



The role of public opinion in rights adjudication : the examples of the United States supreme court and the European Court of Human Rights

Bernadette Joyeux-Jastrebski

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ECOLE DOCTORALE DE DROIT INTERNATIONAL ET EUROPEEN

THESE DE DOCTORAT SOUTENUE LE 2 JUILLET 2018

**THE ROLE OF PUBLIC OPINION
IN RIGHTS ADJUDICATION**

THE EXAMPLES OF THE UNITED STATES SUPREME COURT
AND THE EUROPEAN COURT OF HUMAN RIGHTS

Bernadette Joyeux-Jastrebski

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A MON PERE, QUI A FAIT NAÎTRE EN MOI UN INTÉRÊT POUR L'ARGUMENTATION
A MA MÈRE, QUI A SEMÉ EN MOI LA GRAINE JURIDIQUE ET L'AMOUR DES LANGUES

A MA FAMILLE FRANÇAISE, TO MY AMERICAN FAMILY,
A MON CHER JOSHUA, ET MES TROIS ENFANTS

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LIST OF MAIN ABBREVIATIONS

NB: Names of journals specified in footnotes are displayed in full. Therefore there was no need to clarify their abbreviation in this list.

| | |
|-----------------------------|---|
| ACHR | American Convention on Human Rights |
| CA | California |
| CDDH | Council of Europe Steering Committee for Human Rights |
| CoE | Council of Europe |
| CM | Council of Ministers |
| Dec. | Decision (as opposed to judgment) |
| <i>DOMA</i> | Defense of Marriage Act |
| ECtHR or Cour EDH | European Court of Human Rights |
| ECHR or European Convention | Convention on the Protection of Human Rights and Fundamental Freedoms |
| ECommHR | |
| or Human Rights Commission | European Commission on Human Rights |
| [GC] | Grand Chamber |
| Gr. Ch. | Grand Chamber |
| IACHR | Interamerican Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| LGBT | Lesbians, Gay, Bisexual and Transgender |
| US | United States |
| MIT | Massachusetts Institute of Technology |
| Mass. | Massachusetts |
| NATO | North Atlantic Treaty Organization |
| NGO or NGOs | Non-Governmental Organizations |
| NYU | New York University |
| OSCE | Organization for Security and Co-operation in Europe |
| PACE | Parliamentary assembly of the Council of Europe |

| | |
|------------------------------|--|
| Pa. | Pennsylvania |
| Pub. L. | Public law |
| Stat. | Statute |
| Va | Virginia |
| UCL | University College London |
| U.S.C. | United States Code |
| Sup. Ct. Rules or Sup Ct. R. | Supreme Court rules |
| Comm'n | Commission |
| Nat'l | National |
| F 2D | Federal reporter, 2 nd series |
| C.A. 9 | Federal Court of appeals for the 9 th Circuit |

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INTRODUCTORY CHAPTER

*From time immemorial, governments
showed concerned for opinion.
Ideas and opinions prepared the revolution*

Maurice Hauriou

1. Introduction and Hypothesis

1. Few have escaped, on either side of the Atlantic, the unrelenting debates regarding state recognition of same-sex relationships. Amid a blaze of publicity, the United States Supreme Court (hereafter ‘Supreme Court’) announced on the 26 June 2013¹ in *United States v. Windsor*, that it invalidated Section 3 of DOMA, the Defense of Marriage Act, a federal statute defining marriage as a union between man and woman for the purpose of federal law, which impeded recognition of same-sex marriage in states that had not enacted it and made impossible federal tax refunds for same-sex married couples.² The same day, the Supreme Court declared that initiators of a referendum-supported state constitutional amendment banning same-sex marriage in California had no legal capacity to defend their law in federal court—despite having such capacity under California state law.³ By denying them this right, the Supreme Court faced charges of being anti-democratic. The same year, the European Court of Human Rights, an international Court protecting the same rights for forty-seven contracting states consecrated, on the basis of the non-discrimination principle contained at Article 14 of the European Convention on Human Rights (hereafter ‘ECHR’), the equal value of same sex and heterosexual relationships in the exercise of their right to private and family life (Article 8), by obliging Greece to extend a civil union law protecting the family life of unmarried heterosexual couples, to same-sex couples.⁴ Two years later, the Supreme Court in *Obergefell v. Hodges* and the European Court in *Oliari v. Italy*⁵ penalized states for banning or not providing for civil recognition of same-sex couples;

¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

³ *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (1996)

⁴ ECtHR, *Vallianatos v. Greece*, [GC], Appl. Nos. 29381/09 32684/09, 7 November 2013.

⁵ ECtHR, *Oliari and others v. Italy*, Appl. Nos. 18766/11 36030/11, 21 July 2015, at §17.

marriage in the United States, and civil union in Italy. These are occurrences, when the prohibition of state-approved discriminations of vulnerable persons allowed minorities to win important political battles, sometimes through judicial channels.⁶

2. The growing political importance of supreme courts and international courts has increased scholarly interest in political studies on judicialization of societies.⁷ Studies of judicial institutions, which used to be contained to legal scholarship, have notably extended to other areas of the social sciences, particularly political sciences and international relations.⁸ They are motivated by a desire not only to understand the increase of the judicial authority and judicially-oriented political strategies in today's societies,⁹ but also the transformations of democracy and governance in a globalized world.
3. Legal scholars have claimed that the recent "power" increase of judicial institutions in political life was reinforced by an extensive and evolutionary interpretation of the law, coupled with an ever deeper assessment of the compatibility of public acts with

⁶ On the strategic use of international courts for political aims, see an entire volume of *Comparative Political Studies*, Vol. 39, Issue 1, (2006), particularly K. Alter, "Private Litigants and the New International Courts", *Comparative Political Studies*, Vol. 39, Issue 1, (2006), pp. 22–49, R. Cichowski, *Courts, Rights, and Democratic Participation*, pp. 50–75, Political research on international courts, participants, efficiency and manifold dimensions of their inner workings and output has been very dynamic and continues to develop today. E. M. Hafner-Burton, D. G. Victor and Y. Lupu "Political Science Research on International Law: The State of the Field", *American Journal of International Law*, Vol. 106, Issue 1 (2012).

⁷ See for example A. Garapon, J. Allard, *Les juges dans la mondialisation du droit*, Paris, Seuil, (2005) ; D. Salas, *Le Tiers Pouvoir*, Paris, Fayard (2013), M. Shapiro, *Courts: A Comparative and Political Analysis*. Chicago, University of Chicago Press (1981). M. Shapiro, "The Success of Judicial Review and Democracy", in M. Shapiro and A. Stone Sweet (eds), *On Law, Politics and Judicialization*. Oxford, UK: Oxford University Press (2002), 149-183.

⁸ For a comprehensive bibliographical study of "politics of judicial review" in the United States, see B. Friedman, "The Politics of Judicial Review", *Texas Law Review*, Vol. 84 Issue 2. (2005-2006). At global level, see for example A-M Slaughter, *A New World Order*, Princeton: Princeton University Press (2005). See also S. McLaughlin Mitchell, E. J. Powell, *Domestic Law Goes Global, Legal Traditions and International Courts*, Cambridge, Cambridge University Press (2013). D. Jacobson, G. Benarieh Ruffer, "Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy", *Human Rights Quarterly*, Vol. 25, pp. 74–92 (2003). On the European Court of Human Rights: E. Voeten, "Public Opinion and the Legitimacy of International Courts", in *Theoretical Inquiries in Law*, Vol. 14, No. 2 (2013), pp. 411-436. E. Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", *International Organization*, Vol. 61 No. 4, (2007), pp 669–701. A. Stone Sweet, T. L. Brunell, "Trustee Courts and the Judicialization of International Regimes. The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization", *Journal of Law and Courts*, Vol. 1 Issue 1 (March 2013), pp. 61-88. For a comparative study of constitutional courts, see R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, New York, Harvard University Press (2007). For a political study of the German constitutional court, see G. Vanberg, *The Politics of Constitutional Review in Germany*, New York, Cambridge University Press (2009).

⁹ constatée notamment par Denis Salas, *op. cit.*, ou par Julie Allard et Antoine Garapon, *op. cit.*

international norms, particularly human rights norms.¹⁰ This was particularly the case of the Supreme Court in the 1950s, starting during the Warren and Burger eras.¹¹ Moreover, through adjudication, judicial institutions promote democratic ideals, which are also evolving. For example, Florence Jacquemot has showed that the democratic standard fostered through European human rights adjudication is a transitional conception of democracy, caught in-between a representative ideal, no doubt outdated in practice, and an “unachieved” ideal of “participatory” democracy.¹² In the fulfillment of their roles, European judges participate in practice to a gradual redefinition of democracy. This political system, which oscillates between “participatory democracy” and “opinion democracy”, bequeaths an increasingly important and central role to judicial institutions.¹³ According to Morton Horwitz, the Supreme Court plays a similar role in the United States: in the 1960s, the Warren court did not confine itself to the minimalist and dominant definition of democracy, limited to a formal political equality. The Supreme Court preferred giving democracy, through its case law, a substantial content by “privileging the dignity and equality for all people”.¹⁴ Therefore, throughout the twentieth century, the judiciary established itself not only as a “tierce power”, using the words of Denis Salas, but also as a prevailing power. It now presents itself as the institution that plays the role of a guardian, ensuring that the new norms

¹⁰ See A. Vlachogiannis, *Les juges de la cour suprême des Etats-Unis et la notion de constitution vivante*, Doctorate thesis, Université Paris II Panthéon Assas (2011) and generally F. Jacquemot, *op. cit.*

¹¹ However, the inclusion of international law in Supreme Court opinions is still controversial and triggers challenges to her legitimacy. See D. Sloss, M. Ramsey, W. Dodge (ed). *International Law in the U.S. Supreme Court*, Cambridge University Press, (2012). See also J. Waldron, “Partly Laws Common to All Mankind”: Foreign Law in American Courts”, or Ernest A. Young, “Foreign Law and the Denominator Problem”, *Harvard Law Review*, vol. 119, 148, (2005) p.150-51 (Concerned that the use of foreign law might lead to judicial decision making based on “nose-counting” of foreign laws on each side of a controversy), or also Robert P. Alford, *misusing international sources to interpret the constitution American Journal International Law*, vol. 98, 57, (2004) p. 58 (Claiming that even if they are not as such constraining on American judges, foreign laws might influence them, to the detriment of the American People, which will is not involved in judicial decision-making). To these objections Justice Breyer responded that foreign institutions themselves draw inspirations from U.S. Supreme Court decisions when faced with similar problems. (p. 239). Moreover, Justices had drawn from English law and treatise as inspiration for a long time (p. 241). Although Americans have no direct or democratic connection to foreign judges, “(t)here is little reason to think that the practice will, for better or for worse, lead to the emergence of a Kantian universal law—a single rule of law for the whole world. . . . At most, cross-referencing will speed the development of “clusters” or “pockets” of legally like-minded nations whose judges learn things from one another, either as a general matter or in particular areas of law, such as security, such as security, commerce, or the environment.” p. 245. See S. Breyer, *The Court and the World, American Law and the New Global Realities*, New York, Random House, (2015), 382 p.

¹² Jacquemot, *op. cit.*

¹³ S. Benetulière, *La démocratie d’opinion*, Doctoral Thesis, Université Lyon III , France (2008).

¹⁴ M. Horwitz, *The Warren Court in the Pursuit of justice*, New York, Hill and Wahng (1998), p. 82.

created by public authorities do not infringe, directly or indirectly, on constitutional norms and rights.¹⁵

4. This dissertation starts by acknowledging that since courts' institutional authority has accrued at the same rhythm as their political power, more comprehensive academic studies of judicial institutions are increasingly needed. Although in the United States, the field of judicial studies is well documented by political science and legal studies alike, only recently have scholars taken upon themselves to look at courts, both domestic and international, with both lenses on.¹⁶ For example, in France, recent public law doctorates have focused on seemingly political phenomena: "opinion democracy", the "European standard of democratic society," or "values" in European case-law.¹⁷ The topic of this dissertation follows this trend by investigating the role of a very political phenomenon in judicial life: *public opinion*.
5. 'Public opinion' is henceforth approached as a full-pledged element of rights adjudication, included in different aspects in the institutional and argumentative life of the judicial office.¹⁸ The aim of this work is to "take hold of [public opinion] within the prism of legal categories",¹⁹ in its different manifestations, some of which are not easily discernable.
6. It is often assumed that elected representatives have a monopoly on opinion-inspired decisions. Thus I work from the hypothesis that the relationship between law and public opinion can be discernable in law throughout institutional rules and practices as much as within the substance of judicial decisions. A few elements brought about such hypotheses. First, if the monopoly over principled decisions arguably belongs to the

¹⁵ A. Cox, "Federalism and Individual Rights under the Burger Court", *Northwestern University Law Review*, Vol. 73, Issue 1 (1978-1979) p. 1. The Supreme Court is hence seen as a protector of liberty and an umpire of society. See for example T. Clark, "The Supreme Court as a Protector of Liberty Under the Rule of Law", *Marquette Law Review*, Vol. 43, Issue 1 (1959).

¹⁶ For references see *supra*, note 6.

¹⁷ C. Blanc-Fily, *Les valeurs dans la jurisprudence de la Cour européenne des droits de l'homme. Essai critique sur l'interprétation axiologique du juge européen*, Doctoral thesis, University of Montpellier I, Law School, France, (2014).

¹⁸ C. Perelman believed that public opinion was in itself an element that was to be taken into account to protect or increase the authority of judges. To convince their public that a decision is right, judges have to demonstrate that decisions are equitable, opportune, and socially beneficial. C. Perelman, *Logique Juridique, Nouvelle Rhétorique*, Paris, Dalloz (1976), pp. 155-8

¹⁹ S. Bénéttulière, *op. cit.*, note 8, p. 349, (my translation).

judges,²⁰ public opinion is not foreign to the legal norms that are at the foundation of our democratic societies, and thus to the work of judges, who are responsible for protection of the most basic rights, no matter whether we call them called “civic”, “fundamental” or “human”.²¹ Indeed, according to Belgian legal philosopher Chaïm Perelman, judges are no isolated actors in public life, and their decisions are not uniquely drafted for themselves and for the parties to the case: they are also elaborated for an audience. Perelman’s “new rhetoric” “rests on three main principles: the orator has to adapt to his audience; he does so by resting on assumed points of agreement and ratified premises”.²² Secondly, the relationship between a judicial institution and one of its audiences, public opinion, can be revealed by judges’ most visible outputs: written judgments. Therefore, this thesis will not fail to focus on the written substance of judgments. Moreover, since institutional arrangements govern and influence the inner workings of adjudication and the substance of judges’ decisions, I will focus on institutional arrangements within which the decisions are made and rules all judicial actors are subject to, more specifically institutional arrangements allowing the public and civil society actors access and participation privileges to the judicial institutions that are object of this study. Indeed, such arrangements are witness to the openness of courts to their audiences.

7. This dissertation takes as main object two of the most renowned judicial institutions on account of their efficiency, their legal creativity, and mostly their political visibility as guarantor of the most essential rights of every person: constitutional rights and human rights.
8. First, the United States Supreme Court was born as an innovation, but quickly established its preeminent role in a country where the lack of cultural homogeneity was compensated by a strong legal system and legal culture.²³ The Supreme Court grew its

²⁰ For more development on the debate about the monopoly of rational decision by the judges, see *infra*, Chapter 1 of this thesis.

²¹ Sunstein also holds that when the Supreme Court “entrenches a new constitutional principle or a novel understanding of an old principle, it is never acting in a social vacuum. Often it is endorsing a judgment that long attracted widespread social support from many minds”. See C. Sunstein, *A Constitution of Many Minds*, Princeton, Princeton University Press (2009), p.4.

²² Bénéttulière, *op. cit.*, p. 632, referring to Perelman, *op. cit.*, p. 135.

²³ R. Ferguson even claims that in American culture, the law permeates the culture so deeply that “the lawyer came to replace the minister as the spokesman of American culture”, R. Ferguson, *Law and Letters in American Culture*, Cambridge, Mass., Harvard University Press (1984) p. 9. Helle Porsdam contends that among the few elements of what Kart calls the “ideology of the American culture”, the civic culture of law has acted as a “cultural glue”. H. Porsdam, *Legally Speaking: Contemporary*

political role so as to become the umpire of many political and moral battles reputed to be unsolvable through the medium of classical political channels.²⁴ Several events contributed to the expansion of its authority; most importantly the ratification of the Thirteenth and Fourteenth Amendments that radically changed the federal Constitution.²⁵ For example, most remarkable is the Warren era of the 1960s that revolutionized American constitutional life by progressively censoring legal manifestations of racial segregation and discrimination on the basis of the Fourth, Ninth and Fourteenth Amendments.²⁶ It is difficult to exaggerate while claiming that these changes revolutionized American constitutional life.

9. While the Warren court was changing legal norms, the European Human Rights Commission²⁷ and the European Court of Human Rights were fumbling to build their jurisprudence, so as to more efficiently and more extensively protect human rights in Europe.²⁸ The European Court benefitted from a very new form of legitimacy, that of the indispensable guardian of the rights that had been grossly infringed upon during the Second World War. Within a few decades, the new system of protection built a strong authority. However, the European Court of Human Rights²⁹ is an international court and not a national or constitutional court. The legal framework within which it was created makes it a fragile institution, especially when confronted to national sovereign institutions. Nevertheless, it has acquired such a notoriety and a central role in the search for European unity and the fight for the respect of human rights and fundamental

American Culture and the Law, Amherst, University of Massachusetts Press (1999), p. 218, quoting K. Karst, *Belonging to America: Equal Citizenship and the Constitution*, New Haven, Conn., Yale University Press (1989), pp.31-32.

²⁴ In his confirmation hearing, Justice Roberts had declared that he believed Justices to be umpires of the law, making no rules but making sure that everyone abides by them. Being a political umpire is the opposite of such assertion, since judges cannot solve political questions without making some rules. T. Keck, *Judicial Politics in Polarized Times*, Chicago, University of Chicago Press (2014), p. 131.

²⁵ In *The Bill of Rights*, Akhil Reed Amar contends that there exist two American constitutions; the one of 1787, and the that followed Reconstruction Era after the Civil war, where the Supreme Court could interpreted the Bill of Rights through integration into the Fourteenth Amendment. A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press (1998), p. XV.

²⁶ For a brief history of the Warren Court, See Horwitz *infra*, note 9. In more detail on the role of the Supreme Court in desegregation of the African-American population, see M. J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Oxford University Press, New York (2006).

²⁷ Henceforth referred to as the “Human Rights Commission”.

²⁸ The European Court applies the doctrine of ‘effective interpretation’ to guarantee rights that have truly practical protective force in the lives of Europeans: See ECtHR, *Airey v. Ireland*, Appl. No. 6289/73 (A/32), 9 October 1979, at § 24.

²⁹ Henceforth referred to as the “European Court”.

liberties that it was compared to a constitutional court.³⁰ Professor Merrils declared in the 1990s, as had Tocqueville before him when talking about the Supreme Court, that “there [was] no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the Convention, [and consequently] there is no matter of domestic law and policy which may not eventually reach the European Court”.³¹

10. The following subsections are devoted to the presentation of the object of this dissertation, the central notions on which it is built, and the data building methodology.

2. The State of Research

11. This thesis is based on various pluri-disciplinary sources in legal and political research. The first inspiration is philosophical, based on Chaïm Perelman’s focus on a rhetorical approach to legal logic and his emphasis on audiences. It also took inspiration from political science’s studies of the judiciary as a political institution.

2.1. Public Opinion in the Context of Judicial Discourse

12. Since ‘public opinion’ is not a legal term, an exclusively legal approach to judicial decisions is not the most suited to this study. Also, like Chaïm Perelman, I understand written judgments as a rhetorical communication exercise. This approach to the law was developed after the Second World War, as lawyers and theorists, confronted to the excesses of legal positivism, sought to strike a new balance between enforcing the will of representative institutions and current values. Proponent of the “new rhetoric”, Chaïm Perelman proposed a new approach to legal analysis, based on judges’ ambition

³⁰ See for example A. Stone Sweet, “On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court”, *Revue trimestrielle des droits de l’homme*, Vol. 80, (2009), pp. 923-944 R. Harmsen, “The European Court of Human Rights as a ‘Constitutional Court’: Definitional Debates and the Dynamics of Reform” in J. Morison, K. McEvoy, G. Anthony (eds) *Judges, Transition, and Human Rights*, Oxford, Oxford University Press (2007). G. Ulfstein, “The European Court of Human Rights as a Constitutional Court?” (March 19, 2014), Festschrift to the 40th Year Anniversary of the Universität der Bundeswehr, Munich: *To Live in World Society – To Govern in the World State*, Forthcoming; PluriCourts Research Paper No. 14-08. Available at SSRN: <https://ssrn.com/abstract=2419459>

³¹ Merrils in J. Merrils, A Robertson (eds.), *Human Rights in Europe: A Study of the ECHR*, Manchester: Manchester University Press, (2001) p. 9, quoted by Ed Bates, *The Evolution of the Convention of Human rights: From its Inception to the Creation of a Permanent Court of Human Rights*, New York, Oxford University Press (2010) p. 19.

to convince their audience of the fairness of their decisions. I henceforth describe this doctrine and explain how it applies to the topic of this thesis.

2.1.1. Post World War Times and New Legal Logic

13. In the 1970s, Belgian philosopher Chaïm Perelman proceeded to a new theoretical approach of judicial decisions. Quoting Malinowski,³² this scholar of logic and reasoning first claimed that “legal logic” was non-existent. Rather, there would be “only one logic”,³³ and “formal” logic applies to many different professional fields that include the law. Following Ehrlich, he affirmed that “legal logic” and “formal logic” have nothing but the term “logic” in common. Legal thinking indeed often uses reasoning techniques specific to the juristic field. As Wetlaufer puts it: “law is rhetoric but the particular rhetoric embraced by the law operates through the systematic denial that it is rhetoric”.³⁴
14. To justify his opinion, Perelman rejected the overblown ancient image of rationality attached to roman legal tradition, which stemmed from “absolute justice, conceived as times as divine in origin, at others like natural or rational”.³⁵ Perelman also outlined the evolution of legal practices after the French Revolution, its emphasis on a strict separation of power leaving little leeway to judicial discretion, the strict formalism of positivism, and changes subsequent to the post World War Two era, that in turn rejected the unacceptable outcomes of strict implementation of the law based on positivism.
15. As evidence of widespread change in legal thought, he referenced German scholar Esser,³⁶ who preferred an ideology-free method of legal analysis, more focused on an examination of judicial reasoning. Because of the blind judicial enforcement of unjust laws under fascist regimes, post-war scholars rejected the following assumptions: First, that the law can be implemented like an exact science; and second, that the will of the legislatures and the majority is to be enforced by the judiciary formalistically and free

³² G. Kalinowski, “Y a t’il une logique juridique”, *Logique et analyse*, Vol. 5, 1959, p. 53, quoted in Perelman, “Logique juridique, la nouvelle rhétorique”, *op. cit.*, p. 4.

³³ *Ibid.*

³⁴ G. Wetlaufer, “Rhetoric and Its Denial in Legal Discourse”, *Virginia Law Review*, Vol. 76, 1545 (1990), p. 1554.

³⁵ Perelman, *op. cit.*, at 7.

³⁶ J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*, Tübingen, Germany: J. C. B. Mohr, Paul Siebeck, (1956).

of values. In contrast to positivists, post-war theorists believed that “juridical dogmatic cannot avoid taking positions in controversies, where opposite value judgements come into conflict in a specific case. Its role is to provide arguments that will allow practitioners and especially judges to choose a position and motivate it based on the law”.³⁷ Scholars may have been in search of methods guiding judges towards a particular type of reasoning to motivate their rulings. However legal reasoning is not an exact science; hence it does not guarantee an exact outcome. Ultimately, judicial reasoning consists in striking a balance between syllogistic reasoning and equity: it is a “back-and-forth of the mind”,³⁸ neither subservient to nor competing with the legislative power, but endowed with a new political and legal mission: to proceed to a “constant adaptation of legal pronouncements to *the values* in conflict in judicial controversies”.³⁹ In conclusion, legal interpretation is no longer seen as strict and automatic. Judges adapt the law to social needs, allowing the law to evolve and stay in line with contemporary values. It also allows the law to be more acceptable to the population. Ultimately, what counts is the law as it is effectively enforced, even if it is in opposition with the actually promulgated texts.

16. By stressing the appeal and the unrealistic denial of the existence of a relationship between the law, social needs and contemporary values, scholars confirm the soundness of an assumption that a link may exist between the law and public opinion. Therefore, evolved public opinion—and social evolution—may be relevant to the new vision of adjudication.⁴⁰

³⁷ Perelman, *op. cit.*, p. 81 (my translation).

³⁸ *Ibid.*, p. 83 (my translation).

³⁹ *Ibid.*, p. 84 (my translation) (emphasis added).

⁴⁰ Proponent of this dynamic was famous scholar Roscoe Pound. According to Gardner, Pound is proponent of change, which “occurs when there is sufficient demand for change to shift or expand the perimeter of the mass of surveyed claims, thus requiring the revision of the jural postulates. But in the harmonizing of claims, it must ever be by the ideals of the civilization of the time and place.” J. Gardner, “The Sociological Jurisprudence Of Roscoe Pound (Part I.)”, *Villanova Law Review*, Vol. 7, No. 1 (1961), p.18. Alexander Bickel also explained that the Court had adopted a progressive vision of constitutional adjudication. See Bickel, *The Supreme Court and The Idea of Progress*, New Haven, Yale University Press (1978). This thesis was also supported by prominent legal scholars in Europe, for example J. Chevallier, “Les interprètes ne sauraient aller à l’encontre des représentations et des valeurs sociales dominantes, dont ils sont d’ailleurs eux-aussi imprégnés” cité par A. Schahmanèche, *La Motivation des décisions de la Cour européenne des droits de l’Homme*, Doctorate Thesis, Université de Montpellier I., France, (2012) p. 140.

2.1.2. *New Rhetoric and the New Focus on Audiences*

17. Perelman's "new rhetoric" is a study judicial motivation conceived as rhetoric. To him, judicial decisions are aimed at convincing courts' audiences not only that the law was correctly enforced, but that judicial outcome are fair. Judges try to conciliate the best legal solution with the best interpretation of the law because "judicial peace is conclusively restored only once the most socially acceptable solution is accompanied by a sufficiently solid legal argumentation".⁴¹ It has to be acceptable to other institutions, especially those that originated the legal norm, and other audiences. Indeed, in a democratic country, the expression of public opinion and pressure groups cannot be ignored; as it "create an opposition, which would no doubt be capitalized upon, between the legal country and the real country",⁴² *i.e.* between the majority of representatives who promulgated the law that is being challenged, and the majority of the population's opinion on the legal issue involved at the time of the judgment.
18. Perelman studies judicial reasoning so as to reveal legal logic. His examination is focused on an analysis of motives. To him, "motivating effectively means justifying a decision that was taken by providing a convincing argumentation that indicates the cogency of choices made by judges".⁴³ The judiciary's dialectic is focused on obtaining the adherence of its main audiences, which includes legal professionals, but also people that aren't legally trained such as the parties, or public opinion. However, adherence is never absolute.⁴⁴ To this end, judicial justification will appeal not only to legal arguments, but also to social, moral, economic or political values. Judges' arguments are based on commonly accepted premises, so that the law will be respected based on acceptance and not barely on state-enforced authoritarian obligation.⁴⁵ In Wetlaufer words, if a lawyer's "argument is effective, it quietly and perhaps respectfully coerces its audience".⁴⁶ Thus were it to be a gap between promulgated law and the will of the nation, "good reasons to believe that the current legislator could not share the views of

⁴¹ Perelman, *ibid.*, p. 141.

⁴² *Ibid.*, p. 149.

⁴³ *Ibid.*, p. 162.

⁴⁴ *Ibid.* p. 106.

⁴⁵ "The motivated judgment replaces assertion with reasoning, and the simple exercise of (public) authority by an essay in persuasion. It thus plays in what one can call the legal and moral balance of our country an absolutely essential role.", T. Sauvel, « Histoire du Jugement motivé », *Revue du Droit Public*, 1955, pp. 6, quoted by Perelman, *op. cit.*, p. 154 (my translation).

⁴⁶ G. B. Wetlaufer, *op. cit.*, p.1558.

the former legislator, . . . by seeking to conform with the *will of the nation*, judges will conform in the last resort to the presumed will of the *current* legislator”.⁴⁷

19. The new rhetoric is clearly anti-formalist. More than that, it stresses that the law cannot survive under formalism. To Peter Goodrich, it “is concerned . . . with abstracting idealistically from the normative justificatory techniques of legal judgment and of the legislative process generally, the self-image of self-presentation of the law, [and] to enumerate a generic list of the rhetorical, persuasive and argumentative mechanisms that permit the law to postulate that it is based upon and adequately reflects a consensus as to values and as to social justice.”⁴⁸ In other words, it looks at the judiciary from a new angle, as an institution seeking “rhetorical legitimacy”, *i.e.* to convince an audience, take its expectations into considerations. Motivating thus has a pedagogical vocation. Through motivation, “justice has become a kind of public teaching, that clarifies and makes the law more familiar to those that have an interest to know it”.⁴⁹ Even external challenges contribute to influencing judges, albeit unconsciously. It enables a “dialogue, more or less direct, more or less conscious, between judges and their audience . . . [a sort of] external democratic control on the way judges reason and exercise their function”.⁵⁰ In practice, the assumption that the U.S. Supreme Court takes public opinion or external pressures into considerations is based on such a vision of judicial motivation. Next I will explain how the structure of the European judgments induced some scholars to assume the same of the European Court.⁵¹
20. I believe that the new rhetoric approach is very complementary to a classic legal analysis for the purpose of case studies. Firstly, some short studies already have focused

⁴⁷ Perelman *op. cit.*, 176 (emphasis added)

⁴⁸ P. Goodrich, *Legal Discourse, Studies in Linguistics, Rhetoric and Legal Analysis*, London, Macmillan (1987), p.111-2.

⁴⁹ Schahmaneche, *op. cit.*, pp.128-9, quoting P. Texier, “Jalons pour une histoire de la motivation des sentences”, in *Travaux de l’association Henri Capitant, La motivation*, Limoges, LGDJ, tome III (1998), pp. 5-15.

⁵⁰ *Ibid.*, p.129

⁵¹ As Schahmaneche implies, three audiences—at least—are attentive to the European Court’s decisions: “A public opinion which support the Court has a vested interest in, insofar as the pressure that opinion exercises, generally through the media, can very well encourage states to accept European case-law. In fact, pedagogical motivation seems to be establishing itself.” *Ibid.*, p. 213, (my translation). According to Schahmaneche and Eudes, it is difficult to know to what extent Strasbourg judges are influenced by popular pressures, however it is “a form of constraint that they integrate more or less consciously within the exercise of her function”. M. Eudes, *La Pratique Judiciaire Interne de la Cour EDH*, Paris, Pedone 2005), p. 322, quoted by Schahmaneche, *op. cit.*, p. 139. See also S. Benetulière, *op.cit.*

on the European Court⁵² or the Supreme Court,⁵³ or law generally, as a rhetorical discourse,⁵⁴ albeit not by taking a ‘perelmanian’ approach. Secondly, it looks into the political dimensions of the law.⁵⁵ Moreover, while classic textual analysis would be insufficient,⁵⁶ rhetoric and language analysis complete legal analysis for it “offers us a set of tools for thinking about the discursive conventions within which we work. Just as important, it also offers us a series of specific insights”.⁵⁷ Allying both rhetoric and jurisprudence provides “many analytic possibilities”, disclosing some nonobvious aspects of judges’ motivations,⁵⁸ whereas restraining analysis to “‘objective’ theories of interpretations” would “cut us off from the most valuable insights” other approaches may bring.⁵⁹

2.2. The Academic Interest for the Role of the Public in Adjudication

21. To this day, no legal study has addressed the role non-legal audiences such as public opinion on the European Court case law and adjudication.⁶⁰ The next subsections are

⁵² J-D Mouton, “Les arrêts de la cour européenne des droits de l’homme comme actes de discours : contribution à la méthodologie de la fonction juridictionnelle”, in *Mélanges offerts à Charles Chaumont : le droit des peuples à disposer d’eux-mêmes : méthodes d’analyse du droit international*, Paris, Pedone (1984) pp. 407-431.

⁵³ E. Chemerinsky, “The Rhetoric of Constitutional Law”, *Michigan Law Review*, Vol. 100, pp. 2008-2035 (2002).

⁵⁴ Wetlaufer makes a description of the specific conventions of legal rhetoric generally followed by lawyers. Wetlaufer, *op. cit.* p. 1558-9.

⁵⁵ Wetlaufer differentiates his general description of legal rhetoric from judicial reasoning, which mostly follows these general outline, with its own specificities: “The judge’s voice is even more impersonal than the lawyer’s. Her vantage point is neutral and objective. Her arguments are highly rational. They are backed by as many authorities as circumstances require. Whenever possible, they take the form of deductive, syllogistic proofs. ... The argument is coercive in that it seeks to compel the assent of its audience. The intended and actual effect is closure: the matter has been decided and the right answer has been found. ... Thus, for instance, Supreme Court justices have sometimes set aside their syllogisms and written with a passion that sounds more like the rhetoric of politics than what I am describing as the rhetoric of law. Such writing is to be found in opinions, especially dissents, dealing with such politically sensitive matters as race discrimination, the scope of the first amendment, proper respect for the flag, the death penalty, or rights with regard to privacy, abortion, and homosexuality. My understanding of these passages is that they are the rhetoric of politics and not the rhetoric of law.” *Ibid.*, pp. 1562-3

⁵⁶ “If textual analysis of the European Court’s decisions constitutes the starting point for the research, the latter is insufficient to transcribe the reality of motivation but also exhibit its extreme complexity. Indeed, behind the exposition of motives that one can read, lays the question of the psychological, sociological, cultural, political, ethical, etc. underpinnings of judges’ reasoning”. See Schamaneche, *op. cit.* p. 25 (my translation).

⁵⁷ Wetlaufer, *op. cit.*, 1548.

⁵⁸ To E. Jouannet, there is indeed a gap between the interior language of the judge within his reasoning and his motivation. E Jouannet, “La motivation ou le mystère de la boîte noire”, in H. Ruiz Fabri et J.M. Sorel, *La motivation des décisions des juridictions internationales*, Paris, Pedone (2008), p. 257, quoted in Schamaneche, *op. cit.*, p.11.

⁵⁹ See Wetlaufer, *op. cit.*, p.1595.

⁶⁰ Some have addressed the role of friends of courts contributions into the European Court, the Supreme Court and the South African court, but as legal participants in the proceedings. See L. Van den Eynde, *Interpreting Rights Collectively, Comparative Arguments in Public Interest Litigants’ Briefs on*

devoted to a review of research on judicial politics. More specifically, the second subsection elaborates on the aspects of the relationship between public opinion and basic rights adjudication that were the focus of scholars on both sides of the Atlantic. In fact, American academia pioneered in the field of research on politics of adjudication. The interest was born among political scientists, joined after much resistance by lawyers. However, research of the role of public opinion in judicial decisions is still incomplete. More recently, several political publications have focused on foreign judicial institutions,⁶¹ European courts,⁶² and most recently the European Court of Justice and the European Court of human rights.⁶³

2.2.1. American Research on the Role of Opinion in Adjudication

22. Academic interest for the political role of the judiciary was born early in the United States. It presumably came naturally, due to the fact that the United States is rooted in the Common Law tradition, where the law traditionally is a judicial creation, before parliament gained a more prominent role. Moreover, the strong populist tradition requires that citizens elect a great quantity of public leaders, including judges.⁶⁴
23. In this context, it is important to underline the fact that the term “populist” or “populism” does not entail, in American political cultural language, the very negative and distrusting connotation it is assigned in Europe. It simply refers to a democracy committed to protecting the people from self-interested government and knowing and

Fundamental Rights Issues, Doctorate Thesis, Brussels, ULB (2015) (hereinafter “Interpreting Rights Collectively”).

⁶¹ See for example Ran Hirschl, *op. cit.*

⁶² A. Stone Sweet, “The European Court of Justice and the judicialization of EU governance”, *Living Reviews in European Governance*, 5 (2010), 2. URL (cited on 11 April 2018) <http://europeangovernance-livingreviews.org/Articles/lreg-2010-2>

⁶³ See for example A. Stone Sweet, T. L. Brunell, “Trustee Courts and the Judicialization of International Regimes The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization”, *Journal of Law and Courts*, Vol. 1, No. 1 (March 2013), pp. 61-88 ; E. Voeten, “Public Opinion and the Legitimacy of International Courts”, *Theoretical Inquiries in Law*, Vol. 14 (July 2013), p. 411; E. Voeten, “The Politics of International Judicial Appointments”, *Chicago Journal of International Law* Vol. 9 No. 2 (2009), pp.387-406. R. Cichowski, *The European Court and Civil Society*, Cambridge University Press (2007). A recent doctoral dissertation was published applying to the European Court of Human Rights and the Israeli Supreme Court, related to the tactics to improve reputation and compliance. However, this thesis does not examine reputation with ‘public opinion’ lenses. See S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts*, Cambridge, Cambridge University Press (2014).

⁶⁴ To illustrate the degree of commitment American citizenship entails in terms of following politics at local and federal levels, James Fishkin lists the amount of representatives a Texas citizen is invited to elect: 5 federal representatives, 14 state representatives, 13 county representatives, 7 municipal representatives including 6 in the city council, and 3 school board representatives. J. Fishkin, *The Voice of the People. Public Opinion and Democracy*, New Haven, Yale University Press (1995), p. 8-9.

implementing the will of the People through many different means,⁶⁵ including elections. Amar shows for example that even the protection popular juries of the Fifth (Grand Jury), Sixth (criminal jury) and Seventh (civil jury) Amendments were designed as “populist protectors”:⁶⁶ “the Jury summed up—indeed embodied—the ideal of populism, federalism, and civic virtue that were the essence of the original Bill of Rights”.⁶⁷ The debate over the relationship between “the People” and the Supreme Court and the self-branding of scholars under the term “Popular Constitutionalism”, which I discuss in Chapter One, shows that at the very least the debate over protection of the popular will in the United States still has some beautiful days ahead it.

24. The pioneer study of the political role of the judiciary was no doubt published by political scientist Robert Dahl in 1957.⁶⁸ According to Rosenberg, his efficient article owes its popularity to its innovative spirit. Dahl explicitly studied an expert institution as he would have studied a political institution. As Dahl wrote, under the leadership of Justice Warren, the “Warren Court” was a particularly innovative institution, actively increasing its protection of individual rights, particularly in the context of desegregation.⁶⁹ According to Horwitz, the Warren Court approach individual rights cases from a moral perspective, rather than from an exclusively originalist standpoint.⁷⁰ Dahl considered the Court is a political institution working with legal instruments,⁷¹ it is as political as it is legal. Its decisions are political because of the generality of legal

⁶⁵ In *The Bill of Rights*, Akhil Reed Amar offers an original analysis of the Bill of Rights as a fully pledged structural part of the Constitution that was meant to protect the expression of the will of the People against self-interested government. Rather than an intrinsically the anti-majoritarian individual-protective instrument it has become today, the Bill of Right read in a holistic light is meant to protect the People (p. xiii) it is incorporation through the Fourteenth Amendment that change dits role in the Constitution (p. xiv) : “To minimize such self-dealings (“agency costs”), the Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of jusice through various jury provisions, and preserved the transcendent sovereign right of the majority of the people themselves to alter or abolish government, thereby pronounce the last word on constitutional quenstions. The essence of the Bill of Rights was more structural than not and more majoritarian than counter” (p. xiii).

⁶⁶ *Ibid.* p. 83.

⁶⁷ *Ibid.*, p. 97. Tocqueville also considered the jury as a political institution see *Democracy in Amercia, Complete and unabridged, Vol. I and II*. Bantam Books, 2004, *op. cit.*, pp. 326-333.

⁶⁸ R. Dahl, “The Supreme Court as Policy Maker”, *Journal of Public Law*, vol. 6, 279, (1957). For a historical critique of the popularity of Dahl’s work: G. N. Rosenberg, “The Road Taken: Robert A. Dahl’s Decision-Making in A Democracy: The Supreme Court as A National Policy-Maker”, *Emory Law Journal*, Vol. 50, 613 (2001).

⁶⁹ See in particular *Brown v. Board of Education*, 347 U.S. 483 (1954),

⁷⁰ Horwitz, *op. cit.*, note 9, p. 29.

⁷¹ Rosenberg, *op. cit.*, p. 619. See also R. G. McCloskey, *The American Supreme Court*, Chicago, University of Chicago Press, (5th ed, 2010 (1st ed. 1960)).

sources texts it has to apply, so much so that specialists and members of the Court themselves often disagree on the way the law should be interpreted.⁷²

25. Dahl's article was the starting point of many political academic inquiries into the Supreme Court and the political and legal constraints it has to face. We owe the constitutional scholar Barry Friedman a quite comprehensive review of Supreme Court studies in political sciences and the law.⁷³ This research ranges from the efficiency of legal constraints on the Supreme Court, to the role of parties and external actors (politicians, interest groups, Congress, and states) in proceedings, procedural rules, judicial appointment procedures, and professional and social profiles of judges, and, finally, public opinion. Even though, according to Friedman, lawyers' acknowledgement of the fragility of the wall separating law and politics has been initiated,⁷⁴ "normative theorists cannot come to even tentative conclusions about how judges should act before understanding the constraints those judges necessarily face. This is what positive scholarship has to offer."⁷⁵
26. If political scholarship is significant, legal studies devoted to the role of public opinion in adjudication are rare. In 1993, James Wilson published an article on the role of public opinion in constitutional interpretation.⁷⁶ It was written a few years after Chief Justice Rehnquist commented on the relationship between the Supreme Court and public opinion: "Judges need not and do not 'tremble before public opinion' in the same way that elected officials may, but it would be remarkable indeed if they were not influenced by the sort of currents of public opinion which were afoot in the Steel Seizure Case".⁷⁷

⁷² "[C]ompetent students of constitutional law, including the learned justices of the Supreme Court themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedent may be found on both sides". Dahl, *op. cit.*, note 21, p.280.

⁷³ B. Friedman, "Politics of Judicial Review", *Texas Law Review*, Vol. 84, No. 2, 269 (2005-2006).

⁷⁴ *Ibid.*, p. 269.

⁷⁵ *Ibid.* This confirms what the father of sociological jurisprudence, Roscoe Pound, called for in the early 20th century. Summarized in Pierre Brunet's words, Pound contended that "in order to undersnad, the lawyer must indeed study what courts decide, but also the social and economical circumstances and conditions of their decisions and the ones to which principles are applied" P. Brunet, "Argument sociologiqueet théories de l'interprétation: beaucoup d'interprétation, très peu de sociologie", in D. Fenouillet (ed.) *L'argument sociologique en droit. Pluriel et singularité*, Paris, Dalloz, coll. Thèmes et Commentaires (2015), p. 105.

⁷⁶ J. G. Wilson, "The Role of Public Opinion in Constitutional Interpretation", *Brigham Young University Law Review*, Vol. 1993, No.4, (1993), pp.1037-1138.

⁷⁷ W. H. Rehnquist, "Constitutional Law and Public Opinion", *Suffolk University Law Review*, Vol. 20, (1986) pp. 751-69. The "Steel Seizure Case" involved an order of the United States' president Harry Truman to seize all American steel mills in anticipation of a strike of steel workers at the hight of the Korean War in 1952. The case sparked a lot of controversy on the dangers of abuse of powers by the

Wilson's study was partly historical, partly doctrinal. He based on a recent highly controversial decision over a socially sensitive issue, the constitutional right to abortion and the desirability to overturn a contentious jurisprudence. In *Planned Parenthood v. Casey*,⁷⁸ the Supreme Court made several references to public opinion and public pressures to keep or change the outcome of *Roe v. Wade*.⁷⁹ It led to a long discussion of the legitimacy of a Court seen to overturn a jurisprudence and how it might be interpreted as the judiciary's capitulation to public pressures. The majority of the Supreme Court had considered that it should "not overrule under fire" for it would trigger "an equally reasonable condemnation for another failing in overruling unnecessarily and under pressure".⁸⁰ Based on a survey of past Supreme Court cases and Justices assertions, Wilson's informative study was however more a defense of the majority's reasoning in *Casey*, insofar that it discussing the relationship between the Court's legitimacy and its need to resist the pressures of public opinion.⁸¹ Although informative, this study is not only out of date, but also goal-oriented: the defense of a specific legal outcome and reasoning. This dissertation aims at being more systematic by adopting a focus on several specific themes taken up throughout courts' rights case-law.

27. After Wilson, studies dedicated to that topic were limited to a substantive but partial analysis of Supreme Court decisions. The most recent article drafted by Benjamin Roesch only partially analyzes doctrine and prefers debating why judges refer to public opinion.⁸² Other American articles tackle some aspects of the topic.⁸³ Most of the remaining scholarship is more historical or quantitative⁸⁴ than qualitative: For example,

president. The Supreme Court decided in *Youngstown Sheet & Tube Company v. Sawyer*, 343 US 579 (1952) that the President had no authority under the Constitution to take such an order.

⁷⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (hereinafter referred to as "Casey").

⁷⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁰ *Casey*, *op. cit.*, at 867.

⁸¹ *Ibid.*, at 867-8.

⁸² B. J. Roesch, "Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine", *Suffolk University Law Review*, Vol 39, 379 (2005-2006). See also C. Barrett Lain, "The Doctrinal Side of Majority Will", *Michigan State Law Review*, Vol. 2010, 775 (2010) (focused on Supreme Court references to the prevailing position of states legislature to assess the degree of consensus among American States).

⁸³ W. Sadurski, "Conventional Morality and Judicial Standards", *Virginia Law Review*, Vol. 73, 339, 340 (1987), R. Primus, "Public Consensus as Constitutional Authority", *George Washington Law Review* Vol. 78, 1207 (2009).

⁸⁴ See in particular B. Friedman, *The Will of the People*, New York, Farrar, Straus and Giroux (2009); N. Persily and J. Citrin, *Public opinion and Constitutional Controversy*, New York: Oxford University Press (2008).

Marshall⁸⁵ analyzed language used in the Supreme Court decisions, and coded it to statistically compare it to available polling opinion data on topics adjudicated by the Court. Based on this comparison, he drew conclusions as to the similarity between current public opinion and the substance of court decisions on the same topics. Many studies focus on the topic of influence either of public opinion on the Supreme Court, or of the Supreme Court on public opinion.⁸⁶ The issue is so prevalent in American society that newspaper sometimes publish articles on that topic in mainstream press,⁸⁷ as if to reassure the public that the Court generally respects its preferences. However, few examine the role of public opinion within the Supreme Court's doctrine and throughout institutional life. Moreover, the role assigned to public opinion by courts might be informative as to the influence of public opinion on their decisions. For these reasons, this dissertation will proceed to an in-depth analysis of the role the European and the Supreme Court assign to public opinion throughout their decisions, while trying to acknowledge institutional and political constraints.

2.2.2. The Birth of an Academic Interest for the Democratic Legitimacy of the European Court

28. Lawyers generally agree that judges are concerned by the legitimacy and compliance with their decisions.⁸⁸ In the political arena, concerns regarding the legitimacy of international institutions were expressed as soon as they were born. The European

⁸⁵ T. Marshall, *Public Opinion and the Supreme Court*, Unwin Hyman (1989). This first study was updated Twenty years later: T. Marshall, *Public Opinion and the Rehnquist Court*, State University of New York Press (2009).

⁸⁶ See for example V. Hoekstra, *Public Reactions to Supreme Court Decisions*, Cambridge, Cambridge University Press (2003), C. Casillas, P. Enns, P. Wohlfart, "How Public Opinion Constrains the U.S. Supreme Court", *American Journal of Political Science*, Vol. 55, No 1 (2011), pp. 74-88. J. Ura, A. Merrill, "The Supreme Court and Public Opinion", in *The Oxford Handbook of U.S. Judicial Behavior*,

⁸⁶ See for example V. Hoekstra, *Public Reactions to Supreme Court Decisions*, Cambridge, Cambridge University Press (2003), C. Casillas, P. Enns, P. Wohlfart, "How Public Opinion Constrains the U.S. Supreme Court", *American Journal of Political Science*, Vol. 55, No 1 (2011), pp. 74-88. J. Ura, A. Merrill, "The Supreme Court and Public Opinion", in L. Epstein (ed.) *The Oxford Handbook of U.S. Judicial Behavior*, Oxford, Oxford University Press (2017)

⁸⁷ See for example M. Klarman, "The Supreme Court Is Most Powerful When It Follows Public Opinion", *The New York Times*, 6 July 2015, <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-most-powerful-when-it-follows-public-opinion> (last accessed 7 April 2018). See also K. Linos, K. Twist, "Controversial Supreme Court decisions change public opinion — in part because the media mostly report on them uncritically", *The Washington Post*, 28 June 2017, available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/28/controversial-supreme-court-decisions-change-public-opinion-in-part-because-the-media-mostly-report-on-them-uncritically/?utm_term=.d7e54df50243 (last access 7 April 2017), E. Voeten, "How the Supreme Court Responds to Public Opinion", *Washington Monthly*, June 28, 2013, available at <https://washingtonmonthly.com/2013/06/28/how-the-supreme-court-responds-to-public-opinion/>

⁸⁸ See for example Wetlauffer, *op. cit.*, at 1561.

Court was no exception. Authors of the European Convention of Human Rights were divided among proponents of a Court that would become comparable to United States Supreme Court, effectively enforcing new European “Bill of Rights”, and countries of the Common Law tradition, more skeptical and eager to preserve their sovereignty.⁸⁹ These preoccupations about the democratic legitimacy and sovereignty of the judiciary require a definition of judicial legitimacy, particularly at international level.

29. Academic research did not pay much attention to international courts’ legitimacy until recently, to the detriment of their authority: “By failing to understand and respond to legitimacy concerns, we endanger both the courts and the law they interpret and apply. If international courts lack justified authority, so too will their interpretations of international law... Because no world legislature exists to counterbalance the decisions of international courts, and no worldwide police enforces them, international courts’ legitimacy is all the more essential to their success”.⁹⁰ These reproaches have forced scholars to rework the concept of “legitimacy” so as to understand the substance of these charges, and take appropriate measures to answer them.⁹¹
30. The legitimacy of international courts arguably explains why a state enforces judicial decisions that could go against its interests. This topic has attracted scholars from

⁸⁹ “It was precisely because it was thought that the Court, and the Convention more generally, would have little influence on domestic law that, in January 1966, the British government decided that it would make declarations accepting the right of individual petition and the jurisdiction of the Court.” Ed Bates, *op. cit.* p. 12.

⁹⁰ N. Grossman, “The Normative Legitimacy of International Courts”, *Temple Law Review*, Vol. 86, (2013) p. 63 (hereinafter “Normative legitimacy”).

⁹¹ Among a few recent publications on the legitimacy of international courts, see for example A. von Bogdandy, I. Venzke, “On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority,” *Amsterdam Center for International Law University of Amsterdam Acil Research Paper No 2012-10*. (Claiming that states’ consent cannot suffice to legitimate international courts. They proceed to a multifunctional analysis of international courts that would do justice to their diverse functions International courts indeed stabilize international norms, affirm the validity of legal norms, and legitimate other institutions.) See also G. Ulfstein, “International Courts and Judges: Independence, Interaction, and Legitimacy”, *NYU Journal of International Law and Politics* (2014); PluriCourts Research Paper No. 14-13; University of Oslo Faculty of Law Research Paper No. 2014-14. Available at SSRN: <https://ssrn.com/abstract=2433584> (distinguishing two kinds of legitimacy, normative and descriptive); A. von Bogdandy, I. Venzke, “In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification”, *European Journal of International Law*, Vol. 23, 7, 8 (2012) (“As autonomous actors wielding public authority – this is our principal contention – their actions require a genuine mode of justification that lives up to basic tenets of democratic theory”, *ibid.*, p.8.) On the democratic legitimacy of international courts, see A. von Bogdandy, I. Venzke, “International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance”, in A. von Bogdandy, I. Venzke (eds), *International Judicial Lawmaking*, New York, Springer (2012), pp.4 72-509. See N. Grossman, “Sex on the Bench”, *Chicago Journal of International Law*, Vol. 12, No. 2 (Winter 2012). (Her article tackles the question of legitimating international courts through the respect of the representative democratic principle.)

diverse and complementary fields such as the law, political science and international relations. For this reason, political scholars Buchanan and Keohane expressed the need of a “concept of legitimacy [that] allows various actors to coordinate their support for particular institutions by appealing to their common capacity to be moved by moral reasons, as distinct from purely strategic or exclusively self-interested reasons”.⁹² Scholars established legitimacy criteria that oftentimes intersect. Legal scholar Nienke Grossman first differentiated *normative* legitimacy from *social* legitimacy. The normative legitimacy is an objective standard that helps determine if a judicial institution deserves to be supported. Social legitimacy is based on public perceptions. Next Grossman catalogued procedural and substantial criteria, in which she included an acknowledgment of other non-state international actors, the respect for procedural rules of justice, and a capacity to obtain from states an improved respect for human rights. Therefore, domestic jurisdictions have to help develop the legal protection regimes they are required to enforce.⁹³ According to Grossman, legitimization of international courts will be possible through the democratization of international judicial institutions, although she notes that courts are only rarely accessible to democratic forces in most domestic legal systems.⁹⁴ Grossman defends access to international courts as an individual right to be heard. She claims such right should be enforced in international courts on the basis of a universal right to participation, which is protected by most international instruments of human rights protection. However, her theory is constrained by the inexistence of an international *demos*. As a solution, she transforms the right to participate into a right to be represented.⁹⁵ Since the individual accessibility is not always possible or even desirable, the author proposes

⁹² See A. Buchanan, R. O. Keohane, “The Legitimacy of Global Governance Institutions”, *Ethics & International Affairs*, Vol. 20, No. 4, 405 (2006), p. 409 (suggesting that a global public standard of legitimacy can help citizens distinguish legitimate institutions from illegitimate ones).

⁹³ Grossman, *op. cit.* note 37, p. 65.

⁹⁴ She concludes : “Although these instruments generally refer to the right of individuals to a fair and impartial hearing in a national court or tribunal, there is no difference in the adjudicative function that justifies limiting the right to a fair and impartial hearing only to those whose rights are being adjudicated domestically... Giving [international] courts authority to adjudicate the rights and obligations of voiceless rights holders is a serious threat to their legitimacy and fails to account for the wide recognition of individuals as subjects of international law.” *Ibid.*, p. 84

⁹⁵ “In other words, the *demos* is the diverse set of beneficiaries of international court decision making. The *demos* can also be called stakeholders. Stakeholders must have some meaningful interest in the direction that the law may take in a particular dispute.” *Ibid.*, p. 92.

that persons indirectly affected by future decisions be represented in the procedure, and that they be perhaps implicated in the appointment of judges.⁹⁶

31. Geir Ulfstein, also a legal scholar, developed a legitimacy concept with several components. One includes expertise, representativeness and independence. The second is procedural in that it guarantees the equal access to tribunals and a right to a fair trial.⁹⁷ This legitimacy can be reinforced through the respect for several democratic values, such as for example the representativeness of candidates to the judicial office.⁹⁸ Ulfstein's legitimacy concept also encompasses a democratic dimension. First, the existence of a national or international legislator should be considered; second, public perceptions are important. He claims that "the effectiveness of [International Courts] in fulfilling [their] functions is, to a great extent, a result of their perceived legitimacy".⁹⁹ Thus while conceding that public support is essential to the efficiency of judicial institutions and thus to their legitimacy,¹⁰⁰ Ulfstein adds a popular element to his criteria.¹⁰¹
32. The element of popular perception that Ulfstein includes is close to Grossman's concept of social legitimacy. If scholarship has not expanded on this element of legitimacy, it has recognized that without it, the work of judicial institutions is made more difficult. This explains why the legitimacy issue, whether democratic or normative, only recently appeared in judicial scholarship. According to Michael O'Boyle, deputy registrar of the European Court, this issue is usually raised by governments, especially after an unpopular judgment is released.¹⁰² The deputy registrar reacted in particular to severe

⁹⁶ In order to address the potentially harmful consequences of overly liberal norms of individual access to international tribunals, she advocates the creation of safeguards allowing some degree of scrutiny into the persons or groups that would be authorized to participate. *Ibid.*, p. 93-94.

⁹⁷ Ulfstein, *op. cit.*, p. 10.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, note 38, p. 10.

¹⁰⁰ See G. Vanberg, *op.cit.* pp. 20_24. See also Grossman, quoting judge Gladys Kessler, American president of the National Association of Women Judges, "the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged." *Ibid.*, p. 673, from B. Wilson, "Will Women Judges Really Make a Difference?", *Osgoode Hall Law Journal*, Vol. 28, 507, 515 (1990).

¹⁰¹ He is not the only one. Bogdandy also tackles this question. According to him, democratic legitimacy is also increased through the integration of civil society in judicial appointment procedures, especially in the absence of an international legislative institution. see A. von Bogdandy, I. Venzke, "International Judicial Lawmaking", *op. cit.*, p.472-509.

¹⁰² "Over the years certain governments have discovered that it is electorally popular to criticize international courts such as the Strasbourg court: they are easy targets, particularly because they tend,

critiques uttered by the British press and elite. Among them, Lord Hoffman claimed that the European Court did not enjoy any “constitutional legitimacy”.¹⁰³ O’Boyle is not alone to be concerned with such criticism. For this reason, the Turkish lawyer and political scientist Başak Çali and her colleagues have addressed the question of social, normative, and constitutive legitimacy of the European Court.¹⁰⁴ Their study provides criteria to assess the “popularity” of the court in professional and elite circles in different member states.

33. From interviews with national political and professional elites, Çali, Koch and Bruch drew several legitimacy criteria. But their report did not include a more grass roots dimension of the Court’s legitimacy. According to them, “legitimacy analysis through public opinion surveys would only capture one form of social legitimacy: the ‘acceptance’ form. It would miss the latter two dimensions, which we consider important for a full picture of social legitimacy and what it means”.¹⁰⁵ Nevertheless, if claiming that popular support eases the work of judicial institutions does not mean that they cannot work without such support, scholars agree that repeated challenges can have a negative impact over their work in the long term.¹⁰⁶ For all these reasons, a more in-depth study of the relationship between international institutions and public opinion seems vindicated. However, such studies have yet to be accomplished in Europe.

2.3. The Role of Public Opinion in National and International Rights Evolution

34. Since the legitimacy of judicial institution presents, even at international levels, social and popular dimensions, it is necessary to define what is meant by ‘public opinion’. If the concept is as protean as its definitions are numerous, it is impossible to deny its

like all courts, not to answer back”, M. O’Boyle, “The Future of the European Court of Human Rights”, *German Law Journal*, Vol. 12, 10 (2011) p. 1862.

¹⁰³ Lord Hoffman, “The Universality of Human Rights”, *Law Quarterly Review*, Vol. 125 (2009), pp. 416-32. The political elite represented by former British prime minister David Cameron, also attacked the Court during the British Council of Europe presidency of 2012. Thankfully, the Brighton conference of January 2012 did not “cut the Strasbourg Court’s wings”. L. Burgorgue-Larsen, “Actualité de la Convention européenne des droits de l’homme (janvier - juin 2012)”, *Actualité Juridique Droit Administratif* (2012) p. 1726. It kept the acquis of the Court’s development, while reaffirming the importance of the margin of appreciation doctrine.

¹⁰⁴ B. Çali, A. Koch, N. Bruch, “The Legitimacy of The European Court of Human Rights: The View From the Ground”, *UCL Working Papers* (May 2011).

¹⁰⁵ *Ibid.*, p. 14.

¹⁰⁶ D. Bodansky, “The Concept of Legitimacy in International Law”, *Legitimacy in International Law*, 309, 313, Rüdiger Wolfrum & Volker Röben eds. (2008), p. 601. (He claims that popular opinion regarding an institution is one of the elements of its legitimacy).

existence in real life and its relevance to public decision-making, even at judicial level. Moreover, the importance of rights protection in Europe and in the United States was reinforced partly with the support of popular movements and participation through the medium of judicial institutions.

35. Few terms have spilled as much scholarly ink as “public opinion”. Not that the notion was an innovation of the century of science: it is, in fact, a much older, perhaps antique, concept.¹⁰⁷ Loïc Blondiaux explains that the main reasons for the infatuation of the two last centuries with public opinion are the coming of age of representative democracy, the progressive democratization of voting rights,¹⁰⁸ and progress in the field of statistical research on “public opinion”. The universalization of voting rights and scientific progress in the field of public opinion research contributed to the debate on the role of popular will in representative democracy. The constant improvement of polling techniques subsequently made it, although not without resistance, a prevalent instrument of public life in most contemporary democracies, including France.¹⁰⁹ The frenzied debate on public opinion can be explained by the haziness of the notion, its definition remaining a puzzle, impossible to solve.
36. Despite all this, public opinion is an important element of public law, since it uncovers a very concrete dimension of democracy: the relationship between the real people and the official people, *i.e.* the electorate, consecrated in constitutional provisions. In short, the public gives public institutions their legitimacy. According to the Dean Georges Vedel, there is a need for “correspondence between the opinion of the governed, or at least, of their majority, and the acts of the rulers”.¹¹⁰ For this reason, representative democracy bases the management of public affairs on the majority principle. However, in practice, it is a simple majority that usually elects rulers, and rulers in turn make

¹⁰⁷ Plato and Aristotle, even though they do not strictly use the term “public opinion”, often refer to mass opinion and its importance. Cf. H. L. Childs, *Public Opinion, Nature, Foundations and Role*, Princeton, Van Nostrand, (1965), p.26. For a brief historical summary of public opinion theory, see also D. Reynié, “La théorie de l’opinion publique a la recherche d’un nouveau souffle”, *Hermès, La Revue*, Vol. 3, 31 (2001), p. 21-27.

¹⁰⁸ Indeed, at the golden age of the consent of the people, selection through suffrage is more likely to mirror a popular choice than the practice of drawing lots, an antique practice. B. Manin, *The Principles of Representative Government*, Cambridge, Cambridge University Press, (1997), p. 85.

¹⁰⁹ See, L. Blondiaux, *La Fabrique de l’opinion*, Paris, éd. du Seuil, (1998).

¹¹⁰ G. Vedel, “Le rôle de l’opinion en démocratie”, *Semaines Sociales de France*, 53ème session, (1966), at 306. In the same spirit, see American politician scientist V.O. Key who defines opinion in 1961 as “those opinions held by private persons which governments find it prudent to heed”, V.O. Key, *Public Opinion and American Democracy*, New York, Knopf (1961), p. 14, quoted in R. Erikson and K. Tedin, *American Public Opinion*, New York, Longman (8th Ed. 2011) p. 7 (1961b)

decisions on the basis of the majority principle. In the end, a ‘minority’ governs in the name of a ‘majority’ of active citizens.¹¹¹ Moreover, universal suffrage does not imply that rulers have the capacity to discern the will of most individuals gathering as ‘The People’. According to Maurice Hauriou, “the opinion expressed by the electorate isn’t properly speaking public opinion, since the electorate is not the public, it is an opinion that has already been deformed.”¹¹² If the social contract, and thus the citizens’ obligation to respect decisions made by the body of elected representatives, is always legally valid, the capacity of representatives to efficiently govern is dependent upon realist knowledge of citizen’s opinions.

37. In his history of polling, French political scientist Loïc Blondiaux explains the challenges that philosophers, political scientists, and sociologists had to face in order to define ‘public opinion’, and tells the story of the confrontation of those definitions with the ‘reality’ revealed by polling techniques. Encyclopedia Britannica defines it as “an aggregate of the individual views, attitudes, and beliefs about a particular topic, expressed by a significant proportion of a community. Some scholars treat the aggregate as a synthesis of the views of all or a certain segment of society; others regard it as a collection of many differing or opposing views.”¹¹³ This short introductory sentence to its entry devoted to “public opinion” clearly establishes the divide among schools of thought and scholarship as to the meaning of this political reality. This divide is common to many languages. A more concise reference, French dictionary *Petit Robert* defines ‘opinion’ as “shared ideas, judgments made by the majority of a social group”.¹¹⁴ Opinion thus becomes ‘public’ only once it has been publically expressed in the framework of what Habermas calls the “public sphere” of discussions.¹¹⁵ This conception is shared by Dicey: “First, there exist at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the

¹¹¹ According to French theorist Maurice Hauriou, “the very foundation of the social order is government by the elite.”. M. Hauriou, *Précis de droit constitutionnel*, Paris, Sirey, (1922), p. 195.

¹¹² M. Hauriou, *Précis de droit constitutionnel*, Paris, Sirey, (2ème Éd., 1929), p. 160, cité par Bénéttuillière, *op. cit.*, p. 189.

¹¹³ “Public Opinion”, Encyclopedia Britannica (2017). Available at <https://www.britannica.com/topic/public-opinion> (last accessed 17 May 2018).

¹¹⁴ “Opinion”, *Petit Robert de la Langue Française* (2012) (my translation). Dictionary in digital version.

¹¹⁵ See generally J. Habermas, *The Structural Transformation of the Public Sphere, An Inquiry into a Category of Bourgeois Society*, Cambridge, Polity Press (1989), 305 p.

reigning or predominant current of opinion”.¹¹⁶ Dicey’s definition takes into account the varying characteristics of opinion that make this notion not only difficult to define, but also controversial. It enumerates different dimensions of opinion: First, rationality with “convictions”, second, emotions with “sentiments”, third morality with “principles”, and finally irrationality or fears expressed by “prejudices”. Hence opinions are composite phenomena displaying conflicting dimensions, in the likeness of the human beings who hold them. They are potentially dangerous, but capable of the noblest behavior. This is what the American political scientist Harwood Childs brilliantly demonstrated in 1965: public opinion is a protean concept defined by scholars in such different manners that sometimes result in incompatible definitions. Childs catalogued about forty definitions, which he classified according to the features their author regarded as the most important, such as the degree of uniformity of opinions, the object of opinions, the process of opinion formation, their quality, and the people holding them. Childs put the diversity and the great number of these definitions down to the particular specialty of scholars: “Most definitions of the concept “public opinion” attempt to restrict the meaning of the term to collections of individual opinions of a particular type, having special characteristics or attribute which, in the opinion of the author, are significant and important”.¹¹⁷

38. The debate on the role of public opinion is directly linked to the various definitions individual scholars adhere to. Two schools are identifiable: the “believers” and the “non-believers”. The figurehead of the first group is Bryce, who despite distinguishing opinion makers from followers gives an inclusive definition of the concept.¹¹⁸ Bryce considers the public as the foundation of all powers and that the opinion of public can be expressed at any moment of democratic life, as opposed to only during elections. “Non-believers” hold that the concept of “opinion” is elusive, and believe either that “public opinion does not exist outside of discourses that question or affirm their existence”,¹¹⁹ or that opinion government is at all times dangerous because it goes against the principle that every government must be capable of resisting mass

¹¹⁶ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, London, Macmillan (1905), pp.19-20

¹¹⁷ Childs, *op. cit.*, footnote 57, p. 15.

