COMPARING THE PROCEDURES AND PRACTICE OF JUDICIAL DIALOGUE IN THE US AND THE EU: EFFECTS OF US UNCONSTITUTIONALITY AND EU'S PRELIMINARY INTERPRETATIVE RULINGS μ

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The article investigates the role and powers of the Supreme Court of the United States (SCOTUS) and the European Court of Justice (ECJ) when a conflict between 'federal'/EU and State law arises. It focuses on how it is solved and the procedure followed to assess, in particular, what is the added value of the European preliminary ruling procedure (PRP), and what the composite European Union (EU) judicial system can learn from the United States (US) experience and the other way around. While in the EU the PRP is the main test bench for the relationship between ECJ and State courts, such a structured mechanism is lacking in the US, though other avenues of cooperation have been established over the last two centuries. Against this background, the contribution first reviews and compares the effects of a declaration of unconstitutionality in the US with the interpretative preliminary rulings rendered by the ECJ in which incompatibility between EU and national norms is de facto *asserted and the duty to disapply arises. Second, it considers, respectively, the power of SCOTUS to remand a case to the State courts, once the State law has been judged unconstitutional, and how disapplication of the national law in contrast with EU law works as a result of an ECJ's ruling. Third, in both systems, it reviews the strategies and the arguments for judicial dialogue used by State courts to react and resist the higher court's assessment. Fourth, it*

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examines proposals to better integrate the views and determination of the State courts into the activity of the 'federal'/EU court and vice versa. In summary, the comparative analysis suggests that SCOTUS tends to prefer a more decentralized approach in enforcing its rulings, largely influenced by its distinct models of judicial review. In contrast, the ECJ appears more inclined to assert substantial control, reserving considerable discretion to dictate the specifics of if, when and how the duty to disapply should come into play.

Keywords: Supreme Court of the United States, European Court of Justice, Article 267 TFEU, Certification procedure, Review of State Courts' judgments, Binding Effects of the rulings, Cooperative Federalism

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I. INTRODUCTION

The comparison between the US and the EU has triggered a significant level of scholarly attention considering both 'compound democracies' and

federalizing processes.[1] While their respective institutional set up and articulation of competences between the central and the State governments have been frequently compared,[2] this is much less the case for the structure and powers of the two highest courts, the Supreme Court of the United States (SCOTUS) and the European Court of Justice (ECJ), with respect to the judicial dialogues between them and State courts.[3] While in the EU the preliminary reference procedure is the main test bench for this relationship, such a structured mechanism is lacking in the US, though other avenues of cooperation have been established over the last two centuries but not widely used in practice.

The article investigates the role and powers of SCOTUS and the ECJ, as well as their judicial dialogue and engagement with State courts when a conflict between 'federal'/EU and State law arises, looking at how it is solved due to the different types of judicial review in place for its evaluation. In particular, the article analyses the added value of the European preliminary reference procedure, and what the composite EU judicial system can learn from the US diffused system of judicial review and the other way around. Against this background, the contribution first reviews and compares the effects of the different disapplications of State law through declaration of unconstitutionality in the US and the interpretative preliminary rulings rendered by the ECJ. Second, it considers the power of SCOTUS to remand

[1] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) and Sergio Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press 2010).

[2] See: Michel Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' (2006) 4(4) International Journal of Constitutional Law, 618–651; Fernanda G. Nicola, 'Legal Diplomacy in an Age of Authoritarianism' (2021) 27 Columbia Journal of European Law 152.

[3] For an exception, see: Jeffrey C. Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 American Journal of Comparative Law 421.

a case to the State courts, once the State law has been judged unconstitutional, and how disapplication of the national law in contrast with EU law works as a result of an ECJ's ruling. Third, it reviews the strategies and arguments used by State courts in both systems to react and resist the higher court's assessment. Fourth, it assesses the practice of EU preliminary references and of US certification. Some concluding remarks will be made on the present design of the relationship between federal/EU and State courts, keeping the remedy of disapplication and the functioning of the preliminary reference proceeding at the hearth of the analysis.

II. The Meta-Comparison in Context

EU scholarship has primarily examined the ECJ as a *sui generis* constitutional court, drawing parallels with SCOTUS and highlighting the ECJ's pivotal role in maintaining the equilibrium of powers between the central governing body and the peripheral entities within the EU.[4] Others have shown how its role of guardian of fundamental rights, along with constitutional/supreme courts of Member States, on one hand, empowered the ECJ to expand its judicial review in the field and, on the other, triggered a judicial dialogue with domestic judiciaries so that the "Court had to develop an incomplete constitutional bargain and it used the language of rights to do so."[5]

Limited scholarly attention has been devoted to comparing the EU preliminary reference mechanism with appellate procedures in which a State court submits a case to SCOTUS. This process involves testing the legal framework and obtaining either a rejection or certification of the State law's

[4] See: Martin Shapiro, 'The US Supreme Court and the European Court of Justice Compared' in A Menon and M. Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford University Press 2006).

[5] See: Alicia Hinarejos, *Judicial Control in the European Union: reforming Jurisdiction in the Intergovernamental Pillars* (Oxford University Press 2009) 9.

validity.[6] In conducting a meta-comparison across different times and institutions[7] between SCOTUS and the ECJ, we examine the judicial dialogue they undertake with State courts to assess the scope of certification procedures employed in the US compared with the preliminary reference mechanism utilized by the ECJ.[8]

1. SCOTUS' Highest Authority in Diffuse Judicial Review

The SCOTUS, established in 1789, has the highest authority to settle all constitutional law issues in the nation, as stated in *Marbury v. Madison* as the first case establishing the notion of judicial review.[9] The US Constitution, in the Supremacy Clause, established federal law power over conflicting State laws, and this power translates judicially to the diffuse ability of federal courts to invalidate State laws that are deemed in conflict with the Constitution, international treaties and federal laws.[10] This provision was promoted by

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[6] Michael L. Wells, 'European Union Law In The Member State Courts: A Comparative View' (2021) University of Georgia School of Law Research Paper Series, Paper No. 2021-11, 11, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911155>, last accessed November 5 2023.

[7] On meta-comparisons see: Stéphanie Hennette Vauchez, 'Religious Neutrality, Laïcité And Colorblindness: A Comparative Analysis' (2021) 42 Cardozo Law Review 539, 549-550. On the ECJ and its constitutional jurisdiction, see: Bo Vesterdorf, 'A constitutional court for the EU?' (2006) 4 International Journal of Constitutional Law, 607 and Pierre-Emmanuel Pignarre, *La Cour de justice de l'Union européenne, jurisdiction constitutionnelle* (Bruylant 2021).

[8] Cohen (n 3) 450. Here Cohen discusses how the US could benefit from operating like the ECJ, particularly in allowing certification and minimizing backlog in the lower federal courts. Cohen suggests creating a certification system for SCOTUS.

[9] *Marbury* v. *Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803).

[10] *Id.*, 177; United States Constitution 1787, Article VI, clause 2: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

James Madison, who understood the need to institute a mechanism that would prevent interstate disputes leading to armed conflict.[11] The intent was made even more explicit when the first session of the newly established congress passed the Judiciary Act of 1789. The act granted appellate jurisdiction for all cases 'arising under' federal law and the Supremacy Clause's mandate that 'judges in every State' be bound by federal law against contrary State law.[12]

Generally speaking, SCOTUS rules on the constitutionality of the provision in question as a matter of law and then remands the law back to a State court to determine the correct rewrite or excision of unconstitutional sections. The so called "diffuse model" of judicial review allows all courts to trump a statute of executive act contrary to the Constitution that ultimately espresses the "supreme will of the people."[13] This explains the distinctive feature of the US diffuse system of judicial review by which an appellant makes the choice as a party to petition federal courts or SCOTUS only when *certiorari* is granted.[14] As demonstrated by the case law below, SCOTUS is the highest authority exercising diffuse judicial review and in doing so it employs strong and authoritative language, explicitly declaring a law as struck down or invalidated when it conflicts with constitutional principles.

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thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'.

[11] Leslie F. Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (The Johns Hopkins University Press 2001), 16.

[12] *Id*., 23, referring to Section 13 of the Judiciary Act of 1789.

[13] See: Steven Gow Calabresi, , 'The Diffuse and Second Look Models of Judicial Review', *The History and Growth of Judicial Review, Volume 1: The G-20 Common Law Countries and Israel* (New York, 2021; online edn, Oxford Academic, 20 May 2021), https://doi.org/10.1093/oso/9780190075774.003.0003, accessed 10 Nov. 2023, at 25.

[14] Wells (n 6) 11.

