Supreme Court. This assertion itself was against the U.S. Constitution. According to the U.S. Constitution, the Supreme Court decides where the boundary between federal and state power is.[739] Therefore, the seed planted with both resolutions would be picked up during the Nullification Crisis to feed the theory undermining the Supremacy Clause. The question was how the federal government would react to this rejection of federal supremacy.

[735] *Tariff of 1832* (22nd Congress, Session 1 1832).
[736] Pohjankoski (n 50) p. 345.
[737] Beeman (n 316) p. 186.
[738] Pohjankoski (n 50) p. 346.
[739] The Supreme Court is required to declare unconstitutional any law of Congress it deems to have exceeded those boundaries.

John Calhoun expanded on the theory of the Kentucky and Virginia Resolutions to justify his nullification and compact theory. According to Calhoun's Compact Theory, states had the power to invalidate federal law as the federal government was an agent of the states that were the principals. "Whenever a question of final constitutional interpretation would arise, the federal government would be obliged, 'as in all similar cases of a contest between one or more of the principals and a joint commission or agency, to refer the contest to the principals themselves.'"[740] Interestingly, he regarded nullification as a 'peaceable' act in opposition to the aggressive act of secession from the federal order. "Unlike secession, nullification was for Calhoun a 'peaceable' act; the nullification of federal law would not render the state a foreign nation, but would simply 'repudiate the unwarranted act of the agent' while the state would remain in the Union."[741] Based upon Calhoun's theory, the South Carolinian legislator adopted the Nullification Ordinance of 1832 to declare the federal tariffs null and void.[742]

At this point, the Presidency had to step in to diffuse the challenge and Jackson did so forcefully. "Jackson warned the South Carolinians of the consequences of the Nullification Ordinance, while ridiculing the 'discovery' of their new doctrine and its 'impracticable absurdity'."[743] Jackson acknowledged the dangerous precedent the Nullification Ordinance would set, and the message it would send to other states which may not like a specific federal law and follow South Carolina's example. Moreover, he was afraid that there was no check on the abuse of the theory. "Jackson argued that nullification was unacceptable because there was no check on its abuse."[744] In a presidential proclamation, he stated that the nullification of federal law by state legislators is "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorised by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed."[745] He, thus, firmly rejected the attempt of South Carolina to undermine federal law.

Not only that, but Jackson also considered the use of force to coerce South Carolina to obey federal law. "Jackson effectively vowed to uphold the rule of law by force. For him, the

[740] Pohjankoski (n 50) p. 346.
[741] Ibid.
[742] *South Carolina Ordinance of Nullification (November 24, 1832)* (1832).
[743] Pohjankoski (n 50) p. 348.
[744] Farber (n 329) p. 61.
[745] *Proclamation to the People of South Carolina by Andrew Jackson, President of the United States (December 10, 1832)*.

constitutional duty of the President was to execute the laws of the United States."[746] In a letter to a friend, he mentioned his willingness to enforce the rule of law by force if the situation should worsen.[747] According to Jackson, Calhoun's theory is based upon the conception of a league of nations, a confederation of states. However, "Jackson's vision of the Constitution was that it created a government, not a league of states."[748] The U.S. was formed as a nation of 'we, the people' and, therefore, the national government had the power to coerce states into compliance, even by military means. "[The people of South Carolina], as subjects of the federal government, could be coerced into compliance, should it become necessary."[749] Jackson, thus, was not hesitant to enforce the rule of law in the federated states should it be necessary.

The South Carolinian legislature rejected Jackson's threat of federal coercion to the people of South Carolina. "One of its resolutions addressed the question of federal coercion, declaring that 'there is no constitutional power in the general government, much less in the executive department, of that government, to retain by force [a] state in the Union.'"[750] However, Jackson would not give in, and he would prevail with his view of the U.S. Constitution. Legal historians have weight Jackson's intervention and the invocation of force positively. "[I]t is fair to assume that President Jackson's readiness to deploy federal force contributed to diffuse the conflict."[751] Only when the crisis between the federal executive and the state was nearly diffused the federal legislator would act by passing the Force Act. "Ultimately, Congress passed a Force Act in support of the President, but only after the crisis seemed to near an end."[752] This showed that Congress belatedly acted to support the Presidency in upholding the rule of law.

While Jackson thus upheld the rule of law in South Carolina, his own rule of law record is less glamorous. Three instances highlight the disregard Jackson would at times show towards the rule of law. First, as a commanding general in New Orleans, before he became U.S. President, he would by his own order suspend the constitutionally guaranteed right of habeas corpus. "[…], as commanding general in New Orleans, Andrew Jackson had suspended the writ [of habeas]. Not only that, but he imprisoned the judge who had issued it. And when the U.S. attorney went to another judge to secure the first judge's release, Jackson had them arrested as

[746] Pohjankoski (n 50) p. 348.
[747] Andrew Jackson, *Anti-Nullification - A Letter from Andrew Jackson on the Subject* (Republican Banner 1832).
[748] Pohjankoski (n 50) p. 349.
[749] Ibid.
[750] Ibid.
[751] Ibid.
[752] Farber (n 329) p. 62.

well."[753] Second, he repeatedly showed disrespect towards the Supreme Court rulings. For example, when it came to the second chartered bank of the U.S. "In his campaign to eliminate the Bank of the United States, […], Andrew Jackson was unmoved by the Supreme Court's unequivocal holding that the bank was constitutional. He insisted that executive and legislative branches have as much right to interpret the Constitution in the exercise of their own power as the Supreme Court does in the exercise of its powers."[754] Therefore, he showed no respect for the ultimate authority of the Supreme Court in interpreting the U.S. Constitution. Third, Jackson failed to implement the Supreme Court's ruling in *Worchester v Georgia* in favour of the Indian tribes.[755] In his response to the Supreme Court decision, he made clear that he would not use the federal government to enforce the ruling in Georgia.

Interestingly, Jackson gave in to a challenge that was not in favour of the expansion of the nation, the deprivation of land from the Indians, and fought back against a challenge that could, in the future, undermine the cohesion of the nation towards other nations, the univocal implementation of tariffs. He, therefore, advanced the rule of law where it was in favour of the nation's expansion, and he rejected it where it was to the nation's detriment.

3.2 The Lincoln Presidency and the First Reconstruction

The First Reconstruction provides a framework to analysing the U.S. executive branches actions in safeguarding the rule of law in the federated states. The issue of nullification continued to be a point of contention between states' rights advocates and supporters of federal power in the years leading up to the Civil War. "The great question leading up to the Civil War was whether the federal government did have the power to enforce compliance with its legal determinations, either legislative or judicial."[756] Ultimately, a conflict over slavery would result in a fully-fledged Civil War between the Union and the Confederacy.[757] The newly inaugurated U.S. President Abraham Lincoln had to deal with the fallout and uphold the rule of law in the

[753] Ibid.
[754] Ibid.
[755] *Worchester v Georgia (1832)* United States Reports Supreme Court of the United States.
[756] Foner (n 340) p. 24.
[757] The U.S. Civil War, also known as the War Between the States, was a significant armed conflict that took place in the U.S. from 1861 to 1865. It was primarily fought between the Northern states, known as the Union, and the Southern states, known as the Confederacy. The war emerged as a culmination of long-standing tensions over issues such as slavery, states' rights, and the balance of power between the federal government and individual states.

U.S. "The great question during the Civil War was whether the rule of law itself could survive the effort to defend it."[758] Thus, the Civil War put the rule of law in the U.S. to its greatest test.

The primary cause of the Civil War was the institution of slavery, which was deeply rooted in the Southern agrarian economy. The South relied heavily on enslaved African Americans for their labour-intensive cotton plantations. "[…] by the 1850s, leading Southerners proclaimed slavery to be a positive good. For whites, they said, it provided the basis of a distinctive civilization, for blacks, paternalistic and much needed guidance form a superior race."[759] Meanwhile, the North had undergone industrialization and had abolished slavery or were on the path toward emancipation. The stark differences between the two regions, both economically and morally, fuelled the tensions that ultimately led to the war. By the time of Lincoln's inauguration, South Carolina had been followed by other states declaring their withdrawal from the Union. During the 16 weeks between Lincoln's victory in the 1860 presidential election and Inauguration Day, seven slave states had declared their secession from the Union and formed the Confederate States of America. "When Lincoln took office in March 1961 the lower South had declared independence and rejected federal authority."[760] Lincoln had not yet revealed how he would react to this development as newly elected U.S. President. His Inaugural Address was, therefore, eagerly awaited by the nation.

> "One section of our country believes slavery is right and ought to be extended, while the other believes it is wrong and ought not to be extended. This is the only substantial dispute."[761]

As Lincoln highlighted in his Inaugural Address, the cause of the Civil War was ultimately over slavery and who had the competence to decide whether it was right or wrong. When the federal government decided that slavery would be outlawed the Southern states, they saw no other option than to secede. Therefore, the Civil War was inherently connected to the issue of sovereignty and, ultimately, a sovereignty conflict between the Southern states and the federal government. There were three dominant views of sovereignty in the 19th Century U.S.: Lincoln's view, the Federalist Papers, and Calhoun's view. Lincoln's view was outspoken. For

[758] Farber (n 329) p. 24.
[759] Ibid.
[760] Ibid.
[761] Abraham Lincoln, *Lincoln's First Inaugural Address (4 March 1861)* (The Avalon Project (Yale Law School) 1861).

him, the states could not exist without the Union. "Much is said about the 'sovereignty' of the States, but the word, even, is not in the national Constitution. [The] Union is older than any of the States; and, in fact, it created them as States."[762] Therefore, he clashed with the Calhounian view and had an even more national view than the Federalist Papers.

Overall, the U.S. federal government had far-reaching constitutional powers at the time of the Civil War, as Farber highlights. "[…] the Constitution gave the federal government the core powers normally associated with a sovereign nation – the power to make war, raise its own armies, enter treaties, tax its citizens, regulate internal and foreign trade, decide legal issues at the expense of subnational courts, […]. These are far more sweeping powers than those enjoyed by the European Union today, […]."[763] However, the secession by the Confederacy states clearly challenged those powers. "Thus, the war was in part about whether the Constitution provided a system of authoritative dispute resolution or merely a forum for negotiating between contesting sovereignties."[764] The Presidency's leadership during this time of rule of law crisis would, therefore, be crucial for the future meaning of the U.S. Constitution.

Before the Civil War, Lincoln argued that Southern states could seek remedy through courts to settle the issue of slavery. "[…], Lincoln had once called on Southerners to seek a judicial ruling on slavery in the territories rather than breaking apart the Union."[765] However, when the Supreme Court made the infamous *Dred Scott* decision in 1857, Lincoln rejected the ruling as a misleading interpretation of the U.S. Constitution. "When the Dred Scott decision came down [in 1857], Lincoln promptly rejected the ruling as a definitive resolution of the constitutional issue."[766] Instead, he argued that this was a specific case, and it would create no precedent. Therefore, at the time of his Inaugural Address in 1861, and considering the conservative Supreme Court, he adopted a distinguished opinion on the precedents coming from the Supreme Court. "[…], Lincoln seemed to have backed away from the view that well-settled precedents were binding on the country as a whole. But he still insisted on the binding effect of judicial decisions on the parties – even decisions wrongfully returning a person to slavery [as in the case of Dred Scott]."[767] In his view, slavery was morally wrong and not supported

[762] Abraham Lincoln, *Message to Congress in Special Session (4 July 1861)* (U.S. Congress 1861).
[763] Farber (n 329) p. 42; N.B. this was written before the EU's Treaty of Lisbon.
[764] Ibid
[765] Ibid.
[766] Ibid.
[767] Ibid.

by the U.S. Constitution. Therefore, the *Dred Scott* decision could not be right. Before the Civil War, Lincoln also sought other avenues to diffuse the conflict with the South. One of his ideas was to establish a strict conditionality regime for the Southern states to nudge them to abolish slavery. "He [Lincoln] asked for changes in the Constitution, not to abolish slavery immediately but to authorize the appropriation of funds for any state that provided for abolition by the year 1900."[768] However, his idea to use conditional spending was to no avail.

Shortly after the Civil War started, Lincoln issued the Emancipation Declaration qua presidential power, which declared that all slaves in Confederate territory were to be set free.[769] "He [Lincoln] issued the Emancipation Declaration on September 22, 1862."[770] It stated that on 1 January 1863 "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free;"[771] The addressees of the Emancipation Declaration were Union military commanders in the field and enslaved Americans in the South. "[T]he Emancipation Declaration was effectively an order to military commanders in the field, directing them to liberate slaves in conquered territory."[772] The declaration was a strong executive action to strengthen the rule of law in the U.S. "The Emancipation Declaration was a great victory for human liberty. It was also an extraordinary use of executive power."[773] While the Emancipation Proclamation did not immediately abolish slavery nationwide, it laid the groundwork for future actions and signified a moral and political commitment to ending slavery. The proclamation shifted the purpose of the war to include the abolition of slavery.

Moreover, in the Proclamation of Amnesty and Reconstruction in December 1963, Lincoln ordered the Confederacy states to change their state constitutions, abolishing slavery, if they wanted to be readmitted to the Union. "Lincoln's Proclamation of Amnesty and Reconstruction, issued in December 1863, envisioned abolition by state action. It required Southern states that desired readmission to the Union to adopt new constitutions abolishing slavery."[774] The proclamation symbolizes a second strong executive action to uphold the rule

[768] Foner (n 340) p. 25.
[769] Abraham Lincoln, *Emancipation Proclamation (22 September 1862)* (National Archives, Milestone Documents 1863).
[770] Farber (n 329) p. 154.
[771] Lincoln, *Emancipation Proclamation (22 September 1862)*.
[772] Farber (n 329) p. 156.
[773] Ibid.
[774] Foner (n 340) p. 27.

of law in the federated states. However, ultimately a change of the state constitutions, abolishing slavery, would only be possible under different state governments. In Congress, several Senators flouted the idea that the Republican Form of Government Clause could be used to abolish slavery in the states of the Confederacy. "[Senator Lyman] Trumbull rejected the idea, espoused by [Senator Charles] Sumner and other Radicals, that the war power itself, or the Constitution's clause guaranteeing to each state a republican form of government, gave Congress the power to abolish slavery by statute and that it should do so immediately rather than going through the cumbersome amendment process."[775] However, Lincoln did not follow these ideas and instead favoured a constitutional amendment – the Thirteenth Amendment.

Lincoln played a crucial role in enacting the Thirteenth Amendment to the U.S. Constitution.[776] As the Civil War progressed, Lincoln became convinced that the abolition of slavery was necessary to preserve the Union and ensure lasting peace. In 1864, Lincoln actively supported the passage of the amendment by Congress. He believed that amending the U.S. Constitution was necessary to provide a permanent legal solution to the issue of slavery. He used his political influence and to rally support for the amendment in Congress. In his annual message to Congress in December 1864, Lincoln emphasized the importance of passing the amendment as a means of securing freedom and equality for all Americans. "At the last session of Congress a proposed amendment of the Constitution abolishing slavery throughout the United States passed the Senate, but failed for lack of the requisite two-thirds vote in the House of Representatives. Although the present is the same Congress and nearly the same members, […], I venture to recommend the reconsideration and passage of the measure at the present session."[777] According to him, ending slavery was essential to ensure a just and lasting peace after the war.

The amendment faced challenges and resistance from some congressional members. "It remained uncertain how far congress would go to change the existing legal order by establishing federal oversight of Americans' rights."[778] Lincoln continued to advocate for its passage. He met with members of Congress, used his political connections, and employed his

[775] Ibid.
[776] While the Thirteenth Amendment to the U.S. Constitution is a legislative instrument it will be discussed in this section as it was driven by an executive actor in form of U.S. President Abraham Lincoln.
[777] Abraham Lincoln, *Fourth Annual Message to Congress (6 December 1864)* (Miller Center of Public Affairs (University of Virginia) 1864).
[778] Foner (n 340) p. 54.

powers of persuasion to gather support. The amendment was ultimately passed by the Senate in April 1864, and after intense debates and negotiations, by the House on 31 January 1865. On 1 February 1865, Lincoln signed a joint resolution of Congress submitting the amendment to the states for ratification. The amendment was officially ratified on 6 December 1865, when Georgia became the 27th state to approve it, fulfilling the three-fourth requirement. Section I of the Thirteenth Amendment reads as the following.

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[779]

Therefore, the amendment constitutionalised the substance of the Emancipation Declaration by stating that no slavery nor involuntary servitude shall exist in the U.S. It, thus, created a new right to personal freedom and immensely enhanced the rule of law in the U.S. "The amendment created a new fundamental right to personal freedom applicable to all persons in the United States regardless of race, gender, class, or citizenship status."[780] The amendment was, therefore, crucial to strengthen the rule of law in the U.S.

Moreover, the amendment radically changed American federalism. Section II of the Thirteenth Amendment meant a redefinition of federalism in the U.S. by stating that "Congress shall have power to enforce this article by appropriate legislation." It gave the U.S. legislative branch an exclusive mandate and competence to legislate and enforce the abolition of slavery throughout the U.S. Therefore, it was the first constitutional amendment that would expand the power of the federal government. "[…] it was the Thirteenth [Amendment], the first amendment in the nation's history to expand the power of the federal government rather than restraining it, that initiated this redefinition of federalism."[781] It put the U.S. on a path to the federal legal system of today. Lincoln did not live to see the final ratification of the amendment. "The Thirteenth Amendment, overturning state slave laws, became effective only after Lincoln's death."[782] However, his tireless efforts and leadership were instrumental in its passage. The amendment

[779] *The Constitution of the United States of America* Fourteenth Amendment.
[780] Foner (n 340) p. 32.
[781] Ibid.
[782] Farber (n 329) p. 114.

stands as a monumental achievement in American history, marking the end of slavery and the beginning of a new era of freedom and civil rights for millions of African Americans.

However, as Foner points out, the amendment was not the final answer to the challenge of freedom in the U.S. "The Thirteenth Amendment was not a final answer to the problem of freedom. It turned out to be one indispensable part of a dynamic process that continued for years and gave birth to the Fourteenth and Fifteenth Amendments, further civil rights legislation, and an unprecedented experiment in the South and interracial democracy."[783] Overall, Lincoln's legacy in safeguarding the rule of law via executive power is positive. Specifically, when looking at the Emancipation Declaration and the Thirteenth Amendment as two major acts under his authority. Eventually, under Lincoln the rule of law could survive the effort to defend it – and became much better fortified after the Civil War.

3.3 The Eisenhower Presidency and the Second Reconstruction

The Second Reconstruction provides a framework to analysing the U.S. executive branch actions to safeguard the rule of law in the federated states. In the aftermath of the momentous Supreme Court decision in *Brown v Board of Education*, the attention shifted to the executive branch of government, mainly to U.S. President Dwight D. Eisenhower, whether he would implement the contentious ruling of the Supreme Court nationwide.[784] It was a pivotal moment in American history, where the federal government had to intervene to ensure that the court order was enforced. The following section will analyse this form of executive intervention to safeguard the rule of law in the federated states.

In 1956, in response to the Supreme Court's decision in *Brown v Board of Education*, several state legislatures adopted legislative resolutions to express their rejection and intent not to follow and implement the decision. This resistance included legal challenges, protests, and other measures aimed at impeding the implementation of desegregation and preserving racial segregation in various aspects of public life. As an illustrative example, the General Assembly of Virginia adopted the following act in January 1956.

[783] Foner (n 340) p. 54.
[784] *Brown v. Board of Education (1953)*.

> "[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."[785]

Therefore, there was strong resistance from the federated states against the Supreme Court's decision and they contested the Supreme Court's authority in upholding the rule of law. Other states' legislative bodies would follow the example set by Virginia and reject the Supreme Court's authority on this matter. 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[...]."[786] Additionally, the Georgia General Assembly passed a series of laws known as "massive resistance" measures. These laws were aimed at undermining or nullifying the Supreme Court's ruling and maintaining racial segregation in schools. One of the significant actions taken by the Georgia General Assembly was the passage of laws that allowed for the closure of public schools that faced desegregation orders. These laws gave the state authorities the power to shut down schools rather than desegrated them. The strategy behind these laws was to prevent or delay the desegregation of schools by removing the institutions altogether. Furthermore, the Georgia legislature passed legislation that prohibited the allocation of state funds to any schools that desegregated or admitted African American students. This measure aimed to financially discourage schools from implementing desegregation and maintain the racial divide in education. Interestingly, in this case the state is using financial conditionality to undermine the rule of law. Ultimately, the Georgia General Assembly attempted to amend the state constitution to establish segregation as a fundamental principle and prevent any future attempts to desegregate schools.

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[785] *Act of January 11, 1956, by the Virginia General Assembly* (Virginia General Assembly 1956).
[786] *Reg. Session* (1956).

However, the rejection came not only from state legislatures. Also, parts of the federal legislature, in 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."[787] The question was how the executive, in the form of the Presidency, 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.

In Arkansas, the state's governor Orval Faubus strongly rejected the Supreme Court's decision in *Brown v Board of Education* and had no intent to implement it 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."[788] 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. 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 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."[789] It was now upon the executive to respond to this challenge from the federated states.

In the Eisenhower Administration, a dispute emerged on how to deal with the recalcitrant governor of Arkansas and the opposition in Little Rock. On the one hand, some of the U.S. 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

[787] Schmidt (n 380) p. 266.
[788] Breyer (n 368).
[789] Ibid.

'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."[790] On the other hand, the Attorney General and highest legal advisor to the U.S. 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.'"[791] 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."[792] The U.S. executive branch, therefore, decided to enforce the ruling even against state resistance.

Interestingly, Eisenhower was doubtful about his final decision to send federal troops as he had hinted just months earlier that he would not send 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. […]'"[793] 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."[794] He, therefore, provided a decisive answer to the challenge of the rule of law from the federated states. 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 U.S. 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 U.S. It showed that the executive was willing to support the judiciary in protecting and maintaining the rule of law in the federated states.

[790] Ibid.
[791] Ibid.
[792] Ibid.
[793] Schmidt (n 380) p. 260.
[794] Ibid.

However, while the federal government eventually enforced the decision, the much bolder decision and pivotal role was played by the Supreme Court beforehand. The Supreme Court stepped forward to protect the rule of law in the federated states with the *Brown v Board of Education* 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 Supreme Court. "[…] 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."[795] Overall, this study of the U.S. executive branch during rule of law crisis in the federated states shows that the Presidency was willing and able to enforce the Supreme Court's ruling and thereby uphold the rule of law.

[795] Breyer (n 368).

4. Conclusion

> *"Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right?"*[796]

Chapter 4 has analysed the U.S. political branches of government during times of rule of law crisis and challenges from and within the federated states. Therefore, it has served as a suitable comparator to Chapter 3, which examined the EU's political branches dealing with similar challenges within the EU legal system. The analysis of the U.S. political branches of government has revealed that within the U.S. legal framework, various instruments, mechanisms, and actors play significant roles in safeguarding the rule of law within the federated states. Notably, it highlighted the dependence between the political actors to successfully safeguard the rule of law in the federated states.

Three findings emerge from the analysis of the U.S. political branches of government. First, constitutional features to uphold the rule of law in the U.S. have been declared non-justiciable. The political branches of government are, thus, hesitant to use them. Second, the U.S. legislative branch enacted important landmark legislation to protect the rule of law in the federated states. Third, the U.S. executive branch did step in during times of crisis to uphold the rule of law in the federated states.

First, the inquiry into the Guarantee Clause (Article IV, Section 4 of the U.S. Constitution) highlighted its value as an aspect of the constitutional framework, affirming the commitment to republican government and the protection of democratic principles within the states. However, analysing the leading Supreme Court case-law on the clause has revealed its non-justiciability, rendering it ineffective within the U.S. legal order. It is considered one of the "orphan clauses" of the Constitution, meaning it is rarely invoked in legal disputes or by the courts. In practice, the federal government has not invoked the Guarantee Clause to intervene in state affairs. The Supreme Court has declared it a "political question" left for the

[796] James Madison in Federalist No. 43 (1788), see Hamilton, Madison, and Jay.

government's political branches to address rather than a matter for the courts to decide.[797] Consequently, despite scholars advocating for the enforceability of the Guarantee Clause, it has rarely been applied by the U.S. political branches of government.[798] This shows that despite the value of such a constitutional mechanism, it is not enough to safeguard the rule of law in a federal legal system. Instead, it crucially depends on the institutional actors, specifically the executive branch, enforcing it.

Secondly, the analysis of the U.S. legislative branches revealed that the rule of law could be strengthened in the federated states through landmark pieces of legislation. Nevertheless, by comparing Congress's actions during the Jeffersonian Era, the First and the Second Reconstruction, it showed that Congress acted differently depending on the actions of the other political and judicial branches. During the Jeffersonian Era, Congress was challenged by state legislatures and state judiciaries, which undermined the supremacy of federal law and the rule of law. Congress's answer to these challenges illustrated that those challenges to the rule of law originating from the federated states could be rejected in a joint effort of the legislative and judicial branches. In the context of the First Reconstruction, Congress played a pivotal role in strengthening the rule of law after the Civil War. Notably, Congress acted in tandem with the executive branch under U.S. President Abraham Lincoln and even continued its efforts in opposition to the backwards-looking U.S. President Andrew Johnson. It, therefore, showed that in the American system, the legislative branch could act to strengthen the rule of law, despite executive backlash. During the Second Reconstruction, Congress followed the transformational rulings of the judiciary and enacted a transformative Civil Rights Act to protect the rights of African Americans in the South and eliminate forms of discrimination at the ballot box. However, it also indicated that Congress only followed suit after the Supreme Court acted and the support of the executive branch was secured under U.S. President Lyndon B. Johnson. This underlines that, in the U.S. system, executive support was crucial for Congress to enact legislation strengthening the rule of law.