¹¹⁸ Thus, Bryce trusted the instincts and common sense of the “average man”: “His instincts are generally sound, nor is he insensible to high ideals when presented to him in a form which makes them plain to him. What he lacks in knowledge he often makes up for by a sympathetic comprehension of the attitude of his fellow-men”. J. Bryce, *Modern Democracies*, Part I, New York, Macmillan (1921), p.150.

¹¹⁹ Blondiaux, “La fabrique”, *op. cit.*, p. 68.

opinion.¹²⁰ Some scholars refuse to incorporate public opinion to the “will of the people” because public opinion has a pejorative meaning.¹²¹ Somewhere in-between, some thinkers, such as John Stuart Mill or Dewey, consider that mass participation to government is positive, but can only be viable if masses receive an education on public affairs.¹²² All agree that taking into account public opinion in governance requires that the latter will comply with a few characteristics: intensity,¹²³ reality,¹²⁴ and publicity. Bryce considers the voice of the people expressed in public opinion as pertinent to governance, perhaps rational or even enlightened, and identifiable by rulers.¹²⁵ The supporters of this view have inspired engineers of public opinion to develop techniques aiming at better improving factual knowledge of citizens’ thoughts and needs, so as to help rulers better satisfy their citizens.

39. Therefore, every research endeavor involving the concept of “public opinion” can be compromised by the complexity of the concept revealed by so many definitions and philosophical affinities. The object of this dissertation does not consist in elaborating a new definition that would take into account all intricacies of the concept. Nor is it aimed at establishing a causal link between prevalent beliefs of public opinion and the substance of judicial decision-making, a task better suited to empirical legal studies. It is aimed at analyzing what role judicial institutions reserve to public opinion in the process of judicial decision-making, institutionally and substantially. To this end, I tried to answer three questions: First, can public opinion be considered a legitimate influence in judicial decision-making? From that question followed the next two, if yes, what can be seen as institutional forms of public opinion participation in judicial proceedings? Finally, do judges talk about public opinion in their decisions, and what weight do they

¹²⁰ *Ibid.*, p.77. Blondiaux refers to British philosopher Edmund Burke.

¹²¹ See the 1920s debate between Lippmann and Dewey, summarized on the website of University of Toronto by Daniel Schugurensky, <http://schugurensky.faculty.asu.edu/moments/1922lippdew.html>

¹²² John Dewey claimed that there is “no way to identify the genuine potential of the general population and its capacity to act as “the public” as long as citizens have limited access to education and until “secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry and publicity”, quoted in S. Spichal, *The Transnationalization of the Public Sphere and the Fate of the Public*, New York, Hampton Press (2011), p.18 (hereinafter “Transnationalization”).

¹²³ “[A] political system wisely framed will refer to public opinion those questions alone on which such an opinion can reasonably be expected to exist”, A. L. Lowell, *Public Opinion and Popular Government*, New York: Longmans, Green & Co. (1913), p. 53.

¹²⁴ “In order, therefore, that there may be a real public opinion on any subject, not involving a simple question of harmony or contradiction with settled convictions, the bulk of the people must be in a position to determine of their own knowledge, or by weighing evidence, a substantial part of the facts required for a rational decision”. *Ibid.*, p. 22.

¹²⁵ Bryce, *op. cit.*, p. 156.

attach to the state of public opinion? These questions set the foundations of this thesis' structure. After addressing at theoretical level the question of public opinion as a source of democratic legitimacy in general, and the democratic sources of judicial legitimacy in particular, I will discuss at an institutional level the process of opinion formation by taking into account its sources, such as family, society and the media, and modalities of public opinion expression through participation opportunities in proceedings. At a substantial level, I will include an analysis of how judges generally perceive public opinion; if they consider it as a manifestation of the people and public will or as an enemy of democracy, and if they consider the beliefs of public opinion as a legitimate element in their substantial decisions. In this regard, the terms of reference used by judges—such as 'crowds' or 'opinion polls'—is of paramount importance.

40. In this subsection, I discussed the main aspects of the definition, forms of involvement and expression of public opinion in order to hypothecize its various possible roles within judicial life, and to support my hypothesis that public opinion plays a substantial role within judicial proceedings and argumentation. Next, I explain my choice as to the judicial institutions I decided to compare.

2.4. The Equal Importance of Rights in American and European Legal Systems

41. In order to assess the significance of public opinion in relation of a topic of fundamental importance to democracy that is rights, I decided to confront two legal systems dealing with rights at different levels of governance located in different territories, for which rights are endowed with a similar status. At domestic level, I chose the United States Supreme Court. At international level, I chose the European Court of Human Rights.
42. The United States is a country of law: Tocqueville had noticed it already during his journey across the Atlantic in 1831.¹²⁶ However, he was far from imagining that legal language would irrigate political life to such an extent two centuries later. Indeed, according to Mary-Ann Glendon, "[p]olitical figures now resort primarily to legal ideas and traditions when they seek to persuade, inspire, explain, or justify in public

¹²⁶ "Whilst in Europe the same classes sometimes recalcitrate even against the supreme power, the American submits without a murmur to the authority of the pettiest magistrate. . . It is impossible on the other hand not to perceive that all classes display the utmost reliance upon the legislation of their country, and that they are attached to it by a kind of parental affection." A. de Tocqueville, "*Democracy in America*" *op. cit.*, pp. 285-8.

settings”.¹²⁷ She claims that the Civil Rights” movement of the 1950s transferred the political forum to the court, to the detriment of the quality of political discourse.¹²⁸ Similarly, human rights have acquired a central political significance in the European and global legal landscape, and to a less visible level, so have international human rights courts.¹²⁹

2.4.1. The American and European Concepts and Regimes of Rights Protection

43. Comparing two different levels of jurisdictions working within different types of political and institutional framework is arguably not indicated. A regime of constitutional rights protection on the one hand, and a regime of human rights protection on the other, have, no doubt, different objects and vocation. On the one hand, American constitutional rights are meant to protect persons on a given national territory, and are endowed with legitimacy provided by a single—albeit diverse—*demos*. The American regime was built within a single political and institutional structure and a federal system of courts, not limited to civil rights protection¹³⁰ This is why constitutional rights protection often also involves separation of powers and federalism issues, and resistance from the states.¹³¹ Indeed, powers not explicitly delegated to federal institutions are constitutionally reserved to the States and the People.¹³² Additionally, some consider the “judicial supremacy” doctrine, *i.e.* the gradually strengthened judicial monopoly over federal Constitutional interpretation, as

¹²⁷ M.-A. Glendon, *Rights Talk, The Impoverishment of Political Discourse*, Free Press, (1993), p. 3. On the use of rights for the empowerment of progressive social movement and dynamics of the use of rights for political purposes, see the enlightening study of S. A. Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, Ann Harbor, University of Michigan Press (2nd ed. 2204), 224 p.

¹²⁸ *Ibid*, at 5-6.

¹²⁹ At regional level, let us mention for example the African Court of Human and People’s Rights for the African continent, working from Arusha, in Tanzania. The Interamerican Court of Human Right, seating in Southern America in San José, Costa Rica, enforcing the rights in the contracting states of the Organization of American States (OAS) that accepted its jurisdiction. At global level, the Human Rights Council, created in 2005 and located in Geneva, Switzerland, is no judicial institution but an intergovernmental organ of the United Nations. It proceeds to periodic evaluations of each U.N. member state on a regular basis.

¹³⁰ Showed by all the debates about the desirability of quoting international and foreign legal sources in the Justices interpretative endeavor.

¹³¹ This was the case especially when the Supreme Court started incorporating selectively and progressively certain provisions of the Bill of Rights to the the Fourteenth Amendment and enforcing it against the states. For a contextualized explanation of incorporation in a theoretical perspective, see A. R. Amar, “The Bill of Rights and the Fourteenth Amendment”, *The Yale Law Journal*, Vol. 101, 1193 (1992), or in more details and in a more historical approach to reconstruction events: A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press (1998).

¹³² Under the Tenth Amendment, “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.”

a threat to democracy.¹³³ On the other hand, European *human* rights, because of their reference to humanity in general, have a more universal vocation, despite being protected within a circumscribed territory.¹³⁴ However, the Convention was drafted within a European context, bearing in mind the different legal traditions and the recent history of the continent. Because of the multiplicity of the legal systems the European Court has to work with, and because the it is not integrated into a national or federal judicial system, it has the flexibility to develop its own methods of scrutiny, its own terminology and own standards so they can be adapted to any domestic legal system.

44. Comparability of constitutional and human rights regimes could also be affected by their different philosophies. However, the regimes guarantee rights, which status puts them beyond the reach of democratic process. And both courts strive to fulfill a similar ideal. However, as much as human rights and constitutional rights philosophies should not be assimilated, nor can ‘human rights law’ be equaled to the ‘human rights’ of philosophy. As in the case of American rights, the ‘human rights’ protected by various international Conventions and declarations find their root in a “conception of natural law according to which man, because he is man, possesses a set of rights that are inherent to his nature”.¹³⁵ Paradoxically there exist no unity among human rights conceptions. Gunnar Beck summarizes the paradox revealed by the variety of human

¹³³ L. Kramer in particular believes that the “judicial supremacy” doctrine is the enemy of popular constitutionalism. He defines it as “the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone.” L. Kramer, *The People Themselves: Popular Constitutionalism And Judicial Review*, Oxford, Oxford University Press (2004), p.105, Cited in R. Post et R. Siegel, “Popular Constitutionalism, Departementalism, and Judicial Supremacy”, *California Law Review*, vol. 92, 1027 (2004), p.1027.

¹³⁴ Beside the very universal reference in the term “human rights”, the Preamble of the European Convention on Human Rights also directly and extensively refers to the Universal Declaration of Human Rights of 10th December 1948, (General Assembly Resolution 217 A), considering the European Convention as a “first step” in the enforcement of the Universal Declaration rights in the following words “Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the *universal and effective recognition and observance of the Rights therein declared*; Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms; Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, *to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*. . . ” (emphasis added).

¹³⁵ “La conception du droit naturel selon laquelle l’homme, parce qu’il est homme, possède un ensemble de droits inhérents à sa nature.” M. Lévinet, *Théorie générale des droits et libertés fondamentales* Bruxelles, Bruylant (2 ed. 2008), p. 42.

rights definitions: “They are individualistic, equal, universal, or universalisable; they may also be negative or positive or procedural or substantive. Yet not even the attributes shared by both theories are uncontested”.¹³⁶ For these reasons, French scholar Patrick Wachsmann has claimed that “if Human rights are a universalism (apply to all without distinction), they are not universal”.¹³⁷

45. According to Beck, it is official declarations that have bestowed to these important values promoted by philosophy the rank of a law of human rights, like the United States Constitution bestowed special value with the rank of constitutional rights. Thus “the grounds for justifying the special legal status assigned to rights are of such overriding importance that they merit exemption from the democratic process, which is generally recognised as the appropriate mechanism for resolving conflicts between competing interests, and exclusive jurisdiction by the courts”.¹³⁸ Such arguments put the proclaimed universality of human rights into a less universal, more institutional perspective. They also reconcile constitutional rights with European Convention rights, giving them a more equivalent importance within each in its own context.¹³⁹

46. Moreover, natural law scholar John Finnis warns that legal “human rights” cannot be equated to the human rights of philosophy. Indeed, “scholars sometimes refer to “human rights”, but rather to signify moral requirements applicable to natural law, independly of the existence of a legal protection, or of the form it takes.”¹⁴⁰ Thus, while the human rights of philosophy proceed from a same dignity shared by all human

¹³⁶ G. Beck, “The Mythology of Human Rights”, *Ratio Juris*, Vol. 21, No. 3 September 2008, p. 328. For a systematic summary of different human rights schools of thought in the English-speaking world, see M-B Dembour, “Who Believes in Human Rights? Four Schools of Thought”, *Human Rights Quarterly*, Vol. 32, No. 1, (2010), pp. 1-20.

¹³⁷ P. Wachsmann, *Les droits de l’homme*, “Connaissance du droit”, Paris, Dalloz, (4^e éd., 2002), p. 50. (My translation).

¹³⁸ *Ibid.* p. 313. In contrast, if that debate is presumably solved in the human rights world, the debate as to whether constitutional rights deserve being exempt from the democratic process, i.e. whether courts can decide to strike down laws or even popularly-initiated state constitutional amendments based on civil rights—especially newly discovered rights—is still very much current in the United States. At its core is also the debate on the legitimacy of the ‘countermajoritarian’ power of the Supreme Court.

¹³⁹ Note that contrary to European states, the United States do not answer to an international or supranational court with regard to human rights violation. It only signed the American Convention on Human Rights, but has opted out the Court’s contentious jurisdiction. For general information, see Inter-American Human Rights System, The International Justice Resource Center, accessible on <http://www.ijrcenter.org/regional/inter-american-system/#Inter-American-Commission-on-Human-Rights>

¹⁴⁰ T. Hochmann, “Chronique des arrêts de la Cour supreme des Etats-Unis en matiere de droits fondamentaux (octobre 2008 juin 2010)” *Revue trimestrielle des droits de l’homme* Vol. 22, No. 85, (2011) p. 82.

beings,¹⁴¹ human rights law consecrates “rights sometimes faculties that insure the freedom and dignity of the human person and enjoying institutional guarantees”¹⁴² under different legal regimes, for example at local (constitutional) regional (European Convention on Human Rights, American convention on human rights), or even global level (see for example ICCPR).¹⁴³ The German legal philosopher Robert Alexy suggests a similar view, when he contends that human rights are a legal “substantiation” of philosophical human rights in the same manner constitutional rights are a “substantiation” of human rights.¹⁴⁴ However, official law is not exhaustive and is man-made, thus subject to mistakes. Hence it is conceivable that “unjustly established legal human rights are ‘human rights’, not [philosophically valid] human rights (except for purposes of intra-systemic discourse within that legal system). The same can be said for rights which are legally declared, in a given jurisdiction, to be human rights but which there and in other places could just as well be different in their content, force, and effect”.¹⁴⁵ Thus, assuming that ‘human rights’ legal regimes should aim at complying with the ideal of ‘human rights’, the European Courts and other regional human rights Courts are subject to higher expectations from their public: that of

¹⁴¹ “For they are predicated of all human persons not as members of the class ‘our race/species’, nor out of an emotional or arbitrary sympathy of like with like, but as beings each and all of whom have the dignity of having the at least radical capacity of participating in the human goods that are picked out in practical reason’s first principles (first and foremost the good of human existence/life) and that make sense of all human intending”. J. Finnis, *Human Rights and Common Good: Introduction*. Oxford University Legal Research Paper Series, Paper No 29/2011 May 2011, (hereafter “Introduction”), p.8.

¹⁴² F. Sudre quoted in M. Lévinet, *op. cit.* p. 43 (my translation).

¹⁴³ Rights can be protected at local or domestic (constitutional), regional (in the Americas or in Europe) or at global level with the ICCPR. See the American Convention on Human Rights "Pact of San Jose, Costa Rica" Adopted on 22 November 1969 (hereafter ACHR) and the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

¹⁴⁴ According to Alexy, constitutional rights protection is an institutionalization of human rights in positive law. He concludes that a critique of constitutional rights protection, for example through constitutional litigation in which the plaintiff would argue that a human rights not recognized by the constitution should nonetheless be protected under the constitution, is a critique pertaining the substantiation of human rights: « In any case, one point seems to be clear: one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights. », R. Alexy, “Discourse Theory and Fundamental Rights”, in A. J. Menéndez and E. O. Eriksen (eds.), *Arguing Fundamental Rights*, pp. 15–30, Springer (2006) p.17.

¹⁴⁵ “In all these ways, at least, what can be true of certain elemental human rights accurately defined is more or less clearly not true of many rights constitutionally, legislatively, or judicially declared to be human: that they are properly enforceable against anyone and everyone’s conceptions of common good or public interest. Unjustly established legal human rights are ‘human rights’, not human rights (except for purposes of intra-systemic discourse within that legal system). And the same can be said for rights which are legally declared, in a given jurisdiction, to be human rights but which there and in other places could just as well be different in their content, force, and effect.” J. Finnis, “Introduction”, *op. cit.*, pp. 3-4.

fulfilling a universal ideal. If that is not the case at constitutional level, constitutional battles are increasingly framed in terms of human rights¹⁴⁶ to convince courts comply with various human rights ideals. Also, courts increasingly emulate one another to increase their standards of rights protection.¹⁴⁷ Overall, institutions have enough in common to be compared academically.

2.4.2. The Rights Protected

47. The European Court of Human Rights is an international institution dedicated to the enforcement of rights institutionally and officially considered “objective” and recognized in an instrument of “collective guarantee” of human rights:¹⁴⁸ The European Convention,¹⁴⁹ this “constitutional instrument of the European public order”,¹⁵⁰ is arguably a complete catalogue of rights elaborated from a properly European conception of human rights, in the context of the reconstruction of a peaceful democratic Europe, and aiming at the reconciliation of peoples after the heavy tolls of wars. Indeed, drafters reaffirmed “their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”.¹⁵¹ The European catalogue of rights is more detailed than the American “Bill of Rights” in

¹⁴⁶ The theory of “frames” or “framing”, i.e. the conceptualization of a social issue in terms of a specific type of problem, was coined by D. Snow and R. Benford. “Ideology, Frame Resonance, and Participant Mobilization”, *International Social Movement Research*, Vol. 1, No. 1 (1988), p. 198. As example of debate on the opportunity of framing the homosexual social issues in terms of human rights, see J. Mertus, “The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US”, *Human Rights Quarterly*, Vol. 29, No. 4 (2007), pp. 1036–64.

¹⁴⁷ There is an important literature on judicial dialogue. See for example A.-M. Slaughter, “A Typology of Transjudicial Communication”, *University of Richmond Law Review*, Vol. 29 No.1 (1994), pp. 106 & 120. L. Burgorgue-Larsen, “De l’internationalisation du dialogue des juges”, *op. cit.*, pp. 107-115.

¹⁴⁸ ECtHR, *Ireland v. United Kingdom*, Appl. No. 5310/71, 18 January 1978, A. 25, §239.

¹⁴⁹ The European Convention on Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950 and came into force in 1953. Official texts available at <http://www.echr.coe.int/pages/home.aspx?p=basictexts>

¹⁵⁰ ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, 23 March 1995 [GC], §70 and 75. European Human Rights law is not only considered as a “constitutional instrument” by the Court, but also by scholars. It was called “socle of human rightst protection” (see M. Lévinet, « La convention européenne des droits de l’homme socle de la protection des droits de l’homme dans le droit constitutionnel européen », *Revue française de droit constitutionnel*, No. 86 (2011-2012) pp 227- 263) « european constitutional patrimony » (D. Rousseau, « Une résurrection : la notion de constitution », RDP, 1990, p. 21.) Professor Rousseau is part of a constitutional law movement adopting to a new understanding of constitutional law that doesn’t consider law as constitutional only based on its formal legal value in a normative hierarchy, but on a normative perspective, which puts a strong emphasis on the law of rights and liberties.

¹⁵¹ ECHR, Preamble, at § 4.

terms of number of rights guaranteed and conditions under which the enjoyment of those rights can be subject to conditions and restrictions by public authorities.

48. To a European scholar, understanding American “civil rights” protection can feel difficult not only because of their historical evolution, but also on account of its terminology. Firstly, American civil and political rights that are object of this study are guaranteed by the Federal Constitution. However, the U.S. Constitution contains a rather short list of rights, remarkable for its lack of precision. Before the Bill of Rights was added by amendment in 1791, it was the separation of powers that played a role of barrier against abuse by public authorities. Thus, one of the Founding Fathers Alexander Hamilton referred to the Constitution in those terms: “the Constitution in itself is, in every rational sense, and to every useful purpose, A BILL OF RIGHTS”.¹⁵² The original Constitution protected only five rights: it prohibited retroactive legislations, and bills of Attainders while guaranteeing *Habeas Corpus* in case of illegal arrest (Article One Section 9 or Suspension Clause), and protecting contractual obligations (Article One Section 10) and citizenship rights (Article Four). By limiting the powers of federal institutions (Article Ten), the drafters intended to limit the risks of rights infringements by federal powers. Until the ratification of the Fourteenth Amendment in 1868, the “Bill of Rights” was only a constraint on federal institutions. It is only after this turning point and the Reconstruction Era following the American Civil War that the Supreme Court slowly began adjudicating the first section of the Fourteenth Amendment; the Due Process and the Equal Protection clause. Hence the Bill of Right became a protection rights against abuses of federal and local institutions alike. Note that in practice the Supreme Court did not protect constitutional rights under the label “civil rights” until the ratification of the Fourteenth Amendment.¹⁵³

¹⁵² A. Hamilton, *Federalist Papers No. 84*, in *The Federalist Papers*, NY, Signet, (2003, 1st ed.), p. 250.

¹⁵³ A. R. Amar, *The Bill of Rights*, New Haven, Yale University press, 1998, *op. cit.*, p. 284. According to Henkin, the original Constitution was not contemplating civil rights protection: “Rights were not the concern of the Constitution-makers, the Constitution does not exalt, celebrate, or even proclaim rights. In fact, the original Constitution virtually did not mention rights at all. The Bill of Rights was a postscript, if not an afterthought, the price of getting the Constitution approved. . . . But there was no thought of imbuing our Constitution with rights, of giving our rights constitutional stature and status. And no one thought to require, or even to authorize, the new federal government to secure and protect individual rights, or to nurture, promote, or encourage their exercise and enjoyment.” (Henkin, p. 411) However, it “was not an authentic, full-blown, expression of American constitutionalism (*ibid.*, p. 406). L. Henkin, “Rights: American and Human”, *Columbia Law Review*, Vol. 79, 405 (1979).

49. American terminology uses “civil rights” and “fundamental rights” in specific contexts. First, “civil rights” not only include rights contained in the ten Amendments, *i.e.* Constitutional rights, but also the rights guaranteed in the Civil Rights Act of 1964.¹⁵⁴ For the purpose of this study, American “rights” or “civil rights” will only be referred to as “Constitutional rights” or “civil rights”. The study will not extend to the rights protected by the Civil Rights Act. Secondly, American adjudication classically refers to two different types of constitutional rights: enumerated rights, *i.e.* rights explicitly itemized in one of the articles or Amendments of the Constitution, and the “unenumerated rights”, protected by the Court under the Fifth, the Fourteenth and at times in the “penumbra” of the Ninth Amendment. For example, Justice Douglas justified his protection of the right to privacy and reproductive freedom on the basis of, among others, the Ninth Amendment.¹⁵⁵ If the Ninth Amendment is not considered by all scholars as protecting any right, the Supreme Court used it to justify her protection of rights not explicitly guaranteed by the Constitution.¹⁵⁶ The Supreme Court makes use of the term “fundamental rights” when it deems a right so important as to deserve reinforced protection.¹⁵⁷ In Constitutional law, “fundamental rights” are defined as a “significant component of liberty, encroachment of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment”¹⁵⁸ “Strict scrutiny”, is a method applying a presumption of unconstitutionality to the challenged legal measure, unless public authorities provide a valid justification and convinces the Court that the goal pursued couldn't have been reached through a measure less restrictive of fundamental rights.¹⁵⁹ In cases where the case is argued under the Due

¹⁵⁴ Pub. L. 88-352, 78 Stat. 241, promulgated on July 2 July 1964. This act “prohibited discrimination in public places, provided for the integration of schools and other public facilities, and made employment discrimination illegal”. More information on government information website “Our Documents”, accessible at <https://www.ourdocuments.gov/doc.php?flash=true&doc=97>

¹⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

¹⁵⁶ E. Chemerinsky, *Constitutional Law, Principles and Policies*, NY, Wolters Kluwer, 4^{ème} ed. (2011), p. 815.

¹⁵⁷ Charlotte Girard explains that the expression “fundamental rights” is not, in anglo-saxon law (she refers specifically to British law) used in a systematic manner by scholars, and usually makes comparative studies of different legal systems more complicated. See C. Girard, *Des droits fondamentaux au fondement du droit*, Paris : publications de la Sorbonne, (2010), p. 24. It is confirmed in *Black's Law Dictionary*, which “fundamental right” definition begins with is philosophical in nature: “A right derived from natural or fundamental law”. *Black's Law Dictionary*, *op. cit.* p. 789.

¹⁵⁸ *Ibid.*

¹⁵⁹ Chemerinsky, *op. cit.*, p. 812.

Process Clause, “the constitutional issue is whether the government’s *interference* is justified by a sufficient purpose. But if the right is protected under equal protection, the issue is whether the government’s *discrimination* as to who can exercise the right is justified by a sufficient purpose”.¹⁶⁰ “Fundamental” rights could be compared to their European “intangible” counterparts, which tolerate neither derogation nor restriction such as the right to life (Article 2 ECHR), called “the *supreme value* in the hierarchy of human rights”,¹⁶¹ and the prohibition of torture and inhuman treatment found at Article 3 ECHR, which “enshrines one of the *fundamental values* of the *democratic societies*”.¹⁶² The following work focuses on rights and liberties guaranteed by the United States Constitution¹⁶³ and adjudicated by the Supreme Court under the title “Bill of Rights”, i.e. from the First to the Fifteenth Amendment. U.S. constitutional rights are henceforth referred as “constitutional rights” or “civil rights”. Having found no unified terms for “rights” to signify the most cherished rights of each legal culture, I will henceforth simply refer to “rights” protected by both the European and the Supreme Court. In each specific context, I will refer to “civil” or “constitutional” rights or “human rights”. When referring to rights that the Supreme Court recognized as “fundamental”, it will be specified.

2.4.3. *Judicial Structure and Adjudication Practices*

50. As in the case of the United States, the European Court did not immediately enforce European rights efficiently. For this to happen, member states needed to reform the Convention several times.¹⁶⁴ For purposes of efficiency, the European Court is

¹⁶⁰ *Ibid.*, p. 815.

¹⁶¹ ECtHR, *Streletz, Kessler and Krenz v. Germany*, Appl. No. 22 March 2001, §87 and 94 (emphasis added).

¹⁶² ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, 7 July 1989, §88 (emphasis added) Sometimes the burden of proof will be reversed and lay on the defending state (ECtHR *Tomasi v. France*, Appl. No 12850/87, 27 August 1992, A.241 A, §115). In this regard, the European Court is under more constraints than the Supreme Court, that created rights not specifically mentioned in the Constitution (right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and right to procreate and not to procreate in *Carey v. Population Planning International*, 431 U.S. 678 (1977)). The European Court consecrates the essential importance of certain rights for which the Convention allows no derogation.

¹⁶³ *United States Constitution*, approved on September 17, 1787. The Bill of Rights amendment were signed on September 25, 1791, and officially part of the Constitution on December 15, 1791. Official text available at <http://constitutionus.com/>

¹⁶⁴ Most important reforms include Protocol 11, that took force in 1998 and gave the Court compulsory jurisdiction, introduced individual access, and merged the Human Rights Commission and the Court into a single judicial institution. Protocol 14, signed on 13 May 2004 and taking force on 1 June 2010, aims at making the Court more efficient by creating a backlog filtering system by single judges and adding a new litigation chamber of three judges. Protocol 15, signed on June 24, 2013 but not yet in force, adds a few functioning changes, also to increase efficiency, such as deadlines, judges’ age, admissibility criteria.

composed of three different judgment formations judging on merits, since the single judge formation introduced by Protocol 14 rules only on inadmissibility of cases.¹⁶⁵ Committees of three judges rule on repetitive cases, chambers of 7 judges spread out among six sections rule on non-repetitive cases. The most plenary chamber, the Grand Chamber is composed of 17 ordinarily judges, has jurisdiction to address cases involving special interpretation issues. In contrast, the American Supreme Court is composed of only one chamber of nine ‘Justices’ appointed for life. Moreover, since the cancellation of compulsory appeals procedure, the Supreme Court enjoys control over its backlog through the Certiorari petition procedure, which allows it to pick cases and legal issues it is willing to address.¹⁶⁶

51. One additional difference: The Supreme Court is not allowed to rule *in abstracto*. It interprets Article III, which details the extent of her jurisdiction over “*cases and controversies*”, as prohibiting to deliver “consultative opinions”.¹⁶⁷ Therefore, there is no consultative chamber at the Supreme Court. Thus, in order to show its respect for the separation of power, the Supreme Court elaborated a doctrine aiming to avoid adjudication of political questions: the “political question doctrine”.¹⁶⁸ The European Grand Chamber may deliver consultative opinions regarding interpretative issues (Article 31 ECHR) upon request by a national court or the Committee on the Prevention of Torture (Article 47). Since the Supreme Court generally treats cases that involve more difficult legal questions,¹⁶⁹ this comparative study will focus on the European judgments on the merits that do not involve repetitive cases or established doctrine, and

Lastly, Protocol 16, signed on October 2nd, 2013, allows member states’ high courts to ask the European Court advisory opinions on question of principles.

¹⁶⁵ Since Protocol 14 (Treaty No.194, CTS No. 194 signed in Strasbourg on 13 May 2004 entering into force on 1st of June 2010) Article 27 of the ECHR stipulates: “1. A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination. 2. The decision shall be final.”

¹⁶⁶ This does not apply to appeals (28 U.S. Code §§ 1253), in cases involving several states, opposing the federation and states, in cases involving foreign affairs, or involving a citizen from another a state or a non-citizen of the United States (28 U.S. Code §§ 1251.)

¹⁶⁷ *Muskrat v. United States*, 219 U.S. 346 (1911). Such interpretation stems from a letter of Founding Father George Washington, “Letter to George Washington From John Jay, Chief Justice”, in H. P. Johnston, *The Correspondence and Public Papers of John Jay*. 4 vols. New York and London: G. P. Putnam's Sons, p. 1890-93.

¹⁶⁸ In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court found that federal courts could not address cases concerning jurisdiction directly assigned by the Constitution to other branch of government.

¹⁶⁹ “More generally, the Court’s unbridled discretion to control its own docket, choosing not only which cases to decide, but also which “questions presented” to decide, appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases.” “Questioning”, pp. 1733-34. See also E. Lane, R. Black, “Agenda Setting and Case Selection on the U.S. Supreme Court.”, in *Oxford Research Encyclopedia of Politics*, Dec. 2017, p. 18.

leave to the side consultative opinions. Therefore, cases will be limited to European chambers and grand chamber judgments.

52. Other institutional and substantive aspects differentiate European from American rights adjudication. But despite their historical, jurisdictional, political, philosophical differences, both courts share many unexpected similarities. Those similarities were judged sufficient enough to justify several comparative studies of the two courts.¹⁷⁰ Moreover, several adjudication doctrines were developed by both courts with a view to insure the effective compliance of public authorities with their decisions. For example, the European doctrine of direct effect and the obligation of all law to comply to the European Convention arguably comparable to the American of judicial supremacy—or the use of consensual interpretation, and evolutive interpretation,¹⁷¹ both of which are intrinsically related to the Court's authority and the efficiency of its protection. However, they entail, key differences.

53. Firstly, the Supreme Court elaborated its Supremacy doctrine very early on. Scholarship usually attributes this doctrine to the 1803 judgment *Marbury v. Madison* where Justice Marshall famously declared: “It is emphatically the province of the judicial department to say what the law is”.¹⁷² According to Whittington,

Judicial supremacy largely consists of the ability of the Supreme Court to erase the distinction between its own opinions interpreting the Constitution and the actual Constitution itself. The Court claims the authority not only to look into the meaning of

¹⁷⁰ L. Hennebel, J. Allard, G. Haarscher, *Juger les droits de l'homme, Europe et Etats-Unis face à Face*, Bruxelles, Bruylant (2008). L. Van den Eynde also conducted a comparative study of the basic rights case law of three high courts: the European Court of Human Rights, the United States Supreme Court and the South African Supreme Court. Van den Eynde, *Op. cit.*

¹⁷¹ O'Mahony, K Dzehtsiarou, “Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court”, *Columbia Human Rights Law Review*, Vol. 44, 309 (2013).

¹⁷² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There exist different approaches of this quotation. Some scholars claim that the Court thereby establish her authority to interpret the constitution, others that she established her monopoly over this interpretation. See e.g. D. Douglas, “The Rhetorical Uses of *Marbury v. Madison*”, *Wake Forest Law Review*, Vol. 38, 375 (2003). Douglas contends that *Marbury v. Madison* was not considered a great case or even cited in the Supreme Court's case law for almost a century. It started being cited in the late 19th century, as the Court's case law became increasingly controversial, as the Supreme Court started striking down laws regulating labor or infringing upon freedom of contract and property. He contends that *Marbury* was used in particular to develop the not only exercises of judicial review in the 19th century, but also the doctrine of judicial supremacy, i.e. that “her interpretations of the Constitution are Supreme supreme over those of other governmental actors, a claim that Marshall did not make in his *Marbury* decision”. (p. 409). The latter trend began with the with de desegregation cases in 1958, in *Cooper v. Aaron*, 358 U.S. 1 (1958), in the context of resistance to desegregation in Alabama (*ibid.*)

the Constitution as a guide to the justice's own actions, but also and more importantly to say what the Constitution means, for themselves and for everyone else.¹⁷³

54. Pursuant to Article VI of the U.S. Constitution, called the "Supremacy Clause" the "Constitution, all laws made in furtherance of the Constitution, and all treaties made under the authority of the United States are the "supreme law of the land" and enjoy legal superiority over any conflicting provision of a state constitution or law".¹⁷⁴ Therefore as the ultimate interpreter of the Constitution, the Court has "the position of having the superior or greatest power of authority"¹⁷⁵ with regard to interpretation of all constitutional law, and its decisions "are binding on the coordinate branches of the federal government and the states".¹⁷⁶
55. Without elaborating a doctrine, the European Court elaborated all domestic law not as hierarchically inferior to the Convention, but as subject to scrutiny under the Convention.¹⁷⁷ (Some scholars have talked of "primacy").¹⁷⁸ The corollary is that States are considered liable for all violations of the Convention:

It is, therefore, with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention... The political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional or merely legislative. From the moment that such provisions are the means by which the State concerned exercises its "jurisdiction", they are subject to review under the Convention¹⁷⁹.

56. The Court seems to consider the Convention as prevalent over to even Constitutional norms.¹⁸⁰ However, according to Szymczak, such "primacy" of the European

¹⁷³ K. E. Whittington, *Political Foundation of Judicial Supremacy, the Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton, Princeton University press, (2009), p. xi.

¹⁷⁴ *Black's Law Dictionary*, St Paul, MN, Thomson Reuters (10th ed. p. 1669 (2009)) (nous traduisons). p. 1669.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, p.976.

¹⁷⁷ ECtHR, *Unified Communist Party of Turkey and Others (TBKP) v. Turkey*, Appl. No. 19392/92, 30 January 1998 confirmed by ECtHR, *Zielinski, Pradal, Gonzalez and others v. France*, Appl. No. 24846/94, 34165/96, 28 October 1999. (The court decided that the fact that a legal act conforms to the Constitution does not make it conform with the European Convention.)

¹⁷⁸ See F. Sudre, "Droit international", p. 183.

¹⁷⁹ ECtHR, *United Communist Party of Turkey and Others v. Turkey* [GC], *op. cit.*, at §§29-30 (references omitted).

¹⁸⁰ Sudre, "Droit international", *op. cit.*, p. 183.

Convention is not to be understood as a rule establishing a normative hierarchy, as the supremacy doctrine is. He understands it more as a conflict of norms rule.¹⁸¹ Since the Convention is a subsidiary norm, states are free to choose how to integrate Conventional norms into their own domestic order, directly or through transposition. Nonetheless, contracting states are bound to respect the rights protected by the Convention, whatever the method used to integrate the Convention in their domestic normative hierarchy.¹⁸² Moreover, the Court considers that all domestic norms can be examined in the light of Convention rights.¹⁸³ Nonetheless, liability for *all* domestic violations, if it has been proclaimed a almost twenty years ago, is still contested in domestic laws, especially given the heterogeneity of the methods used domestically to integrate European rights into domestic law.¹⁸⁴

57. One of the consequences of the practical superiority of the Convention over domestic laws—from the European Court’s perspective—is similar to the American supremacy doctrine. Based on Article 32 ECHR, the Court also adjudicates by ensuring its interpretative authority: “Interpretative authority is conducive to an imposition to a state of the solution contained in a judgment against another state facing a similar problem”.¹⁸⁵ Thus, states know that “the court clearly intends to condemn states that let legislations subsist that are similar to the ones judged considered inconsistent with the Convention in another state”.¹⁸⁶ Consequently, despite being bound by the subsidiarity principle and the European Court’s relative interpretative authority (Article 42 Section 1), according to which every decision is binding only to the respondent state, combining

¹⁸¹ It is good to remember that the supremacy doctrine is still intrinsically linked to the separation of powers and federalism. The devolution of powers originates from the states to the federation, and not the other way around. The rule of enumerated powers of Article I Section 8, enumerating the powers of Congress in principle limits the power of federal Congress to the powers expressly attributed by the US constitution. This provision of the Constitution was variably utilized by the Court at different periods to expand or limit the powers of federal authorities. In the New Deal era, it was used to expand federalism see e.g. R. E. Barnett, “Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional”, *NYU Journal of Law and Liberty*, Vol. 5, 581 (2010). Later from the leadership of Justice Rehnquist, the Court started to “cut back” on the strength of federalism by relying more often on the concept of state sovereignty. See e.g. see Heather K. Gerken, “Slipping the Bonds of Federalism”, *Harvard Law Review*, Vol. 128, 85 (2014).

¹⁸² D. Szymczak, “Applicabilité directe des dispositions de la Convention et de ses protocoles”, *Répertoire de droit européen* (July 2007), § 16.

¹⁸³ ECtHR, *United Communist Party of Turkey and Others v. Turkey* [GC], *op. cit.*

¹⁸⁴ Some countries such as Austria, give the Convention Constitutional rank. Some such as France give it a legal rank superior to statutory law. Some give it a legal value equal to statutory law (Germany, Italy). Szymczak §§19-23.

¹⁸⁵ J-P. Marguénaud, “La Cour Européenne des droits de l’homme”, p. 397. Accessed on <http://biblio.juridicas.unam.mx/libros/4/1978/16.pdf>

¹⁸⁶ F. Sudre, *Droit européen et international des droits de l’homme*, Paris, PUF, 9th ed. (2011).

both primacy and interpretative authority allowed the European Court to establish a doctrine to ensure compliance with its case-law, relying on the states' reluctance to be condemned again by the Court.¹⁸⁷

58. Overall, if the *de facto* conventional “primacy” and the doctrine of “judicial supremacy” are not by far identical or do not serve the same function, some scholars such as Alec Stone Sweet, while acknowledging being in the minority, contends:

the ECHR is “characterized by what I call “structural judicial supremacy.” The Court possesses plenary powers to interpret Convention rights authoritatively, while supervising how the ECHR is applied in national legal systems. The Contracting Parties could overturn an objectionable interpretation of the Court, but only by revising the Convention itself. Given the decision-rule governing the regime’s revision – unanimity – this prospect is a practical impossibility.¹⁸⁸

59. Other comparable doctrines and practices apply the substance of rights interpretation. For example, consensual interpretation is used on both sides of the Atlantic, and not exclusively in a progressive manner. It is used at times as a sign of deference to local authorities, at others to adapt the law to current conditions. In Europe, the margin of appreciation doctrine is sometimes used like the originalist doctrine would be in the United States to justify deference.¹⁸⁹ For example, a lack of numerical consensus among

¹⁸⁷ Szymczak, *op. cit.*, at § 10.

¹⁸⁸ A. Stone Sweet, “On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court”, *Yale University Selected Works*, (October 2009).

¹⁸⁹ It has been contended that the Consensus doctrine is often used in a conservative attempt to avoid a new progressive interpretation. In the context of same-sex unions see, among a very rich literature: H. Fenwick, “Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court’s authority via consensus analysis?”, *European human rights law review*, 2016 (3), 249-272 (2016). C. Draghici, “The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?”, *Public Law* (2017), pp. 11-29 (claiming that a “temporary ‘variable geometry’ of rights is also preferable to reining in evolutive interpretation altogether whilst waiting for European consensus to crystallise. The Conclusions thus argue that local consensus is a legitimate interpretive tool if it maximises human-rights protection within a State when domestic democratic processes are jammed; conversely, it should not accommodate a version of persistent objection that destabilises the European consensus orthodoxy and is detrimental to the quasi-constitutionalist project of the Convention.”, p.2.); E. Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards”, *Journal of International Law and Politics*, Vol. 31, 843, 852 (1999). However, from ECtHR *Tyrer v. the United Kingdom*, Appl. No. 5856/72, 25 April 1978, the European Court “deployed consensus as an evidence for evolutive interpretation”, K. Dzehtsiarou, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal*, Vol. 12, No. 10, 1730 (2011). p. 1736 (this articles is an attempt at systematization of the consensus doctrine, but defends the capacity of the Court to disregard consensus—its existence or non-existence—“it if there are reasons for doing so” (*ibid.*, p. 1745). In any case, not only scholars criticize the unstable use of consensus doctrine, some judges make it a point to criticize its use by the court. See e.g. L. Burgorgue-Larsen “Le jeu ambigu du consensus européen dans la détermination de la marge

states justifies granting a contracting state greater discretion. The use of doctrines reveal the rights philosophies adopted by judges, and their vision of the role of the judiciary in democracy.

3. *Significance of the Analysis*

60. To what extent is a use of the “public opinion” concept capable of bringing new light on our understanding of judicial fundamental rights protection? Is it adapted to the international context? As public opinion has extended its reach beyond national governance,¹⁹⁰ social scientists have researched globalization of opinion and the influence of “global opinion” on domestic and international public policies alike. This thesis aims at showing that a comprehensive understanding of judicial adjudication cannot be reached without encompassing the political and social environment in which it is operating. Therefore, it approaches the judicial institution as a political and legal institution, and rests on the assumption that public opinion plays a role, albeit indirectly, in rights adjudication at domestic *and* international level.
61. The notion of public opinion has neither a unique nor consensual meaning, nor is it fixed on an object, a topic, a territory, or a particular public group. Therefore, it has the potential to provide some new input at different levels of analysis. Institutionally, it allows putting back the adjudicative practice of each institution into a context larger than just a tridimensional relationship between a victim of right violation, the respondent, and a judge of last resort. The study includes other actors that directly or indirectly, internally and externally, participate to the law-suit and to the formation of public opinion throughout the adjudicative process: The plaintiffs, the press, international institutions, and third parties or non-governmental institutions. Decisions such as *Brown v. Board of Education*¹⁹¹ or, in Europe, *A.B.C. v. Ireland*,¹⁹² clearly show what echo a judicial review of a case can have in local and international political debate. In this framework, such indirect actors establish a link between the public, the courts and public authorities and contribute to judicial legitimacy. At substantial level, *i.e.* in the study of the corpus of decisions, keeping the analysis of adjudication open to

d’appréciation: La vision critique de Françoise Tulkens”, *Strasbourg Observers*, 2012, <<https://strasbourgobservers.com>>, <hal-01744352>

¹⁹⁰ On this topic, see S. Splichal, “*Transnationalization*”, *op. cit.*, and N. Fraser et al., *Transnationalizing the Public Sphere*, Cambridge, Polity Press (2014).

¹⁹¹ *Op. cit.*

¹⁹² ECtHR, *A.B.C. v. Ireland*, Appl. No. 25579/05, 16 December 2010.

a flexible and adjustable notion of public opinion should broaden the analysis and thereby enrich our understanding. While making sure to not reduce civil and human rights to an exclusively political phenomenon, as political science could, we need to include the impact of judges' perceptions of their social and political environment into our analysis of legal reasoning. In protecting rights, courts not only have to face states, but also plaintiffs, interest groups, the media, national and international opinion. Analyzing the role of the concept of 'public opinion' in decisions aims at determining whether judicial institutions refer to public opinion, directly and indirectly, to which public opinion they refer (local, national and domestic, or international), and how judicial institutions conceptualize each of these segments of public opinion throughout their reasoning: a positive or negative force, a participant in decision making or a dangerous threatening and irrational force. Indeed, a quick reading of the case law demonstrates that "public opinion" is seen under a positive or negative light depending on what right is at stake. Finally, a comparative analysis allows contrasting the importance of opinion in rights adjudication doctrines at national and international levels, and the role of public opinion in domestic and international governance.

62. Our analysis of the role of public opinion in the United States Supreme Court and the European Court of human rights starts from the premise that decisions and public opinion are interdependent to a different degree depending on what importance each court gives to public opinion.

4. Circumscribing the Research Objects

63. This thesis researches what role public opinion is assigned in rights adjudication. Public opinion can be involved in judicial process in two different ways: by its inclusion as participant in the proceedings, and through references in the substance of written judgments.
64. Institutional law, which includes jurisdiction rules and rules pertaining to the organization of institutions, also extends to the role of external participants in proceedings (amici, parties, sponsors, etc.) Some rules are included in constitutive documents, *e.g.* the United States Constitution or the European Convention at Section II. Other rules are included in the rules of courts. For example, with regard to friends of courts, which are henceforth considered representative of different segments of

public opinion, rules and practice alike have contributed to substantial evolution of participation. In Europe, participation rules are found at Article 36 ECHR and Article 44 of the rules of Court. However, the European Court's policy with regard to third party participation is not comprehensively organized by these rules alone : it is through an extensive interpretation of the above-mentioned articles that the European Court progressively welcomed civil society interventions in proceedings.¹⁹³ External participation (at petition level or at review level) also has intensified over the years.¹⁹⁴ In the United States, Article 37 of Supreme Court Rules organizes *amici curiae* intervention.¹⁹⁵ However, the practice has evolved: as the Court was facing increasing numbers of requests for participation, reforms made the case selection more stringent and discretionary, pushing lawyers to devise shrewd litigation strategies and to encourage cooperation between litigants and external participants.

65. For this reason, the main object of this thesis will be first, the institutional involvement of public opinion, and second, the place ascribed to public opinion in judicial decisions. The institutional criterion will be utilized to describe as accurately as possible how the increased participation of diverse actors as well as their diversification has contributed to judicial debate over civil and human rights issues, and what their impact was on legal evolution.
66. In the next subsections, I address the process followed to build a database with cases containing direct references to public opinion. Because the main material of case analysis are the written decisions of the European Court and the Supreme Court, I describe the main differences between the decisions methods and styles of each court I am about to study. I next explain the methodology used to define which cases contain references to “public opinion”, and the database building process.

¹⁹³ On the role of *amici curiae* in the European Court case law, see L. Burgorgue Larsen, “Les interventions éclairées devant la Cour européenne des droits de l’Homme, ou le rôle stratégique des *amici curiae*”, *La conscience des droits, mélanges en l’honneur de Jean-Paul Costa*, Paris, Dalloz, (2011), pp. 67-81, see also Van den Eynde, *op. cit.*

¹⁹⁴ See Marina Eudes, *op. cit.* The issue of *amici* participation is the object of Chapter Two.

¹⁹⁵ Rules of the Supreme Court of the United States, 13 April 2013, entered into force July 1st, 2013. The Court recognizes that “[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”

4.1. The structure of American and European Judgments in a Comparative Perspective

67. The discussion below seeks to underline the main differences between European judicial decisional structures and American judicial drafting styles and how it affects the role that non-legal and social or political arguments play out in the judicial motives and outcomes.

4.1.1. *The Hybrid Structure of European Judicial Decisions*

68. Every court differs from others in the style adopted in its judgments. In this regard, the European Court adopts a drafting structure that is a hybrid of the Roman legal tradition and the Common Law tradition. That is what French scholar Aurélia Schamahneche demonstrates in her in-depth study of motivations. She focuses both on the drafting style and on the reasoning profile of the European Court's judgments.

69. One of the striking features of European drafting style is its very clear, visible outline.¹⁹⁶ The Court first sketches the facts and circumstances of the case, which extensively quotes the "relevant domestic law", other relevant information pertaining to the case, such as international or local reports, relevant international law and case-law. The Court assesses plaintiffs' claims under each legal basis separately. It makes a point to itemize and confront arguments of all parties and to address and explicit its position systematically. Decisions purposely are drafted in a very precise, exhaustive and transparent style, demonstrating its intent to take all participants' concerns seriously, and to ensure acceptance by its readers.

70. This methodology evolved over time. According to Schamahneche, the Court at first conformed more to a French judicial style, briefer but also more difficult to read to non-French legal professionals. To ensure understanding of a diversity of states, the Court progressively adopted a hybrid structure, using French syllogism in a more Common-Law-inspired conversational style. However, the visible and constant outline is foreign to both traditions.¹⁹⁷

¹⁹⁶ Schamahneche adds that in practice the European court inserts detailed summaries of decisions in the printed version of the judgments. *Op. cit.*, p. 391.

¹⁹⁷ *Ibid.*, 543.

71. The European Court borrows from different traditions to produce an original output. From this transpire the Court's vision of the law and of its social role in Europe.¹⁹⁸ A few practices reveal this trend. Firstly, contrary to the traditional French tradition, the European Court does not use syllogism to discover the right decision but the other way around, to justify it.¹⁹⁹ Overall, these practices have the advantage to make decisions "less authoritarian and less enigmatic".²⁰⁰ Secondly, although the European Court is not bound like Common Law courts by a rule of *stare decisis*, it still uses the casuistic method and bases its decisions on relevant past judgments,²⁰¹ thereby satisfying the imperatives of legal security and predictability. Overall, its flexibility allows the European Court to freely make use of foreign law and decisions without risking public controversy like the Supreme Court does. Thirdly, the Court oftentimes grounds its decisions not on the text of the Convention, but on the Convention as interpreted.²⁰² Finally, in contrast to the formalistic and laconic French judicial style, the European Court makes use of extra-legal considerations.
72. The strategic structure of European judgment is easily explained. European judgment legally have a declaratory force. Thus, the Court needs to convince all audiences, especially defendant states, of the fairness and necessity of enforcing its judgments.

4.1.2. The Unsystematic American Judicial Structures.

73. After researching comments on the methodology and drafting style of the European Court of Human Rights and noting the relative abundance of the literature, the lack of an equivalent study regarding drafting style, rhetorical style of Supreme Court judgments is striking. Only a few studies focus on Supreme Court opinions with the

¹⁹⁸ *Ibid.*, p. 464.

¹⁹⁹ *Ibid.*, p. 448-9. In Schahmanecche's mind, this practice cultivates confusion rather than clarity. Moreover, abundant motives do not guarantee clear decisions.

²⁰⁰ C. Grewe, "Le juge constitutionnel et l'interprétation européenne", F. Sudre (dir.), *L'interprétation de la CEDH*, Bruxelles, Bruylant, (1999), p. 214.

²⁰¹ See F. Matscher, "40 ans d'activités de la Cour EDH", *Recueil des Cours de l'Académie de Droit International* (1997), p. 304.

²⁰² Schamahneche, *op. cit.*, p. 445. It is a common practice of the U.S. Supreme court. For example, the case *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), was examined its conformity not to any specific constitutional provision, but to abortion precedent *Roe v. Wade*, 410 U.S. 113 (1973)

tool of rhetoric, but they focus more on judicial strategy²⁰³ and acceptability by other institutions and the public than on the structure of the Court's opinions.

74. Explanations exist. Firstly, contrary to the European Court, Supreme Court's opinions are not drafted by a Registrar or a different administrative unit within the Court, but by the Justices themselves, helped by their staff. Hence, every decision displays a personal style and reasoning.²⁰⁴ For example, Justice Scalia's style is very famous for its specific features.²⁰⁵ As Wald puts it: "Like Hemingway, other judges write to the bone, abhorring descriptive adjectives; still others delight in injecting exotic language in their opinions, calculated to send readers, including other judges, scurrying to the dictionary. We write what we are, and perhaps, more than others, judges are what they write."²⁰⁶ Wald's quote mostly applies to judges' style in writing separate opinions. Most of the time, judges write in an "impersonal tone"²⁰⁷, focusing on "deduction and syllogism and highly rational arguments".²⁰⁸ To sound impersonal, judges use expressions such

²⁰³ Wetlaufer focuses on legal language as rhetoric, but he studies it by comparing legal language to other types of classical literature. His study is not devoted to Supreme Court opinions or rhetorical and argumentative usages generally. However his insights to be useful to this thesis. See Wetlaufer, *op. cit.* Chereminsky focuses on the Supreme Court's strategy with regards to social acceptance of her decisions, rather than proceeding to a rhetorical analysis of the Court's language. See E. Chereminsky, "The Supreme Court of California 2007-2008 Foreword: Judicial Opinions as Public Rhetoric", *California Law Review*, Vol. 97 (2009), pp. 1763-1784. See also E. Chereminsky, "The Rhetoric of Constitutional Law", *Michigan Law Review*, Vol 100 (2002), pp. 2008-2035. (Emphasizes legal language of rhetoric to improve individual voice of each judge, to make opinion look value free, avoid indeterminacy; and legal values courts try to uphold such as stability). The most helpful article was written by Patricia Wald about federal courts opinions generally. Although not applying to the Supreme Court, her description shed light on the rhetoric of high courts' decision-making. See P. M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings", *Chicago Law Review*, Vol. 62, 1995 p.1371-1419.

²⁰⁴ For this reason, many political studies of legal decisions have focused on the drafting style of each single Justice and attempted to predict future outcomes based on their ideology and judicial philosophy since the 1960s. The literature is important and references cannot be exhaustive. See for example G. Schubert, *Quantitative Analysis of Judicial Behavior*. Glencoe, Ill.: Free Press (1959), R. Johnston, "Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts." In R. Peabody (ed.), *Cases in American Politics*. New York: Praeger (1976), pp. 71-110, C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978," *American Political Science Review*, Vol. 75, No. 2 (1981), pp. 355-367. More recently, see D. Katz, M. J. Bommarito II, J. Blackman, "A general approach for predicting the behavior of the Supreme Court of the United States", *PLOS* (April 12, 2017) <https://doi.org/10.1371/journal.pone.0174698> Note that some scholars have begun attempting a similar study on the European Court: N. Aletras, D. Tsarapatsanis, D. Preotiuc-Pietro, V. Lampsos, "Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective", *PeerJ Computer Science* 2:e93 (2016) <https://doi.org/10.7717/peerj-cs.93>.

²⁰⁵ See Wald, *op. cit.*, p. 1516. Justice Scalia's tone is famous for being sarcastic. Also to Wetlaufer: "Sometimes instead of deduction and syllogism and highly rational arguments judges "write with a passion that sounds more like the rhetoric of politics than what i am describing as the rhetoric of law", Wetlaufer, *op. cit.* p. 1563.

²⁰⁶ Wald, *op. cit.*, p. 1415.

²⁰⁷ *Ibid.*, p. 1418.

²⁰⁸ Wetlaufer, *op.cit.*, pp. 1562-3.

as ““The court this” or “the court that”—the imperial “we.” The impersonal style was designed to advance the notion that the court is a corporate body involved in declaring what the law is rather than three or nine or twelve individuals”.²⁰⁹ However the practice of separate opinions tends to compromise the Supreme Courts’ corporate authority by personalizing opinions and exposing Justices to criticism over abuse of discretion or activism. The Supreme Court’s style is thus a compromise between transmitting the image of a neutral and authoritative “corporate body”, and the pedagogical practice of judges explaining their intellectual process or alternate theories on the legal question.

75. The structure of the Supreme Court’s judgements is visibly less systematic and constant than its European counterpart. However, a look at opinions from different periods shows an evolution. The most visible one was the introduction—or reintroduction—of separate opinions.²¹⁰ Moreover, in the 1960s, the Court started to integrate a short syllabus including short facts summary, legal questions and a summary of her holding, and to specify the presence of separate opinions. This made Supreme Court opinions more accessible to her audience and scholars. Some opinions do present a numbered structure, but no title.²¹¹ Yet this outline is not a rule, as even today do not always display this structure.²¹² However, it is possible to notice constant features in the Supreme Court’s judgements.²¹³

76. The structure of the courts’ opinions are important for the purpose of our work. The European Court as a common practice does systematically and extensively quote its own case law, most of the time the essence of past important cases’ motives and dispositions. It usually uses the same excerpt from these opinions. As a result, many of

²⁰⁹ *Ibid.*, p. 1418.

²¹⁰ For a history of separate opinions, see for example B. Friedman, A. Marin, , T. Bennett, S. Navarro Smelcer, *Devide and Concur, Separate Opinions and Legal Change* (August 30, 2016). Online access available at http://www.law.northwestern.edu/research-faculty/colloquium/law-economics/documents/2015_Spring_Friedman_Divide.pdf They argue that in the Common law, publishing « seriatim » decisions, i.e. having each judge publish its personal decision was a tradition. However, judge Marshall famously united the court by eliminating this practice in favor of unanimity and single decision-making. Marshall’s successors allowed separate opinions, but until the 1940s, the practice was rather rare. p. 114.

²¹¹ It is usually organized as such: A first section in Roman numbers I., II., III. etc., each containing subsections A, B, C, etc.

²¹² See for example *Furman v. Georgia*, 408 U.S. 238 (1972)

²¹³ In the first section, the court usually describes the facts and judicial procedure the plaintiff followed until certiorari or appeal was approved. In the second section, the Court outlines the law and case law applicable to the legal question at stake. In a third section, the court usually discusses the arguments of the parties, and ends the decision with the disposition. Some opinions contain more sections, or do not use subsections.

the same excerpts containing references to “public opinion” have been quoted in the arguments of previous cases. As a consequence, if the same case law and excerpts that are quoted are always the same one, the relevance of references to public opinion in such excerpts to the case reasoning is not guaranteed. Therefore, references to “public opinion” are not relevant to the outcome in every case. To the contrary, these quotes could inflate the numbers of relevant references to public opinion in European decisions. The Supreme Court, if it also quotes or liberally refers to past case law, does neither always quote the same excerpt, nor in any systematic manner. Thus, references to public opinion in all forms can safely be assumed to be relevant to the case. This is why knowing drafting practices of both courts help assess the relevance of each reference.

4.2. Database Building: Singling Out ‘Public Opinion’ Indicators

77. This study takes a close look at institutional and substantial elements that what role courts ascribe to public opinion. I focus on institutional arrangements and substantial output. Although I had to establish criteria for case selection, this study is not empirical legal study. Statistical data analysis on the correspondence between public opinion on specific issues and judicial decisions is not relevant to this topic. Not only such data would not establish a causal link between public opinion and judges’ decision, since it wouldn’t establish that public opinion induces judges to decide one way or another, but such inclusion would make any comparative analysis difficult or impossible given the lack of opinion data on all Member states of the Council of Europe related to European human rights issues. I henceforth explain how I identified relevant cases in which the Supreme Court and the European Court refer to “public opinion”. Two criteria are applied to establish research terms: first, a textual and synonymic criterion, and second, an institutional criterion. Once these criteria established, a step-by-step description of the database building process is provided.

4.2.1. Textual and Synonymic Criteria

78. I henceforth define the criteria used to select cases I included in the database for future analysis. I focused on ways to search for direct references to ‘public opinion’ and its synonyms in Supreme Court and European Court’s merits judgments.

79. The first criterion used was synonymic. While there is plethora of definitions of ‘public opinion’, it also has many synonymous. In philosophy, the main component of the definition, ‘opinion’, refers to a belief, with an underlying assumption that this belief is imaginary or false. In the French language, the meaning evolved from referring to an intellectual position, or a hypothesis, and was finally excluded from the scientific language. In the 19th Century it acquired a collective meaning. The expression ‘public opinion’, referred from the 17th century to an “ensemble of ideas and judgments shared by several persons, by a fraction of the social group”.²¹⁴ In political sociology, it is finally used in reference to a “type of social thinking that consists in taking position on general interest issues, and, absolutely, the ensemble of dominant attitudes of the mind in a society”.²¹⁵ This brief outline shows how much the term ‘opinion’ has evolved in its usage, especially in social sciences, from an intellectual and positive meaning to a word with negative connotations. As of today, the spectrum of meaning of ‘public opinion’ is still very wide, depending on context.
80. Other terms are used to mean ‘public opinion’, such as simply ‘opinion’, ‘The Opinion’. Public opinion can be used in reference to different publics, locations, and can be subdivided in different trends, or “movements”.²¹⁶ It is also referred to as “the public”, or the “grand public” (the broader public), although the use of the latter does not only apply to politics. In Supreme Court opinions, it changes names: becomes the “prevalent sentiment”, changes face to become “an enraged community”, has the capacity to be rational (the Court refers to a “well justified public indignation”). It can be consensual, representing the “consensus of society’s opinions”, or temporary, “a great wave of public passions”.²¹⁷ Finally, it can simply represent a valuable support, in the form of “public confidence”.²¹⁸

²¹⁴ A. Rey (ed.), “opiner”, *Dictionnaire historique de la Langue Française*, Paris, Robert (2009), p. 1475. (My translation).

²¹⁵ *Ibid.*

²¹⁶ From the definitions of “opinion” and “public”, *Petit Robert de la langue française*, Paris, Robert, (2012) (Digital edition). This dictionary had more examples of popular and common usages of the term ‘public opinion’, most useful to the task of outlining different types of usages that could be found in written texts. It was complementary to the use of a historical thesaurus.

²¹⁷ *Ibid.* According to Marshall, “Because so many synonyms of public opinion have appeared in Court opinions, it is impossible to compute any precise count of decision that indirectly refer to public opinion. Overall, close synonyms appear to greatly outnumber direct mentions of “public opinion””. T. Marshall, “Public Opinion and the Supreme Court” (1989), *op. cit.*, p.32.

²¹⁸ ECtHR, *Stafford v. United Kingdom*, Appl. No. 46295/99, 28 May 2002, (Zagrebelky and Tulken, J. Concurring).

81. Using the textual and synonymic criterion, I found that both the European and the Supreme Court directly refer to ‘public opinion’ by also using other terms, such as “opinion polls”. “Political pressures” or “public pressures” are mentioned, particularly in connection with questions that preoccupy the public. Hence direct or indirect references vary: public opinion can be used in reference to a measurement tool such as polling data or public opinion ‘surveys’, which are used more or less precisely—namely with or without reference to specific data. From this first research, I concluded that ‘public opinion’ and its synonyms must all be included in this work in order to bring a better and more comprehensive understanding of its role in rights protection. Indeed, without synonyms, the search would be too restricted to show the real importance of this political reality: Courts do not always explicitly name all the authorities they rely on to make a decision.

4.2.2. Database building

82. Comparing references requires choosing the terms to compare, which I did based on studies that had already been published on similar topics. I used Marshall’s groundbreaking work of 1989, where he studied the role of public opinion in Supreme Court adjudication based on statistical data. Marshall details his database building search, which he used to determine the number and frequency of references to public opinion in Supreme Court decisions generally. Although Marshall’s study is empirical, its method was most helpful in designing my own case selection methodology. Therefore, I applied his search terms both to the Supreme Court and to the European online databases,²¹⁹ and added other terms found in the European case law, particularly references to international opinion. In the case of the U.S. Supreme Court, I limited the case selection to constitutional freedoms cases.

83. I first searched the expression ‘public opinion’ in each Court’s database, then expanded the search to direct synonyms. Entered into the database were the expressions ‘opinion of the public’, ‘public sentiment’, ‘prevailing sentiment’, ‘public passion’, ‘majority opinion’, ‘public confidence’, ‘changing attitudes’, ‘evolving opinion’, and ‘informed opinion’, and ‘social attitudes’. Since the term ‘public opinion’ can be used in reference to local, national or even international entities, I also searched ‘international opinion’

²¹⁹ The European Court official database HUDOC is accessible at <http://hudoc.echr.coe.int>

and ‘European opinion’.²²⁰ As social sciences often equal ‘public opinion’ to polling results, I also included the terms ‘opinion survey’ and ‘opinion polls’. ‘Polls’ was excluded as it is too often related to voting rights. ‘Public opinion’ also has several shorter synonyms. One is ‘the public’. However, as it was found in too many decisions, and was too often attached to non-relevant words, it was excluded from the list of public opinion synonyms. Instead, I proceeded to a double search, *i.e.* I searched “the public” in decisions that had already been selected because they contained direct references to public opinion. In this way, I found other references such as “opinion of the public”.²²¹ “Majority opinion” was also excluded because Supreme Court cases often use it to refer to the “majority opinion”, *i.e.* the judgment agreed by a majority of the judges on a case.

84. Following Marshall’s methodology, I tried to include “consensus” to my search but decided against it: In the case of the European Court, “consensus” search would have been problematic as it is a frequently used doctrine of the Court, to decide whether the law has sufficiently evolved in contracting states to warrant an evolution in European Law. Although not irrelevant, references to this doctrine are too often present in the Courts decisions since the court systematically and extensively quotes its own past decisions. Thus, for our analysis to be complete, ‘consensus’ analysis was included as a second term search in cases already directly referring to ‘public opinion’. Note that closer research singled out one case displaying “anti-Roma sentiment”, an equivalent of “inimical public opinion” towards the Roma minority, which we included as relevant. In the case of the Supreme Court, the term “consensus” was found in a very important number of cases, more than doubling the database size and making the case study potentially unworkable. After closer inspection, I found that ‘consensus’ was frequently used to refer to ‘consensus’ among judges as a decision-making practice. ‘Consensus’ also is used by the Supreme Court as an adjudicating doctrine in Eighth Amendment cases. In conclusion, I retained only Supreme Court cases containing ‘consensus’ besides other direct mentions. In the case of European case law, I also relied on indirect references to public opinion, where used as a synonym of democratic majority. A series of cases refer to the “views of a majority”. There, the Court reveals

²²⁰ I could also have included “international community” but this has several meanings not necessarily synonyms with public opinion.

²²¹ For example, in too many decisions it was used in connection with “in the opinion of the public prosecutor”.

its philosophy with regard of the relation between majority and minority will in a democracy.

85. In *Borgers v. Belgium*, the Court also referred to the “sensitivity of the public” to administration of justice.²²² Since the European Court has two official languages, and some cases still are only published in the French language, I also searched for references in French-only cases. I searched “opinion publique”, “opinion internationale”, “sondage” *i.e.* opinion poll, and other French equivalents in decisions that were not published in the English language. Seven cases were added to the list.