For what concerns the SCOTUS jurisdiction, the seminal case for judicial review of State laws is *Fletcher v. Peck* (1810),[15] in which for the first time SCOTUS held that a State law was unconstitutional.[16] The defendant, Peck, had bought a parcel of land from local indigenous peoples and later resold that parcel to Fletcher, who sued Peck, arguing that Peck did not have clear title to the land. The State courts of Georgia had originally allowed the sale, but later invalidated it because the original title of the land was procured through bribery. However, Chief Justice John Marshall found in his opinion that the contract of sale was binding, irrelevant to the way the parcel was acquired by the seller and invalidated the Georgia State law that had cancelled the contract. Chief Justice Marshall affirmed that "[T]he State of Georgia was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.'[17]

In deciding this way, SCOTUS affirmed its highest judicial power of constitutional review and Marshall defined the States not as an unconnected sovereign power, but as part of a 'large empire' a member of the American Union that has constitutional supremacy and can impose limits to the legislatures of the several States.[18] After this decision, the law was struck down in the State of Georgia. However, there was significant pushback on how to settle the land claims in Georgia once this law was struck down.[19] Even so, the indigenous tribe continued to ask for payment and the dispute was eventually pacified by a Congressional Act (31 March 1814) that paid

[15] *Fletcher v. Peck*, 10 U.S. 87, 3 L. Ed. 162 (1810).

[16] See: Robert McCloskey, *The American Supreme Court* (Sanford Levinson eds, 6th edn 2016) 33.

[17] Fletcher (n 15) Page 10 U. S. 139

[18] *Id.*, 136

[19] Jane Elsmere, 'The Notorious Yazoo Land Fraud Case' (1967) 51 The Georgia Historical Quarterly 425, 432.

out $4.2 million to the Yazoo people. The remaining claims were settled by an international Treaty.[20]

Finally, in respect to SCOTUS' enforcing power, it can remand, instruct, and even impose sanctions if a decision is not abided by in the lower courts.[21] For SCOTUS, the federal government can punish a State for failing to implement a binding precedent in this case and similar ones. An example of this process is *Brown v. Board of Education*,[22] as many southern States refused to implement integration plans and were forced to do so with federal power.

2. *The ECJ Evolving and Sui Generis Diffuse Judicial Review*

Turning now to the ECJ, the language is different from the very direct approach taken by SCOTUS in the adjudication of cases and controversies. Moreover, its model of judicial review has been defined diffuse "in flux",[23] meaning that it needs to co-exist with the centralization of judicial review in constitutional/supreme courts of Member States when at stake is the protection of fundamental rights.[24] It is also a *sui generis* and hybrid type of diffuse review since the ECJ, on one hand, performs abstract reviews and, on the other, is *de facto* called to systematically scrutinize national laws in the light of EU law. A symptom of this peculiar diffuse review is that the ECJ

[20] See: J. Michael Martinez, *Scoundrels, Political Scandals in American History* (2023) 25.

[21] Wells (n 6) 15.

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

[23] Markus Vašek, Constitutional Jurisdiction and Protection of Fundamental Rights in Europe in *The Max Planck Handbooks in European Public Law*, Vol. IV Constitutional Adjudication: Common Themes and Challenges (A. von Bogdandy, P. M. Huber and C. Grabenwater eds., Oxford University Press 2023) 376.

[24] See: Mauro Cappelletti, 'Jusidical Review in Comparative Perspective' (1970) 50(5) California Law Rev. 1017-1053. See: also John H. Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985) 89.

uses terms like 'inconsistent', 'setting aside' and 'disapplication'[25] of national laws in conflict with EU law. Indeed, the ECJ does not explicitly and formally impose upon the referring court a duty to disapply the domestic provisions whose possible incompatibility with EU law had induced the referring judge to rely on Article 267 TFEU. The ECJ has no formal power to invalidate national legislation, which is a task of domestic courts only.[26] Typically, preliminary rulings neither address the merit of the national case nor they set the application of EU law to specific facts. In principle, this is the task of the referring court at domestic level which shall apply EU norms to the case at hand according to the interpretation provided by the ECJ. Unlike the supremacy principle in the US, primacy in the EU does not go as far as to turn the incompatibility between supranational and domestic norms into 'unconstitutionality'. From the *Cilfit* decision onwards, it has been written that the preliminary ruling procedure 'does not constitute a means of redress available to the parties to a case pending before a national court'.[27] This implies that the primacy of EU law cannot lead the ECJ, in principle, by virtue of the national court's initiative and thus Article 267 TFEU, to interpret the legal order of a Member State, verify its lawfulness under EU law and decide whether the EU provision 'is applicable in the case brought before it'.[28]

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[25] See: recently, amongst others, respectively, Case C-107/23 PPU *Criminal proceedings against C.I. and Others* EU:C:2023:606, para 28; Case C-113/22 *DX v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social* EU:C:2023:665, para 41; Joined Cases C-615/20 and C-671/20 *Criminal proceedings against YP and Others* EU:C:2023:562, para 65.

[26] But see: *infra*, in this Section, for specific and isolated cases.

[27] Case 283/81 *Srl CILFIT* and *Lanificio di Gavardo SpA* v *Ministry of Health* EU:C:1982:335, para 9; see: also Case C-344/04 *The Queen, ex parte International Air Transport Association and European Low Fares Airline Association v Department for Transport* EU:C:2006:10, para 28.

[28] Case 35/85 *Procureur de la République v Gérard Tissier* EU:C:1986:143, para 9; Case C-428/16 *CHEZ Elektro Bulgaria AD v Yordan Kotsev and FrontEx International EAD v Emil Yanakiev* EU:C:2017:890, para 30.

However, the ECJ can interpret EU law in such a way as to require (from national authorities) the disapplication of all domestic norms – not only the one at hand in the context of the proceeding before the referring judge – in contrast with European norms. As has been very clearly argued, 'Although the ECJ does not have the power to rule on the validity of national measures or apply the law on particular facts, preliminary references serve in fact as the principal way of constitutional review of State action […] ECJ rulings on interpretation thus become a proxy for constitutional review.'[29] *In concreto*, what the ECJ does is assessing the compatibility of national laws with EU primary and secondary law. In this sense, the divergences between SCOTUS' and the ECJ's judicial review, when at stake is a conflict between federal/EU law and State laws, are less remarkable than they seem at first glance.

Having said this, a striking difference can be drawn between the supremacy principle in the US and primacy of EU law inasmuch as primacy alone in the EU cannot justify disapplication, notwithstanding the opposite stance taken by several Advocates general[30], by some authors,[31] and even by the ECJ

[29] Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law 737, 738.

[30] See: Case C-287/98 *Linster* EU:C:2000:3, Opinion of AG Léger, para 73; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* EU:C:1999:620, Opinion of AG Saggio, paras 37-39; Case C-555/07 *Kücükdeveci* EU:C:2009:429, Opinion of AG Bot, para 63; Case C-573/17 *Popławski* II EU:C:2018:957, Opinion of AG Sánchez-Bordona, para 117; Case C-384/17 *Link Logistic* EU:C:2018:494, Opinion of AG Bobek, para 93.

[31] See, amongst others: Denys Simon, *La directive européenne* (Dalloz 1997) 95-96; Melchior Wathelet, 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de justice', in Mark Hoskins and William Robinson (eds.), *A True European – Essays for Judge David Edward* (Hart 2003) 367, 372; Julie Dickson, 'Directives in EU Legal Systems: Whose Norms are They Anyway?' (2011) 17 European Law Journal 190, 201; Marc Blanquet and Guy Isaac, *Droit général de l'Union européenne* (10th edn, Dalloz 2012), 375.

in the *Link Logistic* ruling.[32] As a matter of fact, as had already been suggested by Bleckmann, only directly effective European provisions can produce the disapplication of contrary national laws and replace them.[33] Direct effect is a doctrine unknown to the US legal system and has no role in the judicial review performed by SCOTUS. On the contrary, such EU doctrine is the only means for the principle of primacy to fully take predecence, in practice, over national laws thanks to the remedy of disapplication. However, the extent of the nexus between direct effect, primacy and disapplication has not been precisely unveiled in most of the ECJ's case law its rulings. In spite of such uncertainties, two landmark judgments explain once for all that direct effect is always the precondition for triggering the duty to disapply:[34] *Popławski II*[35] and *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld II*.[36] In particular, in *Popławski II* it was stated that the principle of primacy cannot 'have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all the provisions of EU law by the national courts'.[37] Moreover, the ECJ affirmed

[32] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* EU:C:2018:810.

[33] Albert Bleckmann, 'L'applicabilité directe du droit communautaire', in Michel Waelbroeck and Jacques Velu (eds.), *Les recours des individus devant les instances nationales en cas de violation du droit européen* (Larcier 1978) 85, 124: '*d'après la Cour de justice, seul le droit européen directement applicable a la force de repousser une loi nationale contraire*'.

[34] See: also Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* EU:C:1978:49 ('*Simmenthal*').