[797] *Charles W. Baker et al. v Joe C. Carr et al. (1962)*.
[798] See, for example, Charles L. Cotrell and R. Michael Stevens, 'The 1975 Voting Rights Act and San Antonio, Texas: Toward a Federal Guarantee of a Republican Form of Local Government' Vol. 8 Publius pp. 79, Thomas A. Smith, 'The Rule of Law and the States: A New Interpretation of the Guarantee Clause' Vol. 93 Yale Law Journal pp. 561, Erwin Chemerinsky, 'Cases under the Guarantee Clause Should be Justiciable' Vol. 65 University of Colorado Law Review pp. 849, and Bouie,.

Thirdly, the study of the U.S. executive branch (Presidency) during rule of law challenges demonstrated the significant influence of the individual occupying the highest executive office on the protection of the rule of law. During the Nullification Challenge, U.S. President Andrew Jackson mainly upheld the federal rule of law in the federated states. Despite his sympathy towards states' rights, Jackson firmly rejected the notion of nullification. Rather than resorting to federal force, he diffused the Nullification Crisis. However, in other instances, Jackson undermined the rule of law by not ensuring the enforcement of Supreme Court judgments. Likewise, during the First Reconstruction, Lincoln demonstrated leadership by fighting for the abolishment of slavery and the advancement of civil rights in the Civil War. Nonetheless, some of Lincoln's actions during the Civil War can be criticised from a rule of law perspective. During the Second Reconstruction, U.S. President Dwight D. Eisenhower successfully safeguarded the rule of law in federated states by enforcing desegregation in the South. Following the Supreme Court's decision in *Brown v Board of Education*, Eisenhower utilised the National Guard to implement the judgment against the recalcitrant states. Using federal force, this action demonstrated the executive's power and ability to safeguard the rule of law in the federated states by force. Overall, the analysis of the U.S. executive branch during rule of law challenges revealed that the U.S. constitutional setup allows the Presidency to uphold the rule of law in the federated states. Unlike the legislative branch, the Presidency is less dependent on other political and judicial branches. Ultimately, the Presidency possessed the authority to deploy federal force to protect and defend the rule of law in the federated states. Nevertheless, this power also renders the Presidency vulnerable to undermining the rule of law itself. The following Part II Conclusions will combine the findings of Chapter 3 and Chapter 4 to derive comparative lessons on the political branches' effectiveness in rule of law crises in federal legal systems.

Part II: Comparative Conclusions

The preceding Part II – The Institutional Dimension: Upholding the Rule of Law via Political Branches of Government – analysed the EU's political branches during the rule of law crisis, setting them in comparison to the actions of the U.S. political branches in upholding the rule of law within the federated states. The threefold structure – involving constitutional design, legislative actors, and executive actors – allowed novel and original insights.

First, the comparison between the Guarantee Clause and treaty instruments in the EU displayed that both legal systems possess constitutional instruments to uphold the rule of law. However, it also showed that apex courts are hesitant to declare such instruments justiciable, because they would weaken their institutional position in the federal legal system if they started meddling in political questions. Second, the comparison of both legislatures demonstrated that the U.S. legislature was able to strengthen the rule of law via landmark pieces of legislation after rule of law challenges appeared in the federal legal system. In the EU, the legislature either lacks the competence (EP) or consensus (Council) to enact similar legislation. Moreover, there are structural differences between the legislative competence of the EU and the U.S. Third, the comparison of both executive branches showed that it requires a fully committed executive to safeguard the rule of law in composite states. In the EU, the Commission and the European Council are reluctant and non-committed to sway their full support behind the judicial branch to safeguard the rule of law in the Member States. This is due to the structure of the EU executive branch, which favours national interest over unified actions. In the U.S. the Presidency, if willing, could uphold the rule of law in the federated states.

Constitutional Features Guaranteeing the Rule of Law

First, the study of constitutional features upholding the rule of law in both systems highlighted that different constitutional safeguard clauses exist. While the EU's primary instruments are Article 2, 7 and 10 TEU, the U.S. relies on the Guarantee Clause. However, the U.S. experience underscored the difficulties of applying such a clause.[799]

[799] For the present Comparative Conclusions, the focus lies on Article 7 and 10 TEU. As Article 7 TEU is the practical enforcement instrument to ensure the implementation of the Article 2 TEU values. Article 2 TEU, instead, is merely aspirational. See also Wouters.

As Müller has highlighted, "[…], one of the explicit goals of European enlargement to the East was to consolidate liberal democracies […]. Governments, in turn, sought to lock themselves into Europe as to prevent 'backsliding'."[800] The Guarantee Clause in the US had the same intention when drafted during the Constitutional Convention.[801] It thus provides a blueprint for a clause that ensures a democratic form of government throughout the federated states.[802] However, as Chapter 4 has shown, the Guarantee Clause has not been applied by the Supreme Court and is perceived as a "political question" unsuitable for judicial review.[803] Therefore, it is up to the political branches of government, rather than the courts, to determine whether a state maintains a republican form of government. In the EU, Article 7 and 10 TEU have seemingly a similar objective as the Guarantee Clause.[804] However, Article 7 TEU has proven unworkable, and Article 10 TEU has not been applied to uphold the rule of law so far. Thus, the EU lacks a functioning 'guarantee clause' for the rule of law crisis.

Article 7 TEU is the natural comparator to the Guarantee Clause. The similarities between both clauses are eye-catching. Both aim to protect fundamental values, both are unsuited for judicial review, and both procedures involve monitoring and potential intervention. The Guarantee Clause allows the Congress to intervene if a state's republican government is threatened or disrupted. Similarly, Article 7 TEU empowers the European Council to address potential breaches of fundamental values by a Member State. However, there are also significant differences between both clauses. First, the scope and subject matter of Article 7 TEU are considerably broader. While the Guarantee Clause focuses on guaranteeing a republican form of government in each U.S. state, Article 7 TEU addresses concerns related to democracy, the rule of law, and fundamental rights (i.e., the Article 2 TEU values) within the Member States. Second, the mechanisms and enforcement of both procedures differ. Under the Guarantee Clause, Congress could use its authority to intervene through legislation to ensure compliance

[800] Müller (n 642).
[801] Klarman (n 660).
[802] The Republican Form of Government Clause, also known as the Guarantee Clause, is a provision of the U.S. Constitution found in Article IV, Section 4. It states, "The United States shall guarantee to every state in this union a republican form of government.".
[803] The political question doctrine is a principle the Supreme Court uses to determine whether specific issues are beyond the scope of judicial review and should be left to the political branches of government. The doctrine is based on the idea that some issues are inherently political and should be decided by elected representatives rather than the courts. Chief Justice John Marshall first articulated the political question doctrine in *Marbury v. Madison*.
[804] Article 2 TEU is deliberatively left out here as it is the EU's value clause with limited judicial applicability. Article 7 TEU is the clause to protect the Article 2 TEU values. For views on the justiciability of Article 2 TEU, see Spieker Luke Dimitrios, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' Vo. 20 German Law Journal pp. 1182.

with the constitutional guarantee of a republican government. In contrast, Article 7 TEU establishes a multi-stage procedure in the EU framework involving the Commission, the Council, and the EP, which can lead to the imposition of sanctions or the suspension of voting rights for the Member State. Third, the level of central authority differs. The Guarantee Clause grants authority to Congress to address potential threats to a state's republican government, while Article 7 TEU assigns the responsibility to the European Council to address breaches of fundamental values. These discrepancies reflect the distinctive U.S. federal system in contrast to the EU's supranational decision-making structure.

A further comparator to the Guarantee Clause is Article 10 TEU, which embodies the principle of representative democracy in the EU. The similarities between both clauses are striking. First, both clauses emphasise the importance of democratic principles in their respective system. The Guarantee Clause promotes a republican form of government, while Article 10 TEU emphasises representative democracy. Second, both clauses aim to protect and preserve democratic governance in their respective system. While the Guarantee Clause safeguards the integrity of the U.S. federal system, Article 10 TEU ensures the functioning of the EU based on democratic principles. Third, the enforcement of both clauses is contested in their respective legal order. The Guarantee Clause has been declared non-justiciable by the Supreme Court, while the justiciability of Article 10 TEU has not been decided yet.[805]

Overall, none of the three clauses examined has been applied successfully. The Guarantee Clause has been declared non-justiciable by the Supreme Court and is therefore not applied. Article 7 TEU is applied in the EU but has proven unworkable. As a result, the Commission shifted to invoking Article 10 TEU in infringement proceedings.[806] The prospects of applying Article 10 TEU are debated in the scholarship.[807] Ultimately, it will fall upon the Court of Justice to decide whether Article 10 TEU is justiciable.

[805] The author of this dissertation has argued for the justiciability of Article 10 TEU to protect democracy in the Member States. See Krappitz and Kirst, 'Operationalising the Treaties to Protect Democracy in Times of Emergency'.
[806] *Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee (8 June 2023)* (European Commission Press Office 2023). See also Miriam Schuler, *Taking democracy seriously: The Commission's Infringement Action against Poland for violating EU law with the new law in Poland on the State Committee for the Examination of Russian influence (16 June 2023)* (europeanlawblog.eu 2023), and Nora Visser, *Enforcing Democracy: How the European Commission is Testing out the Legal Waters (13 June 2023)* (VerfBlog 2023).
[807] See John Cotter, 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' Vol. 47 European Law Review pp.

Strengthening the Rule of Law via the Legislative Branch

Second, Chapter 3 has highlighted that neither the EP nor the Council did successfully safeguard the rule of law in the Member States. While the former had only limited competencies to do so, the latter failed due to intergovernmentalism and blockade. The EP's limited impact highlight the dilemma that the most active institution, during the rule of law crisis, holds the least power among the EU political branches of government.[808]

The U.S. legislative branch is structurally different to the EU's co-legislators. However, the reaction of both legislative branches to rule of law backsliding offers valuable insights and comparative perspectives. In the U.S., Congress has promoted the rule of law during rule of law crises through the Civil Rights Act of 1866, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The EP and the Council did not react likewise in the EU. Instead, they painted a picture of institutional dysfunctionality. This is for two reasons. First, they could not enact similar legislation as they lack the competence to enact comprehensive civil rights legislation in the EU.[809] While the EU does not have the competence to enact comprehensive civil rights legislation, it has, in the past, implemented several directives to combat discrimination. For example, the Racial Equality Directive and the Gender Equality Directive.[810] Those directives serve to strengthen the rule of law in the Member States. However, they are insufficient in safeguarding the rule of law in the Member States as the civil rights acts did in the U.S. Second, there was no institutional consensus present how to deal with the rule of law backsliding in the Member States. Consequently, the political branches blocked each other's initiatives which deepened the backsliding in the Member States.[811]

69, and Thomas Verellen, *Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable (8 April 2022)* (VerfBlog 2022).

[808] NB: The EP did not always protect the rule of law, and its track-record must be evaluated carefully (see Chapter 3). For example, the EP was late in commencing the action for failure to act against the Commission and ultimately dropped the lawsuit. See Vela (n 645).

[809] The EU operates under the principle of conferral of powers, meaning that it has limited powers granted to it by the Treaties. The EU's exclusive and shared competencies are defined in Articles 3 and 4 TFEU. Issues related to civil rights fall within the scope of member states' national competencies.

[810] *Council Directive (2000/43/EC) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000) (Racial Equality Directive)* (Official Journal of the European Union 2020); *Directive (2006/54/EC) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006) (Gender Equality Directive)* (Official Journal of the European Union 2006).

[811] See also Kelemen, 'The European Union's Authoritarian Equilibrium'.

Drawing on the study of the U.S. legislative branch during times of rule of law challenges, highlighted the need for a common approach between the legislative and executive branches in upholding the rule of law in federated states. Examples such as the cooperation in the First Reconstruction between Congress and Abraham Lincoln and the collaboration in the Second Reconstruction between Congress and Lyndon B. Johnson demonstrate the effectiveness of a joint agenda in safeguarding and protecting the rule of in the federated states. Applying these lessons to the EU, the legislative and executive branches did not work in tandem during the rule of law crisis. Instead, Chapter 3 showed that the EP's initiatives were not followed-up by the Commission. Moreover, the EP's as well as the Commission's efforts were undermined by the Council. Overall, this paints a dysfunctional picture of the EU's political branches during the rule of law crisis. Unsurprisingly, the EU's political branches of government have so far been unable to safeguard the rule of law in the Member States.

Upholding the Rule of Law via the Executive Branch

Third, Chapter 3 showed that the EU executive branch of government – the Commission and the European Council – have failed to uphold the rule of law within the Member States due to the Commission's political forbearance and the European Council's national interest-led intergovernmentalism.[812] The U.S. executive did not face the same issues.

Exploring the U.S. executive branch during previous rule of law crises in federated states has shown the dependability of rule of law compliance by the executive itself (Jackson Presidency), the need for decisive actions (Lincoln Presidency), and the ultimate ability to use force to uphold the rule of law in federated states (Eisenhower Presidency). In the three selected presidential case-studies the executive proved to be committed to upholding the rule of law in times of national emergency.[813] Most importantly, the executive had the will and the ultimate powers to do so. This is in stark contrast to the EU's executive branch.

The EU executive showed neither decisive action nor did it fully respect the rule of law itself.[814] The EU's institutional structure and legal framework deprive the executive branch of the power to deploy military or police forces to enforce the rule of law within Member States. The

[812] Kelemen and Pavone (n 433).
[813] NB: Andrew Jackson's presidency reflects a mix of both upholding and challenging the rule of law. While he emphasised democratic principles and popular will, his actions regarding Native American policy and the Second Bank of the U.S. raised concerns about protecting individual rights and adherence to established legal frameworks.
[814] Alemanno and Chamon (n 570).

enforcement of laws and maintenance of public order and security are the sole responsibilities of national governments and their respective law enforcement agencies. Since the threat of using force was unavailable, the EU executive branch relied on legal instruments, but neither the European Council nor the Commission applied the existing instruments effectively.[815] The European Council failed to advance the Article 7 TEU procedure. The Commission only incrementally increased its efforts to bring infringement proceedings under Article 258 TFEU. Additionally, the Commission waited extensively before applying the rule of law conditionality mechanism. Instead, "Europe's politicians have developed an unhealthy habit of ducking problems and hoping that the unelected parts of the system, such as central bankers and judges, will work out how to fix them."[816] Consequently, the Court of Justice had been compelled to expand the principle of effective judicial protection.[817] Due to the absence of decisive executive leadership, the rule of law protection in the EU became highly court-focused.

To sum up, the comparison of both executive branches reveals that it requires a wholeheartedly committed executive to safeguard the rule of law in composite states. In the EU, however, the Commission and the European Council exhibit reluctance and lack of full support for the other branches in safeguarding the rule of law. This can be attributed to the structure of the EU executive, which prioritises national interests over unified actions. The EU faces structural flaws that hinder it from being as successful as the U.S. political branches of government in dealing with rule of law crises in composite states. Consequently, due to the EU's political branches' inability, the judicial branch emerged as a frontrunner to protect the rule of law in the Member States. However, as the Court of Justice's judgments lack enforcement in the Member States, the EU turned to a new dimension outside of the traditional realm of the three powers to safeguard the rule of law in the Member States. The following Part III will analyse this financial dimension, in form of rule of law financial conditionality, to safeguard the rule of law in the Member States.

[815] See also Kelemen, 'Appeasement, ad infinitum'.
[816] Pignal (n 10).
[817] Pech and Platon (n 135).

Part III: The Financial Dimension: Upholding the Rule of Law via Financial Conditionality

Chapter 5: Conditionality in the EU

> *"The Commission attaches the highest importance to the rule of law. This is why we will ensure that money from our budget and NextGenerationEU is protected against any kind of fraud, corruption and conflict of interest. This is non-negotiable."*[818]

This quote from Commission President Ursula Von der Leyen underlines the shift towards a new instrument in the rule of law crisis. Chapter 1 and Chapter 3 showed that neither the Court of Justice nor the EU's political branches of government could successfully safeguard the rule of law in the Member States. Therefore, the EU has recently shifted towards a new instrument to uphold the rule of law in the Member States – rule of law conditionality. The following Chapter 5 will analyse this new form of rule of law conditionality in the EU.

Chapter 5 – Conditionality in the EU – analyses the rise of rule of law conditionality in the EU. In December 2020, the EU made history by enacting its first conditionality instrument contingent on rule of law standards in the Member States.[819] Regulation 2020/2092, known as the Conditionality Regulation, is an instrument that links the rule of law with the use of EU funds, allowing the EU to suspend, reduce or restrict access to EU funding in case of rule of law violations.[820] Moreover, the regulation entails a comprehensive definition of what an EU rule of law implies with reference to Article 2 TEU.[821] Arguably, the Conditionality Regulation serves as a complement to the Article 7 (2) TEU procedure. Both measures aim to correct Member States rule of law deficiencies.[822]

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[818] Commission President Ursula von der Leyen during the State of the European Union Address on 16 September 2020. See Ursula von der Leyen, *State of the Union Address 2020: Building the World We Want to Live in: A Union of Vitality in a Modern World* (European Parliament Press Office 2020); despite these clear statements by the Commission President, scholars have plausibly argued that the rule of law is negotiable within the EU, see Kelemen and Pavone (n 433), and Scheppele (n 432).

[819] Hegedüs, 'The rule-of-law deal that saved Merkel's legacy (14 December 2020)'.

[820] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.

[821] Article 2 (a) of the Conditionality Regulation defines that: (a) 'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; 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. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU;"

[822] Notable differences exist between both instruments. For example, the Conditionality Regulation is rooted in secondary law and can be activated via QMV. At the same time, Article 7 TEU is enshrined in primary law, and its activation requires unanimity.

The preceding Chapter 3 has shown that the EU's current instruments, and precisely the Article 7 TEU procedure, are ill-suited to deal with the rule of law backsliding in the Member States of Hungary and Poland. Therefore, the Conditionality Regulation emerges as a potentially more effective instrument in the rule of law crisis. The EU chose conditionality as their panacea in the rule of law crisis. Chapter 5 will show that conditionality has been elevated to a legislative instrument to safeguard the rule of law within the Member States. Therefore, Chapter 5 will analyse these developments and provide the background to the comparative analysis of condition spending in the U.S. legal system in Chapter 6.

The term 'conditionality' carries multifaceted meanings, and its interpretation is contingent on the contextual framework within which it is employed. In the EU context it is a concept that refers to the idea that specific actions or requirements must be met for certain benefits or privileges to be granted.[823] More generally, a condition is a legal technique that pertains to fundamental terms or ancillary provisions in contracts.[824] However, for the following chapter a functional approach to analyse conditionality in the EU context is chosen. Historically, the context of spending conditionality in the EU is tied to the cohesion policy and the EMU (e.g., conditionality in the Greek bailout and the ESM). Moreover, conditionality has been used in the accession procedure to ensure that specific standards and requirements are met by prospective Member States (Copenhagen Criteria). However, recent developments regarding conditionality in the EU go further than anything before. Not only is conditionality used to incentivise Member States to fulfil specific policy objectives, but it is now also used to cut Member States EU funding if they violate the rule of law.

[823] There are several definitions of conditionality in the EU. Baraggia and Bonelli define conditionality as "We prefer to define conditionality in broad terms as the linking of benefits to the fulfilment of certain conditions or of a given behavior." See Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' Vol. 23 German Law Journal pp. 131; Vita defines conditionality as "It refers to the adoption of a prescribed behaviour by state governments or private actors because the said behaviour is a condition for accessing a promised EU benefit." See Viorica Vita, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' Vol. 19 Cambridge Yearbook of European Legal Studies pp. 116.

[824] In contract law, conditions refer to specific terms or stipulations within a contract that outline certain requirements or events. These conditions can affect the parties' rights and obligations under the contract. Conditions are often distinguished from warranties, as they are considered fundamental to the contract's performance. Conditions in contract law revolve around the inclusion of specific requirements or contingencies within a contractual agreement, shaping the parties' rights and duties based on the satisfaction or non-satisfaction of these conditions. See also Schulze, Reiner and Zoll, Fryderyk (2021), European Contract Law (Baden-Baden, Germany: CH Beck, Hart Publishing, Nomos).

Therefore, Chapter 5 is structured as follows. First, it examines the legislative history of conditionality in the EU. It will analyse the legislative roots of conditionality stemming from the CAP and the EMU. Second, it will examine the legal basis of conditionality in the Treaties and the legal framework the EU must abide by when designing conditionality instruments. Subsequently, it will also analyse the Conditionality Regulation and its procedural and substantive features. Third, it explores the judicial requirements of conditionality in the EU along the lines of the seminal Court of Justice judgments in *Hungary v Parliament and Council (C-156/21)* and *Poland v Parliament and Council (C-157/21).* In both judgments, the Court of Justice had to assess the legality of the rule of law conditionality instrument. Finally, a conclusion will evaluate the rise of conditionality in the EU and highlight three findings. The following Chapter 6 will compare the developments in the EU with the use of conditional spending in the U.S. to identify similarities and differences.

1. The Legislative History of Conditionality

Conditionality as a concept and instrument in EU law is not a new phenomenon. External conditionality first emerged in the 1980s regarding development aid tied to the achievement of human rights conditions.[825] "Conditionality first emerged in EU external policies where it has been actively developed since the late 1980s."[826] Conditionality as an internal policy instrument in the EU first appeared in the 1990s, intending to ensure Member States' compliance with EU environmental and agricultural policy standards. Furthermore, it became an established instrument in the EU's accession policy, emphasizing the rule of law, with the Copenhagen Criteria in 1993. It developed from there to become a general policy instrument to ensure fiscal discipline and reform progress within the EMU. Finally, it culminated by becoming an instrument to protect the European values enshrined in Article 2 TEU with the Conditionality Regulation.[827] To understand the significance of this new conditionality approach and the advent of the rule of law Conditionality Regulation, this section will analyse the rise of conditionality as an internal policy instrument in the EU.[828]

Internal conditionality was first introduced in the 1990s within the framework of the CAP to ensure that environmental targets were met by Member States and later became more prominent as an economic governance mechanism within the EMU.[829] "The first mechanisms of spending conditionality were introduced […] in the 1990s, in particular in the context of the Common Agricultural Policy [CAP] where the EU linked funding to fulfilment of certain environmental objectives."[830] In 1993, the European Council adopted the Copenhagen Criteria

[825] In the realm of external policy, the European Union's utilization of conditionality has experienced notable growth, particularly in the post-Cold War era. A significant example of this is the emergence of human rights conditionality, which gained prominence through initiatives like the Fourth ACP-EEC Convention. See *Fourth ACP-EEC Convention signed at Lomé on 15 December 1989* (Official Journal of the European Union 1989). The Lomé Convention was succeeded by the Cotonou Convention in 2000, which underwent subsequent revisions in 2010. Article 9 of the current iteration of the convention encompasses the human rights clause.
[826] Vita (n 823) p. 116.
[827] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.
[828] NB: this chapter will focus on the rise of conditionality as an internal policy instrument in EU law. It will not cover the use of conditionality as an external and development policy instrument. For further reading on conditionality as an external policy instrument see Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Brill Publishing 2002), and Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005).
[829] The Common Agricultural Policy (CAP) is the agricultural policy of the EU. It is a set of policies and regulations designed to support and regulate the agriculture sector in the EU. As part of the CAP, the Commission administers and implements a system of agricultural subsidies and other programmes.
[830] Baraggia and Bonelli (n 823) p. 142.

which included a set of political criteria for accession countries.[831] With the EMU, launched in 1992, conditionality rose to prominence regarding the introduction of the Euro as common EU currency.[832] Those early uses of conditionality in CAP and EMU have defined the design of subsequent conditionality policies in EU law.[833] Furthermore, it rose to prominence in the public eye during the Eurocrisis in 2009 and as a governance mechanism in the newer EU enlargement process towards Romania and Bulgaria (CVM).[834] Finally, the newest use of conditionality is in the context of the rule of law as an instrument against ongoing rule of law backsliding in the Member States.

This section follows a threefold structure to track the rise of conditionality as an internal policy instrument in the EU. First, it will analyse the introduction of conditionality in the EU's agricultural and monetary policy. Second, it will scrutinize the use of conditionality in the EU's accession, enlargement, and neighbourhood policy. Third, it will track the rise of conditionality as an instrument linked to the EU's MFF and to protect the rule of law in the Member States.

[831] The Copenhagen Criteria are a set of conditions that EU candidate countries must meet to be considered eligible for EU membership. These criteria were established during the European Council meeting in Copenhagen in 1993 and serve as the foundation for assessing whether a country is ready to join the EU. The conditionality character of the Copenhagen Criteria lies in their role as prerequisites that a country must fulfill before it can become a Member State. See *European Council in Copenhagen (June 21-22, 1993), Conclusions of the Presidency* (Official Journal of the European Union 1993).