4.2.3. General Trends

86. From the European Court’s official HUDOC database a total of 299 cases – including French language cases – contained direct references to “public opinion” or their synonyms. On the professional websites Westlaw Next²²³ and FindLaw,²²⁴ I found 271 such Supreme Court cases.²²⁵ The European search was limited first to English language case-law decided by the Chamber and Grand Chamber and decided on the merits since the creation of the Court. I decided to focus on merits judgments because their reasoning is more detailed, hence legal and non-legal arguments are more perceptible. It also decreased the number of cases to analyze. Note that European Human Rights Commission decisions were not included in our database, because a first search including the Commission determined that direct mentions of public opinion in its opinions were virtually non-existent.
87. As second step, I sorted cases by theme and legal basis. In Supreme Court data, most cases, *i.e.* 74 of them are based on the Fourteenth Amendment, which are often combined with other Amendments. With 72 cases, the second most important group of cases regard the First Amendment (freedom of speech and association, excluding

²²² The few cases that strongly mobilized public opinion and public debate were noted, although no direct reference to public opinion was made in the decision, keeping in mind they would only be used as an example of external public opinion pressure, but not in textual analysis. One such judgment is *Lautsi v. Italy*, the so-called “crucifix case”. First judgment was released in 2009, ECtHR, *Lautsi v. Italy*, Appl. No. 30814/06, 3 November 2009. Definitive decision was announced by the Grand Chamber in 2011. ECtHR, *Lautsi v. Italy*, [GC], Appl. No. 30814/06, 18 March 2011

²²³ Westlaw Next, accessible at <http://next.westlaw.com/>

²²⁴ <http://caselaw.findlaw.com/court/us-supreme-court> Note that the search did not exclude any period and extended from the foundation of the U.S. Supreme Court to today (July of 2016).

²²⁵ Also for future reference, I kept in a separate database fundamental rights cases itemized by Marshall in both his 1989 and 2008 studies on public opinion and the Supreme Court.

religion); third group of 32 cases concerns Eighth Amendment (prohibition of excessive bail or fines, or cruel and unusual punishment). The Fifth (protection of property), and Sixth (speedy and public trial by jury) Amendments are raised in only over 10 cases each. Eighth Amendment cases display most direct and the most varied types of references to public opinion. Many Supreme Court cases were excluded from the date because of their irrelevance, or because they involved no rights issues. They raised either no constitutional question, since the Supreme Court is also a Court of Appeals, or more institutional issues such as interstate commerce, presidential power, or the powers of Congress. Still remained a substantial number of 264 relevant cases.

88. European trends are interestingly similar, although most cases are based on more than one Convention Article. The most important group *i.e.* over 150 cases, involve freedom of expression (Article 10 ECHR). Less than 75 concern fair trial and procedural rights (Article 6). The next most important group involves complaints for discrimination (Article 14), which as a rule must be combined with another Convention disposition. The last most important group involves rights related to private and family life (Article 8). Those two articles gather respectively around 45 to 70 cases. Far below such numbers, with approximately 20 cases, we find Article 5 (security), Article 2 (life), 3 (torture and degrading treatment), and 11 (assembly). Cases involving the least amount of public opinion references are based on Protocol 1 Article 1 (right to property), Article 2 (education) and Article 3 (prohibition of torture and inhuman and degrading treatment). Note that because of the numerous legal basis in European cases, relevant cases are difficult to set aside. Some references may be relevant to one legal basis rather than another, or simply be include in the description of facts. Besides, 15 cases were based on Article 8 combined with Article 14, which cannot stand by itself: in such case it should be coded with being based on a prohibition of discrimination. However, coding was not my first concern. Of more importance was to classify by order of importance before choosing what theme to analyse.

89. This snapshot of the type of cases receiving most public opinion references is useful in more than one regard. In order for the analysis to be relevant and have explanatory force, it should preferably focus on a representative sample, *i.e.* focus on cases that are frequent among the case-law. Not that an analysis of cases where references are

frequent would have no value, but that it would bring more in terms of explanations of nuances after first analysis of the most important themes.

4.2.4. Matching Those Trends with The Four General Theories

90. Marshall's study of public opinion in Supreme Court cases attempts to establish a link—although not a causal link—between Supreme Court decision-making and the state of American public opinion. Although his is not a detailed study of the role public opinion references play in adjudication, he outlines four theories explaining how the Supreme Court conceives public opinion and its role in society. I chose to use these theories as a starting point for my case analysis.
91. Marshall's first theory looks at public opinion in Freedom of speech cases. To Marshall, the Court believes that "certain types of speech inform public opinion, and that even controversial or unpopular speech deserves legal protection".²²⁶ In this theory, the Supreme Court sees public opinion in a positive light, hence it has a positive and legitimate influence on American democracy. The second theory focuses on the relationship public opinion entertains with rights protection. Public opinion is seen as an "efficient check on government" against abuses. For this reason, no judicial activism is needed to protect citizens. Consequently, judges ought to exercise judicial restraint.²²⁷ The third theory is in line with a sociological, i.e. dynamic and evolving view of the law and judicial review. According to it, judges should strike down laws that are inconsistent with public opinion. Conversely, in the fourth theory, public opinion can be a threat to democracy. The powerful force of majority can pressure minorities to silence, can therefore be a threat on speech and constitutional rights.

Among those four theories, two main themes arise: the relationship between public opinion and democracy, and the role of public opinion in legal evolution. These two themes also pervade the debate on judicial activism and restraint: the countermajoritarian difficulty is concerned with the role of judges within democracy and whether or not they should leave popular democracy make all decisions, with all potential abuse populism may bring constitutional against rights. At its core is also the

²²⁶ Marshall, "Public Opinion and the Rehnquist Court", *op. it.*, p.10.

²²⁷ *Ibid.*, p.11.

debate about legal progress and whether or not judges respond to the public or go against it will when they initiate legal change. Since the most important case groups in my database are freedom of speech, most related to the first theme, and antidiscrimination cases, in which field most legal evolution has recently occurred, I decided that these two themes would serve well as a guideline to my case analysis.

4.3. Selecting Cases for Comparative Analysis

92. After gathering such an important number of cases, a selection of a workable number needed to be made in order to offer a meaningful in-depth analysis of each theme. This section describes the methodology I followed to focus my analysis on most relevant cases and themes. My case selection was based on the comparative approach I adopted for each topic.

4.3.1. Topic Choices

93. The above-described snapshot on cases receiving most direct public opinion references is useful in more than one regard. In order for the analysis to be profitable and representative, this study will have to focus on the most representative sample possible. One could choose to analyze a representative sample of cases by type, or to analyze cases by theme, focusing on the theme where more references to public opinion were accounted for. As some articles are very underrepresented in the pool of European cases, such as Article 1, 2, and 3 of Protocol 1, I chose a thematic analysis, focusing mainly on Freedom of Speech and Association cases (First Amendment and Article 10 and 9 ECHR respectively) and on a specific topic where the law has substantially evolved in the last few decades: the rights of homosexuals.
94. I chose two themes based on the assumption that public opinion may play a different role depending on what right is at stake, and how important that right is. Moreover, studying two themes is undoubtedly more likely to provide a more complex and complete picture of judges' conception of public opinion and of its role in democracy in their decision making process. Conversely, choosing three themes, despite making the study more comprehensive and complete, would not have been manageable in the framework of a doctorate thesis having the ambition to complete, in addition to the institutional study, an in-depth analysis of judicial reasoning. Lastly, focusing on two themes suffices for exploring the main themes debated by scholars when discussing the

role of judges in democracy, that I outline in Chapter One. Many schools of thought consider Courts as models and custodians of rationality, reasonableness and civilization as opposed to political representative institutions, and see this ‘countermajoritarian’ institution as a safeguard rather than a threat for democracy. Also, scholars believe that Judges are endowed with the skills needed to make the law flexible and adaptable to contemporary conditions, needs, and to contemporary attitudes. Both the Supreme Court and the European Court case laws witness the courts’ willingness to act as protectors of the rights of minorities against abuses of majorities, pressures of public opinion or government abuse. As guarantor of a flexible and adaptable law to contemporary needs, both courts have at times adopted a dynamic approach to interpretation, and adapted right protection to contemporary needs.

95. The first case analysis will be devoted to the judicial vision of the role of public opinion in democracy. Since public opinion is often used as a synonym of ‘the people’, or ‘majority’, it is assumed to own some of the people’s democratic legitimacy. Only if the public can express its opinions can the will of the people transpire in public life, which occurs only if freedom of expression is fully respected. Thus, the way courts portray public opinion—i.e. as a positive or negative force—is informative as to the power and leeway each court grants public opinion in its legal and political system. It also reveals each court’s political philosophy of democracy.
96. The choice of the second theme of analysis was made based on three criteria. Firstly, cases had to be have a comparatively prevalent in each database. Secondly, the theme had to involve case law for which both courts that adopted a dynamic approach. Thirdly, the theme involved recent case law so as to be more relevant to the current legal situation.²²⁸ Cases related to the rights of homosexuals fit the three criteria. Moreover, they involved more than one type of rights: freedom of speech, family life and privacy, criminal law were the most frequently used legal basis. This diversity has the potential to make the analysis of the role of public opinion in decisions more representative of all judgments containing references generally. Rights of homosexuals often evolved with the help of antidiscrimination provisions. Finally, homosexuality related cases

²²⁸ Themes had to be excluded. One obvious theme could have been the increasing protection of African-Americans’ rights by the Supreme Court with the medium of the law. However most of this movement occurred in the 1970s and its no longer as topical. The same could be said with the evolution of family law in relation to privacy.

invited very vigorous public debate, which made prevalent arguments and the ‘public mood’ easily accessible to judges.

97. Other reasons make rights of homosexuals particularly relevant. In the United States, the dimension of the relationship between States and the Court is more pronounced on gay rights issues: the Fourteenth Amendment allows the Bill of Rights provisions to be applied to the States (Privilege and Immunities clause) and prohibits discrimination of “discreet and insular” groups (Equal Protection Clause). For the most part, rights of homosexuals have first evolved at state level, and many complaints originated from challenges to state laws.²²⁹ At European level, comparable lawsuits challenge national laws denying a right protected by the Convention based on an unequal status “such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.²³⁰ Therefore, jurisdictions have to strike a delicate balance between minority protection and the preservation of good relations with states authorities.
98. Understandable objections will arise with regard to the decision to set aside Eighth Amendment and European Article 3 cases. Cases involving “cruel and unusual punishments” (Eighth Amendment) or “inhuman or degrading treatment or punishment” (Article 3 ECHR) contain direct mentions of “public opinion” most often, although less so in the European context. They are however key differences between the two courts case laws that lessens the significance of a comparative study. Firstly, while the evolutive potential of the “cruel and unusual punishment” prohibition appears obvious because what is “unusual” evolves with time, the text of Article 3 ECHR does not include any direct or indirect reference to evolving standards.²³¹ Moreover, the topic of the relation between public opinion and Eighth Amendment evolution has been

²²⁹ The topic of legal evolution of the rights of homosexuals see Chapter Four.

²³⁰ Article 14 of the ECHR

²³¹ The term “unusual” implies a relationship between the interpretation of this provision and passing times: what was “usual” as a punishment two centuries ago may not be in the twenty-first century. This was the view of Justice Marshall in his opinion in *Furman v. Georgia*, 408 U.S. 238 (1972) à 383 : The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. This notion is not new to Eighth Amendment adjudication. In *Weems v. United States*, [217 U. S. 349](#) (1910), the Court referred with apparent approval to the opinion of the commentators that “[t]he clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”

widely treated and tested in the legal and social field.²³² Those key differences, combined with the relatively low number of references to ‘public opinion’ in European Article 3 case law (even combined with Article 4 prohibition of slavery and forced labor) diminish the comparative relevance and interest for an in-depth study of the role of public opinion in dynamic and evolutive interpretation.

4.3.2. Selection of Specific Cases for In-depth Analysis

99. Analysis can be complicated by the lack of exact correspondence between rights under different legal regimes. Consequently, in order to compare the role of public opinion references in First Amendment cases with Convention rights, one would have to include Article 10 (expression) but also 11 (assembly and association), and 9 where religion is concerned. On the other hand, homosexuality cases were litigated under multiple basis. The most prevalent legal basis in both case law were the antidiscrimination provisions and right to privacy provisions. Discrimination cases are important insofar as many cases involving sexual orientation challenges are based on anti-discrimination provisions, often used in dynamic and evolutive interpretation (for example, in our database, 14 out of 19 selected homosexuality cases claim discrimination based on Art 14 ECHR).²³³
100. While selecting homosexuality cases, the goal consisted in obtaining a small amount of cases, so as to be able to proceed to a deeper analysis of the role of public opinion in the Court’s reasoning and doctrine.²³⁴ Indeed, analysis of individual cases allow more

²³² See among others A. Sarat, N. Vidmar, “Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis”, *Wisconsin Law Review* 171 (1976); C.W. Thomas, “Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion”, *Vanderbilt Law Review*, Vol. 30, 1005 (1977); N. Vidmar, T. Dittenhofferr “Informed public opinion and death penalty attitudes”, *Canadian Journal of Criminology*, Vol. 23, (1981); R. Bohm, L. Clark, A. Aveni, “Knowledge and death penalty opinion: A test of the Marshall hypotheses”, *Journal of Research in Crime and Delinquency*, Vol. 28, No. 3 (1991), pp. 360-387. The literature contains many panel studies testing Justice Marshall’s Furman opinion in real life experience since 1976. See for example R. Bohm, B. Vogel, “More than ten years after: The long-term stability of informed death penalty opinions”, *Journal of Criminal Justice*, Vol. 32, No. 4, (2004), pp. 307-327; J. Cochran, M. Chamlin, “Can information change public opinion? Another test of the Marshall hypotheses”, *Journal of Criminal Justice*, Vol. 33, No. 6, (2005), pp. 573-584. For challenges to the use of public opinion polls to assess public support for death penalty: P. Jones, “It’s Not What You Ask, It’s the Way That You Ask It: Question Form and Public Opinion on the Death Penalty”, *The Prison Journal*, Vol. 74, No. 1 (1994) pp. 32-50.

²³³ Note that anti-discrimination provisions cannot be used the same way under American and European Law. European cases are constrained by the obligation to claim discrimination in the enjoyment of a right protected by the convention, and not any right as under the Equal Protection Clause of the Fourteenth Amendment.

²³⁴ R. Yin, *Case Study Research: Design and Methods*, London, SAGE Publications Ltd., (2013)

opportunities for deeper analysis of the multiple elements contained in judicial reasoning. Since homosexuality cases concern a wide array of topics, including privacy, labor law, criminal law, I decided to proceed to a thematic study within homosexuality cases: the evolution of homosexuality rights from criminalization to same-sex marriage. Within this topic I only retained privacy and family rights cases, to ensure comparability in substance. In total, I gathered 6 Supreme Court cases and 12 European Court cases contenant des références directes et indirectes à l'opinion publique. This difference in numbers compared to free speech cases can seem surprising. However, although litigation over gay rights began slightly at the same period for both courts, the European Court does not enjoy certiorari-like discretion over case selection like the Supreme Court does, hence the higher number of cases decided in Strasbourg.

101. With regards to Freedom of Speech and Association, case selection was also complex but for a different reason. I counted 154 Article 10 ECHR cases, ten Article 9 cases and twenty more freedom of assembly cases in the ECHR database. However, it is impossible to proceed to an in-depth analysis of over 180 cases. Consequently, I decided when possible to narrow down the numbers by matching data to landmark cases. As there is among scholars virtually no agreement on what a “landmark case” are,²³⁵ I chose as “landmark” cases those selected in casebooks and scholarly debated. Indeed, such case is regarded as “milestone in legal development: it consolidates preceding fragmented practices or openly breaks with them; it narrows down established doctrines or extends them to new circumstances; or it declares new principles or resolves new questions of law”.²³⁶ I assumed that as opposed to landmark cases, the remaining cases would be following the doctrines established in milestones cases. After taking this step, 34 cases free speech cases still remained in the ECtHR database, and 28 for the Supreme Court.
102. These different steps used to select cases were willingly based on neutral criteria so as to allow cases an equivalence in both case-laws, but also to avoid selecting cases based on a personal interest.

²³⁵ Van den Eynde comments on that: scholars rarely explain their methodology of case selections in their handbooks, beyond the pedagogical dimension of their teaching. Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p.27, footnote 196.

²³⁶ *Ibid.*, p. 28.

103. In each theme's database now contained a substantially different number of cases. However instead of being an impediment to analysis, it only affected the method of inquiry into each topic. Public opinion references being more numerous in freedom of speech cases, I decided to devote one chapter to an exploration of what Courts believe the role of public opinion, in its different forms, moods and manifestation, should play in democracy and adjudication. In our opinion, this notion would be susceptible to inform the courts' vision of its role in their own decision-making process, and would transpire throughout other rights' case-law. References to public opinion will serve as clues revealing how public opinion is seen, *i.e.* as a positive or negative force within constitutional democracies. With a much more restricted selection of cases concerning gay rights, an in-depth analysis of decisions will be more applicable. It will include the role public opinion considerations play in courts' overall reasoning, the method of inclusion of these reference into reasoning, doctrines and legal evolution.

5. Legal Research Question

104. The research question is the following: *What role does public opinion play in United States Supreme Court and the European Court of Human Rights rights adjudication?*

6. Outline Description

105. The European Court of Human Rights and the U.S. Supreme Court in their capacity of sovereign judicial institutions, *i.e.* being legally accountable to no superior judicial institution, have an ambivalent relationship with the public. Their *raison d'être* is to incur the respect of rights by state authorities and to censor public acts and behaviors that are incompatible with rights. They complete this difficult task with a definite commitment to representative democracy (Chapter One). However, by judging sometimes democratic acts, *i.e.* acts of government ratified by democratically elected representatives, incompatible with the Convention or the Constitution, both courts censor, in a way, 'The People's' institutionalized will, thereby incurring a "countermajoritarian difficulty". Nevertheless, as history teaches, the world, and among them judicial institutions have come to realize that the Will of the People institutionalized through suffrage is neither perfect, nor beyond reproach, nor *de facto* perfectly representative of the popular will, which is a complex phenomenon. Consequently, they have taken to heart the mission to protect citizens and other residents against abusive policies of public authorities that were infringing essential

rights, even if these policies at times benefited from broad popular support. While fulfilling their mandate, both courts have shown their openness to different forms of public opinion participation in practice and within their institutional setting (Chapter Two). However, they are ambivalent about their vision of public opinion when referring to it in their decisions. There, decision is seen as a force that has the potential to be democracy-strengthening (Chapter Three), but also can guide the direction of legal evolution (Chapter Four).

Outline Summary:

Introductory chapter

Chapter One: The Courts' Necessary Commitment to Representative Democracy

1. Public Opinion in a Society Devoted to the Will of the People
2. Judicial Institutions Between Forums of Principle and Representative Institutions

Chapter Two: Courts as a Forum of Public Participation

1. Courts' Increasing Public Accountability
2. Friends of Court, Between Participants, Experts and Lobbyists

Chapter Three: Public Opinion and Democracy : Freedom of Speech as Indispensable Tool to The Enlightenment of The Public

1. Fundamentals of Expression Protection in a Comparative perspective
2. Democracy, Public Opinion, and the Limits of the Majority Principle
3. Democratic Institutions Openness to Public Criticism
4. Promoting the Ideal of an Informed Public Opinion

Chapter Four Public Opinion as a Rights-Modernizing Force

1. Short Legal History for the rights of homosexual persons
2. The Personalized Pace of Decriminalization of Homosexuality
3. Towards Recognition of Same Sex Unions

Conclusion

Chapter One. Public Opinion and the Judiciary: Origins and Evolution of Democratic Legitimacy Claims

All government rest on opinion.

Federalist No. 49

Government by public opinion exists where the wishes and views of the people prevail, even before they have been conveyed through the regular law-appointed organs, and without the need of their being so conveyed.²³⁷

James Bryce

106. The relationship between public opinion and the judiciary in democracy is undoubtedly not an obvious one. It is not, at the very least, the typical relation people focus on when they mean “government by consent of the People”. Scholarly and political discussions on the link between public opinion and outcomes of judicial discussion often either reject or encourage such a link at normative level, *i.e.* public opinion should or should not have an influence on judicial, law-based judicial outcomes, despite all the political science research establishing a clear link – albeit not causal – between legal evolution and the state of public opinion in the United States. Such debate has at its source a deeper consideration over the core definition of “public opinion”. Is public opinion an equivalent of the democratic ‘Will of The People’, is it a close cousin or an impulsive enemy of the democratic ideal? Where does the legitimacy of the judiciary stem from, and could it proceed from the Will of the People, and to some extent people’s attitudes?
107. This chapter aims at showing that if the source of democratic legitimacy is commonly thought as being the consent of the people, it does not always play the way most imagine. Governance by consent is a recent development. Thus, does government by consent entail popular consent to any public decision, and in this case, does the judiciary also have to answer, to some extent, to the will of the people? I do not mean to solve these questions in theory. Scholarship provides theories as to the origins of democracy

²³⁷ J. Bryce, *The American Commonwealth*, New York, Macmillan (1914), *op. cit.* p. 269 (Hereinafter, “Commonwealth”).

understood as government by consent, from which proceeds the expectation that all government decision should be supported by a significant portion of citizens, usually, the majority. The will of the people can be expressed or discerned in different manners: through vote, direct contact with the electorate, in the public sphere of discussion and in scientifically reliable polls. Scholars and politicians tend to favor one form above the other. Nonetheless they agree that democracy at its core means government by consent of the people, whatever its forms. The difficulty lies in determining if *all* public decisions need to be consented to, and in which *form* should consent be expressed.

108. Public opinion is often assimilated to one form of public will. It is more accurately an attitude, which is an indicator of where the will of the people would tend to lean. This chapter focuses on the relationship between public opinion assimilated to a form of public will, and the judiciary do entertain a relationship, albeit difficult to describe and assess, in public government. I show that the debates over the definition and legitimate role of public opinion in democracy, as well as the one over the sources of legitimacy of the judiciary are at the core of the normative debate over the role of public opinion in judicial rights protection. The first section is devoted to a clarification of the numerous theoretical and academic developments made over the concept of ‘public opinion’ over the course of history, and to explaining how this concept relates to the ‘Will of the People’, which is the prevalent legitimacy criterion of democratic regimes. I claim that the core meaning of ‘public opinion’ has evolved over time, and with it the assumptions with regard to its legitimate role in democracy. The second section is devoted to the sources of legitimacy of high courts. I outline some of the theories that assign legitimacy to high courts based on their capacity for reason and their distance to electoral politics, acting as society’s “forum of principle”. Others theories claim that far from being “countermajoritarian”, which is often pointed at as incompatible with representative democracy, judges are also representative institutions, but in a different manner.

1. Public Opinion in Political Systems Dedicated to the Will of the People

109. In today’s democracies, public opinion has obtained a status that, at least in day-to-day politics, seems equivalent to the one previously enjoyed by the ‘Will of the People’, in the name of which public policies are usually justified. After the Second World War,

representative democracy suffered from a severe loss in credibility. Aside the Will of the People, the protection of human (or civil) rights were chosen as an increasingly prevalent criterion of the strength of a democratic regime and public policies' legitimacy, capable of trumping the will of voters.²³⁸ In the meantime, a recently reworked concept of 'public opinion', presented as a non-formal and arguably scientifically determinable manifestation of the public attitudes eventually eclipsed the latter to become a synonym for 'popular consensus' within nation states, and gradually onto the international scene. Its prevalence is revealed today by the extensive and unprincipled use of opinion polls in the public sphere and as guidelines for policy-making.

110. Today, the term "public opinion" is often used as a synonym of the "Will of the People", although what this term encompasses is far from obvious. Does it include only citizens, or the wider population capable of revolt against policies? Does it include minorities, which struggle to weigh on the elaboration of policies? Despite the fog, both concepts are undoubtedly related. According to Loïc Blondiaux, the "debate over public opinion can be analyzed as an extension of a more general discussion on democracy, and the symptom of fears triggered by the increasing interventions of the people".²³⁹ As a

²³⁸ Habermas and Rehg formulate the paradox of the idea of constitutional democracy in such terms: "[A constitution] consists of norms that are produced by a lawgiver, are sanctioned by the state, and are meant to guarantee individual liberties. According to the liberal view, the democratic self-determination of citizens can be realized only through the medium of such a law, the structural properties of which ensure liberty. Consequently, the idea of a "rule of law," which in the past was expressed in the idea of human rights, comes on the scene alongside—and together with—that of popular sovereignty as a second source of legitimation." J. Habermas and W. Rehg, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", *Political Theory*, Vol. 29, No. 6 (Dec., 2001), p. 766, (emphasis added). Constitutional democracy thus protects liberty and rights through the Constitution, which is its first source of legitimacy, the People coming second. Also, F. Jacquemot claims that the European concept of the Rule of Law "essentially implies obligations pertaining to the defense of human rights and the respect for the law, rather than a separation of powers model." F. Jacquemot, *op. cit.*, p.57 (my translation). Paul Sniderman contends that the codification of rights into constitutions, in his case the Charter of Rights and Freedoms in Canada in 1982, or the Human Rights Act passed in 1998 in the United Kingdom, was a movement triggered in the Post War Period. Constitutional enactments of right protection "forstered the view that democracy depends, above all, on achieving a binding consensus on liberal democratic values". P. M. Sniderman, J. Fletcher, P. Russel, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy*, New Haven, Yale University Press (1996), p. 2. Following this movement, respect for fundamental and human rights became a condition for membership in international organization such as the European Union or the Council of Europe. For example, Article 59.1 of the Rules of the Parliamentary Assembly of the Council of Europe requires to signature and ratification of various international human rights instruments such as the two United Nations International Covenants signed on December 16, 1966 and pertaining to political and civil rights for the first, and to social and cultural rights for the second. Respect for human rights is also required as condition to European membership.

²³⁹ L. Blondiaux, *La fabrique de l'opinion, une histoire sociale des sondages*, Paris, Seuil (1998), p. 61, (my translation) (hereinafter : "Fabrique de l'opinion").

matter of fact, not only does the importance of the will of the people intensify in the modern democratic era, but it is progressively being supplemented by an increasingly transnational “public opinion”. I begin with few historical-political remarks on the increasing importance of the consent of the governed, formally embodied during the Enlightenment period in the “will of the people”. Next, I address the evolution of the role of public opinion in today’s representative democracies, and the challenges triggered by inconsistent definitions of the term.

1.1. Democracy From the Will of the People to the Power of Opinion

111. The above-cited words of James Bryce stress the complexity and confusing character of the debate over the definition of ‘public opinion’ and over its conceptual differentiation from the ‘Will of the People’. They also suggest that both concepts cannot be separated when addressing the importance acquired by popular sovereignty and democracy in political theory and practice over the last centuries.
112. According to Bryce, the will of the people can be discerned at any time, independently from the body of its representatives. Thus, in a true regime of popular sovereignty, the will of the sovereign is not limited to a formal expression through suffrage or through a representative institution; it rather has a continuous character: People “have committed only a part of their sovereignty to their executive and legislative agents, reserving the rest to themselves. Hence their will, or, in other words, public opinion, is constantly felt by these agents to be, legally as well as practically, the controlling authority”.²⁴⁰
113. Bryce’s words hastily assimilate ‘public opinion’ with the ‘Will of The People’. However, most theories consider that public opinion *does not* identify with the will of the people. This calls for a clarification of the conceptual differences between the two. The next subsections discuss the rise of popular sovereignty in the framework of representative democracy, followed by a shift in focus into knowledge of the continuous expression of the will of the people: public opinion. Next, I address the takeover of a reworked concept of public opinion over formal expressions of the will of the people.

²⁴⁰ *Ibid.*, p. 270.

1.1.1. Birth of Consent-Based Representative Democracy

114. Before elaborating on consent-based democracy, it is necessary to begin with some conceptual clarifications. Firstly, democracy does not mean “government by consent”, but government by the people. As consent progressively became the legitimacy criterion for government, it was associated with the republican method of *representation*. Moreover, government by the people is an ancient idea, which should not hastily be assimilated with representative democracy. Bernard Manin explains that the Greek democratic cities were not governed by representatives of the people, but by delegates chosen by the drawing lots. However, lots did not embody the *consent* of the people, but merely ensured that some governmental functions would be performed by citizens themselves: their *participation* in governance was embodied in their right to speak freely in assembly. Hence, according to Manin, if Athens was democratic by recruitment, Athenian democracy did not identify with the will of the people.²⁴¹ It is with the increasing focus on the consent of the governed by political thinkers that was planted the seed of popular sovereignty. The idea of the importance of the will of the people to governance contributed to building government by consent and legitimized political representation. However, political majorities or representative democracies progressively lost their credibility.

1.1.1.1. The Increasing Importance of Popular Consent

115. The principle of government by consent is not new. It stems from the principle: “quod omnes tangit, ab omnibus tractari et approbari debet”, *i.e.* what touches all should be considered and approved by all. This principle resurrected in the Thirteenth and Fourteenth centuries was used to gather assemblies around kings and popes. It is with the insistence on the *consent* of the governed that the principle of government by the people was introduced and coupled with democratic ruling. According to David Held, the idea of consent was first introduced by Marsilius of Padua in *Defensor Pacis* in 1275.²⁴² In Cromwell’s England, Thomas Rainsborough, spokesman of the Levelers, also referred to consent as a necessary requirement to put oneself under a government.²⁴³ In the meantime, institutions of the Church increasingly chose leaders

²⁴¹ See generally B. Manin, *The Principles of Representative Government*, New York, Cambridge University Press, (1997) (hereinafter “Representative Government”).

²⁴² D. Held, *Models of Democracy*, Stanford University Press, (3rd ed, 2006), p. 36.

²⁴³ M. Canovan, *The People*, Cambridge, Polity, (2005), p. 23 (hereinafter “The People”).

through elections. If selection by lot was not altogether abandoned, majority ultimately prevailed with the accrued focus on *consent* as a criterion of political legitimacy, and because *choice* was best expressed through *vote*.²⁴⁴

116. The democratic concern that government should respond to the voice of the people did not always imply the notion of consent.²⁴⁵ Thus why did political thinkers begin insisting on consent of the people as legitimacy criterion? According to Bryce, with the revolutions of the Sixteenth century and later, “it was believed that by sinking a deep shaft into the humbler strata of society the springs might be tapped of a simple honesty and sense of justice which would renovate politics”.²⁴⁶ Government by all and through consent would be better equipped to fight against evils brought by a selfish ruling class. Thus, although revolutionaries in Britain failed to ensure the creation of procedures enabling expression of the will of the people, instituting the will of the people as a legitimacy criterion gave highest public institutions at least a guideline for their actions. “Where the people rule, you cannot stifle independent views. You cannot presume on the ignorance of the people, nor on the appearance of apathy they may show, nor on the power party organization may acquire over them. If you can get at the people — for that is the difficulty — things will usually go well”.²⁴⁷ Bryce hence intuitively summarizes the theory of public support, according to which governance devoid of diffuse support of the public cannot succeed.²⁴⁸ Ultimately, the belief in popular consent, whether real or symbolic, which was shared by natural law theorists, among which Grotius, Rousseau, Hobbes, Pufendorf and Locke, became later the foundation of American government.²⁴⁹

²⁴⁴ B. Manin, “Representative Government”, *op. cit.*, p. 91.

²⁴⁵ Indeed, the King himself had once claimed to personify the People, like Louis XIV later had claimed that he personified the state.

²⁴⁶ J. Bryce, *Modern Democracies*, *op. cit.*, p. 148 (hereinafter “Modern Democracies”).

²⁴⁷ *Ibid.*, p.150.

²⁴⁸ “We can describe support as an attitude by which a person orients himself to an object either favorably or unfavorably, positively or negatively. Such an attitude may be expressed in parallel action.” D. Easton, “A Re-Assessment of the Concept of Political Support”, *British Journal of Political Science*, Vol. 5, No. 4 (Oct., 1975), p. 436. These words were purportedly echoed by Abraham Lincoln: “You can fool all the people some of the time and some of the people all the time, but you can't fool all the people all the time.”

²⁴⁹ The Declaration of independence signed on 4th of July 1776 officially consecrates the principle of popular sovereignty. Moreover, “There seems to be something about the mind and will of the People so far transcending human comprehension as to have a sort of divine quality, because it is a force not only unpredictable but irresistible. It has the sacredness of an oracle. The old saying, “Vox populi, vox Dei”, was meant to convey that when the People speaks, it speaks by that will of the Higher Powers which men

117. American federal institutions kept and replicated existing local representative structures at the federal level. However, American Founding Fathers did not conceive popular government as an absolute. Many of them entertained a strong fear of mob rule.²⁵⁰ The federal institutions they set up were meant to counterbalance the power of the masses with competence. Such is for example the *raison d'être* of the Electoral College instituted to select the United States President,²⁵¹ and of the indirect election procedure originally chosen to select Senators.²⁵² In Bryce's words, thinkers "did not mean to represent [the people] as a class which should predominate and be deemed, because it was the largest, entitled to be the exponent of the national will. Rather was it thought that the inter mingling in political action of all classes would give unity and strength to the nation as one body, because each would make its own contribution." Thus, the concept of consent was introduced as a *qualitative* criterion for policy-making, and to bring unity in nations in the making. To Max Weber, the widespread *belief* in the people's endorsement of rules would be the sole effective way to secure compliance.²⁵³ Moreover, to Wilson, "*consent* suggests an agreement on the essential symbols of political integration, such as the common social institutions, the constitution, established practices in the use of power, the support of the nation, the ethnic group, the language, religion, or the outward trappings of loyalty. These might be regarded as the deeper reaches of the general will".²⁵⁴
118. Until the Eighteenth century, the notion of "The People" was restricted to some limited groups: the secular nobility and magistrates. It was extended to the masses with the progressive expansion of universal suffrage, once thinkers began to trust the "average man", *i.e.* "the man of broad common sense, mixing on equal terms with his neighbours, forming a fair unprejudiced judgment on every question, not viewy or

cannot explain but are forced to obey." Bryce's statement simply expresses that the will of the people is to be obeyed, but does not specify legitimate modes and times for expressing such will.

²⁵⁰ M. J. Horwitz, *op. cit.*, p. 74.

²⁵¹ See Art. II, sec. 1 of the United States Constitution.

²⁵² According to the Federalist Papers, election of senators by state legislatures "is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems" (Federalist No. 62). The Seventeenth Amendment, adopted in on the 8th of April 1913, changed the procedure into a procedure of direct universal suffrage of each state's two senators. See <https://www.law.cornell.edu/constitution/amendmentxvii>

²⁵³ M. Canovan, "The People", in J. Dryzek B. Honig, A. Philips, (eds), *The Oxford Handbook of Political Theory*, Oxford University Press (2008) (hereafter "The People 2"), p. 359 (emphasis added).

²⁵⁴ F.G. Wilson, *A Theory of Public Opinion*, Chicago, H. Regnery Co. (1962), p. 7 (hereinafter "Theory").

pedantic like the man of learning, nor arrogant, like the man of wealth, but seeing things in a practical, businesslike, and withal kindly, spirit, pursuing happiness in his own way, and willing that every one else should do so”.²⁵⁵ They trusted his will because they believed that “the publicity secured to the expression of opinion by speech and in print will supply [such man] with ample materials for judging what is best for all.” Nevertheless, as mentioned above, they did not believe that power of the masses entitled them to become the sole “measure of justice”.²⁵⁶

119. Representation and democracy were not immediately attached to one another, nor ascribed to the concept of government “by the people.” Madison is said to have conceived representative government as a feature of a “republic”, and direct government as that of a “democracy”. The republican government established in the United States was thus clearly not absolutely *popular*, and representation ensured competence in government. The explicit link between democracy and representation in the new American federation was first expressed by founder James Wilson: “in a democracy, [sovereignty] is inherent in a people, and is exercised by themselves or their representatives”.²⁵⁷ By the end of the Eighteenth century, theorists understood that representation “was the solution to the ancient dilemma between enhancing the ability of political associations to deal with large-scale problems and preserving the *opportunity of citizens to participate in government*”.²⁵⁸ Moreover, popular sovereignty could only be fully implemented with regular expression of people’s consent. Otherwise, their consent could simply be granted through a single occurrence: the adoption of the Constitution by the citizens.²⁵⁹ Thus, suffrage was the first step towards regular citizen *participation* in governance, and expression of people’s consent.
120. According to Giovanni Sartori, “[g]overnments put in office by elections that reflect the opinions of the electorate and that are, furthermore, made to be responsive (by the recurrence of free elections) to their electorates are governments that may be called –

²⁵⁵ Bryce, “Commonwealth”, *op. cit.*, p. 149.

²⁵⁶ Wilson, “Theory”, *op. cit.*, at. 13.

²⁵⁷ Cited in R. Dahl, *A preface to Democratic Theory*, Expanded Edition, University of Chicago Press, Political Science (2013), p. 157.

²⁵⁸ Wilson, “Theory”, p. 7. (emphasis added?)

²⁵⁹ For a brief history of setting up state ratification conventions, see <http://www.archives.gov/education/lessons/constitution-day/ratification.html>

without excessive forcing of meaning – *consented-to-governments*.”²⁶⁰ Thus representation through elections has become the legitimacy criterion for governance. But to Philippe Braud, it is the *intervention* of citizens in the choice of their leaders rather than their particular policy choices that embodies the principle of government by the people. Thus, if citizens do not, *per se*, participate to policy definitions. Rather, they can trigger a change of leadership.²⁶¹ However, electoral legitimacy combines several other criteria. For example, elections serve a function of social integration: “to invoke a collective will, even devoid of real practical consistency, reinforces the link between represented and representatives [...]. This common rhetorical process can only help awake and stimulate [voters] attentiveness to political life.” Additionally, popular attention increases a policy’ legitimacy.²⁶² However, legitimacy was also originally closely linked to rationality.

1.1.1.2. The Search for a Reasonable Electorate and the Distrust of Majority Rule

121. It is through the majority principle that the formal expression of the will of the people was instituted. However, it was understood that, in Jefferson’s words, “Although the will of the majority is in all cases to prevail, that will to be rightful *must be reasonable*”.²⁶³ Hence, the first formal expression of the will of the people was instituted through a form of majority rule. Secondly, political thinkers attempted to ensure that government would heed the expression of a *reasonable* will.
122. Concerning the practice of majority rule, I will rely on Sartori’s useful distinction between the majority rule defined as decision-making procedure or conflict resolution rule, used within what he calls the “constitutional-setting”, and the majority principle used in the framework of elections for the selection of future decision-makers. In most countries, consent was early on expressed through elections procedures enforcing some

²⁶⁰ G. Sartori, *Theory of Democracy Revisited, Part One: The Contemporary Debate*, Chatham, Chatham House Publishers (1987) p.88 (hereinafter “Theory”).

²⁶¹ P. Braud, *Sociologie politique*, Paris, LGDJ, (7th ed. 2004), pp. 206-222.

²⁶² *Ibid.*, pp. 490-491 (My translation).

²⁶³ T. Jefferson, *First Inaugural Address*, March 4, 1801, quoted by H. L. Pohlman, *Political Thought and the American Judiciary*, University of Massachusetts Press, (1993), p. 141. Original text can be found on the website of the Heritage Foundation retrieved from <http://www.heritage.org/initiatives/first-principles/primary-sources/jeffersons-first-inaugural-address>

version of majority rule.²⁶⁴ If today some combination of majority ruling dominates in most democracies, the use of the majority principle in elections was early on looked upon with unconcealed apprehension towards “tyranny of the majority”. But according to Sartori, this concern famously expressed by Madison, Tocqueville and Mill was not directed at a political but rather at a *societal* kind of majority tyranny, a kind that does not have to be constitutionally endorsed, but is better defined as a more or less intensified psychological and social pressure on individuals to conform.²⁶⁵ Why was it then, that despite such warnings, majority rule was kept as the prevalent election method? As Jefferson’s above-quoted words show, thinkers did not generally give their full and unrestrained blessing to majority rule. But confusion arose because of the wide array of existing procedures that used the majority principle, which gave an ambivalent message to political actors: ““the tendency of society to impose its own ideas and practices,” *i.e.*, to impose conformity, finds in the majority principle a principle of legitimation.”²⁶⁶ For this reason, Sartori claims that as a legitimating factor, the “majority principle might aggravate social tyranny.” Nonetheless, inasmuch as theorists acknowledged and feared excessive societal pressures, they still thought that republican majoritarian government entailed the lesser evil. Hence Madison wrote in 1833:

[E]very friend to Republican government ought to raise his voice against the sweeping denunciation of majority governments as the most tyrannical and intolerable of all governments.... [N]o government of human device and human administration can be perfect; ... the abuses of all other governments have led to the preference of republican government as the best of all governments, because the least imperfect; [and] the vital principle of republican governments is the *lex majoris partis*, the will of the majority.²⁶⁷

123. With regard to the majority rule as a method of conflict resolution, *i.e.* as a mainstream method for policy making and voting within parliaments, the United States notably and overwhelmingly opted for the majoritarian procedure of decision-making. In other countries, practices have been varying between majority vote, plurality vote, and proportional vote. Overall, whatever the procedure that was privileged, decisional

²⁶⁴ See E. Drumeva, “Systèmes Electoraux—Normes Européennes: Aspects Particuliers et études de cas”, in Venice Commission, *Les Standards Européens du Droit Electoral dans le Constitutionnalisme Européen*, (ed. Du Conseil de l’Europe, Coll. Science et Technique de la Démocratie, No. 39), pp.54-67.

²⁶⁵ Sartori, “Theory”, *op. cit.*, pp. 134-35.

²⁶⁶ Sartori, citing Tocqueville, *ibid.*, p. 135.

²⁶⁷ See “Democracy”, in *Encyclopedia Britannica Ultimate Reference Suite* (Electronic Encyclopedia), 2009.

weight was granted to a relative or absolute majority of elected representatives. Hence majority or proportional representation through elections was ultimately combined with a procedure of majority decision-making. The ultimate goal was to reach decisions closest to consensus. Decision-making methods were designed not only to ensure representativeness, functionality and governmental stability, but also to mirror the true social composition of citizens through progressive elimination or alteration of criteria such as race, age, gender and wealth. It is hence fair to claim that they were not only focused on majority will.

124. John Stuart Mill in 1860 invoked mass participation as a condition of democracy. To be *democratic*, representative government was to be chosen *by all*. He added, however, a condition: to function properly, the masses had to be provided with education. Thus, democracy could be progressively generalized only in proportion to the improvement of the education level of citizens.²⁶⁸ Only through education could the masses evolve into expressing what political thinkers thought may become the qualitative will of a people closest to the *melior pars*. Hence expression of consent was not enough to grant legitimacy.²⁶⁹ In order to be reliable, democracy still had to lean on an electorate capable to choosing good leaders. However, the standard of a rational voter misrepresented reality and put impossible demands on the *demos*.²⁷⁰ Therefore, with the end of the Second World War and following a formidable extension of suffrage in the 1940s, political sociologists began tackling new questions: the problem of rational suffrage and the rational electorate.²⁷¹ After Lippmann, Schumpeter, Berelson and others had amplified the atmosphere of skepticism towards the myth of the rational elector within the American context,²⁷² scholars of the 1970s began questioning this concern. They claimed that to the contrary, a non-political electorate could save the system from political over-involvement and extremism.²⁷³ Philip Converse's work on

²⁶⁸ S. Splichal, *Public Opinion, Developments and Controversies in The Twentieth Century*, Oxford: Rowman & Littlefield (1999), pp. 68-9 (hereinafter "Public Opinion Development and Controversies").

²⁶⁹ R. Collar claimed: "The will of a single person, the will of many, the will of all, is only a force that can be more or less powerful. Neither obedience nor the slightest respect is due to these wills purely and simply because they are wills." cited in Sartori, "Theory", *op. cit.*, p. 138.

²⁷⁰ *Ibid.*, p. 110.

²⁷¹ L. Blondiaux, "Mort et resurrection de l'électeur rationnel. Les métamorphoses d'une problématique incertaine", *Revue française de science politique*, 46e année, No. 5 (1996), pp.753-91.

²⁷² *Ibid.*, p.755.

²⁷³ *Ibid.*, p.762.

issue publics concluded that votes could be rational on certain issues.²⁷⁴ In the 1980s, research extending to the influence of psychological and affective factors on attitudes formations concluded that electors voted based on fragmental information and impressions. New research accomplished in the late 1980s found an elevation in the education levels among the population, paralleled by an increased rationality of the electorate. In turn, Popkin worked on a new criterion. Using cognitive psychology and political economy of information costs, he concluded that voters were *reasonable*, if not rational. He found that voters made their voting choices based on a minimal amount of indispensable information conducing to the most rational vote.²⁷⁵

125. All this research was performed as an attempt to challenge the disturbing disillusionment of political thinkers with popular will, and to confront it with reality.²⁷⁶ Scholars attempted to develop a science-based portrait of everyday voters, uncovering the complexity and intricacies of the voting act, identifying factors influencing its degree of rationality, and mapping processes of opinion formation, thereby somewhat “rehabilitating” the American electorate. However, it is not obvious that social research effectively rehabilitated the electorate, once the myth of the rational elector had been blown over. Hence if the electorate could not be leaned upon, could the will of the people be deemed reliable? While the belief in the sacredness of majority will weakened, the understanding of the will of the people also experienced a substantial shift.

1.1.2. Disintegration of the Will of the People and Takeover of Public Opinion

126. “The Will of the People” is a prevalent concept in the name of which governments justify their public policies. I argued above that the term, while being at the beginning mostly merged with the concept of “public opinion”, was progressively transformed

²⁷⁴ He proved not that voters do not have complex thought processes, but that polls were incapable of reflecting it. *Ibid.* p.766. Moreover, V.O. Key, of the Michigan School, failed in 1966 to prove that electors were rational.

²⁷⁵ Blondiaux, “Mort et resurrection”, *op. cit.*, p.782-3, referring to S. Popkin, *The reasoning Voter*, Chicago, University of Chicago Press (1991).

²⁷⁶ According to Blondiaux, the paradigmatic shift from rationality to reasonability had deep consequences. He believes that rationality and reasonability are very different criteria, and that that Popkin’s results do not reflect political reality. “The People” as an authoritative figure is reduced to deceptive myth, however “a necessary condition for the relatively non-predatory politics geared to some conception of the public good”. Canovan, “The People 2”, p.359.

and replaced by a diluted and reworked concept of public opinion, mostly emptied from its rational-critical dimension.

1.1.2.1. Transformation and Disintegration of the Will of The People

127. While the Anglo-Saxon conception of the “Will of the People” limits it to a sum of particular interests,²⁷⁷ which directly leads the people to electoral power and multiplies the locations of its expression, the French concept dominated by Jean-Jacques Rousseau’s philosophy, refers to a single, united will.²⁷⁸ Citizens’ representation through suffrage entails a transfer of their will to Parliament, and transforms Parliament into the sole depositary of sovereignty, whatever decision-making method is used within the institution.²⁷⁹ According to Daugeron, in practice, the French concept experienced a profound transformation.
128. From the moment France reformed its electoral system and instituted direct universal elections of its President in 1962,²⁸⁰ the “national will” ceased to be expressed within one single location, *i.e.* in the framework of parliamentary decision-making, but extended to others, more particularly the presidency. Parliament and the Law consequently lost their sacred monopoly on the elaboration and expression of the desires of the citizen body: the will of the people was no longer embodied in the Law voted by Parliament, but also and increasingly in the presidential electoral program. Vedel claims that presidential elections became the “organ of electoral will”, creating the illusion of a fusion between the concrete people, and the electorate.²⁸¹ This diagnosis is well expressed by Rosanvallon: “Through elections, [the People] exists

²⁷⁷ J-M. Cotteret, *Les avatars de la volonté générale*, Paris, Michalon, (2011), (referring to Adam Smith) p. 22

²⁷⁸ The difference between the “General will” and the will of the people is the kind of interest that motivates a decision: a transcendental common interest, *i.e.* a “bloc of incontestable ideas” to Hauriou, and a general interest putting aside particular interests and the contradictions they entail. According to Cotteret, “general interest” will generally be relied on to avoid implementing undesirable people’s momentary claims. Both within the legal framework and the political legitimation context, general interest is used to justify setting aside several private interests. See M. Hauriou, *Précis de Droit Constitutionnel*, *op. cit.*

²⁷⁹ “Le propre du régime représentatif est d’être un régime dans lequel il n’y a aucune représentation”, R. Carré De Malberg, *Contribution à la théorie générale de l’état*, Paris, Librairie de la Société du Recueil Sirey (1920-22), p. 212.

²⁸⁰ The 28 October 1962 referendum introduced direct universal suffrage for presidential elections.

²⁸¹ B. Daugeron, “De la volonté générale à l’opinion électorale: réflexion sur l’électoratisation de la volonté collective”, *Jus politicum*, No. 10 (2013), retrieved from <http://juspoliticum.com/-No10-.html>

under an instantaneous and evanescent form,”²⁸² and “the people, confused with the electors, becomes the source of power independently from the expression of the general will, which birth it is supposed to trigger, and from which it no longer emanates.”²⁸³ Most importantly, presidential elections gave the electoral will hierarchical prevalence over the one expressed during parliamentary deliberations, displaced the location of democratic legitimacy,²⁸⁴ diluted the meaning of the collective will, privatized the general will,²⁸⁵ and transformed the law into a “more or less arbitrary constraint, a technical product of management necessities, to the building of which the common man no longer has access”.²⁸⁶ This in turn justified individual challenges to laws voted by the national sovereign in the name of an alleged violation of fundamental rights,²⁸⁷ which contributed to the loss of the mystique of the law, prompting Cotteret to affirm: “It is difficult to build a political system on the claim that the general will is the alpha and omega of the system, while in the meantime giving the individual the possibility to annihilate it.” The practice of citizenship being transformed, the people had to appropriate the Constitution anew, as the guarantee of their rights and freedoms.

129. This loss in the meaning of representation was reinforced by the illusion that party members are also represented through the primaries, or that citizens’ are represented in opinion polls. However, those “avatars of the general will,” in Cotteret’s words, could only be born following what Daugeron calls the “hypostasis of the electoral people”.²⁸⁸ Many “avatars”, *i.e.* alternative techniques of popular will expression, were elaborated in order to further popular participation and citizens’ awareness of public affairs. As example Cotteret mentions the frequently uttered political claim that an elevated number of participants in demonstrations is representative of the will of the people on a certain issue. He also refers to the recent introduction of “popularly initiated

²⁸² À travers les élections, il (le peuple) existe sous une forme instantanée et évanescence, P. Rosanvallon, *La démocratie inachevée, histoire de la souveraineté du peuple en France*, Paris, Gallimard, “Bibliothèque des histoires”, (2000), p.408.

²⁸³ Daugeron, *op. cit.*, p. 13, (my translation).

²⁸⁴ Parliament was thus reduced to the role of auxiliary of the president and of his cabinet.

²⁸⁵ Daugeron, *op. cit.*, p. 19.

²⁸⁶ *Ibid.*, p.20.

²⁸⁷ The Constitutional reform of 23 July 2008 introduced to the French Constitution new article 61-1, which creates the priority preliminary ruling on the issue of constitutionality before the Constitutional Council. This procedure can be used by citizens pursuant to an ongoing lawsuit before one of the highest courts to obtain a response from the Constitutional Council as to the constitutional validity of a contested law. Details of this procedure have been regulated through the organic law n° 2009-1523 of the 10 December 2009 and the decree n° 2010-148 of 6 February 2010.

²⁸⁸ Daugeron, *op. cit.*, p.26.

referendum”²⁸⁹ as an “avatar” of the will of the people. Public opinion polls also qualify. Indeed, at its birth, what Rousseau coined as the “general will” was a synonym of his own concept of “public opinion.” However, as we see below, Rousseau’s concept is very different from what public opinion polls claim to reveal.²⁹⁰

130. Change in the meaning of representation did not necessarily occur in the same manner the United States, since the *electoral will* was already in power at various levels of governance; at local, state, federal levels, and within legislative institutions as much as within the judiciary through the practice of popular juries. Hence it is probably not just by chance that ‘avatars’ of popular will were readily developed there. By the 1920s, with the enlargement of the electoral base,²⁹¹ knowledge of what swayed voters became urgent and motivated social scientists to develop tools to fill that demand. Theoretical scholarship was deserted and public opinion studies became an applied science. Within a few decades, the scientific and unfailing ambitions of Gallup transformed what had previously been a deliberative, elitist concept into a statistic number reputed to socially represent citizens, *i.e.* based on *representativeness* rather than *representation*.²⁹² Thus in parallel to the privatization of the law, previously insignificant polled opinion acquired the status of “non debatable fact”.²⁹³
131. In short, at the same time the “general will”, *i.e.* a national consensus based on general interest, left room to “electoral power” and similar avatars defined based on to the sum of particular interests, “public opinion”, that was born within a public sphere of continuous critique, transformed into an average individual “top of the head” point of view²⁹⁴ or a “verbal expression of an attitude”.²⁹⁵ Both concepts experienced a process

²⁸⁹ In fact, the 23 July 2008 constitutional reform institutes at Article 11 sec. 3 of the French Constitution of 1958 the “referendum d’initiative partagée” (shared initiative referendum). The procedure is initiated by members of parliament and has to be supported by 10% of the electorate, *i.e.* 4.5 million citizens. The compulsory initiation by parliament (1/5 of its members) and the high threshold of popular support makes it very unlikely to succeed.

²⁹⁰ L. Blondiaux, “Le règne de l’opinion. Chronique d’une prise de pouvoir”, *Le Débat*, Vol. 1, No 88, (1996), pp. 17-30 (my translation).

²⁹¹ In many states, the electoral base was enlarged throughout the end of the 19th century. At federal level, a substantial change was brought about with the 19th amendment to the Constitution granting women the right to vote, passed by the Senate in June 1919, ratified by the states in August 1920.

²⁹² Distinction representation *v.* representativeness by Cotteret, *op. cit.*, pp. 49-61.

²⁹³ For a detailed history of the takeover of public opinion polls in democracy, see E. Blondiaux, “Fabrique de L’opinion”, *op. cit.*

²⁹⁴ B. A. Bardes, R. W. Oldendick, *Public Opinion: Measuring the American Mind*, New York: Rowman & Littlefield Publishers, 4th ed. (2012), p.12 (Hereinafter “Public Opinion”).

²⁹⁵ R. S. Erikson, K. L. Tedin, *American Public Opinion: Its Origins, Content, and Impact*, Boston, Pearson, (8 ed. 2010), p.7.

of individualization or reduction to single units. And while the electoral will weakened, a new reworked concept of public opinion took over.

1.1.2.2. Takeover by a New Concept of Public Opinion

132. It is a well-known fact that the term “public opinion”, although not unknown to earlier political philosophers, was coined by Jean-Jacques Rousseau and developed during the Enlightenment period. Many definitions were devised since, as showed by Childs in 1965.²⁹⁶ ‘Public opinion’ became the focus of an ever-growing academic field monitoring the increasing political importance of the consent of the people in representative democracies. It developed along with the ideas of popular sovereignty and of public debate as a check on government
133. Historians ordinarily outline two key periods in public opinion theory; first, the Enlightenment normative era, and second, the pragmatic social theoretical and statistical era.²⁹⁷ But it is through the existence of ‘public spheres’²⁹⁸ that government by public opinion could become a reality. To Bentham, the development of a critical public sphere could allow public opinion to gain control over political power. The public sphere was also the arena for development of Kantian reason.
134. The first era of public opinion theory is dominated by an insistence on debate and deliberation, entrusting government only to a financially independent and educated elite.²⁹⁹ However some philosophers admit that popular participation is a necessary check upon government, but do not equal public opinion with rationality. Hegel trusted

²⁹⁶ Childs, *op. cit.*

²⁹⁷ As a preliminary note, let us stress that to the German philosopher and sociologist Jürgen Habermas the concept of “public opinion” also developed over the centuries along with the empowerment and the transformation of the bourgeois public sphere. Before being public, the public sphere developed privately, as bourgeois learned critical rational debate through contact with the world of literature. Eventually, as they “desired to influence public power in their common interest, the humanity of the literary public sphere served to increase effectiveness of the public sphere in the political realm” See J. Habermas, *The Structural Transformation of the Public Sphere*, Cambridge, MIT Press, (1991 (first edited in German in 1962)), p.56 (hereinafter “Structural Transformation”).

²⁹⁸ In *Between Facts and Norms*, Habermas defines the public sphere as a “communication structure rooted in the lifeworld through the associational network of civil society” and the political public sphere as a “sounding board for problems that must be processed by the political system because they cannot be solved elsewhere,” p.359, J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MIT Press, (1996 (1992)) (hereinafter “Facts and Norms”).

²⁹⁹ Note that Kant’s conception of public opinion does not classify the concept into a rational category. To him, opining is not rational and only decisions based upon knowledge deserve to be taken in public life.

science more than “mere knowledge as appearance”.³⁰⁰ Tocqueville saw it not as a rational force, but as a potentially oppressive social force. However, he called for a government heeding a rational stratum of public opinion structured into layers of representation.³⁰¹ Overall, the Enlightenment notion of public opinion is, according to Blondiaux, somewhat idealized and unrealistic. It is an “idealized reference, tribunal of reason and irresistible force lead by men of letters and capable of bending the world under its judgments and estimations, displaying an instinctive if not characterized contempt towards common or vulgar public opinion displayed by the “noisy and blind multitude” that d’Alembert talked about”.³⁰²

135. In the Enlightenment period, there seems to be an identity between the two concepts of ‘public opinion’ and the ‘Will of the People’. However, as Habermas points out, both Rousseau’s permanent plebiscitary form of will, unreflected but publicly known, and the Physiocrats’ will of a *public éclairé* referred to the same concept of public opinion without referring to the same meaning. Rousseau’s public would assemble for acclamation rather than critical debate and be entirely devoted to the common good of all. On the other hands, representatives in the Physiocrats’ theory would follow public opinion’s insight.³⁰³
136. In the 1920s, Tönnies elaborated several definitions of ‘public opinion’ depending on its degree of rational advancement.³⁰⁴ He defined “opinion of the public”—*i.e.* his most rational concept of public opinion—as a “complex form of social will”, solidifying over a process of maturation of society: “common way of thought, the corporate spirit of any group or association is built upon reasoning and knowledge, rather than on unproved impressions, beliefs, or authority”.³⁰⁵ In order to explain differences, he distinguished between common thinking of a community (*Gemeinschaft*) and society (*Gesellschaft*); the latter referring to an advanced stage of evolution of society where unrelated members of different groups share common concern about economic, political and moral issues. Being connected to reason, Tönnies’ vision of opinion is rational and cannot be assimilated to other stages or popular opinion development, such

³⁰⁰ Habermas, “Structural Transformation”, *op. cit.*, p.118.

³⁰¹ *Ibid.* pp.133-34.

³⁰² L. Blondiaux, “Ce Que les Sondages Font à l’Opinion Publique”, *Politix*, Vol. 10, No. 37 (1997), p. 122 (my translation).

³⁰³ Habermas, “Structural Transformation”, *op. cit.*, p. 99.

³⁰⁴ Splichal, “Public Opinion Development and Controversies”, *op. cit.* p. 108-113.

³⁰⁵ Citation in Splichal, *ibid.*, p. 101.

as popular beliefs, or popular feelings, both subjective and more or less ephemeral. As its name indicates, opinion of the public needs to have been publically expressed and is born after a transition from published opinion. The opinion of the public is thus reserved to the elite, but as social will, it is binding to the whole community. Thus Tönnies' concept is characterized by an absence of partisanship, special interest, and committed to the common good. Its degree of solidity depends on unity of society.

137. Theories changed after the rationalist era in the Twentieth century, as scholars began looking more closely into individual, social and psychological components of public opinion that contributed to its formation. From this research, they drew conclusions as to the reliability of common people's opinions. Lipari lists three schools within social and psychological scholarship.³⁰⁶ According to the first popular conception, people are capable of opinions welling up "from the bottom levels of society to the top, ensuring a two-way flow of communication between representatives and the represented."³⁰⁷ Thus individual citizens' involvement is mirrored in public policy. The second "elitist" or social constructionist school analyzes public opinion in all its shapes and complexity, acknowledging that it is built out of individual and social experiences and realities. It emphasizes that the manner in which communication is performed is as important as the substance of transmitted messages and stresses the people's vulnerability to manipulation. Hence it does not trust individual involvement quite to the same extent. The third and most pessimistic school, called critical or radical-functionalist, maintains: "the general public—including minority groups—has negligible influence on public opinion, which is largely controlled by those in power".³⁰⁸ Thus even if public leaders heed public opinion, the link between individual citizens who constitute the "general public", and governance is weakened, and not strengthened, by public opinion.
138. One object of public opinion scholarship consists in determining, based on empirical data about how individual opinions are formed in everyday life, whose opinions are relevant to governance. Hence all scholarly definitions, be they normative or empirical, focus on a specific or salient aspect of public opinion. Overall, they most commonly

³⁰⁶ Lipari, in D. Ferguson, *Researching the Public Opinion environment*, Thousand Oaks, CA: SAGE publications (2000), p. 7 (Hereinafter "Public Opinion Environment").

³⁰⁷ Cited from "public opinion", *Encyclopædia Britannica online*, retrieved at <http://www.britannica.com/EBchecked/topic/482436/public-opinion/258754/The-18th-century-to-the-present>

³⁰⁸ Lipari cited in D. Ferguson, "Public Opinion Environment", *op. cit.*, p.7.

emphasize two dimensions: the degree of uniformity and homogeneity of opinion (consensual, majoritarian, unanimous),³⁰⁹ and the process of formation of public opinion at individual and collective level,³¹⁰ which can involve the study of the influence of individual opinions on public opinion formation or on decision making. The third dimension is the depth, quality and level of rationality of opinion and opinion holders,³¹¹ followed by the holders of opinions and their level of education and information. Intensity of opinion is also a factor in the work of Abbott Lowell, or Bryce,³¹² as much as is the “public” dimension of the issue at stake.

139. The most important divide among scholars respects the question whether the “public opinion” deemed relevant to governance is a collective-intellectual³¹³ (sometimes imagined)³¹⁴ will, or an individual-aggregate³¹⁵ average. This debate has a heavy bearing on their assessment of opinion polls. In everyday political life, it is the individual-aggregate average concept of public opinion that usually dominates. Indeed, techniques and later scholarship were born out of a desire to help representatives heed the will of their constituents. Distrusting the claims of representativeness of main parties and interest groups, Gallup took up Bryce’s challenge of finding a way to know public opinion, and relied for this on his belief in science.³¹⁶ Gallup claimed that his new poll was more democratic, for it gave equal value to each opinion that he gathered, in the likeness of individual suffrage. He did not discriminate depending on social

³⁰⁹ H. L. Childs, *op. cit.*, p.18.

³¹⁰ “The macro-level social construction of public opinion is driven by a variety of forces, but four are most important: 1. the model of democracy shared by members of a community or nation ; 2. the types of technologies or methodologies available for opinion assessment ; 3. the rhetoric of our leaders, and 4. the evaluation of public opinion by journalists.” See S. Herbst, *Reading Public Opinion, How Political Leaders View the Democratic Process*, Chicago, University of Chicago Press, (1998), p. 13 (hereinafter “Reading Public Opinion”).

³¹¹ For example, W. A. Mackinnon defined public opinion as “that sentiment on any given subject which is entertained by the best informed, most intelligent, and most moral persons in the community.” To Habermas, the “public” gathered “the lecteurs, spectateurs, and auditeurs as the addressees and consumers, and the critics of art and literature” and other members of the “upper stratum” of 17th century society.” See Habermas, “Structural Transformation”, *op. cit.*, p. 31.

³¹² “Some currents develop more strength than others. because they have behind them larger numbers or more intensity of conviction; and when one is evidently the strongest, it begins to be called Public Opinion par excellence, being taken to embody the views supposed to be held by the bulk of the people,” Bryce, “Modern Democracies”, *op. cit.*, p.154.

³¹³ “Social judgement of a self-conscious community on a question of general public import after rational public discussion”, J. T. Young, *The New American Government and Its Work*, New York, The Macmillan Co., (1923), pp. 577-78.

³¹⁴ “Public opinion upon any matter was conceived as the hypothetical result of an imaginary plebiscite thereon”, R. C. Binkley, “The Concept of Public Opinion in the Social Sciences”, *Social Forces*, Vol. 6, pp. 389-96.

³¹⁵ See Bardes, Oldendick, *op. cit.*, p. 5.

³¹⁶ Blondiaux, “Fabrique de L’opinion”, *op.cit.*, p. 173.

standing or education of the persons surveyed. He attempted to look at samples proportionately analogous to the real social makeup of the nation. His ambition was to create a tool that would mirror the electoral process, where each citizen participates to public decisions no matter his degree of interest or information about public affairs. His ambition was to make electoral polling in harmony with what is today the golden rule of American democracy: the “*one man, one vote*” rule.³¹⁷

140. However, in reality, opinion polls only measure the superficial³¹⁸ and ephemeral expressions of deeper attitudes of citizens, rather than a more general behavior anchored in the deeper personality of individuals they survey.³¹⁹ Despite its potential for rationalization and objectivization of data on what public opinion truly believes, polling has triggered concern that it would result in significant trade-offs in politics, as “formal rationality”, i.e. rationality based on calculations, would replace “substantive rationality”, focused on the value of the goals rather than the means to reach them.³²⁰ As it affords only a partial and elusive knowledge of public opinions regarding specific issues, disregarding their reality in the minds of respondents. In Habermas’ words, “[p]olitical opinion polls provide a certain reflection of “public opinion” only if they have been preceded by a focused public debate and a corresponding opinion-formation in a mobilized public sphere”.³²¹ Pollsters may have

³¹⁷ Bardes & Oldendick thus opted for a quantitative definition: “Public opinion is the aggregate of the views of individual adults on matters of public interest”. Bardes, Oldendick, *op. cit.* p.5. However, their definition does not fulfill conditions of knowledge, publicity and intensity of the deliberative ideal.

³¹⁸ Thus to P. Converse, “it is ironic that it is exactly this kind of “one person, one vote” tally of opinions as routinely reported today by polls and surveys which has now become the consensual understanding of the world around as to a baseline definition of public opinion” P. Converse, “Changing Conceptions of Public Opinion in the Political Process”, *The Public Opinion Quarterly*, Vol. 51, Part 2: Supplement: 50th Anniversary Issue (1987), p. S14.