[35] Case C-573/17 *Criminal proceedings against Popławski* EU:C:2019:530 ('*Popławski II*').

[36] Case C-205/20 *NE* v *Bezirkshauptmannschaft Hartberg-Fürstenfeld II* EU:C:2022:168 ('*NE II*'). For a detailed analysis of the relationship between primacy, direct effect and disapplication in the light of the ECJ's case law see: Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 European Law Open 576, 590-593.

[37] *Popławski II* (n 35), para 60.

that 'a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it'.[38]

Finally, EU judges observed that 'a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect'.[39] Consequently, the *Popławski II* ruling aims at interpreting the 'famous' *Simmenthal* judgment in the sense that, just as domestic authorities have a *duty* of disapplication only when the EU provision is directly effective and can for this reason replace the conflicting national law, in the same way, a domestic judge has the *discretion* to disapply when direct effect is lacking. In this latter case, however, the legal subjective positions of those affected by disapplication shall be sufficiently safeguarded through the internal legal order, although EU law alone, lacking direct effect, cannot govern the case. The judgment delivered by the ECJ in the *Thelen Technopark* case[40] confirms this reasoning, clarifying that national authorities can (not must) 'disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect'.[41] An approach followed by the ECJ in the recent *Commission v. Spain* ruling:[42] while affirming that national courts were *not required*, solely on the basis of *EU* law, to disapply a provision of national law contrary to a non-directly effective provision of EU law, the Court admitted such possibility and connected this to the discretionary power of domestic judges, to be exercised on the basis of national, rather than EU, law. In this regard, it is not fully clear when and how, in practice, a national authority could disapply an

[38] *Ibid*., para 62.

[39] *Ibid*., para 68. In the same vein, see: Case C-122/17 *Smith* EU:C:2018:631, para 49.

[40] Case C-261/20 *Thelen Technopark* EU:C:2022:33.

[41] *Thelen Technopark* (n 40), para 33. The provision at stake was Article 15 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. See: also Gallo (n 36) 593.

[42] Case C-278/20 *Commission* v *Spain* EU:C:2022:503, para 141.

internal provision, on the basis only of national law, when such provision conflicts against non-directly effective EU provisions. For sure, such situations can occur if there is an antinomy within the domestic legal order and either the judge, or the administration, confronted with conflicting national provisions, decides to set aside a national law not in compliance with EU law and consequently applies another domestic rule which is compatible with EU norms. This might be the case if there are different types of legal sources essentially regulating the same issue.

If the antinomy arises between an EU-friendly superior domestic norm, such as a statute passed by national parliaments, and an inferior norm, like a national regulation passed by the executive, which stands in contrast to EU law, the problem is easily solved in terms of hierarchy of norms. This is even more clear when a declaration of unconstitutionality is made, in respect to those legal orders which foresee such remedy. If such declaration ensures, ultimately, a compliance with EU law, it is irrelevant that this occurred on the basis of national law rather than EU law. Effectiveness of EU law is at the core of the ECJ's role, regardless of the legal source generating the removal of inconsistent domestic law. Additionally, the *Popławski II-Thelen Technopark* formula could apply also in situations where the antinomy arises between sources of equal standing. In this case, every Member State's legal order would provide judges with the adequate substantive and procedural mechanisms to recompose the conflict. A harmony that would be achieved, through the recognition of the precedence of one law over another, by ensuring a fair enforcement of (non-directly effective) EU norms.

Furthermore, in *NE II* the ECJ, openly overruling the *Link Logistic* case,[43] confirmed once for all what was already incidentally observed in *Asociaţia*

[43] See on this issue Daniel Sarmiento, 'The 'Overruling Technique' at the Court of Justice of the European Union', in this special issue.

'Forumul Judecătorilor din România' and Others,[44] *IS*[45] and *Euro Box Promotion*:[46] the national court shall 'give full effect to the requirements of that law in the dispute before it, if necessary disapplying of its own motion any national legislation or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect'.[47]

The choice by the ECJ to deem direct effect as the *condicio sine qua non* of the most complete manifestation of the primacy principle, i.e., the disappliction of inconsistent national law, is perfectly understandable.[48] Indeed, direct effect ensures that the EU principle of conferral and the principle of subsidiarity are not overturned by a unrestrained application of the principle of primacy. Asserting disapplication on the basis of primacy would entail a 'blank proxy capable of undermining the fertile relationship between EU law and domestic legal systems for good, as well as the mutual cooperation between EU institutions and Member States' authorities'.[49] As a matter of fact, direct effect still nowadays is an essential doctrine capable of shaping, in proto-federalist terms, a legal order that, albeit having generated a unique advanced system of integration, is not a federal union, as known. Should the EU ever become a federal union, direct effect will no longer be necessary in its current form.[50] Only then national courts will cope with EU

[44] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others* v *Inspecţia Judiciară and Others* EU:C:2021:393, para 247 For a detailed analysis of the relationship between primacy, direct effect and disapplication in the light of the ECJ's case law see Gallo (n 36), 590-593.

[45] Case C-564/19 *IS (Illegality of the order for reference)* EU:C:2021:949, para 80.

[46] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* EU:C:2021:1034, para 252.

[47] *NE II*, para 37.

[48] See the observations in Gallo (n 36), 593.

[49] *Id*., 603-604.

[50] Michael Dougan, 'The primacy of Union law over incompatible national measures: Beyond disapplication and towards a remedy of nullity?' (2022) 59 Common Market Law Review 1301, 1323, refers to direct effect as an 'essential passerelle'.

law like they handle domestic law and, therefore, enforce EU provisions regardless of their direct effect, or lackthereof.[51] As a matter of fact, the EU and domestic legal systems, although closely interconnected, are separate.[52] This is also the reason why disapplication, rather than the remedy of annulment, is the most complete form of effective judicial protection and a distinctive nature of EU law:[53] direct effect enables EU provisions to apply in domestic legal systems and serve as cognizable norms to be enforced by national authorities, including judges.[54]

Now, we have already recalled that at the core of the preliminary reference proceeding lies the interpretation (and validity) of EU law, not the incompatibility of domestic provisions with the latter. However, in practice, we have witnessed, although in very exceptional cases, both the express review and annulment of domestic measures by the ECJ and, conversely, the express review of EU norms and decisions by domestic courts. As for the latter case, over the years, certain Member States' jurisdictions have issued explicit and confrontational judgments that, in practice, resulted in the disapplication of EU law provisions conflicting with domestic legal orders. This will be demonstrated in section V.

As to the former case, special attention shall be devoted to the ECJ judgment in *Rimsevics and ECB v. Latvia*,[55] whereby the ECJ annulled the decision of

[51] See Gallo (n 36) 603-604.

[52] See Dougan (n 50) 1323-1324.

[53] See Case C-314/08 *Krzysztof Filipiak* EU:C:2009:719, para 82.

[54] Amongst the first scholars to reflect upon the potential, future, limits and *effet utile* of direct effect see Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 40 European Law Review 155 and Sacha Prechal, 'Does Direct Effect Still Matter?' (2000) 37 Common Market Law Review 1047.

[55] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:C:2019:139. See also Case C-487/19 *W.Ż* EU:C:2021:798. For a critical account see Michael Dougan, 'The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?' (2022) 59 Common Market Law Review 1301.

the Central Bank of Latvia to temporarily suspend his Governor, Mr. Rimsevics, who was subject to criminal investigations. Most notably, the actions brought by Mr Rimšēvičs and the European Central Bank against that decision represent the first and only case which the ECJ heard on the basis of the jurisdiction conferred on it by the second subparagraph of Article 14(2) of the Statute of the European System of Central Banks (ESCB) and of the European Central Bank to review decisions relieving the governors of the national central banks from office. Now, it is precisely due to the special character of such ruling that its findings cannot be generalized. In fact, in Rimšēvičs the domestic measure is annulled by the ECJ pursuant to a Treaty provision that explicitly confers upon it the power to review its lawfulness. This is a derogation rooted not in a judicial decision taken by the ECJ, yet in primary law, also outside the realm and logics of direct effect. As clarified by the Court, Article 14(2) 'derogates from the general distribution of powers between the national courts and the courts of the European Union as provided for by the Treaties and in particular by Article 263 TFEU'. However, that derogation 'can be explained by the particular institutional context of the ESCB within which it operates', being the ESCB 'a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB'.[56] Anything extraordinary, then, occurs in *Rimšēvičs*, from the standpoint of the role and competences of the ECJ; what occurs is the application of a *sui generis* EU law provision.