[832] The European Monetary Union (EMU) is a currency union established by the EU to create a single currency, the Euro, used by most of the EU's member states. The EMU is based on the principle of a single market, which allows for the free movement of goods, services, capital, and people within the EU. The EMU is managed by the ECB, which is responsible for setting monetary policy and overseeing the Euro's stability.

[833] For example, the mechanics and procedures of the rule of law Conditionality Regulation (Regulation 2020/2092) are inspired by the application of conditionality within the framework of the EMU.

[834] The Cooperation and Verification Mechanism (CVM) is a process that was established by the Commission in 2007 to monitor and address issues related to the rule of law and judicial reform in Bulgaria and Romania. The CVM was established to help these two countries, which joined the European Union (EU) in 2007, meet the EU's requirements for membership and address concerns about corruption and the independence of their judiciaries.

1.1 Conditionality in the European Agricultural and Monetary Policy

The first application of internal conditionality as a concept and instrument in the EU was in the CAP during the 1990s. Policies within the framework of the CAP provide sizeable financial support to European farmers through various measures, including direct payments, grants, and subsidies.[835] In order to receive this support, farmers must comply with specific rules and regulations. In the 1990s, the EU sought to achieve a higher environmental standard in European farming through CAP policies.[836] Those policies included a form of conditionality, as they conditioned funding upon high environmental standards. For example, to receive support under the CAP, farmers were obliged to follow specific rules on how they use their land, such as requirements to maintain certain types of land cover or implement certain farming practices. They were also required to follow the rules on food safety and animal welfare and to respect environmental protection laws. These requirements and conditions were intended to ensure that the CAP is used effectively and efficiently and that it supported the goals of the EU, such as promoting sustainable agriculture and environmental protection.

Shortly afterwards, and with monetary integration, conditionality found its way into the European monetary policy. The introduction of the EMU followed a three-stages structure from the 1990s to the 2020s and was defined by a set of conditionality criteria.[837] Member States needed to fulfil specific criteria to become members of the EMU and comply with specific fiscal standards to remain part of the EMU, known as the Maastricht criteria. First, to join the EMU, Member States needed to meet specific fiscal and economic convergence criteria (known as Maastricht criteria), which include requirements on price stability, sound public finances, exchange rate stability and long-term interest rates. Second, the Commission and the ECB would assess the Member State's economic and fiscal policies to verify compliance with the convergence criteria. Third, based on the assessment, the European Council would decide on whether the Member State fulfils the necessary criteria to join the EMU. Fourth, they needed to adopt the Euro as their currency and relinquish their old currency. These requirements and

[835] The agricultural sector in the EU is not price competitive compared to other regions of the world. Therefore, without subsidies of the CAP, agricultural production within the European Union would largely not be economically viable.
[836] Andrea Lenschow, 'The Greening of the EU: The Common Agricultural Policy and the Structural Funds' Vol. 17 Environment and Planning: Government and Policy pp. 91, and Neil Ward, 'The 1999 reforms of the common agricultural policy and the environment' Vol. 8 Environmental Politics pp. 168.
[837] See also the discussion of the EMU and the European Semester as ancillary tools in the rule of law crisis in Chapter 3.

conditions were intended to ensure the EMU's stability and integrity and support the EU's overall goals. Moreover, there was a spill over effect of conditionality instruments from the EMU to the ESM which was developed as an intergovernmental mechanism in 2012 after the Eurocrisis.

During the European debt crisis[838], which emerged as a corollary of the global financial crisis in 2009, 'strict conditionality' became a feature of the ESM and made its first appearance before the Court of Justice in the *Pringle (C-370/12)* judgment.[839] "Conditionality became […] a defining feature of the European Stability Mechanism (ESM) and was officially sanctioned by the Court of Justice in *Pringle*."[840] Under the ESM, the benefits for the Member States subject to it were economic support in the form of loans and grants. This form of financial benefit is very similar to the benefits under the EMU, in which conditionality has proven to be an effective instrument to ensure Member States' compliance with budgetary restraints. As Baraggia and Bonelli point out, conditionality has proven effective in EMU law. "[I]n the field of Economic and Monetary Union (EMU) law conditionality has emerged 'as the most effective tool for enforcing fiscal constraints'."[841] Notably, the laws and regulations under the ESM and the EMU only apply to the Member States which have the European single currency, the Euro.[842] Therefore, this monetary and debtor conditionality did not apply to all Member States. Overall, the conditionality in the EU's monetary policy (EMU) is twofold. First, Member States must fulfil the specific criteria to join the EMU. Second, by eventually becoming subject to the ESM, they must abide by an additional set of criteria to be eligible to receive funds.

However, conditionality was not only used concerning the CAP, the EMU, and the ESM but also in the EU's accession, enlargement policy, and neighbourhood policy (ENP). The benefits of conditionality in the EU are primarily of direct financial nature (as in the CAP and the EMU).

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[838] The Eurocrisis, also known as the European Debt Crisis, was a financial crisis that affected the eurozone, a group of 19 Member States that use the Euro as their currency. The crisis began in late 2009 when it became clear that several eurozone countries, including Greece, Ireland, and Portugal, were facing severe financial problems and were at risk of defaulting on their debt.

[839] The European Stability Mechanism (ESM) is a financial facility that the EU established in 2012 in response to the Eurocrisis, also known as the European Debt Crisis. The ESM is designed to provide financial assistance to eurozone countries facing financial difficulties to help them stabilize their economies and avoid defaulting on their debt. See also *Thomas Pringle v Government of Ireland and Others (C-370/12)* European Court Reports Court of Justice of the European Union.

[840] Baraggia and Bonelli (n 823) p. 143.

[841] Ibid.

[842] Currently, 19 Member States of the European Union are part of the EMU.

However, this is not the case in all policy fields. In the EU enlargement and accession context, the benefits are substantially different and have an economic benefit through non-financial means. "The benefits […] are often economic, as [it] was the case for EU financial assistance conditionality during the Eurocrisis, or for forms of 'spending conditionality', but not necessarily so: […], in the EU enlargement conditionality, the key benefit available is EU membership, […]."[843] Therefore, the benefit under EU conditionality policies shifted from direct financial support towards non-tangible goods such as visa-free travel, EU membership and access to the Schengen Area, which would then bring economic benefits.[844]

1.2 Conditionality in the Accession, Enlargement, and Neighbourhood policy

In the EU's accession policy, the Copenhagen Criteria play an essential role. The criteria establish a set of conditions necessary to become an EU Member State.[845] Established during the Copenhagen Council Summit in 1993, they also mark the first approach to conditionality from a rule of law perspective.[846] "In the 1990s, the Union put in place a robust conditionality structure in its enlargement policy. Both membership itself and financial and technical assistance throughout the accession process have become conditional upon the candidate countries' continuous progress under the Copenhagen Criteria, including the political one, which demands respect for democracy, the rule of law, and human rights."[847] Thus, the Copenhagen Criteria had a political, i.e. a democracy feature to it, which made it different from the previous conditionality mechanisms aimed at ensuring economic or environmental conditionality. Therefore, for the first time, the Copenhagen Criteria sought to ensure democratic standards in the new joining Member States. Finally, also in the enlargement policy, the EU established a dual conditionality through the CVM mechanism and the Copenhagen Criteria. First, applicant states must fulfil the Copenhagen Criteria to join the EU as a new Member State. Secondly, to ensure the process of reforms in the new Member State, it must abide by the rule of the CVM. Arguably, this has been a successful strategy by the EU to ensure

[843] Baraggia and Bonelli (n 823) p. 141.
[844] The Schengen Area is a group of 26 European countries that have abolished passports and other controls at their mutual borders to create a free movement area for people, goods, services, and capital. The Schengen Area is named after the 1985 Schengen Agreement, which was signed in the village of Schengen in Luxembourg.
[845] The Copenhagen Criteria are a set of political, economic, and legal criteria established by the EU in 1993 to determine which countries are eligible to become Member States. The criteria were developed at a meeting of the European Council in Copenhagen, and they are the minimum standards that candidate countries must meet to join the EU.
[846] *European Council in Copenhagen (June 21-22, 1993), Conclusions of the Presidency*.
[847] Baraggia and Bonelli (n 823) p. 142.

democratic and rule of law standards in Romania and Bulgaria. Notably, neither Hungary nor Poland is subject to the CVM, as the instrument was only developed after both countries joined the EU.

Conditionality was also used for Member States have they had joined the EU. Bulgaria and Romania have been subject to the CVM since they acceded to the EU.[848] When both countries joined the EU in 2007, they were subject to the CVM to ensure their continued progress in various fields. Under the CVM, the Commission monitors the reform progress by both Member States and provides recommendations and guidance on areas where further action is needed. If one of the Member States fails to fulfil these targets, access to the Schengen Area may be restricted. "[I]n the context of the Cooperation and Verification Mechanism (CVM), it is Bulgaria and Romania's participation in the Schengen Area that has been made (informally) conditional upon progress in the areas monitored by the mechanism."[849] The CVM is reviewed regularly, and the Commission publishes annual reports on the progress made by the two Member States. Therefore, in the post-accession context, and in opposition to the EMU and the ESM, the benefit of conditionality is not merely economic but instead the uninterrupted access to the Schengen Area for the citizens of both Member States.

The EU has used the instrument of conditionality in its ENP policy since the early 2000s.[850] In the context of the ENP, conditionality refers to the requirements and conditions the EU sets for its neighbouring countries to access certain benefits and privileges, such as financial assistance and trade agreements.[851] The ENP is structured through several Association Agreements (AA), which provide a framework for the EU and its neighbouring countries to cooperate in various areas, including political dialogue, economic cooperation, and reform promotion. The ENP uses a range of instruments to promote cooperation and integration with the neighbouring countries, and the EU applies conditionality to ensure that these instruments are used responsibly. The EU applies conditionality to various areas of cooperation, such as democracy, human rights, rule of law, and economic governance. For example, the EU sets conditions for financial assistance, such as requirements for reforms of democratic institutions, anti-

[848] See also the discussion of the CVM as an ancillary tool in the rule of law crisis in Chapter 3.
[849] Baraggia and Bonelli (n 823) p. 142.
[850] The European Neighbourhood Policy (ENP) is an EU policy that aims to promote stability, security, and prosperity in the EU's neighbourhood. The ENP is intended to provide a framework for the EU to develop its relations with its neighbouring countries, including North Africa, the Middle East, and the Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine).
[851] See also the discussion of the ENP as an ancillary tool in the rule of law crisis in Chapter 3.

corruption policies, and judicial systems. Similarly, the AAs, which the EU signed with some of its neighbouring countries, may include provisions on human rights, rule of law, and good governance.

While the conditionality mechanisms mentioned above are based upon specific areas and sectors such as environmental policy (CAP), monetary policy (EMU), and the enlargement process (CVM), the new Conditionality Regulation introduced by the EU in January 2021 is based on the general EU budget and focused on internal rule of law compliance in the Member States. It applies to all Member States and is not Member State specific such as the CVM or the EMU. At the end of 2020, the European co-legislators agreed to introduce Regulation (2020/2092), the Conditionality Regulation, which subjects general EU funding to the Member States to their obligation to uphold rule of law standards. This pivot towards general EU budget conditionality is a new development for the EU. "[U]ntil a decade ago, the few conditionalities attached to EU internal expenditure were limited to specific budget headings and sufficiently connected with the spending objectives of the relevant funds."[852] It, however, did not emerge out of the blue. Instead, the European co-legislator introduced general budgetary conditionality from the 2010s onwards as part of the MFF.

1.3 The Rise of Rule of Law Conditionality

Conditionality as a legal instrument entered the budgetary field with the MFF 2014 – 2020.[853] "Since the 2013 Multiannual Financial Framework reform, conditionality arrangements have covered virtually all EU budget headings and are connected with a wide array of policy goals, which are at times 'exogenous' to the specific spending objectives."[854] Following the Commission's readjusted economic policy coordination, the MFF 2014-2020 allowed the Commission to introduce spending conditions for achieving specific policy targets by the Member States.[855] While the EU previously focused on achieving compliance in sectoral policy areas, in 2013, the focus shifted to achieving compliance by the Member States through general

[852] Vita (n 823), and Marco Fisicaro, 'Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation' Vol. 18 European Constitutional Law Review pp. 334, p. 339.
[853] *Council Regulation (1311/2013) lying down the multiannual financial framework for the years 2014-2020 (2 December 2013)* (Official Journal of the European Union 2013).
[854] Fisicaro (n 852) p. 340.
[855] See *Communication from the Commission: Reinforcing Economic Policy Coordination (12 May 2010)* (2010), in which the Commission outlined its new economic policy coordination following the Eurocrisis.

budget conditionality and centralized enforcement.[856] According to Fisicaro, 2013 marked the beginning of a new trend to use spending conditionality as an enforcement mechanism of EU law. "The 2013 reform indeed marked the start of a trend in EU post-crisis internal governance to use conditionality as an alternative enforcement mechanism of EU law, one that becomes ever more attractive in fields where the EU institutions struggle to enforce compliance through the ordinary enforcement procedures."[857] Therefore, the latest use of conditionality as a general budget conditionality instrument may be regarded as the consolidation of conditionality in EU law.

Fisicaro distinguishes two types of conditionality policies that played a role in the Commission's shift towards internal Member State conditionality from 2013 onwards. Both are eventually leading to a competence conflict between the EU and the Member States. The two types of conditionality policies can be labelled as first *regulatory conditionalities* and second, *enforcement conditionalities*. Both types of conditionalities are aimed at achieving compliance by the Member States. The first is regulatory conditionality, by nudging Member States to adopt a national legislative or regulatory measure to receive EU budgetary funding. The second, enforcement conditionality, requires compliance with existing EU law to receive EU budgetary funding. In both cases, it increases the EU's oversight of Member State internal policies "[…] either by inducing the adoption of legislative or regulatory measures at national level ('regulatory' conditionalities) or by enforcing compliance with existing EU law ('enforcement' conditionalities)."[858] Eventually, those two new types of conditionalities could create a competence creep between the EU and the Member States in the future.

The new form of conditionality which entered the EU law arena with the MFF 2014 – 2020 can be labelled as budgetary conditionality. It is very different from the previously explained forms of EU conditionality in the CAP, EMU, ESM, CVM, and ENP. It has a robust federal dimension and is used in areas where the EU does not have a traditional enforcement mechanism. "These are […] questions with a strong "federal" dimension insofar as they concern the relationship between the two main levels of government in the EU, which once again the EU struggles to tackle with its traditional enforcement mechanisms, while at the same

[856] Cf. Roland Bieber and Francesco Maiani, 'Enhancing centralized enforcement of EU law: Pandora's Toolbox?' Vol. 51 Common Market Law Review pp. 1057.
[857] Fisicaro (n 852) p. 140.
[858] Ibid.

time still lacking other coercive instruments typical of federations."[859] Putting this into perspective, the EU only has limited authority regarding enforcing Article 2 TEU values. Therefore, the EU's shift towards value conditionality is logical as it lacks the competences to intervene in this area. This development is comparable to the situation in the U.S., in which the federal legislator usually resorts to conditionality in areas of limited federal authority.[860] "The EU by virtue of Article 7 TEU undoubtedly has the power to oversee respect for the rule of law, but cannot adopt, for example, norms harmonising the organisation of the national judiciaries."[861] Therefore, the introduction of budget conditionality in 2013 was, first, a necessary step for the Commission to ensure that the values of Article 2 TEU are upheld. Second, the introduction through the MFF was handy as it provided a foot into the door on which the Commission could build in the following years.

After the introduction of general budgetary conditionality, which was introduced with the MFF in 2013, it was a minor step to enact further conditionality policies in connection with the EU budget. Therefore, the Commission in 2018 circulated a draft regulation on how the rule of law could be upheld via budgetary conditionality, the so-called Conditionality Regulation.[862] After protracted negotiations between the Member States in the Council, this regulation was finally enacted in December 2020 and established a new instrument for the Commission to uphold the rule of law in the Member States.[863] Through the Conditionality Regulation, the whole EU budget (MFF) and the Covid Recovery Fund (NGEU) are linked to fulfilling rule of law criteria.[864] "Its aim is to halt that authoritarian trend, using the threat of the suspension of EU funding as a leverage to induce national policy changes in those member states which no longer fully respect the founding principles of the European constitutional order, such as the independence of the judiciary, freedom of the press, and societal pluralism."[865] Generally, the Conditionality Regulation has elevated conditionality to a constitutional virtue.[866] However, it has also increased the level of executive oversight in the legal tenet of the EU and sparked

[859] Baraggia and Bonelli (n 823) p. 144.
[860] See *South Dakota v Dole (1987)* United States Reports Supreme Court of the United States.
[861] Baraggia and Bonelli (n 823) p. 151.
[862] *Proposal for a Regulation of the European Parliament and of the Council (2018/0136) on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (2 May 2018)* (European Commission Press Office 2018).
[863] Hegedüs, 'The rule-of-law deal that saved Merkel's legacy (14 December 2020)'.
[864] For an in-depth analysis of the NGEU's framework see Chapter 4 of Fabbrini, *EU Fiscal Capacity*.
[865] Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' (Cambridge, United Kingdom) [Cambridge University Press] Cambridge Yearbook of European Legal Studies.
[866] Cf. Takis Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?' Vol. 16 Croatian Yearbook of European Law and Policy.

criticism by several Member States, which instigated an annulment proceeding against the new Conditionality Regulation.[867] With the Conditionality Regulation, the legal instrument of conditionality has reached a new level which is very different to the previous form of conditionality. "[…] these forms of conditionality differ from mechanisms of strict conditionality that were in place under the ESM, the package of NextGenEU and [the] new rule of law conditionality regulation certainly 'advance conditionality as a constitutional virtue'."[868]

Finally, also in the following MFF for 2021 – 2027, the EU budget is increasingly linked to the fulfilment of specific criteria.[869] Most notably, it includes "enabling conditions" attached to the European Structural and Investment Funds (ESI Funds), among which stands out a horizontal enabling condition related to the CFR.[870] Moreover, to receive funding under the EU's Cohesion Policy, Member States must submit a National Strategic Reference Framework (NSRF) outlining their plans and priorities for using the funding. The Commission and the Member States review these plans and make sure that the funding is used efficiently and effectively. Similarly, the EU's CAP policy entails specific requirements that Member States must meet to receive funding. For example, countries must comply with EU regulations on environmental protection, animal welfare, and food safety to receive CAP funding. Therefore, the MFF is increasingly important for the EU to set its priorities and allocate its resources. Moreover, it plays a crucial role in supporting the EU's efforts to promote economic and social integration, address regional imbalances, and meet the challenges of globalisation and changing demographic trends. To do this, the MFF increasingly entails conditions that need to be met for the EU funding to be received and spent accordingly.

[867] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)* European Court Reports Court of Justice of the European Union.
[868] Baraggia and Bonelli (n 823) p. 151.
[869] *Council Regulation (2020/2093) laying down the multiannual financial framework for the years 2021 to 2027 (17 December 2020)*.
[870] Cf. Scheppele and Morijn (n 264).

2. The Legal Basis of Conditionality

The legal basis for conditionality instruments in the EU depends on the policy area in which conditionality is applied. The following section will analyse the legal basis for conditionality in the EU, with a specific focus on the EU's newest conditionality instrument – the rule of law Conditionality Regulation.[871] This instrument represents a gradual shift, as for the first time, the EU applies value conditionality towards the Member States. The section will explore the adoption, features, and application of the Conditionality Regulation and provide a comprehensive overview of this new legal instrument in the rule of law crisis.

Budgetary conditionality instruments in the EU are linked to the EU's budgetary legal basis. It is the EU's competence to disperse and allocate its budget to different programs. It is comparable to the budgetary competence used for conditionality policies in other federal legal systems.[872] While conditionality has been used in various areas of EU policy[873], conditionality which conditions the disbursement of EU funds to the Member States, is strictly tied to the budgetary-legal basis of the EU, which is enshrined in Chapter 4, Title II Financial Provisions of the Treaty. Chapter 4 gives the EU institutions the power to establish conditions that Member States or other entities must meet to receive EU funding. The conditions are used to ensure that the money is used for its intended purpose and that it follows the EU's principles and values.

When designing the Conditionality Regulation, the Commission pondered over two legal bases in the legal drafting process: Article 322 (1) TFEU and Article 325 (4) TFEU.[874] In the case of the Conditionality Regulation, the EU legislator decided on the former. Łacny has highlighted that this decision might be grounded on the broader material scope of Article 322 (1) TFEU. "Article 322 (1) (a) TFEU applies to all aspects related to the implementation of the EU budget, it is wider than the scope of Article 325 TFEU, which relates only to the protection of the budget."[875] So while the material scope of Article 322 TFEU is arguably broad, it was still a

[871] The following section builds on a publication by the author of this dissertation in Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union'.
[872] Viorica Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' 2017/16 EUI Working Papers LAW.
[873] See the above-described use of conditionality in CAP, EMU, ESM, ENP and the CVM.
[874] Cf. Armin von Bogdandy and Justyna Lacny, 'Suspension of EU funds for breaching the rule of law - a dose of tough love needed?' Vol. 7 European Policy Analysis.
[875] Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?' Vol. 13 Hague Journal on the Rule of Law pp. 79, p. 90.

stretch by the EU legislator to use this article as legal basis for the rule of law Conditionality Regulation. Specifically, Hungary and Poland, in their challenge before the Court of Justice, argued that Article 322 (1) TFEU does not provide for such an expansive legal act.[876] Article 322 (1) (a) TFEU provides the following.

> "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:
>
> (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;"

Article 322 (1) provides the legal basis of the Conditionality Regulation, aiming to protect the EU budget from rule of law deficiencies in the Member States. However, Hungary and Poland argued before the Court of Justice that the article is unsuitable for establishing a regulation that interferes with the Member States' rule of law standards.[877] From the view of the EU legislator, the regulation is seen as part of the implementing process of the budget, which allows for withholding the budget in the case of rule of law deficiencies in a Member State. "The selection of Article 322 (1) (a) TFEU for the legal basis of the Regulation 2020/2092 may indicate that protection of the Union budget is the primary objective of this regulation, while the breaches of the rule of law indicate the scale of the protection to be ensured."[878] In the proceedings before the Court of Justice, the Council argued that the primary aim of the regulation is the protection of the budget and that rule of law breaches are a severe impediment to the successful implementation of the budget.[879]

This section is structured as follows. First, the background and adoption of the Conditionality Regulation will be discussed by focussing on the controversial 2020 Council Compromise.[880] Second, the analysis will concentrate on the substantial features of the regulation by focusing on the definitions and legal intricacies. Third, the procedural features of the Conditionality Regulation will be analysed by focussing on the time frames and voting requirements. Fourth,

[876] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)*.
[877] Ibid.
[878] Łacny (n 875).
[879] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)*.
[880] Alemanno and Chamon (n 570).

this section will look at the measures under the regulation.[881] Finally, this section will look at the first application of the regulation against Hungary for systemic breaches of the principles of the rule of law and the non-application against Poland.[882]

[881] Please note that the term 'sanction' in relation to the rule of law Conditionality Regulation is used as economic measure aimed at influencing the targeted Member State's behavior. It is not used as formal legal penalty, in contrast to the Art. 7 TEU procedure.

[882] *Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary (12 December 2022)* (Council of the European Union Press Office 2022).