³¹⁹ Summarizing scholarly criticisms, Loïc Blondiaux contends that polls only account for private opinions, a “provoked, reactive and non-spontaneous opinion”, “atomized, individual and non-organised opinions”, “verbally expressed opinions, and without taking into account symbolic or violent expressions of opinion”. He deplores that “opinion polls do not differentiate between opinions according to their degree of intensity or commitment, and assumes that all opinions have equal force”, that opinions remain indifferent to the expertise of the people they survey, and “does not require that opinion result from a public discussion or deliberation before proceeding to their survey” (my translation). L. Blondiaux, “Ce que les sondages font à l’opinion publique”, *Politix*, Vol. 10, No. 37, p. 128-9.

³²⁰ Herbst, referring to Max Weber’s concerns on the effect of quantification on substantive politics. ” S. Herbst, *Numbered Voices, How Opinion Polling Has Shaped American Politics*, Chicago, University of Chicago press (1993), p. 14 (hereinafter “Numbered Voices”).

³²¹ On the issue of opinion polls, Habermas more comprehensively asserts: “What makes such “bundled” opinions into public opinion is both the controversial way it comes about and the amount of approval that “carries” it. Public opinion is not representative in the statistical sense. It is not an aggregate of individually gathered, privately expressed opinions held by isolated persons. Hence it must not be confused with survey results. Political opinion polls provide a certain reflection of “public opinion” only if they have been preceded by a focused public debate and a corresponding opinion-formation in a mobilized public sphere.” Habermas, “Facts and Norms”, *op.cit.*, p. 362.

improved their techniques since the 1930s, but new challenges continually arise, like for example at the era of the Internet public sphere and social media.³²² As techniques multiply, improve and adapt to new complex realities, they do not allow for a clear understanding of their reliability for the common man, and perhaps even for politicians. They do not make public opinion more accessible to citizens, and have not spared the people the task of resisting the dubious claims of representativeness of parties and interest groups, as they had intended.³²³ However, official institutions still retain the fiction of an “intact public opinion” “because it is still the only accepted basis for the legitimation of political domination” without which “modern democracy lacks the substance of its own truth”.³²⁴

141. Overall, if what Habermas calls the “psychosociological”, *i.e.* pollsters-dominated vision of public opinion succeeded at taking over a space heretofore occupied by both the normative and institutional³²⁵ strands of public opinion theories, more focused on deliberation, it was only possible because “there exist no historical or sociological essence of the concept of public opinion in scholarly discourse”.³²⁶ Nevertheless, by dissecting public opinion under its tiniest aspects and intricacies, sociologists’ reworked concept of public opinion has been impoverished, and *de facto* replaced by a “mass opinion” composed of single units, insulated from its political functions, transformed into an a political object no longer “public” and born out of communication respecting public discussion principles. Such evolution of scholarship may have empowered public opinion as an autonomous form of social will, distinct from the institutional “will of the people” and allowed it to reach out beyond the nation-state.

³²² Bardes, Oldendick, “Public Opinion”, *op. cit.*, pp. 84-86.

³²³ On this account, Russel Renka believes that the internet has enhanced the use and misuse of polls, especially when reported by advocate groups. He proposes a “manual for separating good polls from bad ones, and garden-variety bad from the truly ugly”. Available on the website of Southeast Missouri State University at http://cstl-cla.semo.edu/rdrenka/renka_papers/polls.htm#Polls_v._Reports_from_Polls

³²⁴ “The true modern state presupposes as the principle of its own truth the sovereignty of the people, and this in turn is supposed to be public opinion. Without this attribution, without the substitution of public opinion as the origin of all authority for decisions binding the whole, modern democracy lacks the substance of its own truth.” Habermas, “Structural Transformations”, *op. cit.*, p. 237-8,

³²⁵ The institutional theory sees public opinion as a result of public debate within a smaller circle of the elite, gathered within an official debate institution, *i.e.* Parliament. See S. Bénéullière, *op. cit.*, , p. 11, commenting Habermas.

³²⁶ *Ibid.*, p. 15.

1.2. The Contemporary Empowerment of Public Opinion

142. “Empowerment” of public opinion is thereby defined as a process of differentiation of public opinion from the nationally institutionalized “will of the people”. It is arguably through this process that “public opinion” has become the dominant political actor it is today, at least when its attitudes are known. I henceforth contend that the progression of normative and sociological debates over definitions, importance, framework, functions, formation and expression of public opinion contributed to public opinion empowerment. Moreover, in the last decade, a body of research has begun questioning whether the multiplication of specialized international policy-making institutions had triggered the birth of international publics and contributed to the birth of a *transnational* opinion. Next, I address how such movement participated to a process of emancipation of public opinion from the national to the transnational political arena, and triggered discussions about the relevant space of consensus formation for public policymaking.

1.2.1. *Public Opinion Empowerment from the Will of the People*

143. Both notions of the ‘will of the People and ‘public opinion’ were developed in the same period, and strongly associated with each other without being granted the same meaning. This implies that ‘public opinion’ enjoyed a different type of political legitimacy than ‘the will of the People’. Nevertheless, debates over the conceptual differences between the two notions did not hinder the birth of empirical research starting from the 1930s. Once the reign of opinion polling was established and aggregate public opinion instituted as a quasi-actor of everyday politics, scholarly critiques of pollsters’ scientific claim resumed to a deliberative understanding of the role of public opinion in governance, more focused on the issue of public opinion legitimacy. They recognized the significance of structural and social conditions of opinion- and will-formation to the legitimacy of public decisions. Hence if the structure of the “public sphere” is essential to legitimacy, so is the role of actors who, within the public spheres of debate, influence the public opinion formation.

1.2.1.1. *Returning to a Deliberative Understanding of Public Opinion Legitimacy*

144. Since Rousseau coined the expression, ‘public opinion’ was at times assimilated to the will of the people, at times strongly differentiated from it. James Bryce announced the

confusion when claiming that the expression “is used to express directly the people’s judgement upon an Initiative or by Referendum, or is applied to the choice of persons to represent the people in an assembly, or to act on their behalf as officials”.³²⁷ French legal theorist Maurice Hauriou also distinguished both: “the opinion that is expressed by the electorate is not, properly speaking, public opinion, for the electorate is no public, it is an already deformed opinion”.³²⁸ Hence the difference lies in the fact that the space of public debate in which opinion is formed and expressed looms larger than the electorate and institutionalized assemblies.

145. Many scholars have contributed to deliberative democracy theory.³²⁹ I hereby focus on the theories of Jürgen Habermas, since his widely debated notion of the public sphere in democracy, faithful to the principle of popular sovereignty, tightly links opinion- and will-formation within the public sphere to its process of integration into legitimate public decision-making. To him, it is informal opinion building within culturally mobilized public spheres, institutionalized opinion- and will-formation that gives public decision-making, *i.e.* the law in general, its legitimacy. Habermas also describes institutional conditions guaranteeing discursive self-determination of citizens and incorporation of their will into laws.³³⁰
146. According to Habermas, public opinion is formed within a sphere of public communication. This “public sphere” consists in a “space of institutions and practices between the private interests of everyday life in civil society and the realm of state power. The public sphere thus mediates between the domains of the family and the workplace – where private interests prevail – and the state which often exerts arbitrary forms of power and domination”.³³¹ The public sphere is the forum in which political issues are publically debated throughout an ideally unrestrained, fair and inclusive process. Public exposure “is supposed to discredit views that cannot withstand critical scrutiny and to assure the legitimacy of those that do [...]. In addition, a public sphere is conceived as

³²⁷ Bryce, “Modern Democracies”, *op. cit.*, p. 151.

³²⁸ Hauriou, *op. cit.* p. 214 (my translation).

³²⁹ In his chapter devoted to deliberative democracy, David Held, notably cites Bernard Manin, John Fishkin, Jon Elster, John Rawls, Drzyzek, Joshua Cohen and many others. See D. Held, *op. cit.*, p. 230-55.

³³⁰ See generally Habermas, “Between Facts and Norms”, *op. cit.*, pp.132-193.

³³¹ In the words of D. Kellner, Habermas, the Public Sphere, and Democracy: A Critical Intervention, retrieved from <https://pages.gseis.ucla.edu/faculty/kellner/papers/habermas.htm> (last visited 7 April 2018).

a vehicle for marshalling public opinion as a political force”.³³² According to this vision, public opinion thus results from an “emancipatory process of auto-education of a self-conscious civil society”³³³ where “neither general interest, instituted in the State, nor majority will expressed through suffrage would suffice to justify democratic choices”.³³⁴ Hence Habermas considers “normative legitimacy” and “political efficacy of public opinion” as essential to a democracy.³³⁵ Public opinion is thus deemed worthy of being heeded by government, not as the result of top of the head responses to “scientific” polling, but as a discursive collective thought that passed through the sluices of institutionalized procedures of public decision-making.³³⁶

147. Habermas discursive definition of public opinion differs from the definition of public opinion that prevails today, and that has little to do with discussion but more with resistance to government, what he calls “nonpublic opinion”, because it verbalizes accepted premises sub reflective or self-evident facts without discussing them.³³⁷ In contrast, Habermas defines as “quasi-public” opinion verbalization of opinions through traceable official channels, that do not satisfy critical debate requirements, but that are transmitted to the non-critical public sphere through the media, without protection from manipulation. In such context, public opinion is used as an argument for the public not to think. According to him, only informal organizations allowing for critical discussion and displaying internal public spheres externally relayed to the public sphere can allow a truly public opinion to emerge:

The degree to which an opinion is a public opinion is measured by the following standard: the degree to which it emerges from the intraorganizational public sphere constituted by the public of the organization’s members and how much the intraorganizational public sphere communicates with an external one formed in the

³³² N. Fraser, “Transnationalizing the Public Sphere”, in K. Nash, *Transnationalizing the public sphere*, Polity Press, (2014), p. 8-9.

³³³ Bénéttuilière, *op. cit.*, p.6.

³³⁴ “Ni l’intérêt général, porté par l’Etat, ni la volonté majoritaire exprimée par le suffrage ne suffiraient plus à justifier les choix démocratiques”. L. Blondiaux, “La délibération, norme de l’action publique contemporaine”, *Projet*, Vol. 4 No. 268 (2001), p.82.

³³⁵ Fraser, *op. cit.*, p. 9. As Fraser underlines, Habermas’ claim of critical legitimacy and political force of public opinion in politics did not remain unchallenged.

³³⁶ “Only after a public “struggle for recognition” can the contested interest positions be taken up by the responsible political authorities, put on the parliamentary agenda, discussed, and if need be, worked into legislative proposals and binding decisions.” J. Habermas, “Between Facts and Norms”, *op. cit.*, p.314,

³³⁷ J. Habermas; “Structural Transformation”, *op. cit.*, p. 244.

publicist interchange, via the mass media, between societal organizations and state institution.³³⁸

According to such conception, all legitimacy cannot be granted to suffrage, since even universal suffrage not all-inclusive. Participation through suffrage rests on citizenship rights and electoral accountability but excludes what Fraser calls *counterpublics*: women before they could vote, other minorities, non-citizens, *i.e.* individuals affected by a decisions on which outcome they have no say.³³⁹ Conversely, open discussion forums exhibit a manifest advantage, since participants focus on the strength of arguments presented by other debaters, and not their civic status.³⁴⁰ Neither does Habermas grant *all* political legitimacy to discursively formed public opinion. He considers it a preliminary and *complementary* element of legitimacy, which role consists in bringing issues from the periphery of society to the center of the political and constitutional system for treatment. The will that is formed through unconstrained channels of communication is henceforth institutionalized through official procedures and institutions (*i.e.* parliaments, courts).³⁴¹ If majority rule is no longer the primary criterion for legitimacy of decisions, it does not disappear, as it “can be viewed as the rationally motivated yet fallible result of a process of argumentation that has been interrupted in view of institutional pressures to decide, but is in principle resumable”.³⁴²

148. Discursive theory triggers many concerns regarding its applicability to real-life political systems. Habermas’ demanding ideal-typical legitimacy standard of deliberative opinion-formation also begs the question: what criteria or “rationality” should be applied so arguments presented throughout the debate are deemed valuable? The theorist acknowledged this issue when discussing other theories such as Dahl’s. He concluded that even under ideal conditions, the problem-solving capacities of discursive debate are constrained by other factors.³⁴³

³³⁸ *Ibid.*, p. 248

³³⁹ Fraser, on counterpublics, *op. cit.*, p. 5.

³⁴⁰ Excerpts of Habermas’ work gives at time an idealized picture and the public sphere and public opinion. He affirms that Public opinion “can be manipulated but neither publicly bought nor publicly blackmailed. This is due to the fact that a public sphere cannot be “manufactured” as one pleases. Before it can be captured by actors with strategic intent, the public spheres together with its public must have developed as a structure that stands on its own and reproduces itself out of itself.” Habermas, “Facts and Norms”, *op. cit.*, p. 364.

³⁴¹ *Ibid.*, p. 362.

³⁴² *Ibid.*, pp. 178-9.

³⁴³ At issue are for example the validity suppositions and their confrontation with actual life, and the complexity of society. Hence in an ideal communication context, a community would be capable of

All theories of deliberative or discursive democracy have been challenged on account of the criteria they laid out for rationality assessment of their claims concerning deliberative democracy's capacity for conflict resolution. It was not certain whether participants to debates would accept and comply with decisions they did not agree with.³⁴⁴ Moreover, including "all affected" persons to debates does not necessarily correlate with the improvement of the quality of debates: being affected by a decision does not imply that participants in debate possess knowledge of the issue, or have an opinion as to how to handle it.³⁴⁵ However, some proponents claim that deliberative democracy in fact improves conditions of public debate, hence the legitimacy of public decisions.³⁴⁶

According to Habermas, the birth of public opinion is a process, and today's societies do not constitute the best environment for an ideal development, but may progressively occur if political power "is effectively subjected to the mandate of democratic publicity."³⁴⁷ To be successful in its democratizing and rationalizing endeavor, Habermas' public sphere depends on "the extent of [public] access (as close to universal as possible), the degree of autonomy (the citizens must be free of coercion), the rejection of hierarchy (so that each might participate on an equal footing), the rule of law (particularly the subordination of the state), and the quality of participation (the common commitment to the ways of logic)".³⁴⁸ It is thus dependent upon what other

adequately understanding the meaning of his arguments and judging their truth in decisive manner even ideal conditions can constrain capacity of discourse to solve problems. Habermas acknowledges this problem when he asserts: "yet, even under such ideal conditions, discourses and bargaining can develop their problem-solving force only insofar as the problems at hand are sensitively perceived, adequately described, and productively answered in the light of a reflexive, posttraditional transmission of culture" (*op. cit.*, pp. 323-24). He places the capacity of success of this model on local contexts and the capacities of participants.

³⁴⁴ For a discussion of critiques of deliberative democracy see Held, "Models of Democracy", *op. cit.*, p. 231.

³⁴⁵ Scholars have tested the rational potential of deliberative democracy. However, in order to guarantee ideal conditions of deliberation in an atmosphere of respect, they provide carefully selected information on debated topics to the deliberators. Needless to say, those are ideal conditions, even 'counterfactual', that do not mirror day-to-day conditions, but are meant to test the potential of a theory. See among others J. Fishkin, R. Luskin, A. Siu, "Europolis and the European public sphere: Empirical explorations of a counterfactual ideal", *European Union Politics*, Vol. 15, No.3 (2014) pp. 328-351 (testing the democracy-enhancing potential of deliberative theory with multiple deliberators from diverse member states of the European Union on common European issues).

³⁴⁶ See generally C. Ross, *The Leaderless Revolution, How Ordinary People Will Take Power and Change Politics in the 21st Century*, New York, Pinguin (2011).

³⁴⁷ J. Habermas, "Structural Transformation", *op. cit.*, p. 244.

³⁴⁸ Summarized by P. Rutherford, *Endless Propaganda: The Advertising of Public Goods*, Toronto, University of Toronto Press (2000), p. 18.

scholars call “organs of public opinion”, *i.e.* actors that contribute to its public formation and expression.

1.2.1.2. Role of Public Opinion Organs in the Public Sphere

149. In 1962, Habermas claimed that, in contrast to the Enlightenment period, the public sphere had lost much of its critical power. Public life was “refeudalized” through “manipulative publicity”,³⁴⁹ which decides what types of opinions are acceptable.³⁵⁰ Other theorists have argued that advertising techniques have corrupted public debate and weakened the public’s capacity to truly democratize public decision-making.³⁵¹ In such context, we need to determine which if any type of “public opinion” can be deemed relevant to today’s governance.
150. Habermas acknowledges that public debate can be animated by “opinion-forming associations”.³⁵² To him, the quality of the public sphere and thus of public opinion is correlated with the role organs of public opinion play in the public sphere.³⁵³ Public opinion organs include public actors as opposed to private, *i.e.* factors influencing the formation of individual and collective opinion such as parents, family, social context, economic status, etc. Such “organs” are not usually included in the definitions of public opinion. Thus, I will limit my description of organs to actors influencing public opinion that are themselves part of public and political life. Organs include pressure groups, political parties, the media, and political institutions, such as parliament, the executive and their employees. This subsection is devoted to non-institutional organs of public opinion, *i.e.* those organs that do not qualify as “public authority”—governmental cabinets, administration, the judiciary—because of their public function, one aspect of

³⁴⁹ Habermas, “Structural Transformation”, *op. cit.*, p. 178.

³⁵⁰ *Ibid.*, p. 245.

³⁵¹ “The [public] sphere remains a site for the production of public opinion that is given concrete form by surveys and polls which, to a degree, actually fashion the opinion through the process of asking certain questions (and not asking others). Because of an excess of goods and risks competing for attention, the sphere continues to be a contested arena; however, much of the excess is manufactured by people and institutions with money, moral clout, or other forms of power. The mass media play out a double role here, both as the vehicle for competitive spectacles and as the source of news, a different kind of discourse, though again a monologue and now contaminated by the ubiquity of publicity”. Rutherford, *op. cit.*, pp. 274-5.

³⁵² J. Habermas, “Further Reflexions on the Public Sphere”, in Craig Calhoun, *Habermas And The Public Sphere*, MIT press, (1992), p.454 (hereinafter, “Further Reflexions”).

³⁵³ A “public sphere that functions politically requires more than institutional guarantees of the constitutional state; it also needs the supportive spirit of cultural traditions and patterns of socialization, of the political culture, of a populace accustomed to freedom”. *Ibid.*, p. 453.

which consists in heeding the will of citizens. In the next chapters, I argue that Courts openness to the public translates into its openness to organs of public opinion as well.

Pressure groups

151. Are defined as pressure groups “an interest group or an organization that engages in a campaign to sway public opinion and change government policy”.³⁵⁴ Synonyms include “interest groups”, “lobby”, “faction”, or “organized interests”.
152. Interest groups are defined as “an association of people who join together to influence popular opinion or governmental action”³⁵⁵ are specialized;³⁵⁶ they inform and influence both public authorities and the general public on specific issues. They establish a link between leaders and the public.³⁵⁷ By taking upon themselves to inform the public, they play an “educative” role, since they provide citizens with a better understanding of public issues.³⁵⁸ They need the support of the public in order to exercise influence on public decisions. Thus, they regularly campaign to convince people of the importance of their claims, and have become regular consumers of opinion polls, to demonstrate their representativeness.³⁵⁹
153. Scholars tend to exclude interest groups from their definition of public opinion for several reasons. Firstly, their commitment is partial and they are highly specialized. Consequently, their relationship to public opinion is instrumental; they use public support as an argument to claim representativeness. Secondly, their members usually display more intense convictions than the general public.³⁶⁰ The claims they express in

³⁵⁴ Definition of “pressure groups”, *Black’s Law Dictionary*, Thomson Reuters (10th ed, 2014), p. 1376.

Note that “special interest groups” or ‘SIG’ are usually aimed at influencing policy, not public opinion,

³⁵⁵ “Interest group”, *ibid.*, Note that “special interest groups” or ‘SIG’ are usually aimed at influencing policy, not public opinion. *Ibid.*, “special interest group”.

³⁵⁶ “Focused on a single issue of a range of issues, interest groups represent subsets of the public at large. Interest groups are both of the public and apart from it. Consequently, the mass public’s opinion (represented by demonstrations, letters, or surveys) can be both a tool, and a challenge to an organization’s goal”. D. J. Heath, “Shaping Public Opinion”, in *Encyclopedia of Public Opinion*, Vol 1, (2004), p.33 (hereinafter “Shaping Public Opinion”).

³⁵⁷ Erikson & Tedin, “American Public Opinion”, *op. cit.*, p.21.

³⁵⁸ See J. M. Berry, C. Wilcox, *The interest group society*, Boston, Little Brown (5th Ed., 2008). Sociologists also explain that interest groups convince journalist to publish favorable articles and supported by statistical and polling data. Heith, in “Shaping Public Opinion”, *op. cit.*, p.36.

³⁵⁹ “In contrast to a mass mailing campaign or a march on Washington, displaying poll data is an extremely cost-effective means for articulating the public will”. *Ibid.*, p.35.

³⁶⁰ An article of the Public Opinion Quarterly shows that interest groups display more extreme point of views than the majority of citizens. See R. L. Classen, S. O. Nicholson, “Extreme Voices. Interest Groups and the Misrepresentation of Issue Publics”, *Public Opinion Quarterly*, Vol. 77, No 4, (Winter 2013), pp. 861-87. They add, . “In those cases where interest groups matter, especially on issues that involve

the public sphere are neither necessarily statistically representative of, nor similar or compatible with, opinions of members of the public on a specific issue.³⁶¹ Thus, their claims cannot be lightly assimilated with mainstream thought. Thirdly, the diversity of interest groups does not guarantee that all opinions are represented in the public sphere.

154. Interest groups most importantly establish a linkage between public authorities and the public.³⁶² Neither the vision of American Founding Fathers³⁶³ nor the French tradition seem to favor the domination of private interests, which they pejoratively call “faction”. American separation of powers was conceived with a view to safeguard the balance of powers, and to avoid that one faction would become dominant or unduly dominate public debate. It is the generalization of direct universal suffrage, for example in France or the American Senate,³⁶⁴ that stimulated the multiplication of interest groups.
155. Lastly, interest groups should not be completely merged within the notion of civil society, which despite a wide range of existing definitions would encompass many interest groups. For example, Spichal defines civil society as composed of entities independent from the market and the state. They are “voluntary self-governing organizations, activities, and networks outside the realm of the state and the economy, [...] in which people freely associate and communicate—not to gain profit or power but for the sake of sociability, knowledgeability and self-management”.³⁶⁵ Also, pressure groups such as labor unions cannot be completely separated from the economy, nor do all pressure groups act completely independently from either economic actors or the State as they need funding for organizational purposes. Splichal’s notion however insists more on a discursive, rational and educational dimension of civil society than the notion of pressure groups suggests: “Civil society should be seen as a locus for limiting the power of the state and capital, but it does not seek to replace either state or

mass membership groups such as those featured in our research, legislators who attend to interest group members are listening to unrepresentative voices. In this way, interest groups distort the views of the broader, attentive public on a particular issue.” *Ibid.* p. 883.

³⁶¹ Additionally, they found that “those active in interest groups hold positions that are more extreme than, and often at odds with, the positions of less active members within the issue public.” *Ibid.*

³⁶² Erikson & Tedin, “American Public Opinion”, *op. cit.*, p.21.

³⁶³ See Madison, “Federalist No. 10, The Same Subject Continued (The Union as a Safeguard Against Faction and Insurrection)”, in *The Federalist Papers*, NY, Signet, (2003), pp.71-78.

³⁶⁴ In the case of the federal Senate, American Founding Fathers preferred indirect suffrage so as to counterbalance the devastating effects sudden changes in public opinion could have for public life. See Federalist No. 63, The Senate Continued, in *The Federalist Papers*, p. 380-87.

³⁶⁵ S. Splichal, “*Transnationalization*”, *op. cit.*, p. 86 (hereinafter “*Transnationalization*”).

private actors.” This speaks for the complexity and intertwining role of organs working within the public sphere.

The Media

156. In a general sense and in practice, the function of the press consists in informing its audience on current events. Yet, the presentation as much as the substance of information published in various forms of media influences and shapes public opinion.³⁶⁶ Moreover, different communication outlets generate different types of influence. The media also plays a function of agenda setting as they classify information they receive and select newsworthy contents. Finally, they inform the public of its own opinion as it is displayed through public debate and opinion polls. The practice of informing the public about the views of other citizens contributed to the legitimization of opinion polls and reinforced their claim of scientific character.³⁶⁷ However that claim still remains disputed.³⁶⁸ Moreover it has been argued that opinion polls themselves tend to influence opinion, which skews survey results.³⁶⁹ Nonetheless, the power of opinion polls remains strong, as their results are rarely falsifiable. Ultimately, the media can “transform a particular interest to a common interest by linking “primary publics” and confronting (or linking) the rulers and the ruled. Ideally, they channel the flows of discourses from opinion formation in the networks of the public sphere to the political will formation in the political system and *vice versa*”.³⁷⁰ But in order for the media to perform a normative function respecting a rational principle of publicness, fostering an open and unconstrained debate, the press requires independence, not only from public authorities but also from interest groups and economic and social powers.³⁷¹ Today’s press no longer complies with normative ideals. To Habermas, the rational public

³⁶⁶ On this question see L. R. Jacobs & R. Y. Shapiro, *Politicians Don’t Plunder: Political Manipulation and the Loss of Political Responsiveness*, Chicago, University of Chicago press, (2000).

³⁶⁷ See Heith, “Shaping Public Opinion”, *op. cit.*, p.42.

³⁶⁸ On accountability and representativeness concerns and proposals for overcoming them, see E.B. Bluemel, “Overcoming NGO Accountability Concerns in International Governance”, *Brooklyn Journal of International Law*, Vol. 31, No.1, (2005-2006) pp. 139-206. For a discussion of real-life accountability, see for example A. Dhanani, C. Connolly, “Non-governmental Organizational Accountability: Talking the Talk and Walking the Walk?”, *Journal of Business Ethics*, Vol. 129, No. 3 (July 2015) (assessing the accountability of non-state actors based on Habermas theory of communicative action).

³⁶⁹ For this very reason, public regulations in certain countries prohibit the publication of opinion polls in the days preceding and during elections. On the issue of polling publication regulations, see generally R. Rambaud, *Droit international et comparé des sondages électoraux : avantages et inconvénients du modèle français*, retrieved from <http://publications-sfds.fr>

³⁷⁰ Splichal, “Controversies”, *op. cit.*, p.91.

³⁷¹ *Ibid.* p.92.

sphere of the 19th century has degraded, “refeudalized” over time, becoming a public locus for marketing and propaganda. Democratization of the public sphere did not provide everyone with access to a rational arena of debate. Rather, “the public is split apart into minorities of specialists who put their reason to use nonpublicly and the great mass of consumers whose receptiveness is public but uncritical”.³⁷²

157. In order to enable a media that would play a role closer to its normative ideal, some scholars have advocated more public broadcasting, or lay out examples of public regulations that would discourage concentration of media outlets.³⁷³ To them, “the difference between the media that are “organs of the public” and those whose main task is to influence “the buying public” (or, rather, audiences) may be used as an indication of the polarization taking place in the public sphere between the actors constituting the public sphere (i.e. the public) and others merely using the public sphere for promotional or disciplinary publicity”.³⁷⁴ Today’s the press’ relations to public opinion has become superficial, concludes Diane Heith, condemning public opinion to an “afterthought”.³⁷⁵ Despite this fault, democratic Constitutions regard public debate as essential to democracy and protect the freedom of the press.
158. Hope was revived with the advent of the Internet and the creation of very dynamic social media outlets. Could Internet renew the public sphere and make it comply with normative ideals? Despite an undeniable change in the forms of communication, Internet did not solve the problem of face-to-face debate in large societies, nor did it make democracy more direct.³⁷⁶ New forms of actions were shaped, but Internet also

³⁷² Habermas, “Structural Transformations”, *op. cit.*, p.175. He later specifies: “In reality, however, the occupation of the political public sphere by the unpropertied masses led to an interlocking of state and society which removed from the public sphere its former basis without providing a new one. For the integration of the public and private realms entailed a corresponding disorganization of the public sphere that once was the go-between linking state and society”, p.177.

³⁷³ Slichal, “Transnationalization”, *op. cit.*, p. 95.

³⁷⁴ *Ibid.*, p.97.

³⁷⁵ “Media application of public opinion dooms the information to become an afterthought or spectator within any issue debate. The news media marginalize public opinion as a legitimate source of authority during policy debates. See Heith, “Shaping Public Opinion”, *op. cit.*, p. 42.

³⁷⁶ For example, Kristin Demetrious expresses serious concerns with some of the effects of the development of social media to the deliberative capacity of the public sphere: “Central to these concerns is its potential to be a powerful discursive forum for social and political control that has invisibly positioned itself in relation to publics and indeed many large public organisations. This together with the constant demands of a 24-hour news cycle, flourishing cultures of populism and narcissism and the proliferation of subjective commentary means governments may find it harder to engage publics with complexity and achieve the long term reform that is so urgent in the light of current environmental challenges.” K. Demetrious, “Bubble wrap: social media, public relations, culture and society”, in L.

encouraged parochialism and isolation, which did not improve its credibility.³⁷⁷ Financial dependence of the media did not decrease, and corporatism increased,³⁷⁸ while not barring Internet from becoming an instrument of potential surveillance. Spichal concludes that “without societal interests and social will, technology itself cannot produce revolutionary changes in social relationships [...] it certainly fosters globalization. However, globalization may be more fettering than fostering democracy and technology is often a tool for that obstruction.”³⁷⁹

Political leaders

159. Political leaders also affect opinion formation. Chosen to represent citizens, they debate public issues within the public and in the context of their public function: they build their own opinions according to information they receive from members of the public, pressure groups, the press, and various public institutions. They are called to justify their decisions to their constituents within the public sphere. Whether constituents can directly and substantially influence political leader’s positions in practice is a question for political scholars.³⁸⁰
160. Political research has shown that, in the United States at least, politicians, more particularly presidents and parties, have become greedy consumers of opinion polls. Other research based on Susan Herbst’s interviews of Illinois public leaders demonstrates that each group (leaders, state agents, journalists and pressure groups) adopts a specific, professionally-shaped conception of public opinion and of its degree of information and competence on political issues. All display critical distance vis-à-vis opinion polls but use them in their profession according to their needs.³⁸¹ Thus people’s notion of public opinion role is affected by their professional environment and experience.

Edwards, C. Hodges (eds.), *Public relations, society & culture: theoretical and empirical explorations*, New York, Routledge (2011) p. 130.

³⁷⁷ Slichal, “Transnationalization”, *op.cit.*, pp. 112-13.

³⁷⁸ *Ibid.*, p.115.

³⁷⁹ *Ibid.*, p.116.

³⁸⁰ See Bardes, Oldendick, “Public Opinion”, *op. cit.*, p. 12.

³⁸¹ She also explains that the group of interviewees that entertain the most optimistic vision of opinion, compatible with participatory democracy is the group of pressure groups. Herbst, “Reading Public Opinion”, *op.cit.*, pp.125-26.

161. In the mean time, in the context of political debate, it is the poll-driven definition of public opinion, used frequently by all organs of public opinion to establish the validity of their claims, that has come to dominate political life,³⁸² thereby taking its independence from the will of the electorate.
162. In the following chapters I will focus on what conceptions are perhaps typically adopted by judges. But first I inquire about the transnationalization of the concept of public opinion and its role in an international context.

1.2.2. The Empowerment of Transnational Opinion

163. The twentieth century was the age of democratization of national politics. More and more, formerly excluded groups were granted civil and political rights, sometimes the right to vote was extended to some noncitizens.³⁸³ As democratization occurred, globalization of politics also progressed dramatically. While many policies are to some extent defined internationally, in organizations or specialized agencies, the expression of ‘the Will of the People’ remains bound to the national territory and nationally-based suffrage rights. So is the concept of ‘public opinion’, usually used in public life to make claims about public attitudes toward public policy; acceptance, enmity, likelihood of actively resisting policy. Hence it is usually referred to within the context of the political entity citizens usually are confronted to most often: the city, the region, the central or federal state. At times, policies that are examined are originated at international level. In such context, what public opinion do people refer?
164. The above discussion of the public sphere underlines the close link between the public sphere, the public and the will of the people. However, the critical space in which opinion develops is not, like nations’ borders, limited by geographical physical

³⁸² According to Susan Herbst: “With the advent of opinion poll, the essence of public opinion has been transformed: We are now most likely to think of public opinion as the result of a confidential, scientifically conducted survey of unconnected individuals. Along with these semantic and methodological changes has come a metamorphosis in the perceived role of public opinion. It is difficult, however, to judge whether public opinion has become more or less important to presidents, legislators, journalists, or citizens themselves. Since the meaning of public opinion has changed, we know that eighteenth or nineteenth century statements about the value of public opinion cannot be compared to contemporary ones.” S. Herbst, “Numbered Voices”, *op. cit.*, p. 172.

³⁸³ For a comparative study of alien’s right to vote in European Union member states see for example F. Fabbrini, “The Right to Vote for Non-Citizens in the European Multilevel System of Fundamental Rights Protection. A Case Study of Inconsistency?”, *Czech Society for European and Comparative Law, Eric Stein Working Paper* No 4 (2010), accessible at <https://cesp.files.wordpress.com/2015/05/eswp-2010-04-fabbrini.pdf> (last accessed 7 April 2018).

boundaries. With media development and globalization, many issue debates, whether they concern only citizens of one country or beyond, are accessible to a larger audience. Thus, the sphere in which opinion develops now looms larger. But does it mean that at national level, *relevant* public opinion also did expand, and should be heeded by governments? Similarly, with the transnationalization of issues, should governments only heed their own national will or all affected parties? Through transnationalization of political issues, the notion of ‘public opinion’ has distanced itself from what was commonly understood as the national will. From existing research, I conclude that public opinion may not only have transnationalized, but also empowered itself from classical representative institutions, so as to become a parallel but distinctive source of legitimacy. Thus in all likelihood, acceptance of public decisions, including judicial decisions, proceeds from multiple locations and types of “public opinion”.

1.2.2.1. Transnationalisation of Public Opinion

165. Globalization of governance is a topic that has been occupying scholars for a few decades now. This preoccupation only increased with the global reach of the Internet that accelerated globalization of governance. With the crisis of national democracy, scholars showed interest in Habermas’ theory of the public sphere and his work on normative criteria that allows for an assessment of the legitimacy of institutionalized governance based on their heeding discursively formed public opinion.³⁸⁴ Because of the transnationalization of governance, scholars have observed an increased differentiation of public opinion from the will of the people: increasingly, public opinion is in fact no longer coextensive with citizenship.³⁸⁵ Nancy Fraser attempted an inquiry into the applicability of Habermas’ legitimacy criteria in the context of a transnationalizing public sphere. Based on this observation, she deplores that the reliance of Habermas’ theory of the public sphere on a Westphalian framework of reference is not applicable in an internationalized context. In this framework, public opinion’s legitimacy corresponds to the territorial basis of the state, at which levels the institutionalized will of the people is formed.

³⁸⁴ Fraser stresses that Habermas’ claim about the legitimacy of public opinion was challenged. However, this is not at issue here, since we assume that public opinion is broadly regarded as a legitimate voice of the people in the mainstream society, and if not at least in the media.

³⁸⁵ “The opinion they generate no longer represents the common interest not the general will of any demos.” Fraser, *op. cit.*, p.22.

166. The differentiation of public opinion from the will of the people is problematic for two reasons. Firstly, national issues are no longer only national in character and can involve other concerned non-resident citizens and other countries. Consequently, the institutionalized will excludes some concerned people. Secondly, if an increasing portion of decision-making is made at international level, it is important to make sure that national public opinions are informed of issues decided at that level so that they can rationally form their opinion before it is implemented and possibly express their concern with the right interlocutors, *i.e.* at the right level of decision. However, in this transnational constellation, policymaking is not always as salient as issues deserve. This leads Fraser to exclaim, “If states do not fully control their own territories, if they lack the sole and undivided capacity to wage war, secure order, and administer law, then how can their citizenries’ public opinion be politically effective?”³⁸⁶ Nick Couldry finds her observation exaggerated. People’s habits are still local and national: He claims that most national public opinions still debate day-to-day issues and local and national regulations and have not gone transnational. English is the international opinion language only to some people, and most populations are far from abandoning their language base. He proposes instead to understand the transnational public sphere as “the networked resultant of transformations at multiple levels”.³⁸⁷
167. The acknowledgement of a multiplicity of public spheres and corresponding public opinions makes it hard to underestimate the challenges facing public authorities’ when implementing the will of their people. Moreover, it is not sufficient for public opinion to exist at international level: To become a critical check on public authorities, international public opinion would need to fulfil some conditions of efficiency.
168. Political and sociological studies are helpful to the task of defining real-life opinion. The claim that “international” or local public opinion leans one way or another on certain key social issues serves to pressure governments to implement specific policies. However, in a post-national constellation, such claims are not always verifiable. Applying, as Fraser proposes, the “all affected” principle as criterion to decide whose claim a government should heed is a thorny endeavor, for as Couldry puts it, “everyone is affected one way or another.” Thus, the claim of public opinion legitimacy is difficult

³⁸⁶ *Ibid.*, p.21.

³⁸⁷ N. Couldry, *What and where is the transnationalized public sphere*, in Nash, “Transnationalizing”, *op. cit.*, p.45.

to vindicate, as it is not readily knowable. Is James Bryce thought that a skilled politician could know the will of his constituents likely true in today's world? Does the age of global Internet provide such possibility?

169. As discussed earlier, the age of global Internet and social network hardly provided the conditions for the formation of a discursive rational opinion formation some had hoped for (corporatism hasn't spared internet providers and does not allow unconstrained discourse). This becomes all the more problematic as opinion- and will-formation are less and less tightly linked. In the meantime, it allows for a different constellation of opinion formation, more distant and independent from traditional decision-making. It might be exaggerated to claim that public opinion has empowered itself, although it clearly has differentiated itself from the will of the electorate. However, whatever its level of formation and its issue-focus, public opinion has not yet evolved to the point of being discursively formed qualitatively conform with Habermas' ideal of legitimate public opinion.
170. If private association allowing for internal public sphere become an organ allowing the birth of truly public opinion, can international non-governmental organizations (or international "NGOs") contribute to the building of transnational opinion? According to Kate Nash, if international non-governmental organizations and protest movements are not legitimated, based on Fraser's criteria, as counterpublic, they "may contribute to global democracy insofar as they alter the discursive and institutional conditions that make global justice and democracy impossible at the global scale".³⁸⁸ This may in turn contribute to more accountability of international policy-making bodies. To Bohman however, their "indirect influence has some legitimizing force, but it does not by itself make such regimes 'democratic' nor does it solve the problem of domination inherent in the relatively independent operation of their quasi-legal powers".³⁸⁹ In the absence of formal institutions allowing for direct influence, the public can be only weak and rely on general public opinion to influence authorities. "Or, as in the case of NGOs with respect to human rights, publics may rely heavily on supranational judicial institutions, adjudication boards and other already constituted and authoritative bodies.

³⁸⁸ K. Nash, "Towards Transnational Democratization?", in K. Nash (ed.), *Transnationalizing the public sphere*, Polity Press, (2014), p.76.

³⁸⁹ J. Bohman, "Democratization Through Transnational Publics: Deliberative Inclusion Across Borders", in R. Tinnevelt, R. Geenens (Eds.), *Does Truth Matter? Democracy and Public Space*, p.152.

In order that publics use their communicative freedom to transform normative powers, they need not ever become strong publics in the national sense of being connected to a particular set of parliamentary or representative institutions”.³⁹⁰ Indeed, taking the example of the European Union, he affirms that deliberations at that level are only “semi-public”. He privileges the constitution of “specialized mini publics” capable to deliberate on specific issues. However, it is difficult to define what such “mini public” would be and at what level of publicness they would deliberate, and whether they would be vindicated to claim that the results of their debates are legitimate.

1.2.2.2. *Empowerment from Representative Institutions*

171. Despite claims that public opinion has transnationalized or globalized, and distanced itself from the officially legitimate will of citizens in possession of voting rights, the issue remains as to the translation of this transnationalization into official democratic institutions. Inasmuch as institutionalization could potentially catch up with the reality of public opinion formation in a way that would include all levels of its existence, it would have to also take into account the fact that public opinion also distanced itself from *representative* institutions. This, Habermas acknowledges in his theory of institutionalization of public opinion. He includes administrative and judicial institutions among institutions capable of translating a public opinion discursively formed within the public sphere and into official norms.³⁹¹ However, as Fraser underline in her article, he does not discuss the *international* institutionalization of public opinion.
172. If the international public sphere has developed over the last decades, and added up to other spheres of debates already existing at national and local levels, representative institutions have not matched this development at the same speed. When they exist, they usually include deliberative bodies composed of representatives of national parliaments.³⁹² Thus those institutions are *indirectly* representative of citizens, and not

³⁹⁰ *Ibid.*, p.158-59.

³⁹¹ Habermas summarizes his sociological translation of discourse theory of democracy in the following way: “binding decisions to be legitimate must be steered by communication flows that start at periphery and pass through sluices of democratic and constitutional procedures situated at the entrance of the parliamentary complex or the courts (and, if necessary, at the exit of the implementing administration as well).” Habermas, “In Between Facts and Norms”, *op. cit.*, p. 356.

³⁹² This is the case of the Parliamentary assembly in the Council of Europe (PACE), of the NATO, and OSCE.

politically salient.³⁹³ Therefore, in order to influence decision-making, publics still need to return to the national level and convince their leaders to represent their point of view at international levels of governance. Such is the limit of institutionalization of *transnational* opinion at international level. This begs the questions as to how international institutions can be led to heed public opinion, so that their will can be reflected into public decision-making. This would require that organs of public opinion communicate public preoccupations to these institutions. As an example, civil society and pressure groups have organized and reached out to international public sphere and institutions. However as at domestic level, the normative question of their legitimacy is still in question. One could ask if their discourse is representative of arguments discursively formed at international level, or of arguments local publics would agree with. If not, they might be qualified as “counterpublics”, and their claims might not be deemed legitimate. Conversely, if international legitimacy was to rely on a discursive criterion, then the minority status of certain groups at national levels would matter less. Following Kate Nash’s claim that counterpublics also have a democratizing potential,³⁹⁴ it could also be claimed that the discursive legitimacy of these groups rests on their being counterpublics, hence countermajoritarian.

173. In 2003, Jacobson and Ruffer published an article pertaining to international individual agency *i.e.* the process of changing legal norms through international judicial institutions. Deeming that the republican idea of deliberation could not capture the individual level of self-reliant agency, they focused on individual participation at international level through the use of the intensified web of norms crossing paths at local to international levels of governance.³⁹⁵ In their study of international agency, they neglect the increasing participation of third parties in judicial procedures, and the role of combined involvement of all participants, individuals or collective, in international agency. Nor do they account for the contribution of judicial cases to

³⁹³ To be representative of public opinion, such institutions would need to be politically salient, *i.e.* citizens and members of opinion would need to be aware of their existence and of the nature of their political power, and attempt to influence them.

³⁹⁴ Nash, *op. cit.*, pp. 60-78.

³⁹⁵ D. Jacobson, G. Benarieh Ruffer, “Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy”, *Human Rights Quarterly*, Vol. 25, No. 74 (2003).

international debates and opinion-formation.³⁹⁶ Such accounts would greatly improve the understanding of agency and democratization of the international public sphere.

174. I argue that international courts, as some of the most popularly accessible international institutions of the day, are a fruitful study ground of the internationalization of public opinion. Where best to see the real-life incorporation of arguments found in the public sphere on widely discussed issues of the day? As civil and human rights are objects of public debates at national as much as international level, the involvement of public opinion and its organs at different levels of the public sphere will likely be more salient in debates surrounding important institutions, such as the Supreme Court at national level, and the European Court at international level. In order to explore this possibility, I first need to assess the origins of judicial legitimacy, and investigate whether high courts, domestic or international, possess a degree of popular legitimacy. In the next section, I address the sources of judicial legitimacy, taking as first focus the United States Supreme Court, extending the debate to the international context, with the case of the European Court of Human Rights. I also address the claims that high courts may be considered representative of discursively and rationally formed public opinions.

2. Judicial Institutions Between Forums of Principle and Representative Institutions

175. Despite and perhaps because of an atmosphere of increasing disenchantment with politics, and widespread fears of populism, judicial institutions may have been the only institutions which popularity has suffered neither in the United States nor elsewhere. Rather, in the late twentieth century, judicially-enforced constitutionalism has been continuously expanding, international Courts have multiplied, and transnational judicial dialogue has been flourishing.³⁹⁷ It could be because courts are perceived as a

³⁹⁶ This line of enquiry is a very recent field of study. On NGO's role in the European Court's proceedings and beyond, see for example L. Van den Eynde, "The multifaceted and crucial role played by NGOs at the European Court of Human Rights", (August 4, 2014), retrieved from <http://strasbourgobservers.com/2014/08/04/the-multifaceted-and-crucial-role-played-by-ngos-at-the-european-court-of-human-rights/> (last accessed 7 April 2018). To her, NGOs play a very varied set of roles: "fact-finding, data collection, information sharing, legal analysis, whistleblower function, cooperation with human rights bodies such as the Council of Europe, drafting and publication of reports later discussed in the press and in the public opinion, advocacy, support to victims and representation of applicants, etc."

³⁹⁷ For a critical assessment of international judicial dialogue, see among an abundant literature L. Burgorgue-Larsen, "De l'internationalisation du dialogue des juges. Missive doctrinale à l'attention de Bruno Genevois", in *Mélanges en l'honneur du président Bruno Genevois*, Paris, Dalloz (2009), pp. 95-130, and most recently an account of diverse courts' practices all accross the world : A. Müller, Hege E.

assuaging remedy for individuals living in obstructed and dissatisfying political systems. It also could be that Courts are assumed to fulfill some democratic ideals better than institutions which claim of representativeness stems from elections. This section discusses the scholarly debates over the role of the judiciary in the fulfillment of two democratic ideals: le liberal ideal of representation, emphasizing consensus, and the republican deliberative ideal, emphasizing reason.

176. In the United States, the high standing acquired by the Supreme Court over two centuries generated one main critique. For its assertive and increasing authority, the Supreme Court is often accused of being “countermajoritarian”, particularly when it strikes down democratically ratified legislations. Conversely, proponents of “countermajoritarianism” contend that its distance from majoritarian politics, *i.e.* from majority party pressures, is necessary to limit majorities’ abuse against discrete and insular minorities. In between are those who argue that a third way exists, one that does not reflexively assume first that parliamentary majorities are the sole representative of voters or represent them perfectly, and that concedes that high courts could be regarded as representative institutions. This school also does not believe that limiting majorities’ power is undemocratic. To the contrary, its members believe the judiciary can be conceived as a rational deliberative institution that possesses a democratic dimension, be it indirect, and has can have an uplifting effect on politics. Judicial institutions have the potential of becoming a force capable of constraining, taming, or counterbalancing the power of democratically elected representatives by complementing the executive and the legislative with a different kind of democratic charisma. Firstly, a court can be a “forum of principle”, a moral institution that in using the tool of reason corrects the less principled laws promulgated by parliaments. In so doing, it promotes the traditions of the country as enshrined in the Constitution and its historical, political and philosophical foundations, while enforcing today’s “public reason”. Secondly and paradoxically, the judiciary is claimed to be, although differently, a representative institution.

Kjos (eds.), *Judicial Dialogue and Human Rights*, Cambridge, Cambridge University Press, (2017), 620 p.

2.1. A Reasons-Responsive Institution: The Judiciary as a “Forum of Principle”

177. Is the ‘countermajoritarian’ function of courts a chance or a problem? Some scholars have argued that *because* it is countermajoritarian, the Judiciary possesses qualities that could complement and potentially redeem politics. In other words, it fulfills the reasonableness and deliberative ideals of democracy better than parliaments or elected officials. The next subsection presents the thesis defended by proponents of a vision of the Judiciary as a “forum of principle”, *i.e.* an institution that in fulfilling its function of guardian of the Constitution is responsive to reasons rather than policy considerations, and therefore enjoys democratic legitimacy. Next, I outline the theory laid out by deliberative democratic theorists who argue that judicial institutions best fulfill the ideal conditions of deliberation. Both schools’ claims suggest that democracy and constitutionalism are not incompatible, but mutually reinforcing. They challenge the common idea that all democratic legitimacy stems from popular elections, and that unelected institutions possess no popular legitimacy.

2.1.1. *The Judiciary as the Institution of Reason*

178. Ronald Dworkin and John Rawls are perhaps the most prominent theorists writing on the relationship between judicial institutions and public reason. Both scholars claim that the judiciary is model of reasonableness, in contrast to other democratic institutions. After exposing their theories, I discuss the applicability of their claims to international judicial institutions of human rights protection, *i.e.* in our case, the European Court of Human Rights.

2.1.1.1. *Democracy and the Judiciary: A Compatibility Based on Reason*

179. Many constitutional legal scholars see the Judiciary as a “countermajoritarian” institution, *i.e.* claim that it fails to respect the will of majorities when striking down unconstitutional laws.³⁹⁸ Others deem this avowedly elitist institution as necessary to

³⁹⁸ See among others A. Bickel, *The Least Dangerous Branch*, Yale University Press ((1st ed. 1962)1986), 306 p.; J. Waldron, “The Core of the Case against Judicial Review”, *Yale Law Journal*, Vol. 115, (2006), pp. 1346-1406, “The Core of The Case”); M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton: Princeton University Press (1999), 254 p. For a complete review of the “countermajoritarian difficulty”, see B. Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy”. *NYU Law Review* (1998) (hereinafter “Part One”). Accessible at <http://ssrn.com/abstract=60449>. Barry Friedman wrote a series of papers on this topic that he published in different journals: B. Friedman, “Reconstruction’s Political Court: The History of the Countermajoritarian Difficulty, Part Two”, *Georgetown Law Journal* Vol. 91 (2002), pp.1-87

protect rights against majority-initiated political abuse.³⁹⁹ Whether the judiciary is a “democratic institution” or not hence depends on one’s definition of democracy and the role basic rights play in it. For rights enthusiasts, instead of contradicting democratic principles, judicial right protection allows democracy to thrive. This is the claim of process-based theorists, such as John Hart Ely,⁴⁰⁰ as much as substantive theorists like Dworkin.⁴⁰¹ Both scholars can be differentiated based on the rights they give priority to.

180. According to Christopher Zurn, Dworkin’s vision of democracy is not based on the democratic pedigree of specific institutions, *i.e.* whether its members are selected through direct popular elections, but on whether an institution has the “right answer”. To him, “because democracy requires getting the right answers on fundamental questions, any political institutions that do so are by (re)definition democratic”.⁴⁰² This assumption is based on the premise that that judges, on grounds of their training and relative institutional isolation from the heated debates conducted in elected institutions, are truly more capable of reaching the “right answer” than their elected colleagues.
181. According to Dworkin, the U.S. Supreme Court is an institution characterized by its commitment to principle, consistency, integrity and anti-passivism.⁴⁰³ Composed of nine Justices chosen by the President and confirmed by the Senate for life, the Supreme Court is not subject to political pressures of election or later career prospects. To Dworkin, it embodies the principled institution by excellence for filling a “herculean” task that Parliament, incessantly courted by special interest groups, cannot fulfill. In

(hereinafter “Part Two”). B. Friedman, “The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*”, *NYU Law Review* Vol 76 (2001), pp.1383-1455 (hereinafter “Part Three”); B. Friedman, “The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics,” *U. Pa. L. Rev.* Vol. 148 (2000), (hereinafter “Part Four”); and B. Friedman, “The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five”, *Yale Law Journal* Vol. 112, pp. 153-259(2002) (Hereinafter “Part Five”). All are available on http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=19936.

³⁹⁹ For defenses of judicial supremacy see among others L. Alexander and F. Schauer, “On extrajudicial Constitutional Interpretation”, *Harvard Law Review*, Vol. 110, No. 7 (1997), pp.1359-1387. E. Chemerinsky, “In Defense of Judicial Review: The Perils of Popular Constitutionalism”, *University of Illinois Law Review*, Vol. 2004, No. 3, pp. 673-690.

⁴⁰⁰ J. H. Ely, *Democracy and Distrust, A Theory of Judicial Review*, Cambridge, Mass., Harvard University Press (1981), 280 p.

⁴⁰¹ R. Dworkin, *A Matter of Principle*, Cambridge, Mass., Harvard University Press, (1985), 425 p. (hereinafter “Matter of Principle”)

⁴⁰² C. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge, Mass., Cambridge University Press (2009), p. 18.

⁴⁰³ See R. Dworkin, *Law’s Empire*, Cambridge, Mass., Harvard University Press (1986), pp. 355-399.

contrast, the Supreme Court responds to reason and proceeds to an historical and coherent reading of the law. Moreover, Justices heavily rest on their understanding of historical and political development of the country, and not only on the written letter of the Constitution and other written sources. Thus, their decisions are not based on a judge's political desires, but on the consistency of the law with principles on which constitutional provisions are founded. Of course, each judge may understand those background principles differently, thus the need for a Supreme Court necessarily implies an acceptance of the political nature of its decisions. Despite this unavoidable fact, judges reach decisions based on principle rather than policy⁴⁰⁴. Thus democracy "is a conversation carried out by linguistic experts—especially judges and lawyers addressing them—and located in that political institution most insulated from the input of the citizens".⁴⁰⁵ Hence Dworkin's concept of democracy is based on reason, not representativeness, and so is his concept of the law".⁴⁰⁶ Consequently, the "Forum of Principle", has the potential to remove emotions and private interests from the debate and to transform conflicts into legal questions. Most importantly, it is because it gets the right answers based on reason that the politically isolated judicial institution still qualifies as democratic.⁴⁰⁷

182. However, since Dworkin accepts the political dimension of the judicial office, one can wonder how to concretely differentiate arguments of principle from political arguments. To him, "an argument of principle does not often rest on assumptions about the nature and intensity of demands and concerns distributed throughout the community. On the contrary, an argument of principle fixes on some interest alleged to be of such character as to make irrelevant the fine discrimination of any argument of

⁴⁰⁴ R. Dworkin, "Matter of Principle", *op. cit.*, p. 69.

⁴⁰⁵ Zurn, summarizing Rawls' account of public reason, *op. cit.*, p.19,

⁴⁰⁶ According to Dworkin, "We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individuals and society will once someplace, finally, become questions of justice. I do not call that religion of prophecy. I call it law." Dworkin, "Matter of Principle", *op. cit.*, p. 71.

⁴⁰⁷ This section does not aim at assessing whether Dworkin's theory is right in its assessment of reality. Firstly, Dworkin clearly assumes that his Hercules embodies an idealized picture of the judicial office. Secondly, the half-human-half-god name he gives to his imaginary judge demonstrates either that Dworkin has utopian regards for the judicial office, or that he does not think that the role he gives judges is possible to fulfill in real life. Let us stress that Dworkin's writings demonstrate that if he considers the judicial office as democratic, he does not regard public opinion as such: "Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that Hercules must defend against any inconsistent opinion however popular." Dworkin's judges are also no "passivists", thus they cannot give in to public opinion. See R. Dworkin, *Taking Rights Seriously*, Cambridge Mass., Harvard University Press (1978), p.126.

policy that might be oppose it”.⁴⁰⁸ Thus the answer lies in the judges’ capacity to discern what interests should prevail in principle, rather than giving in to the bidding of the loudest faction, which political isolation facilitates. What Dworkin does not seem to address is how judges discern the most rational principle as opposed to the argument supported by most people: are judges that herculean as to immunize them against the pressure of the most accepted arguments?

183. The representativeness of arguments is at the core of Rawls’ theory of public reason. His theory also assigns a special status for the Supreme Court.⁴⁰⁹ However, his claims are not based on the special capacity of judges to perform herculean rational tasks, but rather on their relationship to another kind of reason: “public reason”.⁴¹⁰ All citizens, judges included, are to respect public reason.
184. Because it specifies criteria of what counts or not as *democratic* public reasons⁴¹¹, Rawls’ theory is better at explaining what makes the Judiciary a principled institution. To him, judges can accept as “public reasons” only “presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial”.⁴¹² Public reasons are aimed at fulfilling the common good and their objects are “matters of fundamental justice”, *i.e.* among others, basic rights. Thus, Rawls’ vision of adjudication seems more accessible to the average person than Dworkin’s herculean forum. Rawls also shows a concern for scientific

⁴⁰⁸ R. Dworkin, “Hard Cases”, *Harvard Law Review*, Vol. 88, No. 6 (Apr. 1975), p.1062 (hereinafter “Hard Cases”).

⁴⁰⁹ J. Rawls, *Political liberalism*, New York, NY, Columbia University Press (1993), p. 216. He concludes that the use of democratic public reason “applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents.” pp. 215-6.

⁴¹⁰ To Rawls, “Public reason is characteristic of a democratic people [...] Public reason then, is public in three ways: as the reason of citizens as such, it is the reason of the public; its subject is the good of the public and matters of fundamental justice; and its nature and content is public, being give by the ideals and principles expressed by society’s conception of political justice, and conducted open to view on that basis.” Rawls, *ibid.*, p. 213.

⁴¹¹ Rawls defines public reasons as: “Reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.” Rawls, *ibid.* p. 214.

⁴¹² *Ibid.*, p. 224. It is however not clear at what point a question can be deemed “controversial”, which can become problematic particularly in the field of science, since firstly, new science can contradict past results, and take much time to get the status of “accepted” science, and secondly, judges do not possess the training to discern the veracity of scientific results.

accuracy by stressing the importance of relying on science. Therefore, adjudication is not left to any ignorant crowd.

185. As they are bound to justify their decisions, judges take up at the same time an educative function, and that of an umpire, in what one could picture as a civilized dignified, quiet and respectful setting: “Often its role forces political discussion to take a principled form so as to address the constitutional question in line with the political values of justice and public reason. Public discussion [...] educates citizens to the use of public reason and its value of political justice by focusing their attention on basic constitutional matters”.⁴¹³ Therefore, it is this educative role makes judges democratic.
186. Because he provides criteria to recognize public reason, Rawls’ vision of the judicial office seems somewhat less utopic or ideal-typical than Dworkin’s. However, it is not clear what kind of relationship Rawls’ judges entertain with public opinion. In Rawls world, judges are portrayed as more in touch with current values and public opinion, or at least less reluctant to take it under advisement than Dworkin’s Hercules. Therefore, public opinion’s role in adjudication is not fundamentally incompatible with reason in adjudication. That is also Perelman’s opinion: in the 1970s he conceded that less formalistic adjudication adopting the methods of his “new rhetoric”⁴¹⁴ aimed at convincing or consolidating the support of its audience – *i.e.* the public⁴¹⁵.
187. One thing is certain; Dworkin refuses to reduce democracy to majoritarianism. To the contrary, “democratic politics is possible for a morally divided nation only if its citizens share a faith in the likelihood of moral progress through reasoned argument”.⁴¹⁶ Hence impartiality, effectiveness, participation and public deliberation are equally important to democratic life.⁴¹⁷ According to Christopher Eisgruber, Supreme Court decisions

⁴¹³ Rawls, *op. cit.*, p. 240.

⁴¹⁴ Perelman defines the new rhetoric as “the study of discursive techniques aimed at triggering or increase adherence to claims presented to a specific audience”. C. Perelman, « *Logique juridique* », *op. cit.*, p.114 (my translation) (hereinafter “Logique Juridique”).

⁴¹⁵ Judges’ authority does not suffice to insure them legitimacy. “To the extent the functioning of justice ceases to be purely formalistic but aims at adherence from the parties and public opinion, it does not suffice to indicate that a decision was made based on the authority of a legal text, [judges] must demonstrate that it is equitable, appropriate and socially useful.” Consequently, judges’ authority increases. Moreover, the capacity of the law to adapt requires that they judge “not according to government’s directives, but according to society’s mainstream values, their role consisting in reconciling existing institutions with these values, so as to evidence not only the lawfulness but also the reasonableness and acceptability of their decisions”, *Ibid.*, p.147 (my translation).

⁴¹⁶ C. Eisgruber, *Constitutional Self-Government*, Cambridge, Harvard University Press (2001), p. 82.

⁴¹⁷ *Ibid.*, p. 87.

involving a moral issue do foster public discussion.⁴¹⁸ Therefore, they contribute to the strengthening of democracy.

2.1.1.2. Rationality and Democratic Pedigree of International Judges

188. Judges sitting on the European Court of Human Rights may be very different from Supreme Court Justices because they are international judges, but they are nonetheless *judges*. They thus share the most important attributes of their profession with constitutional judges. Therefore, if a constitutional court is a model institution of reason, so is a human rights court sharing the same overarching goals; Rawls' ideal of basic rights protection, Dworkin's search for the right answers, and a same commitment to principle, consistency, integrity and anti-passivism. Nevertheless, the fact that they are international judges affects the way they exercise reason. Also, their degree of legal representativeness is affected by the fact that practice adjudication in an international institution. Thirdly, the European Court's international position and its increased distance to the populations affects its educative impact and capacity to generate public debate.

Capacity for Reason

189. The topic of the ideal and unique ability of international judges to rationally assess compliance with human rights norms is absent from literature or approached only indirectly. George Letsas, who applied Dworkin's theories to European human rights adjudication,⁴¹⁹ does not address this topic. He advocates an interpretation respecting the principles underlying rights protected by the European Convention that would be

⁴¹⁸ Decisions such as abortion, gay, have been discussed heavily in the U.S. press. So have social security and the right to family planning, and gay marriage. See generally on the topic of public reactions to public opinion, V. J. Hoekstra, *Public Reaction to Supreme Court Decisions*, Cambridge, Mass. Cambridge University Press (2003), 190 p.

⁴¹⁹ Letsas, who undertook an application of Dworkin's theory to interpretation of the European Convention, only claims that the legal doctrines of originalism, consensus and textualism have no place under the European Convention. Instead, he proposes to apply Dworkin's moral reading to the Convention and to bring consistency the Court's doctrines. To him, "Neither the text, nor drafters' intentions, can alone justify why the ECHR grants a particular right or not. Certainty and publicity, two values often cited in support of intentionalism and textualism, have no application in the European Convention which is neither meant to guide individuals conduct nor to protect states' expectations about what their ECHR obligations are. On the contrary, the ECHR aims to prohibit states from treating individuals in a certain way, however convenient, natural or justified states may find it." To him, "The only consensus that is morally significant is the one entailed by the drafting of the ECHR and the agreement to be legally bound by certain fundamental principles of liberal democracy." G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press (2007), p. 11.

combined with ideals of liberal democracy.⁴²⁰ He regrets that in practice, the European Court grants rights “that have no relation with the moral principles underlying the rights protected by the convention”.⁴²¹ From his criticism of the Court, it seems that Letsas believes the Court has a potential for increased rationality compared to member states and their institutions, but that it has not yet reached its it.

190. Applying Dworkin’s assertion that judges are democratic because they find the right answer based on reason to the European Court requires caution. Human rights, like constitutional rights, have the potential to apply to any legal norm and public behavior, including constitutional domestic norms. However, an increased distance of international judges from the domestic social and legal contexts might push international judges to dismiss domestic public reasons too easily. Moreover, international judges’ capacity for (public) reason competes with the one of national judges’. Domestic judges arguably possess a better understanding of national public reasons but lack the critical distance international judges benefit from when they scrutinize domestic normative compliance with European norms or European public reason. Consequently, the right and principled answer to legal problem may differ depending on judges’ level of decision and on their perspective.
191. With regard to the degree of rationality and its correlation to high professional training, European human rights judges are required high professional expertise.⁴²² To this extent, they are probably as distinguished professionally as United States Supreme Court Justices. Therefore, they can be said to possess the same capacity for reason and to enjoy comparable distance from political pressures than United States judges are renowned to have; perhaps more since the procedure of nomination is not as public and politically polarized as in the United States.⁴²³ However, there are some substantial differences in Europe. Firstly, except for individual judges’ professional experiences, European judges are not trained in the diverse legal systems of all contracting states they scrutinize but usually only one: their own. Besides, gaps between European countries’ legal cultures are often deeper than between American states who all belong

⁴²⁰ Letsas, *ibid.*, p. 11.

⁴²¹ *Ibid.*, pp.126-130.

⁴²² Article 21(1) ECHR: “The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.”

⁴²³ On the different methods of selection of Supreme Court Justices in the United States and European judges in the Council of Europe, see *infra*, Chapter Two.

to one rather homogenous system and legal tradition. Requiring that judges be knowledgeable of all systems would be a utopic requirement, a herculean task indeed.⁴²⁴ Moreover, each lawyers' knowledge of its own system is limited. Consequently, the fact that the European system of human rights protection relies on one national judge to explain to others all intricacies and subtleties of his own legal system in any given case involving his country is ground for skepticism as to the degree of rationality that a college of judges can reach.⁴²⁵ Therefore, for the European system to have more potential for rational decisions based on knowledge and understanding, it would be necessary that European judges have the capacity not only to keep a neutrality-enhancing distance *vis-à-vis* domestic politics,⁴²⁶ but also possess a solid understanding of the many other legal systems which human rights compliance they are asked to scrutinize.

192. I argued above that the capacity of judges to reason on moral questions does not entirely depend on their understanding of the law. However, a complete—if not comprehensive—understanding of the law is necessary to make judgments on its compatibility with fundamental rights principles. Thus, to this extent and in the event of complex cases, the work of European judges may become too difficult, and their analysis may be too diluted to reach better legal results than, for example, those reached by national judges or constitutional or highest courts. Moreover, national legal systems are in danger of being reformed based on an incomplete or superficial understanding of apparent imperfections.⁴²⁷ In conclusion, European judges' capacity for reason may be equivalent to the one of American judges, but their legal expertise is of a different kind.

Popular Representativeness

⁴²⁴ It may be superfluous to add that the differences between European states' legal systems run much deeper than the legal differences between American states, even when it comes to Common Law states and Louisiana.

⁴²⁵ Special rules were drafted with respect of the right of the defendant contracting party to have a national judge sit in the judging formation. See Article 26 (1) of the Convention, and Rule 26 (1) (a) of the European Court Rules of Court.

⁴²⁶ At the European Court, one judge is elected for every country. But the judges are not legally fulfilling a representative mandate for their home country. Article 21(2) ECHR.

⁴²⁷ For example, in ECtHR, *Kress v. France*, Appl. No. 39594/98, 7 June 2001, the European Court condemned France for allowing the “*commissaire du gouvernement*”, a public servant representing the public in administrative proceedings, not only not to disclose any information on his conclusions, but also for assisting deliberations while parties attorneys had no access. This decision triggered a lot of debate within French scholarship. The Court reversed its judgment in ECtHR *Yvonne Etienne v. France*, Appl. 11396/08, 15 September 2009. See L. Sermet, “Yvonne Etienne, la page tournée de l'affaire Marlène Kress”, *AJDA*, Vol. 41 (2009) p. 2249-2251.