As to the EU preliminary reference mechanism, the practice tends to make it close to the US inasmuch as in referring the case to the ECJ, the national court, while lacking the power of *certiorari*, is often induced by private parties to issue a preliminary reference to the Court of Luxembourg. Although this procedure is a remedy only available to domestic judges, 'is of utmost

[56] *Rimšēvičs* (n 55) para 69.

importance to the ability of EU citizens to defend their rights under EU law effectively'.[57]

In theory, one could argue that due to the mediated nature of the preliminary reference, originating from court and not from appellants, the quasi-hierarchical structure of the EU judiciary is weakened by the optional character of this mechanism.[58] However, on the one hand, courts of last resort are obliged to use the preliminary reference procedure if a doubt of interpretation or validity of EU law arises (Article 267(3) TFEU), save for the exceptions established by the ECJ case law, like for the fulfillment of the *acte clair* and of the *acte éclairé* criteria.[59] By the same token, courts other than those of last instance are compelled to make a preliminary reference when there is a question of validity of EU law, according to the *Foto-Frost* ruling,[60] or when they wish to deviate from the ECJ interpretation of an EU legal act.[61] On the other hand, the ECJ, like SCOTUS, presents its judgments as binding precedents for all Member States with an *erga omnes* value, beyond the proceeding of the referring court.[62] *Erga omnes* means that the ruling

[57] Morten P. Broberg, 'Preliminary References as a Means for Enforcing EU Law', in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* 103, 109 (Oxford University Press 2017).

[58] *Id.*, 19.

[59] See the doctrine set in *Cilfit*, and its evolution, on which see François-Xavier Millet, 'Cilfit Still Fits' (2022) 18 European Constitutional Law Review 533; Lorenzo Cecchetti and Daniele Gallo, 'The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: 'CILFIT Strategy' 2.0 and its Loopholes' (2022) 15 Review of European Administrative Law 29; and François-Xavier Millet, 'From the Duty to Refer to the Duty to State Reasons: The Past, Present and Future of the Preliminary Reference Procedure', in this special issue.

[60] Case C-314/85 *Foto-Frost* EU:C:1987:452.

[61] Morten P. Broberg and Niels Fenger, *Preliminary references to the European Court of Justice* (3rd edn, Oxford University Press 2021) 201-234.

[62] Although EU law lacks a stare decisis doctrine similar to that of common law countries: Rafał Mańko, 'Preliminary reference procedure, Briefing of the European

binds not only the referring court[63] but all the authorities of all the Member States, including domestic judges.

Lastly, as to enforcement mechanisms, for what concerns the ECJ preliminary rulings, the Court has no such a mechanism to address State resistances and defiant courts as it depends on the Member States' courts to implement its rulings.[64] Though much weaker than in the US, however, also the EU can deploy some tools in such circumstances, as will be illustrated in section V.

As a last remark, it is beyond doubt that the meta-comparison centers on distinct historical contexts and institutional challenges faced by SCOTUS and the ECJ, stemming from their different common law and civil law foundations and therefore approaches to judicial review. In the early nineteenth century, SCOTUS confronted the task of solidifying its judicial sovereignty and authority in relation to State courts, an accomplishment effectively realized under the leadership of Chief Justice Marshall and under the guise of Hamilton's Federalist Paper no 78. SCOTUS's authority to have the final say with *erga omnes* effect in a diffuse judicial review originated

Parliamentary Research Service, PE 608.628, July 2017. See Giuseppe Martinico, 'Retracing Old (Scholarly) Path. The Erga Omnes Effects of the Interpretative Preliminary Rulings' and Sarmiento (n 43). On this point see, amongst early commentators, Andreas Matthias Donner, 'National Law and the Case Law of the Court of Justice of the European Communities' (1963) 1 Common Market Law Review 8, 15. For a detailed account showing the ECJ's tendency to explicitly grant erga omnes binding legal effects to the ECJ's preliminary rulings see David Anderson, *References to the European Court* (Sweet & Maxwell 1995) 310; David Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002) 331-332.

[63] See, ex multis, Case 52/76 *Luigi Benedetti* v. *Munari F.lli s.a.s.* EU:C:1977:16, para 26; Case C-446/98 *Fazenda Pública* v. *Câmara Municipal do Porto* EU:C:2000:691; Case C-173/09 *Georgi Ivanov Elchinov* v. *Natsionalna zdravnoosiguritelna kasa* EU:C:2010:581.

[64] Wells (n 6) 19-20.

from a protracted struggle among US courts, wherein judicial review is a routine function within their purview for examining the constitutionality of a statute. In contrast, the ECJ was established in 1952, embodying a system of centralized abstract judicial review administered, along with the Court of Luxembourg, by decentralized domestic courts. Its formidable challenge was to evolve in a system of *sui generis* diffuse judicial review, which presents several similarities with the US judicial review model, as shown in this section.

III. Remand to State Courts and The Remedy of Disapplication

Generally, when SCOTUS decides that a law is unconstitutional, the case is remanded to the lower court to decide how this applies to the specific facts but absent the now-invalidated law. The power to remand is granted by statute,[65] and the principle of remand was established in *Fletcher*.[66] Here SCOTUS established that State courts were subordinate to its jurisdiction as SCOTUS had the ultimate power to decide over a conflict between US constitutional law and State law. Therefore, the remand process of introducing new theories and evidence that were not previously considered or were overlooked is a staple of the US Supreme Court jurisprudence.

In the EU the power to disapply national norms in contrast with EU primary or secodary law directly effective provisions lies in the hands of domestic courts. According to Broberg and Fenger, 'the preliminary ruling constitutes merely an interim stage in the national proceedings which continue after the [ECJ]'s ruling having regard to the clarification of EU law that has now been established.'[67] However, often time the boundaries between interpretation and application of EU law by the ECJ become difficult to draw in practice. The remand of the case by the ECJ to the national court is mandatory in the

[65] 28 U.S.C.A § 2106.

[66] *Fletcher* (n 15).

[67] Broberg and Fenger (n 61) 399.

preliminary ruling mechanism.[68] Yet, the reality reveals that sometimes the ECJ ruling leaves no margin of manoeuvre to the domestic court and, *de facto*, 'settles the dispute'.[69] Hence, a European centralized review of national law and, in this vein, a detour of the role conferred by the European treaties to the ECJ.[70] This is further demonstrated by Advocate General Warner's affirmation in his opinion in the *Foglia I* case that the Court can be entrusted with

> the question of the compatibility with Community law' of a rule or administrative practice prevailing in a Member State by means of two types of proceedings: those set forth in then-Article 169 TEEC, currently Article 258 TFEU, to be initiated by the Commission, and those brought 'by a reference under Article 177 made by a court or tribunal of that State in proceedings in which the appropriate authority of that State is a party.[71]

As to SCOTUS, there are three forms of disapplication of State law by the Supreme Court in practice. With a series of caveats, such a categorization can be extended to the ECJ preliminary ruling jurisprudence as well, showing that the rationale and the dynamic of the ECJ case law with regard to State law is not *a priori* different from that of SCOTUS.

We call the first form of disapplication by SCOTUS 'immediate disapplication by national courts' referring to the logic of the *Brandenburg* decision, creating a free speech test that could not be altered in a remand situation. In *Brandenburg v. Ohio* (1969)[72] the plaintiff was prosecuted under an Ohio law that limited speech that was deemed to encourage crime, terrorism, or other violence. The plaintiff, a member of the Ku Klux Klan, was found guilty under the Ohio law, but successfully appealed to SCOTUS,

[68] Broberg and Fenger (n 61) 371 ff. on the margin of manouevre of the Court and the 'duty' to remand the case to the national court.

[69] Tridimas (n 29) 737 ff.

[70] Léontin-Jean Constantinesco, *L'applicabilité directe dans le droit de la CEE* (new edition of the 1970 volume, Bruylant 2006) 41, speaks of 'déviation fonctionnelle'.

[71] Case 104/79 *Pasquale Foglia* v. *Mariella Novello* EU:C:1980:22, 766.

[72] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

who created the famous Brandenburg test, requiring a two-part test to prosecute someone for inflammatory language, and striking down the overly broad State law. After the SCOTUS decision, which reversed the Ohio court's condemnation of Brandenburg's words, SCOTUS did not remand but rather decided directly on the facts.[73] The lack of remand is notable here because SCOTUS seemed to decide that the discussion was over, breaking from usual remand proceedings and demonstrating a lack of trust in the State to act accordingly.[74]

In the framework of the EU preliminary reference mechanism, especially in the area of free movement law, there are very few judgments in which the court not only predefines the outcome of the case, but it sets how the provided interpretation of EU law mandates a certain solution of the dispute in the specific circumstances at stake. In *Grundig Italiana SpA v Ministero delle Finanze* the ECJ dealt with the shortening, by Italian legislation, of the time-limit for claiming reimbursement of consumption taxes imposed in violation of EU law.[75] In this decision the ECJ suggested the establishment of a transitional period of ninety days for claims advanced before the new legislation came into force in breach of EU rules, and also extended the transitional period to be guaranteed by domestic law to six months to protect the principle of effectiveness.[76] Of course, once the preliminary ruling was delivered, the case was resumed in front of the national court, but the ECJ had gone as far as to 'rewrite' domestic legislation forcing its application to the case.[77]

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[73] *Ibid*., 449.