2.1 History and Adoption of the Conditionality Regulation

The idea of a link between the rule of law and the European budget originated in 2017 at the Commission's DG JUST department.[883] The idea emerged once it became clear that other measures to halt rule of law backsliding in Member States (specifically through Article 7 TEU) had failed.[884] The idea was further developed and supported by academic contributions which emphasised the need for European budget conditionality.[885] In its vision for the new seven-year budget, the Commission agreed and acknowledged the need for a Conditionality Regulation that would link the funds of the EU to rule of law standards. [886] This was clearly outlined in the Commission's Communication explaining the priorities for the new seven-year budget of the EU[887] and on the same day, 2 May 2018, the Commission put forward the first legislative proposal for a regulation addressing systemic deficiencies in the rule of law via the budget.[888]

Following the ordinary legislative procedure, the EP, relatively swiftly, adopted a formal position on this proposal in April 2019.[889] However, in 2019, the proposal did not move forward within the legislative process of the EU, as the Council was hesitant towards it and did not adopt a position. The turning point for the proposal came in 2020, with the adoption of the new MFF and, considering the anticipated economic downturn due to the pandemic, the NGEU Fund. In a historic European Council Summit in July 2020, the Member States agreed that a conditionality regime should be introduced together with the MFF and the NGEU.[890] This

[883] Markus Becker, 'EU Commissioner Pushes for Hard Line on Poland (7 March 2017)' *Spiegel International* (Hamburg, Germany) <https://www.spiegel.de/international/europe/eu-commissioner-pushes-for-hard-line-on-poland-a-1137672.html>, and Eszter Zalan, 'Justice commissioner links EU funds to 'rule of law' (31 October 2017)' *EU Observer* (Brussels, Belgium) <https://euobserver.com/eu-political/139720>.
[884] Pech and Scheppele (n 145).
[885] Gábor Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' Vol. 11 Hague Journal on the Rule of Law pp. 171, and Alexander Mattelaer, *Exploring the Boundaries of Conditionality in the EU* (European Policy Brief, 2018).
[886] *Communication from the Commission to the European Parliament, the European Council, the Council: A Modern Budget for a Union that Protects, Empowers and Defends, The Multiannual Financial Framework 2021-2027 (2 May 2018)* (European Commission Press Office 2018).
[887] Ibid.
[888] *Proposal for a Regulation of the European Parliament and of the Council (2018/0136) on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (2 May 2018)*.
[889] *European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (4 April 2019)* (European Parliament 2019).
[890] *Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions (European Council Press Office 2020).*

finally gave the political backing by the European Heads of State for a conditionality regime linked to the EU's budget.[891]

At the July Council Summit, the European Council found itself in a situation where swift and bold actions were needed to kick-start the EU's economic recovery amid the COVID-19 pandemic and the interrelated economic downturn. After intensive negotiations, the Heads of State agreed on a new seven-year budget – the MFF, a recovery fund – the NGEU, an increase of the own resources of the EU (from 1.6% to 2.0%) – the Own Resources Decision, and on a Conditionality Regulation regarding the rule of law. Following the seminal July European Council Summit, the German Council Presidency took the legislative dossier and proposed a compromise in September 2020.[892] An agreement was subsequently reached, and the proposal was returned to the EP for further negotiations. Intensive trialogue meetings between the Council, EP, and the Commission eventually led to a conclusive legislative draft published on 5 November 2020.[893]

After the publication of the provisional agreement and the accompanying support by a majority of the EP and a majority of Member States in the Council, Hungary and Poland – the Member States which are subject to an Article 7 TEU procedure – threatened to veto the Own Resources Decision and, thus, the NGEU and the MFF altogether.[894] While the Conditionality Regulation could be adopted under QMV, the MFF had to be adopted on a unanimous basis, and the Own Resources Decision had to be ratified by each national parliament.[895] This system, thus, provided the Hungarian and Polish governments with significant leverage in their negotiating position. Only a new European Council Summit on 11 December 2020 could solve this impasse.[896] During the December Summit, the Heads of State agreed on comprehensive declaratory statements regarding the adoption, application, and interpretation of the

[891] John Morijn, *The July 2020 Special European Council, the EU budget(s) and the rule of law: Reading the European Council Conclusions in their legal and policy context (23 July 2020)* (eulawlive.com 2020).
[892] Maia de la Baume and Lili Bayer, 'Germany seeks breakthrough on linking EU payouts to rule of law (28 September 2020)' *Politico Europe* (Brussels, Belgium) <https://www.politico.eu/article/germany-seeks-breakthrough-on-linking-eu-payouts-to-rule-of-law/>.
[893] *Draft provisional agreement between European Parliament and Council on the rule of law (5 November 2020)* (European Parliament Press Office 2020).
[894] *Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary (26 November 2020)* (Government of the Republic of Poland Press Office 2020).
[895] Qualified Majority Voting (QMV) is a decision-making mechanism used within the institutions of the EU to make certain decisions more efficient and effective. It is a way of voting that considers both the population and the countries in the EU, allowing for decisions to be made even if not all Member States agree. QMV is used primarily in the Council.
[896] *European Council meeting (10 and 11 December 2020) – Conclusions*.

Conditionality Regulation.[897] In this unusual declaration, the European Council agreed that the Commission shall develop guidelines on the applicability of the regulation and shall abstain from bringing any case under the regulation until such guidelines are finalised. This was although the European Council did not have the formal competence to issue such legal commands towards the Commission.[898] The EP strongly condemned this practice and the European Council Conclusion in a parliamentary resolution on 17 December 2020. Stating that "[…] the European Council shall not exercise legislative functions;"[899] and that "[…] any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice."[900] Therefore, the European Council Conclusions also represented an interinstitutional conflict between the EP and the European Council with the subject of controversy being the Council overstepping its competencies and its assigned role in the Treaties.

The Council Conclusions enabled the EU to move on with the Conditionality Regulation, the MFF and the NGEU. "Originally crafted by the German Presidency in close contact with Budapest and Warsaw, this text has enabled the EU25 to overcome the veto posed by Hungary and Poland on the adoption of the entire package, thus reaching a 'mutually satisfactory solution'."[901] However, many scholars criticised this last-minute compromise for bringing the deal over the line as it violated the EU's constitutional principles.[902] "The interpretative declaration of 10 December 2020 is set to go down in history as a dark page for the rule of law in the Union legal order."[903] These controversial statements, thus, lifted the blockage of the MFF and the Own Resources Decision by Hungary and Poland and enabled the EU to move on with the legislative package. Finally, on 14 December 2020, the Council adopted the regulation.[904] On 16 December 2020, the regulation was adopted by the EP[905] and thus became

[897] See Recital 2. point a) till point k) in ibid.
[898] Alemanno and Chamon (n 570).
[899] *European Parliament Resolution on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (17 December 2020)* (European Parliament 2020).
[900] Ibid.
[901] Alemanno and Chamon (n 570).
[902] Ibid.
[903] Ibid.
[904] *Adoption of the Council's position at first reading and of the statement of the Council's reasons = Outcome of the written procedure completed on 14 December 2020* (Council of the European Union Press Office 2020).
[905] *Agnese Krivade, Parliament approves the "rule of law conditionality" for access to EU funds (16 December 2020) (European Parliament Press Office 2020)*.

law with its publication in the OJ. Therefore, the regulation applied from 1 January 2021 onwards.

The adoption of the Conditionality Regulation together with the new seven-year budget seems rational from a political point of view. From a legal point of view, adopting the new budget allowed for establishing new rules related to the disposal of funds and created a further incentive for Member States to agree to a package of legislation. From a political perspective, scholars have warned for years that some Member State governments illegally use EU funds to support cronyism, anti-EU projects, and illiberal structures, consistently calling on the Commission to act.[906] The new seven-year budget enabled the Commission to establish this crucial legislation as a *sine non qua* together with the new budget. Thus, Member States were forced to agree on the Conditionality Regulation to avoid the lapse of the previous budget and a potential financial shutdown. Furthermore, the economic downturn of the pandemic further increased the pressure on Member States' governments to enable further stimulus (in the form of the NGEU). Therefore, various trends in 2020 were accumulating factors in creating momentum for a Conditionality Regulation linked to EU funds. Hence, it was practical and innovative to link rule of law standards to the EU budget in the Conditionality Regulation.

2.2 The December 2020 Council Conclusions

The European Council Conclusions of 10-11 December 2020 (December Conclusions) extensively address the Conditionality Regulation and include substantive caveats to its application.[907] Furthermore, they revealed deeper questions about the EU's principle of institutional balance.[908] The European Council made several declaratory statements to get the deal over the line before the end of 2020. Those statements differ sharply from the reading of the legal text of the regulation. The legal value of these declaratory statements is disputed among scholars,[909] and creates the bizarre image of an EU that compromises the institutional rule of law against the rule of law in the Member States.[910]

[906] See Kelemen, 'The European Union's Authoritarian Equilibrium'highlighting that "[…] funding and investment from the EU helps sustain these regimes.".
[907] *European Council meeting (10 and 11 December 2020) – Conclusions*.
[908] Alemanno and Chamon (n 570).
[909] Thu Nguyen, *The EU's New Rule of Law Mechanism: How it Works and Why the 'Deal' Did Not Weaken it (17 December 2020)* (Policy Brief, 2020).
[910] Scheppele (n 432), Pech and Platon (n 135), and Alemanno and Chamon (n 570).

The first caveat can be found in paragraph I. 1 (c) of the Council Conclusions, in which the European Council states that the Commission shall develop guidelines before applying the regulation. This would be a normal development for EU regulations that are applied with broad leeway. However, paragraph I. 2. c) states that those guidelines shall only be developed considering an annulment action against the regulation based on Article 263 TFEU. This would also not be extraordinary since the Commission often adapts its application practices following the jurisprudence of the Court of Justice. However, the same paragraph states that the Commission shall not apply the regulation until the guidelines are finalised. This can be interpreted as meaning that the Commission shall wait for a case before the Court of Justice and only subsequently adopt guidelines before it can apply the regulation. Realistically, this could take up to two years and is a significant impediment to the success of the regulation.[911]

A second caveat is to be found in the subsequent paragraph (d) of the Council Conclusions, which states that the regulation should only apply when there are no other more efficient means to protect the EU's budget. The paragraph mentions the Common Provisions Regulation[912], the Financial Regulation[913], and infringement procedures under Article 258 TFEU explicitly. This eventually implies that the Commission must carefully weigh an infringement proceeding under Article 258 TFEU or Article 325 TFEU against applying the regulation. Specifically, Article 325 TFEU provides the legal ground for the Commission to bring an infringement proceeding against a Member State in which the financial interest of the EU is negatively affected.

Thirdly, paragraph (e) of the Council Conclusions explicitly states that 'the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism' and highlights the vital link to the EU's budget to trigger the application of the regulation.[914] This again highlights that the connection between the rule of law and the EU's financial interest will be essential when applying the regulation. Additionally, the following paragraph (f) emphasises that the triggering factors in Article 4 of the regulation are an exhaustive list of elements and are not open to events of a different nature. Additionally, the concept of generalised deficiencies in the rule of law is explicitly excluded according to paragraph (f). By

[911] According to the Judicial Statistics of the Court 2019, a Court proceeding lasts approximately 14,4 months, while adopting guidelines takes additional time. See *The Year in Review: Annual Report 2019* (2019).
[912] *Common Provisions Regulation*.
[913] *Financial Regulation (Regulation 2018/1046)* (Official Journal of the European Union 2018).
[914] *European Council meeting (10 and 11 December 2020) – Conclusions*.

this wording, the European Council Conclusions turned the initial 2018 proposal by the Commission upside down, whose legislative intention was to address generalised deficiencies in the rule of law.[915] Thus, and in large part, the Council Conclusions emphasise and restate the restrictive scope of the regulation.

Overall, the European Council Conclusions of 10-11 December 2020 led to a long-lasting legal discussion about the roles of and the relationship between the European Council and the Commission. Strictly following the Treaties, the Commission is the 'Guardian of the Treaties' according to Article 17 TEU. The Commission is thus obliged to act within its remit to protect the interests of the EU. However, as the Court has repeatedly held, the Commission has broad discretion in exercising this role. Nevertheless, it can hardly be argued that it is in the interest of the EU to defer the application of a crucial piece of legislation that intends to protect the EU's budget and the rule of law in the Member States. However, the Council's Legal Service in December 2020 confirmed the European Council's conclusion accordance with the Treaties and the regulation's text.[916] This affirming legal opinion makes any opposition by the Commission against the Council Conclusions less likely. Then again, the EP declared that there is no legal value to the European Council Conclusions and the Commission, as an independent body, is bound to ensure the application of the Treaties and secondary legislation.[917] Therefore, the European Council Conclusions led to an ongoing inter-institutional contest over the prerogative of interpretation of the regulation and the EU principle of institutional balance.

2.3 Substantive Features of the Conditionality Regulation

The regulation covers breaches of the principles of the rule of law if they are linked to the EU's budget. This is a consequence of the budgetary legal basis chosen. Article 4, which entails the detailed conditions for applying the regulation, makes this very clear. The regulation's scope explicitly covers breaches of the principles of the rule of law that risk affecting the EU's budget in a *sufficiently direct way*. A mere violation of the principles of the rule of law in a Member

[915] *Proposal for a Regulation of the European Parliament and of the Council (2018/0136) on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (2 May 2018)*.
[916] *Opinion of the Council Legal Service: Part I of the Conclusions of the European Council of 10 and 11 December: 2020 - Conformity with the Treaties and with the text of the Regulation on a general regime of conditionality for the protection of the Union budget (11 December 2020)* (Council of the European Union Press Office 2020).
[917] *European Parliament Resolution on the Multiannual Financial Framework 2021-2027, the InterInstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (16 December 2020)*.

State would not suffice to trigger the mechanism. The link to the EU's budget or the EU's financial interest is indispensable.

Article 2 (a) specifies that the principles of the rule of law should be understood having regard to the EU values enshrined in Article 2 TEU. This Article also defines that fundamental rights are only considered under this regulation if judicial protection or equal treatment is affected. In the following Article 3, the regulation entails an indicative and non-exhaustive list of examples of what would be considered a breach of the principles of the rule of law. Among them are endangering the independence of the judiciary; failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities; and limiting the availability and effectiveness of legal remedies.

Article 4 (2), which lays out the detailed conduct which constitutes a breach of the principles of the rule of law, can then be understood as the core provisions of the regulation. There is, thus, a duplication in Article 3 and Article 4 (2). However, Article 3 must be understood as a definitional provision, whereas Article 4 (2) would be the operative Article. Moreover, Article 4 (2) directly links the regulation's two main elements (the principles of the rule of law and the EU's budget) by pointing out potential fields of application. The list of Article 4 (2) provides thus potential examples for applying the regulation.

2.4 Procedural Features of the Conditionality Regulation

The regulation's procedure is laid out in Article 6 and comprises several steps of procedural rules. Some of the procedural steps can be compared to the infringement procedure under Article 258 TFEU, while others are taken from the macroeconomic conditionality rules introduced with the establishment of the EMU.[918] If the Commission believes to have found a breach of the principles of the rule of law in a Member State which affects the EU's budget, it will send a reasoned letter to that Member State (Article 6 (1)). The concerned Member State can then address the findings of the Commission with a reply and/or by proposing remedial measures (Article 6 (5)). Finally, the Commission shall consider Member State's observations

[918] Armin von Bogdandy and Justyna Łacny, *Suspension of EU funds for breaching the rule of law – a dose of tough love needed?* (European Policy Analysis, 2020).

before deciding if it wants to submit an implementing act to the Council to cut funds to the Member State concerned or cease the case.

Initially, the position of the Commission and the EP was to propose voting by reverse qualified majority (RQMV).[919] The macroeconomic conditionality rules of the EMU operate by reverse QMV, which presumably inspired the Commission's attempt to use reverse QMV here. However, during the trialogue meetings, the Council pushed back on this and amended the regulation to the usually used QMV.[920] With a reverse QMV, it would have been an even more powerful instrument since it would have put the burden of proof upon the accused Member State. The feasibility of reverse QMV was also not opposed by an Opinion of the Legal Service of the Council. This shows the obstructive stance and the efforts by the Council in watering down the regulation during the legislative process.[921]

There is, however, one caveat to the whole procedure, which can be found in Recital 26 of the regulation. In the case that a Member State should believe that the Commission's proposal of an implementing act violates the principle of objectivity, non-discrimination, or equal treatment, it may exceptionally request to discuss the matter at a European Council meeting. If a Member State is convinced that the Commission's claims are unwarranted or sees that a delay of the procedure is in its political interest, it will likely trigger this procedure which would delay the case or raise the discussion to the political level. In these cases, the 'deadline' to decide for the Council is extended to three months.

2.5 Measures under the Conditionality Regulation

Article 5 of the regulation provides for the measures that the Commission can propose to enact against a Member State that violates the principles of the rule of law. This Article builds

[919] According to reverse qualified majority voting (RQMV) proposed by the Commission, a Commission recommendation is deemed to be adopted unless the Council decides by a qualified majority to reject the recommendation within a given deadline that starts to run from the adoption of such a recommendation by the Commission.
[920] Aleksejs Dimitrovs, *Rule of law conditionality for the EU budget: agreement is there (5 November 2020)* (eulawlive.com 2020).
[921] *Opinion of the Council Legal Service: Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union´s budget in case of generalised deficiencies as regards the rule of law in the Member States - Compatibility with the EU Treaties (25 October 2018)* (Council of the European Union Legal Service 2018).

substantially on the Financial Regulation[922], which governs the disbursement of funds from the EU's budget, and the Common Provisions Regulation administers the EU's structural funds' distribution.[923] The Article is split into two streams. One stream outlines the measure which can be adopted for (i) funds which are implemented by the EU itself and a second stream, (ii) for funds which are implemented under shared management.[924] Funds under shared management comprise the CAP and the cohesion policy funds. These funds are implemented by the Member State and make up approximately 70 % of the EU's budgetary expenditures.[925] The protocol of the Council vote on the regulation even foresees the possibility of incorporating the content of the Conditionality Regulation into the Financial Regulation in the long run.[926]

There is also the possibility of lifting measures after breaches of the principles of the rule of law have been remedied by the concerned Member State. The procedure for lifting measures can be found in Article 7. With remedial measures, the accused Member State may refute the findings of the Commission and prove that the conditions of Article 4 are no longer fulfilled. The Council is further instructed to review all existing measures annually and consider whether the measures can be lifted. Finally, Article 7 (3) foresees the possibility for a Member State to recoup funds from the budget that were withheld due to implementing acts. However, the funds will be lost for the Member State after two years when the deficiencies have not been remedied. Overall, the measures under the regulation are solid and robust and allow the EU to drastically cut funds to Member States in case systemic domestic rule of law deficiencies are identified.

2.6 Application of the Conditionality Regulation against Hungary

On 27 April 2022, three weeks after the Hungarian parliamentary elections, which Viktor Orban's Fidesz party won by a wide margin, the Commission formally triggered, for the first time, the rule of law Conditionality Regulation against the Member State of Hungary.[927] At the

[922] *Financial Regulation (Regulation 2018/1046)*.
[923] *Common Provisions Regulation*.
[924] *Financial Regulation (Regulation 2018/1046)*, Article 62 thereof.
[925] Bogdandy and Łacny (n 918).
[926] *Adoption of the Council's position at first reading and of the statement of the Council's reasons = Outcome of the written procedure completed on 14 December 2020.*
[927] Marton Dunai, 'Viktor Orban wins new term as Hungary's prime minister but OSCE criticises campaign (4 April 2022)' *Financial Times* (London, United Kingdom) <https://www.ft.com/content/482f9cb3-4bdd-4bf7-b776-b8c99b60aaca> and Vlad Makszimov, 'Hungary: Commission officially launches procedure linking bloc funds to rule of law (27 April 2022)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/politics/news/hungary-commission-officially-launches-procedure-linking-

time when the Commission triggered the Conditionality Regulation against Hungary, there were regular debates about the rule of law in Hungary in the EP ongoing for years (the latest on 15 September 2022)[928], eight rule of law-related infringement proceedings by the Commission against Hungary[929], and a pending Article 7 TEU preceding against Hungary in the Council.[930] However, none of these instruments has yielded significant results and changed Hungary's fast rule of law backsliding towards an electoral autocracy and a hybrid regime.[931]

Procedurally, the Commission issued a request for information (RFI) to Hungary before formally triggering the Conditionality Regulation in April 2022. On 24 November 2021, the Commission issued an RFI to the Hungarian government to gather information about the state of the rule of law in Hungary and received a reply by 27 January 2022.[932] Thus, the Commission strictly followed the procedure in Article 6 (4) of the Conditionality Regulation. However, the RFI only strengthened the Commission's concerns about the rule of law in Hungary. This led the Commission to trigger the Conditionality Regulation against Hungary in April 2022 formally. Moreover, the timing of triggering the Conditionality Regulation seems to be intentionally chosen as a moment shortly after the Hungarian parliamentary elections, which signalled that no shift in domestic policy was to be expected over the following years and that the trend of rule of law backsliding would continue with Orban's Fidesz government holding onto power.

bloc-funds-to-rule-of-law/>. The following section builds on a publication by the author of this dissertation in Niels F. Kirst, 'The Conditionality Regulation in Action: The Case of Hungary' EU Law Live.

[928] *European Parliament Resolution on the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (15 September 2022)* (Official Journal of the European Union 2022).

[929] *Commission v Hungary (C-286/12) (Retirement Age of Hungarian Judges)*, *Commission v Hungary (C-288/12) (Independence of the Data Protection Supervisor)*, *Commission v Poland, Hungary and the Czech Republic (C-715/17, C-718/17 and C-719/17, Asylum Relocation Decision)*, *European Commission v Hungary (C-66/18, Hungarian Higher Education Law)*, *European Commission v Hungary (C-78/18, NGO Law)*, *European Commission v Hungary (C-808/18, Hungarian Asylum Law)*, *Commission v Hungary (C-821/19) (Stop Soros Law)*, and *Commission v Hungary (C-769/22) (Hungarian LGBTQ Law)*.

[930] *European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (12 September 2018)*.

[931] Jorge Liboreiro and Sandor Zsiros, 'Hungary is no longer a full democracy but an 'electoral autocracy,' MEPs declare in new report (16 September 2022)' *Euronews* (Brussels, Belgium) <https://www.euronews.com/my-europe/2022/09/15/hungary-is-no-longer-a-full-democracy-but-an-electoral-autocracy-meps-declare-in-new-repor>.

[932] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* (Official Journal of the European Union 2022) Recital 1.

Besides the Conditionality Regulation, the year 2022 also marked the advent of the RRF[933] under which Member States receive funds from the NGEU. Under the RRF, each Member State had to submit a NRRP in 2022, which the Commission would later approve after a careful assessment. "Each national plan has been drawn up by governments and validated by the Commission and the Council, and payments of EU grants and/or loans, which run until 2026, depend on the achievement of milestones and targets detailed in the plan."[934] The NRRPs added a further layer of conditionality as the Commission decided to bind the disbursement of funds to specific milestones and targets that need to be achieved. "The operation of the facility introduces de facto conditionality, which is not specific to the rule of law, and which is used to the full in this respect by the European institutions."[935] Interestingly, both conditionality-based procedures – the Conditionality Regulation and the milestones – were intertwined by the Commission when it started its conditionality strategy towards Hungary in 2022. "The combined use of conditionality instruments linked to the EU budget and the milestones to be achieved in the Recovery Plans thus multiplies the EU's ability to force Member States to change their rule of law practices."[936]

After the Commission received Hungary's response to the RFI, it decided to take the next step on 27 April 2022 by sending a written notification to Hungary under Article 6 (1) of the Conditionality Regulation.[937] The Commission justified the activation of the Conditionality Regulation with "systemic irregularities, deficiencies and weaknesses in public procurement procedures; the high rate of single bidding procedures and the low intensity of competition in procurement procedures; issues related to the use of framework agreements; the detection, prevention and correction of conflicts of interest; and issues related to public interest trusts."[938] Earlier on, Hungary and Poland had unsuccessfully challenged the Conditionality Regulation before the Court of Justice.[939] As the Conditionality Regulation was upheld by the Court of

[933] *Regulation (2021/241) of the European Parliament and the Council establishing the Recovery and Resilience Facility (12 February 2021) "RRF Regulation"* (Official Journal of the European Union 2021).
[934] Maurice (n 509).
[935] Ibid.
[936] Ibid.
[937] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* Recital 2.
[938] Ibid.
[939] Vlagyiszlav Makszimov, 'Hungary, Poland refer controversial rule of law mechanism to court (11 March 2021)' *EurActiv* (Brussels, Belgium) <https://www.euractiv.com/section/justice-home-affairs/news/hungary-poland-refer-controversial-rule-of-law-mechanism-to-court/>.

Justice in late 2021 (16 December 2021)[940] and the Commission published its guidelines on the application of the regulation in early 2022 (2 March 2022)[941], it saw no further obstacles to the activation of the regulation.

After the Hungarian government was confronted with the accusation of the Commission, Brussels and Budapest entered a dialogue on how to remedy the deficiencies detected by the Commission. This included many back-and-forth written exchanges between the Hungarian government and the Commission. The Hungarian government sent letters to the Commission on 27 June, 30 June, 5 July, and 19 July to outline their view of things and even propose remedial measures.[942] However, the Commission was unsatisfied with the Hungarian replies to its rule of law concerns. Therefore, on 20 July 2022, it sent an intention letter to Hungary according to Article 6 (7) of the Conditionality Regulation. This intention letter outlined the expected remedial measures by Hungary and the potential budget cuts in case of non-fulfilment. Budget Commissioner Johannes Hahn, who oversees the procedure against Hungary, explained this step in an official Communication to the Commission on the same day.[943] The intention letter marked the next step of the escalation against the Hungarian government and allowed it to formally take a position on the expected remedial measures and the proportionality of the envisaged budget cuts.[944]

As a result, the Hungarian government agreed that it would address the identified rule of law deficiencies with 17 remedial measures to try to avert the Commission from formally forwarding a proposal for an implementing decision to the Council, which would have the final vote on budget cuts.[945] The Hungarian government proposed the remedial measures in two replies to the intention letter on 22 August 2022 and 13 September 2022.[946] Among them were

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[940] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)*, and Niels F. Kirst and Beatrice Monciunskaite, *The CJEU Gives its Green Light for the Conditionality Regulation (21 February 2022)* (Bridge Network EU 2022).
[941] *Communication from the Commission: Guidelines on the application of the Regulation 2020/2092 on a general regime of conditionality of the protection of the Union budget (2 March 2022)* (European Commission Press Office 2022).
[942] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* Recital 8.
[943] *Communication to the Commission: Communication from Commissioner Hahn to the Commission on the information to Hungary, pursuant to Article 6(7) of Regulation (2020/2092), about the intention to make a proposal for an implementing decision on the appropriate measures to the Council (20 July 2022)* (European Commission 2022).
[944] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* Recital 8.
[945] Ibid.
[946] Ibid.

the following: the establishment of a new Integrity Authority, the establishment of an Anti-Corruption Task Force, strengthening the anti-corruption framework, reducing the share of single-bidder procurement procedures, action plan to increase competition in procurement procedures, strengthening cooperation with OLAF, ensuring improved transparency in public spending, and ensuring transparency in the use of Union support by public interest asset management foundations.[947] It was now in the Commission's hands whether it would find the remedial measures and the implementation plan put forward adequate to remedy the concerns.