193. International human rights judges and domestic judges are confronted to different challenges for several reasons. Firstly, they do not possess the unique link that binds national judges to citizens: international judges are more removed from the domestic citizenries than constitutional or highest courts within their domestic system, be it only in political visibility. If European judges' function is to protect citizens against public abuse, which is in the advantage of individuals, this additional distance to the populations, which is not easily compensated by media exposure, may not improve the perception of representativeness of domestic public reasons in the European decision-making process.
194. Secondly, the Supreme Court and the European Court are organized very differently. The set-up of the European court is more representative: it is a substantially bigger institution, composed of many chambers of various sizes and prerogatives. The Court is composed of 47 judges, each chosen by one state. Internally, the Grand Chamber is composed of 17 judges and each chamber is composed of 7 judges, discounting Committees of three judges and single judges dealing with inadmissible and repetitive cases respectively. Only 9 justices are assigned to the Supreme Court in the United States. Moreover, European Judges are assigned to different sections so as to balance legal and regional representativeness of each section. This organization only makes the European court more geographically representative than the Supreme Court. 17 judges chosen from a pool of 47 decide for all 47 member States in Europe, while always the same nine Justices scrutinize the laws of 50 states in the United States.

Educative Impact

195. The political and cultural distance of an international court can also weaken the chances for strong public debates in the public sphere, and hence the educative impact public debates can bring to citizens. Of course, one can assume that some human rights issues can become salient enough in European states so as to provoke a crosspollination of arguments throughout national public spheres. Such movement could deepen some issues in the minds of citizens, and perhaps give birth to a European public opinion on the matter. However, for this to happen, the adjudicated issue needs to be prevalent also in other member states. This has happened in a few cases, as some topics have triggered an extended European public debate for example on the role of religion in public

schools,⁴²⁸ abortion,⁴²⁹ euthanasia in France,⁴³⁰ and gay marriage.⁴³¹ But as the examples show, those usually are controversial topics.

196. Overall, provided one accepts that the democratic pedigree of an institution is greater than its relationship to the voters but also involves its capacity for rational judgment based on public reasons and its impact on public debate, one can approach Courts as democratic and representative institutions. However, what is “representative” in the eyes of scholars may not be representative in the eyes of citizens. Or their sentiment of being well represented is a critical factor in day-to-day governance. Hence judicial institutions that practice rational adjudication based on representative and public reasons could compensate for the weaknesses of representative democracy, but only if they first become models of rational debate.

2.1.2. The Deliberative Ideal: Courts as Forums of Debate

197. Many scholars assert that high courts—the U.S. Supreme Court is most often taken as example—fulfill ideals of deliberative democracy better than elected institutions.⁴³² For example, in order to comply with Habermas’ ideal of democratic legitimacy, decisions need to respect two criteria: decisions must be taken in compliance with legal procedures, and the moral political requirement for the assent of all citizens is to be secured through reasoned deliberation.⁴³³ However, it is not certain that Dworkin’s flattering portrait of judges as moral reasoners complies with Habermas’ legitimacy requirements.
198. In *Between Facts and Norms*, Habermas explores the role of Courts in democracy. His positive outlook on legal reasoning, which he opposes to a political discourse focused on self-interest, implies that the judiciary has more aptitude for reasoning. Based on this claim, constitutional courts should be considered as more legitimate than other

⁴²⁸ ECtHR, *Lautsi v. Italy* [GC], Appl. No. 30814/06, 18 March 2011.

⁴²⁹ ECtHR, *A.B. and C. v. Ireland* [GC], Appl. No. 25579/05, 16 December 2010.

⁴³⁰ ECtHR, *Lambert and others v. France*, Appl. No. 46043/14, 5 June 2015.

⁴³¹ ECtHR, *Oliari and others v. Italy*, Appl. No. 18766/11 and 36030/11, 21 July 2015.

⁴³² See for example J. Rawls, *Political Liberalism*, *op. cit.* p. 231-40; F. Michelman, *Brennan and Democracy*, Princeton, Princeton University Press (2005) (resting on reason and representativeness); R. Alexy, “Balancing, constitutional review, and representation”, *International Journal of Constitutional Law*, Vol. 3, 572 (2005); M. Kumm, “Institutionalizing Socratic Contestation.” *European Journal of Legal Studies*, Vol 1, no 2 (2007), pp. 1–32.; A. Gutmann, D. Thompson, *Democracy and Disagreement*, Cambridge Mass., Harvard University Press (1996), 422 p.

⁴³³ Zürn, *op. cit.* pp. 227-231.

institutions. But if Habermas extensively reflects on ideal conditions of deliberation, his study of the judiciary is not an inquiry into the judiciary as deliberative institution, but as a law-making institution: it is the Law itself that is the focus of Habermas' study, and the potential site of rational redemption of politics.⁴³⁴ It is assumed that rational debate among concerned individuals will result in a reasonable decision. In other words, reason is the likely outcome of a general respect for optimal deliberative conditions. Thus, is it possible to conceive courts as the institutional model *par excellence* where the “ ‘unforced’ ” force of the better argument”⁴³⁵ could triumph?

199. After Rawls and Dworkin lauded the rational virtues of the Highest Court, Habermas' treatment of ideal conditions of deliberation and the role of courts became an inspiration for scholars inquiring into the American Supreme Court's potential and performance as a deliberative institution.⁴³⁶ I hereby discuss their assessment.

2.1.2.1. Courts as Ideal Venues for Deliberation

200. Deliberation occurs at every level of public life. But legitimacy is all the more important when the output of deliberation is a binding decision. Michelman claims that in his idealized theory of judicial reasoning, Dworkin's misses a very remarkable feature of adjudication: its plurality.⁴³⁷ More than one judge seats on the bench. In a collegial setting, different understandings are brought to the table, decisions are to be made, consensus has to be made, prejudices and personal stories may resurface, sacrificing pure reason on the altar of decision-making. Only a favorable deliberative context and mindset could potentially compensate for plurality decision-making.
201. Deliberative democracy advocates each developed their own criteria for assessing whether an institution is deliberative. But most of these criteria vary individually. Several arguments are commonly heard with regards to the claim that high or

⁴³⁴ E. Christodoulidis, *Law and Reflexive Politics*, Dordrecht, Kluwer (1998), p. 30.

⁴³⁵ Zurn *op. cit.* p. 229, referring to William Rehg's work: W. Rehg, *Insight and Solidarity: A Study in The Discourse Ethics of Jürgen Habermas*, Berkeley, University of California Press, (1994).

⁴³⁶ See generally Gutmann & Thomson, *op. cit.*, J. Ferejohn and P. Pasquino, “Constitutional Adjudication : Lessons from Europe”, *Texas Law Review*, Vol. 82, (2003-2004), pp. 1671-1704.

⁴³⁷ “Dworkin has produced an apotheosis of appellate judging without attention to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality. We ought to consider what that plurality is “for.” My suggestion is that it is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom. There is a message there for the politics of judicial appointments, not to mention for the politics of law.” F. Michelman, “Foreword: Traces of Self-Government”, *Harvard Law Review*, Vol 100, No. 4 (1986-1987), pp.76-77.

constitutional courts are more deliberative than other types of institutions. Christopher Eisgruber claims that four conditions must be respected in order to reach the goal of a practice of politics based on reasons rather than on power struggles: impartiality, effectiveness, participation and public deliberation.⁴³⁸ According to Michelman, “deliberation ... refers to a certain *attitude* toward social cooperation, namely, that of openness to persuasion by reasons referring to the claims of others as well as one’s own. The deliberative medium is good faith exchange of views—including participant’s reports of their own understanding of their respective vital interests—[...] in which a vote, if any vote is taken, represents a polling of judgements”.⁴³⁹ Both theorists refer to personal qualities of participants to the deliberative activity that can be found in many individuals and professions: an “attitude” and “good faith” for Michelman, “impartiality” to Eisgruber. Habermas’ criteria refers to sensibly similar criteria. To him, it is under ideal conditions of deliberation that will-formation occurs: “yet, even under such ideal conditions, discourses and bargaining can develop their problem-solving force only insofar as the problems at hand are *sensitively perceived, adequately described, and productively answered in the light of a reflexive, posttraditional transmission of culture*”.⁴⁴⁰ Thus if Habermas’ demanding ideal seems to be better applicable in “sensitive” and “reflexive” contexts, would the judiciary, especially in Dworkin’s idealized image, not be an ideal forum?

202. To Rawls, the judiciary is the model of public reasons *par excellence*. Through its deliberations, the Supreme Court gives “public reason vividness and vitality in the public forum”⁴⁴¹ because it does, at first sight at least, comply with the following normative conditions. The first type of deliberative condition is linked to reason, and judicial institutions are fertile grounds for the practice of reasoning. Firstly, judges are obliged to justify their decisions. Or normative deliberation puts on the political actor an obligation of justification through public good.⁴⁴² Secondly, Rawls considers that

⁴³⁸ Eisgruber, *op. cit.* p. 87.

⁴³⁹ F. Michelman, “Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation,” *Tennessee Law Review* Vol. 56, 291 (1989), p. 293, quoted by Jürgen Habermas in *Between Facts and Norms*, Cambridge, Mass., MIT Press (1996), p. 273. (Emphasis added.)

⁴⁴⁰ Habermas, *ibid.*, pp. 323-24. (Emphasis added.)

⁴⁴¹ J. Rawls, “The Idea of Public Reason”, in J. Bohman & W. Rehg (eds.), *Deliberative Democracy: Essays on Reason And Politics*, MIT Press (1997), p. 93, 112. Quoted in M. Sen, “Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System”, *Notre Dame Journal of Law Ethics & Public Policy*, Vol.2 7, No.2 (2013), p. 313.

⁴⁴² Christodoulidis, *op. cit.*, p. 39, referring to C. Sunstein, “Beyond the Republican Revival”, *Yale Law Journal*, Vol. 97, 1539 (1998) (hereinafter, “Beyond the Republican Revival”).

juridical discourse is the ““paradigmatic idiom” of public deliberation because it adheres to the neutral canons of “public reason”.⁴⁴³ To Eisgruber, Courts are principled institutions as opposed to other institutions devoted *quid pro quo* and compromise. Thirdly, deliberative practice, where participants are made capable to reflect critically during a structured debate, requires distance from day-to-day politics. And it is such distance, such as life tenure,⁴⁴⁴ that institutional arrangements provide to judicial institutions. To Michael Perry, politically insulated judges are more likely to find the right answer because contrary to judicial more deliberation-oriented institutional set-ups, the political process “tends to resolve such issues by reflexive, mechanical reference to established moral conventions”.⁴⁴⁵ Moreover, to Sunstein, in order to filter out self-interest from deliberative process, the deliberator is required to participate with an open spirit: one would have to practice political empathy and set aside one’s own perspective and think from the point of view of everyone.⁴⁴⁶ Because of justices’ life tenure, American scholarship generally assumes that the Supreme Court complies with this criterion at least in appearance.

203. The second type of favorable deliberative conditions lays in institutional arrangements. To Maya Sen, there is a case for scholars’ admiration for judicial institutions on account of deliberative ideals, because they display a “variety of institutional mechanisms that have a distinctively deliberative shine”.⁴⁴⁷ On the one hand, internal collegiality provides a fertile ground for deliberation. Contrary to Dworkin’s Hercules, Michelman claims, the U.S. Supreme Court is composed of nine judges that have to take decisions together. They are not “loners” and are forced into dialogue with others.⁴⁴⁸ Thus, after the case has been reviewed and plaintiffs, defendants and other concerned parties have been heard,⁴⁴⁹ judges proceed to *internal* deliberation and decisions are made by a

⁴⁴³ Zurn, *op. cit.* p. 167.

⁴⁴⁴ Eisgruber discusses disinterestedness and life tenure (although Eisgruber talks about moral issues, in which many people have moral stakes and may be less likely to act in a neutral manner than for technical matter. Eisgruber, *op.cit* pp. 55-56.

⁴⁴⁵ M. J. Perry, *The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary*, New Haven: Yale University Press (1982), p. 102.

⁴⁴⁶ Sunstein, “Beyond the Republican Revival”, *op. cit.* p. 1569.

⁴⁴⁷ M. Sen, “Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System”, *Notre Dame Journal of Law Ethics & Public Policy*, Vol. 27, 303 (2013).

⁴⁴⁸ Michelman, “Traces of Self-Government”, *op. cit.* p. 76.

⁴⁴⁹ Rules of court lay out procedures of parties’ participation (plaintiff, defendants, public authorities involved), external involvement (e.g. friends of courts, amici curiae), and about the possibility of public hearing. All those bear upon the quality of internal deliberation among judges. According to Ferejohn and Pasquino, American and European systems reveal the many forms of internal deliberation possible. American deliberation among justices of the Supreme Court takes mostly written form and does not often

college of judges after debate—written or oral, often behind closed doors. Each court has its own internal rules and thus may deliberate differently, in conditions more or less favorable to deliberative ideals. Nevertheless, constitutional judges are reputed to proceed to an “uncoerced dialogic process”,⁴⁵⁰ and at first sight this reputation should apply to collegial decision-making formations of the European Court (three judges, seven judges, and seventeen judges). Secondly, deliberation ideally should occur among equal participants. Or, during internal deliberations, *i.e.* deliberations among judges within the court,⁴⁵¹ judges deliberate among peers, thus the equality condition is fulfilled. But beyond ideal conditions are real-life public decision-making and judges, and other contextual facts that may affect deliberations

2.1.2.2. Courts’ Real-Life Deliberative Performance: Reason Versus Public Deliberation

204. “When an issue moves to the Supreme Court, public argument does not die off; instead it becomes more substantive, emphasizing the quality of reasons rather than their marketability”.⁴⁵² At least so is Eisgruber’s opinion. Kumm goes so far as claiming that judicial review is the very “institutionalization of the practice of Socratic contestation”.⁴⁵³ However, to Mendes, claims of deliberative ideal and courts are unverified, too superficial, and need to be explored deeper:

involve justices deliberation in each-others’ presence. Deliberation in Europe often happens behind closed doors and in isolation from the public but result in more deliberative solution, as the consensus rule is given priority to show a united front to the public. Such practices have a heavy bearing of courts’ real life deliberative performance. See Ferejohn, Pasquino, “Lessons from Europe”, *op. cit.*

⁴⁵⁰ Christodoulidis *op. cit.* p.48.

⁴⁵¹ In their study of comparative deliberative practices of various constitutional courts, Ferejohn and Pasquino differentiate between two different sorts of deliberative practices: internal and external. Internal deliberation involves the judges with their peers, whereas external deliberations seems to be public deliberation on constitutional courts involving judges as well as the public outside the courtroom: “Internal deliberation by a group is the effort to use persuasion and reasoning to get the group to decide on some common course of action. External deliberation is the effort to use persuasion and reasoning to affect actions taken outside the group. Internal deliberation involves giving and listening to reasons from others within the group. External deliberation involves the group, or its members, giving and listening to reasons coming from outside the group. Constitutional courts commonly engage in both practices, but the U.S. Supreme Court is much more externalist in its deliberative practices than are the European courts.” Ferejohn and Pasquino, *op. cit.*, p. 1692.

⁴⁵² Eisgruber, *op. cit.* p. 98-99

⁴⁵³ M. Kumm, *op.cit.* As summarized by Zurn, “[t]he basic purpose and justification for the institution of constitutional review is the beacon and indicator of the exceptional moral truth that were discovered at the start of our collective religious-political learning process” C. Zurn, *Deliberative Democracy and Constitutional Review*, accessible at http://www.pgrim.org/philosophersannual/pawebarts/zurnb.htm#_ftn49

Political deliberation is an intellectual exercise within real politics. It is not a thought experiment to check which principles would derive from a hypothetical original position or a mere heuristic device to envision what would emerge from an ideal speech situation. It is an admirable gamble of political imagination. It tries to instil the faculty of reason in a domain of human interaction defined by the exercise of coercive force. It tries to confront brute power with reasons that are publicly acceptable.⁴⁵⁴

205. Hence if deliberation is such a complex goal to reach, an inquiry into the real-life compliance of judges with deliberative ideals is warranted.
206. The reason for the confusion between high expectations for courts' capacities for reason and deliberation on the one hand and wishes for a strong public role of the Judiciary on the other hand, is due to the form of Constitutional Courts. Mendes stresses that if collegiality is a fact of courts, constitutional adjudication is different than classical courts adjudication.⁴⁵⁵ In a nutshell, "our constitutional courts are continuous constitutional conventions, except that their decisions do not need the ratification by the *people*".⁴⁵⁶ A constitutional court is, so Mendes, a "co-framer of the political".⁴⁵⁷ Therefore, expectations of legitimacy are different.
207. Mendes is not the only one suspecting that judges do not actually conform to Eisgruber, Rawls and Dworkin's romanticized portraits of high courts.⁴⁵⁸ To him, courts would be deliberative if they fulfilled their mission by effectively "promoting public contestation, fostering collegial engagement and crafting a deliberative written decision." Thus, their function entails two main dimensions: decision making, which includes the deliberation and its output, and the judicial decision and its effect on public debate.

⁴⁵⁴ C. H. Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford, Oxford University Press (2013), p 48.

⁴⁵⁵ As an example of obvious differences, constitutional judgments are "valid erga omnes and practically removes the statutes from the legal system". adjudication "form of decision-making that is usually associated with a bilateral confrontation of pleadings that informs and delimits the judgment by a disinterested third-party to the dispute." Mendes, *op. cit.* p.73.

⁴⁵⁶ Mendes, *op. cit.* p. 78. quoting M. Cohen, "Legal Theories and Social Science." *International Journal of Ethics*, Vol. 25, No. 4: pp.469–493(1915) at 484.

⁴⁵⁷ *Ibid.*, p. 80.

⁴⁵⁸ See also Ferejohn and Pasquino, *op. cit.*, Mendes *op. cit.*, Sen *op. cit.*, Gutmann & Thomson, *op. cit.*, M. Cohen "Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort", *American Journal of Comparative Law*, Vol. 62, No. 4, (2014), pp. 951-1008. Some have even asserted that Parliaments were often underestimated in their capacity for the use of reason and legal reasoning in legislation making.

208. In his real-life deliberative performance assessment toolbox, Mendes outlines the mission of deliberating judges by breaking down the deliberative process in three stages. The first phase is predecisional, *i.e.* it involves public debate on the issue raised by the case. The decisional phase comes second and corresponds to Ferejohn and Pasquino's concept of "*internal deliberation*" *i.e.* collegial deliberation within the court and with the parties and concerned persons.⁴⁵⁹ The postdecisional phase starts at the moment the decision has been published.
209. With regard to the second phase, Mendes adds a few criteria collegial deliberation should respect. Participants are to be open to revise their views, and to act according to ethics of consensus, commit to respect the ethical element of respect, practice empathy and be responsive to all points of view. Decisions affecting the deliberators and indirectly concerned people need to be taken collectively, especially if they are authoritative.⁴⁶⁰
210. Mendes stresses that procedural rules neither do guarantee true deliberation in practice,⁴⁶¹ nor that decisions complying with rules of procedure will be morally deeper.⁴⁶² Deliberation cannot be equaled with voting and bargaining. However, research shows that in the case of the U.S. Supreme Court, the practice of "judicial decision making might be more similar to legislative bargaining than to a truly deliberative model".⁴⁶³ Moreover, the Courts' hearing and deliberation between each Justices' chambers are also very private.⁴⁶⁴ Ferejohn and Pasquino emphasise that contrary to their European colleagues—*i.e.* national constitutional judges and not European Court judges—U.S. Justices tend to deliberate in a written manner by writing memos, and to attempt to influence each other privately rather than within a group.⁴⁶⁵

⁴⁵⁹ Ferejohn and Pasquino, "Lessons from Europe", *op. cit.*, p. 1692.

⁴⁶⁰ Mendes, *op. cit.*, p. 18.

⁴⁶¹ "The ways the quality of deliberation and the institutional devices interrelate in practice are possibly hard to formalize or to predict. The mere existence of favorable procedural routes does not guarantee a constant deliberative performance, but constitute the basic conditions for such aim." Mendes *op. cit.*, p.105. In fact, not all deliberative democrats believe that the if the court is "principled", it is a deliberative institution Waldron, "The Core of the Case", *op. cit.* To Gutmann and Thomson, this is empirical question more than a principled one.

⁴⁶² *Ibid.*, p. 80. In fact, a few of them like Habermas and Zürn adopt a rather procedural view of legitimate constitutional adjudication, or support a more modest role for constitutional adjudication, except when democratic self-government is at stake.

⁴⁶³ Sen, *op. cit.*, p. 321.

⁴⁶⁴ *Ibid.*, p. 311, 320.

⁴⁶⁵ J. Ferejohn and P. Pasquino, "Constitutional Adjudication: Lessons from Europe", *Texas Law Review* Vol. 82, 1671 (2003-2004), p. 1696 (hereinafter "Lessons from Europe").

Moreover, the American judiciary progressively abandoned its culture of consensus,⁴⁶⁶ and their practice is remarkable for its plurality.⁴⁶⁷ Justices' collective decisions are called "opinions"—which is quite revealing as to the lack of consensus among deliberators. Disagreement or different approaches on the law are displayed at length in separate opinions.⁴⁶⁸ This trend is growing as well as the European Court's decisions increasingly display plurality of opinions among judges.

211. In Mendes third phase, decisions need to be collective and thus accessible to the persons concerned directly and indirectly, *i.e.* the average citizen.⁴⁶⁹ However, "majority opinions" are not easy to understand to neophytes. Consequently, however well justified opinions may be, "deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content".⁴⁷⁰ On some aspects, European Court's judgments suffer the same problems than Supreme Courts' opinions. While they are more structured, their length and details make them hard to read, let alone to summarize, to non-specialists. Moreover, judgments are still only accessible

⁴⁶⁶ On the evolution of the practice of consensus decision making within the Supreme Court, see generally R. Post, "The Supreme Court Opinion As Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court", *Minnesota Law Review*, Vol. 85, 1267 (2000-2001), pp. 1267-1390.

⁴⁶⁷ "Dworkin has produced an apotheosis of appellate judging without attention to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality. ...Plurality ... is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom", Mendes, *op. cit.*, pp. 91-92.

⁴⁶⁸ Although some claims the Supreme Court has been making efforts towards consensus and increasingly releases unanimous decisions. Note that the subject matter of those statistics regards the whole Constitution, not only civil rights. Moreover, the statistics are to be read with caution, as "unanimity" can have more than one meaning: "The second measure counts only those cases in which every Justice joined some part of the majority opinion. This approach takes a more forgiving view of unanimity and allows individual Justices to write concurring opinions that expand on their view of a case. However, this measure still does not count cases in which five Justices join together for a majority opinion but the other four Justices agree with the result but not the reasoning". See <http://www.scotusblog.com/2014/07/a-few-notes-on-unanimity/>, (blog from July 10th, 2014) 10:40, accessed on Oct 30th, 2015.

⁴⁶⁹ According to Mendes: "A deliberative written decision, thus, is not a cryptic and arcane announcement of an allegedly right answer. Neither is it an apodictic assertion of what the constitution means by virtue of the court's putative interpretive superpowers. It is rather the product of an effort to deal with all points of view in a thorough manner." *Op. cit.* p. 110.

⁴⁷⁰ Gutmann & Thompson, *op. cit.* p. 4. See also M. Sen *op. cit.* p. 313. On Rawls ideal of public reason and decisions based on accessible reasons, Maya Sen claims: "To this extent, reasons provided must be more than simply a collection of judges' own personal opinions. Neither should the proffered justifications be based on a particular religion or an idiosyncratic worldview. Justifications reflected through judicial opinions should be written in a way that people from all walks of life can understand". *op. cit.* p. 313.

to French or English speakers, and only rarely translated in the language of respondent states.⁴⁷¹

212. The decisional stage is when the concept of “deliberative court” becomes thorny. Normative pro-deliberation scholars have praised—or wished—that the Supreme Court were an example of deliberativeness. Scholars like Dworkin or Rawls meant by this that decisions were based on reason, which suggests that they focused on reasoning, and therefore thus internal deliberation. However, in their comparative study of Courts, Ferejohn and Pasquino found two different types of deliberative courts: the European Kelsenian type, more internally deliberative, and the American type, more externally deliberative. It does not seem to matter what type of deliberativeness courts display, for the “authority of the courts ultimately rests on giving persuasive legal reasons in support of their holdings”.⁴⁷² An outwardly deliberative court may be composed of judges that see themselves as deliberators meant to communicate with their fellow citizens. Such court will hence draft decisions for a public, seeking to trigger deliberation. It will deliberate at the *post decisional* stage⁴⁷³ in the public sphere instead of containing deliberation within closed forums like parliaments or courts, at the expense of internal deliberation.⁴⁷⁴ Yet does a choice need to be made between the quality of decisions and strengthening democracy through public debate? According to Sen, it is not so, as some legal topics are more ripe for public discussion, which is the case of civil rights: “the public nature of these “fundamental” rights, their salience in contemporary public dialogue, and their importance in citizens’ day-to-day lives means

⁴⁷¹ Any interested party looking for a case on the ECtHR HUDOC database can see in the “Case Details” tab the following disclaimer: “Translations into non-official languages are not made by the Registry of the Court and it does not check their accuracy or linguistic quality. They are published in HUDOC for information purposes only and the Court accepts no responsibility for their quality or content.”

⁴⁷² Ferejohn, and Pasquino, “Lessons from Europe”, *op. cit.* p. 1680 referring to The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”)

⁴⁷³ For example, “If the individual Justices see themselves as involved in a large discussion in the public sphere, they may be less inclined to seek to compromise their own views with others on the Court. They may aim not to persuade their fellow Justices, but to argue with them and others in the public sphere. therefore “there is too little genuine internal deliberation on the Supreme Court. In our view, this is at least partly due to the efforts of individual Justices to develop and exhibit their own personal views of the Constitution and to resist accommodation with others on the Court”, Ferejohn and Pasquino, “Lessons from Europe”, *ibid.*, pp. 1698-1700.

⁴⁷⁴ *Ibid.* Critiques have pointed to the fact that being too outwardly deliberative might have a negative effect not only on the quality of judges’ reasons. Firstly judges do not debate their colleagues but the public: their preferences are usually public and less likely to evolve during deliberation, especially if judges are appointed on account of their political and legal opinions. See Sen, *op. cit.*, p. 330.

that this is a prime area for the courts to engage in the kind of public reasoning required by deliberative democracy”.⁴⁷⁵ However, do judges truly engage in such kind of reasoning? To Sen, they do not: A Court has too many legal tools at her disposal to avoid being deliberative when it is more expedient.⁴⁷⁶ Moreover, public perceptions of judges political engagement encourages parties to adopt behaviors that hamper true public deliberation, such as argumentatively targeting specific judges based on their known preferences so as to sway the judgment in their favor.⁴⁷⁷ Consequently, the Supreme Court *could but does not* live up to her potential of deliberativeness.⁴⁷⁸ Conversely, with less public and media exposure and a safe international distance, the European Court would qualify as a more deliberative institution. Nevertheless, politically divisive elections of judges have begun,⁴⁷⁹ if to a much lesser extent than in the United States, added to other similarities also affect the deliberative potential of the European Court.⁴⁸⁰

213. In conclusion, if one takes reason as one of the most important criteria for democratic legitimacy, then the high judicial institutions certainly have a higher legitimacy potential, especially in the field of rights.⁴⁸¹ As Mendes stresses, depending on political contexts and circumstances, judges espouse a more or less deliberative behavior, which can be more favorable to public debate, and thus strengthen democratic engagement. Therefore, at this stage, the scholarly challenge to democratically legitimize the

⁴⁷⁵ *Ibid.* She continues “After all, the public understands with agonizing clarity what it means to be denied privacy in their sexual and reproductive lives, and they understand what it means to not be able to marry the person they love”, *ibid.*, p. 327.

⁴⁷⁶ Sen, *ibid.*, p.324-325.

⁴⁷⁷ Scholars add that this orientation of the judges has motivated lawyers to target specific judges in their pleading to sway the “median voter”, i.e. the Justice most likely to tip the balance of the Court’s judgement in their favor. See D. Black, “On the Rationale of Group Decision-Making”, *Journal of Political Economy*, Vol. 56, No. 1, 23 (1948), pp. 23-34. See also A. Downs, *An Economic Theory of Democracy* (1957). K. T. McGuire et al., *Targeting the Median Justice: A Content Analysis of Legal Arguments and Judicial Opinions* (May 24, 2009) (unpublished manuscript) (finding that litigants are more likely to include arguments that appeal to the median Justice). Referred to by Sen *op. cit.*, p. 522.

⁴⁷⁸ The liberality for multiple voices, and the absence of any constraint, ethical or otherwise, against such practice, harms the capacity of the US Supreme Court to play a deeper deliberative role in American politics.” And SC judges should comply with deliberative “norms towards pursuit of consensus and towards ethics of compromise and self-restraint with regards to the public exhibition of personal idiosyncrasies,” Mendes, *op. cit.* p. 95.

⁴⁷⁹ K. Lemmens, “(S)electing Judges for Strasbourg, A (Dis)appointing Process?”, in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Procedures of the European Courts*, Oxford, Oxford University Press (2015), p. 108.

⁴⁸⁰ See generally Bobek, “Selecting Europe’s Judges”, *op. cit.*

⁴⁸¹ As noted above by Sen, deliberativeness is more likely in the field of rights.

judiciary is partially won. To strengthen their claim to legitimacy, scholars now only need to convince the public that high courts also are representative.

2.2. The Judiciary as Representative Institution

214. Are courts democratically legitimate? Scholars claim they are, because they do not restrict their definition of democracy to representativeness through the approval of an electorate. Firstly, they include the capacity for rational judgment and deliberativeness. Secondly, their conception of representativeness is also broadened: they claim that judges are representative because the reasons they use are actually representative of people's reasons; hence the Court is *argumentatively* representative. More controversially, other scholars have gone so far as to assert that the U.S. Supreme Court's decisions were conform to public opinion, which sufficed to legitimize it democratically, and to counter accusation of "countermajoritarianism". The next subsection investigates these claims and to what extent they are applicable to an international court.

2.2.1. Courts as Social and Argumentative Representatives

215. In the first half of this chapter, I explained that conceptions of representative democracy vary in part depending on the importance given to citizen participation in the public sphere. Perhaps because institutions cannot represent citizens efficiently at all levels of government, is it all the more important to account for representativeness also within the unelected branches of government, so the will of the citizenry is taken into account at all levels. Following this impulse, several scholars have argued that constitutional courts were representative institutions.
216. The concern for representativeness reveals a search for two qualities in candidates for office: First, a capacity to discern and fulfill the needs and will of the constituents, second, accountability.⁴⁸² Judges are hence democratically representative if they possess both these qualities. I henceforth examine institutional tools of representativeness meant to ensure that the judiciary is representative of the social and political make-up of the population. Next I inquire into what makes the judicial function

⁴⁸² A. Lever, "Democracy and Judicial Review: Are They Really Incompatible?", *Perspectives on Politics*, (2009) Vol. 7, No. 4, p. 811.

representative in a different way; through the arguments they use when justifying their decisions.

2.2.1.1. Social and Political Representation

217. The claim that non-elected judges are representative is counterintuitive. Proponents of this theory, writing in the American context, started from a negative premise: they intended to defend the U.S. Supreme Court from those who accused it of being anti-democratic. They endeavored to prove that the Supreme Court was democratic in a negative way: *because it was not as antidemocratic as it appeared*. For example, Eisgruber asserts that courts are no less representative than other institutions like parliaments.⁴⁸³ He names the existing institutional tools ensuring that judges have some representative and thus democratic pedigree, such as confirmation of candidates by an elected institution, the Senate in the case of the Supreme Court.⁴⁸⁴ Eisgruber also claims that American Justices' life tenure warrants for judicial "disinterestedness", *i.e.* shields them from parties' ideology.⁴⁸⁵ However, the appointment and confirmation process meant to ensure a certain level of representativeness has the opposite effect, that open efforts by the presidential majorities to appoint on the bench judges responsive to the same principles as parties in power.⁴⁸⁶
218. Beside elections, several institutional tools were developed to ensure that institutions would be able to take into account the concerns of diverse social groups present in a population. In legislatures, social representativeness is most commonly accomplished through an allocation of seats according to the numerical importance of each social group. Judicial design cannot adopt the same method because of the smaller number of office holders and the fact that constitutional—as much as international—judges are not usually elected. However, the judicial office is argumentation oriented: parties have to make their case to judges. Therefore, representativeness is provided for by making sure that members of major social groups are present on the bench, so that elements of

⁴⁸³ Eisgruber, *op. cit.* pp. 50 (Parliaments may represent their constituent poorly, while courts might represent the people well although in a different manner. *Ibid.* pp. 48-78.)

⁴⁸⁴ In the United States, this however at best insures that candidates are representative both of the executive's ideals and the parties' mainline ideologies.

⁴⁸⁵ Eisgruber, *op. cit.*, p. 59. (Judges disinterestedness would stem from their life tenure).

⁴⁸⁶ As mentioned earlier, the fact that the Court is externally deliberative in the United States, *i.e.* that judges frequently debate in the public spheres on the issue that they are faced with, reinforces the bipartisan aspect of their function. See Ferejohn and Pasquino, *op. cit.*, 373-74.

social life can be seen through the lenses of judges' members of those social and political groups that make up the life of a polity. Also, it is assumed that arguments of different social groups will be more likely to be—or feel—understood by the Court if members of these groups sit on the bench. Thus, representativeness is accomplished when social divides and possibly members of minorities are, so far as it is possible, among members of the bench.⁴⁸⁷ Such divides generally include gender, regions, ethnic and linguistic, economic, and religious backgrounds. Representativeness is generally provided for in rules of court or in appointment practices. But although it is easier to reflect social divides in a *national* constitutional court than in an *international* human rights court, this concern was present throughout the European Court's construction as well.⁴⁸⁸

219. In the United States Supreme Court, concern for gender or religious representativeness was first displayed through the purposeful geographical selection of candidates from different regions of the country (19th century), then from different social groups (20th century). Religion (roman catholic, Jewish), gender, *i.e.* women (Sandra Day O'Connor) and minority members (African-Americans with Thurgood Marshall and Clarence Thomas, Hispanic minority with Sonia Sotomayor) were progressively added to the highest bench. In Europe, Court appointment rules provided by the Convention⁴⁸⁹ are vague and do not encompass provisions related to diversity besides the natural geographical diversity ensured by the appointment of one judge per member states, and the geographical diversity of chambers. Democratic legitimacy of judges and justices is ensured in the United States and Europe alike through an indirect democratic process:

⁴⁸⁷ Annabelle Lever mentions “descriptive representation”, a theory claiming that different groups and society divides should taken into consideration during appointment procedure, either because it is required by law—if possible—or in practice, *op. cit.*, p.810.

⁴⁸⁸ National representativeness has been provided for in the selection of judges, each state having one official judge to select (Article 51) The organizational layout of the Court also ensures that the Grand Chamber each section composition is geographically and balanced with members from the different regions of Europe (Rule 24 for the Grand Chamber, and Rule 25 for the sections). Finally social representativeness—mostly the gender issue—is included in the Rules of Court (Rule 25).

⁴⁸⁹ For these reasons, the Parliamentary Assembly of the Council of Europe (PACE) laid out criteria for the nomination of judges by contracting states: “The Assembly decided to improve its own procedure for choosing between the three candidates nominated by each Contracting Party. To this end, it adopted a number of texts: Resolution 1082 (1996) and 2015 Recommendation 1295 (1996) in April 1996, Resolution 1200 (1999) in September 1999, Resolution 1646 (2009) in January 2009 and Resolution 2002 (2014) in June 2014”. See Procedure for Electing Judges to the European Court of Human Rights, Information Document Prepared by the Secretariat, (October 2015). The Assembly, showing concern for democratic legitimacy and representativeness, instructed its sub-committee “to make sure that in future elections to the Court member states apply the criteria which it has drawn up for the establishment of lists of candidates, and in particular the presence of candidates of both sexes”.

members of parliament—Senate in the United States,⁴⁹⁰ Parliamentary Assembly in the Council of Europe—approve or reject candidates proposed by executives. Politicians gathered in the Parliamentary Assembly of the Council of Europe and scholars alike have advocated gender diversity on the bench.⁴⁹¹ For example, at the article 6 of her Resolution 1429 (1999), the Parliamentary Assembly of the Council of Europe (PACE) laid out criteria to guide member states in their selection process. To provide for representativeness, the Assembly asked Contracting States to present candidates of both genders.⁴⁹²

220. Besides socio-political representativeness, it was argued that courts can be a venue for citizens to represent *themselves* and their case for reform where the political environment would require too much effort and time to succeed. In Mattias Kumm's words, a court can be seen as a forum for Socratic contestation, where citizens can challenge public acts of government.⁴⁹³ For a citizen, contesting acts of governments in court can be deemed necessary, for example in cases where old or neglected legislations that are causing damages in private lives have not mobilized the attention and energy of enough people for representatives to try to reform them. Here, citizens can participate as their own agent:⁴⁹⁴ courts become representative through individual representation. Such practice could be objected to for being undemocratic. For example, to Jeremy

⁴⁹⁰ Article II of the United States Constitution: "[The president] shall have power, by and with the advice and consent of the Senate, to make treaties..., he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court".

⁴⁹¹ N. Grossman, "Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?", *Chicago Journal of International Law*, Vol. 12, No. 2, (2012). With regard to the United States, see, C. Tobias, "Diversity and the Federal Bench", *Washington University Law Review*, VOL. 87 (2009), pp. 1197-1211. (History and assessment of regulation and practice of federal judicial appointment and respect for gender and ethnic diversity) and C. Tobias, "Filling the Fourth Circuit Vacancies" *North Carolina Law Review* Vol. 89, 2161 (2010-2011) (Comparative study of 4th circuit federal court and Supreme Court judges' selection in the United states).

⁴⁹² Following the clear disregard by Belgium, submitting a whole-male candidate list in 2012, and the passive response by the Parliamentary Assembly, David Kosař questions the solidity of the accomplishments in terms of gender balance in the last decades. D. Kosař, "Selecting Strasbourg Judges, A Critique", M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Procedures of the European Courts*, Oxford, Oxford University Press (2015), p.132.

⁴⁹³ M. Kumm, *op. cit.*

⁴⁹⁴ See Lever, *op. cit.*, p. 813. She adds: "Democratic government does not demand special virtue, competence or wisdom in its citizens or their leaders. From a democratic perspective, therefore, the case for judicial review is that it enables individuals to vindicate their rights against government in ways that parallel those they commonly use against each other", p. 815. On citizens as agents of their own cause in constitutional law, see D. Feldman, "Public Interest Litigation and Constitutional Theory", *Modern Law Review* Vol. 55 (1992), pp. 44-46. On citizens of agents of international law see D. Jacobson and G. B. Ruffer, "Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy", *Human Rights Quarterly*, Vol. (25), No. 1, (February 2003), pp. 74-92.

Waldron, because as it circumvents the classic rules of the democratic norm-making process, it is countermajoritarian. Nonetheless, using courts as forum for reform is of particular interest because the effect of a case can extend further than the courtroom, all the way to the public sphere, and ultimately be the starting point of more extensive reforms.⁴⁹⁵ Courts can therefore deliver the outcome or be the trigger for necessary reforms in a democracy. Thus citizens can perceive courts as reliable trustees able to “prevent the abuse of the People’s name in normal politics”.⁴⁹⁶ Court therefore have a true public deliberative potential.

221. However, since judicial decisions can entail important social changes such as “superprecedents”⁴⁹⁷ or “constitutional moments”,⁴⁹⁸ allowing individual or civil groups to frequently circumvent the classic election-based representative democratic process and social consensus through courts could become deeply problematic for democracy. In this regard, the Supreme Court can be, so Ackerman, a legitimate agent, capable of recognizing the deliberative quality of the civic engagement that triggered a new superprecedent, thereby ensuring the true existence of social consensus.⁴⁹⁹ However superprecedents have all the more strength if, beyond being brought to judges by extensive civic engagement and public debates, they are also argumentatively representative.

⁴⁹⁵ “Regardless of whether they win or lose, litigants can succeed in raising the profile of an otherwise marginal issue and bringing it into the limelight for public debate. Individuals and groups who engage in litigation can succeed in gaining popular support for a cause, even if they fail to persuade the judges of the Supreme Court.” A. Kavanagh, “Participation and Judicial Review, A Reply to Jeremy Waldron”, *Law and Philosophy*, Vol. 22, No. 5, (September 2003), p. 483.

⁴⁹⁶ B. A. Ackerman, “The Storrs Lectures: Discovering the Constitution”, *Yale Law Journal*, Vol. 93, No. 6, (1983-1984), p. 1030.

⁴⁹⁷ Ackerman explains that the constitutional canon of the United States, composed both of the Constitution and the practice, does not take into consideration the evolution of the country since ratification : “At present, however, there is a yawning gap between this official canon and the nation-centered self-understanding of the American people. The profession has been trying to fill this gap with an operational canon - as I shall call it - that promotes landmark statutes and superprecedents to a central role in constitutional argument.” B. Ackerman, “The Living Constitution”, *Harvard Law Review*, Vol. 120, No. 7, 1737, (2006-2007), p. 1750. In his article, Ackerman comments on confirmation hearings where future Justices Roberts and Alito were asked by Senators if they considered the abortion case *Roe v. Wade* as a superprecedent.

⁴⁹⁸ See generally Ackermans’ “Storr Lecture”, *op. cit.*

⁴⁹⁹ High degree of participation through amici curiae, sponsors, mobilization of civil society around a case and high media salience all can be indicators of what is at stake in a case and the degree of social consensus or disagreement on an issue. Whether such a participation is accurately indicative of what side of an issue the majority of the people lean on is a different debate, discussed infra in Chapter Two.

2.2.1.2. *Argumentative Representation*

222. Scholars claim that judges can be representative “argumentatively”.⁵⁰⁰ Adjudication indeed involves making a case in front of judges and a process of drafting a decision, which involves justification. They claim that judges are argumentative through their argumentation in the process of justification. “Argumentative representation” is the process through which judges listen to arguments presented to them internally—during proceedings—and externally—in communication with the public sphere—and take them into account in the outcome of the case and its justification.⁵⁰¹ Therefore, arguments are “representative” not only because they have been expressed extensively in the public sphere by various actors (citizens, politicians, the civil society, litigants and defendants), but also because the process of justification by judges is evidence of accountability.⁵⁰² Both criteria of representation are thus fulfilled.
223. German legal theorist Robert Alexy claims that courts could be conceived as “venue for argumentative representation”.⁵⁰³ To argue this, Alexy applies a discourse theory of democracy. This ideal, like deliberative democracy, emphasizes the importance of deliberation within the political system and the public sphere. He also calls it “discursive democracy”.⁵⁰⁴ According to Alexy, because in performing its function, a court is acting exclusively as an argumentation forum, “the representation expressed by a constitutional court is an exclusively argumentative one.”⁵⁰⁵ However, to be representative, reasoning must satisfy two requirements: Contain “sound and correct arguments”, and “rational persons who are able and willing to accept sound or correct arguments for the reason that they are sound or correct”.⁵⁰⁶ “Representativeness” thus proceeds from widespread *acceptance* of judges’ arguments, not from the existence of arguments in the public sphere, nor from the social representativeness of judges. As in

⁵⁰⁰ R. Alexy, “Balancing, constitutional Review and Representation”, *op. cit.*, pp. 579-81.

⁵⁰¹ On “external” and “internal” deliberation, see J. Ferejohn and P. Pasquino, “Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice”, in W. Sadurski, (ed.) *Constitutional Justice East and West*, Kluwer (2002) (hereinafter “*Deliberative Institutions*”). On courts taking into account arguments found in the public sphere, see C. H. Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford, Oxford University Press (2013) pp. 106-7.

⁵⁰² Annabelle Lever shows, democratic justification is a way for judges to show democratic accountability. Lever, *op. cit.* p. 808.

⁵⁰³ Alexy, quoted by Mendes, *op. cit.*, p. 87.

⁵⁰⁴ R. Alexy, “Discourse Theory and Fundamental Rights”, in A. J. Menéndez and E. O. Eriksen (eds.), *Arguing Fundamental Rights*, pp. 15–30, Springer (2006) (hereinafter, “*Fundamental Rights*”).

⁵⁰⁵ Alexy, “Balancing”, *op. cit.*, p. 581.

⁵⁰⁶ *Ibid.*

Dworkin or Rawls, judges easily qualify as “rational persons,” and a quality that is less disputed in their case than in the case of members of Parliament. It is the use of the technique of balancing that provides a guarantee of judicial rationality.⁵⁰⁷ As a corollary of representativeness, constitutional review’s representativeness has priority over the representative legitimacy resulting from elections.⁵⁰⁸

224. Adopting a more social approach to representativeness than Alexy’s reason-based approach, one can ask *what arguments* are considered representative. In constitutional adjudication, argumentation occurs at different stages of the procedure: by applicants in the briefs and during the hearings, by the judges in the written decision. Debate also occurs among judges behind closed doors, among the parties, among politicians and citizens in the public sphere. Therefore, debates occur to different degrees of intensity, starting *before* the case reaches the Court, throughout all proceedings and after the Court’s decision. Following Ferejohn and Pasquino’s intuition, one could say that internal and external deliberations expose judges to existing arguments of both sides of a controversy and enrich the debate and judges’ thought process while they reach a decision. To Alon Harel, this process shows how democracy and judicial review are not mutually exclusive: Judges are sensitive, not oblivious, to social values and enforce them in their decisions.⁵⁰⁹ Here representativeness is measured only partially in terms of numbers: It is not the numbers of persons represented and measured according to the “one man one vote” principle; it is the number and the quality of arguments that are measured. And the more salient a case will be, the more likely it is that the public sphere will express a wider diversity of arguments. Thus “in order to represent people adequately in regard to issues of moral principle, a democratic government will have to be sensitive to the complex ways in which its citizens think about and confront moral matters”.⁵¹⁰ And if judges are rational and representative, aren’t they in the best position to fulfill such demand?

⁵⁰⁷ Alexy, “Fundamental Rights”, *op. cit.*, p.23.

⁵⁰⁸ Alexy, “Balancing”, *op. cit.*, p. 580.

⁵⁰⁹ A. Harel, “Rights-Based Judicial Review: A Democratic Justification”, *Law and Philosophy*, Vol. 22, No. 3/4 (Jul., 2003), p. 276.

⁵¹⁰ Eisgruber, *op. cit.*, p. 53. Also “a democratic government should aspire to be impartial rather than merely majoritarian: it should respond to the interests and opinion of all the people, rather than serving the majority, or some other fraction of the people”, *ibid.* p. 54.

225. It is ultimately on the quality and, in Dworkin's words, on the *integrity* of judges that rests their capacity to make the synthesis of all types of arguments submitted to them and present in the public sphere, and to draft a decision that contains *arguments representative* of the social and political values of their fellow citizens. Indeed, it is not their legal acumen but the judges' sensibility to fellow citizens' values, and their institutional isolation—which purportedly shields them from party politics, political idiosyncrasies, and the potentially corrupting effect subsequent career prospects could have⁵¹¹—that puts the Judiciary in a better position to make the moral judgments involved in basic rights adjudication.⁵¹² Judicial review's legitimacy also rests on its institutional features, which makes it likely that “judicial reasoning will be convergent with and embedded within a larger societal discussion about moral issues [and based on] moral reasons that enjoy popular appeal”.⁵¹³ In this manner, judges' decisions are representatives of the people's convictions about what is right. For example, Eisgruber's judges are not strictly representative: they speak *for the people*. Thus, judges may not be neutral in the strict sense, but political isolation puts them in a better position than citizens to take decisions based on their moral belief and to be accepted by citizens who believe in judges' good-faith efforts to make decisions according to the public good. Eisgruber's judges proceed, in Zurn's words, to the “juridical representation of people's moral reason”.⁵¹⁴ To Eisgruber, judges also are in a position to take responsibility for their decisions because their vote counts more in a small group than citizens' vote in a democracy, therefore and they possess more of the public accountability that a public decision entails. On the contrary, to Michelman, judges are representative⁵¹⁵ because they are *in dialogue* with citizens: if decisions reflect the content of public discussions, then citizens, even if they substantively disagree, will be

⁵¹¹ According to Eisgruber, “it ought to reflect the benefits of public discussion, rather than the idiosyncratic whims or intuitions of a few privileged decision-makers”. *Ibid.*, p. 56.

⁵¹² Eisgruber does not believe judges have a better capacity than random citizens to make decisions on moral issues, but that their institutional positions shield them from interest consolidation.

⁵¹³ Eisgruber, *op. cit.* p. 71.

⁵¹⁴ C. Zurn, “*Deliberative Democracy*”, *op. cit.*, p. 172.

⁵¹⁵ And that is what the Supreme Court majority seemed to believe when declaring in 1992 in *Planned Parenthood v. Casey*: “Like the character of an individual, the legitimacy of the Court must be earned over time... [The people's] belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. ... The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation, to which it is responsible”, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), pp. 865-6.

more likely to respect them,⁵¹⁶ and perhaps welcome their judgment as the outcome of a process of democratic interpretative deliberation.⁵¹⁷ Ultimately, Lever concludes, it is the obligation to justify their decisions and the willingness to expose themselves to challenges, rather than sidestepping a problem on procedural or technical grounds,⁵¹⁸ that strengthens the case for judges' representativeness. They will show accountability, so "when these challenges take the form of further legal cases, judges will not easily be able to duck or ignore those challenges".⁵¹⁹

226. In conclusion, if constitutional courts, and potentially human rights courts, are not more popularly representative than directly elected institutions, they are claimed to be in the very least differently representative. To this extent, they would possess some degree of popular legitimacy, be it limited to carefully selected public arguments or reasons. Accordingly, the judiciary would be conveniently immune from many of the most dangerous features of popular electorates to individual rights: compulsive and angry behavior, or prejudiced decision-making. As a logical next step, scholars have expanded their inquiry into another possible constitutional path: consensus constitutionalism.

2.2.2. Consensus Constitutionalist Doctrine: The Courts and Mainstream Public Opinion

227. The next line of theory treating of the representativeness of judicial review shows some continuity with theories that claim that the legitimacy of the Judiciary stems from extensive judicial deliberation, and but also some differences. Adverse to Popular constitutionalists,⁵²⁰ some of whom advocate either the abolition or a substantial reform

⁵¹⁶ "We would be reserving our respect for official efforts that pay us the respect of striving to make themselves ever more effectively available to be influenced by public debates that are fully and fairly receptive to everyone's perceptions of situation and interest and, relatedly, to everyone's opinions about what sorts of arrangement really do make public deliberation fairly receptive to everyone's views and really do render official bodies available to the influence of those views." F. Michelman, "Brennan and Democracy", *op. cit.*, p. 59.

⁵¹⁷ Zurn, *op. cit.*, p.176. See also Michelman : "Whoever cares about democracy, it appears, has to take a kind of responsibility for it, even beyond that of knowing what democracy is, without waiting for democracy to tell her. She has to take responsibility for becoming a national founder, basic-law-giver and cultural prophet all rolled up in one. Or else hand that responsibility over to the judges." Michelman, "Brennan and Democracy", *op. cit.*, p. 51.

⁵¹⁸ M. Sen, *op. cit.* p.324.

⁵¹⁹ Lever, *op. cit.*, p. 811.

⁵²⁰ Tushnet questions the principled character of judicial review: "Looking at judicial review over the course of the U.S. history, we see the courts regularly being more or less in line with what the dominant national political coalition wants. Sometimes the courts deviate a bit, occasionally leading to better political outcomes and occasionally leading to worse ones. ... On balance, judicial review may have

of judicial review to make it popular and responsive to popular sovereignty,⁵²¹ a new school has developed: Consensus Constitutionalism.⁵²² Among them, some claim that the Supreme Court's adjudicative methods *should be* popular⁵²³, some that it *is* popular⁵²⁴ because it is consensual.⁵²⁵ All assess "popularity" in different ways.⁵²⁶ I first outline some theories that do not see an incompatibility between judicial review and popular sovereignty because it *should be* or *it is* popular, and therefore, representative of an ongoing consensus. Next, I attempt to assess the applicability of such claims to a purportedly quasi-constitutional court, the European Court of Human Rights.

some effect in offsetting legislator's inattention to constitutional values. The effect is not obviously good, which makes us lucky that it is probably small anyway." M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, (2000), p.153.

⁵²¹ It is a "law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble", and "Law committed to the principle of universal human rights justifiable by reason in the service of self-government." Tushnet *op. cit.*, p. 181

⁵²² While he recognizes some virtues to Consensus Constitutionalism, among others that of being more realistic, Driver deplores that some of its proponents first have overestimated the extent to which a consensus exists in society, second, that they have an overly thin concept of the law, for many legal problems can call for different solutions. Third, some consensus constitutionalists have altogether abandoned a normative stance, by taking an overly descriptive approach (Friedman for example). Driver's own approach, which he calls "contested constitutionalism", claims that constitutionalism evolves along with social and political conflicts of everyday political life. J. Driver, "The Consensus Constitution", *Texas Law Review*, vol. 89 (4) (2011), p.758 Alexander and Solum call this form of constitutionalism also "expressive popular constitutionalism". L. Alexander, L. Solum, "Book Review. Popular ? Constitutionalism", *Harvard Law Review*, Vol. 118, 1594 (2005), p. 1626.

⁵²³ "Populist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics". Tushnet *op. cit.*, p.157. See also R. Parker, *Here the People Rule, a constitutional populist manifesto*, Harvard University Press, (1994) 144 p. J. Waldron, *The Dignity of Legislation*, Cambridge University Press, (1999), 224 p. (Chemerinsky classifies Waldron as a popular constitutionalist).

⁵²⁴ B. Friedman hence claims "The decisions of the justices on the meaning of the Constitution must be ratified by the American people". B. Friedman, *The Will of the People*, New York, Farrar Straus and Giroux (2009) p. 381.

⁵²⁵ These debates parallel the theories on the right ways to interpret the provisions of the Constitution. For example, widely cited John Hart Ely in the 1980s criticized interpretism, which recommends an interpretation as close to the text as possible, and the opposing and predominant other school advocating an interpretation of fundamental American values. Ely disagreed with both theories, and advocated a compromise: insuring majority governance while protecting minority rights. Ely insisted on a procedural view of due process as meant to protect the structure of government, designed to represent everyone's will. J. H. Ely, *Democracy and Distrust, A Theory of Judicial Review*. Harvard University Press (1981) 280 p.

⁵²⁶ For a clear explanation of popular constitutionalism see generally Alexander and Solum, "Popular? Constitutionalism?" *op. cit.*

2.2.2.1. *Judges as Followers of an Ongoing Consensus*

228. The strong authority of the United States Supreme Court is at the source of the heated scholarly, but also political, debates over the “countermajoritarian difficulty”.⁵²⁷ Although heated, these debates are also fertile. Scholars have shown the extent of their creativity from vindicating the legitimacy of a countermajoritarian institution, by defending for example judicial supremacy,⁵²⁸ to making their case against judicial review altogether.⁵²⁹
229. “Popular constitutionalism”,⁵³⁰ starts from the premise that “The People” are the primary titleholders of sovereignty and should consent to public decisions. Some of its proponents advocate a democracy without judicial review,⁵³¹ or a judicial review responsive to the will of “the People”.⁵³² Another strand of the school, the “consensus constitutionalists”, extensively uses history to prove that the Supreme Court is not “countermajoritarian”, but rather conforms to society’s consensus on constitutional matters, as a matter of fact, and to some scholars, also as a matter of norm.⁵³³ It follows

⁵²⁷ See generally, B. Friedman, “History of the Countermajoritarian Difficulty”, *op. cit.* Part One to Part Five.

⁵²⁸ See among others E. Chemerinsky, “In Defense of Judicial Review” *op. cit.*

⁵²⁹ Tushnet, *op. cit.*, but also Waldron, “The Core of The Case” *op. cit.*

⁵³⁰ Alexander and Solum define ‘popular constitutionalism’ as “the view that the people themselves are the agents who make, enforce, and interpret the Constitution. When the Constitution is violated, the people themselves enforce the Constitution, either by voting the rascals out or by rising up against them. When the Constitution is ambiguous, the people themselves are charged with resolving the ambiguity by deliberating about — and articulating — the people’s own view of constitutional meaning. These popular interpretations bind the executive, judicial, and legislative branches of government. And finally, if the people are unhappy with their written constitution, they can override, alter, suspend, or ignore it.” Alexander and Solum, *op. cit.*, p. 1617.

⁵³¹ To Chemerinsky, popular constitutionalism is opposed to judicial Review: E. Chemerinsky, “The Perils of Popular Constitutionalism”, *University of Illinois Law Review*, No 4 (2004) p. 673

⁵³² Supreme Court Justices would come to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions — an actual authority, too, not some abstract “people” who spoke once, two hundred years ago, and then disappeared. Kramer, “The people Themselves”, *op. cit.*, p. 253.

⁵³³ Consensus constitutionalism is a form of popular constitutionalism that is not opposed to judicial supremacy but advocates popular intervention in constitutional interpretation in a different form. The terminology of these different schools varies and differentiating them helps making the difference between the different claims. Therefore I adopt Driver’s terminology of “consensus constitutionalism”. Driver, *op.cit.* Consensus constitutionalism could be said to conform with the sociological vision of interpretation, according to which “[lawyers] are disinterested by the fact that the one that makes the law is a man of his time, totally imbued of the thoughts of his time, inhabited by the culture that surrounds him, who works with the viewpoints and the conceptions that he draws from his cultural surroundings, who talks with the words that have a century of history behind them, which meaning was fixed by the sociological process of a thousand-year-old linguistic development and not by the personaliy of the individual.” p.15: J. Kohler, « Judicial Interpretation of Enacted Law », in *Science of the Legal Method :Select Essays by Various Authors*, translated par Ernest Bruncken, Boston, The Boston Book Company, (1917), p. 187-201. My translation from P. Brunet, “argument sociologique”, *op. cit.*, p. 106.

that the Supreme Court is not democratically illegitimate. Consequently, the countermajoritarian reputation of the court, its heroic image of civil rights protector against intolerant crowds, is “overblown”.⁵³⁴ The Court is not countermajoritarian insofar as it won’t, or only rarely will, confront the mistaken opinions of a majority infringing a contested right, nor innovate and discover the existence of a new right.⁵³⁵ In fact, the way the Constitution is interpreted by the Court is conforming to the social spirit of the times, in other words, to the “Will of The People,” or of the majority. “The Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection”.⁵³⁶ People therefore maintain a say in the way the highest judges interpret the Founding Document, although indirectly.

230. According to Friedman, in order for the people to obtain Courts decisions conforming to their will, they exercise a relationship with the Court that is “dialogic”,⁵³⁷ that is a mediated interaction that occurs through social debate on a constitutional issue that judges are asked to deal with.⁵³⁸ Firstly, the type of interaction described by Friedman bears much resemblance to the dialogue described above about argumentative representation.⁵³⁹ He depicts a dynamic cascade of dramatic social events, ranging from the assertion of violation of right X by an individual, campaigns, controversy and media reporting, to the Supreme Court hearing of the case and its decisions, all the way to the aftermath, which includes the next judicial nomination debates and nomination hearing questions related to the issue X.⁵⁴⁰ Secondly, what Friedman stresses in his description,

⁵³⁴ In Klarman’s words “the overblown nature of the countermajoritarian hero image” M. Klarman, “What’s So Great About Constitutionalism?” *Northwestern University Law Review*. Vol. 93, 145, (1998), p.192.

⁵³⁵ In fact, Klarman even argues that famous cases labelled “countermajoritarian” were in fact not or very little countermajoritarian at the time, as the social consensus on the issue had already evolved, for example *Brown v. Board of Education*. 347 US 483 (1954), M. Klarman, “Rethinking the Civil Rights and Civil Liberties Revolutions”, *Virginia Law Review*, Vol. 82, No. 1 (1996), p. .7-8 (Hereinafter “Rethinking Civil Rights”)

⁵³⁶ Klarman, “Rethinking Civil Rights”, *op. cit.*, p.17.

⁵³⁷ B. Friedman, “Dialogue and Judicial Review”, *Michigan Law Review*, Vol. 91, 577 (1992-1993), p.581.

⁵³⁸ The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, constitutional interpretation is an elaborate discussion between judges and the body politic. *Ibid.*, p. 653

⁵³⁹ And thus confirms Michelman’s theory. See Friedman, *ibid.*

⁵⁴⁰ “If the issue is of general importance the Supreme Court may hear the case. At this point in the process, an issue, not just a case, is clearly being debated. The Court will hear argument about the issue, which will have been tailored throughout the litigation by the process of winnowing and synthesizing. Groups that might be affected will file their own briefs and will offer help to the parties. Debate is sharpened... The public notices when the Supreme Court decides. Reporters cover the cases the Court will hear - generating interest - and the decisions, which generate debate. Some people agree with the Court; others

is that the evolution of constitutional meaning through dialogic interaction involves not only judges and lawyers, but a multitude of actors playing a role many miles before and after the Courts takes a decision on a constitutional—and perhaps moral—matter: the individual dialogues on the topic within a group, then the issue reaches the media all the way to the judges and beyond in the wider public sphere. Thirdly, to Friedman, dialogue rests on the existence of a social debate on constitutional matters so that the actors involved in judicial deliberation and interpretation can hear each other's messages: The Court is at the center of the debate, not just the end of it, although its decisions settle the legal norm until the next precedent changes it. Over time, judges are swayed in their interpretation by a social display of intense convictions of the many actors involved.⁵⁴¹

231. Two main factors explain constitutional evolution. Firstly, regarding public values, “consensus constitutionalists note that Americans have repeatedly altered their conceptions and preferences. Americans subscribe less to a mindset than to a particular set of views, and that particular set of views can [and has] undergone significant revision over time”.⁵⁴² It is through the public display of those views that citizens have impacted judicial interpretation of the Constitution. Why would judges accept to be swayed by public values? It may be because they know their fallibility when they interpret an open-ended text describing generally an image of a desired society. Judges may be humble, as Sunstein believes.⁵⁴³ He does not believe that judges change their jurisprudence because their legitimacy requires acceptability by the public. Judges are not acting by sheer strategy: Being guided by the public is, so Sunstein, desirable.⁵⁴⁴ To Primus, strongly held public opinion, instead of being a *constraint* on judges, should

are outraged. ... This cycle of action creates more media attention... So it goes in infinite progress.” Friedman, *Ibid.*, p. 656.

⁵⁴¹ Judicial decisions can upset the status quo, requiring societal response and thus fostering societal consideration. Friedman, “Dialogue and Judicial Review”, *op. cit.* p. 670

⁵⁴² Driver, *op. cit.*, p. 768.

⁵⁴³ “judges cannot always know whether they are right, even about the meaning of the Constitution, and intense public convictions may provide relevant information about the correctness of their conclusion. If the prevailing method makes constitutional adjudication turn on disputable judgements of fact or morality, the beliefs of the public may indeed be relevant. It is important, however, to know whether these public beliefs are subjects to a systematic bias or to cascade effects. If so, there is much less reason to consider them, because they lack epistemic credentials”, Sunstein, “Constitution of Many Minds”, *op. cit.*, p. 143.

⁵⁴⁴ To Friedman however, the Court is in practice mindful of acceptability of her decisions. That is what Primus reproaches him: “The fact that the court stays within the bounds of “public tolerance is not a sufficient substitute because there are appropriate as well as inappropriate decisions to be found within this range.” R. Primus, “Public consensus as constitutional authority,” *George Washington Law Review*, Vol. 78, 1207 (2009-2010), p. 1214 (hereinafter “Public Consensus”).

rather be a factor in their decision-making process.⁵⁴⁵ Primus believes public opinion should be authoritative if it respects the basic values of the constitutional system.⁵⁴⁶ Thus the Court should take public consensus into account only if public consensus retains the truth, not if it is mistaken.⁵⁴⁷ The public view is only an indicator of the right answer.⁵⁴⁸ Judges are to keep a double consciousness; that of the valid law, and that of public consensus that can, in case of a difficult interpretation, point to a direction.

232. One important critique expressed against consensus constitutionalists is the vagueness of their terminology. For example, “public opinion” and “consensus” are used interchangeably, although they are not the same either in technical nor legal language.⁵⁴⁹ While scholars do not believe the Court relies on opinion polls—a behavior that would, no doubt, damage its reputation of moral, authoritative,⁵⁵⁰ neutral and non-political public actor.⁵⁵¹ Scholars themselves often rely on polls, among other sources, to show that opinion and jurisprudence move in the same direction. However,

⁵⁴⁵ Primus, the role of judges may be understood as making decisions “by reaching compromises between the election returns and what the judges themselves would most like to do”, *ibid.*, p. 1217

⁵⁴⁶ “[I]f the reason to treat something as a source of authority in constitutional decisionmaking is that doing so conduces to decisions that respect or vindicate constitutional values, and if the set of relevant (if contested) values includes democracy, the rule of law, and public identification with the regime, then the door is open to considering public consensus as a source of constitutional authority”. Primus, “public consensus”, *op. cit.*, p. 1220.

⁵⁴⁷ R. Primus, “Double Consciousness in Constitutional Adjudication”, *Review of Constitutional Studies* Vol. 13, No.1 (2007-2008) p. 5 (hereinafter “Double Consciousness”).

⁵⁴⁸ “[T]he views of the demos should be treated as a source of reasons in constitutional adjudication independently of whether textual, precedential, or some other kind of constitutional authority calls for the inclusion of those views. Public opinion here stands on its own bottom. Just as precedent is entitled to weight even though no constitutional text directs judges to consult precedent, strong public opinion – in cases where it has something to say – is entitled to weight even when no other form of constitutional authority so provides”. Primus, “Double Consciousness”, *op. cit.*, p. 8

⁵⁴⁹ A standard dictionary of politics for example defines public opinion either by its reference to a number of opinion holders—“the aggregation of the views of individuals in society”—rather than to an intellectual community of views on a given topic ; consensus is defined as a “cross-party agreement” on objectives, as “a set of parameters which bounded the set of policy options regarded by senior politicians and civil servants as administratively practicable, economically affordable and politically acceptable” – see *Oxford Concise Dictionary of Politics*, London, Oxford University Press (2009). See definitions for “consensus” at p.111 and “public opinion” at p. 442. We will devote more details to the issue of the difference between the two in a later chapter. For the moment suffices to say that “public opinion” has a popular dimension, whereas “consensus” has an elitist and specialist dimension.