[74] Michael S. Rosenwald, 'The landmark Klan free-speech case behind Trump's impeachment defense' The Washington Post (Washington D.C 12 February 2021), <https://www.washingtonpost.com/history/2021/02/10/brandenburg-trump-supreme-court-klan-free-speech/>, first accessed on 27 November 27 2022.

[75] Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* EU:C:2002:525.

[76] *Ibid*., para 42.

[77] Tridimas (n 29) 741.

We call the second form of disapplication 'disapplication with flexibility in outcomes'. This happens in most of circumstances, when a case is decided by SCOTUS and remanded to the State court. The State court must take into account the decision and logic of the opinion but its result can be the same ultimate decision as it had before. For example, in *Sochor v. Florida*, a capital punishment case, the Florida Supreme Court had given what SCOTUS decided was an unnecessarily vague jury instruction, leading to the death sentence for the defendant. SCOTUS remanded, barring the 8th Amendment violation in the jury instruction, but the Florida Supreme Court found that the error was negligible and upheld the conviction on the other factors associated with weighing the defendant's culpability.[78] This shows that the end result can still be the same, so the remand is not an automatic reversal. Also in the EU, most preliminary rulings provide guidance to the referring court, but leave flexibility in the final outcome. The discretion guaranteed to the national judge depends on the levels of detail offered in the ECJ's instructions and on whether the ECJ allows exceptions. In *Gourmet*, for example, the Court considered that Swedish legislation forbidding the advertising of alcohol amounted to a limitation of the free movement of goods.[79] The ECJ was quite deferential toward the national court, considering the prohibition justified, unless the factual and legal features characterizing trade in the country could lead the domestic judge to detect that less restrictive means could have been used.[80] On other occasions, for instance in *Watts*, on the eligibility for reimbursements of medical expenses incurred in another Member State and the conditions set by UK law, the ECJ was much stricter and provided for specific requirements not to proceed with disapplication.[81] It set a series of conditions under which the

[78] *Sochor* v. *Florida*, 504 U.S. 527 (1992).

[79] Case C-405/98 *Gourmet* EU:C:2001:135.

[80] *Ibid*., para 34.

[81] Case C-372/04 *Watts* EU:C:2006:325.

prior authorization of the expenditures was to be considered in breach of EU law and conditions to be ascertained by the national court.

Finally in the US, in exceptional circumstances we can find a third form of disapplication of State law by the Supreme Court that we call 'disapplication without margin of interpretation'. In practice this type of disapplication is the most extreme when compared to the other two because it gives no margin of interpretation to State courts. In fact through this exceptional form of disapplication the US Supreme Court can avoid the remand to a State court. *NYT v. Sullivan* (1964) is a good example of such third form, as SCOTUS, and in particular the majority opinion authored by Justice William Brennan, struck down the Alabama libel statute in question.[82] What makes *NYT* unique is that Justice Brennan made a point to say that he did not believe the Alabama court would accurately decide the situation without the criminal libel law. Justice Brennan wrote for the majority: 'this Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make sure that those principles have been constitutionally applied'.[83] Normally, SCOTUS decides on a legal issue only, but here the Court applied the new legal standard of 'actual malice' to the facts, essentially directing the lower courts on how they were going to rule on remand. *NYT v. Sullivan* is traditionally seen as an outlier for the result of SCOTUS applying the test on behalf of the State court showing that it did not trust the local court to correctly implement the new decision.

As for the ECJ, in an increasing number of preliminary interpretative rulings, in particular dealing with discrimination, it has left no discretion to the domestic courts or authorities. In *Mangold*, the ECJ clearly asserted that the German legislation on fixed-term employment contracts was incompatible with EU law, following a strict proportionality test, and had

[82] *NYT* v. *Sullivan*, 376 U.S. 254.

[83] *Ibid*., 285.

to be set aside.[84] More recently, in *Coman*, in the sensitive field of the recognition of same-sex marriages and on the ground of free movement of persons, the ECJ has come to set a positive obligation for Member States: to acknowledge the effect of any marriage validly celebrated in another EU country under the condition that the couple has resided for at least three months on that country, thereby setting aside national law that prevents such an outcome.[85] Finally, there is still no evidence, instead, of ECJ's arguments similar to those used by Justice Brennan in *NYT v. Sullivan*: for the ECJ to replace the domestic court would amount to a patent *ultra vires* activity with doubtful consequences.

IV. States' Resistance to SCOTUS Rulings

The Supreme Court faced frequent open resistance from State officials, especially in the antebellum south.[86] The conflict between States and SCOTUS started early when SCOTUS ruled on one of its first cases, *Chisholm v. Georgia* (1793).[87] Georgia refused to carry out the ruling that allowed a citizen of South Carolina to bring a case against Georgia, in violation of what Georgia viewed as its sovereign immunity.[88] State opposition to the case would continue until it was overturned by the enactment of the Eleventh Amendment five years later.[89] So common were such cases prior to the Civil War that the only years (1841-49) that didn't see mass resistance from States coincided with the court's justices holding a pro-states' rights majority.[90]

[84] Case C-144/04 *Mangold* v *Helm* EU:C:2005:709.
[85] Case C-673/16 *Coman* EU:C:2018:385.
[86] Goldstein (n 11), 14.
[87] *Id.*, 16.
[88] *Id.*
[89] *Id.*
[90] *Id.*, 23.

A relatively high level of resistance to SCOTUS decisions would continue until the end of the Civil War in which State courts were defiant of specific federal court interpretation of State or federal laws. The US' relatively high level of cultural homogeneity, shorter-term of independence, and recent experience of confederation make this opposition surprising when compared to the case of the EC.[91]

In one such case, *McCulloch v. Maryland* (1819), SCOTUS found that no State could impose a tax that only targeted the national bank.[92] In defiance of the ruling, the Ohio state auditor enforced the tax with the support of the governor and the state legislature.[93] In doing so, the state of Ohio argued that only states had ultimate authority to decide the constitutionality of federal law.[94] Similarly, in *Worcester v. Georgia* (1832), Georgia ignored SCOTUS's determination that it did not have the authority to regulate trade with the Cherokee Nation. Georgia ignored SCOTUS and issued arrests for a number of Cherokee Nation members.[95] In an attempt to stop the violence against the Cherokee in neighboring Alabama, Andrew Jackson sent federal troops to prevent further violent attacks by Alabamians.[96] The federal force would prove too small for the Alabama perpetrators, and they were forced to retreat.[97]

Opposition was not limited to the antebellum South. After the Civil War, state courts resistance to federal court's judicial authority did not occur again

[91] *Id.*, 18-20 Leslie Goldstein has found that resistance to federal authority was highest with particular States on particular issues, ranging from issues tax laws, land ownership, banking, laws regulating speech and press, and fugitive slave laws.

[92] *Id.*, 21.

[93] *Id.*

[94] *Id.*, 21.

[95] *Id.*, 31.

[96] *Id.*, 49-50.

[97] *Id.*

until the civil rights movements in the '50s and '60s.[98]The Civil War marked a turning point in which despite the Supreme Court was tainted with the infamous decision of *Dred Scott*[99] upholding slavery its 'decline without fall'[100] nevertheless diluted the state courts resistance towards the federal judiciary. In fact the docket of the federal judiciary kept growing steadily due to its relatively easy access compared to the state one and with more than eight hundred judges in the politically appointed federal judiciary .[101]

The constitutional validity of the Court's jurisdiction has been on fairly solid ground since, and even very controversial decisions like *Bush v. Gore* do not give rise to attacks on the Court's jurisdiction.[102] Yet the Supreme Court has an arsenal of political and judicial tools to ensure state courts compliance that it uses according to the different types of resistances and historical circumstances.

First, as mentioned above, the Supreme Court in special dire circumstances has been able to mobilize the Federal government and the National Guard. In fact, after *Brown v. Board of Education*, in the case of recalcitrant Southern governors that still refused to enforce the Court's mandate SCOTUS took extreme measures. In *Cooper v. Aaron*, the Court took the unusual step of issuing an opinion signed by all nine Justices denouncing this, and the Southern states backed down.[103] Normally, SCOTUS lays down an opinion and remands for proceedings 'not inconsistent' with it. If a lower court

[98] See Michael J. Klarman, From Jim Crow to Civil Rights. The Supreme cOurt and the Struggle for Racial Equality (Oxford University Press 2006).

[99] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[100] See McCloskey (n 18) 64.