On 18 September 2022, the Commission released a statement on Hungary's proposed measures, highlighting that the measures to remedy the deficiencies seemed fundamentally suitable. However, the implementing provisions were not yet precisely defined, and the concrete implementation of changes is pending.[948] Therefore, the Commission found that the measures were insufficient overall, and the College of Commissioners decided to take the next step and adopted a formal proposal for a Council Implementing Decision released the same day.[949] It proposed to suspend 65% of operational programmes under the cohesion policy against Hungary under the Conditionality Regulation, which equalled €7.5 billion of cohesion policy money, in case Hungary would not fulfil key implementation steps by 19 November.[950] This proposal for a Council Implementing Decision was expected to be voted on within one month in the Council according to Article 6 (10) of the Conditionality Regulation. This would have meant immediate budget cuts for Hungary already in 2022. However, on 13 October 2022, the Council, following a request by the Hungarian government, decided that exceptional circumstances apply and extended the timeline for the vote in the Council by three months according to Article 6 (19) of the Conditionality Regulation. The Commission wanted to see the result of the remedial measures proposed by Hungary until 19 November 2022. "Hungary shall inform the Commission by 19 November 2022, and every three months thereafter of the implementation of the remedial measures Hungary has committed to […]."[951] Specifically, to assess the implementation of several reforms to remedy the rule of law breaches identified by the Commission and to avert a vote in the Council.

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[947] Petri Sarvamaa and others, *The 7.5 billion Euro question: Did the Hungarian government implement the necessary reforms to avoid rule of law sanctions? (17 November 2022)* (2022).
[948] *EU budget: Commission proposes measures to the Council under the conditionality regulation (18 September 2022)* (European Commission Press Office 2022).
[949] *Proposal for a Council Implementing Decision (2022/0295) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (18 September 2022)* (European Commission Press Office 2022).
[950] Ibid.
[951] Ibid.

Between the 18 September 2022 and the 19 November 2022, the Hungarian government, however, did not adopt sufficient legal changes to satisfy the Commission's demands. Following those developments and amid insufficient reforms by Hungary, the Commission proposed the suspension of 7.5 billion Euros of cohesion funds under the Conditionality Regulation on 30 November 2022.[952] Additionally, the Commission proposed a general ban on the disbursement of funds to the newly established Hungarian foundations of public interest and institutions maintained by them (mainly concerning the areas of education and research universities), and it subjected the disbursement of funds in the future to the fulfilment of 17 remedial measures. On the same day, however, the Commission also proposed adopting Hungary's NRRP, paving the way for Hungary to receive money from the NGEU. The Commission, therefore, on the one hand, proposed budget cuts via the Conditionality Regulation. However, on the other hand, it opened the door for significant disbursement of funds under the NGEU. However, the proposal for a Council Implementing Decision of the Hungarian NRRP was subject to 27 super-milestones that Hungary was due to fulfilling before the first money would flow. The Commission, therefore, tied those two decisions together by proposing budget cuts under the Conditionality Regulation and, second, approving Hungary's NRRP, however, with a decisive conditionality criterion built into the disbursement of funds.

Taking a step back and looking at the details of the NGEU, RFF, and NRRP allows a better understanding of how the Commission envisions this two-sided conditionality mechanism.[953] In 2022, the Commission had to assess Hungary's NRRP. This second prong of the Commission's rule of law enforcement against Hungary is built upon the requirement that all NRRPs must lay out a plan to achieve the country-specific recommendations of the European Semester. "[…], as underlined in Article 17 [of the RRF Regulation], 'the recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester', and this is a condition for eligibility of the NRRP."[954] The proposed NRRP by the Hungarian government was formally approved but

[952] *Communication from the Commission to the Council: on the remedial measures notified by Hungary under Regulation (2020/2092) for the protection of the Union budget (30 November 2022)* (European Commission 2022).
[953] The Recovery and Resilience Facility (RFF) is a financial instrument that provides substantial financial support to Member States for their national recovery and resilience plans. These plans outline how each Member State intends to use the funds to promote economic recovery, enhance resilience, and contribute to long-term sustainability.
[954] Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences'.

technically found insufficient by the Commission on 30 November 2022.[955] The Commission, therefore, communicated a proposal for a Council Implementing Decision on the Hungarian NRRP to the Council subject to 27 super milestones.[956] On the same day, 30 November 2022, the Commission also officially proposed suspending 65% of operational programmes under the cohesion policy against Hungary under the Conditionality Regulation, which equalled €7.5 billion of cohesion policy money foreseen for Hungary.[957] The Commission, therefore, drew the consequences of the inadequate reforms that the Hungarian government had to achieve until 19 November 2022. "On the same day on which the Commission proposed the suspension of the funds under the conditionality mechanism, it also proposed the approval of the Hungarian national recovery and resilience plan (NRRP)."[958] Therefore, the Commission used a two-pronged tactic to target Hungary for its rule of law deficiencies.

To complete the puzzle, Hungary and the Commission also entered into a Partnership Agreement in December 2022, which allows the EU to exercise conditionality regarding the disbursement of EU funds. "On 22 December 2022, the Commission approved the partnership agreement with Hungary for Cohesion Policy 2021-2027, for a total amount of almost €22 billion."[959] The Partnership Agreement contains enabling clauses that must be fulfilled to disburse cohesion funds to the Member States. In the case of Hungary, these enabling clauses are horizontally tied to the Charter of Fundamental Rights conditions. Therefore, Hungary is under pressure, especially regarding domestic LGBTQ and asylum legislation, which infringes on European citizens' rights guaranteed in the Charter. Additionally, the Partnership Agreement mentions the 27 super milestones of the Hungarian NRRP as a further condition. "It sets judicial independence as a horizontal condition, i.e., one that could justify the suspension of the entire €22 billion programme, and makes the disbursement of funds conditional on the implementation of twenty-seven super milestones required under the RRP."[960] Therefore, the Partnership Agreement is another powerful instrument to exercise conditionality towards Hungary.

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[955] *Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds (30 November 2022)* (European Commission Press Office 2022).
[956] *Proposal for a Council Implementing Decision (2022/0414) on the approval of the assessment of the recovery and resilience plan for Hungary (30 November 2022)* (2022).
[957] *Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation 2020/2092 for the protection of the Union budget* (European Commission Press Office 2022).
[958] Thu Nguyen, *The Hungary Files: Untangling the political and economic knots (8 December 2022)* (Policy Brief, 2022).
[959] Maurice (n 509).
[960] Ibid.

Coming back to the Conditionality Regulation and the 17 remedial measures that Hungary had to implement to avert the adoption of the implementing decision by the Council. The Hungarian government started implementing several reform packages rather quickly and adopted two extensive reforms linked to the remedial measures in the Hungarian parliament on 22 November 2022 and 7 December 2022. Those two reform packages were rushed through the Hungarian parliament and adopted by a Fidesz two-thirds majority. "The Commission had […] proposed a 65 per cent suspension in September, but the Hungarian parliament passed two so-called 'omnibus' laws in October and November to meet the EU's demands."[961] To keep the Commission informed about the progress made, the Hungarian government sent letters to the Commission on 19 November 2022, 26 November 2022, 6 December 2022, and 7 December 2022.[962] However, this was to no avail, as the Commission was still unsatisfied with Hungary's progress. Now the ball was within the Council field, as it was foreseen to debate and decide over the proposal for an implementing decision over the freezing of funds proposed by the Commission. It was now in the Council's hands how it would respond to Hungary's reforms and the Commission's assessment and proposal. Observers did not expect the Council to make a quick decision regarding the implementing decision proposed by the Commission.[963] A long process of negotiation in the Council over the approval of the implementing decision seemed likely. However, things turned out differently. First, the Council, on 6 December 2022, demanded an updated assessment of the already fulfilled Hungarian remedial measure by 7 December 2022, which the Commission published on 9 December 2022. This indicated that the Council pivoted towards a timely decision on the proposed implementing decision.

On 12 December 2022, only 12 days after the Commission's final assessment of the Hungarian progress made, the Council voted on the implementing decision put forward by the Commission and decided by a qualified majority to suspend 6.3 billion Euros of cohesion funds from Hungary.[964] Therefore, the Council mainly followed the proposal by the Commission and only slightly amended the amount of the frozen funds. From 65%, it went down to 55% of funding suspension of the budgetary commitments in cohesion policy programmes for Hungary

[961] Ibid.
[962] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* Recital 32.
[963] Nguyen, *The Hungary Files: Untangling the political and economic knots (8 December 2022)*.
[964] *Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary (12 December 2022)*.

to accommodate the Hungarian government. Therefore, it lowered the funding suspension to 55%, equalling €6.3 billion of European cohesion policy money foreseen for Hungary. The Council made this last-minute change by triggering Article 6 (11) of the Conditionality Regulation, allowing it to amend the proposal for an implementing decision freely.[965] This gives the Council a de facto carte blanche in deciding what measure it considers appropriate. Substantially, the Council was unsatisfied with Hungary's progress in addressing the rule of law deficiencies found by the Commission.

> "As a consequence, in light of the assessment carried out above, it should be concluded that the remedial measures notified by Hungary, taken as a whole, as adopted and in view of their details, and the ensuing uncertainty about their application in practice, do not put an end to the identified breaches of the principles of the rule of law."[966]

Most interestingly, on 12 December 2022, the Council approved the Hungarian NRRP.[967] This was necessary as the funding out of the RRF for Hungary would have gone in vain if the national plan were not approved within 2022. "While it decided to suspend cohesion funds under the budgetary conditionality mechanism, the Council adopted Hungary's €5.8 billion NRRP, including twenty-seven "super milestones" on justice, transparency in public procurement, and the fight against fraud, corruption and conflicts of interest."[968] Therefore, the Council followed the Commission's lead in the two-sided conditionality strategy towards Hungary. On the one hand, it suspended funds under the Conditionality Regulation. However, on the other hand, it formally approved the NRRP tied to strict milestones under the RRF Regulation. On the NRRP, "[t]he Council specified that these milestones must be "fully and correctly" implemented before Hungary can submit its first payment claim."[969]

Moreover, it turned out that a political power game between Hungary and the other Member States overshadowed the decisions made on 12 December 2022 by the Council. Previously,

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[965] Article 6 (11) of Regulation 2020/2092 states, "The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision." See Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union'.

[966] *Council Implementing Decision (2022/2506) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (15 December 2022)* Recital 58.

[967] *NextGenerationEU: Member states approve national plan of Hungary (12 December 2022)* (Council of the European Union Press Office 2022).

[968] Maurice (n 509).

[969] Ibid.

Hungary had vetoed the Macro-financial Assistance for Ukraine and the agreed global corporate tax rate in the Council.[970] Hungary, thus, blackmailed the EU and the other Member States into approving the Hungarian NRRP and lowering the proposed amount withheld under the Conditionality Regulation. It turned out, that Hungary was successful with this strategy. In a rapid turn of events, Hungary lifted the veto and the Hungarian NRRP was approved. In exchange for the approval of the NRRP and the lowering of the funds withheld under the conditionality mechanism, Hungary lifted its veto on the €18 billion aid for Ukraine and a global corporate tax rate.[971] A critical observer might call this political horse-trading over the rule of law.

The question remains what to make of the Commission and the Council's joint action to embrace a two-(or even three-)sided conditionality strategy towards Hungary.[972] From the outset, it is to be welcomed that the EU has finally found a way to exercise leverage over Hungary to halt the ongoing rule of law backsliding in the Member States, which severely threatens the values of the EU enshrined in Article 2 TEU, the cohesion of the EU and the status of the EU in the world. Therefore, the Conditionality Regulation's first application against Hungary is essential for a Commission moving from being a harmless observer on the sidelines to becoming a real enforcer and guardian of the EU values. Moreover, tying in with other instruments, such as the NRRP and the Partnership Agreement, is a clever gambit as it allows the Commission to mainstream conditionality towards any EU funds going to Hungary. However, there are some things to be observed in this exciting strategy to protect the rule of law and democracy in Hungary.

First, the Conditionality Regulation is no panacea for rule of law problems in the Member States as its application is hampered by its strict legal requirements and restricted scope. "The conditionality mechanism is only legal because it requires a direct link between rule of law violations and the EU budget to be demonstrated, and the milestones imposed in the recovery plans must have an economic and social justification, as the Recovery and Resilience Facility

[970] Sam Fleming and Marton Dunai, 'Hungary blocks €18bn worth of EU aid for Ukraine (6 December 2022)' *Financial Times* (London, United Kingdom) <https://www.ft.com/content/5ac5e2ec-c4b9-404c-b8e5-8b72f96c4568>.
[971] Alice Tidey, 'Hungary agrees deal and lifts veto on €18bn EU aid package for Ukraine (13 December 2022)' *Euronews* (Brussels, Belgium) <https://www.euronews.com/my-europe/2022/12/13/hungary-lifts-vetoes-on-ukraine-aid-and-corporate-tax-to-lower-frozen-eu-funds#:~:text=But%20EU%20ambassadors%20agreed%20to,and%20a%20global%20corporate%20tax.>.
[972] If one counts the Partnership Agreement between the Commission and Hungary as an additional layer, it equals a three-sided conditionality strategy towards Hungary.

is legally based on the EU's economic and social competences."[973] Therefore, the Commission is still hampered in its efforts to request fundamental rule of law conditionality as all instruments used are intended for different purposes (such as the EU budget protection or economic and social development).

Second, the Commission's strategy will only be successful if the Commission maintains its strict requirements and keeps holding the line in not disbursing any funds to Hungary until the rule of law deficiencies are not adequately addressed. "The potential power of the budgetary conditionality mechanism, the favourable conditions in cohesion programmes, and the milestones in Recovery and Resilience Plans will only be effective if the Commission maintains a clear and demanding line in their application."[974] Any political compromise or horse-trading over the rule of law risks the credibility of the Commission's demands and empowers the Hungarian government not to take the Commission's demands seriously.

Third, and from an institutional perspective, the introduction of the RRF influences the balance of power between the EU institutions and the Member States as it shifts the weight towards the EU institutions and equips the Commission with further leverage towards Hungary. "From a political viewpoint, NGEU increases the weight of the EU institutions, both globally, and in their relations with member states' governments, because through a system of significant financial incentives they can influence national economic policies, favouring virtuous behaviours such as reforms and investments."[975] It opens a new avenue for the Commission to substantially influence and steer reform programs in the Member States towards a functioning rule of law system and confront backsliding in the Member States.

2.7 Non-Application of the Conditionality Regulation Against Poland

The Conditionality Regulation has so far not been triggered against Poland, despite the Member States rule of law violations.[976] The reason for this non-application of the Conditionality Regulation seems to be several factors which led the Commission to refrain from applying the

[973] Maurice (n 509).
[974] Ibid.
[975] Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences'.
[976] For an in-depth analysis of the Polish rule of law violations see Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' No. 18/01 Legal Studies Research Paper Series (Sydney Law School).

new instrument. In March 2022, the EP urged the Commission to apply the Conditionality Regulation against Hungary and Poland, however, so far to no avail in the case of Poland.[977] While the EP has cancelled its lawsuit before the Court of Justice, also at the Commission level there seems to be no incentive to start triggering the rule of law Conditionality Regulation.[978] This is astonishing as it seemed that Commission would be inclined to target both Member States.[979] Three leading reasons might explain the Commission's inaction.

First, with the Russian aggression against Ukraine in February 2022, Poland has positioned itself as strong supporter of the neighbouring country and has taken a large toll of Ukrainian refugees. "Poland has been bearing the brunt of taking in Ukrainian refugees fleeing the war to the EU – the country alone has so far taken in more than 3.4 million and will require financial assistance from the EU to deal with these numbers."[980] As Nguyen points out, the EU is reliant on Poland in dealing with those refugees and cannot risk to escalate the conflict further or substantially cut further funds to Poland. Moreover, Poland is an essential part of the EU's and eventually NATO's response to the Russian aggression in Ukraine. "Poland, by virtue of its geographical and political decision, is a central part of the EU's and NATO's strategic response to the war in Ukraine, whether in terms of receiving refugees, maintaining lines of communication and supply, or organising material military support."[981] Therefore, the Commission is not willing further deteriorate its relations with Poland.

Second, there could be a substantial hinderance in applying the rule of law Conditionality Regulation to Poland. The rule of law violations in Poland are less based on corruption, cronyism, and nepotism as in Hungary, and instead much more on the independence of the judiciary. The relation between the independence of the judiciary and the EU budget is less visible than in the case of Hungary. "The Commission has not triggered the budgetary conditionality mechanism against [Poland] as it could not demonstrate that the infringement of independence of judges directly threaten the management of the budget and the financial

[977] Agnese Krivade, *Rule of Law conditionality: Commission must immediately initiate proceedings (10 March 2022)* (European Parliament Press Office 2022).
[978] Vela (n 645).
[979] Daniel Tilles, 'After moving to cut Hungary's funds, EU is "analysing Poland", which has "many problems" (19 September 2022)' *Notes from Poland* (Krakow, Poland) <https://notesfrompoland.com/2022/09/19/after-moving-to-cut-hungarys-funds-eu-is-analysing-poland-which-has-many-problems/>.
[980] Thu Nguyen, *The proof of the pudding: Imposing financial measures for rule of law breaches (24 May 2022)* (Policy Brief, 2022).
[981] Maurice (n 509).

interest of the Union, as required by the regulation."[982] As Maurice points out, the Commission might be lacking substantial legal arguments to trigger the regulation against Poland.

Third, and finally, the Commission could play a political divide and conquer in which it singles out the Member State of Hungary and tries to master the rule of law issues there first before it turns to Poland. With the objective not to completely alienate two Member States at the same time. Also, in terms of population size and economic gravity, Poland is more important than Hungary for the EU. Therefore, the Commission applies a flexible approach whereby it uses the NGEU instead of the Conditionality Regulation against Poland. "The institutions half-heartedly acknowledge that this situation justifies a certain flexibility in the dialogue with Warsaw, while trying to remain firm on the objectives of restoring the rule of law."[983]

Overall, the Commission soft approach to the rule of law violations in Poland risks further deterioration of the rule of law in the Member State.[984] External factors such as the war in Ukraine seems to blind the Commission's assessment of the rule of law violations of the Polish government. "There is a trap to be fallen into that the war in Ukraine warrants unity in the EU as well as financial support for member states hardest hit by the refugee and energy crises but at the expense of precluding Brussels from enforcing financial measures against them – even when they blatantly breach the rule of law."[985] Legally, this is a dangerous development as the Commission, once more, uses the principle of the rule of law as a political bargaining chip. Moreover, it seems like the Commission is itself not applying the rule of law equally to all Member States and that it thereby potentially undermines the principle of equality between the Member States.

[982] Ibid.
[983] Ibid.
[984] See also the critique regarding the swift approval of the Polish National Recovery and Resilience Plan Wojciech Sadurski, *The European Commission Cedes its Crucial Leverage vis-à-vis the Rule of Law in Poland (6 June 2022)* (VerfBlog 2022).
[985] Nguyen, *The proof of the pudding: Imposing financial measures for rule of law breaches (24 May 2022)*.

3. Judicial Requirements of Conditionality

The Conditionality Regulation, which entered into force in January 2021, was immediately challenged by two Member States, Hungary, and Poland, in an action for annulment under Article 263 TFEU.[986] The Conditionality Regulation must be regarded as a new dimension of conditionality in the EU and presents a possible solution to the rule of law crisis in the Member States. Therefore, the first judicial pronouncement of the Court of Justice is critical to understanding how the judicial branch of the EU reacts to the EU legislator's attempt to use conditionality in the rule of law crisis. The Court of Justice's case-law will be analysed in the following section.[987]

This section is structured as follows. First, the requirements for the legal basis of the Conditionality Regulation before the Court of Justice will be analysed. Second, the Court of Justice's assessment of the compatibility of the Conditionality Regulation with Article 7 TEU will be examined. Third, the compatibility of the Conditionality Regulation with the general principles of national identity and equality between the Member States, both to be found in Article 4 (2) TEU, will be studied. Fourth, the requirements of proportionality and legal certainty towards the Conditionality Regulation will be scrutinised. Ultimately, this will allow drawing a summary of the judicial requirements of conditionality in the EU and a conclusion about the prospects of rule of law conditionality in the EU's multilevel constitutional system.

[986] See Makszimov (n 939).
[987] The following section builds on a publication that the author of this dissertation co-authored in Niels F. Kirst and Beatrice Monciunskaite, 'Establishing a Link between Solidarity and Responsibility – The Court's Judgment on the Conditionality Regulation' Vol. 24 Irish Journal of European Law.

3.1 Requirement of the Correct Legal Basis

16 February 2021 marked a seminal judgment for the EU's legal order. The Court of Justice affirmed the legality of Regulation 2020/2092[988] – the Conditionality Regulation.[989] The judgment was anticipated by many observers of the EU's rule of law crisis, as the regulation could be crucial in solving the rule of law impasse in Hungary and Poland. The regulation in question was enacted in January 2020 by the Council and the EP to protect the EU's budget against rule of law deficiencies in the Member States. In addition, it would give the EU an instrument to cut EU funding of the Member States. Consequently, the proceeding was widely followed and held in full court, with many Member States participating in the oral hearing.[990] The Court of Justice, in its ruling, affirmed the legality of the Conditionality Regulation and rejected the challenge by Hungary and Poland.

The first question that the Court of Justice had to answer was whether the EU legislator chose the correct legal basis when enacting the Conditionality Regulation under the EU's budgetary competence of Article 322 (1) TFEU. Poland and Hungary both challenged the budgetary, legal basis of the regulation since it was insufficient to enact a financial Conditionality Regulation aimed at penalising breaches of the rule of law. The Court of Justice rejected those arguments and followed the argumentation by the Council as it regarded the criteria of a *sufficiently direct link* to the budget as adequate in distinguishing the regulation as a budgetary instrument. Thus, the Court of Justice found that the regulation is not to "penalise breaches of the rule of law as such" but rather to ensure that the budget is implemented accordingly to the value of the rule of law.[991] Therefore, the budgetary legal basis of the regulation is both, an advantage – as it is legally rock solid – and a detriment, as it does not allow the regulation to remedy breaches of the rule of law as such.

Further, the Court of Justice highlighted that the EU must be able to defend the values on which it is based. Most importantly, the Court of Justice highlighted that "compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede

[988] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)*.
[989] *Regulation (2020/2092) on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) (16 December 2020)*.
[990] John Morijn, *A Closing of Ranks: 5 key moments in the hearing in Cases C-156/21 and C-157/21 (14 October 2021)* (VerfBlog 2021).
[991] *Poland v Parliament and Council (C-157/21)* European Court Reports Court of Justice of the European Union para 129.

to the European Union and which it may disregard after accession."[992] The Court of Justice, therefore, affirmed that the EU might act – in the present case in the form of financial conditionality – to safeguard compliance with the Copenhagen Criteria even after a Member State has acceded to the EU.[993]

Finally, the Court of Justice highlighted that the EU's budget is one of the main instruments giving effect to the principle of solidarity in the EU. Implementing that principle through the EU's budget would be seriously undermined if breaches of the rule of law are committed in the Member States when utilising EU funds. Therefore, and to uphold the objectives pursued by the EU, a horizontal Conditionality Regulation "is capable of falling within the power conferred by the Treaties on the European Union to establish 'financial rules' relating to the implementation of the Union budget."[994] Thus, to ensure that the principle of solidarity is upheld at the implementation of the budget, the EU has the competence to enact policy instruments such as the Conditionality Regulation.

3.2 Compatibility with Article 7 TEU

After affirming the correct legal basis of the regulation, the second question that the Court of Justice had to answer was whether the regulation was compatible with the Article 7 TEU procedure. Another complaint was that the Conditionality Regulation circumvents the Article 7 TEU procedure. The complaint by Hungary and Poland aimed towards a demonstration that the EU acted outside its competence and created a parallel mechanism to Article 7 TEU. However, the Court of Justice rejected that argument and highlighted that both procedures have different aims, functions, and themes. While Article 7 TEU aims to penalise breaches of the values of the EU, Regulation 2020/2092 aims to protect the EU's budget. Finally, the Court of Justice stressed that the supervision function of the EU via this instrument extends only to situations in which the Member State implements the EU budget. Therefore, the regulation does not go beyond the limits of the powers conferred on the EU and both Member States "cannot claim that only Article 7 TEU allows them to be examined by the EU institutions.[995] The Court, thus, establishes a second avenue of Member States scrutiny against the value of

[992] Ibid.
[993] *European Council in Copenhagen (June 21-22, 1993), Conclusions of the Presidency*.
[994] *Poland v Parliament and Council (C-157/21)* para. 140.
[995] Ibid.

the rule of law enshrined in Article 2 TEU. First, via Article 7 TEU, and second, via the Conditionality Regulation.

3.3 Compatibility with National Identity and Equality between Member States

After affirming the correct legal basis and the compatibility with the Article 7 TEU procedure, the Court of Justice had to answer whether the regulation complies with the principle of national identity and the principle of equality between the Member States, both enshrined in Article 4 (2) TEU. Hungary and Poland claimed that the Conditionality Regulation violates the equality of Member States under Article 4 (2) TEU. Most notably, Poland argued that the regulation would infringe on the principle of equal treatment of Member States, as smaller and medium-sized Member States would be disadvantaged compared with larger States during the regulation's voting process. Furthermore, they claimed that such an inequity arises as the measures under the regulation must be passed by a qualified majority of the Council, i.e., at least 15 Member States representing at least 65% of the EU's population.[996]

However, the Court of Justice dismissed the challenge by distinguishing between the legitimacy of QMV for the adoption of normative acts which affect all Member States and penalizing measures affecting one Member State. In line with the Advocate General's reasoning, the Court of Justice noted that Article 16 TEU, which establishes QMV as the standard in Council proceedings, is not specific to the procedure established in the regulation and is "fully compatible with the choices made by the authors of the Treaties."[997] Therefore, the Court of approved the procedural features of the regulation.