⁵⁵⁰ To Forbath, there is a “difference between the power to act by dint of strategic canniness versus the power to act by dint of moral authority and the deference it may produce. W. Forbath, “The Will of the People? Pollsters, Elites, and Other Difficulties”, *George Washington Law Review*, Vol.78, 1191 (2009-2010), p. 1194.

⁵⁵¹ As a matter of fact, the ponctual reliance of the Supreme Court on social science has been the object of some studies and debates. The most renowned one was written by Paul Rosen in the 1970s, P. L. Rosen, *The Supreme Court and Social Science*, Urbana, University of Illinois Press (1972). See also A. L. Davis, *The United States Supreme Court and the Uses of Social Science Data*, New York, MSS information Corporation (1973), R. J Erickson, R. J Simon, *The Use of Social Science Data in Supreme Court Decisions*, Urbana, University of Illinois Press (1998)

even if they were correct, this fact would not establish a causal link between the two.⁵⁵² This is why the most reliable evidence of “popular constitutionalism” through consensus or attention to public opinion seems to require the careful scrutiny of the judicial output itself: the written decision.

2.2.2.2. The Judiciary as an Arbiter Between Fundamental Rights Philosophies

233. Popular and consensus constitutionalist scholarships are aimed at solving or discredit an old constitutional dilemma: the countermajoritarian difficulty, *i.e.* the constitutional court judicial legitimacy issue. Those who seek to apply their “solutions” or thoughts to an international institution, necessarily tumble into a big obstacle: Since an international rights court is no constitutional court in the strict sense, its legitimacy does not rest on a democratic legitimacy in the electorally-based representative sense, because its creation is not initiated by a *demos*, or a unified population that can express its will or consent through vote or through the public sphere. Therefore, there cannot be, strictly speaking, ‘popular human rights review’. Moreover, judges seeking guidance or confirmation in public opinion would have a much harder time succeeding, the diversity of cultures and languages making consensus, let alone a readable one, much less likely to exist. Even if reliable international polls existed, they would not make the task any easier, knowing how much language, culture and political context can influence the reading and understanding of a question.⁵⁵³
234. With regard to the specific case of the European *demos*, some scholars have attempted to determine if there existed a “European community”,⁵⁵⁴ a European public sphere.⁵⁵⁵

⁵⁵² Forbath, *op. cit.*, pp. 1201-2.

⁵⁵³ Polling methodology applying to a single population is already very sensitive to questionnaire construction methods, and results can be affected by small technical details. Responses can be strongly affected by factors such as types of questions asked (closed or open-ended), order of questions in the questionnaire, the population that is polled, etc. H. Weisberg, J. Krosnick, B. Bowen, *An Introduction to Survey Research, Polling and Data Analysis*, Thousand Oaks, Sage Publications, 3rd Ed (1996), pp.77-100. If some agencies now propose international polls, such as Gallup see <http://www.gallup.com/analytics/213704/world-poll.aspx> multicultural and multinational comparative surveys face different types of challenges, the sample design hinging on social and cultural contexts which can include countries with multiple language groups, political context and local survey laws, economic conditions and infrastructures influence survey costs, variations in countries polling culture and sampling methods, access to data etc. If new technologies and challenges improves new understanding of challenges that multinational surveys face, “many aspects of design and implementation continue to be opaque”. B-E Pennell, K.C. Hibben, “Surveying in Multicultural and Multinational Contexts” in *The SAGE Handbook of Survey Methodology*, Sage publications (2016), pp.157-173.

⁵⁵⁴ See generally R. Risse, *A Community of Europeans*, Ithaca, Cornell University Press, (2010)

⁵⁵⁵ See generally M. Conrad, *Europeans and the Public Sphere*, Stuttgart, Ibidem press, (2014).

However such research was accomplished with the purpose of challenging contentions of democratic deficit of the European Union. Firstly, if some scholars conclude that a European sense of community is budding, even existent at embryonic level,⁵⁵⁶ their claim only concerns the case of the European Union a community of 27 contracting states (until Brexit occurs) out of the 47 members of the Council of Europe. If it is difficult to assert with any certainty the existence of a European sense of community – less than an identity—it would be even more difficult to assert the existence of a community of Europeans within the territory of the Council of Europe, what I will call ‘wide-Europe’. But if the existence of a Wide-European opinion is questionable, could the active protection of human rights in on the wide-European territory provide for a budding wide-European human-rights-focused public sphere? If such public sphere existed, could it provide a locus for consensus human rights interpretation?

235. Robert Alexy is right when he claims that constitutional rights are rooted in human rights.⁵⁵⁷ Like constitutional rights, international human rights protected by treaties are rooted in human rights, although through a specific national lens and not in an exhaustive manner: only a partial list of rights is guaranteed protection. Thus, the vision of human rights displayed in one international convention is not complete: it requires application, specification, which is what the judicial function consists of. Moreover, human rights contained in international regional conventions—*i.e.* America, Europe, Africa—are rooted in a local culture and history.⁵⁵⁸ It is therefore reasonable to claim that a local “consensus,” albeit very broad, on a more geographically adapted vision of human rights is possible. But is such consensus as clear among the population, among

⁵⁵⁶ Both Risse and Conrad’s studies are based on public debate on common European topics. However, they chose topics that are not only of common concern to all European Union citizens, but also of an almost existential dimension for Europe (the European constitution debates, European enlargement to Turkey). If it does attest that some topics do trigger public debates on similar questions in all member states, evidence of public debates on more mundane day-to-day questions would have stronger evidentiary value. In this regard, the deliberative poll conducted among European citizens reported Fishkin, Luskin and Siu that focusses on important but less existential issues such as immigration and climate change has more evidentiary value. It also demonstrates the potential of small venues of informed, rational, equal deliberative debate among Europeans, while admitting its ideal-typical features that do not exist in real life. See Fishkin, Luskin, Siu, *op. cit.*

⁵⁵⁷ Alexy, ‘Balancing, constitutional review, and representation’, *op. cit.*, p.17. (hereinafter “Balancing”).

⁵⁵⁸ See for example Carozza article on the south american human rights culture P. Carozza, “I diritti umani, l’ “arte” della democrazia e il “gusto per la libertà locale””, in M. Cartabia and A. Simoncini (eds), *La Sostenibilità della Democrazia nel XXI Secolo*, Il Mulino (2009).

legal specialists? Is it easy to access amidst an international multilingual public debate partially accessible only to polyglots?⁵⁵⁹

236. Alexy also asserts that constitutional rights protection is an institutionalization of human rights.⁵⁶⁰ Therefore, a critique of constitutional rights protection, a claim that a human right that is not officially recognized by a constitution should nonetheless be judicially protected, is a critique over the substantiation of human rights.⁵⁶¹ So is the case of a lawsuit in the European Court of Human rights requesting broadening interpretation of the Convention to a new right. To substantiate, *i.e.* give content to human rights, Alexy names eight approaches, two of which are retained for their highest merit: A consensual model, based on a “congruence” of beliefs among people,⁵⁶² and a discourse theoretical model.
237. According to the consensus approach, it is social consensus that gives rights substance, *i.e.* only facts or values based on congruence can be labeled objective. However, the existence of similar values among a wide group itself cannot be a sufficient reason to accept the statement that Value X is true because social consensus supports it, therefore Right Y exists. Collective justifications for the Value X, or the new Right Y, must be elaborated.⁵⁶³ Thus Alexy only lends potential to the consensus approach if consensus “embraces all human beings and ...is stable” so long as reasons for the beliefs can be provided.⁵⁶⁴ One may ask, if rights are truly universal, why would one need to elaborate reason-based justifications when substantiating them? Mary-Ann Glendon showed that in the late 1940s, when the Universal Declaration of Human Rights was drafted,

⁵⁵⁹ Assuming a transnational debate on any issue could occur, it would only be partially accessible to polyglots, specialists or common men, since anyone only possesses knowledge of a few languages only. If the terms of the debate may be understood, all arguments could not be understood by all. Therefore, judges argumentative representativeness could only be limited.

⁵⁶⁰ R. Alexy, “Human Rights”, *op. cit.*, p. 220.

⁵⁶¹ R. Alexy, “Fundamental Rights”, *op. cit.* p. 17.

⁵⁶² “The third approach is the consensual one. If a consensus is nothing more than a mere congruence of beliefs, then consensualism is nothing other than collective intuitionism. Its only source of objectivity is the fact of congruence. If this congruence embraces all human beings and if it is stable, then it ought not to be underestimated. Even then, however, reasons for the concurrent beliefs can be demanded. Once consensus is connected with argument, the approach is more than a merely consensual approach. It moves in the direction of discourse theory. If the consensus is not complete, the role of reasons counts more than mere majorities, which might well be based on bad arguments”, *Ibid.* p 19.

⁵⁶³ “In any case, one point seems to be clear: one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights.”, “Fundamental Rights”, p.17.

⁵⁶⁴ *Ibid.*, p.19.

countries could agree on a list of fundamental rights, but not on their foundations.⁵⁶⁵ Cultures, religions and recent histories all advocated prioritizing the same value of human dignity and its corollaries, *i.e.* rights possessed by all human beings. But drafters from all professional, cultural and geographical origins could not agree on the background reasons for the existence of these rights. However, if foundations give rights content as Alexy claims, then consensus on foundations are necessary or argument over them will occur.⁵⁶⁶ This is why human rights scholarship is still debating today the foundations and contents of human rights,⁵⁶⁷ despite the important number of international treaties that guarantee their protection.

238. The scholarly consensus on the importance of legitimacy challenges to human rights norms equally speaks to the need to substantiate human rights through public debate. Scholars showing skepticism towards treaty norms, such as John McGuinnis and Ilya Somint,⁵⁶⁸ or enthusiasts like Allen Buchanan, concede that there is a legitimacy problem facing human rights treaty-making and treaties' judicial enforcement.⁵⁶⁹ Official human rights norms, which these scholars clearly differentiate from the philosophical ideal of human rights, are often accused of being an "arbitrarily restricted set of values or an arbitrary ranking of values due to cultural biases".⁵⁷⁰ Like Alexy, they also suggest that in order to contribute the legitimacy of human rights law, those

⁵⁶⁵ M-A Glendon, *World Made New*, New York, Random House (2001).

⁵⁶⁶ Alexy, "Fundamental Rights", *op. cit.* p. 17.

⁵⁶⁷ See for example M-B. Dembour outline of the difference schools of human rights. See for example M-B. Dembour, "What Are Human Rights? Four Schools of Thought", *Human Rights Quarterly*, Vol. 32, No 1, (February 2010), pp. 1-20, or Gunnar Beck's critique of human rights as mythology: G. Beck, "The Mythology of Human Rights", *Ratio Juris*, Vol. 21, No. 3.(2008) (Claiming that a justification for human rights, although needed to support their superiority over other rights, is impossible to provide.) Alexy also offers his typology of existing types of foundations for human rights and offers his critique of their main strengths and failures. For this reason, he and other discourse theorists propose a theory of validity based on the respect of rules of discourse: "Nearly everything possibly relevant has been tried out. One can find-to name eight examples-references to religious revelation, human nature, undeniable evidence, great traditions, existential decisions, individual interests, collective goods and far-reaching factual consensus. The basis for discourse-theoretical justifications is formed by the rules of practical discourse." R. Alexy, "Discourse Theory and Human Rights", *Ratio Juris*, Vol. 9 No. 3 (September 1996), p. 210 (hereinafter "Human Rights").

⁵⁶⁸ J. O. McGuinnis & I. Somint, "Democracy and International Human Rights Law", *Notre Dame Law Review*, Vol. 84, No. 4, (2009). "The democracy deficit of international human rights law casts doubt on the supposed beneficence of international human rights norms relative to those established by domestic democratic institutions." McGuinnis and Somint argue that human rights treaty making lacks democratic legitimacy in the way the treaties are drafted, signed and ratified : procedures, personnel.

⁵⁶⁹ "The more central the protection of human rights becomes in international law, the more the lack of a credible public justification for human-rights norms calls into question the legitimacy of the international legal system". A. Buchanan, *Human Rights, Legitimacy, and the Use of Force*, Oxford University Press (2010), p. 93.

⁵⁷⁰ A. Buchanan, "Human rights and the legitimacy of the international order", *Legal Theory*, Vol. 14 No. 1 (2008), p. 40 (hereinafter "Legitimacy of the International Order").

norms should not be accepted solely based on their legal status.⁵⁷¹ Instead, they should be defended through argumentation *and* public debate.⁵⁷²

239. For this reason, Alexy proposes another justification model: the discourse theoretical model. This approach requires that the substantiation of rights through “the practice of asserting, asking, and arguing”, *i.e.* justification and explanation occurs following rules of discourse necessarily connected with reasoning. For Alexy, however, discourse theory does not *provide* a foundation to human rights. It is discourse that assists the discovery of human rights foundations. In a nutshell, “[t]he discourse rules are merely rules of speech. To observe them means only to treat the other as an equal partner in the discourse. From this it does not automatically follow that the other as such, hence also in the realm of action, has to be treated as a person”.⁵⁷³ Additionally, Alexy proposes to institutionalize this practice of justification of human rights within a system of “deliberative democracy”, where the ideal of deliberation is built into democratic institutions, and discursively oriented constitutional review is provided for. In this framework, constitutional review “comes closer to discursive ideals than general democratic discourse is able to arrive at alone”.⁵⁷⁴ In Alexy’s theory, legitimacy of the law is not provided by universal consensus, *i.e.* acceptance as in Habermas, but by the assumed and accepted autonomy of each discursive participant.
240. From Alexy’s approach one can conclude that high courts are the most rational locus for the substantiation of human rights,⁵⁷⁵ be it at international level through institutions

⁵⁷¹ “Human rights norm must be defended on another basis than their appearance in multilateral treaties or their status as a custom”. McGuinnis, Somint, *op. cit.*, p.1764-5.

⁵⁷² Buchanan, “Legitimacy of the International Order”. *op. cit.*, p. 62: “Institutions that contribute to the articulation of human-rights norms ought to provide venues for deliberation in which the authority of good reasons is recognized, in which credible efforts are made to reduce the risk that strategic bargaining or raw power will displace rational deliberation, in which principled contestation of alternative views is encouraged, in which no points of view are excluded on the basis of prejudicial attitudes toward those who voice them, and in which conclusions about human rights are consonant with the foundational idea that these are moral rights that all human beings (now) have, independent of whether they are legally recognized by any legal system”. See also A. Sen, “Elements of a Theory of Human Rights”, *Philosophy & Public Affairs*, Vol. 32, No. 4 (Autumn, 2004), p. 322, 356.

⁵⁷³ Alexy, “Human Rights”, *op. cit.*, p. 222.

⁵⁷⁴ Alexy, “Fundamental Rights”, *op. cit.*, p.23. Alexy’s discourse theoretical approach is based on a discursive form of democracy, *i.e.*, a regime which as far as possible implements the ideal of rational discourse in its institutional set-up (*i.e.* a discursively oriented parliament), and also provides safeguards for the protection of fundamental rights (*i.e.* domestically constitutionalized human rights) through constitutional adjudication. To him, constitutional adjudication is only compatible with discursive democracy because the higher degree of rationality compensates for other institutions’ insufficiencies, and so long as the adjudicative institution complies with the norms of rational discourse. The rationality of constitutional review is ensured through the practice of balancing.

⁵⁷⁵ Alexy, “Fundamental Rights”, *ibid.*, p. 22.

guaranteeing protection of a European conception of human rights, or a domestic level, through institutions guaranteeing protection of a domestic vision of human rights. Following, for those like Alexy,⁵⁷⁶ Rawls or Dworkin⁵⁷⁷ who consider tribunals as forum of reason, human rights adjudication could be conceived as the ideal location for human rights substantiation. However, a judicial forum of principle that is not open to public participation, although more likely to respect the criteria of discourse⁵⁷⁸ would leave judges alone the mission of being umpires between different rights philosophies. Conversely if courts were open forums of debate, they may be capable of giving citizens the sense that they are subject and authors of rights.⁵⁷⁹ In his defense of the capacity of international institutions to substantiate human rights in a legitimate fashion, Allen Buchanan gives a few criteria, two of them involve first, being more representatively inclusive so as to include various cultural understandings, and second, “providing principled, authoritative specifications of human rights when there is a range of reasonable alternative specifications”.⁵⁸⁰ Were they to fulfill these criteria, international Courts could become a tailor-made avenue for international debate on the substantiation of human rights, provided they reach a balance between principled adjudication and openness to argumentative participation. Such balance is of course difficult to reach and can by no means be perfect in any institution, but it would strengthen the legitimacy of human rights norms, while not leaving to the judges the exclusive role of being umpires between different rights philosophies.

⁵⁷⁶ *Ibid.*, p. 23.

⁵⁷⁷ Judicial reviews offers “an independent forum of principle ... in which his claims about what he is entitled to have will be steadily and seriously considered at his demand.” R. Dworkin, “A Matter of Principle”, *op. cit.*, in J. Finnis, *Human Rights and Common Good: Collected Essays*, (2011), Oxford, Oxford University Press, p. 23.

⁵⁷⁸ To substantiate human rights, Alexy proposes as criteria the necessity of promulgating human rights norms into law, gives types of valid justifications for human rights, requires from participants a respect of the principle of autonomy of human rights subjects, and universal consent, impartiality and equality, and democracy. Alexy, “Human Rights”, *op. cit.*

⁵⁷⁹ Jürgen Habermas also writes: “However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (preexisting) moral facts that one merely needs to enact as positive law”, J. Habermas, “On the Internal Relation between the Rule of Law and Democracy”, in C. Cronin & P. De Greif eds., *MrT The Inclusion Of The Other: Studies In Political Theory* 260 (Press 1998) (1996), quoted in J. Mayerfeld, “Democratic Legitimacy of International Human Rights Law”, *Indiana International & Comparative Law Review* (2009), p. 73.

⁵⁸⁰ A. Buchanan, “Human Rights, Legitimacy and the Use of Force”, *op. cit.*, p. 91.

Conclusion

241. This chapter was devoted to an investigation into legitimacy of governance. The first involved the origins of the claim that the will of the people was the source of legitimacy of democratic governance, and that any public authority claim to legitimacy had to rely on popular acceptance. Here the specific case of judicial institutions' legitimacy comes into question: judicial institutions, particularly high courts, do not usually play the same role in the classic separation of powers than do elected institutions such as the head of the executive or parliaments. I thus had to enquire where high courts legitimacy stems from, and if they possess, to some extent, popular sources of legitimacy.
242. In the first section, I discussed the notion of public opinion and its evolution and differentiation from the will of the people. Although the meaning of both expressions is still linked in conventional language use, it is clear that public opinion-formation occurs at many levels and involves more than citizens in age of voting or elections platforms and members of parliament: it is more inclusive than institutionalized will.
243. I identified many definition of public opinion definitions in existing scholarship, ranging from a discursive and rational type of opinion, to a plebiscitary form of will committed to common will, to an individual statistical type. Nevertheless, when used in public discourse as argument supporting a claim, the differentiation between the two is rarely explicit, if only implied. Moreover, in conventional use, "public opinion" most often refers to polling surveys. Both are used in reference to popular will, without always specifying the legal status of the persons included. Such references rely on the assumption that public opinion or the popular will should be heeded by public authorities when they define their policy orientation: it is a *legitimacy claim*. However, I showed that the concept of "consent" of the governed only *became* the main criterion for democratic legitimacy after centuries of development, and that the meaning of consent itself has undergone substantial evolutions.
244. Therefore, the issue of "countermajoritarianism", attacks on institutions that do not possess majority-based popular legitimacy, is not the only legitimacy issue in today's governance. Majority governance has been challenged not only in the context of increasingly assertive judicial supremacy in the United States, but also with of the weakening of representative institutions and the burgeoning of governing institutions

at local, national and international level. Such phenomena put to light the increasing difficulties that face conventional representative institutions to introduce the will of their constituents into a policy-making process they are less and less able to control. Moreover, the differentiation between representative will and real-life public opinion has intensified through the transnationalization of governance.

245. In this context, the most compelling question regards how public institutions can heed the will of their constituents or reflect the views of a preferably rational public opinion in their decisions. Public support theory as much as deliberative democracy theory would concur that any policy-making too distant from public opinion would be doomed to fail for lack of perceived or real popular legitimacy.
246. The second section was devoted to the origins of judicial legitimacy. It was written in an attempt to present and synthesize a wide range of constitutional theories regarding the role of the rights-protective judicial institutions in representative democracy. I tried to show that the role of rights-protective courts, if countermajoritarian, was not considered anti-democratic by all scholars. To the contrary, many strands of scholarship defended the role of courts as defenders of democracy and developed alternative criteria for democratic legitimacy that judges possess.
247. To some scholars, the judiciary, forum of reason by excellence, is the only reliable safeguard against abuse by majorities. To others, the judiciary can become a principled forum of argumentation where human rights norms are developed with the reasoned participation of the public. The democratic legitimacy of rights adjudication is assessed based on different criteria. On the one hand, judicial legitimacy rests on Courts' capacity to finding the right answer through reason. On the other, their legitimacy necessarily requires a degree of representativeness of the population's diversity of thought, *i.e.* argumentative representativeness, which can be found in public debate. To others again, legitimacy only rests on the capacity of institutions to comply with society's consensus or public opinion and base their assessment on high courts legitimacy based on their assessment on such compliance. Hence if judicial legitimacy is still debated, it is more commonly assessed in more complex terms than electoral approval: reason, public debate and participation are additional important criteria. They allow adjudication to reflect mainstream consensus through a "dialogic" relationship.

248. I also argued that a more dialogic relationship between judges and individuals might also help international Human rights adjudication improve its legitimacy. “Human rights” may be universal, but those who agree they are do not agree why. And since constitutional rights find their foundation in human rights, challenges to human rights foundations weaken both national and international rights protection. Likewise, challenges to the way judges substantiate human rights are challenges to the foundations on which judges base their jurisprudence.⁵⁸¹ This is why scholars have advocated a more participatory style of adjudication, at least argumentatively. How this can be done best is a difficult question. But the day-to-day adjudicative practices and past court reforms show that efforts are incrementally being done to open the court to participation. This movement is not exempt from criticism; especially for those who believe that the lack of judges’ answerability to popular will is their very *raison d’être*.⁵⁸² But this chapter was not meant to take side for one school or another. It was meant to recapitulate theories that claim that judges can be at the same time the best institutions for rational decisions based of their high-level credentials, and democratically legitimate because they protect *individuals* through the participation of the public. Whether it is the case in practice is the work of descriptive (political) scholarship.
249. The mission of the next chapter is to show that the institutional evolution of high courts, in this case the Supreme Court and the European Court, displays an acknowledgment that a certain degree of public participation in rights evolution is needed.
250. Ultimately, we don’t know who is right; the popular constitutionalist who believes that rights are best protected at democratic level without a judicial institution, or the consensus scholar who believes that judicial rights protection is not countermajoritarian because courts do follow consensus, or even if consensus is truly possible. If participation to rights evolution has expanded to the judicial forum, it might also be because rights advocates appeal to the institutions that can protect them best. Perhaps

⁵⁸¹ The American confirmation process show just that: candidate justices are scrutinized to find what their jurisprudential philosophy is, to determine what decisions judges would likely make if they were nominated.

⁵⁸² For human rights see among others Mayerfeld, *op. cit.*, p.87. For constitutional scholars see Eisgruber, *op. cit.* and others scholars that advocate judicial supremacy in the name of rights protection, see *infra*, note 287.

isolating rights protection from the public is not possible, because the public will always keep the protection of its rights on the top of its own docket.

Chapter Two: Courts Dialogic Relations to Organs of Public Opinion

“For if the average American cannot understand the Court's reasoning, then all that remains are the Court's rulings; but rules issued by unelected judges lacking an accessible justification can be experienced as subjugation.”

Michael Serota

251. In Chapter One, I presented different theories exploring the different aspects of high courts legitimacy: their capacity for reason, and their democratic potential. Based on the assumption that democratic legitimacy is brought about by more than electorally-based consent, many scholars have defended several aspects of high Court's function they deemed democratically legitimate. Some even argued that the Supreme Court's compliance – intentional or factual – with societal consensus or mainstream public opinion confirmed its democratic legitimacy.
252. This chapter aims at exploring in practice the claim that Courts are a venue for democratic participation. The debate over the countermajoritarian aspects of judicial review inspired scholars to defend judicial review as a venue for participation against those who consider that “if we came up with a decision-making procedure that produced good decisions but involved no participatory element, it would not be justified because it failed to recognise the value of participation”.⁵⁸³ Such theories were advanced by several scholars⁵⁸⁴ and applied to multiple courts, from the United States Supreme Court to international courts such as the European Court of Human Rights.⁵⁸⁵ Participation was not only considered with a focus on individual participation and agency, but also group participation such as non-governmental organizations.⁵⁸⁶ They take support in theories acknowledging the political power of constitutional

⁵⁸³ E. Kavanagh summarizing and responding to Waldron's main argument against the power of judicial review. E. Kavanagh, “Participation and Judicial Review: A Reply to Jeremy Waldron” *Law and Philosophy* Vol. 22 (2003), p. 459. See also J. Waldron, *Law and Disagreement*, Oxford, Clarendon Press, (1999), pp. 101–103, 246–247 (hereinafter “Law and Disagreement”).

⁵⁸⁴ Kavanagh, *ibid.*

⁵⁸⁵ *Ibid.*, see also Jacobson and Ruffer, *op. cit.* (claiming individuals are their own agents in international politics, using courts as avenue for change).

⁵⁸⁶ Cichowski, *op. cit.* (arguing that social activists, through non-government organizations, have mobilized convention rights towards progress in the last fifty years).

adjudication, whether or not this acknowledgment comes with normative support.⁵⁸⁷ These claims were, of course, challenged on multiple grounds, mostly normative.⁵⁸⁸

253. This chapter does not aim at discussing the normative foundations of these claims. The interest in such statements is born out of their potential for explaining how courts relate to their public. I start from the premise that individual persons or “agents”, the first participants to judicial proceedings, are also High Courts first public. Indeed, the most essential aspect of a court’s relation to the public is arguably the ease and clarity of litigants’ access to relief. Other participants such as interest groups that act as plaintiff or third parties are second public. The first chapter indeed established that interest groups are “organs” of public opinion. So are the media and political leaders. This chapter’s inquiry starts from the premise that high courts do entertain a dialogic relationship with their public. This premise is entertained as a hypothesis, and the work remaining in this thesis is aimed at exploring to what extent this premise is or not justified in practice. I claim that a study into the relationship between High Courts and public opinion should start with an inquiry into High Courts administration of participation by their audience to their proceedings. Indeed, if ground rules regarding individual access to relief are usually provided by democratically promulgated law—constitutional or statutory laws⁵⁸⁹—rules of courts administrate the details of access to relief of third party participants, such as friends of courts, access of the media to hearings and documents, and related accesses.
254. The second section will more specifically be dedicated to the inclusion of third parties, i.e. non-litigants in the proceedings as an indicator of judicial opening to indirect form of public opinion participation. I argue that the degree to which courts include third

⁵⁸⁷ See among others J. Raz, “Rights and Politics”, *Indiana Law Journal*, Vol. 71, No. 1 (1995), pp. 42-44.

⁵⁸⁸ Bellamy contests the democratic potential of political litigation R. Bellamy “The Democratic Qualities of Courts: A Critical Analysis of Three Arguments”, *Representation*, Vol. 49 No.3, 333-346(2013). Waldron, a proponent of citizens’ participation in public decision making, object to judicial review altogether. See J. Waldron, *Law and Disagreement*, Oxford, Clarendon Press (1999), pp. 101–103, and 246–247 (hereinafter “Law and Disagreement”).

⁵⁸⁹ If individual access to European Court proceedings are directly guaranteed at Article 34 of the European Convention on Human Rights, it is not the case for the United States Supreme Court. The Constitution only specifies for the general jurisdiction of the Court at Article III Section II in cases related to “--to Controversies to which the United States shall be a Party;-- to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” Nothing is said about individual access. The Judiciary Act of 1925 gave Justices discretion to hear cases on appeal through the Certiorari procedure. In both cases Rules of Courts regulated details about access. For more details supra.

parties in the process demonstrates their inclusiveness and displays the existence of a vibrant relationship of trust with the people,⁵⁹⁰ and thus with public opinion. As regards the American context, Omari Scott Simmons explains that “the Supreme Court’s role in American democracy manifests a tension between the Court’s duty to adjudicate disputes between two parties, resolving the specific conflict before it, and its role to create law, settling disputes between circuits and answering novel legal questions”.⁵⁹¹ Because of the impact of Supreme Court’s decisions, *i.e.* all the high number of third persons potentially concerned by judicial outcomes, the Justices may not wish to rely only on the input of immediate parties. Consequently, “the Court operates within a broader context of a “constitutional culture,” that involves an ongoing conversation with non-judicial actors”.⁵⁹² This chapter is based on the presumption that the European Court also cultivates such a conversation at its own level.⁵⁹³

255. Throughout adjudication, Courts are not only receptive to the needs and complementary perspectives of third parties; they also receive valuable input from them. However, the relationship third parties, otherwise called “*amici curiae*” or “friends of court”, entertain with Courts differs from Court’s rapport to public opinion *per se*. As Caldeira and Wright frame it, “unlike public opinion surveys and other fora where interest groups participate, amicus briefs are more focused on case related issues and the audience is more clearly defined via the statement of interest”.⁵⁹⁴ To some extent, amici mediate issues from grassroots—albeit a limited and often issue-focused sample of the people—to the Court, and from the court to the public: According to Garcia, “Amicus is not only directed at courts”. It is a “way of making views known to the group’s constituents and to the general public.” It is an “expressive function in a democratic system” that is “often part of a campaign about important political and social issues”.⁵⁹⁵

⁵⁹⁰ O. Scott Simmons, “Picking Friends From the Crowd: Amicus Participation as Political Symbolism”, *Connecticut Law Review* Vol 42 (2009) pp. 187-233 quoting R. C. Post, “Foreword, Fashioning the Legal Constitution: Culture, Courts, and Law”, *Harvard Law Review*, Vol 117, 4 (2003) p. 11 (Inclusiveness shows Court’s “judicial authority might best be reconceived as a relationship of trust that courts forge with the American people”).

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*, pp. 188-189.

⁵⁹³ For studies on the status and role of non-governmental organizations in European Court proceedings, see among others Cichowski, *op. cit.*, Van den Eynde, *op. cit.*, and Burgorgue-Larsen, “Interventions éclairées”, *op. cit.*

⁵⁹⁴ See G. A. Caldeira, J. R. Wright “Organized Interests and Agenda Setting in the U.S. Supreme Court”, *The American Political Science Review*, Vol. 82, No. 4 (Dec., 1988), p. 1113.

⁵⁹⁵ R. J. Garcia, “A Democratic Theory of Amicus Advocacy”, *Florida State University Law Review* Vol. 35, No. 2, 315 (2008), p. 339.

256. The basic structure of any lawsuit is triangular. In the simplest of cases it only involves a petitioner, a defender, and the deciding judges. Very often however persons, institutions and groups and a myriad of other individuals surround a case whose interests may be to varying degrees affected by the outcome. It is all the more the case of cases filed at Supreme Court or European Court level: many of them, especially fundamental rights cases, affect not only an individual's life and core rights, but also many people experiencing a similar situation. Moreover, where an important question of principle is involved, many additional people, institutions and organizations may consider themselves concerned on a moral or value level, whether or not the case may later affect their lives concretely. It is for this reason that the study of the relationship between high courts and their public must also include the regulation of their relationship to organs of public opinion, *i.e.* third parties, the media, and political leaders.

1. Courts' Public Accessibility

257. This subsection is devoted to the ways courts have managed their relationship with primary publics, petitioners, through the progressive reorganization of plaintiffs' access to relief. First, I discuss the way the U.S. Supreme Court and the European Court of Human Rights have come to balance an increasingly difficult public access with plaintiffs' entitlement to relief through the filtration of applications. Second, I will discuss the difficult balance Courts had to strike to insure a right level of public visibility in the media without sacrificing the quality of justice.

1.1. Procedural Transparency and Public Access, First Steps to Legitimacy

258. High courts face challenges unique to their function. One of these challenges consists in responding to the needs of justice and to new legal problems while facing floods of potentially frivolous applications. External as well as internal reforms were meant to help courts tackle such problems. I hereby show how reforms went beyond responding to courts managerial challenges. I claim that progression of reforms deeply transformed both the U.S. Supreme Court and the European Court of human rights and their relationship to their first public: potential litigants. They set the stage for the growth of both courts authority and popularity. The second paragraph addresses the way courts

tried to improve access to relief to serious applications through the development of standing and admissibility doctrines.

1.1.1. The Difficult Balance Between Public Access and Efficiency

259. The various internal and external structural reforms that the Supreme Court and the European Court had to undergo to improve efficiency are witness to the progressive increase of their public authority throughout the years. Both Courts had to take internal management measures to more effectively manage the increasing volume of their docket. The Supreme Court and the European Court both underwent at least one significant reform that radically changed their function and gave them the needed leeway to grow their effectiveness and authority while dealing with a radically grown number of cases. To the Supreme Court, that meant an increase in discretion in the selection of cases, while the European Court saw its structure grow, making sure cases were properly sorted so that most serious and difficult cases would reach the most solemn formations, while more routine cases would be confided small committees of three judges, and cases lacking merit would be stricken down altogether. These reforms were adapted to each Court's political context and mission, and to the level of influence and independence they already had acquired. The next two subsections shortly explain these reforms and the impact they had on each Court's public visibility, authority and popularity, and on their societal impact as what some scholars believe have become vehicles of social change.

1.1.1.1. The United States Supreme Court Reforms and the Decrease of Public Access

260. The Supreme Court's general jurisdiction is the fruit of two hundred years of evolution. It is regulated by the federal Constitution at Article III, Section II. In reviewing cases, the Court must first and foremost respect the separation of powers principle.⁵⁹⁶ Thus

⁵⁹⁶ Note that since the Supreme Court is a federal court, the Eleventh Amendment prohibits it from finding relief against state governments. The Courts have developed the abstention doctrine to avoid adjudicating state government issue, thereby respecting the separation of powers: "Within this general obligation to exercise jurisdiction, however, the Supreme Court has recognized certain exceptions when a federal court should defer to the state courts [based on the] overarching goal of preserving a "balance between state and federal sovereignty," a concept known as comity." See J. Caballero, "Colorado River Abstention Doctrine in the Fifth Circuit: The Exceptional Circumstances of a Likely Reversal", *Baylor Law Review* Vol. 64, No. 277 (2012), p. 280.

certain cases, such as a citizen's suit against a one of the fifty states,⁵⁹⁷ cannot be originated in federal courts.⁵⁹⁸ Secondly, the Supreme Court has named two sources defining whether it will adjudicate a case: the nine categories of Article III, Section 2 of the United States Constitution, and prudential considerations that have inspired justiciability doctrines, *i.e.* doctrines establishing under which condition a case could be adjudicated by a court of law.⁵⁹⁹ For example, the federal court standing doctrine provides that a federal court will decide a case on the merits if the plaintiff has suffered an injury that it is linked to the defendant's conduct, and that a federal court's decision is likely to redress the injury.⁶⁰⁰ The Supreme Court does not adjudicate constitutional rights only, thus injuries to constitutional rights have their own specific requirements.⁶⁰¹

261. The increasing importance civil rights cases in American constitutional adjudication was influenced on the one hand by the Court's institutional and procedural reforms, and on the other hand by the development of its prudential approach to Constitutional rights.⁶⁰² Despite what the dramatic increase in the number of civil-rights petitions suggests, the relationship of the Supreme Court to the public is not only shaped by civil

⁵⁹⁷ As most American scholarship usually refers to the fifty states as "states" rather than "federated states", I refer to "states" in the same manner.

⁵⁹⁸ Amendment XI of the Constitution of the United States : "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State". Passed by Congress March 4, 1794. Ratified February 7, 1795.

⁵⁹⁹ E. Chemerinsky, *Constitutional Law: Principles and Policies*, New York, NY: Aspen, 4 th ed, 2011, 1440 pages, p. 48. (hereinafter "Constitutional Law") "Justiciability" is defined as the "quality, state or condition of being appropriate or suitable for adjudication by a court", *Black's Law Dictionary*, *op. cit.*

⁶⁰⁰ Chemerinsky, "Constitutional Law", *op. cit.* p. 62. Other standing doctrines have been established based on prudential considerations. Detailing them goes beyond the scope of this study.

⁶⁰¹ Firstly, constitutional provisions on which the petition is based must bestow rights, secondly, generalized grievances will not stand. Often deciding if the plaintiff suffered an injury requires an inquiry into the facts of the case.

⁶⁰² Thus, one of the key cases starting the debate over the legitimacy of civil rights adjudication and the constructive interpretation of civil rights was brought up by the applicability of the bill of rights to the states and substantive due process. The debate started with the *Slaughterhouse* case, where the Supreme Court decided the privilege and Immunities clause of the Fourteenth Amendment did not apply to the states (*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)). Two decades later, the Supreme Court found an alternative approach to incorporate some of the rights protected by the Bill of Rights to the states through the enforcement of the Due Process clause of the 14th Amendment to the States (for example, *Chicago, Burlington & Quincy Railroad Co v. City of Chicago*, 166 U.S. 226 (1897) (right to property), and *Twining v. New Jersey*, 211 U.S. 78 (1908), where the Court acknowledged that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because the denial of them would be a denial of due process of law. ... if this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law". Cited in Chemerinsky, "Constitutional Law" *op. cit.* p. 512.

rights adjudication.⁶⁰³ I claim that it is most fundamentally shaped by the public's individual access to the Court. Thus, I will inquire into the evolution of Supreme Court jurisdiction procedures that participated to an increase in civil rights petitions on public access.⁶⁰⁴

262. Originally, constitutional rights were far from making the biggest volume of constitutional adjudication.⁶⁰⁵ The Supreme Court had compulsory jurisdiction on all cases listed at Article III §2 of the Constitution⁶⁰⁶, *i.e.* it had obligation to adjudicate all petitions that complied with the description. After the American Civil War, which lasted from 1861 to 1865, the Supreme Court's backlog increased significantly and made reforms necessary for the sake of efficiency.⁶⁰⁷ In all the significant reforms of the Supreme Court Justices themselves took active Part. Chief Justice Lon Fuller is said to have initiated the Evarts Act of 1891.⁶⁰⁸ After much debate, a first step was taken creating the Circuit Court of Appeals to assist the Supreme Court.⁶⁰⁹ Upon this reform, the Supreme Court still had compulsory appellate jurisdiction over many of the

⁶⁰³ The dramatic increase in certiorari petitions was visible. In the 1880s, they represented approximately 400 to 500 per year. Petitions experienced a sustained rise in the 1910-20s and the 1930s. In 1944, the number of petitions hit the mark of 1000 petitions in one year. The post 1954-56 period showed another rise to 1500 petitions, then to 4000 in 1973. Numbers stabilized in the 1980s, but another spectacular increase occurred in the 1990s, with an increase of more than 1000 petitions in one year. If numbers continued rising at a faster pace in the 1990s, they have been pretty stable since the 2000s. Source : http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_totals (last accessed 19 March 2018) . However, it is difficult to assess the importance of certiorari-related civil rights petitions in comparison to other provisions. Suffices to say, civil rights related provisions are clearly the most litigated. See L. Epstein, J. A. Segal, and al. *The Supreme Court Compendium*, 4th Ed. Washington D.C., CQ Press, 2006 p. 673-4.

⁶⁰⁴ The Supreme Court's jurisdiction is regulated at 28 U.S. Code §1251 to 1254. Its original jurisdiction is regulated at 28 U.S. Code § 1251. It includes exclusive jurisdiction in cases involving two and more states, and non-exclusive jurisdictions in cases involving the U.S. and a state, ambassadors, states and citizens of another state. The Court also hears appeals from District Courts' 3 judges committees through direct petition for Writ of Certiorari, or through certification from Court of appeals on a question of law.

⁶⁰⁵ Sources: Art I §9 of the U.S. Constitution establishes limits on congress power, prohibits suspension of the writ of habeas corpus and bills of attainder or ex post facto laws; Article III §2 protects the right to a trial by jury; Art. III §3 guarantee of testimony by two witnesses or on confession in cases of treason. only the traitor can be punished; Art. IV § 2: the Privilege and Immunities Clause guarantees the same rights to all citizens of all states.; and Art. VI prohibits religious tests to access public office.

⁶⁰⁶ As mentioned above, the Supreme Court jurisdiction extends not only to constitutional questions, but to laws and treaties, ambassadors, ministers and consuls, admiralty, controversies between states etc.

⁶⁰⁷ The Civil War saw a great increase in the number of cases on the Supreme Court's docket, which resulted in backlogs and delays. In 1860, out of the 310 cases, decided 280; in 1870, of the 636 cases, there the Court decided 365. In 1890, the Court faced an "absurd number" of 1800 cases on her appellate docket, all of which it had the obligation to decide. See E. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges Bill", *Columbia Law Review*, Vol. 100 (2000), pp. 1643-1738 (Hereinafter "Questioning").

⁶⁰⁸ *Ibid.*, p. 1651

⁶⁰⁹ Hartnett, *op. cit.*, p. 1698, quoting 66 Congressional Record 2920 (1925) (reproducing letter from Taft to Copeland (Dec. 9, 1924)).

lower courts' judgments, but its load was alleviated as some of the Circuit Court of Appeals decisions were deemed final, no longer needing review by the Supreme Court. As an exception to this rule, however, some questions could be transferred to the Supreme Court through the certification procedure: The Circuit Court of Appeals was given the power to certify *i.e.* transfer some legal questions to the Supreme Court, which the latter had discretion to accept or reject. The Court thus could choose to grant or deny a Writ of Certiorari and to decide a question of legal importance.⁶¹⁰ Despite these efforts the volume of the Court's docket did not subside. More efforts had to be made to help the Supreme Court's increase its efficiency. Reformers thus decided to work at decreasing the Court's backlog.

263. The most impactful reform was the one that generalized the Writ of Certiorari procedure in 1925. The petition for Writ of Certiorari is a type of relief through which a plaintiff requests from the Supreme Court judicial redress for legal errors committed by lower courts. Procedure originated in the English Court of King's Bench as a "extraordinary writ [or written order] issued by an appellate Court to deliver the record in the case for review".⁶¹¹ It originally aimed at examining if a lower Court had committed an "excess in jurisdiction".⁶¹² It was not meant to be used to assert jurisdiction in a case, but was "an auxiliary process".⁶¹³ Under this procedure, a petitioner or plaintiff files a petition or request for a Writ of Certiorari, which the Court can discretionarily decide to grant and therefore review the case, or to deny, namely refuse to review the case.⁶¹⁴
264. Although the Evarts Act of 1891 had already introduced the Writ of Certiorari in the field of non-compulsory jurisdiction, Justices could not devote much time to it due to the volume of compulsory jurisdiction that they had retained.⁶¹⁵ The 1916 reform

⁶¹⁰ Hartnett, *ibid.* p.1651.

⁶¹¹ "Certiorari", *Black's Law Dictionary*, *op. cit.* p. 275.

⁶¹² *Ibid*, quoting B. J. Shipman, *Handbook of Common-Law Pleading* §340, Henry Winthrop Ballantine ed., 3d ed. (1923) p. 541,

⁶¹³ Hartnett, "Questioning", *op. cit.* p. 1650, citing *American Constr. Co. v. Jacksonville &c. Co.* 148 U.S. 372 (1893) at 380 (contrasting the pre-1891 United States practice with the practice of the Queen's Bench);

⁶¹⁴ This is no procedure allowing review as a matter of right. For that petitioners have to submit the case in state court or lower federal courts.

⁶¹⁵ If some of the mandatory jurisdiction was retained, it was uncertain which ones. The determination of remaining mandatory jurisdiction depended on breadth of interpretation. According to Hartnett, "Jurisdiction remained mandatory: 1) where the state court decided against the validity of a treaty, federal statute, or authority exercised under the United States; and 2) where the state court rejected a federal challenge to the validity of a state statute or authority exercised under a state. However, where "any title,

resorbed the docket a little by delegating some jurisdiction.⁶¹⁶ But the core of the reform was accomplished in the “Judges Bill” of 1925. It was initiated by newly nominated Chief Justice and former president of the United States Howard Taft in 1921⁶¹⁷ in order to alleviate the Court’s backlog and promulgated in 1925. The “Judges’ Bill” was born after quite a few moderately successful attempts at reform.

265. Taft proposed to “limit the mandatory jurisdiction of the Court solely to “questions of constitutional construction” and give “an opportunity to litigants in all other cases to apply for a writ of certiorari,” so that the Court “may exercise absolute and arbitrary discretion with respect to all business but constitutional business”.⁶¹⁸ Taft thus wished to limit the Supreme Court’s jurisdiction to Constitutional issues. By so doing, he hoped to reinforce the Court’s existing purposes: “expounding and stabilizing principles of law” and preserving “uniformity of decision among the intermediate courts of appeal”.⁶¹⁹ He sought to increase the Court’s autonomy.
266. By voting a bill drafted by Justices themselves⁶²⁰ under the leadership of then Chief Justice Taft, and that gave the Court wide discretion to decline review, Congress unconsciously but radically transformed the Court into a potential agent for social change.⁶²¹ Firstly, the reform cancelled the obligation for the Supreme Court to grant review of legal questions certified by lower courts.⁶²² Secondly and most importantly, Congress entrusted the Court to decide what cases were of public importance by selecting among the large pool of petitions which ones were important enough to be

right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" the federal claim, review was by certiorari. Just what was encompassed by the "validity" of a "statute" or an "authority"? If construed broadly, mandatory review remained when a state court rejected a challenge based on federal law to state legislative and executive action. If construed narrowly, however, many such cases were shifted from mandatory to discretionary jurisdiction”, Hartnett, “Questioning”, *op. cit.*, p. 1658.

⁶¹⁶ The Webb Act of Sept. 6, 1916, ch. 448, § 2, Public Law No. 258, 39 Stat. 726.

⁶¹⁷ Taft was President of the United States from 1909 to 1913.

⁶¹⁸ J. Sternberg, “Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court”, *Journal of Supreme Court History*, Vol. 33, No. 1, 2008, 1–16, p.8.

⁶¹⁹ Hartnett, *op. cit.* pp.1664-5.

⁶²⁰ The bill was drafted by Supreme Court Justices upon request of the Senate committee, but the reform was initiated by Justice Taft before he was confirmed Chief Justice of the Supreme Court. See Sternberg, *op. cit.*

⁶²¹ Some members of Congress had worried that the reform would give Justices too much discretion. But Justices assured them that some existing practices would remain in place after under the new Statute.

⁶²² Certification was another way lower courts could submit a legal question to the Supreme Court, which she was bound to review. Through prudential considerations, the court slowly denied some certified questions and altogether discouraged the use of the procedure, which therefore disappeared. (Hartnett, *op. cit.*, pp. 1710-12)

granted. Thus, the Court could decide what legal issues it wanted to adjudicate, as well as the number of cases it was ready to review.⁶²³ Moreover, this reform would change the way the Court would adjudicate a case.⁶²⁴ Of its former internal practices, Chief Justice Taft had assured Congress the Court would keep, only a few were preserved. For example, by keeping with the practice of the “rule of four” at the petition stage—a rule whereby 4 Justices would decide to review a case, in contrast to the rule of five, whereby 5 Justices are the required majority to decide on the merits of a case—the Court maintained the chance that a less popular constitutional question would be adjudicated.

267. Essentially, the Judges’ Bill gave discretion to the Supreme Court to dismiss 80% of petitions filed on the basis of non-compulsory jurisdiction.⁶²⁵ According to James Beck, the 1925 Bill transformed the Court into a “quasi constitutional convention”,⁶²⁶ capable of deciding as many cases as it would judge appropriate, and whatever constitutional question it deemed desirable. The power and impact of the Court in society increased accordingly.⁶²⁷ The power to “decide not to decide” gave the court the ability to target issues and impact society; far from remaining the “*pouvoir nul*” judicial institutions had heretofore been reputed to be.⁶²⁸ However, from the surge in power didn’t follow an increase in transparency of its proceedings,⁶²⁹ which would have enhanced her public

⁶²³ “In effect the court achieved absolute and arbitrary discretion over the bulk of its docket.” Under the 1988 Act, which still governs today, the Court retains mandatory appellate jurisdiction only from a three-judge panel of a court of appeals on the issue of a state’s federal legislative apportionment. Sternberg considers that the 1988 act only formalized already existing Supreme Court practice. Sternberg, *op. cit.* p. 13.

⁶²⁴ *ibid.*

⁶²⁵ “In 1924, 40% of the cases filed in the Supreme Court were within the Court’s obligatory jurisdiction, with 60% of the filings left to the Court’s discretion to decide whether to decide. In 1930, the percentage of obligatory filings fell to 15%, with 85% left to the Court’s discretion”. Hartnett, “Questioning”, *op. cit.* p. 1704, footnote 364.

⁶²⁶ In the words of James M. Beck, Solicitor General in the Judge’s Bill debate (Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing Before the House Comm. on the Judiciary, 67th Cong. 30 (1922), quoted in Hartnett, *ibid.*, p. 1670.

⁶²⁷ “Court’s unique mission ‘to define the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal system’, Brennan, Another Dissent, *op. cit.*, note 6, at 482. See also *ibid.*, at 484 (“The screening function is an indispensable and inseparable part of this entire process, and it cannot be curtailed without grave risk of impairing the very core of the extraordinary function of the Supreme Court.”).

⁶²⁸ “For 75 of our more than 200 years under the Constitution, we have had a Supreme Court with a far-ranging power to set its own agenda and thereby shape the nation’s political agenda.” J. Sternberg, “Deciding Not to Decide”, *Judicature*, Vol. 84, No. 3, (2000), p. 127 (hereinafter, “Deciding Not to Decide”).

⁶²⁹ As Cordray and Cordray claim, the Court is now allowed “to grant certiorari according to vague guidelines that afford them maximum discretion, based on very little collegial deliberation, with virtually no public disclosure or explanation of their actions and subject to no precedential constraints.” M. M.

accountability. The Supreme Court's work was still protected under a heavy cloak of secrecy and complexity—the very issue that had originally driven the Judiciary Committee's reform.⁶³⁰ Another reform took place in 1988 which took away more of the compulsory jurisdiction left to the Court.⁶³¹ If the number of petitions submitted each term continues rising, scholars have observed a shrinking in the Court's docket, *i.e.* in the number of cases the Supreme Court accepts reviewing. According to Owens and Simon⁶³² and Gooch⁶³³, this decrease in the docket can be explained by the polarization and absence in cohesiveness within the Court, which makes an agreement of four judges to review a case more difficult to obtain. Shortly after the 1925 reform, the Supreme Court asserted itself increasingly: It started incorporating the Bill of Rights against the states, which until then could not be examined against federal rights standards, and developed more ambitious rights-related jurisprudence.⁶³⁴

268. Today, some scholars have claimed that civil rights petitions were more likely to be reviewed by the Supreme Court than others,⁶³⁵ and that strategic considerations were more present at certiorari stage when Justices vote to grant a petition than at the merits stage.⁶³⁶ To Vanessa Baird, the dominant provisions reviewed by the Supreme Court in a given period is not always the same and varies. For example, number of decided discrimination cases increased in the early 1960s until late 1970s, while criminal cases took more of the Court's attention in the late 1960s.⁶³⁷ Indeed, the type of cases that are accepted for review ultimately impact the type of societal influence the Court can

Cordray, R. Cordray, "The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection", *Washington University Law Quarterly*, Vol. 82, 389, (2004) p. 390.

⁶³⁰ *Ibid.*, p. 402.

⁶³¹ Judiciary Act of 1988, Pub. L. 100–352, 102 Stat. 662, enacted June 27, 1988, codified at 28 U.S.C. § 1257.

⁶³² R. J. Owens, D. A. Simon, "Explaining the Supreme Court's Shrinking Docket", *William & Mary Law Review*, Vol. 53, 1219 (2012), D. M. Gooch, "Ideological Polarization on the Supreme Court, Trends in the Court's Institutional Environment and Across Regimes, 1937-2008", *American Politics Research*, Vol. 43, No. 6 (2015)

⁶³³ Gooch, *ibid.*

⁶³⁴ Hartnett, "Questioning", *op.cit.* p. 1644.

⁶³⁵ V. Armstrong, C. A. Johnson, "Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?", *Polity*, Vol. 15, 141, 145-47 (1982) (arguing that the presence of a civil liberties issue serves as a "cue" for the Court to grant certiorari). This study however is old. For a more complete study on factors affecting the issues the Supreme Court will review, see V. A. Baird, *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*, Charlottesville, VA, University of Virginia Press, (2007), 240 p.

⁶³⁶ See G. A. Caldeira et al., "Sophisticated Voting and Gate-Keeping in the Supreme Court", *Journal Law, Economics & Organization*, Vol. 15, 549, (1999), p. 550.

⁶³⁷ V. Baird, *op. cit.*, pp. 85-86.

exert.⁶³⁸ Today, the most litigated constitutional provisions are the constitutional amendments of the Bill of Rights.⁶³⁹

269. All of the above shows that reforms bringing more independence of the Supreme Court have facilitated its transformation into what some believe has become an agent of social change or “nations’ moral leader”.⁶⁴⁰ Moreover, as civil rights issues tend to dominate the Supreme Court docket today, possible social change effected by the Court would likely affect the field of civil and fundamental rights most. Because these reforms have made access to the Supreme Court more difficult, unlikely and arbitrary, they can be interpreted as having restricted plaintiff access to relief, increasing the Court’s distance to its publics. However, the Court’s discretion can arguably be seen as an opportunity to address the issues most often submitted to it by plaintiffs, or societal issues of the day. By increasing its independence from the federal executive and legislative powers and choosing what cases to review, the Court can be perceived as either more attune to popular concerns, or as more arbitrary and politically oriented.
270. The European Court of Human Rights institutional setting, although different, has allowed it to play a less visible, but nonetheless deeply impactful and therefore comparable role in society.

1.1.1.2. Public Access to European Court Proceedings

271. The European Court was born as an institution devoid of compulsory jurisdiction. Originally, individual plaintiffs were not allowed direct access to the Court. The instrument of “collective enforcement” of human rights was originally entrusted mostly to states.⁶⁴¹ Pursuant to Article 25 of the original 1950 Convention text, individuals and

⁶³⁸ Although many scholars have challenged the conception of the Court as a “counter-majoritarian” hero; see for example G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Chicago, Chicago University Press, 2d Ed. (2008); Hartnett believes that at the very least, “the most significant impact of Supreme Court decisions is to increase the political salience if the issues decided—regardless of which way it decides the issues”. Sternberg, “Deciding not to Decide”, *op. cit.*, p.127.

⁶³⁹ See Epstein, Segal, and al, *op. cit.*

⁶⁴⁰ Hartnett discusses the views of other scholars strongly supporting a wide agenda-setting power so as to play its role of moral leader of the nation, considering for his part that “it is past time to frankly acknowledge that such views are nothing more than a call for mixed government, with one branch-the judiciary-representing the interests and views of the “better” class of society”. Hartnett, “Questioning”, *op. cit.*, p. 1736-37, quoting J.H. Ely, “The Apparent Inevitability of Mixed Government”, *Constitutional Commentary*, Vol. 16, 283, (1999) pp. 290-91.

⁶⁴¹ Preamble, §5. States could also initiate proceedings pursuant to Art. 24 of the 1950 European Convention of Human Rights.

organizations were granted an indirect and conditional access to the proceedings through the Human Rights Commission, upon recognition by the State charged with a violation of the European Convention. The recognition of competence by the contracting states was a filtering device that for a time assuaged the concern of states concerned with the potential reach of the decisions and the threat to their sovereignty.⁶⁴² They kept the option of not renewing their recognition of the Commission's competence. Only the European Commission of Human Rights was accessible to individual petitioners,⁶⁴³ which upon drafting a report and sometimes recommendations, could defer a case to the Court.⁶⁴⁴

272. The Human Rights Commission was instituted in 1954,⁶⁴⁵ while the Court was first inaugurated in 1959.⁶⁴⁶ At this time, many of the optional clauses of the Convention had not been ratified by all contracting states, which preferred keeping a period of reflection. Before the Commission referred an individual petition to the Court in 1958, only two inter-state cases had been declared admissible by the Commission.⁶⁴⁷ The treatment by the Court of the first two individual petitions set up the future status of the individual in the proceedings for year to come. Although the petitioner was not granted *locus standi*, in *Lawless*, the Court accepted that the Commission communicate to the Court relevant points of the applicant's arguments in its report. In this way the Commission found a new role of "defender of public interest",⁶⁴⁸ with the support of the Court.
273. The first years of its function, the Commission did not only act as a filter of petitions to the Court, it also established the standard practices for the future of individual petitions. Indeed, it became a standard to allow an opportunity for both the defendant state and

⁶⁴² Bates, *op. cit.*, p. 459.

⁶⁴³ Art. 25 sec. 4 ECHR in its 1950 version. The capacity of the commission to hear individual applications entered into force in 1955 after 6 states had declared their acceptance of the court's jurisdiction.

⁶⁴⁴ Jurisdiction of the court regulated by art 25 of the ECHR in its 1950 version, and art 34 of today's text. Previously the court petitions could be only filed by states and subject to defendant states acceptance. This was the logical corollary from the nature of the system of « collective human rights protection ».

⁶⁴⁵ Bates, *op. cit.*, p. 174

⁶⁴⁶ The Court held its inaugural session between 23 and 28 February 1959 in Strasbourg, and it was formally inaugurated on 20 April 1959, the tenth anniversary of the Council of Europe. *Ibid.*, p.181.

⁶⁴⁷ First three admissible cases were referred to the Court in 1958. On 9 June 1958 the Commission declared the first individual application admissible, that of ECtHR, *De Becker v Belgium*, Appl. No. 214/56, 27 March 1962.

⁶⁴⁸ Bates, *op. cit.*, p. 203, see Commissioner Waldock's submissions to the Court, ECtHR, *Lawless v. Ireland*, Appl. No. 332/57, Series B 1960–61 at 245 and 261–262.

the plaintiff to have a hearing in addition to their written arguments, and to detail the reasoning of all decisions, including admissibility, or indicating that the Commission would indicate its provisional view on the case before concluding.⁶⁴⁹ Between 1960 and 1965, the Commission did not refer a single case to the Court.⁶⁵⁰ The Commission had indeed adopted a very cautious approach to admissibility, which in the long term served to build the confidence of contracting states.⁶⁵¹ However, this triggered criticism, considering that the Commission was usurping the authority of the Court, barred from the possibility of playing its own role in the European human rights landscape.⁶⁵²

274. With the increase of the number of admissible applications to the Commission after 1966, *i.e.* 37 as of 1970 compared to 7 between 1954 and 1966, the Commission became increasingly busy.⁶⁵³ However, it did not refer all cases to the Court in which it had decided judges had jurisdiction. After 1966, the Commission referred more cases to the Court, although some years, it did not.⁶⁵⁴ It was in the background of these ‘sleeping beauty years’ that important member states such as the United Kingdom or France in 1974, made the “Pro-European” gesture of accepting the optional clauses.⁶⁵⁵ Bates reports that to some, the prudent, slow and steady legal development produced by the Commission had proved that the individual could be a worthy subject of international law, and that states were ready to accept scrutiny and to implement the European system’s judgments. To many however, now had come the time for a new era of the European human rights system.⁶⁵⁶ Their wish was satisfied in the next years with some important decisions being made by the Court such as *Tyrer v. the United Kingdom and the Sunday Times case*,⁶⁵⁷ and the new activist turn taken by the Court, which confirmed in the early 1980s.⁶⁵⁸ Thus the work accomplished in the first two decades by the

⁶⁴⁹ Bates *op. cit.*, p. 219, Footnote 237, and p. 223.

⁶⁵⁰ *Ibid.*, p. 214.

⁶⁵¹ *Ibid.*, p. 220.

⁶⁵² *Ibid.*, p. 214.

⁶⁵³ *Ibid.*, p. 239.

⁶⁵⁴ *Ibid.*, pp. 249-255.

⁶⁵⁵ The United Kingdom ratified the Convention on 3 September 1953 and France on 3 May 1974.

⁶⁵⁶ Bates, *op. cit.*, p. 262.

⁶⁵⁷ ECtHR, *Tyrer v. the United Kingdom*, Appl. No. 5856/72, 25 April 1978 is a landmark case in European criminal law (Article 3 ECHR). ECtHR, *Sunday Times v. The United Kingdom*, [Plenary] Appl. No. 6538/74, 26 April 1979, was one of the first cases consecrating freedom of expression (Article 10 ECHR). The latter case is mentioned in the analysis of public opinion in European Democracy, in Chapter Three.

⁶⁵⁸ For example, A major case for homosexuals was indeed decided in 1981: ECtHR, *Dudgeon v. The United Kingdom*, Appl. No. 7525/76, 24 February 1983.

Commission set minimum standards for later work by the Court, and allowed the Court to adopt more bold approach to human rights protection. In 1995, president Ryssdal was to laud the Convention system for the result that, as he believed, European citizens now were conscious of their individual rights and ready to turn to the Court for protection against more “ordinary” violations of their rights.⁶⁵⁹

275. This is against this background that the Protocol 11 institutional reform was undertaken, which transformed the system into a single permanent Court endowed with compulsory jurisdiction and individual right of petition (Article 34 ECHR).⁶⁶⁰ Today, the right to individual access to the European Court is not only considered a “key component of the machinery for protecting”⁶⁶¹ rights in Europe, but also a “centrepiece of the human rights protection mechanism established by the European Convention on Human Rights”.⁶⁶² However, despite the Court’s recent priority policy, the European Court has no comparable amount of discretion to select cases for review.⁶⁶³ With the continuous increase in judgments and applications, the docket of the Court chambers and of the Grand Chamber continued to rise. Thus, more efficiency-minded reforms were undertaken to attempt to solve that problem, in which the Court took active part. For example, in anticipation of the entry into force of Protocol 14, the Court introduced the Pilot-judgment procedure its case-law in 2004.⁶⁶⁴ Upon the ratification of Protocol 14,

⁶⁵⁹ Bates, *op. cit.*, p. 386.

⁶⁶⁰I. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature by the member States of the Council of Europe on 11 May 1994. Entered into force in Nov. 1st 1998

⁶⁶¹ ECtHR, *Mamatkulov and Askarov v Turkey*, Appl. Nos 46827/99, 46951/99, 4 February 2005, §122.

⁶⁶² In the words of the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1403 (2004) of the Parliamentary Assembly on the human rights situation in the Chechen Republic at §11. Note that NGOs also have a right of access (Article 33 ECHR) and so do, under conditions, legal persons or group of persons (informal association) ... provided they establish “a sufficiently direct link between the applicant and the damage which he considers that he has sustained as a result of the alleged violation” (See European Commission of Human Rights, ECtHR, *Association X. and 165 liquidators and court appointed administrators v. France*, App. No 9939/82, 04 July 1983).

⁶⁶³ The Priority Policy was taken in 2009, classifying applications into seven categories, which include single judge and 3 judges formations. This policy was updated to take effect on 22 may 2017. The first highest priority categories include firstly, “urgent applications” (risk to life and death and deprivation of liberty, for example). The second priority category includes applications “raising questions capable of having an impact on the effectiveness of the Convention system or applications raising an important question of general interest”. The third includes Applications which on their face raise as main complaints issues under Articles 2, 3, 4 or 5 § 1 of the Convention.” See European Court of Human Rights, The Court’s Priority Policy, accessible at https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

⁶⁶⁴ In anticipation of the ratification of Protocol 14 (Treaty No.194, CTS No. 194 signed in Strasbourg on 13 May 2004 entering into force on 1st of June 2010) the ECtHR introduced what she called the “pilot judgement” procedure in its own case law. With the case of ECtHR *Broniowski v. Poland*, Appl. No. 31443/96, 22 June 2004, the European Court created a new way to manage repetitive cases in a more

single judge formations were instituted to filter out clearly inadmissible cases, while 3 judges formation would be competent with routine cases. The Chamber and Grand Chambers would now be free to examine more difficult cases or new legal problems. Only the Grand Chamber committee of 5 judges competent to examine referrals to the Grand Chamber has discretion to decide whether the case can be reviewed, based on the criteria laid out at Article 43 of the Convention: Referral is only possible for cases that “raise a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.” As an exception to the rule of Article 45, which compels the Court to justify its decisions in all cases, and at all stages of the procedure—admissibility or merits—the panel of five judges is not bound to motivate a denial of review upon referral.⁶⁶⁵ None of these reforms however came close to giving the Court a discretionary power to select cases comparable to the Supreme Court’s. The issue of adapting a certiorari-type procedure to the European Court was considered but dismissed as “alien to the philosophy of the European human rights protection system”:⁶⁶⁶ It was considered likely to provoke (or increase) a politicization of human rights protection and to be “perceived as arbitrary”.⁶⁶⁷

efficient way. This procedure allows the Court to isolate a “structural” or “systemic” problem believed to be at the source of a human rights violation and suggest to the Respondent state general measures aimed at solving the problem. Hence the Court gains in efficiency by freezing the stream of cases until the State remedies the issue. Once the issue is deemed resolved, the Court discards all “clone” cases and requires from the State to ensure efficient domestic remedies for those cases at domestic level. The Rule is now inscribed at Article 46 ECHR. Upon ratification of the Protocol 14, the Court inscribed the procedure in internal rules in February 2011, at Rule 61 of the Rules of Court: “1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.”

⁶⁶⁵ Article 73 (2) of the Rules of Court as of 1st of June 2015. Note that Protocol 16, open for signature since October 2nd, 2013 and entering into force upon ratification by 10 contracting states (8 have ratified as of March 2018), endowed the Court with a consultative power for questions submitted to it by national jurisdictions. For more information on Protocol 16, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=pPFChdPt

⁶⁶⁶ In its report, the Group of Wise Persons, considered that “giving the Court a discretionary power to decide whether or not to take up cases for examination (a system analogous to the certiorari procedure of the United States Supreme Court)...would be alien to the philosophy of the European human rights protection system [...] the introduction of a mechanism based on the certiorari procedure would [...] entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary”. *Report of the Group of Wise Persons to the Committee of Ministers*, CM (2006)203, 15 November 2006, at § 42.

⁶⁶⁷ Report of the Group of Wise Persons to the Committee of Ministers, CM (2006)203, 15 November 2006, at § 42. The Group considered that “the introduction of a mechanism based on the certiorari procedure would [...] entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary.”