[101] A politically appointed judiciary has inevitably raised questions of lack of diversity, see Jennifer L. Peresie, 'Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts' (2005) 114 Yale Law Journal 1759 and Harry T. Edwards 'Race and the Judiciary' (2002) 20 Yale Law & Policy Review 325.

[102] *Bush v. Gore*, 531 U.S. 98 (2000).

[103] See *Aaron v. Cooper*, 358 U.S. 28 (1958); Wells (n 41) 39.

deviates from the Court's mandate, litigants can seek additional review as in *Martin*[104] and, if that isn't possible, a writ of mandamus.[105] Generally, the Court has used the threat of such a writ of mandamus in lieu of the writ itself to exact compliance.[106] Another third tool, already discussed in section III, in the Supreme Court implementation arsenal is to enter judgment itself,[107] or 'remand with directions' to enter a specific judgment.

Finally, the US Supreme Court also has the power under 18 USC 401, a federal statute establishing the power of federal courts to punish for contempt or disobedience of a lawful order or command, though here, too, the power is almost never exercised.[108] However, in one tragic case dating back to 1909, state officials lynched a prisoner despite SCOTUS issuing a

[104] See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) [In *Martin*, the United States Supreme Court held that it possesses the authority to review decisions made by state courts interpreting federal law or the Constitution to ensure a consistent application of the law across all states.]

[105] A Mandamus is a judicial order by an appellate court commanding a lower court or public officer to comply with a prior ruling. Such an order may require the recipient to act or withhold action. *See generally* U.S. Department of Justice, *Justice Manual: Civil Resource Manual Sec. 215. Mandamus* <https://www.justice.gov/jm/civil-resource-manual-215-mandamus> first accessed on November 27, 2022.

[106] See, *e.g.*, *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).

[107] See discussion on *NYT* v. *Sullivan* as an example of this feature, *supra* Section II, para 3.

[108] 18 U.S.C.A. § 401, A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

stay of execution, and the US AG charged state officials with contempt and sentenced them to prison.[109]

V. States' Resistance to ECJ Rulings

Also thanks to the preliminary reference procedure, the ECJ has been able to credit itself as a strong and authoritative Court and as an engine of integration. The paradigm of 'integration through law' was mainly built around the growing body of ECJ case law.[110] The judicial 'creation' of general principles of EU law such as direct effect and primacy, combined together, however, caused some backslash by Member States' courts. The threat of lowering the level of fundamental rights' protection across the then Community, lacking EU human rights provisions and standards, beyond market freedoms, prompted national courts to devise interpretative tools such as the *Solange* and the counter-limit doctrines.[111] The response of the ECJ was to develop a fundamental rights' jurisprudence drawing on the constitutional traditions common to the Member States that could appease the vindications by the domestic judges.[112] The strategy was to a large extent effective, but the unclear contours of the remedy of disapplication, on the one hand, and the broadening of the scope of integration through subsequent Treaty revisions since 1986, on the other, let new signs of domestic resistance by state courts to emerge.

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[109] See *United States* v. *Shipp*, 589 F.3d 1084 (10th Cir. 2009).

[110] Mauro Cappelletti, Monica Saccombe, and Joseph H.H. Weiler (eds), *Integration Through Law. Europe and the American Federal Experience* (vol. I, De Gruyter 1986).

[111] See, respectively, German Constitutional Tribunal, BVerfGE 37, 271 - Solange I, and BVerfGE 73, 339 - Solange II, and Italian Constitutional Court, Judgment No. 183/1973. As well-known, the expression 'controlimiti' was not invented by the Court, but is rather a scholarly elaboration by Paolo Barile, 'Il cammino comunitario della Corte' (1973) 18 Giurisprudenza costituzionale 2406, 2406-2419.

[112] See, e.g. Case 29/69 *Stauder* EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; and Case 4/73 *Nold* EU:C:1974:51 (though the latter refers to an action for annulment).

Unlike SCOTUS, over its (only) 70 years of activity, the ECJ had to balance between heterogeneity of legal cultures and constitutional traditions among the Member States and the need to move the process of integration forward. In this context, the ECJ has explicitly affirmed that in some situations the duty to disapply, in spite of direct effect and the emergence of a clash between EU law and national law, should be subject to derogation.

One of these legitimate exceptions arises when the ECJ approves[113] the invocation of the national identity clause foreseen in Article 4(2) TEU[114] by the referring court in its reference pursuant to Article 267 TFEU and/or by the State involved in the proceeding before the EU judges, which normally takes place in the context of Article 267 TFEU.

The EU post-Lisbon landscape has witnessed interesting, though sometimes alarming developments in this respect. While highest courts had been traditionally reluctant to issue preliminary references before, since 2009 most Constitutional Courts have started making referrals though not on a regular basis.[115] Still, such a partial change in attitude does not necessarily entail the adoption of a more collaborative disposition of the highest judicial authorities toward the ECJ. The national constitutional identity has been

[113] See, for instance, Causa C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401.

[114] On the identity clause, looking just at monographs and edited volumes, see François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des Etas members* (LGDJ 2013); Giacomo Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea-Natura e portata dell'art. 4, par. 2, TUE* (Editoriale Scientifica 2017); Christian Calliess and Gerhard van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023).

[115] Maria Dicosola, Cristina Fasone, Irene Spigno, 'Foreword: Constitutional Courts in the European Legal System after the Treaty of Lisbon and the Euro-crisis' (2015) 16 German Law Journal 1317, 1318. Of the 18 Constitutional Courts in the EU those who have not made referrals yet are the Constitutional Courts of Bulgaria, Croatia, of the Czech Republic, Hungary, Latvia, Luxembourg, Romania and Slovakia.

routinely invoked by these Courts to waive the obligation to disapply state law, but the ECJ has made clear that it is the only authority to authorize such a derogation.[116]

The preliminary reference procedure has been the main scene within which this confrontation has taken place. As Broberg and Fenger have pointed out, the cases of evident non-compliance with a preliminary reference ruling have been rare.[117] Perhaps the most well known examples involving national Constitutional and Supreme Courts are those of the Czechoslovak pension saga,[118] of the Danish saga on age discrimination in employment relationships,[119] and of the German PSPP saga, dealing with the European Central Bank's mandate.[120] On several occasions, the French *Conseil d'État* has tried to shy away from the obligation to implement preliminary rulings. For example, in one case it contested that the ECJ judgment[121] went beyond the preliminary question asked or accusing the ECJ of having exceeded its competence under Article 267 TFEU after it allegedly grounded the preliminary ruling on an understanding of the facts in the main proceedings

[116] Gallo (n 36) 595.

[117] Broberg and Fenger (n 61) 400. See: also Cohen (n 3) 434.

[118] Czech Constitutional Court, Judgment of 31 January 2012, Pl ÚS 5/12 on which see: Robert Zbíral, 'Annotation on Czech Constitutional Court, Judgment of 31 January 2012, Pl US 5/12' (2012) 49 Common Market Law Review 1475.

[119] See: Danish Supreme Court, Judgment No. 15/2014, 6 December 2016, as a response to Case 441/14 Dansk Industri v Rasmussen EU:C:2016:278, on which see: Sabine Mair and Urška Šadl, 'Mutual Disempowerment: Case C-441/14 Dansk Industri (on behalf of AJOS A/S) v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A' (2017) 13 European Constitutional Law Review 347.

[120] German Federal Constitutional Tribunal, Case No. 2 BvR 859/15, 5 May 2020, on which see: the Special Section: 'The German Federal Constitutional Court's PSPP Judgment' (2020) 21(5) German Law Journal 1090.

[121] Joined Cases C-511, 512 & 520/18 *La Quadrature du Net and others* EU:C:2020:791.

not shared by the referring court.[122] Possibly, even more alarming has been the position taken by the Constitutional Court of Romania in its indirect 'dialogue' with the ECJ, through the preliminary references issued by other Romanian courts. In *Asociatia Forumul Judecătorilor din România*, the ECJ had considered in contrast with the principle of primacy the national constitutional case law preventing lower courts from disapplying national provisions in contrast with EU law whenever those provisions were expressly judged in compliance with the Constitution.[123] The Constitutional Court of Romania 'responded' that the ECJ had acted *ultra vires* when imposing the disapplication of the domestic judicial reforms on the ground of EU norms lacking direct effects.[124] In a follow-up preliminary ruling, the ECJ clarified once again that domestic judges have the power not to apply a judgment of the Constitutional Court contrary to EU law,[125] to which the Constitutional Court of Romania reacted on 23 December 2021 with a (harsh) press release claiming that national judges had to abide by the domestic constitutional jurisprudence rather than by the EU case law and that they could be subject disciplinary proceedings in case of deviation from this rule. In dealing with a further preliminary reference issued by the Court of Appeal of Craiova, Romania, the ECJ rejected the constitutional identity argument and objection in the landmark decision of *RS*.[126] The ECJ also clarified that imposing disciplinary proceedings and penalties against ordinary judges examining the compatibility with EU norms of national provisions already adjudicated in line with the Constitution amounts to

[122] See: Conseil d'État, Assemblée, 21/04/2021, no 393099 and the case note by Araceli Turmo, 'National security as an exception to EU data protection standards: The judgment of the Conseil d'État in French Data Network and others' (2022) 59 Common Market Law Review 1.