3.4 Requirements of Legal Certainty and Proportionality

Finally, the Court of Justice had left open the question of whether the Conditionality Regulation in its current form complies with the principles of legal certainty and proportionality. Both applicant states raised several concerns regarding the regulation's compliance with the principle of legal certainty. Most notably, the Polish government disputed the regulation's proposed definition of the rule of law in Article 2(a) of the regulation. They argued that, as a

[996] Ibid.
[997] Ibid.

matter of principle, it is inappropriate for the regulation to bind Member States to a universal definition of the rule of law as the precise definition of this concept can differ from Member State to Member State. Furthermore, The Polish government argued that Article 2(a) of the regulation unduly extends the scope of the rule of law value under Article 2 TEU. Here, the Polish government insisted on a shallow definition of the rule of law and was eager to prevent a thicker formulation of this EU value from emerging.

However, the Court of Justice rejected this view and reiterated that Article 2(a) of the regulation is not intended to "define that concept exhaustively" but is limited to the regulation to protect the EU's budget.[998] Furthermore, the Court stated that the principles listed in Article 2(a) do not overstep the limits of the rule of law definition, as these principles are axiomatic to understanding the rule of law. The Court explained that "[...] it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value."[999] This statement undoubtedly implied that discriminatory policies adopted by both Poland and Hungary are undeniably contrary to the value of the rule of law in the EU.

[998] Ibid.
[999] Ibid.

4. Conclusion

> *"The facts are undisputed. We all know how the rule of law situation has been deteriorating for too long, not only in Hungary and Poland but also in some other Member States. We finally need to use the best tool we have to prevent EU money from sponsoring autocrats."*[1000]

Chapter 5 focused on the financial dimension of the rule of law crisis in the EU. 2020 marked the introduction of rule of law conditionality into EU law as an instrument to counter the rule of law backsliding in the Member States. This development presented a shift in the EU's approach to rule of law backsliding Member States. While the EU previously sought to counter backsliding via judicial or political instruments, rule of law conditionality represents a new enforcement dimension. Moreover, it signifies a new oversight power for the Commission and a competence shift towards Brussels. For the first time, the EU can restrict funding to Member States in case of rule of law deficiencies. Potentially, this could mark a new step in European integration. This conclusive section will evaluate these developments and highlight the following three findings: the rise of conditionality in the EU, the contentious adoption of the Conditionality Regulation and the judicial requirements of rule of law conditionality in the EU.

First, the rule of law Conditionality Regulation marked the peak of the rise of conditionality policies within the EU. Internal conditionality expanded from agricultural and monetary policy to accession, enlargement, and neighbourhood policy. From 2014 onwards, the EU has begun to tie the disbursement of budgetary funds to conditionality requirements. In 2020, the EU deepened budget conditionality to include EU values such as the rule of law. Amid ongoing rule of law challenges in Hungary and Poland, this development has resulted in introducing a rule of law conditionality mechanism established in Regulation 2020/2092. The rule of law Conditionality Regulation represents a new conditionality dimension in the rule of law crisis and an answer to the impracticality of other rule of law instruments such as the Article 7 TEU procedure and the Article 258 TFEU standard treaty enforcement procedure.

[1000] MEP and co-rapporteur for the Conditionality Regulation Petri Sarvamaa during a debate in the European Plenary on 16 February 2022. See Petri Sarvamaa, *Rule of Law: ECJ has removed last obstacle to application of the Conditionality mechanism* (European Parliament Press Office 2022).

Moreover, the rise of rule of law conditionality in the EU can be understood as a response to the evolving challenges and complexities faced by the EU in ensuring compliance with its core values and principles by the Member States. When the CEE countries sought to join the EU in the 2000s, accession negotiations and eventual membership were conditional upon meeting a set of political and economic standards known as the Copenhagen criteria. These criteria included requirements related to the rule of law, democracy, human rights, and a functioning market economy. However, the rule of law crisis in Hungary and Poland showed that rule of law standards at the time of accession were insufficient. Therefore, the EU has moved from conditionality at the time of accession to address issues within existing Member States – such as democratic backsliding and breaches of the rule of law in Hungary and Poland. As the EU continues to face new challenges, conditionality will likely remain a prominent feature of its governance and enforcement mechanism.

Second, adopting the rule of law conditionality mechanism while promoting the rule of law within the Member States painted a worrying picture of the institutional rule of law. The Council Conclusions of December 2020 are the focal point of this development. The December Council Conclusions are highly contentious and could set a precedent for institutional rule of law violations. According to the Treaty, the European Council shall give broad directions to the European polity project. However, in this case, the conclusions entail precise rules for applying a specific regulation. Therefore, they put the Commission on the horns of a dilemma. The Commission decided to follow the Council Conclusions, thus dishonouring its obligation to act as guardian of the Treaties. Overall, the declaratory Council Conclusions set a dangerous precedent for intergovernmental overreach in the rule of law crisis and the deficiencies of the current institutional set-up of the EU.[1001]

Moreover, there is a lack of institutional reflection on whether conditionality will genuinely bring relief to the rule of law violations in the Member States. This is problematic from two points of view. First, there is no institutional reflection on which competence boundaries exist for conditionality and whether a competence creep via conditionality could emerge.[1002] Secondly, there are no studies nor empirical data on the effectiveness of conditionality in the EU. “EU institutions seemingly have continued to almost blindly trust conditionality with little

[1001] Alemanno and Chamon (n 570), and Scheppele (n 432), Pech and Platon (n 135).
[1002] See, for example, Fisicaro (n 852).

reflection on whether and what limits may exist, or even on the real effectiveness of conditionality."[1003] For the future, the EU is well advised to evaluate the effectiveness of conditionality closely and to follow the constitutional guardrails set by the Court of Justice in its judgments.

Third, the Court of Justice has defined constitutional guardrails for using rule of law conditionality in the EU. The Court of Justice established judicial requirements for the use of rule of law conditionality in its judgments on the Polish and Hungarian challenge of the regulation. [1004] Four main findings stick out. First, the Court of Justice affirmed the budgetary, legal basis under Article 322 (1) TFEU – the EU's budgetary competence. This legal basis requires 'a sufficiently direct link' to the EU budget to apply the regulation. Second, the Court of Justice affirmed the compatibility of the mechanism with Article 7 TEU – the political rule of law procedure. The Court of Justice held that there is no exclusivity of the Article 7 TEU procedure regarding rule of law violations in the Member States. Third, the mechanism complies with the principle of national identity and equality between the Member States. Fourth and finally, measures under the mechanism must fulfil the requirements of legal certainty and proportionality. With its two judgments, the Court of Justice defined legal guardrails, which will be essential for the future use of rule of law conditionality in the EU.

From a judicial perspective, the Court of Justice has set the first guideposts for the further use of rule of law conditionality in the EU. Moreover, the Court of Justice used strong constitutional language to underpin the legality of the Conditionality Regulation and confirmed that enacting rule of law conditionality is within the EU competencies. The Conditionality Regulation goes along with a new level of constitutional oversight over Member States exercised by the Commission. Therefore, the judgments present essential findings over the boundaries of EU competencies and point towards a power shift towards the EU institutions.

[1003] Baraggia and Bonelli (n 823) p. 145.
[1004] *Hungary and Poland v Parliament and Council (C-156/21 and C-157/21)*.

Chapter 6: Comparative Perspective: Conditional Spending in the U.S.

> *"Commonly known as the Spending Clause, Article I, Section 8, Clause 1 of the U.S. Constitution has been widely recognised as providing the federal government with the legal authority to offer federal grant funds to states and localities that are contingent on the recipients engaging in, or refraining from, certain activities."*[1005]

This quote by Brian Yeh highlights the constitutional foundations of the U.S. conditional spending doctrine. Conditional spending, or conditionality, provides an alternative form of public power and authority for a federal legal system to exercise authority in areas it could otherwise not.[1006] As Chapter 5 has shown, the EU desperately needed new enforcement mechanisms to safeguard the rule of law within the Member States. Across the Atlantic, conditionality, or conditional spending as it is known in the U.S., is a long-standing instrument for ensuring federal policy objectives in the federated states. Chapter 6 will take it into focus.

Chapter 6 – Comparative Perspective: Conditional Spending in the U.S. – analyses the U.S. experience with conditional spending.[1007] It will analyse the application of conditional spending in the U.S. to contrast it with the EU. Specifically, the application, success and boundaries of conditional spending will be contrasted with the Commission's approach of using conditionality to safeguard the rule of law in the Member States. Historically, conditionality has been a popular instrument in diplomacy, international law, and federal systems.[1008] Chapter 6 analyses the application of conditional spending in the U.S. federal legal system and compares it with the emerging application of conditionality in the EU.[1009] In both legal systems, conditionality is often linked to financial and economic benefits and, therefore,

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[1005] Brain T. Yeh, *The Federal Government's Authority to Impose Conditions on Grant Funds* (Congressional Research Service (CRS) Report, 2017) Summary.
[1006] Cf. Baraggia and Bonelli (n 823).
[1007] This chapter will not analyse the use of conditionality through the Taxing Power in the U.S. legal system. In comparing financial conditionality in the EU and the U.S., the spending-based side of conditionality is more suitable comparator as the EU currently cannot lay and collect taxes. Therefore, the EU cannot use tax-based conditionality, and a comparison to the U.S. makes less sense. For conditionality exercised via the Taxing Power in the U.S., see Ruth Mason, 'Federalism and the Taxing Power' Vol. 99 California Law Review pp. 975, and Gale Ann Norton, 'The Limitless Federal Taxing Power' Vol. 8 Harvard Journal of Law and Public Policy pp. 591.
[1008] See, for example, Sarah L. Babb and Bruce G. Carruthers, 'Conditionality: Forms, Function, and History' Vol. 4 Annual Review of Law and Social Sciences pp. 13.
[1009] In contrast to Chapter 2 and Chapter 4, Chapter 6 will already include comparative views on the EU (not just in the Part III Conclusion). As Chapter 6 and the analysis of conditional spending represent an instrument currently emerging in the EU, including comparative views already in the chapter is beneficial for the reader.

to the *power of the purse* of the federal legislator. Thus, the term conditionality describes a wide array of mechanisms to convince agents (i.e., composite states) into compliance. Primarily via financial means, however, not limited to it.[1010]

In the U.S., conditional spending is a well-known legal instrument for ensuring the implementation of policies in the federated states. The U.S. federal government has used conditional spending to protect several transformative policies in the states, ranging from social to economic to administrative reforms. "Conditions have […] supported desegregation in education and labour market, have established a national uniform highway speed limit, have persuaded states to adopt […] minimum drinking age, have facilitated military recruitment in colleges, have contributed to the establishment of a politically independent civil service at the state level and have promoted legislation on minimum wage and overtime pay in federally funded activities."[1011] Thus, the U.S. federal government uses conditional spending in many policy areas to ensure policy implementation in the federated states. However, conditional spending has not been unchallenged, leading to numerous cases before the Supreme Court. Chapter 6 will study the judicial requirements of conditional spending in the U.S. legal system to better understand the prospects of conditionality in the EU.

As the previous Chapter 5 has shown, Regulation 2020/2092 marked the dawn of rule of law conditionality in the EU. However, Poland and Hungary immediately challenged the regulation after its introduction in 2021.[1012] In his Opinion, AG Sánchez-Bardona argued in favour of the regulation and stressed that the EU legislature remained within its conferred powers when it implemented rule of law conditionality.[1013] In his Opinion, he took specific inspiration from the U.S. legal order and hinted at the successful application of conditional spending in the U.S. "In the United States, federal institutions have used financial conditionality in their relations with the federated states and local authorities in order to make the grant of funds from the federal budget conditional on acceptance of a prohibition on racial segregation in education and the workplace, the introduction of a minimum wage, the establishment of an independent

[1010] Conditionality can also grant political benefits. See, for example, Karen E. Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' Vol. 3 European Foreign Affairs Review pp. 253.
[1011] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 1.
[1012] See Makszimov (n 939).
[1013] Jennifer Rankin, 'ECJ adviser backs rule-of-law measure in blow to Poland and Hungary (2 December 2021)' *The Guardian* (London, United Kingdom) <https://www.theguardian.com/law/2021/dec/02/ecj-adviser-backs-rule-of-law-measure-in-blow-to-poland-and-hungary>.

public state administration [the Hatch Act], or the imposition of a national speed limit on motorways, […]."[1014] Chapter 6 will investigate whether the U.S. experience with conditional spending can serve as a guidepost for the EU.

Historically, the U.S. founding fathers did not include coercive power for the federal government in the U.S. Constitution.[1015] Two centennials later, in the 20th century, the U.S. federal government discovered the powers of the Spending Clause of the U.S. Constitution to nudge states into compliance. However, conditional spending operates in a changing legal landscape. The recent developments in the U.S. with *NFIB v. Sebelius* highlighted that. Nonetheless, there are various areas in which the federal government uses conditional spending. "Conditional spending, […], is a staple of U.S. federalism. It is how the federal government gets all fifty states to maintain a national drinking age, […], it is how the federal government gets the states to maintain certain educational standards, […], it is how the federal government in the Hatch Act prohibits state employees who work on federally financed programs from engaging in political activity that may cause corruption."[1016] Halberstam has highlighted many areas in which the federal government uses conditional spending to ensure legal standards in the states. Therefore, he argues for a broader application of conditionality in the EU by learning from the U.S. experience.[1017]

To analyse conditional spending in the U.S., Chapter 6 is structured as follows. First, it will analyse the legislative history of conditional spending in the U.S. to provide an overview of the legal foundations of the U.S. legal system. Second, it will examine the legal basis of conditional spending in the U.S. Third, it will study the judicial requirements of conditional spending as defined by the Supreme Court. Finally, the conclusive section will provide an outlook on the prospects of conditional spending as an instrument to uphold the rule of law in federal legal systems drawing from the U.S. example.

[1014] *Hungary v Parliament and Council (C-156/21) (Opinion of the Advocate General Sánchez-Bordona)* European Court Reports Court of Justice of the European Union Footnote 62.
[1015] Cf. Pohjankoski (n 50).
[1016] Halberstam, *Rule of Law in Europe: A Conversation with Daniel Halberstam and Paul Nemitz*.
[1017] See Halberstam and Schröder (n 389).

1. The Legislative History of Conditional Spending

The legislative history of conditional spending instruments in the US is inherently connected to the Spending Clause of the U.S. Constitution. While the Spending Clause is one of the most potent instruments in the U.S. Constitution, the exact meaning and competencies included in the clause were fiercely debated among the founding fathers, specifically between Alexander Hamilton and James Madison.[1018] "The evolution of conditional spending in the U.S. legal system is closely related to the debate on the scope of federal spending power. The debate goes back to the founding years of the U.S. federation and the intellectual dispute [between] Hamilton and Madison."[1019] While the first Secretary of the Treasury Alexander Hamilton argued that the clause should be interpreted widely, James Madison argued for a narrow interpretation. "While Madison fiercely believed that federal spending must be narrowly construed in subordination of the explicitly enumerated federal legislative powers. […] Hamilton argued that spending should be read in autonomous terms [from] the legislative powers, allowing the federal government enough flexibility to support economic growth and to address the 'exigencies' of the time."[1020] According, to the Supreme Court case-law, the balance is currently on Hamilton's side, allowing the U.S. federal government vast spending powers with minor limitations attached.[1021]

In her study on conditional spending in the U.S. legal system, Vita characterises the rise of conditional spending in the U.S. in four different stages ranging from the 19th century until today. Those stages are described as the following: first, a development stage (1862 – to the 1920s) in which the concept of conditional spending debuted in the U.S.'s legislative toolbox. Second, an experimentation stage in which the federal legislator experimented with different forms of conditional spending (the 1930s – 1950s). Third, an expansion stage, accompanying the Civil Rights Revolution (the 1960s – 1970s). Moreover, fourth and finally, a consolidation stage in which conditional spending was fully consolidated in the U.S. federal legal system (the

[1018] Cf. Klarman (n 660).
[1019] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 8.
[1020] Ibid.
[1021] *National Federation of Independent Business v. Sebelius (2012)* United States Reports Supreme Court of the United States.

1980s – 2020s).[1022] The following section will follow this classification to provide an overview of conditional spending in the U.S. legislative history.

[1022] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 8.

1.1 The Development Phase

The first stage in the rise of conditional spending in the U.S. lasted from 1862 to the 1920s. It can be characterised as the development stage.[1023] During this stage, the U.S. legislator first developed the concept of conditional spending. The critical legislative acts of this stage are the Morril Acts of 1862[1024] and 1890.[1025] The Morrill Land-Grant Act of 1862, signed into law by President Abraham Lincoln, allowed for the creation of land-grant colleges in the U.S. states by using the income from the sales of federally owned land. Those lands were often obtained from indigenous tribes through Treaty, cession, or seizure. Those lands were then allocated to educational facilities under the condition that those facilities would provide militarily and technical training to the students. "The program allocated land grants to state educational institutions and conditioned the latter to provide military instruction to the young people attending the establishment."[1026] Therefore, the first conditional spending mechanism in the U.S. must be seen in the context of the U.S. civil war (1861 – 1865), which sparked a militarisation of the U.S. society and required a more technically and militarily educated workforce. As a result, a renewed version of the act came into force in 1890 as the Morrill Act of 1890 or the Agricultural College Act of 1890. Its primary aim was to boost technical engineering in the U.S. by requiring colleges that would profit from the grant to offer engineering degrees. The act also conditioned "that African Americans were to be included in the United States Land-Grant University Higher Education System without discrimination."[1027] The Morril Act of 1890 helped the U.S. become a worldwide technological leader. By 1911, 3,000 engineers graduated yearly in the U.S., with 38,000 in the workforce. At the same time, the industrial leader in Europe, Germany, was graduating only 1,800 engineers yearly.[1028] Thus, the Morril Acts helped the U.S. become a technical education leader and powered the U.S. economy in the 19th century.

[1023] Cf. Ibid.
[1024] *Morrill Act of 1862* (United States Congress 1862).
[1025] *Morrill Act of 1890 (or Agricultural College Act of 1890)* (United States Congress 1890).
[1026] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 8.
[1027] Alabama A&M University, 'Morill Act of 1890' (*Alabama A&M University*, 2022) <https://www.aamu.edu/about/our-history/morril-act-1890.html>.
[1028] See Daniel E. Williams, 'Morrill Act's Contribution to Engineering's Foundation' Spring 2009 The Bent of Tau Beta Pi pp. 1.

1.2 The Experimentation Phase

The second stage of conditional spending in the U.S. was triggered by the Great Depression of 1930 and, subsequently, the New Deal policies, which would reform many areas of the U.S. society and the work environment.[1029] It can be described as the experimentation stage in the rise of conditional spending in the U.S.[1030] The two most prominent federal laws that relied on conditional spending to provide state and local governments with financial incentives were the Davis-Bacon Act of 1931[1031] and the Hatch Act of 1940.[1032] "The most notorious conditions of the period remain the Davis-Bacon Act of the 1931 and the Hatch Act of 1940, establishing a wage floor for employees of federally funded programs and requiring that state administrators of federal grants refrain from partisan political activities, respectively."[1033] The former, signed by President Herbert Hoover, requires contractors to pay the local prevailing wages on public works projects for labourers and mechanics. It generally applies to "contractors and subcontractors performing on federal and federally assisted contracts in excess of $2,000 for construction, alteration, or repair […]."[1034] The latter, signed into law by U.S. President Franklin D. Roosevelt, required that civil service employees in the federal government's executive branch abstain from engaging in political activity. Therefore, the Hatch Act "seeks to balance the government's interest in an efficient and impartial workforce with employees' rights to participate in the political process."[1035] Thus, the Hatch Act ensured the independence and non-partisan of civil servants in the U.S. Finally, the Hatch Act is a potent conditional spending mechanism seeking to ensure the independence of state officials and ultimately to protect the rule of law on the state level. The federal legislator applies it to the present day to ensure political independence at the state level.

[1029] The Great Depression was a severe and prolonged economic downturn that took place during the 1930s, primarily in the U.S. but also affecting many other countries around the world. It was a period marked by widespread unemployment, poverty, financial crisis, and a sharp decline in economic activity; the New Deal refers to a series of domestic programs and policies implemented by U.S. President Franklin D. Roosevelt during the 1930s in response to the economic challenges of the Great Depression. The New Deal aimed to address the widespread unemployment, poverty, and economic instability that had resulted from the financial crisis of the late 1920s and early 1930s. The New Deal encompassed a wide range of initiatives and reforms aimed at providing relief, recovery, and reform.

[1030] Cf. Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 8.

[1031] *Davis–Bacon Act of 1931* (United States Congress 1931).

[1032] *Hatch Act of 1939, An Act to Prevent Pernicious Political Activities* (United States Congress 1939)

[1033] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 9.

[1034] *Employment Law Guide - Federal Contracts - Working Conditions: Prevailing Wages in Construction Contracts* (United States Department of Labor 2016).

[1035] Whitney K. Novak, *The Hatch Act: A Primer* (Congressional Research Service (CRS) Report, 2020).

1.3 The Expansion Phase

The third stage of the rise of conditional spending in the U.S. legal system is characterised by the legislative efforts of the Lyndon B. Johnson Administration in the context of the Civil Rights Revolution of the 1960s. It can be described as the expansion stage of the rise of conditional spending in the U.S.[1036] The conditioned funding was designed to support the Civil Rights Acts of the 1960s around issues such as non-discrimination, the inclusion of disabled persons, alcohol and drug abuse prevention, environmental protection, economic advancement, health and human safety, minority participation and labour standards, including minimum wage requirements. Three legislative acts stand out in this regard. First, the Elementary and Secondary Education Act (ESEA) of 1965 provided federal funding to primary and secondary education facilities on the student and teacher performance conditions.[1037] The act mandated funds "for professional development, instructional materials, resources to support educational programs, and the promotion of parental involvement. […] The government has reauthorised the act every five years […]. In the course of these reauthorisations, a variety of revisions and amendments have been introduced."[1038] Since its enactment, the ESEA, with its conditional funding for educational institutions, remains a cornerstone of the U.S. educational system. Second, the Highway Beautification Act of 1965 provided federal funding for the repair and beautification of highways upon the condition of the prohibition of highway banners.[1039] The act "[…] called for control of outdoor advertising, including removal of certain types of signs, along the nation's growing Interstate Highway System and the existing federal-aid primary highway system. It also required certain junkyards along Interstate or primary highways to be removed or screened and encouraged scenic enhancement and roadside development."[1040] Third, the Highway Energy Conservation Act of 1975, signed into law by President Richard Nixon, provided federal funding for highways upon the condition of imposing a speed limit of 55 miles per hour.[1041] The act, introduced to reduce energy consumption in light of the global oil crisis of 1973, proved to be a powerful conditional spending mechanism within the U.S.

[1036] Cf. Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?'.
[1037] *Elementary and Secondary Education Act (ESEA) of 1965* (United States Congress 1965).
[1038] Catherine A. Paul, 'Elementary and Secondary Education Act of 1965' Social Welfare History Project <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/>
[1039] *Highway Beautification Act (HBA) of 1965* (United States Congress 1965).
[1040] *How the Highway Beautification Act Became a Law* (US Department of Transportation 2022).
[1041] *Emergency Highway Energy Conservation Act of 1975* (United States Congress 1975).

However, Congress repealed the act in 1995 and fully returned the speed limit-setting authority to the individual states.[1042]

1.4 The Consolidation Phase

The fourth and final stage of the rise of conditional spending in the U.S. commenced in the 1980s and lasts until today. It comprised policies under the Reagan, Clinton, Bush, Obama, and Trump administrations. Notably, three of those administrations were Republican, while two were Democratic led. However, all administrations continued to use conditional spending in their policies. Therefore, it becomes increasingly clear that using conditional spending as a legal instrument is a non-partisan phenomenon in the U.S. The empirical work of Paul Posner on coercive federalism supports that argument.[1043] "While the substantive policy goals of conditions may change from conservative to progressive ends, the strategy of using conditional spending to induce state behavior in line with federal preferences was rarely questioned."[1044] The use of conditional spending is, therefore, a bipartisan phenomenon and crystallises as an essential feature of the U.S. federal legal system.

Despite the credo of deregulation of the Republican-led Ronald Reagan Administration, conditional funding did not decrease during that time.[1045] Therefore, the Reagan Administration consolidated conditional funding in the U.S. legal system. The most famous and politicised act based on conditional spending during the Reagan Administration was most likely the National Minimum Drinking Age Act of 1984.[1046] The act "[…] instructed the federal government to withhold about five per cent (now ten percent) of highway grants from states allowing possession or consumption of alcohol at a lower age than 21."[1047] Despite its name, the act did not outlaw the consumption of alcohol by people under 21 years of age. It outlawed just the purchase of alcohol. The state of South Dakota challenged the act in *South Dakota v.*

[1042] Senator John Warner, *The National Highway System Designation Act of 1995* (1995).
[1043] See Paul Posner, 'Mandates: The Politics of Coercive Federalism' in Timothy J. Conlan, Paul L. Posner and Alice M. Rivlin (eds), *Intergovernmental Management for the 21st Century* (Brookings Institution Press 2008).
[1044] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' P. 9.
[1045] See Posner, and Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Brookings Institution Press 1998).
[1046] *National Minimum Drinking Age Act of 1984* (United States Congress 1984).
[1047] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 9.