276. Statistics on European Court's judgments show that as of today, the likelihood of obtaining a decision on a case is very low. With approximately 50.000 new applications a year and 2388 merits judgments delivered in 2014, only 4.78% of applications are likely to receive a merits judgment (the rest of the applications being judged inadmissible or struck out).⁶⁶⁸ The reforms have ensured that the Court would be able to manage its backlog more efficiently, striking out inadmissible cases, speeding up treatment of repetitive cases, and giving discretion to the Court to hear interpretative issues. Because the Court is obliged to review all filed applications and has no discretion to discard petitions at will the European Court statistically decides more cases than the Supreme Court, where altogether about 1% of petitions are granted and decided on the merits in 2012.⁶⁶⁹
277. In conclusion, reforms of the Supreme Court and ECtHR were initiated in order to help the courts maintain or restore judicial efficiency more than for opening their doors to plaintiffs seeking relief against serious civil or human rights violations by public authorities. However, if petitioner access may have decreased in numbers, the newly found discretion of the Supreme Court allowed the it to examine more civil rights issues and more publically salient problems, potentially closer to popular concerns. In Europe, the growth of the Commission and the Court also came as a result of increasing individuals' interest and perceived existence of a forum for their claims. Reforms were undertaken to satisfy such claims and improve individual rights protection more efficiently.

1.1.2. The Substantial Improvement of Plaintiffs' Access to Judicial Relief

278. Access to relief at Supreme Court level is rather difficult and chances to get a decision on the merits are rare. As a response to this concern, both courts have developed admissibility criteria with a view to see justice carried out in a "concrete and

⁶⁶⁸ When contrasting the number of judgments to the existing number of pending applications before a judicial formation, chances for an application to obtain a judgment drop: With 99900 applications in early 2014, and 2388 decisions that same year, the percentage of chances to obtain a decision on the merits drops to 2.3%. This does not account for the seriousness of the application filed. Those personal calculations are based on Council of Europe, *Analysis of statistics 2014*, January 2015. Accessible at http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf (last accessed 7 April 2018)

⁶⁶⁹ K. S. Bathia, "Likelihood of a Petition Being Granted", 30th Jan. 2013, accessible at <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/> (last accessed 7 April 2018).

effective”⁶⁷⁰ manner. The Supreme Court developed its admissibility doctrine called “standing” in the 1940s after Congress had created new rights that had not previously existed in common law. It is therefore difficult to judge whether the Court relaxed its admissibility requirements before 1940 or after 1940, and to assess whether public access improved over time. Nonetheless, the first subsection endeavours to give an overview of admissibility criteria that have been applied by the Supreme Court since that time. Next, I summarize and compare admissibility requirements at European level.

1.1.2.1. Public Access and The United States Supreme Court’s Standing Doctrine

279. Obtaining relief for a rights violation by a State in the United States seems complex. Because of the separation of powers and because powers are delegated from the States to the Federation, States enjoy “sovereign immunity”, *i.e.* they may not be sued in federal courts by citizens unless they give their consent to lawsuits.⁶⁷¹ The Court however created an exception to this rule in *Ex Parte Young*, by the “simple expedient of naming the appropriate state officer as the defendant”.⁶⁷² There are some exceptions to the state sovereign immunity principle. For example, the Supreme Court embraced the idea that the federal legislature had the power to abrogate state sovereign immunity to enforce the Fourteenth Amendment rights,⁶⁷³ the very rights that allowed the incorporation of most Bill of Rights provisions against the states and permitted citizens to obtain relief against them for federal constitutional rights violations. One of these enforcement statutes is the 1871 “Ku Klux Act”, which was initiated as an effort put an end to the Klan’s violence against the African American population in the South in the

⁶⁷⁰ Reference to the Court’s expression ECtHR, *Airey v. Ireland*, 9 october 1979, Appl. No. 6289/73, at § 26.

⁶⁷¹ This rule was inscribed into the United States Constitution with the Eleventh Amendment, as reaction to the case *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), whereby the Supreme Court held that a suit initiated by a South Carolina merchant against Georgia was admissible despite the State’s sovereign immunity. The Court in *Hans v. Louisiana*, 134 U.S. 1 (1890) interpreted that the doctrine of Sovereign immunity had been constitutionalized by the Eleventh Amendment and excluded any suit against a state by a citizen, also on issues of federal law. J. Jeffries, P. Karlan, and al., *Civil Rights Actions. Enforcing the Constitution*, Foundation Press, 2nd Ed. (2007) p. 5.

⁶⁷² *Ex Parte Young*, 209 U.S. 123 (1908). This case is usually cited to claim that a cause of action exists to prevent violations of constitutional rights despite absence of congress express authorization. Jeffries, Karlan, *op. cit.*, p.12.

⁶⁷³ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Later in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), the court declared that state immunity abrogation would occur only if Congress made that intention “unmistakably clear in the language of the statute”. Like the Thirteenth Amendment had endowed Congress with the power to enforce its content through statutory law, Section 5 of the Fourteenth Amendment also endows Congress with the power to vote provisions of enforcement.

Reconstruction Era,⁶⁷⁴ and enclosed today's most litigated provisions in the field of civil rights: 42 U.S.C. section 1983. This section allows plaintiffs to obtain relief for a breach in their constitutional rights by lodging a complaint against public officers for a violation of civil rights.

280. Requirements for standing in federal courts, *i.e.* conditions of admissibility for a party's legal claim in court, traditionally include, first, the existence of a personal or imminent⁶⁷⁵ sufficient injury. For our purpose an injury to constitutional rights suffices unless the provision on which the case is based presents a "generalized grievance" and not an injury "in fact", which is a ground for dismissal. However, in order to avoid that a blatantly unconstitutional statute affecting every citizen goes unchallenged, the Court has ruled: "where a harm is concrete, though widely shared, the Court has found injury in fact".⁶⁷⁶ Secondly, if the injury has not occurred yet, but likely will, the plaintiff can obtain review under the "ripeness" doctrine.⁶⁷⁷ If the enforcement of a statute will by itself constitute 'hardship', *i.e.* if actual persons have an actual stake in the outcome of the case, the case is ripe. Thirdly, the plaintiff must prove that the injury is "fairly traceable to the defendant's allegedly unlawful conduct and unlikely to be redressed by the requested relief".⁶⁷⁸
281. Additionally, the Court has held that the plaintiff must assert his own rights in federal courts and not the rights of a third party.⁶⁷⁹ However, It has allowed many exceptions to this rule. Firstly, if a third party that suffered an injury is unlikely to be able to sue, or unlikely to assert her own rights, a plaintiff asserting his own rights is allowed to defend a third party's rights if he is likely to advocate them efficiently.⁶⁸⁰ Are also

⁶⁷⁴ The "Reconstruction Era" refers to the period following the American Civil War, fought over the enfranchisement of slaves in the Southern States. At the end of War, the Thirteenth Amendment, passed by the Congress on January 31, 1865 and ratified by the states on December 6, 1865, amended the Constitution by abolishing slavery and endowing Congress with the power to enforce the end of slavery. The Civil Rights Act of 1866, enacted April 9, 1866, was voted by Congress to that end.

⁶⁷⁵ Chemerinsky, "Constitutional Law", *op. cit.*, p 62-63.

⁶⁷⁶ *Federal Election Commission v. Atkins*, 524 U.S. 11, 24(1998).

⁶⁷⁷ "Ripeness" refers to "the state of a dispute that has reached, but not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made". *Black's Law Dictionary*, *op. cit.* "Ripeness", pp. 1524.

⁶⁷⁸ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁶⁷⁹ *Warth v. Seldin*, 422 U.S. 490 (1975), at 499.

⁶⁸⁰ See *Barrows v. Jackson*, 346 U.S. 249 (1953) (a white man prosecuted to breach of contract discriminating against black can also advocate the rights of African Americans because they are, as non-parties to the contract, unable to defend their own rights in this case). See also *Eisenstadt v. Baird*, 405 US 438 (1972) (A doctor prosecuted for distributing contraceptives to unmarried couples can also defend the rights of unmarried couples barred from receiving contraceptives).

allowed to defend the rights of third party individuals or societies that are part of the third party's constitutionally protected activity.⁶⁸¹ In a similar way, the overbreadth doctrine allows a plaintiff to assert the constitutionally protected right of third parties even if it does not cause an injury to him personally.⁶⁸² Lastly, associations have standing to defend the rights of their members if it or its members would be affected in a tangible way by the breach and if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit".⁶⁸³

282. Overall, the Supreme Court has developed if constrained, a wide-reaching doctrine of standing allowing direct and indirect victims of civil rights breaches and third parties to be included under certain conditions. It shows an effort to ensure that petitioners file serious petitions obtain relief in federal courts—not only with at the Supreme court—while maintaining its ability to easily dismiss non-serious petitions.

1.1.2.2. Access to Relief in Strasbourg

283. Review of a case by the European Court of Human Rights is based on the assertion of a breach of a Convention right. In order to avoid that all breaches, major and minor, would clog its docket, the Court regularly reasserts two main principles: subsidiarity, that assigns European human rights law the role of corrector to domestic laws' deficiencies,⁶⁸⁴ and direct effect, *i.e.* the absence of requirement to adopt a special law

⁶⁸¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such is the case of parochial school challenging a law on public schooling, also vendors asserting rights of customers etc. However, it does not work always. See *Gilmore v. Utah*, 429 U.S. 1012, 97 S. Ct. 436 (1976). (A mother was seeking relief in her son's name, asserting a right her son had not asserted in court) and *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), (A father was seeking relief for his daughter challenging the "under God in the pledge of allegiance in public school. The father didn't have custody of the child and the court interpreted that case as a domestic relations matter.)

⁶⁸² *Village of Schaumburg v. Citizens for a Better Env't.*, 444 US 620 (1980). However, this doctrine appears is limited to first amendment cases. See Chemerinsky, "Constitutional Law", *op. cit.* p 88

⁶⁸³ *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

⁶⁸⁴ On the subsidiarity principle and its meaning see among others F. Sudre, "La subsidiarité, "nouvelle frontière" de la Cour EDH", *JCP G*, (2013), doctr. 1086 (hereinafter "Subsidiarité"). On the balance between subsidiarity and the Court's concern of making rights effective, B. Pastre-Belda, "La Cour EDH entre promotion de la subsidiarité et protection effective des droits", *Revue Trimestrielle des Droits de l'Homme*, Vol. 94 (2013), p. 251. On the principle and its use by the Courts and its evolution over time, see A. Mowbray, "Subsidiarity and the European Convention on Human Rights", *Human Rights Law Review*, Vol. 15, No. 2, (2015), pp. 313–341.

to enforce ECHR rights in domestic law.⁶⁸⁵ As a corollary of the principle of subsidiarity, plaintiffs have to exhaust all effective domestic remedies before filing in Strasbourg (Article 35 Sec. 1 ECHR).⁶⁸⁶ The principle of direct effect requires from national judges that they enforce the Convention at national level, so plaintiffs do not have to go through the costly and time-consuming procedures all the way to Strasbourg to obtain relief.⁶⁸⁷

284. As mentioned above, it is since Protocol 11, which put an end to States' possibility to opt out from the Court's jurisdiction, that individuals have direct access to the European Court as a matter of right (Article 34). Pursuant to Article 1 of the Convention, Contracting States have responsibility to ensure their rights to "everyone within their jurisdiction". The European notion of jurisdiction is therefore mostly territorial, based on the territory on which the challenged act or behaviour has been accomplished rather than on citizenship or based on the domestic law of the plaintiff. States are thus responsible for all breaches of institutions possessing a public mandate on their territories.⁶⁸⁸
285. Pursuant to Article 34 of the Convention, "any individual, non-governmental organization or group of individuals" can seek relief at European level. Individuals must have a personal stake in the case, since in principle, Article 34 does not create an *action popularis*.⁶⁸⁹ Thus, a prisoner which citizenship rights or legal capacity were

⁶⁸⁵ Although the European Court considers the Convention directly applicable in domestic law, contracting states used different methods to assign the Convention legal value within domestic law, thereby deciding what judges may or may not examine domestic law in light of the Convention. On that specific topic see for example A. Stone Sweet, H. Keller "The Reception of the ECHR into national orders", in H. Keller, A. Stone Sweet, (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press (2008).

⁶⁸⁶ The jurisconsult of the European Court defines it as "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]. The Court can and should intervene only where the domestic authorities fail in that task." Jurisconsult, Interlaken Follow-Up. Principle of Subsidiarity, (2010), available at http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf. The Court asserted this principle in some of its first cases *ECtHR, Handyside v. the United Kingdom*, Appl. No. 7 Dec. 1976.

⁶⁸⁷ Although the European Court favors direct incorporation in domestic law (*ECtHR, Ireland v. the United Kingdom*, Appl. No. 5310/71, § 239), contracting states have adopted different methods adapted to their constitutional regime. States having incorporated the Convention directly include Belgium, the Netherlands, Portugal, Spain, France and Bulgaria. State that transposed the Convention through a special law include Malta, Finland, Denmark, Ireland, Island, Norway, and the United Kingdom.

⁶⁸⁸ *ECtHR, United Communist Party of Turkey and others v. Turkey*, Appl. No. 19392, 30 January 1998, at §29(asserting the responsibility of contracting states for acts of institution carrying a public mandate) and *ECtHR, Ilascu et al. v. Moldavia and Russia*, 8 July 2004 [GC], Appl. No. 48787/99 (judging that in principle, *rationae loci* jurisdiction of the Court applies to acts perpetrated on a territory for which one member states owns jurisdiction.)

⁶⁸⁹ *ECtHR, De Becker v. Belgium*, Appl. No. 215/56, 27 March 1962.

removed may seek relief at European level although he wouldn't be legally capable in his own country.⁶⁹⁰

286. The Court has interpreted the term “non-government organization” *a contrario*, as any organization that is not of a government, *i.e.* that does not possess any public authority or mandate, or fulfils any public administrative duty, provided they are fully autonomous from the state.⁶⁹¹ Non-governmental organizations can however only file a case provided they are themselves concretely and directly victims of a violation: they can't lodge an abstract challenge against a public act. That rule however was progressively relaxed, to the point of the Court allowing a quasi *actio popularis*.⁶⁹² Although the link between the organization and the violation must be sufficiently direct for its case to be admissible, the European Court recognizes that non-governmental organizations have become a common resource for individuals seeking legal help against violations: It admits that an organization can represent the interests of its members in Court if they are directly concerned by the alleged violation.⁶⁹³ In exceptional cases, such as extreme vulnerability, the Court admits that an organization represents a victim.⁶⁹⁴ Also, the Commission first and the Court subsequently, have enlarged the notion of “victim” to include “potential” victims⁶⁹⁵ and “indirect victims”, the latter including persons who experienced an injury based on the violation of the rights of third person, or who have a personal stake in that an end be put to this violation.⁶⁹⁶ The “indirect victim” status requires the existence of a direct victim and a direct and personal link between the direct and the indirect victim.⁶⁹⁷
287. With regards to the qualifying impact of rights violations, *i.e.* damage requirement, it was formerly not necessary to have suffered a damage to qualify as victim of a

⁶⁹⁰ ECommHR, *Ilse Koch v. Federal Republic of Germany*, App. No. 1270/61, 8 March 1962.

⁶⁹¹ ECtHR, *Holy Monasteries v. Greece*, Appl. Nos. 13092/87 and 13984/88, 9 December 1994, Persons exercising a public mandate are therefore considered governmental organization and thus barred from filing a case in their own name. ECommHR, *Demirbas and 18 other applicants v. Turkey* (dec.), Appl. No. 1093/08 9 Nov. 2010.

⁶⁹² Sudre, “Subsidiarité”, op. cit., p. 303.

⁶⁹³ ECtHR, *L'Erablière ASBL v. Belgium*, Appl. No. 49230/07, 24 feb. 2009,

⁶⁹⁴ ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, Appl. No. 47848/08 [G.C.], 17 July 2014.

⁶⁹⁵ ECommHR, *Bruggemann and Scheuten v. German Federal Republic*, Appl. No. 6919/75, 19 May 1976. In ECtHR, *Klass and Others v. Germany*, [Plenary] 6 September 1978, §30-38, a person can claim the status of victim based on the mere existence of a law which could have a detrimental effect on her.

⁶⁹⁶ ECommHR, Appl. No. 1478/62, 18 dec. 1963.

⁶⁹⁷ ECtHR, *Nölkenbockoff v. Germany*, [Plenary] Appl. No. 10300/83, 25 August 1987.

breach.⁶⁹⁸ However, Protocol 14 introduced new conditions of admissibility. Pursuant to new Article 35 Section 3, (b), unless an exception applies,⁶⁹⁹ applicants have to demonstrate a “significant disadvantage”, satisfy a “minimum threshold of seriousness”, assessed through scrutiny of “*inter alia* : the nature of the right allegedly breached, the seriousness of the impact of the alleged violation on the exercise of the right and/or the potential consequences of the violation on the applicant’s personal situation”.⁷⁰⁰ To avoid that potentially serious moral prejudice may be denied relief, the court proceeded to a teleological interpretation of the wording of article 35 sec. 3, (b), considering that “a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest”.⁷⁰¹ In including “important questions of principle” that “may cause a significant advantage” into the threshold of serious injuries, the European Court ventures into the field of potential injuries while giving itself the option to tackle serious social questions. Ultimately, the European Court has made sure that individual and groups of plaintiffs or organizations supporting them would find their way to the Court and have the opportunity to seek relief for potentially serious violations insufficiently dealt with at home.

288. Hence both the Supreme Court and the European Court’s reading of their standing and admissibility requirements have open their courtroom to potentially more serious issues including issues of principles. Through such interpretation, they communicated to the public that they were institutions one could rely on to seek legal relief for legal dysfunctions as well as issues of principle. I claim that this, together with landmark legislative and internal reforms, has contributed to making these two judicial institutions landmark actors of governance playing no lesser role than the executive and legislature in public governance, although they are not always as salient to the public eye.

⁶⁹⁸ ECtHR, *Inze v Austria*, Appl. No. 8695/79, 28 October 1987.

⁶⁹⁹ Article 35 Sec. 3, (b) “the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal”.

⁷⁰⁰ ECtHR, *Giusti v. Italy*, no. 13175/03, 18 October 2011, at §34. Court or commission?

⁷⁰¹ ECtHR, *Korolev v. Russia, admissibility*, Appl. No. 25551/05, 1st July 2010.

1.2. Ensuring Public Visibility

289. In making their admissibility criteria flexible, Courts opened their doors to plaintiffs seeking relief for serious cases. Both the Supreme Court and the European Court gave a signal that they were welcoming people seeking relief from broken laws and systemic problems, thereby communicating to the public that they are accessible, reliable and legitimate governing institutions. However, this is not the most efficient method of communication, as it is aimed at legal professionals and plaintiffs.
290. Another way for Courts to communicate their availability as a channel for change is by slowly working towards more transparency; for example, by opening their doors to the public. Courts' relationship to the press is particularly crucial, for the media communicates and translates—or miscommunicate and mistranslates—the substance of judicial work to the public.⁷⁰² Even though the media sometimes miscommunicates the true substance of courts' decisions, they benefit public debate insofar as they bring courts closer to the public eye. As organs of the public, the media affects public perceptions of the Court.⁷⁰³
291. The topic of domestic and international Courts' relationship to the media raises two questions. First, do institutions with a predilection for rational decision-making overestimate or underestimate the importance of faithful public communication of their work to citizens, and the impact it has on the efficiency of their work? While the first subsection is devoted to this question, the second will focus on the contrast between the manners in which the judicial function can be communicated to the public. The first example is the extreme mediatisation of Supreme Court confirmations, the second is the quasi-invisibility to the public of judicial selections and elections of European judges.

1.2.1. *Justice Seen Versus Justice Done*

292. "Not only must Justice be done; it must also be seen to be done." This famous sentence from English case *R. v. Sussex Justice, Ex parte McCarthy*⁷⁰⁴ reveals how important public visibility of 'justice being done' contributes to public understanding and

⁷⁰² On press reports of Supreme Court decisions, see E. Slotnick, "Media coverage of Supreme Court decision making: problems and prospects", *Judicature*, Vol. 75, No 3, pp. 132-3.

⁷⁰³ On the role of organs of public opinion in the formation of public perceptions, see Chapter One.

⁷⁰⁴ *R. v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923]).

legitimacy of the judiciary. Like public accessibility of written decisions, which is mostly important for experts and the press—the persons most likely to read judgements—public hearings are a form of judicial public accountability. However procedural rules and openness to the public vary strongly from institution to institution. It also deeply impacts the way the press portrays the courts and public understanding of their work.

1.2.1.1. Access to Public Hearings and Courts' Public Visibility

293. The European Convention of Human Rights protects the right to a fair and *public* hearing.⁷⁰⁵ The Court naturally strives to apply this principle to itself: Pursuant to article 40 ECHR, the European Court's proceedings are public, which includes documents submitted to the Registrar, and hearings when they are organized. With one or two hearings organized per month on average, it seems that public hearings are the exception rather than the rule.⁷⁰⁶ However, all hearings are organized by the Grand Chamber, and from the statistics, the Grand Chambers holds public hearings in most cases it adjudicates,⁷⁰⁷ a logical choice since Grand Chamber cases raise “a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance”.⁷⁰⁸ Moreover, to increase its public accountability, the Court makes hearings available online in the form of a webcast.⁷⁰⁹
294. Does the European practice compare to hearings before the U.S. Supreme Court? As in Europe, observers are in principle allowed to attend Supreme Court oral arguments.⁷¹⁰ But space is as limited in the room as opportunities to travel are rare for most people.

⁷⁰⁵ Art. 6, sec. 1, ECHR: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

⁷⁰⁶ See the Court's calendar <http://www.echr.coe.int/Pages/home.aspx?p=hearings/calendar&c> (last accessed 7 April 2018). According to the European Court's annual reports, 28 hearings were held in 2015 by the Grand Chamber out of a total of 22 judgements, while the Court had rendered 823 judgments. 13 hearings were held in 2017, 19 judgements were delivered, while the Court decided a total of 891 judgments. With such a number of judgments, the Court would be hard pressed to organize many public hearings. European Court of Human Rights Annual Report 2015, available https://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf (last accessed March 2018) and most recently *Annual Report, European Court of Human Rights*, provisional version, (2017)

⁷⁰⁷ See the list of pending cases at <http://www.echr.coe.int/Pages/home.aspx?p=hearings/gcpending&c=>

⁷⁰⁸ Art. 43, sec. 2 ECHR.

⁷⁰⁹ Hearings are available on the following website : http://www.echr.coe.int/Pages/home.aspx?p=hearings&c=#n1357300199863_pointer (Last accessed 7 April 2018)

⁷¹⁰ S. Bloch, T. Krattenmaker, et al., *Inside the Supreme Court: The Institution and Its Procedures*, 2 ed. (2007), West Academic Publishing, p. 1005.

The Supreme Court makes recordings and tapes since the 1950s, but the availability of some highly controversial cases and their broadcasting has shed doubts on the appropriateness of their availability, were they to be misused.⁷¹¹ Facing the Court's reluctance to give access, a senator attempted to introduce legislation forcing the court to broadcast hearings.⁷¹² The attempt failed but convinced the Court to make tapes available to the public before the traditional end of term, on the same day.⁷¹³ However, the Supreme Court has so far declined to allow live broadcasting of oral arguments, even on its website.

295. The reluctance of the Supreme Court to broadcast arguments stems from the belief that it is incompatible with the “greatness” of Supreme Court decision-making:⁷¹⁴ it may affect the way judges relate to the public. Justices could become less concerned with justice and care more about perceptions of their public, which may change their speech register into a “soundbite” style.⁷¹⁵ Concerns were also expressed that broadcasters would only publish misleadingly truncated excerpts of oral arguments, too focused on a Justice's personality⁷¹⁶ or on controversial lines of questionings that are less relevant to the solution of the case, and turn judicial decision making “away from substance”,⁷¹⁷ like representative institutions. However, others found that broadcasting oral arguments could improve the work of advocates⁷¹⁸ and public knowledge of proceedings, thereby

⁷¹¹ M. Cohn, “Let the Sun Shine on the Supreme Court”, *Hastings Constitutional Law Quarterly* Vol. 35, 161 (2007-2008), p. 162. Bloch stresses that Chief Justice Earl Warren stopped providing tapes to national archives following a CBS anniversary broadcasting of oral arguments of the Pentagon Papers Case. In 1990s, access to tapes was subject to agreement to not commercialize copies.

⁷¹² Senator Arlen Specter, 2007, bill S.344, 109th Congress. The bill never went beyond a first hearing.

⁷¹³ Cohn, *op. cit.* p.162.

⁷¹⁴ To Whitman, televising oral argument is “not inconsistent with greatness, but not the quality that make a justice great”. See C. B. Whitman, “Televising the Court: A Category Mistake (Symposium on Televising the Supreme Court).” *Michigan Law Review First Impressions* Vol. 106 (2007) p. 6.

⁷¹⁵ Soundbite style justice: “Media attention already focuses on the sharpest tongue on the bench. Let us not give verbal skill more importance than it deserves, lest it change the character of our least democratic but most open branch.” Whitman, *Ibid.*, p. 6.

⁷¹⁶ “[I]t is exactly the process of struggling with writing that gives the judiciary its unique character and disciplines the tendency to rely on first impressions or subjective reactions...The collegial process is the whole point. A Justice who speaks for the greatest number of her colleagues speaks with the most authority”, Whitman, *ibid.*, p.6. See also B. F. Martin Jr., “Gee Whiz, the Sky Is Falling!”, *Michigan Law Review First Impressions*, Vol. 106 No. 1 (2007), p. 1. Available at: http://repository.law.umich.edu/mlr_fi/vol106/iss1/31, reference to Justice Kennedy's concerns (last accessed 7 April 2018).

⁷¹⁷ Whitman, *op. cit.* p.7. Christina Whitman also argues that oral arguments already receive the wrong kind of attention by court watchers enjoying outcomes predictions, *ibid.* p. 6.

⁷¹⁸ K. N. Flaxman, “Will It Make My Job Easier, or What's in it for Me?”, *Michigan Law Review First Impressions* Vol. 106, 16 (2007), p. 17. Available at: http://repository.law.umich.edu/mlr_fi/vol106/iss1/27 (Last accessed 7 April 2018).

enhancing the Courts public accountability,⁷¹⁹ if only by improving their public behavior.⁷²⁰ Martin stresses that if the Court decides to make oral arguments accessible online, “[u]nlike television, the Internet will allow viewers to watch entire oral arguments anytime and anywhere, thus minimizing the number of people who receive their “Supreme Court TV” solely in soundbite format”.⁷²¹

296. It is difficult to assess how online access to oral arguments would affect the Supreme Court’s work, if one compares to the European Court’s Grand Chamber, which is already broadcasting its hearings. For many reasons, the main one being that the European Court is no national Court and does not enjoy comparable cultural and linguistic ties to most citizens, the European Court doesn’t enjoy such high public visibility and its proceedings are not politicized to the same extent. Thus, it is rare, if it ever occurred,⁷²² to come across truncated and misused excerpts of European hearings on mainstream television. In contrast, the Supreme Court is already the subject of much criticism and lobbying, and demonstrations around the Court’s building are so frequent, especially on the days that precede oral arguments and during oral arguments on controversial cases,⁷²³ that the Court has regulated the right to demonstrate around the Supreme Court’s building.⁷²⁴ Therefore, online availability may certainly improve the knowledge and understanding of serious watchers, who might be more numerous than national archives visitors. However, if oral arguments were to be broadcasted even on

⁷¹⁹ See B. F. Martin Jr. *op. cit.* p. 4. Moreover, he does “not deny there is a risk that some lawyers arguing before the Court will use their time to pander to public opinion, perhaps jeopardizing their clients’ interests or making a mockery of the Court”.

⁷²⁰ “Televising arguments should make it easier for arguing counsel to frame the post-argument debate by encouraging better judicial behavior. . . Similarly, a Justice who declines to ask questions of counsel at oral argument, but who engages in whispered conversations with other justices, might change his or her behavior in light of its exposure on YouTube. Likewise, a Justice who makes a truly stupid comment may find that life tenure does not provide immunity from public ignominy.” K. N. Flaxman, *op. cit.* p17. Also, B. Martin, *op. cit.* p. 4.

⁷²¹ Martin, *op. cit.*, p.3.

⁷²² We want to stress that the author of this dissertation never came across a television broadcast of European hearings, neither in part nor in full.

⁷²³ Small demonstrations around the Court happen daily. In April 2015, many protestors surrounded the Court during hearing of *Obergefell v. Hodges* case gay marriage case. Other debates die hard: both sides of the abortion debate rally every year in front of the court on the January anniversary of *Roe v. Wade* judgment.

⁷²⁴ “The term demonstration includes demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to draw a crowd or onlookers,” says the revised Regulation 7, which was effective June 13, 2013.

the Supreme Court's website, it would be difficult to prevent the exploitation of "soundbite format" excerpts in the news.

1.2.1.2. Courts' Relationships to the Press

297. Availability of case materials, access to oral arguments and the Courts' relation to the press are the windows to the Court's relationship to the public because press coverage is the first link between government and the governed. However judicial institutions have a less salient role than the executive and legislative institutions. The heart of this ambivalence lays in the fact that the core of judicial work is technical and, many will admit, quite tedious.⁷²⁵ Considering tribunals as institutions of reason, most judges do not mind distance from the press.⁷²⁶ However, both the Supreme Court and the European Court are called to decide on many controversial cases, and in such context a lack of knowledge of the law and of the internal workings of courts explains inadequate coverage.⁷²⁷ Moreover, media's definition of newsworthiness does not mirror lawyers' definition.⁷²⁸ Therefore, because of the gap between the Supreme Court lack of concern for newsworthiness and the controversial aspect of some cases, which makes them worth reporting even poorly,⁷²⁹ some scholars have claimed that the Supreme Court was the least understood federal institution of the United States.⁷³⁰ It is that gap that scholars and reformers alike have been attempting to correct.

⁷²⁵ Quoting Graham, Slotnik explains: "One argument that I never heard a justice make against permitting cameras in the courtroom is that Supreme Court proceedings are so dull that it is a public service to keep them off the tube. On this the justices missed a bet." Graham asserts that much of what goes on in the courtroom "rocks along at the excitement level of watching cement set", Slotnick, *op. cit.*, p. 138.

⁷²⁶ Most judges do not mind the fact that their work lacks newsworthiness. See Slotnick, *op. cit.*, p. 129

⁷²⁷ Slotnick, quoting Davis, "Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court", *Communications and The Law*, Vol. 9, 43, 55 (1987), p. 142.

⁷²⁸ T. Johnson, E. Socker, "Actions, Factions, and Interactions: Newsworthy Influences on Supreme Court Coverage", *Social Science Quarterly*, 93 (2), 434-463 (2012), p. 437. (Authors test whether Supreme Court media coverage (in terms of both overall volume and specific frames) is driven by Court actions, by factional battles on the Court, by the Court's interaction with other governmental actors, or by all three.)

⁷²⁹ According to Jones, Press coverage conveys the image of "an institution locked in mortal combat, where sheer numbers rather than force of argument or legal reasoning determined the result" (Jones, *op. cit.* p. 625, quoting Greenhouse *op. cit.* p. 1552).

⁷³⁰ Caldeira claims that public knowledge of the Supreme Court is shallow. See G. Caldeira, "Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests", *Kentucky Law Journal*, Vol. 77, 531, (1988-89), pp. 536-38. See also R. A. Jones, "Media Politicization of the United States Supreme Court", *Oñati Socio-legal Series* [online], Vol. 4 No. 4, pp. 613-630. Available from: <http://ssrn.com/abstract=2499231>

298. Scholars have been treating the topic of Supreme Court press coverage for a long time.⁷³¹ However, scholarly interest in the European Court's press coverage is very recent.⁷³² Moreover, it was the focus of legal scholars and did not involve to political scientists or journalists themselves. The existing study, report of a 2013 colloquium on the relation of the Court and the press mostly focused on the evolution of interest of the press for the Court, the types of communication of the Court, differences of approaches and needs between the press and the Court, the lack of precision of and accuracy of articles on European law, the types of cases discussed in domestic press. Supreme Court studies focuses on similar, if more precise issues, which can assist the following discussion of the European Court. Supreme Court and media scholarship extend to three main themes: first, the lack of accessibility of the Court's work to the public, second, the newsworthiness—or lack thereof—of Supreme Court's work, and third, its politicization through press reports. For example, analysis of the vocabulary used in the press revealed the degree to which the press presents the Court's work in a sensational, politicized and divisive manner.⁷³³ Scholars thus deplore that press reports tend to sensationalize the Supreme Court's work more than deserved,⁷³⁴ oversimplifying cases,⁷³⁵ describing results in terms of winners and losers, stressing the divisions inside the Court in terms of political affiliations (conservative and liberals) or in relation to the president that nominated them.⁷³⁶ They criticize the lack of precision in the use of

⁷³¹ See for example Jones' remarkable study based on corpus linguistics, analysing linguistic patterns in press reports on the Supreme Court. Jones, *ibid.*

⁷³² Jones, referencing studies since the 1980s, *ibid.*, p. 617, Following an international colloquium on the topic of the European Court in the Press, a collective book was published in 2015 in the French language: P. Dourneau-Josette, E. Lambert-Abdelgawad, *La Cour européenne des droits de l'homme dans la presse*, Bruxelles, Anthémis (2013).

⁷³³ Tony Mauro concludes that "a narrow view of accountability, one that reduces it to public observation, has already turned too much governmental decision-making away from substance. Media attention already focuses on the sharpest tongue on the bench", T. Mauro, "The Right Legislation for the Wrong Reasons", *Michigan Law Review First Impressions*, Vol. 106, No. 8 (2007), p 1011.

⁷³⁴ According to Jones, sensationalism leads to politicization. Jones, *op. cit.*, p. 616. More disconcerting than the selective coverage, however, is that many commentators characterize the quality of reporting on the Court as both shallow and divisive (see Serota, *op. cit.*). They give the wrong implications by forgetting key information, and decide for the reader: "When the New York Times declared that the "core of the disagreement" was simply about whether minorities have trouble voting in the covered states, period, its obvious implication was this: the majority took the position that minorities have no problem casting their votes in the south; the dissent disagreed... Let the reader decide for himself whether he agrees with the dissent's criticism; do not spoon-feed it to him in an article that purports to contain only the facts." Horwitz, "The Warren Court", *op. cit.*, p. 527.

⁷³⁵ As Amnon Reichman puts it, "the jurisprudence of sound bites rather than the jurisprudence of concept, interest, or value." see A. Reichman, "The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar", *California Law Review*, Vol. 95, 1619, 1639 (2007).

⁷³⁶ They refer mostly to the judge ideology or to the president who nominated them. (Jones, *op. cit.*, p. 623).

legal vocabulary and the false messages it conveys to the public, as well the lack of trustworthy references.⁷³⁷ However, they do not only blame the press, but constraints inherent to the work of the Supreme Court:⁷³⁸ Reporters have to translate court decisions and make them accessible to their audience, which is made difficult by the Court's lack of media accommodation: Firstly, the decisions themselves are long, technical and inaccessible. Secondly, according to the Court's calendar, many decisions are released on the same day. Cases compete for reporters' attention, and their length and technicality does not increase the likelihood that deeply impactful cases will be the ones reported.⁷³⁹ Thirdly, some journalists have mentioned that their profession as Supreme Court reporter is quite isolated not only from normal Washington politics but also from the Court itself, the direct sources being unavailable to verify the correctness of their reports, or even whether the stakes have been understood correctly.⁷⁴⁰

299. American scholars have proposed solutions to these structural problems, which involve both the Court and the press. Horwitz proposed some changes in the practices and ethics in reporting, while Serota recommends the creation of an "Office of 'Public Opinion'" which would work on drafting "engaging" summaries of decisions that he calls "public opinions" and which would be more accessible to the public.⁷⁴¹ Both scholars purport that such realistic reforms, which do not involve a "camera in the Court", would greatly improve the courts' visibility and understanding among the public, strengthen the role of Courts as public educators⁷⁴² and their public legitimacy.⁷⁴³ They would also contribute to discrediting the myth that courts are always deciding based on the judges'

⁷³⁷ Jones, *ibid.*, p. 617. Linda Greenhouse acknowledges accusations press reports misleading readers about the supreme Court p. 1551. L. Greenhouse, "Telling the Court's Story: Justice and Journalism at the Supreme Court," *Yale Law Journal*, Vol. 105 (1996), pp.1537-1560.

⁷³⁸ Greenhouse, *ibid.*, p. 1539.

⁷³⁹ *Ibid.*, p. 1550.

⁷⁴⁰ *Ibid.*, p. 1540.

⁷⁴¹ The step would be taken by the justices themselves. See M. Serota, "Intelligible Justice", *University of Miami Law Review*, Vol. 66, 649 (2011-2012), p. 664.

⁷⁴² See M. Serota, *ibid.* and J. Horwitz, "Writing a Wrong: Improving the Relationship Between the Supreme Court and the Press", *Ohio Northern University Law Review*, Vol. 40, 511 (2013-2014), (hereinafter "Writing a Wrong"). "[I]f these commentators are correct, and the Court is in fact an educative institution, then the justices' opinions-their primary means of instruction-ought to be tailored to the abilities of their students: the general public." C. Eisgruber, "Is the Supreme Court an Educative Institution?", *N.Y.U. Law Review*, Vol. 67, 961, (1992), p. 1030 (supporting the view of the justices as educators); quoted by Serota, *op. cit.* pp. 667-8.

⁷⁴³ It is important for the court's public image but also for her authority: "For if the average American cannot understand the Court's reasoning, then all that remains are the Court's rulings; but rules issued *by* unelected judges lacking an accessible justification can be experienced as subjugation." Serota, *ibid.*, p. 668.

prevailing political preferences.⁷⁴⁴ Ultimately, the right public visibility in the press, and not the lack thereof, might be the what Supreme Court Justices really need.

300. More studies on press coverage of the European Court have yet to be accomplished. For this reason, the European Court's relationship to the press it is difficult to compare to the Supreme Court's. In addition to the above referenced colloquium, a quick search in newspaper publications⁷⁴⁵ can give an impression of the faults European media suffers from compared to the United States. At a first glance, European press reports do not match the depictions made by American scholars about the mainstream press. Whether or not they are accurate,⁷⁴⁶ facts are always included in the reports. Divisiveness, decision scores and the existence of dissent are rarely mentioned. European legal basis for the case is based upon are mentioned half the time. Quotes from the cases are included half the time, and quotations from other sources are inserted a third of the time. References to judges' ideologies are altogether absent.⁷⁴⁷ Existing contributions on representations of the European Court and its work in the German and French press tend to confirm my analysis. However, they also teach that each domestic press describes the Court and its work in different manners and insists on different aspects. Nussberger stresses for example that the German press rarely insists on social controversial issues but reacts negatively in specific instances.⁷⁴⁸ Although the French press seems to have a predominantly positive opinion of the Court, and increasingly reports on the functioning of the Court and follows up on specific cases, journalists still report on controversial cases and sharply criticizes the Court.⁷⁴⁹ The United Kingdom

⁷⁴⁴ Horwitz, "Writing a Wrong", *op. cit.* p 525. The European Court also faces similar accusations, challenged by German European Court judge Angelika Nussberger, *op. cit.*, p. 43.

⁷⁴⁵ The search was initiated on January 20 on the Factiva database, including publications related to the European Court of Human Rights or "ECHR" in three languages, French, English and German, within the period of December 20th and January 21st, 2016. To be somewhat comparable to Horwitz and Jones studies on press coverage, only publications were included, which includes social media and blogs. Articles included treated of actual cases decided by the Court and not declarations that a case would be submitted to the Court.

⁷⁴⁶ Verifying the accuracy of press reports was not the object of this paragraph and would involve a more lengthy study, which is not the main topic of this section.

⁷⁴⁷ Nussberger claims that United Kingdom press comments on the composition of chambers judging against the country, which is not the case in Germany.

⁷⁴⁸ Nussberger explains that although being mostly favorable to the European Court, the German press reacted negatively to the ECtHR, *von Hannover v. Germany* [GC], Appl. No. 59320/00, 24 June 2004 (private life of public persons) or ECtHR, *M. v. Germany*, Appl. No. 19359/04, 17 December 2009 (preventive custody), p. 39.

⁷⁴⁹ H. Surrel, "La cour européenne des droits de l'homme dans la presse française", in P. Dourneau-Josette, , E. Lambert-Abdelgawad, (eds.) *La Cour européenne des droits de l'homme dans la presse*, Bruxelles, Anthémis (2013), p. 62.

is however the most critical press, more focused on the individual judges and on their political motivations.⁷⁵⁰ Overall, it seems that besides a few marginal exceptions, such as societal or ethical questions, domestic press focus on cases that directly concern their country.⁷⁵¹

301. Both the colloquium and the press analysis suggest that European Court “politics” are not politicized to the same degree, although a few very controversial cases have been widely reported domestically or internationally by the press.⁷⁵² What explains this lesser degree of politicization? Firstly, the Court is not part a national regime, and is therefore less politically salient. Secondly, although European decisions are long and complex, the European Court publishes judgment abstracts on all cases, which probably increases their public accessibility, although they might not comply with Serota’s concept of what would makes a “public opinion”, *i.e.* judgment summary meant for the public, “engaging”.⁷⁵³ However, their existence decreases if not cancels the likelihood that press reports based on these summaries will contain gross fact errors. Thirdly, the European Court does not have “decision days” and publishes opinions every week,⁷⁵⁴ therefore cases do not compete against each other for public attention. All those three factors alone do not improve public knowledge of the Court, but likely contribute to a lessened politicization. However, it seems that the European Court has worked more actively, if late, on its relationship to the media as translator of its decisions to the public through the creation of a communication agency, and reflected on the fact that “justice

⁷⁵⁰ Nussberger, *op. cit.*, p. 39.

⁷⁵¹ *Ibid.*, and Surrel, *op. cit.*, p. 68.

⁷⁵² For example in Spain, see ECtHR, *Del Rio Prada v. Spain, Espagne* [GC], n° 42750/09, 12 July 2013. *Del Rio Prada* was case pertaining to the principle of criminal legality applied to former members of the terrorist organization ETA. The case strongly mobilized the Spanish press as the Courts’ solution resulted in the liberation of a few assumedly unapologetic members of the organization. According to Professor Burgorgue-Larsen, Spanish public opinion did not understand the Grand Chamber solution. The decision became the perfect scapegoat of what was portrayed as a “judicial aberration”. L. Burgorgue-Larsen, *Actualité de la Convention européenne des droits de l’homme* (juillet - décembre 2013) *Actualité Juridique Droit Administratif*, 2014, p. 147. Among many others, cases such as ECtHR, *Perinçek v. Switzerland*, Appl. No. 27510/08, 17 déc. 2013 (the Grand Chamber also decided the case in 2015, which we comment in Chapter three) and ECtHR, *Lautsi and others v. Italy* [GC], Appl. No. 30814/06, 18 March 2011 also triggered many press reports and negative public opinion sentiments not only domestically, but internationally.

⁷⁵³ Serota, *op. cit.*, p. 663.

⁷⁵⁴ Decisions are published every Tuesday and Thursdays, in French and English or in some cases in a non-official language. They are announced by press release containing a summary a week in advance. For a snapshot on how the press office of the European Court works, see the press office website at http://echr.coe.int/Pages/home.aspx?p=press&c=#n13692166902903753763043_pointer

must be communicative”.⁷⁵⁵ A fourth factor however, might be decisive to the degree of press attention: the high number of judges and the non-salient procedure of nomination, which we discuss in the next section.

1.2.2. Judicial Appointments: High Political Salience Versus Excessive Discretion

302. Are there good reasons to depict the judiciary as the institution of reason? The public image of judicial nominations, mediated through the press, could help assess whether such characterization is justified. This subsection focuses on the public visibility of the judicial nominations and election processes in the Supreme Court and the European Court, keeping in mind that the two different institutional contexts heavily bear on the public image of courts. I hereby enquire if high public visibility improves or impedes on the Supreme Court’s rational work, and if the opacity of the European nomination process does advance the rationality of decision-making or sends a misleading image to the public.

1.2.2.1. The Excessive Political Visibility of Supreme Court Confirmation

303. The following section discusses the hypothesis that the degree of publicity of judicial confirmation and election processes heavily bears on the quality of candidates to judgeship. In the case of the United States, the evolution of procedures and practices strongly impacted their publicity as well as the degree of politicization of judicial nominations, and of the work of the Court. The focus of this subsection is on how the confirmation process evolved in the United States, and what brought about such a high degree of politicization.
304. Pursuant to Article II section 2 of the U.S. Constitution, the President nominates candidates to the Supreme Court bench after the Senate has given “advice and consent.” The right of the Senate to consent endows the nomination process with a democratic dimension.⁷⁵⁶ Presidents submit their proposal to the Senate, which in turn confirm or

⁷⁵⁵ Hubé, N., “L’institution judiciaire européenne sous contrainte de publicité”, in Dourneau-Josette, Pascal, Lambert-Abdelgawad, Elisabeth Dourneau-Josette, Pascal, Lambert-Abdelgawad, Elisabeth, (eds.) *La Cour européenne des droits de l’homme dans la presse*, Bruxelles, Anthémis (2013), p. 208.

⁷⁵⁶ Some have challenged the right of the Senate to reject the presidents’ nominees. “While the word “advice” may have a discretionary component, “consent” has been interpreted to “require confirmation

reject the nominee. The internal process within the Senate has evolved over time. What was first a “behind closed doors” procedure has progressively transformed into a quasi “reality show”. First, a Judiciary Committee of the Senate was appointed to proceed to what became a profile screening the profile of the candidate proposed for nomination. The Committee would submit a report to the Senate, which in turn would approve or reject him. The Senate held a first public confirmation hearing at the occasion of Justice Brandeis’ hotly contested nomination in 1916. However, the Senate accepted to hear a nominee in person for the first time in 1925, on the occasion of the confirmation of justice Harlan Fiske Stone. In 1929, the Senate began keeping records of Senators’ votes on confirmation and opened the process to the public. The Senate eventually welcomed the advice of a diversity of stakeholders—including interest groups—at each confirmation. The practice of hearing nominees became systematic from the 1950s onward. The transparency of the process reached its summit when live television and radio broadcasting of the hearing were introduced.⁷⁵⁷

305. Today, the process of judicial hearing and confirmation draws considerable political attention. It has been accused of displaying some reviled features of the classical political process the judiciary is supposed to be distant from.⁷⁵⁸ The Senate confirmation hearing, scrutinizing and exposing nominees’ past private and public life and their political beliefs, has become an “ugly affair” for nominees.⁷⁵⁹ The United States’ President not only has to “sell” his nominee to the Senate, but to the whole nation.⁷⁶⁰ Indeed, since the Seventeenth Amendment reform ratified on April 8th, 1913, Senators, now elected through direct universal suffrage, are accountable to the people directly, and no longer to states’ parliaments.⁷⁶¹ Moreover, by allowing the participation of

by majority vote” of the Senate”. see D. R. Stras, “Understanding the New Politics of Judicial Appointments”, *Texas Law Review*, Vol. 86, (2008) p. 1058.

⁷⁵⁷ Introduction of live broadcasts are described in Slotnik, *op. cit.*, p. 133.

⁷⁵⁸ According to Davis, “The general public and the elites involved in the process expect at least the image of the process to be one of propriety and sobriety, rather than naked power grabs by factions. Some of the recent nomination struggles have appeared more like the latter than the former.” See R. Davis “Supreme Court Nominations and the News Media”, *Albany Law Review*, Vol. 57, 1061 (1993) p. 1066. David Stras adds: “In fact, the new politics of judicial appointments have become so contentious, especially with respect to circuit court nominees, that the process for appointments now bears striking similarity to the polarizing legislative process that so many Americans find objectionable”, Stras, *op. cit.*, p.1034-1035

⁷⁵⁹ Stras, *ibid.*, p. 1065.

⁷⁶⁰ Davis, *op. cit.*, p. 1065.

⁷⁶¹ According to Stras, “By permitting special interest groups to lobby senators directly, rather than through the intermediary of state legislatures, the Seventeenth Amendment made rent-seeking behavior by individual groups easier and less costly.” See Stras, *op. cit.*, p. 1061.

interest groups in the confirmation procedure, Senators have exposed themselves to a multitude of sources of political pressure, that were previously limited to their party and state's parliaments. The nomination process is, in short, directed by political agendas. Thus, the attractiveness of the process to the media, that made a confirmation vote the most salient vote in a Senator's career, has encouraged senators to make a show of their political convictions to voters, parties and stakeholders during the hearing and during the vote.⁷⁶²

306. Scholars have studied the different factors that contributed to the transformation of this process and how this impacted the day-to-day work of courts and the public understanding of their function. Firstly, the reform bringing direct universal suffrage exposed Senators directly to the preferences of voters and interest groups, thereby making the process more politically visible. Secondly, the skyrocketing presence of private interests in the process,⁷⁶³ which is encouraged by the free exposure brought by the heavy media presence, has intensified the high stakes of the judicial office.⁷⁶⁴ However to Stras, the highly ideological selection process is more a symptom than a cause of the "new politics" of judicial appointments.⁷⁶⁵ To him, the new politics stem from the Court's decision to decide "hot button issues". Although ideology was always an existing dimension in judicial confirmations, what changed was the degree of "partisanship and ugliness that we see today".⁷⁶⁶ However, some decisions have impacted the degree of aggressiveness of hearings: the *Brown v. Board of Education*⁷⁶⁷ decision of 1955 triggered a heavier emphasis on nominees' ideological viewpoints. Scholars who believe that the Judiciary politicized its own nomination process disagree

⁷⁶² David Stras explains that Supreme Court votes are the politically most visible votes a senator can cast, in which senators want to boost the support of their constituents and feel a high pressure to vote with their party. See Stras, *ibid.*, p.1066.

⁷⁶³ According to Stras, "Between 1930 and 1960, a total of twenty-six interest groups testified before the Senate Judiciary Committee with respect to Supreme Court nominations; between 1960 and 1994, that number ballooned to 206", *ibid.*, p. 1062.

⁷⁶⁴ Stras refers to Dewittes' claim that many liberals see the court as an agent of social change. Stras, *op. cit.*, p. 1048.

⁷⁶⁵ Stras, *ibid.*, p. 1071.

⁷⁶⁶ Stras *ibid.*, p. 1059. Thus, there was never a golden age in nomination process. In *The Selling of Supreme Court Nominees*, John Anthony Maltese argues that the flaw in this widely held view is that such a golden age never existed. If the confirmation process is a mess today, it was just as much of a mess at the dawn of the Republic (On Maltese's book see a critique by A. Hathaway, "The Politics of the Confirmation Process", *Yale Law Journal*, Vol. 106, 229 (1996-1997) pp. 235-240. Few critics of the confirmation process really believe that the consideration of potential justices ever was or ever will be devoid of politics. What many critics do claim, however, is that the qualifications of nominees, rather than their ideology, should be the focus of attention. See Hathaway p. 238.

⁷⁶⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

on the starting point of this ideological turn. Some start in the 1950s, with the Civil Rights movement, but others believe the fight between Roosevelt and the Court and the New Deal “substantive due process” was the trigger.⁷⁶⁸

307. Is there anything to say in favour of the media-brought saliency of Supreme Court confirmations? If nothing else, Stras claims, public visibility of nominations “expose the public” at least minimally to the work of the Court, and therefore make the Court more publically accountable.⁷⁶⁹ But it had other effects. For example, Rhodes argues that the mediatisation effectively affected the “ideal” professional qualifications required expected among the public,⁷⁷⁰ and that senators try to comply with these expectations when screening candidates. As a corollary, Presidents now tend to look for moderate profiles and for candidates capable of facing the high intensity public screening by the committee.⁷⁷¹ They also heavily train them to evade controversial responses that would plummet their chances of being confirmed.⁷⁷² Despite the decreasingly controversial profile of chosen candidates, the media-loaded confirmation process makes any element of their life subject to media scrutiny. As a consequence, nominees to the Supreme Court bench have become more “consensual”, where what is needed are lawyers who think boldly.⁷⁷³ Thus the current requirement that nominees have judicial experience does not guarantee that a Justice will “think boldly”. Indeed, some of the most famous Justices had little or no experience on the bench before being confirmed.⁷⁷⁴ Consequently, heavy media salience does not make the Court more rational.

In the case of judicial confirmations, heavy politicization and media presence go hand in hand. In the case of the U.S. Supreme Court, one didn’t trigger the other, but both grew as the other took more space. Other factors have contributed to politicization

⁷⁶⁸ To which we can add, as mentioned above, the reform of Senatorial elections in 1913 and subsequent 1925 Taft Supreme Court reform.

⁷⁶⁹ See Stras, *op. cit.*, p. 1055.

⁷⁷⁰ “While many citizens still appreciate the impact of a judge’s own jurisprudential philosophy, these repeated public statements have created a popular conception of the ideal judge as being constrained by legal rules that bar elevating personal values over the American constitutional tradition.” see Rhodes, *op. cit.*, p. 576.

⁷⁷¹ Davis, *op. cit.*, p. 1078.

⁷⁷² Scholar explain that president seek to make sure their nominees will be confirmed as their reputation partly depends on it.

⁷⁷³ G. Stone, “Understanding Supreme Court Confirmations”, *Supreme Court Review*, Vol. 2010, 381 (2010), p. 460.

⁷⁷⁴ Rhodes, *op. cit.*, p. 582.

and media presence, such as the reform of the Senate or the Supreme Court, and the development of new internal practices.

1.2.2.2. *Media Discretion and the Lack of Public Accountability of ECtHR Judges' Election Process*

308. The last subsection prompts a question. Does a weak public visibility of the judicial appointment process correlate with the quality of the personnel ultimately seating on the bench? It could correlate with a less politicized office, but as Stras claims commenting on the Supreme Court, public visibility is a symptom rather than a cause of the politicization of the judicial office.⁷⁷⁵ As a matter of fact, the European judicial selection and election process is virtually absent from the press, unless it triggers scandal.⁷⁷⁶ Must one however deplore a lack of public accountability? As in the case of the U.S. Supreme Court, norms and practices have evolved. What hardly evolved and is deplored by most stakeholders is the opacity of the process.
309. Article 22 of the Convention provides for a two-steps procedure. After three Candidates have been selected by a Contracting State's government, one of them is elected by the Parliamentary Assembly of the Council of Europe. The organization of the state-level selection process is left to the governments' discretion, although respect of Council of Europe Parliamentary Assembly and Council of Ministers recommendations is advised. Both parts of the process, selection at domestic level and confirmation at European level, have the potential of becoming politically salient. However, the selection process is most often monopolized by domestic executive powers,⁷⁷⁷ sometimes involving independent advisory panels, such as high judicial councils, instead of domestic

⁷⁷⁵ Stras, *op. cit.*, p. 1071.

⁷⁷⁶ L. Burgorgue-Larsen, reports on the scandal triggered by the Spanish domestic selection process of candidates to the Spanish seat at the European Court. It has proven controversial and not free from ideology. She reports that Prime Minister Rajoy's cabinet had given directives, that the candidate be under sixty-one to ensure the selection of his ideal candidate, and de facto exclude another female older candidate. Only communication of this political maneuvering by the press allowed Council of Europe institutions to be aware of it. Whether Spain will submit the a list of including the name of the Spanish Cabinet ideal candidate and how the Assembly will respond is still unknown. B. Burgorgue-Larsen, "Actualité de la convention européenne des droits de l'homme", *AJDA* (janvier-juillet 2017), p. 1768. (hereinafter "Actualité Janvier 2017").

⁷⁷⁷ J-F. Flauss, "Brèves observations sur le second renouvellement triennal de la Cour européenne des droits de l'homme", *Revue Trimestrielle des Droits de l'Homme* (2005) p.19, quoted by L. Burgorgue-Larsen, "Des idéaux à la réalité. Réflexions comparées sur les processus de sélection et de nomination des membres des Cours européenne et interaméricaine des droits de l'homme", in *La Revue des droits de l'homme* [En ligne], Vol. 6 (2014) p. 4., last accessed 29 December 2015, <http://revdh.revues.org/949>

representative institutions. Moreover, governments have no reason to make the selection results known to the press as long as the final election by the assembly of the Council of Europe has not occurred. Therefore, public visibility of the domestic selection process is quasi inexistent, which makes media involvement unlikely.

310. The election of judges by the Parliamentary Assembly may not be newsworthy for the same reason the Supreme Court confirmation process was not originally newsworthy: because of the confirming or electing institution's lack of direct accountability to the public—in this case, the Parliamentary Assembly of the Council of Europe. I mentioned earlier that Supreme Court confirmations began being prominent in the press after the Seventeenth Amendment election reform made Senators directly eligible by citizens. Members of the Assembly are selected from national representative institutions according to internal procedures. Although they are democratically legitimate, most citizens mostly ignore the presence of their representative—and which ones—at the Assembly. Surely, if members of the Parliamentary assembly were elected through direct universal suffrage, and their political profile was more prominent, the topic of their decisions, including judicial elections, would be publically more relevant.
311. Other factors influence media presence: first, the controversial potential of the Court's work; second, the importance governments give to the selection of candidates, which correlates with the level of professional qualifications required from candidates. The third factor is the involvement of private interests in the election of judges.
312. Erik Voeten has inquired about other factors affecting candidates' selections at domestic level. He researched whether states chose their judges based on the direction they would like European case-law to go, *i.e.* more liberal or more conservative, or whether other factors are partly or completely controlling the selection. Voeten found that ideology did not significantly affect domestic selections, since one national judge does not alone affect the decisional balance of the 17 members of the Grand Chamber, which decides most important questions, as much as the swing vote does in the nine-members Supreme Court. Conversely, he found that countries more open to European integration and internationalism tend to comply more actively with the Assembly ideal profile and to choose candidates with a more activist profile. Countries deeming judicial elections of lesser importance tend to use the selection process as a reward for a

candidate's political loyalty.⁷⁷⁸ Overall, he seems to discern a trend towards harmonization of domestic judicial selection processes, where he notes that "high-level national judges [are seen as] appropriate candidates for judgeships".⁷⁷⁹

313. However ideological domestic selection of candidates could be, States do have to go through an obstacle course to make sure their preferred candidate is elected. Firstly, the Convention does not shine by its specificity. Article 21 only provides broad guidelines and leaves it to the discretion of the Parliamentary Assembly to detail them.⁷⁸⁰ Resolution 1646 (2009)⁷⁸¹ consolidates the criteria laid down in resolution 1646 (2004)⁷⁸² to guide states in their choice of suitable candidates. However, with the increasingly consensual dissatisfaction of the Assembly, as well as some European judges and States over the quality of applicants, scholars and officials alike have begun paying close attention to the domestic and European processes of selection. Advisory tools were developed to help states satisfy professional requirements.⁷⁸³ Based on a resolution of the Council of Minister of November 10th, 2010, an Advisory Panel was created to advise contracting states confidentially on the pertinence of their contenders. The seven-members panel of experts, for the most part composed of former judges of

⁷⁷⁸ See E. Voeten, "The Politics of International Judicial Appointments", *Chicago Journal of International Law*, Vol. 9, N. 2 (2009), p. 396 (hereinafter "International Judicial Appointments"). Voeten also suggests that "a trade-off may be achieved through appointment procedures that facilitate opportunities for governments to shape the overall direction of the court, but minimize opportunities for governments to influence judges on individual cases." p. 405. This assessment may not have proven true, as suggests B. Burgorgue-Larsen, the last selection of judge by Spain has proven controversial and not free from ideology. Burgorgue-Larsen, *op. cit.*, "Actualité Janvier 2017".

⁷⁷⁹ Voeten, "International Judicial Appointments", *op.cit.* Note that he more specifically refers to the case of International Criminal Tribunal for Yugoslavia.

⁷⁸⁰ Judge's eligibility requirements were developed by the Parliamentary Assembly in several documents: Recommendation 1649 (2004) of 30 January 2004; Resolution 1082 (1996), Recommendation 1295 (1996) of 22 April 1996; Resolution 1200 (1999) of 24 September 1999 and Resolution 1646 (2009) of 27 January 2009.

⁷⁸¹ The Parliamentary Assembly Resolution 1646 (2009) lays out the following criteria: "[T]he Assembly recalls that in addition to the criteria specified in Article 21, paragraph 1, of the Convention, as well as the gender requirement, states should, when selecting and subsequently nominating candidates to the Court, comply with the following requirements: 4.1. issue public and open calls for candidatures; 4.2. when submitting the names of candidates to the Assembly, describe the manner in which they were selected; 4.3. transmit the names of candidates to the Assembly in alphabetical order; 4.4. candidates should possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other (see model curriculum vitae appended hereto); 4.5. that, if possible, no candidate should be submitted whose election might result in the necessity to appoint an ad hoc judge".

⁷⁸² See criteria laid down at Section 19 of Recommendation 1646 (2004).

⁷⁸³ Domestic selection procedures vary in every state. Thus, the Assembly invited contracting states to specify their procedure of candidates' selection, since selection procedures are different in every country (Section 4.2). Such a step would improve transparency but it could also permit the drafting of more detailed guidelines, and perhaps a more stringent standardization of selection norms for all 47 contracting states, as some scholars have advocated.

the European Court and judges of domestic Supreme Courts, submits its opinion to the Parliamentary Assembly. The panel is mandated to examine applications to give its opinion on the candidate's suitability for office.⁷⁸⁴ Once the list is deemed acceptable, the Panel informs the contracting states and submits its opinion to the Assembly. If it is not, the Contracting State will have to submit a new list.⁷⁸⁵ Subsequently, the list of candidates is examined by the Committee on the Election of Judges to the European Court of Human Rights from the Parliamentary Assembly of the Council of Europe, created by the Assembly's most recent resolution (2002) 2014⁷⁸⁶. The committee proceeds to hearings of candidates and submits the list of candidates to the Assembly in alphabetical order for the vote, together with its opinion on the best-qualified candidate. 318 representatives of the 47 member-states, chosen from domestic parliaments, elect the judge at a majority in one or two rounds, as needed.

314. Public accountability and transparency of judicial elections in the Council of Europe also apply to the Assembly. If rules of the Parliamentary Assembly with regard to the election of judges are accessible, the concrete practice shines by its opacity. Indeed, if sittings by the Assembly are public in principle,⁷⁸⁷ the opinions of the Committee on the Election of Judges on the most suitable candidate are very laconic and do not display information on the motives.⁷⁸⁸ Moreover, if the results of the vote by the Assembly are available online, access to debate report is difficult, or in the very least far from being as easy to access as television broadcasts for the Supreme Court confirmation hearings.

⁷⁸⁴ Hearings of candidates are subsequently organized by the Assembly's Committee on the Election of Judges to the European Court of Human Rights, competent for the scrutiny in name of the Assembly.

⁷⁸⁵ In practice however, a report from the steering committee of human rights has pointed at the questionable habit of member states that submit their list to the Assembly without waiting for the opinion of the Advisory Panel, as if to show they were not bound by the Panel's opinion. This practice was deemed damageable to candidates as their names is publicly displayed. See Steering Committee of Human Rights of the Council of Europe, CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for elections of judges to the European Court of Human Rights, 29 November 2013.

⁷⁸⁶ Resolution 2002 (2014)1 Evaluation of the implementation of the reform of the Parliamentary Assembly. It evaluated the past reforms of the Assembly and amended a few rules, among which it proceeded to the creation of a Committee on the Election of Judges to the European Court of Human Rights, tasked with the examination of candidate's curriculum vitae, drafting a report and recommendations to the Assembly and with examining national procedures for the selection of candidates.

⁷⁸⁷ Rule 32 of the Rules of Procedure of the Assembly: "Sittings of the Assembly shall be public, unless the Assembly decides otherwise."

⁷⁸⁸ This was the case until Resolution 2002 (2014), which at §4. requires that the recommendation to reject a candidate be specified to the Assembly.

Thus, with regard to public accountability, the European situation is diametrically opposed to American Senatorial screening and confirmation process.

315. Over the years, the opacity of the European judicial election process has been heavily criticized, thus a few reforms attempts were initiated. However, their main focus was to improve the quality of applicants. This motivated the creation of the Advisory Panel. In turn, the practices of the advisory panel were challenged because of its composition, its lack of transparency and accountability. For example, Allemanno points at the composition of the panel, half of which members are former judges of the European Court of Human Rights. Since motivations of its opinions are not made public it is difficult to scrutinize whether the Panel complies with the criteria provided by the Convention, or if its members are implementing their own agenda.⁷⁸⁹ Another critique regarded the multiplication of eligibility criteria that, combined, make the search for suitable candidates extremely difficult for states willing to comply with them. Others have deplored the lack of predictability of the Assembly, which is not consistently complying with its own norms.⁷⁹⁰ Kosar proposes that the Assembly be more flexible and give more emphasis on the most important criteria. He also suggests a reform in the number of applications states are required to submit. He proposes either that States be required to submit one candidate less if three were impossible to find, or to limit the number of applicants to one. In this case, the role of the Assembly would be changed into one of a confirmation or rejection body.⁷⁹¹ Such a proposal, if adopted, could increase the politicization of the domestic selection process and the degree of scrutiny of the candidate by the assembly. It could also give more public visibility to judicial elections.

⁷⁸⁹ Alemanno points at the claim that making motivations public may have a chilling effect on future candidates not willing to expose themselves to be turned down by the Assembly, which may be detrimental to their subsequent career. He argues however that such effect was not proven in practice and that not making motives public might expose them to unnecessary gossip. Moreover, making motives public might have a pedagogical effect and could profit other member states in the future in their choice for new candidates. A. Alemanno, "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection", in M. Bobek, *Selecting Europe's Judges*, Oxford University Press (May 2015), pp. 211-212. The creation of the new Committee on the Election of Judges by Resolution 2002 (2014), imposing on the Committee to display reasons for rejecting a candidate will show if Alemanno's fears were vindicated.

⁷⁹⁰ Kosar stresses that the Assembly has not consistently applied the gender requirement, sending signals to the states that an all-male list of applicants is acceptable. D. Kosar, "Selecting Strasbourg Judges: A Critique," in M. Bobek, *Selecting Europe's Judges A Critical Review of the Appointment Procedures to the European Courts*. Oxford: Oxford University Press (201), p. 157.

⁷⁹¹ Kosar, *op. cit.*, p. 160.