[123] *Asociaţia "Forumul Judecătorilor Din România"* (n 44).

[124] Constitutional Court of Romania, Judgment No 390/2021 of 8 June 2021.

[125] *Euro Box Promotion* (n 46).

[126] Case C-430/21 *RS* EU:C:2022:99, para 65. See: also *IS (Illegality of the order for reference)* (n 45).

undermine 'the effectiveness of the cooperation between the Court of Justice and the national courts established by the preliminary-ruling mechanism'.[127]

Which tools, then, can the ECJ and the EU use in the event a state resists implementing preliminary rulings? Unlike SCOTUS, EU institutions cannot deploy military forces against a Member State who fails to implement a preliminary ruling. However, there are other instruments at the EU's disposal which compel Member States to adopt preliminary rulings. First, infringement actions under Article 258 TFEU can start should a court either refuse to issue a preliminary reference to the ECJ, when it is mandatory to do so, or if it fails to comply with a preliminary ruling (especially if it triggered it).[128] Of course, the infringement procedure goes through many steps, but if the State court does not abide by the prescription or the preliminary judgment by the end of the pre-judicial stage, the country could be eventually condemned. To date, the only case where the ECJ ruled that a Member State had been in breach of the duties under Article 267 TFEU following an infringement proceeding has been in *Commission v France (Advance Payments)* due to the persistent hostility of the French *Conseil d'État* to issue a preliminary reference and to conform its case law to the ECJ consolidated jurisprudence.[129]

The second instrument that can be used by the EU against state courts' resistance to comply with a preliminary ruling and to issue a preliminary reference is State liability. Since the '*Francovich* rule'[130] was set Member States can be liable to pay compensation to individuals who suffered loss due to the domestic violation of EU law. With this regard, the comparison with the US has revealed that, contrary to the expectations, the enforcement of state liability is stronger and broader in its scope in the EU than in the old, long-

[127] *Ibid*.

[128] Broberg and Fenger (n 61) 240-242.

[129] Case C-416/17 *Commission* v. *France* EU:C:2018:811.

[130] Case C-6/90 *Francovich* v. *Italy* EU:C:1991:428.

standing, US federation.[131] In *Köbler* the ECJ extended state liability for violation of EU law and to the activity of national courts, including to the lack of use or misuse of the preliminary reference mechanism.[132] However, it set a very high bar with regard to when the state liability can be triggered in such a case, thus confining it to exceptional circumstances.[133] According to Clelia Lacchi, a promising way to enhance the monitoring over the implementation of Article 267 (3) TFEU would be to frame the preliminary reference mechanism as a tool instrumental to guarantee effective judicial protection to individuals.[134] This would mean that the lack of a referral, when in fact it was mandatory, or the lack of implementation of a preliminary ruling, under specific circumstances, could trigger a violation of Article 47 of the Charter.[135] After all, this argument already resonates within the ECJ case law meant to ensure the independence and impartiality of domestic courts, as devised in *Associação Sindical dos Juízes Portugueses*,[136] subsequently applied in the rich case law on controversial national judicial reforms in Eastern Europe.[137]

Finally, the potential of other two tools can be further explored in tandem. Firstly, pending the accession of the EU to the European Convention on Human Rights (ECHR), the avenue of the 'external' supervision by the

[131] Daniel J. Meltzer, 'Member State Liability in Europe and the United States' (2006) 127 Harvard Law School Public Law Research Paper 3.

[132] Case C-224/01 *Köbler* v *Austria* EU:C:2003:513.

[133] Tridimas (n 29) 752-753.

[134] Clelia Lacchi, 'Multilevel judicial protection in the EU and preliminary references' (2016) 53 Common Market Law Review 679, 703-708.

[135] Ibid.

[136] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117 on which see: Laurent Pech and Sébastien Platon, 'Judicial independence under threat:The Court of Justice to the rescue in the ASJP case' (2018) 56 Common Market Law Review 1827.

[137] Laurent Pech, 'The European Court of Justice's jurisdiction over national judiciary related measures', in *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,* PE 747.368 - April 2023.

European Court of Human Rights (ECtHR) could be used. Indeed, the lack of referral to the ECJ by national courts on the ground of Article 267 TFEU can be challenged by individuals in front of the ECtHR for violation of Article 6(1) ECHR, as the right to a fair trial includes access to courts. The ECtHR acknowledged such a violation for the first time in 2014.[138] It ascertains whether there is an obligation by the Court to issue a preliminary reference and, consequently, whether the domestic judge refused to do so without providing reasons for the denial in light of the *CILFIT* criteria.[139] However, this move by the ECtHR could also trigger some problems in terms of autonomy of the EU legal order and of legal certainty. Although the ECtHR has made clear that it does not review the way EU law has been interpreted by the domestic court and it sticks to *CILFIT*, the ECJ uses different standards to assess the respect of Article 267(3) TFEU.[140]

Secondly, the declining rate of the compliance with the ECJ rulings[141] could be tackled at least in part through spending conditionality, particularly in EU countries whose courts have been the objects of political capture. Country specific recommendations (CSRs) in the framework of the European Semester and annual rule of law reports are not only now more frequently targeting both effective judicial protection and access to justice standards to assess national performance, but they have also become inextricably linked to the implementation of several milestones and targets of the national recovery and resilience plans in this Member States.[142] The

[138] *Dhahbi* v. *Italy* App No. 17120/09 (ECtHR 8 April 2014).

[139] Lacchi (n 134) 699-700.

[140] Niels Fenger and Morten P. Broberg, 'Finding light in the darkness: On the actual application of the acte clair doctrine' (2011) 30 Yearbook of European Law 180, 203-204.

[141] Pech (n 137) 83-85.

[142] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17. More complex, instead, seems to be the activation of the rule of law conditionality

lack of compliance with Article 267 TFEU and with ECJ preliminary ruling could also endanger the payment of the installments foreseen under the Recovery and Resilience Facility.

VI. The Practice of EU Preliminary References and of US Certification

In the United States there is a clear separation between state and federal law so that the States Supreme court has the last word on state law and the Supreme Court is the highest appellant court on federal law. Although the Supremacy Clause in the US constitution (Article VI, clause 2) makes it clear that state judges are bound by Constitution and federal law, litigants who rely on federal law will make sure to access a federal court as state courts are not always the most reliable enforcers of federal law.[143] This lack of comity by state courts in respecting the rulings of federal courts is considered in common law as a matter of mere obligation and of deference and mutual respect towards other courts that could be state, federal or international ones.[144]

Like in the US, EU supranational law and domestic law in theory have their own fields of competence to regulate. However, the design of the EU judicial system, the practice of the preliminary reference procedure and the case law of the ECJ make it difficult to disentangle the two bodies of law. It

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under Regulation 2092/2020 for the denial to use the preliminary reference mechanism or for lack of implementation of the ECJ rulings, although Article 4 refers to 'the effective judicial review by independent courts of actions or omissions' by the national authorities implementing the EU budget or monitoring the implementation.

[143] See: Cohen (n 3) 448. See: also *NYT* (n 82), 285.

[144] See: '"A decent Respect to the Opinions of [Human] Kind": The Value of a Comparative Perspective in Constitutional Adjudication', International Academy of Comparative Law (quoting Ruth Bader Ginsburg) <https://aidc-iacl.org/ruth-bader-ginsburg-a-decent-respect-to-the-opinions-of-humankind-the-value-of-a-comparative-perspective-in-constitutional-adjudication/>.

is clear that national courts are crucial components of the EU judicial system, ensuring that sufficient legal remedies are offered to guarantee effective legal protection in the EU law remit (Article 19(1) TEU).[145] At the same time, as observed in section V, especially since the entry into force of the Charter of fundamental rights, the ECJ has intervened on crucial constitutional matters for the Member States and the management of national law is somewhat in its mandate insofar as the constitutional traditions common to the Member States are part of the standards of review for the Court (Articles 6(3) TEU and 52(4) Charter) and the national constitutional identity is foreseen as a limit to the EU action (Article 4(2) TEU). There have been some conflicts between domestic courts and the ECJ, as reported, but overall the preliminary reference procedure has managed to channel dissensus between courts and has enabled the ECJ to find a compromise and balanced solution, sometimes more deferential toward the referring judge, some others more intrusive. References for a preliminary ruling are by far the most common type of proceeding in front of the ECJ. In the period 2018-2022 preliminary reference proceedings amounted to 67.74% of the total number of new cases introduced in front of the Court.[146] In 2022 only, 546 new preliminary references were issued with variations across the Member States.[147] Germany, Italy, Bulgaria, Spain, Poland, and Austria, in this order, are the countries whose courts made most referrals in 2022 (the figures are similar for the previous years), whereas Sweden, Denmark, Slovenia, Malta and Cyprus are those with the fewest referrals.[148] Of course, it is not just a matter of numbers, but also of contents of the orders of referral. With the increase in the number of preliminary reference proceedings, the clarity and the

[145] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006).