Dole. In 1987, the Supreme Court upheld it as constitutional by giving the federal government a wide leeway of using conditional spending policies.[1048]

Under the Democratic-led Clinton Administration in the 1990s, the conditions of spending were consolidated around educational policies. The Clinton Administration built upon the efforts of the Johnson Administration with the ESEA of 1965. Through the Educate America Act (EAA) of 1994, the Administration enacted the school performance conditions.[1049] Those conditions subjected low-performing schools receiving federal funding to a set of comprehensive education performance results and outcomes. The reform further federalised education policy in the U.S. and limited the state's power in that area.[1050]

The Republican-led Bush II Administration continued using conditional mechanisms to coerce states into specific policies.[1051] Particularly interesting is a further reform based on conditional spending in the educational area, the No Child Left Behind Act (NCLB) of 2001.[1052] This act further developed the educational criteria established with the EAA in 2000. To receive federal school funding, states had to give these assessments to all students at select grade levels. Additionally, the Administration established the Help America Vote Act (HAVA) of 2002, which established that all states and localities must upgrade their election procedures, including their voting machines, registration processes and poll worker training.[1053] Finally, conditional spending also entered domestic security policy after the 9/11 terrorist attacks. "The post-9/11 reform agenda facilitated the establishment of novel conditions of spending deployed through security and emergency preparedness directives."[1054] Conditional spending, therefore, entered a new policy field during the Bush II Administration.

The Democratic-led Obama Administration continued the consolidation of conditional spending policies on the federal level. Specifically in the areas of education and healthcare. For example, in education, the founding of colleges was made conditional upon LGBTQ inclusion.

[1048] *South Dakota v Dole (1987)*.
[1049] *Educate America Act (EAA) of 2000* (United States Congress 2000).
[1050] See Michael Heise, 'Goals 2000: Educate America Act: The Federalization and Legislation of Educational Policy' Vol. 63 Fordham Law Review pp. 345, and Susan H. Fuhrman, 'Clinton's Education Policy and Intergovernmental Relations in the 1990s' Vol. 24 Publius pp. 83.
[1051] See Paul Posner, 'The Politics of Coercive Federalism in the Bush Era' Vol. 37 Publius pp. 390.
[1052] *No Child Left Behind Act (NCLB) of 2001* (United States Congress 2001).
[1053] *Help America Vote Act (HAVA) of 2002* (United States Congress 2002).
[1054] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 10.

"Conditions in education included a broader interpretation of Title IX non-discrimination conditions in education as to include transgender students and combat sexual assault on campus."[1055] In healthcare, the most sweeping conditional spending-based legislation was passed, the Affordable Care Act (ACA) or Obamacare.[1056] The ACA required states to participate in the law's Medicaid expansion and established a powerful conditional spending mechanism. The ACA was subsequently challenged in *NFIB v. Sebelius* before the U.S. Supreme Court.[1057]

The Republican-led Trump Administration shifted the policy goals of the conditional spending policies but maintained them as a powerful mechanism to nudge states into specific behaviour. "[T]he substantive scope of conditions has shifted from progressive to conservative policy goals, yet the use of conditions is actively continued."[1058] Specifically, around the subject of immigration, the Trump Administration created a conditional spending mechanism on the federal level, which made funding for the states subject to active participation in federal immigration enforcement.[1059] This measure, enacted via the President's Executive Order, targeted democratic states with a national border.[1060]

Lastly, even under the Democratic-led Biden Administration the application of conditional spending was reenforced. "The federal act sponsored by President Joe Biden to rescue the US economy and rebuild it in response to the COVID-19 pandemic - the American Rescue Plan Act of 2021 - established among others an ad hoc fund worth 350bn dollars (i.e. just below roughly half the value of NGEU) to support states and local authorities: the so-called 'Coronavirus State and Local Fiscal Recovery Fund'."[1061] However, these funds are subject to a stringent set of conditions as clarified by the U.S. Department of Treasury. "[…], the states and local authorities receiving federal money have to spend the resources for specific objectives - including fighting the pandemic and supporting families and businesses struggling with its public health and economic impacts, and maintaining vital public services, even amid

[1055] Ibid.
[1056] *Affordable Care Act (ACA) of 2010* (United States Congress 2010).
[1057] *National Federation of Independent Business v. Sebelius (2012)*.
[1058] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 11.
[1059] See Peter Margulies, 'Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement' Vol. 75 Washington and Lee Law Review.
[1060] *Executive Order 13768 "Enhancing Public Safety in the Interior of the United States"* (Executive Office of the President 2017).
[1061] Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences'.

declines in revenue resulting from the crisis - and are subject to clear reporting and accounting duties."[1062] The system is, therefore, similar to the NGEU established in the EU. In the aftermath of the COVID-19 pandemic, both legal systems opted for similar conditional spending policies.

To conclude, conditional spending has undergone different evolutionary stages to arrive at its current extensive application in the U.S. federal legal system. Starting as an instrument to promote land-grant colleges in the states, it has become the go-to instrument for Congress to enforce policies in the states in areas with limited federal competencies. Therefore, conditional spending has proven to be a vital instrument to strengthen the federal fabric of the U.S. legal system. "In spite of wide constitutional debates on the use of conditions, these have been employed in a sustained manner by both progressive and conservative governments to achieve important policy goals, especially when alternative tools proved insufficient."[1063] Hence, the legislative history of conditional spending in the U.S. provides a success story of how conditional spending has changed and improved numerous policy areas in the states. However, it has never been used explicitly to uphold the rule of law in the states. This is the case in the EU. In the EU, conditionality is relatively new instrument, used in similar but different manner as in the U.S. Similarities are identifiable, albeit conditionality as a legal instrument has a much shorter history in the EU. However, also in the EU, a rise of conditionality through time (from the 1990s to the 2020s) can be identified. Moreover, also in the EU, conditionality is increasingly used in areas of shared or supporting competencies where the EU could otherwise not legislate. In the EU, the rise of conditionality finds its provisional peak in the Conditionality Regulation of 2020. In the US, regulatory and enforcement conditionalities constitute the bulk of federal conditionalities. In the EU, with the Conditionality Regulation, rule of law conditionality takes the lead. Therefore, rule of law conditionality is a specific feature which is unique to the EU legal system.

[1062] Ibid.
[1063] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 35.

2. The Legal Basis of Conditional Spending

The legal basis for conditional spending in the U.S. is Article I, Section 8, Clause 1 of the U.S. Constitution (the Spending Clause).[1064] The article is one of the most powerful within the U.S. Constitution. Scholars have called it "the heart and soul of the U.S. Constitution. It specifically enumerates the powers that the federal government is permitted to exercise."[1065] It gives Congress power to lay and collect taxes and to provide for the general welfare of the U.S. via all kinds of policies and expenditures.

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"[1066]

This so-called *power of the purse* is one of the most potent instruments that Congress has at its disposal to ensure that federal policies are abided by the states in areas outside the federal government's competence. "As [it] is well known in federal systems, […] the use of conditionality produces an almost inevitable expansion of central intervention, in the sense that it is always the central level of government who uses conditionality to influence the behaviour and the policies of the other levels of government."[1067] As conditional spending is a powerful but also contentious instrument, the federated states have litigated in several instances against it. Most notably, in cases in which the states felt that conditional spending would overstep the boundaries of the federal legislator and coerce them to follow a specific policy. In the U.S., the Supreme Court, in several judgments, defined the powers and limits of the Spending Clause.

However, one caveat to the power of the purse and the application of conditional spending in the U.S. is the Tenth Amendment to the U.S. Constitution. Halberstam has pointed out that "[…] there are sensible limits in federal systems to the Union's purchase of component states compliance in domains otherwise beyond the enumerated powers of the Union."[1068] In the U.S.,

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[1064] NB: This section will not analyse the legal basis of the Taxing Power in the U.S. Constitution (Article I, Section 8) as there is currently no valid comparator in the EU legal system.
[1065] Beeman (n 316) p. 32.
[1066] *The Constitution of the United States of America* Article I.
[1067] Baraggia and Bonelli (n 823) p. 151.
[1068] Halberstam, *Rule of Law in Europe: A Conversation with Daniel Halberstam and Paul Nemitz*.

the Tenth Amendment encapsulates such a sensible limit. The Tenth Amendment states the following.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1069]

The Tenth Amendment, therefore, enshrines the principle of subsidiarity into U.S. constitutional law. It requires that the federal legislator respects the state's rights and autonomy. "The Supreme Court has interpreted the Tenth Amendment to prevent the federal government from 'commandeering' state governments, either by requiring them to enact laws that address particular problems or by compelling 'the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.'"[1070] However, while the federal government is barred from 'commandeering' state government, Congress can still use the power of the purse to condition federal funds. "Congress may condition the receipt of federal funds on state compliance with federal directives."[1071] The federal government, thus, walks a fine line between incentivising and commandeering states to adopt a specific policy.

Looking to the EU, the legal basis for conditionality policies is similar but different in detail. The EU's early conditionality instruments in the CAP, EMU and ESM were based on the legal bases deriving from the specific policy area. When it comes to enlargement and accession policy, the EU used Association Agreements (AA) and newly designed policy instruments to ensure conditionality (for example, the CVM). However, in both legal orders, the legal basis of conditionality instruments is generally rooted in the budgetary competence of the legislator. In the U.S., Article I, Section 8, Clause 1 of the U.S. Constitution provides the legal basis. Whereas in the EU, Chapter 4, Title II of the TFEU provides the legal basis for adopting budgetary instruments, among them the Conditionality Regulation. The U.S. legal basis is constitutionally broader as it gives the federal legislator full authority over federal spending. In the EU, different Treaty articles deal with budgetary provisions, Therefore, numerous articles provide potential competence to adopt conditionality instruments. The EU federal legislator chose Article 322 (1) TFEU for the rule of law conditionality mechanism as it is the

[1069] *The Constitution of the United States of America* Tenth Amendment.
[1070] Yeh (n 1004) p. 3.
[1071] Ibid.

broadest.[1072] Hence, while conditional spending in the U.S. is constitutionally broader, in both cases the budgetary competence provides the ultimate competence to condition federal money towards the states. In the EU, the EU legislator is hampered as it manoeuvres in the waters of exclusive, shared, and supportive competences and in the case of the Conditionality Regulation, around EU values. A sensitive area for Member States. Therefore, this competence is much more likely to be legally challenged by the Member States as seen in *Hungary v Parliament and Council (C-156/21)* and *Poland v Parliament and Council (C-157/21)*.[1073]

[1072] Cf. Łacny (n 875).
[1073] *Hungary v Parliament and Council (C-156/21)* European Court Reports Court of Justice of the European Union, and *Poland v Parliament and Council (C-157/21)* European Court Reports Court of Justice of the European Union.

3. Judicial Requirements of Conditional Spending

The Supreme Court has defined judicial requirements for the application of conditional spending in its case-law. The separation of powers doctrine between the federal government and the states played a crucial role in this.[1074] The U.S. Constitution defines the framework for the federal government's power to impose conditions on the states. The Supreme Court, based on constitutional principles, has established the standards for the application of conditional spending in the U.S. legal system. Generally, the federal government's application of conditional spending must respect the role and authority of the states in the federal system, and not unduly intrude on areas of traditional state authority. Specifically, the Supreme Court's case-law provides four conditions on the application of conditional spending in different contexts. Of course, these standards are open to interpretation and change over time depending on the Supreme Court's makeup and the political climate.[1075]

The Supreme Court's case-law on the conditional spending doctrine is abundant and dynamic. However, in several rulings since the 1980s, the Supreme Court has defined the boundaries of the application of conditional spending in the U.S. federal legal system. According to the case-law, four criteria must be considered to ensure the legality of the application of conditional spending regarding the disbursement of federal funds. The four criteria are the following: i) No ambiguity of the legal instrument, which requires that the legal instrument is clear and predictable in its measures and requirements; ii) the purpose of the instrument must be germane to the federal interest, and there must be a direct connection between the disbursement of funds and the purpose of the legislative instrument. This requirement is linked to the basic standards of federalism in the U.S.; iii) no violation of a constitutional provision, specifically not of the Tenth Amendment. This again, is related to the principles of federalism in the U.S., which require that all powers not delegate remain with the states; and iii) no coercive conditions, as they could amount to commandeering. Here, the Supreme Court established that conditional spending policies shall not amount to commandeering states, as they are independent in their

[1074] In the U.S., the separation of powers doctrine is a foundational principle, enshrined in the U.S. Constitution. It is essential to the U.S.'s system of government. The doctrine is designed to ensure that no single branch of government becomes too powerful and to provide a system of checks and balances that prevents the abuse of authority. For further reading see, for example, Edward H. Levi, 'Some Aspects of the Separation of Powers' Vol. 76 Columbia Law Review pp. 371 and Thomas W. Merrill, 'The Constitutional Principle of Separation of Powers' Vol. 1991 The Supreme Court Review.

[1075] See, for example, Freund, and Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, Princeton University Press 1998).

decision-making (the non-commandeering doctrine). The following section will look at these four legal requirements in detail and discuss them considering the leading case-law.

3.1 No Ambiguity (*Pennhurst State School v. Halderman*)

The first requirement, the Supreme Court defined for conditional spending in the U.S., is that the requirements to receive federal funds must be ambiguously set out. Yeh highlights that the Supreme Court stressed that requirements under a policy to receive federal grants must be ambiguously set out and easy to follow by the participating states. "Under the relevant Supreme Court precedents, federal grant conditions must be set forth unambiguously before a recipient enters into a grant agreement with the federal government."[1076] The leading case-law in which the Supreme Court established the requirement is *Pennhurst State School and Hospital v Halderman (1984).*[1077] In this decision, the Supreme Court highlighted that "[t]hough the Congress' power to legislate under the spending power is broad, it does not include surprising participating states with post-acceptance or 'retroactive' conditions."[1078] This legal doctrine became known as the *Pennhurst* criteria for federal conditional spending and has been cited by the Supreme Court in subsequent cases.

The Supreme Court's requirement of non-ambiguity is logical, as it would otherwise trap the federated states into commitments they did not sign up for. The non-ambiguity of laws is a requirement of the rule of law itself.[1079] Comparing this requirement to the judicial framework for conditionality in the EU, it becomes clear that the Court of Justice defined a similar criterion. In *Repubblika*, the Court of Justice found that Member States knew what they would sign up for when they joined the EU.[1080] Therefore, they are bound by the values of Article 2 TEU. Furthermore, one of the requirements in the EU acquis and additionally defined in the Copenhagen Criteria is the rule of law.[1081] Additionally, the Court of Justice affirmed in *Hungary v Parliament and Council (C-156/21)* that the clauses in the Conditionality Regulation are sufficiently clear and understandable to the Member States.[1082] Finally, the Member States may also seek direct contact with the Commission to verify whether they abide by the rule of law in a specific instance.

[1076] Yeh (n 1004) p. 7.
[1077] *Pennhurst State School and Hospital v Halderman (1984)* United States Reports Supreme Court of the United States.
[1078] Ibid.
[1079] Bingham (n 1).
[1080] *Repubblika v Il-Prim Ministru (C-896/19)*.
[1081] *European Council in Copenhagen (June 21-22, 1993), Conclusions of the Presidency*.
[1082] *Hungary v Parliament and Council (C-156/21)*.

3.2 Germane to the Federal Interest (*South Dakota v Dole*)

The second requirement of conditional spending, the Supreme Court defined in its case-law, related to the connection between the funds and the federal interest. The leading case-law on this requirement is *South Dakota v Dole (1987).* Justice Rehnquist's discussed and defined the relatedness criteria in his majority opinion. "The Dole case concerned the National Minimum Drinking Age Amendment of 1984, which authorised the Secretary of Transportation to withhold 5% of federal highway funds from states which permitted persons below 21 years of age to purchase alcohol."[1083] The question that the Supreme Court had to answer in *South Dakota v Dole* was whether Congress exceeded its spending powers or violated the Twenty-first Amendment by passing legislation conditioning the award of federal highway funds on the state's adoption of a uniform minimum drinking age.

Justice Rehnquist rejected the challenge by South Dakota of the missing relatedness and opined that conditioning a portion of a state's federal highway funds on its adoption of a minimum drinking age was permissible since it was "directly related to one of the main purposes for which highway funds are expanded – safe interstate travel."[1084] Justice O'Connor and Justice Brennan dissented by highlighting the missing link between the drinking age and highway construction. "Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a state's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[1085] This shows that the Supreme Court justices were of different opinion whether the federal legislator could go that far.

A similar requirement can also be found in the Court of Justice's case-law. In the EU, the Court of Justice has established a similar criterion between the funds' purpose and the federal instrument's conditions. Before the Court of Justice, Hungary and Poland argued that the Conditionality Regulation misses a direct link between the infringement of values and the disbursement of the funds under the EU's budgetary competence. The Court of Justice rejected that argument and emphasised the "sufficiently direct link" criterion in *Hungary v Parliament and Council.*[1086] According to the Court of Justice, it was necessary for the legality of the

[1083] Yeh (n 1004) p. 9.
[1084] *South Dakota v Dole (1987)*.
[1085] Ibid.
[1086] *Hungary v Parliament and Council (C-156/21)* European Court Reports Court of Justice of the European Union.

Conditionality Regulation that the EU legislator based the criteria for restricting funds on the direct and clear impact measures in the Member States have on the EU budget. Only if this direct link between Member States' measures and the EU budget is established, the Commission can propose withdrawing EU funds to the Council.

The similarities between the criteria in *South Dakota v Dole* and in *Hungary v Parliament and Council* and *Poland v Parliament and Council* are eye catching. Both seek to establish constitutional guardrails for the federal legislator's use of conditionality policies towards. "[…] the EU Court has institutionalised a 'sufficiently direct link' test, while the U.S. Supreme Court established the 'germaneness' criterion in *Dole* case [sic] to examine whether conditions are reasonably related to the federal interest in a given program."[1087] Both criteria, 'germaneness' and 'sufficiently direct link', are similar in the way that they seek to ensure a close link between spending and the cross-cutting condition. "[…] both EU and the US courts, have put in place judicial doctrines to ensure that a reasonably close link between spending and the cross-cutting condition exists."[1088] Vita argues that both criteria have proven weak judicial review criteria. They make it extremely difficult for the composite states to argue that a close link does not exist. "It is worth noting that both tests have proven little bite and credible constraint in practice."[1089] Overall, this shows that both apex courts establish a weak judicial review criteria for the federal legislator's use of conditionality policies. The Court of Justice's recent judgments on the Conditionality Regulation confirm this.[1090]

3.3 No Violation of Constitutional Provisions (*USAID v. Alliance for Open Society*)

The third requirement for conditional spending in the U.S., pronounced by the Supreme Court, is that the instrument may not violate any constitutional provision and does not lure states into violating a constitutional provision. The Supreme Court defined this criterion in the landmark judgments *South Dakota v Dole (1987)* and *United States Agency for International Development v. Alliance for Open Society (2013)*. The requirement sounds relatively clear from the outset, as no laws that do not comply with the U.S. Constitution can stand. However, the requirement is more specific since it requires the federal government not to induce states into

[1087] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 25.
[1088] Ibid.
[1089] Ibid.
[1090] *Hungary v Parliament and Council (C-156/21)*, and *Poland v Parliament and Council (C-157/21)*.

activities that would be unconstitutional. The Supreme Court gave an example in *Dole* that "for example, a grant of federal funds conditioned on invidiously discriminatory state action, or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power."[1091] This requirement is necessary to ensure that the U.S. Constitution is respected when implementing policies at the state level.

A mirrored requirement can be found in the EU context. Neither the EU institutions, nor the Member States are entitled to violate the Treaties. If this would happen, the Commission, as guardian of the Treaties, could initiate and infringement proceeding under Article 258 TFEU. Or even the Member States themselves could seek to an action for annulment under Article 263 TFEU against the Commission or any other EU Institution. Therefore, a procedural equality of arms exists in the EU. Likewise, the instrument of conditionality cannot be used if it would compel Member States to infringe upon the Treaties. It is instead the opposite; the Conditionality Regulation aims to ensure that Member States comply with and respect the Treaties. Therefore, also this requirement of the Supreme Court can analogously be found in the EU.

3.4 No Coercive Conditions (*New York v. U.S., Printz v. U.S., NFIB v Sebelius*)

The fourth requirement for conditional spending, defined by the Supreme Court, is that the instrument may not coerce states into compliance. Therefore, conditional spending instruments must not infringe upon the basic principles of federalism in the U.S., most prominently not upon the Tenth Amendment. As explained earlier, the Tenth Amendment bars the federal government from 'commandeering' state governments. The Supreme Court most prominently pronounced this principle in *New York v. United States (1992)* and *Printz v. United States (1997).*[1092] Both cases set the boundaries between the federal government's powers to commandeer state government's actions in the U.S. federal legal system.[1093] As Yeh points out, "both cases were premised on the view that under the federalist system, the states are sovereign entities distinct from the federal government, and Congress cannot blur this distinction by

[1091] *South Dakota v Dole (1987)*.
[1092] *New York v United States (1992)* United States Reports Supreme Court of the United States, and *Printz v. United States (1997)* United States Reports Supreme Court of the United States.
[1093] For a deeper inquiry into commandeering and comparative federalism see Daniel Halberstam, 'Comparative Federalism and the Issue of Commandeering' in *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford University Press 2001).

commandeering the state political branches to perform functions on the federal government's behalf."[1094] The non-commandeering doctrine has since then remained a vital part of U.S. federalism.

However, while the Tenth Amendment precludes the federal government from commandeering state government, it does not bar Congress from conditioning federal funds upon certain conditions. "As the Supreme Court has explained, legislation enacted pursuant to the Spending Clause is one significant way that Congress may influence state behaviour without 'commandeering' state officials in violation of the Tenth Amendment."[1095] However, there is still a caveat to Congress's application of conditional spending. Congress may not coerce states to follow a specific federal policy. One way of such coercion would be increased is via monetary pressure, similarly seen with the Conditionality Regulation in the EU

In *NFIB v Sebelius (2012),* the question was whether Congress could withhold a significant amount of funding if states do not comply with U.S. President Barack Obama's ACA legislation, also known as Obamacare or whether there is a limit to the amount withheld.[1096] Chief Justice Roberts, writing the majority opinion, stated that "when funding for an existing program is conditioned on the adoption of a 'new' program, the total amount of federal funds at issue cannot represent a significant portion of a state's budget, or withdrawal of the funding will be held to be unconstitutionally coercive."[1097] Roberts, therefore, concluded, "that the threatened loss of federal program funds in the case at hand, which made up 10% of an average state's budget, represented a 'gun to the head' and was a form of 'economic dragooning that leaves the States with no real option but to acquiesce' […]."[1098] Therefore, this limitation must be regarded as protecting the states' sovereignty, not to be coerced into measures they are not willing to follow.

The fourth requirement defined by the Supreme Court displays the most considerable difference to the EU context. Whereas the EU judicature did not oppose coercive conditions and commandeering (yet), the Supreme Court's case-law prohibits commandeering. In the EU, the stated aim of the Conditionality Regulation is to ensure that the rule of law is respected

[1094] Yeh (n 1004) p. 3.
[1095] Ibid.
[1096] *National Federation of Independent Business v. Sebelius (2012)*.
[1097] Yeh (n 1004) p. 11.
[1098] Ibid.

when implementing EU funds in the Member States. Scholars have argued that the aim of the Conditionality Regulation is, therefore, to coerce Member States into compliance.[1099] Moreover, the Court of Justice confirmed the legality of the Conditionality Regulation and affirmed that it complies with the principle of subsidiarity. Therefore, both legislator (EP and Council) and the judiciary supported commandeering in EU law. It remains to be seen if this will change in the future, and if the Court of Justice will develop a doctrine of unlawful commandeering in EU law.

[1099] Pekka Pohjankoski, *New Year's Predictions on Rule of Law Litigation: The Conditionality Regulation at the Court of Justice of the European Union (7 January 2021)* (VerfBlog 2021), and Baraggia and Bonelli (n 823).

4. Conclusion

> *"Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. […], we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly."*[1100]

Chapter 6 analysed conditional spending in the U.S. federal legal system to contrast it with conditionality in the EU. The differences between both legal orders loom large regarding conditionalities policies. The U.S. has a long history of conditional spending dating back to the 1860s to promote federal policy objectives in the federated states. The EU used conditionality in agricultural, monetary, and external policy areas and only recently to safeguard the rule of law in the Member States. The rule of law crises in the Member States of Hungary and Poland prompted this development. Therefore, conditionality has been used in different policy areas and with different objectives in each legal order. Finally, the study of the U.S. experience showed that rule of law conditionality EU goes beyond the U.S. use of conditional spending.

The following conclusive remarks will highlight three findings from the analysis of conditional spending in the U.S. First, conditional spending in the U.S. has advanced into one of the most powerful instruments of the federal government; Second, the Supreme Court has established constitutional guardrails for using conditional spending in the U.S.; Third, conditional spending in the U.S. is not used to safeguard the rule of law in federated states. Nevertheless, it remains a contested area between state's rights and federal authority.