[146] Here and below the data reported can be found in the Detailed statistics of the Court of Justice, Court of Justice of the European Union, *Curia*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf> accessed on March 31, 2023.

[147] Ibid.

[148] Ibid.

quality of national courts' referrals become very important to support the job of the ECJ and its growing workload. Since 2005 the ECJ has provided domestic judges with a series of guidelines and recommendations.[149] Amongst other things, the Court also invites the referring court 'to briefly state its view on the answer to be given to the questions referred for a preliminary ruling' in the order issued.[150] Scholars and judges have described the situation where the domestic court also provide a possible answer to the question(s) posed as the 'green light procedure', which simplifies the task of the ECJ: if the ECJ agrees with the referring court, it could immediately accept the solution proposed without entering the ordinary preliminary ruling procedure.[151] The 'green light path' is not used routinely, but as the knowledge and practice of EU law advance among national courts the quality of the order of referrals also improves.[152]

By contrast, the practice of certification in the US remains rare and controversial because it is often seen with 'hostility or ambivalence' by courts

[149] For the latest version, see: ECJ, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, OJ C380/1.

[150] Id., para 18.

[151] 'Report by the Working Party on the Future of the European Communities' Court System from 18–19 January 2000', in Alan Dashwood and Angus C. Johnston (eds), *The Future of the Judicial System of the European Union* (Bloomsbury 2001) 168; Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and Network of the Presidents of the Supreme Judicial Courts of the EU, *Report of the Working Group on the Preliminary Rulings Procedure* (2007) 8–9; Maria Dicosola, Cristina Fasone, and Irene Spigno, Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis (2015) 16(6) German Law Journal 1327; Broberg and Fenger (n 61) 24, highlighting also the drawbacks of such a procedure, Davor Petrić, The Preliminary Ruling Procedure 2.0 (2023) 8(1) European Papers, 40-41.

[152] See, e.g., the orders of referral of the Spanish Constitutional Tribunal in Case C-399/11 *Melloni* EU:C:2013:107, for its clarity and for the proposals advanced as well as the order of referral in Taricco by the Italian Constitutional Court (order No. 24/2017).

from different jurisdictions.[153] One of the reasons is that as Cohen puts it 'judicial federalism is unsparingly hierarchal and confrontational' leading to the broader encroachment and expansion of federal constitutional and statutory law into state laws.[154]

The scope of the certification procedure was initially to prevent jurisdictional conflicts and the Judiciary Act of 1802 allowed the request for questions of law by federal Circuit courts that had to certify their questions to the Supreme Court.[155] While this practice of certification was abandoned by the Supreme Court and is now 'dormant' when it comes from a federal court of appeals to SCOTUS,[156] the practice of certification from federal courts to State Supreme Courts is enjoying some success as an 'intra-systemic vertical certification' of questions of law from lower to higher courts.[157] Often federal courts have to certify a question to State supreme courts in cases of diversity jurisdiction or when State action is challenged based on constitutional or federal statutory law.[158] The New York Court of Appeals (the highest court in the State) has been one of the exemplary courts in this respect that since the mid-1990s has answered several certified questions every year to the United States Court of Appeals for the federal Second Circuit.[159] Another possibility for state courts would be to answer questions

[153] Cohen (n 3) 455.

[154] *Id*., 455.

[155] *Ibid*.

[156] *Id*., 457.

[157] *Id*., 456.

[158] *Ibid*.

[159] *Id*., 456. See: Rob Rosborough, *How te Court of Appeals takes Certifies Questions from the federal Courts and Other States' Supreme Courts: The 202 Certifies Questions* in New York City Court of Appeal website says there are 3-4 certification questions per year, see: <https://nysappeals.com/2020/10/14/court-of-appeals-certified-questions/> accessed on November 27, 2022.

certified to them by other State court as contemplated by federal law and advocated by scholars but never used in practice.[160]

Overall, the certification mechanism could provide a powerful tool to enhance comity between state and federal courts despite additional delays and costs that litigants have to bear.[161] However, certification has been seen with skepticism by judges who need to give an answer to the certifying court that has no obligation to respect and therefore follows its legal interpretation that is often dealing with abstract issues and different factual setting.[162] Nevertheless, scholars have pointed out that certification remains most effective when openly showing conflict, cooperation and dialogue between federal and state courts that could potentially enhance comity and therefore greater uniformity in the interpretation of state and federal laws.[163] This is in line with the logic behind the EU preliminary reference procedure and ensures the uniform enforcement of EU law while relying on judges and domestic authorities as the first enforcers of supranational norms.

In conclusion, the certification in the US is not used on a regular basis nor is able to produce binding effects.[164] By contrast, in a relatively new 'federalizing process' the ECJ and national courts share a structural and daily channel of coordination described as 'the central pillar of the Union's cooperative federalism'.[165] With this regard, in the US Judge Guido Calabresi

[160] See: Bernie Corr and Ira Robbins, 'Inter jurisdictional Certification and Choice of Law' (1988) 41 Vanderbilt Law Review 411, 412-413. The Honorable Henry DuPont Ridgely, Justice of Supreme Court of Delaware, 'Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law' (2010) 63 Southern Methodist University Law Review 1127, 1139. The authors talk about Delaware accepting a certified question from NY Court of Appeals in the case of 998 A.2d 280 (Del. 2010).

[161] Corr and Robbins (n 160), 427.

[162] Cohen (n 3) 457.

[163] *Id*., 461.

[164] *Id*., 421-422.

[165] Robert Schütze, *European Union Law* (3rd edn., Oxford University Press 2021) 357.

has urged to use certification as a reverse preliminary reference, though in small quantity, to tackle the problem of federal courts interpreting State statutes by requiring a hypothetical determination of their constitutional validity without having a clear clue of the State court's understanding of the 'local' constitution and legislation.[166] This relates more directly to conflict arising in EU constitutional courts in their interactions with the ECJ over domestic constitutional norms and points to a similar need the ECJ has to better integrate the view of those courts in the supranational case law.[167]

VII. Conclusion

This article has offered a meta-comparison across distinct periods and judicial review features between the ECJ's preliminary interpretative rulings and the SCOTUS case law on unconstitutionality of State laws. The aim has been to assess how both courts behave when there is a problem of compatibility of domestic law with EU law and of unconstitutionality of State law vis-à-vis the US Constitution. Interestingly SCOTUS and the ECJ have devised similar forms of disapplication of State law (though with some caveats): immediate disapplication by national courts, disapplication with flexibility of outcomes, and disapplication without margin of interpretation. The two courts have also faced resistance to the implementation of their rulings, especially during the first century of the US constitutional history for SCOTUS and more vehemently since the entry into force of the Lisbon

[166] Guido Calabresi, 'Speech: Federal and State Courts: Resorting a Workable Balance' (2003) 78 New York University Law Review 1293, 1301.

[167] See the proposals put forward in the EU to this end: Joseph H.H. Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) XLIV Political Studies 517, 532-533 and Joseph H.H. Weiler and Daniel Sarmiento, 'The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics' (EU Law Live, 6 July 2020) < https://eulawlive.com/the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-a-reply-to-our-critics-by-j-h-h-weiler-and-daniel-sarmiento/ > accessed on March 31, 2023.

Treaty for the ECJ. Although the enforcement mechanisms supporting the implementation of SCOTUS and federal courts' judgments are more pervasive and far-reaching than in the EU, the tools at disposal of the EU institutions and the ECJ have grown over the last twenty years. In particular, the preliminary reference procedure in the EU has provided a successful tool to fine-tune the ECJ case law in conjunction with the Member States' courts and to ensure the uniformity of EU law. Due to this mechanism and to the design of the EU judicial system, the relationship between the ECJ and domestic courts shows a more evident centralizing dynamic compared to the US, where instruments of cooperation between federal and State courts, notably certification, are seldom used. This is a further proof showing how deeply integrated the EU system of courts is through the *sui generis* diffuse model of judicial review underpinning the preliminary ruling procedure, in conjunction with the ECJ's constant scrutiny of national laws by virtue of the principles of primacy and direct effect.