First, conditional spending has developed into one of the most potent instruments of the U.S. federal government. By focussing on the history of conditional spending in the U.S., Chapter 6 tracked the rise of conditional spending to become one of the most effective instruments of the federal government to reign into states' competencies and influence and incentivise state governments to adopt specific policies. Conditional spending has allowed the federal government to extend its reach and impact on various policy areas, ranging from education and healthcare to infrastructure and social services. Even today, conditional spending continues to be used widely by the federal government and plays a significant role in shaping policy outcomes in the federated states. As the EU is at an early stage of using conditionality policies,

[1100] Chief Justice William Rehnquist's majority opinion in *South Dakota v Dole (1987)*.

the U.S. experience could provide guidance for the future. "The […] EU is where U.S. [sic] was about half a century ago in experimenting with conditionality's promise and achievements."[1101] Therefore, the evolution of conditional spending in the U.S. legal system could provide a blueprint for the further deepening of conditionality in the EU.

Second, through its case-law, the Supreme Court established constitutional guardrails for conditional spending. Chapter 6 showed the Supreme Court's vital role in establishing the boundaries and requirements for the constitutionality of conditional spending in the U.S. In cases such as *Pennhurst State School and Hospital v Halderman, South Dakota v Dole, USAID v Alliance for Open Society, New York v United States, Printz v United States, and NFIB v Sebelius* the Supreme Court scrutinised conditional spending programs against the U.S. Constitution. It established four vital criteria for the federal government.

As federalism and the scope of federal power remain contested in the U.S., the judiciary's role in striking a balance between federal objectives and state autonomy remains critical. On the one hand, scholars have criticised the Supreme Court's case-law on conditional spending as limitless.[1102] On the other hand, only the Supreme Court's wide margin for conditional spending allowed it to become such a successful policy instrument. The judicial requirements outlined in these landmark cases have shaped the contours of conditional spending programs, influencing the relationship between the federal government and the states. As Vita highlights, "[…] the use of conditional spending is above all a constitutional matter and must be used with due regards to the internal constitutional safeguards."[1103] Undoubtedly, questions regarding the balance between federal objectives and states' rights will continue to occupy the Supreme Court's docket in the future. As this area of law evolves, the Supreme Court's deliberations on constitutional principles will continue to shape the future of conditional spending and its implications for American governance and federalism.

Third, conditional spending in the U.S. is not subject to rule of law criteria. Chapter 6 highlighted that conditional spending in the U.S. is not used to safeguard the rule of law within

[1101] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 35.
[1102] For a critique of the Supreme Court's case-law on conditional spending, see Lynn A. Baker and Mitchell N. Berman, 'Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke It to Do So' Vol. 78 Indiana Law Journal pp. 459.
[1103] Vita, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' p. 35.

the federated states. This is a substantial difference to the application of conditionality in the EU. As the U.S. has three powerful branches of government, it does not need to use conditional spending for this purpose. Instead, it is primarily used for regulatory and enforcement conditionality. When the federal government provides financial assistance to the states through grants or funding programs, it may attach conditions to the receipt of these funds, requiring the states to take specific actions or implement policies as a condition of receiving the federal money. However, it has not applied conditional spending to specifically uphold the rule of law.

Nevertheless, the U.S. experience showed that conditional spending remains a contested area between state's rights and federal authority. The federal government faces a challenge in respecting the principles of federalism and the rights of states. Moreover, it faces a conflict between federal interests and the Tenth Amendment of the U.S. Constitution. The principle of non-commandeering is derived from the Tenth Amendment. While the federal government cannot directly compel states to adopt laws or regulations (as this would be considered commandeering, prohibited under the Tenth Amendment), it can exert significant influence through conditional spending. Therefore, the federal government must strike a delicate balance between voluntariness and federal coercion regarding conditional spending programs. Federal coercion would amount to situations where the federal government uses its financial power to pressure or influence state governments to adopt policies or regulations. It occurs when the federal government conditions the receipt of federal funds or grants on the states' compliance with federal requirements or mandates. States that rely heavily on federal funding may feel pressured to comply with federal requirements to avoid the loss of crucial financial support. As Chapter 6 highlighted, the federal government must walk a fine line between voluntary participation and coercion while respecting the non-commandeering doctrine.

Overall, Chapter 6 underscored the rise, success, and the complexities of conditional spending in the U.S. The delicate interplay between federal objectives and state autonomy requires careful consideration and constitutional analysis. As conditional spending remains a contested area of law, the Supreme Court deliberations and adherence to constitutional principles will continue to shape the future of conditional spending and its significance for federalism in the U.S. By striking a delicate balance between voluntary participation and coercion, the Supreme Court plays a pivotal role in upholding the rule of law and protecting the equilibrium of power between the federal government and the states in the realm of conditional spending.

Part III: Comparative Conclusions

The preceding Part III – The Financial Dimension: Upholding the Rule of Law via Financial Conditionality – studied the financial dimension of the rule of law crisis in the EU by focusing on the rule of law conditionality mechanism and comparing it with conditional spending in the U.S.[1104] Since the EU cannot effectively protect its values proclaimed in Article 2 TEU, it needs to resort to the instrument of financial conditionality to incentivise Member States to uphold EU values domestically. A similar instrument to uphold U.S. constitutional values in the states does not exist. Therefore, Part III extended beyond the Court of Justice and the judicial dimension (Article 258 TFEU; Chapter 1); it went beyond the EU's political branches of government and the institutional dimension (Article 7 TEU; Chapter 3) and focused on conditionality as an instrument to safeguard the rule of law within the Member States.

Three findings emerged. First, federal legal systems use financial conditionality to achieve policy aims in the federated states, as seen in the U.S. example. While financial conditionality in the U.S. is a reward-based instrument to endorse federal policy objectives in the states, the EU uses financial conditionality as a penalty-based instrument to cut funding to rule of law offending Member States. Second, as conditionality instruments intrude into state sovereignty, they face legal challenges before the apex courts of each federal legal system. Consequently, the apex courts established constitutional guardrails for conditionality instruments. Third, the successful history of financial conditionality to achieve federal policy objectives in the U.S. serves as an indication for the EU to broaden its conditionality instruments beyond the rule of law.

Rule of Law v Policy Conditionality

First, the U.S. experience with conditional spending can serve as a guidepost for the EU. It provides a valuable reference point for a federal legal order in which financial conditionality is successfully used to promote specific policy objectives in the federated states. However, significant differences lie in the scope, objective, and application of financial conditionality.

[1104] The U.S. comparison focused on conditional spending emerging from the spending power of the U.S. Constitution. It did not discuss conditionality through the taxing power and the use of taxes as regulatory instruments in the U.S. This is justified by the EU's inability to collect and lay taxes.

While conditionality policies in the U.S. are merely regulatory, the EU employs conditionality to uphold and promote the rule of law in the Member States. Regulation 2020/2092 is the first conditionality policy in the EU designed to promote an Article 2 TEU value by safeguarding the rule of law in the Member States. In contrast, conditional spending in the U.S. is not rule of law specific and has never been applied in that way. The U.S. uses conditional spending to promote federal policy objectives in healthcare, education, and infrastructure. This is a significant difference between both instruments. Whereas in the U.S., conditionality is used as a reward-based instrument, in the EU it is a penalty-based instrument.[1105]

Moreover, the EU's rule of law conditionality mechanism was born during crisis time and allows to cut earmarked funding to individual Member States. This goes beyond and differentiates it from conditional spending in the U.S. In the U.S., conditional spending is a regular policy instrument applied in normal policy areas. Nevertheless, the federal government can exert significant influence through conditional spending. States that rely heavily on federal funding may feel pressured to comply with federal requirements to avoid the loss of crucial financial support. Moreover, the EU chose an intrusive version of financial conditionality to discipline rule of law offending Member States, as all other options had failed. The U.S. never had to go that far because other options to prevent rule of law backsliding in the federated states had worked. In the U.S., an instrument, such as the rule of law conditionality mechanism, would potentially be unconstitutional as the Tenth Amendment, the prohibition of federal coercion, and the principle of non-commandeering would render it so.[1106]

Finally, the EU's political branches were less willing to use conditionality and withhold funds than the U.S. federal administration. In the EU, the executive branch (Commission) lacked initiative in enforcing conditionality. The legislative branch (EP) needed to file a lawsuit before the Court of Justice to prompt the executive branch's action. Previously, the second legislative

[1105] See also the distinction that Fisicaro makes between enforcement and regulatory conditionalities in Marco Fisicaro, 'Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation' Vol. 18 European Constitutional Law Review pp. 334.

[1106] The Tenth Amendment emphasises the concept of federalism, which divides powers between the federal government and the state governments. It affirms that any powers not explicitly granted to the federal government by the Constitution, nor prohibited by the Constitution to the states, belong to the states or the people. It aims to prevent the federal government from exceeding its enumerated powers and intruding into areas meant to be left to the states or the people themselves. The prohibition of federal coercion, also known as the anti-commandeering doctrine, is based on principles of federalism. It holds that the federal government cannot compel or coerce state governments to enact or enforce specific laws or regulations. States maintain a degree of autonomy and are free to exercise their discretion in areas not explicitly granted to the federal government by the Constitution.

branch (Council) watered down the proposal of the executive branch (Commission) in the legislative process. This underlines the institutional hesitancy and indecisiveness when applying rule of law conditionality in the EU. In comparison, the U.S. federal administration has no hesitancy to use conditionality to promote its core policy agenda.[1107] Moreover, conditional spending is a straightforward mechanism as the policies are enacted by the legislative branch (Congress) and enforced by the executive branch.

Conditionality Under Judicial Review

The EU could enact the rule of law conditionality mechanism, even as it strikes deep into Member State's sovereignty. Similarly, in the U.S., conditional spending instruments also affected the state's sovereignty. Therefore, conditionality instruments in both systems were challenged before the respective highest courts. Consequently, the apex courts established constitutional guardrails regarding conditionality policies in both legal orders.

Similarities can be identified regarding the judicial requirements of conditionality in both legal systems. The standards developed by the Supreme Court in its case-law are similar to those developed by the Court of Justice in *Hungary v Parliament and Council*[1108] and *Poland v Parliament and Council.*[1109] As such, the Supreme Court case-law serves as a valid comparator regarding the limits of conditionality in a federal legal system. The limits are the non-commandeering doctrine in the U.S. and the 'sufficiently direct link criterion' in the EU. Both establish ultimate limits to federal coercion through financial conditionality.

The non-commandeering doctrine in the Supreme Court's case-law is striking. In the EU, there is no direct equivalent to the non-commandeering doctrine. However, the principle of subsidiarity serves as a similar concept in some respects. In *Poland v Parliament and Council*, the Court of Justice found that the principle of subsidiarity did not apply to the rule of law conditionality mechanism.[1110] Instead, the Court of Justice established the 'sufficiently direct link criterion', which requires a link between the rule of law deficiencies in the Member State and the EU budget. Overall, this shows that the guardrails are individual to each system and

[1107] See the use of conditional spending to enforce Obamacare under the Obama Administration and the use of conditional spending to enforce the closure of immigrants under the Trump Administration. See, for example, Kenneth R. Thomas, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis* (Congressional Research Service (CRS) Report, 2012) and Margulies.
[1108] *Hungary v Parliament and Council (C-156/21)*.
[1109] *Poland v Parliament and Council (C-157/21)*.
[1110] Cf. *Poland v Parliament and Council (C-157/21)* para. 240.

depend on the forms of federalism.[1111] In the U.S., the use of conditional spending by the federal government has seen its limits in *NFIB v Sebelius*.[1112] This is not the case in the EU, as the Court of Justice upheld the most far-reaching conditionality policy so far – the rule of law conditionality mechanism.

Mainstreaming Conditionality

Third, drawing from the U.S. example, mainstreaming rule of law conditionality across policy fields could enhance the EU's ability to safeguard the rule of law within the Member States. One approach to strengthen rule of law compliance by the Member States would be to expand financial conditionality to sectoral spending programs.

The EU could use its budgetary competence to include conditionality requirements in its sectoral spending programs. As Halberstam and Schröder proposed, the idea of 'mainstreaming' conditionality within the EU could ensure rule of law compliance by the Member States.[1113] Mainstreaming conditionality would mean taking inspiration from the U.S. experience of conditional spending in which conditionality is used in many policy areas, from highway speed limits to promoting educational standards. It could increase the incentive for Member States to uphold the rule of law in their domestic legal system to ensure the uninterrupted flow of funds from Brussels. However, it would require significant legal changes as those conditionality requirements need to be implemented into directives and regulations, and it would require resources to monitor each Member State's compliance with those sector-by-sector requirements.

Moreover, the use of conditionality in the EU is not necessarily limited to financial conditionality alone. It could be expanded to participation in data transfers or other areas, following Halberstam and Schröder's argument.[1114] However, this could lead to a situation in which a Member State is factually excluded from the Single Market if it violates specific requirements and could raise issues with the principle of conferral. Therefore, to ensure

[1111] In the U.S., operating under the model of American federalism, the non-commandeering doctrine emerged from the Tenth Amendment. Instead, the EU's system of cooperative federalism benefitted from a technical solution (sufficiently direct link) to the issue of commandeering as the EU's budgetary powers are focused on the expenditure side. See also Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law*.
[1112] *National Federation of Independent Business v. Sebelius (2012)*.
[1113] Halberstam, *Rule of Law in Europe: A Conversation with Daniel Halberstam and Paul Nemitz*.
[1114] Halberstam and Schröder (n 389).

compliance of a broader use of conditionality with the principle of conferral, conditionality would have to be limited to the values germane and essential to a given policy area, as also Halberstam and Schröder argue.[1115] Very much similar to the judicial limitations the Supreme Court outlined in *South Dakota v Dole (1987).*[1116] Overall, functional, administrative and legal difficulties remain in fully enforcing this approach in the EU legal system. However, broadening conditionality holds promise for the EU's future.

In conclusion, the three preceding arguments have highlighted findings from comparing conditionality in the EU and the U.S. First, the U.S. federal legal order has employed conditionality for a long time and had a successful experience using conditionality to incentivise federated states to opt into federal policies. In contrast, the EU's conditionality experience is different to that. Stemming from ENP, EMU and EU enlargement, the EU used conditionality to ensure that the EU acquis is upheld and has now moved towards value-conditionality. Second, as the conditionality instruments in both legal systems intruded into state sovereignty, they faced legal challenges before the apex courts of each federal legal system. Consequently, the apex courts established constitutional guardrails for conditionality instruments contingent on the federal legal system design. Third, the rule of law conditionality mechanism in the EU could mark the beginning of the broadening of rule of law conditionality across policy fields. The U.S. experience of implementing policies through conditional spending is a success story of upholding federal objectives in the federated states. The EU could pursue this path by following the U.S. example.

[1115] Ibid.
[1116] See *South Dakota v Dole (1987)*.

Conclusion: The U.S. Federal Experience as a Guidepost for the EU's Current Challenges

This dissertation focussed on the EU's response to the rule of law crisis in the Member States in three dimensions: judicially, before the Court of Justice (Chapter 1); institutionally, at the EU's political branches of government (Chapter 3); and financially, through financial conditionality (Chapter 5). The challenges the EU faces on each of the three dimensions were contrasted with empirical precedents of the U.S. federal legal order dealing with rule of law challenges in the federated states. Similarly, the dissertation used a three-dimensional approach to study the U.S.: judicially, it analysed the Supreme Court dealing with rule of law challenges (Chapter 2); institutionally, it examined the U.S. political branches responding to rule of law challenges (Chapter 4); and, financially, scrutinising the conditional spending doctrine in the U.S. (Chapter 6). Together, those dimensional pairs provided the backdrop for comparative results in finding innovative avenues for resolving the rule of law crisis in the EU.

Primarily, the comparative study has shown the similarities and differences between both legal systems dealing with rule of law backsliding and exhibited the difficulties of dealing with the same phenomenon in different federal legal systems.[1117] Most importantly, the functional comparison revealed possible improvements to the EU's current situation. Overall, this comparative exercise provides ample food for thought on how the EU could overcome the rule of law crisis in the Member States and emerge more robust, flexible, and effective in dealing with rule of law backsliding in the Member States.

The study of the EU has shown that neither the judicial nor the institutional branch could safeguard the rule of law in the Member States. Thus, the EU had to turn to financial conditionality as the last resort in the current rule of law crisis. By doing so, the EU went further than any U.S. conditional spending instrument so far, as rule of law conditionality intruded into Member States sovereignty. Up to this point, this approach seems promising for the EU. However, the rule of law backsliding in Hungary and Poland may not remain isolated incidents. To prevent future backsliding in the Member States, the EU either has to reform, increase

[1117] While both are federal legal systems, the EU operates under the model of cooperative federalism, while the U.S. operates under the model of American federalism. See Schütze, *From Dual to Cooperative Federalism the Changing Structure of European law* and Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States'.

institutional cooperation, or deepen the financial conditionality dimension to safeguard the rule of law within its Member States.

First, the comparative study of the rule of law crises in federal legal systems showed that the EU's current treaty framework does not allow to prevent rule of law backsliding successfully. In contrast, due to its unique federal structure, the U.S. federal framework allowed the U.S. to overcome rule of law crises more effectively. Treaty reform could be a possible solution to remedy this in the EU.[1118] As demonstrated in Part I, the EU's current centralised judicial design is not a feature but a flaw in the rule of law crisis.[1119] The EU legal system could be more robust in responding to rule of law challenges if the EU judicial system were further federalised.[1120] Part II exhibited that the EU legislative and executive branches have failed to safeguard the rule of law and implement the Court of Justice's judgments in the Member States.[1121] One possible solution to remedy this is to amend the EU's incomplete federal architecture.[1122] In the U.S., the federal government can implement federal court decisions in the states.[1123] In the EU, the Commission and the European Council lack such powers. The comparison displayed that an executive branch with the willingness and ability to act could use federal force to uphold the rule of law in the federated states.[1124] However, as seen in Chapter 3, a similar solution is not within reach in the EU. Whether a federal force in the EU is feasible

[1118] Treaty reform refers to the process of amending or revising the EU's primary legal texts, which are the treaties that establish the legal framework and institutional structure of the EU. Treaty reform is a complex undertaking which involves negotiations among the Member States. The intricate interplay between national interests, supranational governance, legal complexities, and the need for consensus among a diverse group of Member States makes treaty reform extremely difficult. See also Federico Fabbrini, 'Reforming the EU Outside the EU? The Conference on the Future of Europe and its Options' Vol. 5 European Papers pp. 963, and Federico Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (Oxford University Press 2020).

[1119] For the emerging resistance against the Court of Justice judgments, see also Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' Vol. 14 International Journal of Law in Context pp. 258.

[1120] Two ways of enhancing the EU's judicial architecture come to mind: Either setting up a network of lower EU district courts in the Member States. Or, authorising the Court of Justice to have an appellate review over Member State court rulings. See Paul R. Dubinsky, 'The Essential Function of Federal Courts: The European Union and the United States Compared' Vol. 42 The American Journal of Comparative Law pp. 295, and Michael Lewis Wells, 'European Union Law in the Member State Courts: A Comparative View' Vol. 30 Tulane Journal of International & Comparative Law pp. 109.

[1121] For an account of the Commission's failure to fulfil its prescribed role as guardian of the Treaties, see Kelemen and Pavone (n 433), and Scheppele (n 432); For an account of the Council's failure in upholding the rule of law see Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' Vol. 54 Journal of Common Market Studies pp. 1075.

[1122] For comparative considerations, how the rule of law and democracy is safeguarded in other federal legal systems and what the EU could learn from that, see Matteo Bonelli, 'A Federal Turn? The European Union's Response to Constitutional Crises in the Member States' Vol. 10 Perspectives on Federalism pp. 41.

[1123] See Pohjankoski, 'Federal Coercion and National Constitutional Identity in the United States 1776-1861', and Tushnet.

[1124] See also Roberts (n 49).

or desirable is outside this dissertation's scope and requires further research. In the EU, no similar mechanism is available to counter Member State resistance and re-establish federal supremacy. Eventually, the European public needs to debate whether federal authority should be able to safeguard the rule of law in the Member States during rule of law crises.

Second, as treaty reform seems unrealistic at the time of writing, the U.S. comparison has displayed that improving the situation could be achieved by effective institutional cooperation. Effective cooperation between the judicial and the political branches could be a potential solution to the rule of law crisis in the EU. As Part I demonstrated, the Court of Justice's judgments were not respected and implemented in all Member States.[1125] The implementation of judgments is contingent on the other branches' support in a federal legal system. The lack of institutional support aggravates the Court of Justice's position in the rule of law crisis tremendously and renders its quest to uphold the rule of law a Sisyphean task. As Part II indicated, the EU's political branches have been ineffective in using all available instruments and have blocked each other from progressing.[1126] This has led to a stalled situation on the institutional level and benefitted the ongoing rule of law decline in Hungary and Poland.[1127] As Part 3 exposed, the executive branch (Commission) lacked initiative in enforcing conditionality.[1128] The legislative branch (EP) needed to file a lawsuit before the Court of Justice to prompt the executive branch's action.[1129] Previously, the second legislative branch (Council) watered down the proposal of the executive branch (Commission) in the legislative process.[1130] This underlines the institutional hesitancy and indecisiveness when applying rule of law conditionality in the EU. A federal legal system is only firm in upholding the rule of law in composite states when its institutions work together effectively. This has not been the case in the EU. Consequently, the EU institutions need to cooperate more effectively to safeguard the rule of law in the Member States.

Third, so far, the only workable solution in the EU is financial conditionality. The U.S. comparison exhibited that conditional spending has proven to be a successful instrument in

[1125] Gwozdz-Pallokat (n 291).
[1126] For an account of the Commission's failure in using all instruments available, see Scheppele (n 432); for an account of the Council's obstructing stance, see Oliver and Stefanelli.
[1127] See also Kelemen, 'The European Union's Authoritarian Equilibrium'.
[1128] See Sonja Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?' Vol. 60 Journal of Common Market Studies pp. 1684.
[1129] Krivade, *Rule of Law conditionality: Commission must immediately initiate proceedings (10 March 2022)*.
[1130] See Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards A Solution of the Rule of Law Crisis in the European Union'.

upholding federal policy objectives in the federated states. However, unlike the U.S., the EU conditionality instrument intrudes even more into the Member State's sovereignty. While it allows the EU to cut funding to rule of law offending Member States, it also renders the instrument legally more fragile. At the time of writing, the Commission is pursuing the first application of the rule of law conditionality mechanism against a Member State.[1131] This application will be pivotal in guiding the way forward. The rule of law conditionality mechanism has shifted the focus from the Court of Justice to the EU auditors. With rule of law conditionality, the centre of the EU's rule of law crisis shifted from the Court of Justice to the Commission's auditors and the EP's Budgetary Committee (BUDG). If financial conditionality proves to be a successful instrument, the EU might even expand conditionality. Amid missing treaty reform and lack of institutional cooperation, the EU could further deepen conditionality to protect the rule of law in the Member States. The expansion of conditional spending in the U.S. progressed in tandem with the expansion of federalism.[1132] Therefore, analogously, financial conditionality in the EU could mark a new step in European integration, advancing federalism and a possible avenue for a solution to the rule of law crisis. Nevertheless, this expansion could also potentially deepen the divide between the Member States and the EU. Conditionality could become a coercive instrument that harms the EU's legitimacy and blights its aims in the first place.[1133] If conditionality becomes a replacement for the lack of federal force, it might discourage Member States' participation in the EU or even push them to consider leaving the EU. This would counteract the idea of the EU as a voluntary union based upon the rule of law.

Overall, this brings back the overarching question of this dissertation: How can the EU safeguard the rule of law within its Member States, which eventually leads to the much larger question about the EU's constitutional form and identity. What is the EU's constitutional identity: Is it more in the nature of federal polity or a federation of polities?[1134] This is a question that the U.S. had to grasp and ultimately answer in the former sense to overcome rule of law crises in the federated states.[1135] The precariousness of the EU's answer to that question renders its response to the rule of law crises a piecemeal approach without any real chance of

[1131] *Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (18.9.2022)* (Official Journal of the European Union 2022).
[1132] See Yeh (n 1004), and Dilger (n 705).
[1133] Cf. Pohjankoski, 'Federal Coercion and National Constitutional Identity in the United States 1776-1861' p. 358.
[1134] Cf. Bermann, 'Marbury v. Madison and European Union 'Constitutional' Review' p. 566.
[1135] See Pohjankoski, 'Federal Coercion and National Constitutional Identity in the United States 1776-1861'.

success. Under the current circumstances, conditionality seems to be the only policy initiative that yields chances of success as it presents a credible financial threat to the Member States. Considering the absence of treaty reform or meaningful inter-institutional cooperation, conditionality leads the way forward for dealing with rule of law backsliding in the Member States. However, the question remains in which direction the discussion about the EU's identity will develop in the future and whether strengthening the EU's judicial and political institutions could result from this discussion.

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The bibliography is structured as follows: Books, Chapters in edited Collections, Journal Articles, Electronic Journal and Policy Articles, EU Case-law, U.S. Case-law, Other Case-law, EU Legal Rules, U.S. Legal Rules, Governmental Documents, Press Releases, Newspaper Articles, Blog Posts, Further References.

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