316. However, it would take many more reforms to make the election process visible in the headlines. Indeed, if the name and the role of the European Court of Human Rights are widely known in the mainstream press, the Council of Europe itself and its Parliamentary Assembly suffer from a lack of political visibility⁷⁹² and are often confused with institutions of the European Union. Thus, candidates are screened and elected in all anonymity, protected from the indiscretion of zealous interests. Moreover, outside of Strasbourg, it is difficult to measure the degree of involvement of states or special interests in the election process.⁷⁹³
317. Does public scrutiny improve the quality of the judicial personnel? I concluded that making judicial selection a media event has detrimental effect on the reputation and the work of the Supreme Court, and in the acceptance of its decisions. Paradoxically, the populations' expectations with regard to judicial qualifications do not seem to change. In the case of the European Court, criticism points mostly at the level of judges' qualifications; which affects the Court's reputation and legitimacy mostly within professional circles, and increasingly within the mainstream press.⁷⁹⁴ From such criticism cannot be concluded that the lack of public visibility or transparency is the core of the problem of the European Court. However, it is possible that an increase in the transparency and political visibility of the election process would make the European bench a more desirable career path and attract more qualified contestants⁷⁹⁵.
318. For a high court tackling fundamental and therefore controversial questions, ensuring the right degree of public visibility is a challenge. This challenge appears to be stronger for the U.S. Supreme Court, probably because its authority is more rooted than in Europe following numerous challenges since its inception in the early 19th Century. Civil rights controversies seem to have magnified challenges to the U.S. Supreme Court authority and have made the need for transparency stronger. This is why the Court had

⁷⁹² Here some research on public visibility of the European Court of Human Rights and the Council of Europe institutions would be enlightening.

⁷⁹³ Interights' report from 2003 on the election of judges, and the references to lobbying in different scholarly articles shows that interests are involved. The degree of that involvement is unknown. - See J. Limbach et al, "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights" 4 *Interights* (2003). Also, Kosar discusses the need of candidates to lobby the Parliamentary Assembly before the election. Kosar, *op. cit.*, p. 154-6.

⁷⁹⁴ According to Kosar, "growing consensus that how judges are selected has an impact on the ECtHR's legitimacy", *ibid.* p. 127. See K. Dzehtsiarou and D. K. Coffee, "Legitimacy and Independence of International Tribunal: an analysis of the European Court of Human Rights", *Hastings International & Comparative Law Review*, Vol. 37, 271 (2014).

⁷⁹⁵ Kosar explains the Assembly's concern for attracting of the "top candidate", Kosar, *op. cit.* p. 157.

to work on balancing those needs at every level: by allowing some access to oral arguments and to the press so as, in the realm of possible, not to damage the privileged position brought by insulation from daily politics. Overall, scholarship suggests that the degree of exposure of judicial confirmation triggered has undermined this privileged position. The European Court does not face the same transparency problems. The main issue the Court and Council of Europe member states are confronted with is backlog management and an improvement of judicial recruitment. If officials were to solve these issues, would the European Court be shielded from ever-louder legitimacy challenges? It is possible that the European Court could protect itself from states' criticism by strengthening its legitimacy base; its relationship to grass-roots stakeholders.

2. Friends of Court, Between Participants, Experts and Lobbyists

319. This section enquires about the role of a specific organ of public opinion in rights judicial proceedings: civil society. If civil society is renowned to mobilize and communicate to the public on specific public interest issues, it was also progressively admitted to observe and then contribute to many types of proceedings, including rights proceedings. In that framework, their status evolved to the one most famously known as *amici curiae* or “friends of court”. The “amicus” is defined as “someone who is not a party to a lawsuit but who petitions the court or is requested to file a brief in the action because that person has a strong interest in the subject matter”.⁷⁹⁶
320. Originally *amici curiae*, or third parties were considered an added value mostly for courts, thus their name.⁷⁹⁷ I claim that they have become a bridge between the Court and the public. I show that *amici* have been progressively included into judicial procedure at first to provide expert legal advice in case of doubt. Over time, although third-party participation has exponentially increased, and some believe that rather than helping the courts, they tend today to burden the courts' work., at least in the case of the U.S. Supreme Court. I address claims that third party activity surrounding the bench participated to the transformation of judicial institutions into what now looks increasingly like a new type of interest group forum.

⁷⁹⁶ “*Amicus curiae*”, *Black's Law Dictionary*, *op. cit.* p.102.

⁷⁹⁷ S. Krislov, “The Amicus Curiae Brief, From Friendship to Advocacy”, *Yale Law Journal*, Vol. 72, *op. cit.*, p. 695.

2.1. Third-Party Participation as a Court-Friendly Tool

321. Over history, a specific legal tool was used to allow the participation of non-parties to the law suit. This tool is commonly called “*amici curiae*”. It has evolved over time, a jurisdiction at a time, to include different types of participants. As participation developed, rules were also created to accommodate those participants. They started as representatives of the legal profession and progressively included other types of participants. This subsection focuses on the meaning of the word “third party” and a quick history of third party interventions until today. At first third party interventions were permitted as a help to the courts, as experts on a legal issue. Their inclusion into the U.S. judicial system and their export to other countries through international organization expanded the practice into an indirect expression of the public. I show that although with its expansion, the practice has become controversial, it is defensible on a rights basis, as an expression of a right to petition, or freedom of expression.

2.1.1. *The Progressive Elaboration of Flexible Third-Party Intervention Rules*

322. Debate on historical origins of *amici curiae* and on whether today’s practice has strayed too far from the original practice is raging. To the courts, third party participation started as a very useful tool: they were generally experts readily available to give legal insight. As the practice has evolved and their numbers significantly multiplied, their usefulness—or disservice—to the courts was debated. Ostensibly responding to commonly uttered criticism, courts have amended their rules in an attempt to tackle the most serious issues.

2.1.1.1. *The Origins of Amicus Curiae: From Legal Experts to Partisan Interveners*

323. Scholars have been treating the topic of Supreme Court press coverage for a long time.⁷⁹⁸

324. *Amici curiae* scholars have long debated the neutrality label of third party interveners. Historians of *amici curiae* seek to understand the underlying original spirit behind third

⁷⁹⁸ See for example Jones’ remarkable study based on corpus linguistics, analysing linguistic patterns in press reports on the Supreme Court. Jones, Jones, Ronnell Andersen, “Media Politicization of the United States Supreme Court”, *Oñati Socio-legal Series* [online], Vol. 4, No. 4, pp. 613-630.

party interventions, and how the procedure has evolved over time and across territories.⁷⁹⁹ Behind their research lays a desire to determine if the procedure allowing third party interventions has strayed too far from the original spirit of its creation, and whether its transformation made today's third parties interventions legitimate. Meanwhile each court progressively developed its own norms of participation, adapted to their needs and their own local political and legal context. Thus, with the growth in number and intensity of amici participation, and the growing attention to the various practices across the world, the main feature of *amicus* participation in many courts is its lack of uniformity, which has increasingly nourished the debate.⁸⁰⁰

325. The controversy is interestingly illustrated by the two contrasting definitions Krislov gives at the beginning of his 1963 study. The first stems from the frequently quoted Abbott's Dictionary of Terms and Phrases, "the *amicus curiae* is: A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge".⁸⁰¹ This first definition stipulates that third parties are assumed to not have an interest in the case. The second definition Krislov uses does not restrict the definition of amici to neutral interveners but describes *amici* as court's legal helpers: "When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiae*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember".⁸⁰² Thus the core of the debate can be articulated in this manner: are *amici curiae* assumed to be neutral interveners, and are they constrained to use legal discourse ?

326. In an extended study on the origins and historical evolution of third party interventions, S. Chandra Mohan underlines the core issue: in order to determine if today's practice of third party intervention is legitimate, scholars compare those practices to the historical rule. Since the origins of third party interventions, whether they originate in

⁷⁹⁹ *Ibid.*, see also for example E. Angell, "The Amicus Curiae American Development of English Institutions", *International & Comparative Law Quarterly*, Vol. 16, No. 4, 1017 (1967), and S. S.

⁸⁰⁰ "Inasmuch as permission to participate as a friend of the court has always been a matter of grace rather than right, the courts have from the beginning avoided precise definition of the perimeters and attendant circumstances involving possible utilization of the device." Krislov, *op. cit.*, p. 695.

⁸⁰¹ *Ibid.*, p. 694.

⁸⁰² *Ibid.*, p. 695, Krislov quotes *Holthouse's Law Dictionary*.

Roman times or in the common law system,⁸⁰³ are disputed, controversy over the type of input *amici curiae* can provide continues.⁸⁰⁴

327. Mohan provides an enlightening typology of the types of *amici* that have intervened in courts since the Roman times.⁸⁰⁵ The first, classic traditional amicus could intervene upon invitation by the Courts. He was a lawyer or a legally trained bystander with expertise, called to advise and assist the Court, by request of the Court or on his own initiative. Amici were therefore legal professionals, at the service of the courts, experts pursuing no self-interested goal. His interventions were meant to help the courts avoid errors, and this way to preserve their honor. Third parties are believed to have helped overcoming the shortcomings of the adversarial system, highly bipartisan, by providing the neutral perspective of an independent adviser,⁸⁰⁶ or assisting on behalf of concerned third parties. Courts could decline an intervention if the intervener was not neutral. Interveners were chosen for their prestigious position but were not paid.⁸⁰⁷ Secondly, in the middle ages *amici* became bystanders, spectators, who could inform the Court during hearings performed on the city square. Lawyers would often be present among the audience. The third type is a supportive amicus,⁸⁰⁸ a person appointed by the court to support one of the parties, or persons with a direct and personal interest in the outcome of the case, or government officers allowed to intervene in the public interest, such as solicitors general in early 20th century United States. Fourthly, what Mohan calls the “political modern amicus”⁸⁰⁹ is a development of the 20th century, or the period

⁸⁰³ On this point, Mohan believes that the “more persuasive argument is that the amicus curiae practice is an integral part of a civil law tradition rooted in Roman law with more flexible rules of court appearance and representation... [H]aving found its way into the commonlaw system, the amicus curiae later developed and has remained in some juris-dictions such as the United States as more of an adversarial weapon. In others, it largely retained the purity of its ancient Roman form.”

⁸⁰⁴ S.C. Mohan, “The Amicus Curiae, Friends No More?”, *Singapore Journal of Legal Studies*, Vol. 2010, 352 (2010), p. 363. To Mohan, the reason the origins of amici is contested is because some of the main references on the topic have never provided evidence of the regulations existing in roman law showing what the meaning of amici really was. However, he stresses that in Roman times, in principle men in positions of responsibilities couldn’t not take decisions and had a moral obligation to consult.

⁸⁰⁵ Mohan, *op. cit.*, p. 364-373

⁸⁰⁶ Mohan, “The most frequently cited explanation for its presence in the common law and a consequent deduction that it has obvious common law beginnings, is that it served as a useful and convenient tool to overcome the shortcomings of the adversarial system which is essentially “partisan” or “bi-polar”. Referring to G. Williams, “The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis”, *Federal Law Review*, vol. 28, 365 (2000) at 367.” Mohan questions this assertion, believing that amicus curiae is more likely to be born in Roman times and an inheritance of the Civil law systems. She however does not dispute the input of a neutral third party into common law systems could have made.

⁸⁰⁷ Mohan, *ibid.*, p. 368

⁸⁰⁸ *ibid.*, p 369.

⁸⁰⁹ *ibid.*, p. 370.

subsequent to 1820 according to Banner.⁸¹⁰ The modern amicus can have many faces.⁸¹¹ On the one hand, the neutral amicus seeks to provide the court with facts and research, new perspectives on the case supporting no specific litigant's claims. This type of amicus is "a fundamental departure from the traditionally adversarial methods of common law courts".⁸¹² However, insofar as it is "more similar to the fact-gathering methods of some inquisitorial civil law courts, [it resembles] a civil law moment—one in which a court can gather facts without relying on the efforts of the disputing parties before it".⁸¹³ The advocate amicus on the other hand seeks the courts' attention to its social agenda, and is not always favored by courts, particularly by the U.S. Supreme Court, which explicitly proclaimed its enmity to their participation in its 1949 rules.⁸¹⁴ In the United States, new federal rules were drafted since that time in order to manage advocacy interventions. They required that third party interveners disclose their professional or financial ties to one of the parties. Despite policies attempting to discourage an excessive number of overzealous friends, it appears that the increase of participation is due to amici's perception that they can influence the judicial output. Indeed some scholars have claimed that Supreme Court judicial output was not based on the law and legal norms or arguments (legal model) but on judges' ideologies, and on policy goals (attitudinal model);⁸¹⁵ that judges were "policy-makers". If

⁸¹⁰ Banner, *op. cit.*, p. 114. Krislov claims that the movement towards partisan amicus participation started early, from the moment the Court allowed exceptions to the neutrality rule after *Coxe v. Phillips* in 1736. ("It is important to note that in spite of the pretense that the duty of the amicus was solely to protect and inform the court, the amicus in *Coxe* was permitted to stray from this exclusive obligation and defend the interests of one not a party to the law suit." This change announced a "fundamental transformation": "While the courts continued to cling to the proposition that the amicus was a detached servant of the court---"he acts for no one, but simply seeks to give information to the court" --his services no longer precluded commitment to a cause. Indeed, the very notion of his acting for no one was belied by his rising to do just the opposite--in many instances to act directly and officially as counsel for one not formally a party to the case".) Krislov, *op cit.*, p. 697.

⁸¹¹ In 1967, Angell classifies third interveners in three categories : government representatives, private organizations of professional or occupational membership, and "public interest" organizations ("innumerable private associations and entities, in general formally organised, which purport to speak for non-occupational, non-governmental, broad public interests: churches and religious bodies; minority groups such as Negroes (22 million in the United States) and Jews (5 million), civil libertarians, pacifists--the range is almost unlimited."), *op. cit.*, p. 1019. Since "interest" in the outcome of the case can be take different shapes (political, financial, social, ideological) we consider that all three categories do have an interest in the outcome of the case, although it might be more or less tangible for its members.

⁸¹² S. Kochevar, "Amicus Curiae in Civil Law Jurisdictions", *the Yale Law Journal*, Vol. 122, 1653 (2013), p. 1656.

⁸¹³ *Ibid.*

⁸¹⁴ Krislov, *op. cit.*

⁸¹⁵ On the attitudinal and legal models, see J. A. Segal and H. J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Cambridge (2002) pp. 44–114. As mentioned above, many studies focused on what motivates U.S. Supreme Court decisions used Dahl's 1957 study: R. Dahl, "Decision-Making in a Democracy", *op. cit.*

interventions are linked to third parties' social agenda, Paul Collins' findings that 60,2% of interventions regard civil rights issues come as no surprise.⁸¹⁶ After all, basic rights advocacy was second half of the 20th century legal hallmark.

328. Does the inflation in the number of amici interventions discounts the quality of their input, or is it the substance of their input that is in question? Can courts truly exercise “rational” decision-making in such context? This debate is wrongheaded. According to Banner, historical studies on the origins of *amici curiae* obscure a myth: the myth that *amicus curiae* were, at a point in American history, “neutral” interveners. On this point, he is not alone, as Lowman asserted in 1991 that as soon as *amicus curiae* emerged in the U.S. federal system, he was no longer exclusively an “impartial judicial servant”.⁸¹⁷ To him, only a few friends of court are involved to truly help the Court. To Banner, scholarship has fallen prey to a “unrealistically nostalgic version of the history of American legal practice.” Banner took advantage of available technologies and newly available information available on online databases, that were non-existent at Krislov times to challenge Krislov's claims. Banner found that in a sample of 19th century Court cases he analyzed, *amici* were not required to give neutral advice, although neutral interveners were more common. Banner explains that the very small number of cases that were reported in writing at the time were reported because they were the most important cases of their times. They were more likely to attract amici interveners because of their importance, but also more likely to attract neutral interventions because of their social importance, and thus of their “public interest” dimension. This therefore affected the work of scholars. Based on his sample and new data, he concluded that interventions started being truly partisan in the 1830s. After 1870, the most neutral amici did not file in writing and limited their intervention to oral arguments. At the time, friends of courts had an interest usually limited to the case at hand and not in the long-term development of the law.⁸¹⁸

⁸¹⁶ P. Collins, “Friends of the Supreme Court”, *op. cit.*, p. 48. Note that since the European Court is exclusively a human rights courts, such statistical would not be applicable.

⁸¹⁷ M.K. Lowman, “The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave” *American University Law Review*, Vol.41, 1243 (1991-1992), p.1254.

⁸¹⁸ Banner bases his assertions on the fact that written reports of cases began being written in the late 19th century, when trained lawyers were available and third party interventions by expert lawyers no longer as necessary. From that time, the lack of neutrality of third parties began being more visible. Thus if change in nature of third party interventions occurred, it was mostly linked to the change in the nature of litigation, *op. cit.*, p.122).

329. Are partisan friends of courts unique to the American legal system, or has this issue expanded to other systems? Firstly, scholars believe that *amici curiae* were, despite its roman origins, a common law institution that took an adversarial turn through its integration into the American system.⁸¹⁹ If *amici curiae* exist under different forms in other countries, the debate over friends of courts' neutrality and expertise expanded abroad with its use in international institutions.⁸²⁰ However *amici* exist throughout the world.⁸²¹ It could be argued that the reason the debate over neutrality and advocacy of third parties has expanded beyond the United States lies in three factors: First, the adversarial system coupled with the rise of civil rights litigation in high courts may have transformed the institution into a partisan, legal tool within the United States. Second, the Supreme Court is a very internationally renowned and widely observed legal institutions abroad, and its practices can inspire other countries and legal actors. Third, many "public interest" litigators have expanded their social battles to other legal horizons.⁸²²
330. Overall, the literature on third party interventions makes a fact clear: *amici curiae* are now associated with the United States' judicial system and are considered a predominantly common law institution. However, it has been replicated in Europe. The literature on the history of European interventions beyond normative history is scarce. Rachel Cichowski has explained that the development of the right of third parties to intervene came progressively as a bottom-up achievement brought by "the interaction between social activists and the [European Court]".⁸²³ First third parties interventions attempts were made when no European Convention article yet contemplated their existence. The first successful attempt at intervention was initiated by a government in

⁸¹⁹ Mohan claims it has become an "adversarial weapon" on American soil, *op. cit.*, p. 360.

⁸²⁰ Kochevar refers to the dispute over amicus curiae use at the World Trade Organization and in international investment arbitrations, *op. cit.*, p. 1659.

⁸²¹ It is found in French courts also. Mohan rightfully stresses that under French law, amici are to be differentiated from intervenors, expert witnesses and consultants. See Mohan, *op. cit.*, p. 362. As an example of the existence of amici in French law, Angell refers to the commissaire du gouvernement adviser to the Conseil d'Etat as a friend of Court. This remark dating 1967 is interesting in light of the debate sparked over the "neutrality" of the office of commissaire du gouvernement in French courts at the European Court of Human Rights because of his rights to assist deliberations of the judges behind closed doors. Angell, *op. cit.* p. 1017.

⁸²² On the evolution of civil society commitments, see for example Van den Eynde, "Interpreting Rights Collectively", *op. cit.*, p.396.

⁸²³ R. "Cichowski, "Civil Society and the European Court of Human Rights", *APSA Annual Meeting Paper*, (2010), p. 7.

the 1979 *Winterwerp*⁸²⁴ case, one year after the first attempt failed.⁸²⁵ In 1981, the Court allowed a trade union not only to file an intervention but also to participate in oral proceedings.⁸²⁶ Subsequently, the Court interpreted Article 37(2) of the Rules of Court of 1982 as allowing interventions by “any person concerned”,⁸²⁷ in which it included all kinds of “third parties”. The Court however has not adopted the Latin terminology of “*amici curiae*”, although as we will show further, the European practice shows third parties are more often seen as “experts” in Europe than their American counterparts.

2.1.1.2. The Evolution of Third Party Participation Rules

331. As a response to the surge in numbers of third party petitions, rules have been adapted and constraints inserted to better guarantee such participation could fulfil courts’ needs without disrupting the proceedings. Because of this debate over legitimacy and third parties’ self-asserted expertise, there was and still is a call for regulation of third party intervention. However, Europe and the United States needs call for different solutions.

U.S. Supreme Court Rules and Practice

332. According to Krislov, the Supreme Court seems to have started working with unwritten rules on amici interventions. Although neutral on judicial advocacy at first, it remained hesitant out of fear that amici would “dwarf the narrowly defended legal issues presented by the litigants”.⁸²⁸ It wrote its first rules in 1937, but the new rules were merely a consecration of unwritten practice, where consent of one of the parties was required to file a brief. In case of refusal, the Court could grant permission for an intervention. After a period of abuse of the possibility to file with virtually no

⁸²⁴ ECtHR, *Winterwerp v. Netherlands*, Appl. No. 6301/73, 24 October 1979. The UK Government based his request to intervene on Article 38 Section 1 of the Rules of Court : “the Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear....in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task.”. Quoted in Cichowski p. 8.

⁸²⁵ ECtHR, *Tyrer v. U.K.*, Appl. No. 5856/72, 15 March 1978.

⁸²⁶ See case of ECtHR *Young, James & Webster v. UK*, Appl. Nos. 7601/76, 7806/77, 13 August 1981.

⁸²⁷ Rule 37 (2) “The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time limit and on issues which he shall specify. He may extend such an invitation or grant such leave to any person concerned other than the applicant”. See Revised Rules of Court, adopted on 24 November 1982, in force 1st of January 1983. Interestingly the French version says “any interested person”. An analysis of the practice may be enlightening as to how the Court has interpreted this sentence.

⁸²⁸ Krislov, *op. cit.*, p. 698.

constraints,⁸²⁹ the Court adopted new written rules in 1949, formally requiring consent of the parties and explicitly discouraging briefs that did not bring any substantial input.⁸³⁰ The 1949 rules recognized amici filed without consent of the parties, as long as they secured consent of the Court. However, the Court gave a clear signal that it did not encourage idle participation by starting to consistently denying applications to file amici briefs.⁸³¹ Moreover, the Supreme Court took a symbolic step adding additional formal constraints on amici briefs.⁸³² At the time Krislov was writing in 1963, the Court had reached an equilibrium in the acceptance and refusal of briefs. On the one hand, by requiring consent of the parties, it put parties in position of responsibility by encouraging litigants and amici to cooperate in their strategies. On the other, it kept doors open to neutral interveners so they could give some alternative input to the Court. In today's practice the importance of the rule of consent is negligible: "virtually all litigants willingly comply with requests by amici".⁸³³ When consent is denied, the potential *amicus* may petition the Court for leave to file, at the same time as it files its brief. Today, the Court entertains an open-door policy and rarely denies petitions.⁸³⁴

333. Few substantial amendments were made to Rule 37 since 1949. In 1954, the rules became a little more specific as to the formal constraints on amicus briefs (for example

⁸²⁹ According to Harper and Etherington, the briefs filed in the 1940s were not only abusive in numbers, making the Court seem as if "it were a political-legislative body, amenable and responsive to mass pressures from any source." but also in content: "for the most part, briefs amici are repetitious at best and emotional explosions at worst." For a brief snapshot of that period see F. Harper and E. Etherington, "Lobbyists Before the Court", *University of Pennsylvania Law Review*, Vol. 101, 1172 (1952-1953). Pp. 1172-73.

⁸³⁰ In the 1949 rule, the Court irrevocably assert her disapproval: "Such motions are not favored." see Sup. Ct. Rules 27:9(b), 338 U.S. 959 (1949)

⁸³¹ Krislov, *op. cit.*, p. 714. Additionally, Krislov stresses that in 1949, a shift to partisanship in amici interventions and already occurred and irritated the court, *ibid.*, p. 709. He claims that partisanship was linked to the more general shift in American interest group politics and to their organization). *Ibid.*, p. 704.

⁸³² The court imposed a vague deadline to briefs submission: "reasonable time". The Supreme Court also required that amici briefs be filed in a separate document. The signal of discouragement of excessive amici filing by the court was followed by a new policy of frequent refusals on the part of the Solicitor General to grant his consent to filing by supportive friends of Court when he was party to the case. Presumably missing the substantial help of some of the filed amici, some Justices expressed their disapproval and obtained from the Solicitor General a policy change. Meanwhile in 1957, the Department of Justice defined its official standards of participation.⁸³² At the height of Cold War tensions, the Solicitor General expressed his disapproval of academic interventions, and "propaganda" briefs. He would only accept briefs from persons proving substantial interest (concerned files) in the outcome of the case or bringing new material to the Court's attention (expert briefs).

⁸³³ see P. Collins, "Interest Groups and their influence on Judicial Policy", in Kevin McGuire, *New Directions in Judicial Politics*, New York, Routledge (2012), p. 224.

⁸³⁴ Collins specifies that during the 1994 terms, the court granted 99% of petitions and denied only one motion, *ibid.*, p. 225).

briefs were limited to 5 pages).⁸³⁵ A new rule 44—today Rule 28(7)—was added in which the Court allowed third parties to participate in oral arguments.⁸³⁶ However, their participation would take on the time allowed to litigants in oral proceedings.⁸³⁷ As in the 1940s, the opportunity to file *amici* briefs was again widely used as an avenue of social reform during the Civil Rights Movement. Eventually, irritation over the abuse of the *amici* privilege by parties and interest groups alike, joining forces in order to circumvent various types of formal constraints on a party's brief—for example, maximum length of a brief, type of arguments admitted⁸³⁸—pushed the court to draft a new rule. Pursuant to Rule 37(6), added in 1997, “an amicus disclose whether counsel for a party wrote the brief in whole or in part and also requires identification of every person or entity—other than the amicus, its members, or its counsel—who made a monetary contribution to the preparation or submission of the brief.”⁸³⁹ This rule allows the Court's staff to have a visual of existing coalitions among participants, to gather different names under a single group on each side of the controversy, and to discern, if possible, what group can be presumed to be neutral.⁸⁴⁰ As the need for transparency has only increased since, an additional constraint to the disclosure rule was added.

⁸³⁵ Other details were added to the rules such as the rule 37 (3)(a) in 2007: “The Rule now also requires amici curiae to notify parties of the intent to file amicus curiae at the petition stage, and to confirm that they have given the parties such notification. That portion of footnote 1 may be worded as follows: “Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.” See *U.S. Supreme Court Memorandum to Counsel* from 16 August 2007, accessible at http://www.supremecourt.gov/ctrules/tocounsel_07rulesrevisions.aspx

⁸³⁶ Today, the participation of amici curiae to oral arguments is regulated at Rule 28 (7). “By leave of the Court, and subject to paragraph 4 of this Rule, counsel for amicus curiae whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for amicus curiae may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.” S. Ct. Rules 28(7), from the *Rules of Court* of 2013.

⁸³⁷ *ibid.*

⁸³⁸ “The submission of amicus curiae briefs is strictly regulated regarding time-limits and the form. Among others, there are instructions regarding the format, the typeset, the paper, the margins, the color of the cover and word limits.” Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p. 86.

⁸³⁹ See D. B. Smallman, “Amicus Practice: New Rules for Old Friends”, *American Bar*, accessible at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/smallman.html

⁸⁴⁰ See Sup. Ct. R. 37(6) first introduced in 1997, R. J. Garcia, “A Democratic Theory of Amicus Advocacy”, *Florida State University Law Review*, Vol. 35, 315 (2008), p. 352. (The U.S. Supreme Court “required disclosure of whether the amici are receiving compensation from any party to the lawsuit for filing the brief. This rule allows the courts to know the full extent of “interest group activity” and to know whether the judges have a financial interest in the litigation or a connection to one of the parties”), p. 352.

Today's Rule 36(7) requires an identification of all monetary contributions to *amicus* briefs preparation not only by parties and parties' counsels, but by any other person.⁸⁴¹

334. *Amici* now can file their motion seven days after parties have filed their briefs. Collins sees it as a conscious strategy of the Court to avoid that amici, knowing the content of litigants' briefs, repeat the same arguments.⁸⁴² These rules allows the court to keep a liberal policy on amicus participation, while trying to keep the volume of *amicus* input manageable. However, in highly controversial cases or cases of high social importance, it appears that no rule could efficiently keep participants from expressing their concern to the Court, whether or not their input is in fact taken into consideration by the Court's limited staff.⁸⁴³ For example, an astronomical number of amici briefs were filed in the recent case of *Obergefell v Hodges*, a lawsuit contesting the definition of marriage as a union between one man and one woman in the law of the states of Tennessee, Michigan, Kentucky and Ohio and their compliance with the equal protection clause of the 14th Amendment. At Supreme Court level, the case mobilized 147 amici briefs originating from various political social, professional, and religious groups.⁸⁴⁴ As explained below, many factors account for the number of briefs that are filed in a given case, for example social importance and the filing organizations' strategy with regards to their political agenda and their relationship to their members and donors. Supreme Court third party rules evolution is a history of constant adaptation to ever-growing flows of participants. The Court tried to standardize the briefs format so as to make its work more efficient and clarify expectations while not discouraging potentially valuable input, especially on thorny social and legal issues.

⁸⁴¹ S. Ct. Rule 37 (6), effective 1 July 2013, provides: "Except for briefs presented on behalf of amicus curiae listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text." Rule 37(4) makes an exception to the rule of disclosure for government agencies, the most important of which is the Solicitor General.

⁸⁴² *ibid.*

⁸⁴³ Scholars debate whether courts clerks have the time to read all amici that are filed, and they can therefore influence the ultimate outcome of the case. See for example...

⁸⁴⁴ On amici participation in *Obergefell v. Hodges*, see R. Robson, "Guide to the Amicus Briefs in *Obergefell v. Hodges*: The Same-Sex Marriage Cases", *Constitutional Law Prof Blog*, (2015), <http://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html>, quoted in Van den Eynde, "Interpreting Rights Collectively", p. 86.

The European Court of Human Rights

335. In Europe, non-parties can intervene as “third parties”, they do not benefit the status of “amicus curiae”. Moreover, they have limited *locus standi* before the European Court of Human Rights. At first, third party interventions were reserved to member states, in particular the plaintiff’s country of origin in the cases the plaintiff did not sue his own member state. This complied to a classic vision of international law.⁸⁴⁵ This right of non-party contracting states to intervene in the proceedings were not inscribed in the European Convention, but in the Rules of Court.⁸⁴⁶ It was meant to permit States to defend the rights of their nationals,⁸⁴⁷ ensuring the “good administration of justice”. To intervene, member states had to be invited by the president of the Court. After 1998, third intervention procedure was inscribed in the newly reformed Convention Article 36, states intervened either by right (Art. 36 Sec. 1) or through authorization of the Court (Art. 36 Sec. 2). According to Sicilianos, contracting states have been using their right to intervene at times to support their nationals,⁸⁴⁸ at time to challenge their claims.⁸⁴⁹
336. In Chapter One, I presented different theories exploring the different aspects of high courts legitimacy: their capacity for reason, and their democratic potential. Based on the assumption that democratic legitimacy is brought about by more than electorally-based consent, many scholars have defended several aspects of high Court’s function they deemed democratically legitimate. Some even argued that the Supreme Court’s compliance – intentional or factual – with societal consensus or mainstream public opinion confirmed its democratic legitimacy.
337. Third party intervention made its official grand entry into the Convention through Protocol 11 in 1998 at Article 36 Sec. 2 of the Convention. It is now detailed in the

⁸⁴⁵ This procedure was introduced by old article 37 §2 of the Rules of Court, which did not explicitly use the terminology of “third party” intervention.

⁸⁴⁶ In the meantime, Sicilianos explains that old article 48 ECHR allowed member states to refer a case to the court and defend the rights of their own nationals in Strasbourg. The possibility of non-party contracting states to intervene in proceedings proceeded from this philosophy. L-A. Sicilianos, “La tierce intervention devant la cour européenne des droits de l’homme”, H. Ruiz-Fabri, J.-M. Sorel (dir.), *Le tiers à l’instance devant les juridictions internationales*, Paris, Pedone, (2005), p. 123.

⁸⁴⁷ *Ibid.*, p. 124.

⁸⁴⁸ *Ibid.*, p. 130.

⁸⁴⁹ *Ibid.*, p.131, referring to case ECtHR, *K.K.C. v. The Netherlands*, Appl. No. 58964/00, 21 December 2001, where Russia intervened to challenge the claims of its national, who was contesting the conformity of his deportation to Russia with the ECHR.

Rules of Court at Rule 44(1)(a):⁸⁵⁰ Upon invitation by the President of the Chamber — which is, in practice, rather an authorization⁸⁵¹— and for the sake of “proper administration of justice”, a non-party state or “any person concerned” is allowed to take part in proceedings in writing or at a hearing. However, in practice, non-state third parties were allowed to intervene in proceedings from at least 1989 upon invitation by the President of the Court.⁸⁵²

338. The provision “any person concerned” at as it is formulated at Rule 44 can apply to many different types of interveners. In practice, it is interpreted liberally so as to gain all the potential benefits third party interventions could bring to the Court,⁸⁵³ in particular the Grand Chamber.⁸⁵⁴ According to Sicilianos, different kinds of interveners have been allowed to take part in proceedings as third parties. A first group gathers persons having direct interest in the outcome of the case in domestic civil proceedings, initiated the case at domestic level,⁸⁵⁵ or have interests common to the plaintiff. A second group gathers interveners Sicilianos labels as “*amici curiae*”. Because of the substantive input they bring the Court, he maintains that they play in the case a role akin to a traditional *amicus*.⁸⁵⁶ According to Sicilianos, non-governmental organizations, independent experts, research centers, religious institutions, domestic administrative agencies, international agencies give the Court substantive expert input, conforming to the classic definition of *amicus curiae* mentioned above. They seek to inform the Court, even though they also advocate for the cause or one or the other party. Because their input can truly enlighten the Court on human rights violations by adopting a perspective different from that of contracting states or parties to the case,

⁸⁵⁰ In 1998 the article devoted to third party intervention in the Rules of Court was Rule 61. Rule 44 was introduced into the Rules of Court on 7 July 2003.

⁸⁵¹ Sicilianos, *op. cit.*, p. 132.

⁸⁵² L. Hitoshi Mayer, “NGO standing and Influence in Regional Human Rights Courts and Commissions, *Brooklyn Journal of International Law*, Vol. 36, No. 3 (2011), p. 915, citing D. Gomien, D. Harris, L. Zwaak “Law and Practice of The European Convention on Human Rights and the European Social Charter”, (1998) p. 80.

⁸⁵³ L. Burgorgue-Larsen, p. 73. See ECtHR, *Karner v. Austria*, 40016/98, 24 July 2004, at §6.

⁸⁵⁴ *Ibid.* p. 74.

⁸⁵⁵ in ECtHR, *Pham Hoang v France*, appl. No. 13191/87, 25 September 1992, the plaintiff claimed violation of article 6 Section 3 (c) of the Convention because he had not been granted a lawyer appointed by the Court in cassation proceedings. The council of cassation attorneys, who declined the appointed lawyer, intervened in the ECtHR proceedings to explain the particular of their role in cassation proceedings to the Court.

⁸⁵⁶ Sicilianos, *op.cit.*, p. 132.

the Court has been liberal in interpreting the “concerned” requirement loosely,⁸⁵⁷ and in its acceptance of amici interventions.

339. Another actor of significance has been granted a special access to the Court through third party intervention: The Commissioner for Human Rights of the Council of Europe. The Commissioner was given this right to intervene after the Parliamentary Assembly of the Council of Europe had lobbied many years in support of the institutionalization of a European type of human rights prosecutor for gross violations of human rights within the territory of the Council of Europe.⁸⁵⁸ Given the understandable reluctance of contracting states to the potential political ramifications such an international office could have had,⁸⁵⁹ it was decided to keep his function to an exclusively diplomatic dimension, and to give him a simple right of intervention. Moreover, the Commissioner for Human Right’s mandate being limited to the promotion of human rights and to the prevention of their violation rather than to their protection,⁸⁶⁰ a right to initiate law suits would have drastically changed the nature of his mandate. With the consecration of a right to intervene as third party by Protocol 14,⁸⁶¹ the Commissioner can now contribute to the “European public order”. He is enabled to situate individual petitions within the broader context of potentially systematic human rights violations for the Court,⁸⁶² for example in Countries with the worst record of human rights violations such as Russia, Turkey, Poland, Romania and Ukraine.⁸⁶³ His position is thus in-between an institutional representative and a defender of the public.

⁸⁵⁷ Let us stress that the other official version of the text, in French, does not use the term “concerned” but “interest”, which appears a more difficult criterion. This fact may explain that French scholar Sicilianos believes the “interest” criterion has been interpreted loosely, while in fact it appears the term “concerned” is more inclusive and not limited to material interest.

⁸⁵⁸ According to Sicilianos, parliamentary assembly had lobbied in Rec 1606 (2003) 23 June 2003 (17 session) for the creation of the right of the Commissioner to originate a lawsuit to remedy human rights violations occurring in “zones where the European Convention of Human Right cannot be enforced” such as zones of armed conflicts or emergency zones or intervention of a contracting state in another state’s territory. That would have allowed quick interventions to remedy serious and systematic human rights violations. They thus spoke for the creation of an “actio popularis” through the commissioner of human rights. Sicilianos, *op. cit.* p 144. (my translation).

⁸⁵⁹ Sicilianos, *op. cit.*, p. 146.

⁸⁶⁰ *Ibid.*, p. 144.

⁸⁶¹ For explanations on Article 13 of protocol 14 amending rules regarding third party intervention, see Treaty Series-No. 194 “Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention”, §86-89.

⁸⁶² Sicilianos, *op. cit.*, p. 150

⁸⁶³ L. Burgorgue-Larsen notes that in most petitions concerning these contracting states in 2009 or 2006, the Court concluded in a violation of the one of the core intangible rights protected by the Convention.

340. Beside regulating who can intervene as third parties, the Convention and rules of Court also specify certain procedural constraints such as brief filing deadlines at Rule 44 Section 1 (b) or Rule 34 § 4. However, the European Court is not burdened with a wide use of the procedure of third party intervention as is the United States Supreme Court. Thus, it does not seem to have felt the need to micromanage the details and formatting of amici submissions to the same extent as the Rules of the Supreme Court do. However, Rule 44 Section 5 suggests that the European Court through its chambers presidents may impose non-written norms or set more detailed rules regarding briefs submissions on a case-by-case basis, depending on the case at hand.⁸⁶⁴
341. With regard to substance, the only guideline provided by the Rules to advocates consists in imposing a duty to file “duly reasoned” written remarks to the Court. Given the diversity in legal cultures among Council of Europe member states and the effort involved in filing a brief in a foreign language, this could be seen as a demonstration of tolerance on the part of the Court, so as not to discourage more interventions. However, this is debatable, when one reads claims of former registrar Paul Mahoney, who claimed that the Court was often declining third party applications.⁸⁶⁵ In fact, scholars have contradicted this assertion based on discussions with interveners, who asserted interventions were almost always granted.⁸⁶⁶ When the Court declines requests, it is for three types of reasons: ‘either the information sought to be provided concerns States other than the defendant State, or the issues do not present a sufficiently proximate connection with the case before the Court or the intervention is not seen as

L. Burgorgue-Larsen, “Les Interventions éclairées devant la Cour Européenne des droits de l’homme ou le rôle Stratégique des Amici Curiae”, *La conscience des droits, Mélanges en l’honneur de Jean-Paul Costa*, Paris, Dalloz (2009), p. 76.

⁸⁶⁴ Rule 44 (5) of the Rules of Court: “Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber.” (Rules as valid since 14 November 2016).

⁸⁶⁵ P. Mahoney, “Commentaire”, in H. Ruiz-Fabri et J.-M. Sorel (Dir.), *Le tiers à l’instance devant les juridictions internationales*, Paris, Pedone, (2005), p. 155 (hereinafter “Commentaire”).

⁸⁶⁶ Van den Eynde contends: “According to most scholars and litigating groups that have been surveyed, the [European Court] has demonstrated that it is particularly receptive to amicus participation and ‘leave to intervene by way of written submissions is almost always granted’”. Van den Eynde, “Empirical Look”, *op. cit.* p. 281. Let us stress that if Van den Eynde’s interveners were repeat interveners, experienced with the courts expectations, their interventions were probably less likely to be declined as they also had gained a reputation with the court. It is possible that unexperienced interveners experience less success.

necessary by the Court’⁸⁶⁷Generally its welcomes third party intervention, since they are “about making the universality of [human] rights effective”.⁸⁶⁸

2.1.2. Third Party Intervention as Indirect Expression of the Public

342. In the subsection above, I showed that both the European and the Supreme Court progressively adapted their rules to enable the participation in proceedings of non-parties to the cases they were adjudicating. In so doing, they showed that they considered third parties as court-friendly because they often provide courts with greatly needed facts and expert knowledge. My working hypothesis is that participation of third parties and rules evolved in parallel. I hereby examine the steady rise in the numbers of petitions to intervene in Supreme Court and fundamental rights proceedings by experts and advocate alike. This growth in numbers was challenged but also vindicated by scholars. Next I discuss the scholarly defense of third party participation on rights basis in the United States, and see how it applies to Europe.

2.1.2.1. Steady Increase in Third Party Participation as an Instauration of a Dialogic Dynamic Between Third Parties and the Courts

343. In this subsection, I look at third party participation numbers to obtain a clearer picture of the evolution and social context within which third parties get. Paul Collins’ analysis of the numbers of third party briefs filed with the Supreme Court between 1946 and 2001 “offers a snapshot of how many *amicus* briefs the justices saw at any given point in time” and areas of highest participation rates. Note that his work does not focus solely on constitutional rights cases, but on all cases filed at Supreme Court level. It is nonetheless enlightening for this thesis’ purposes, since it aims at providing “leverage over the question of whether they are a common occurrence in all issue areas or whether their presence is more pronounced in civil rights and liberties law, the issue area on which most examinations of *amicus* influence focus”.⁸⁶⁹ With at least one *amicus* filed

⁸⁶⁷ Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, at 284.

⁸⁶⁸ According to Burgorgue-Larsen, these interventions are “enriching”, which explains their likelihood to be accepted by the European Court. “It is about making the universalism of rights effective”. L. Burgorgue-Larsen, “De l’importance de la “communauté de vue dans les sociétés modernes”, libres propos sur la méthodologie interprétative de la cour à partir de l’arrêt *Démir et Baykara* du 12 novembre 2008, in *Recueil des conférences d’actualité de l’institut international des droits de l’homme*, Bruylant, (année) (my translation) (p.75 ?)

⁸⁶⁹ P. Collins *Friends of the Supreme Court: Interest Groups and Judicial Decision-Making*, Oxford, Oxford University Press (2008), pp. 45-46 (hereinafter: “Friends of the Supreme Court”).

in 90% of the cases between 1990 to 2001, Collins claims that “amicus participation is clearly now a staple of interest group activity in the Court”,⁸⁷⁰ confirming concerns once expressed by Justice Jackson and Scalia. More specifically, civil rights are one of the two areas in which amici are filed most often.⁸⁷¹ Civil rights cases have experienced the most dramatic growth in amici participation. The number of interventions in civil rights cases was similar to participation levels of the least litigated issues and grew close to the percentages of intervention in cases involving most litigated issues.⁸⁷² Moreover, between 1946 and 2001, the three cases attracting the highest number of briefs involved civil rights.⁸⁷³

344. Several indicators exhibit the intensity third party participation growth over the years. Some scholars have focused on the variation in raw numbers of amici briefs filed per term, others on the percentage of cases filed where third party were granted leave to file.⁸⁷⁴ Lee Epstein and her colleagues report that while in 1946 only 21.1 percent of cases (of 137 cases) attracted amicus participation, it increased to reach 91.9 percent (of 86 cases) in 1993, and increased to reach 97.0 percent (of 67 cases) in 2011.⁸⁷⁵ Within forty years, Kearney and Merrill measured a 800% increase in amicus participation filed at merits stage (as opposed to the certiorari case, where the case has least chanced of being granted review).⁸⁷⁶ But above all, the most telling indicator of

⁸⁷⁰ *Ibid.*, p. 46.

⁸⁷¹ Not only the most, he says, but more than half: “This finding is not surprising given that scholars have long identified these cases as among the most salient to organized interests”, *ibid.*, p 50).

⁸⁷² According to Collins, the 5 most litigated including economics, judicial power, federalism and federal taxations issues from the end of the Second World War, under the leadership of Chief Justice Vinson, to 2001 under the leadership of Chief Justice Rehnquist. *Ibid.*, Figure 3.2. p. 47.

⁸⁷³ “In fact, civil rights and liberties issues produce the three cases with the highest number of amicus filings. Webster is followed by *Regents of the University of California v. Bakke* (1978), a high-profile affirmative action case in which 54 amicus briefs were filed, and *Cruzan v. Director, Missouri Department of Health* (1990), a case involving a dispute over whether the parents of a patient who is in a persistent vegetative state can refuse life-saving medical treatment on the patient's behalf. In that case, 39 amicus briefs were filed.” Collins, “Friends of the Supreme Court”, *op. cit.*, p.49

⁸⁷⁴ For an example of study focused on raw numbers, see T. Hansford, K. Johnson, “The Supply of Amicus Curiae Briefs in the Market for Information at the U.S. Supreme Court”, *Justice System Journal*, Vol. 35, No. 4, (2014).

⁸⁷⁵ Epstein, et al., *The Supreme Court Compendium. Data, Decisions, and Developments*, Thousand Oaks, CA, CQ press (6th ed. 2015), Table 7-22, “Supreme Court Cases Containing at Least One Amicus Curiae Brief, 1946-2013 Terms”, pp. 703-5

⁸⁷⁶ They compare amici participation of two decades: the 1946-1955 decade and the 1986-1995 decade. See J. Kearney and T. Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court”, *op. cit.*, p. 752, cited by Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p. 88. Note that amici can be filed at cert stage at the Supreme Court, but that in many cases, friends of courts tend to file a brief once the case they are interested in supporting have passed the barrier that only about 1% of cases pass. In this case they do not waste their resources. About determinants of filing a third-party brief at cert, see K. Zuber, U. Sommer, J. Parent, “Setting the Agenda of the United States Supreme Court? Organized

an intensification of amici participation is the growth in numbers of amici briefs filed per case. According to Franze and Anderson, in the last five years, more than 11 briefs per case on average were filed,⁸⁷⁷ twice as many as in the 1990s, and more than tenfold the average of the 1940s.⁸⁷⁸ From 2011 to 2014, civil rights cases reaches unprecedented record numbers of amici briefs.⁸⁷⁹ As of today, the case with the highest number of amici filed is also a civil rights case: *Obergefell v Hodges* with 145 amici filed, although *United States v. Windsor* and *Hollingsworth v. Perry* as combined cases reached the number of 156 amici briefs.⁸⁸⁰ All these facts combined show the intensity of the controversy a single case can provoke in the public, and bring to the Supreme Court.

345. Other political scientists closely analyzed factors involved in the rising numbers of briefs filed at the Supreme Court over a period ending more recently, in 2008. Hansford and Johnson conceive rising numbers of amici filing as a response to latent expression of demand of information by the Supreme Court. They base their research on the hypothesis that “the justices should have a greater demand for externally provided information than legislators, as there is far less policy specialization at the Court than in, for instance, Congress”.⁸⁸¹ They analyze endogenous factors that could give potential filers signal that the Court welcomes their information and conclude that some of these factors, which include references to amici in Supreme Court opinions or change in the position of the median justice, encourage amici participation and account for variations in the raw numbers of amici participation between terms.⁸⁸² Their findings confirm the hypothesis that the dynamic of amici participation is not to be reduced to

Interests and the Decision to File an Amicus Curiae Brief at Cert”, *Justice System Journal*, Vol. 36, No. 2, (2015), pp. 119-137.

⁸⁷⁷ During the 2014-15 term the number of briefs averaged 12 briefs per case; and 14 in 2012-13. A. Franze, R. Anderson, “Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm”, *The National Law Journal*, (August 19, 2015), p. 1.

⁸⁷⁸ *Ibid.*

⁸⁷⁹ “The marriage equality cases generated 156 amicus briefs in 2012-13 and the health care cases 136 briefs in 2011-12. Still, the 2013-14 term was in record breaking territory with 82 amicus briefs filed in *Burwell v. Hobby Lobby*, the contraception mandate case.” A. Franze, R. Anderson, “Justices Are Paying More Attention to Amicus Briefs” (Sep 18, 2014), p. 1.

⁸⁸⁰ Van den Eynde, *op. cit.*, p. 88.

⁸⁸¹ Hansford, *op. cit.*, pp. 364-380. The numbers show a steady growth, with variations from term to term.

⁸⁸² Other scholars had previously studied the determinants of the level of amicus participation in supreme court cases. See R. Salzman, C. J. Williams, B. T. Calvin, “Determinants of The Number Of Amicus Briefs Filed Before The U.S. Supreme Court, 1953- 2001”, *Justice System Journal*, vol. 32, No. 3, 293 (2011)”.

mere lobbying on the part of participants, but should be seen as a dynamic dialogue between the Court and third parties on the social issues involved.⁸⁸³

346. While amici participation growth is highly salient in the United States, it is not the case of European adjudication. However, major differences account for a less dramatic growth. Firstly, the European individual access right only exists since Protocol 11 entered into force on 1st November 1998, *i.e.* for almost two decades. Therefore, the growth in third party participation cannot yet be as visible compared to a court in activity for over two centuries. Secondly, since the European Court is an international court, which official languages are foreign to most citizens of the contracting states, it can reasonably be assumed that it is less politically salient and less likely to attract as many third parties as a national high court. Moreover, most organizations initiating third party participation are based in common law countries,⁸⁸⁴ while most European contracting states are civil law countries where third party participation in judicial proceedings only has started to develop.⁸⁸⁵ Thirdly, third party lobbying was modelled after United States' judicial politics, which also a recent vintage (1920s-1950s) so it naturally followed with delay.
347. For these reasons, we should not too readily agree with Bartolomeusz's conclusions that "amici curiae intervene in [European Court] proceedings relatively frequently in absolute terms, but in about 99 per cent of case dealt with by the Grand Chamber and Sections they do not participate and, apparently, do not seek to participate".⁸⁸⁶ This might be low, but it does not account for factors that skew such a low percentage, and for the growth trends. Few scholars have conducted comprehensive studies of third party intervention since 1998. Bartolomeusz gave a number of 35 applications for leave

⁸⁸³ Collins make the difference between the two types of participation: interest participation and amicus participation. "Friends of the Supreme Court", *op. cit.* Harper and Etherington already considered amici as the main tool for interest group lobbying at the court in the 1950s, *op.cit.* p.1172. Scott Simmons sees amici as an expression of public participation: "Amicus participation dispels external public criticism that the Court is detached and indifferent to the public, without significantly undermining the Court's independence", *op. cit.* p. 185.

⁸⁸⁴ Van den Eynde, "An Empirical Look", *op. cit.*, p. 283

⁸⁸⁵ S. Kochevar, *op. cit.*, p. 1661.

⁸⁸⁶ Bartolomeusz, *op. cit.*, p. 236. He asserts: "Over the period from November 1998 to 31 March 2005, the Court heard, and delivered judgment in 35 applications in which third parties participated pursuant to Article 36(2). Additionally, in relation to one application a third party had sought, and been refused, leave to intervene. These figures indicate that while the ECHR has a fairly substantial amicus practice in absolute terms, relatively speaking, amici curiae have participated in less than one per cent of the ECHR's proceedings since 1 November 1998". He concludes that in percentage they don't participate or don't seek to, *ibid.*, p. 235.

to intervene from November 2011 and March 2005, based on database information. However, as van den Eynde stresses in her own analysis, information on the European Court HUDOC database and written opinions are often unclear and incomplete. In an attempt to replicate Bartolomeusz's research without information on his methodology, I did not obtain the same results. According to a HUDOC search of third-parties' briefs filed based on Article 36 (2),⁸⁸⁷ I concluded that 55 briefs were filed in Chamber and 46 in Grand Chamber cases between November 1998 and 31 December 2005.⁸⁸⁸ This of course does not include petitions to intervene that were denied by the Court. Overall, in most cases, two or one brief were filed in the case.

348. A basic search of the HUDOC database between November 1998 and March 31, 2015 shows that third parties – who in our numbers include interested parties, parties in domestic proceedings and third-party government – filed briefs in 0,6% of the cases. 3,5% of Grand Chamber cases attracted a third-party intervention (103 cases) and 0,39 % of cases before a chamber. Such numbers show a weak participation by third parties. However, such low numbers cannot be compared to the 10 amici briefs per case in more than 97% of cases of the U.S. Supreme Court. While the Supreme Court exercises discretion in case selection and in number of adjudicated cases, the European Court only has a basic system to sort admissible from inadmissible cases, and only clear repetitive cases are handled in smaller formations of 3 judges. Consequently, the European chambers and Grand Chamber adjudicated 1,068 cases in 2017 alone, while the Supreme Court decided 69.⁸⁸⁹ Percentages of cases attracting third-party interventions at the European Court are therefore hardly comparable to those of the Supreme Court.

⁸⁸⁷ The information on third-party interventions is contained in opinions of the court. A search for “Article 36 §2 of the Convention” has the advantage to list all cases where third parties requested to intervene without excluding governments and other interested parties. It also avoids including “Article 36 § 2” from other domestic norms quoted in other decisions.

⁸⁸⁸ In a few cases, one single third party brief was filed for several cases (ECtHR, *Coster v. the United Kingdom* [GC], Appl. No. 24876/94, *Lee v. the United Kingdom* [GC], appl. No. 25289/94, ECtHR, *Beard v. the United Kingdom* [GC], appl. No., *Jane smith v. Ireland*, Appl. No. 24882/94) by the European Roma Centre, but cases were separately decided the same day 18 January 2001.

⁸⁸⁹ The numbers of judgment are rather stable at the Supreme Court, which delivered 69 judgments also in the 2014 term, while the European Court delivered 2336. The priority policy has helped the Court dispose more efficiently with many applications, especially when joined. Statistics on Scotus Blog, <http://www.scotusblog.com/statistics/> (last accessed March 2018). See also yearly European Court's *Analysis of Statistics 2017*, accessible at https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf and *Analysis of Statistics 2014*, accessible at https://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf (both last accessed March 2018)

349. To get a sense of the intensification of third-party participation, I took a rapid look at the raw numbers and percentages from 1998 to 31 December 2017.⁸⁹⁰ Evolution in numbers of briefs submitted from 1998 is clear, especially when compared to the steady increase in numbers of judgments, which started to decrease in 2009 to plateau at around a thousand cases decided a year in chambers and grand chamber. After having gathered numbers of third party briefs submitted I calculated the approximate average number of brief per case in which a brief was submitted. It therefore did not account for all the judgments in which no brief was submitted to the Court. Numbers show a higher average number of briefs submitted for the Grand Chamber than for the Chambers. Nevertheless, the steady increase is noticeable in particular after 2009 (See Graph). This trend is confirmed if one looks at the cases which attracted the most non-governmental organizations interventions. From van den Eynde data, while one case attracted 2 or 3 interventions in 1995, 1996 and 1998, in 2010-2012, 6 cases attracted respectively 2, 3, or even 4 briefs, which does not account for third-party government intervention.⁸⁹¹ Moreover, in many of those cases, briefs were filed jointly by several organizations.⁸⁹² Thus, as in the case of the Supreme Court, the intensity of third-party participation cannot be measured only based on the number of briefs that are filed.⁸⁹³ Up to date, three cases have attracted the greatest number of interventions: *Lautsi v. Italy*, *Parillo v. Italy*, and *Perincek v. Switzerland*.⁸⁹⁴ Nine briefs were submitted in *Lautsi*, including one brief jointly filed by 10 governments and one by 33 members of the European Parliament. *Parillo v. Italy* attracted 12 briefs, one of them signed by 42 members of the Italian Parliament. Finally, *Perincek v Switzerland* attracted 10 briefs including 2 government briefs. However, if one believes Mahoney's contention that the Court often refuses third-party briefs, both van Den Eynde and my own results

⁸⁹⁰ This research was accomplished based on the data provided by judgments on the merits, through a "Article 36 § 2" search in the HUDOC database between November 1998 and December 2017, keeping in mind Van den Eynde's warning that the European Court is not always comprehensive or accurate, or even easily understandable in its specification of third party participation.

⁸⁹¹ Van den Eynde, "An Empirical Look", *op. cit.*, p. 278.

⁸⁹² For example, ECtHR, *Oliari and others v. Italy*, Appl. Nos. 18766/11 36030/11, 21 July 2015, a gay and lesbian rights case, mobilized 5 briefs for 15 organizations.

⁸⁹³ This is also the case of Supreme Court amici participation strategies. In many cases, briefs are filed jointly by several organizations. See for example : A. Wohl, "Friends With Agendas Amicus Curiae Briefs May Be More Popular Than Persuasive" *A.B.A. Journal* Vol. 82, 46 (1996), p. 46.

⁸⁹⁴ ECtHR, *Lautsi and others v. Italy* [GC], Appl. No. 30814/06, 18 March 2011, (a freedom of education case involving religious signs in public schools). ECtHR, *Parillo v. Italy* [GC], Appl. No. 46470/11, 27 August 2015 (a case involving the Italian prohibition of donation of embryos stemming from in vitro fertilization for scientific research); ECtHR, *Perinçek v. Switzerland*, [GC], Appl. No. 27510/08, 15 October 2015 (a freedom of expression case involving denial of a genocide in Turkey).

underestimate the potential of participation involved in Europe: as mentioned above, the Supreme Court has developed a very liberal policy of third-party participation, virtually refusing none, which according to Mahoney is not the case of the European Court.⁸⁹⁵ The years 2010, 2015 and 2016 attracted record numbers of brief submissions in the European Court history. Overall, while the records of the European Court are far from a match the 147 amici briefs filed in *Obergefell v. Hodges* or the 156 of *Holligsworth v. Perry* and *United States v. Windsor*,⁸⁹⁶ it reveals a trend of increasing awareness that the European Court is an instrument of legal change and that organizations need to get involved to ensure that the law does not evolve without their expert input.

2.1.2.2. Third-Party Filing as a Form of Protected Speech

350. In 2008, Ruben Garcia published a defense of amicus intervention based on the U. S. Constitution and democratic theory. He begins by stating that the rules of interventions in American courts are not adapted: today's voluminous practice of third-party interventions at all stages of state and federal judicial proceedings in the United States does not reflect the concern for minority protection proponents of judicial supremacy and activism advocate. Not only do critiques claim that an amicus is not always a "vindicator of the politically powerless",⁸⁹⁷ but practices have triggered concerns "about wealthy, powerful interests having a louder voice".⁸⁹⁸ To counter this concern, Garcia proposes a "forum analysis" of amicus curiae as a form of speech protected by the Constitution, instead of the more classic defense based on the right to petition protected by the First Amendment.⁸⁹⁹

⁸⁹⁵ Mahoney, "Commentaire", *op. cit.*, p. 155.

⁸⁹⁶ These cases are discussed more thoroughly in Chapter Four. Up to date, no case mobilized more amici briefs than marriage equality cases in the Supreme Court. Numbers have severely dropped in comparison with a maximum of 85 cases in 2015-16 in the field of affirmative action, and 35 briefs in a patent case in 2016-17. A. Franze, R. Anderson, "In Quiet Term, a Drop in Amicus Curiae at the Supreme Court", *The National Law Journal*, (September 2017), p.2.

⁸⁹⁷ Lowman, *op. cit.*, p. 1245.

⁸⁹⁸ R. Garcia, *op. cit.*, p. 333. Note that the evolution of amici intervention into a form of political lobbying is addressed *infra* at sec. 2.2.

⁸⁹⁹ Garcia refers to case protecting all law suits even abusive under the right to petition. The Supreme Court held in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) that the right to petition protects even ill-motivated lawsuits as long as they are reasonably based in fact or law, p. 336. In this decision, "the high court, though not ruling on First Amendment grounds, nevertheless noted that it had long viewed the right to sue in court as a form of petition. "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights," Justice Sandra Day O'Connor wrote for the Court, "and have explained that the right is implied by the very idea of a government,

351. Firstly, Garcia asserts that the amicus function of “notice and comment” found in the petition clause of the First Amendment can be seen as a form of expression of a social movement, that is not only directed at courts, but at the courts’ broader publics. Indeed, many non-governmental organizations, whether they are active in government advocacy or at grassroots level, are part of social movements. Therefore, he suggests that amicus participation is an indirect mode of public opinion participation in courts: “The “notice and comment” view echoes the tradition of legal realism, which suggests that legal decisions are affected by the times in which they are rendered. Legal realists believed that there was little difference between the advocacy needed to change the law in the legislature and in the courts”.⁹⁰⁰ Those movements can bring useful social evidence data to the courts, in the tradition of Louis Brandeis, who famously introduced social science in legal briefs.⁹⁰¹ Secondly, Garcia claims that lawyers could use the procedure of amicus to fulfill their duty of due diligence to their client and avoid the costlier and riskier lawsuit route. They could express the legal concerns of their clients to the court when they are similar to the ones advocated by another plaintiff in an ongoing case. In the eventuality of a favorable outcome, they would have an enforcement tool for his rights without having to go to court. A right to file an amicus brief could also be an avenue to defend a potential injury, or an injury not significant enough to be redressed by a court.⁹⁰² Filing an amicus brief as an individual could also be regarded as an expression of citizens’ right to appear without a lawyer.⁹⁰³
352. Garcia also advocates wide amicus participation rights based on democratic theory. Regarding the democratic dimension of the amicus filing practice, he contends that amicus participation is a way to participate to a public debate, and to help society reach

republican in form.” O’Connor further observed that the First Amendment petition clause says nothing about success in petitioning — “it speaks simply of the right of the people to petition the Government for a redress of grievances.” Accessed at <http://www.firstamendmentcenter.org/right-to-sue> This right is regarded as “nearly absolute.” See N. B. Smith, “Shall Make No Law Abridging . . .”: An Analysis of the Neglected, but Nearly Absolute, Right of Petition, *University of Cincinnati Law Review*, Vol. 54, 1153 (1986), p. 1154.

⁹⁰⁰ Garcia, *op. cit.*, p. 340.

⁹⁰¹ Louis Brandeis is credited to have introduced social science in briefs in *Muller v. Oregon*, 208 U.S. 412, (1908). On this topic See D. Klebanow, F. L. Jonas, *People’s Lawyers: Crusaders for Justice in American History*, Routledge (2003), pp. 70-71 (describing Brandeis’s representation of the state of Oregon in defending different limits on the working hours of men and women). Note that Brandeis was not representing a third party but a party to the case. Reference found in Garcia, *op. cit.*, p. 340.

⁹⁰² Garcia, *op. cit.*, pp. 344-5.

⁹⁰³ Right protected by the Judiciary Act of 1789, where Congress provided that in all federal courts, “the parties may plead and conduct their own cases personally or by counsel.” See *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2003 (2007).

consensus, it is thus a tool for “deliberative democracy”.⁹⁰⁴ He also deems it compatible with popular constitutionalism, and regards amicus participation in judicial proceedings as a better fit than public opinion involvement.⁹⁰⁵ Following this idea, one could stretch and claim that amicus participation is an indirect form of public opinion participation in courts.⁹⁰⁶ For this to be realized, he advocates that “the standards for filing such amicus briefs should not be unreasonably high”.⁹⁰⁷ Finally, he advocates amicus participation based on democratic deliberative theory.⁹⁰⁸ Responding to critiques of amici participation in judicial proceedings as an interference with non-political decision making⁹⁰⁹ or incompatible with popular democracy, he asserts: “both deliberative democracy and interest group theories add something of value to judicial decisionmaking. Moreover, it is hard to characterize American democracy as any one kind of democracy; it is a blend of elite competition, public choice, and deliberative democracy [...] Thus, especially in the federal context, amicus participation can provide an important channel of communication with the judiciary”. Scott Simmons adds that the Supreme Court also plays a quasi-representative role⁹¹⁰ perhaps because of the numbers and variety of third parties intervening. However, Garcia’s defense of third-party participation could be weakened by criticisms directed at self-interested lobbying practices, their ensuing abuses and substantial biases that are addressed in the last subsections of this chapter.

353. In the European context, the right to third-party participation could also be vindicated based on the right to fair and public hearing protected by Article 6 (1) ECHR.⁹¹¹ It is a

⁹⁰⁴ “The version of deliberative democracy that I am using here is simply the idea that democratic decisionmaking is improved by a greater number of voices in the process” Garcia, *op. cit.*, p. 346.

⁹⁰⁵ “The difficulty of measuring public opinion and its relevance to deciding constitutional law cases are only two of the problems inherent in popular constitutionalist theories [...] All of this merely shows that active participation in government, including the courts, is increasingly viewed as essential to the functioning of a democratic system. That participation can take a variety of forms, including filing amicus briefs. Thus, the standards for filing such amicus briefs should not be unreasonably high.” *Ibid.*, pp. 345-6.

⁹⁰⁶ See Omari Scott Simmons, *op. cit.* p. 233 (“Amicus participation dispels external criticism that the Court is detached and indifferent to the public.”)

⁹⁰⁷ Garcia, *op. cit.*, p. 345-6.

⁹⁰⁸ On courts and democratic deliberation see generally Chapter One of this dissertation.

⁹⁰⁹ Garcia, *op. cit.* p. 346. Referring to R. A. Posner, *Law, Pragmatism, And Democracy*, Harvard University Press (2005) (arguing in favor of Schumpeterian democracy over deliberative democracy), pp. 204-5.

⁹¹⁰ (“The Court’s function as a quasi-representative institution is neither without tension nor imperfection. But, in the end, this function is unavoidable.”)

⁹¹¹ Art 6 (1): “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

right of paramount importance in European law, that was labelled part of the “bone structure”⁹¹² of the European public order. Thus, it comes as no surprise that the Court has asserted that the right to a fair trial proclaimed in the *Golder* case⁹¹³ had such a “prominent place” in a democratic society⁹¹⁴ that it “cannot be sacrificed to expediency”, and restrictively interpreted.⁹¹⁵ The right to third-party participation can be defended on the basis of Article 6 insofar as it entails the right to access to a judge,⁹¹⁶ a right similar to a right to petition the court,⁹¹⁷ or on the right to access to a judge for persons in dire financial conditions, since such circumstances could deter victims from any attempt to seek rights enforcement in court.⁹¹⁸ Third-party intervention could provide an alternative venue to direct petition and could contribute to dropping the costs of a lawsuit, especially since all available and useful domestic remedies must be exhausted.⁹¹⁹ By liberally allowing third-party interventions, the court would provide individuals and groups with new avenues for human rights protection and cancel their need to initiate year-long proceedings. Some petitioners, failing to qualify as plaintiff for lack of injury but willing to fight for the sake of principle might also be satisfied that way. Similarly, third-party interventions could be an alternative avenue to persons not yet qualifying as victims of a civil right violation: their rights might be infringed in the future by a law that has not been applied to them. Therefore, they are not victims yet, but could be if the law was ratified.⁹²⁰ This is especially the case if the persons may have to choose between respecting the disputed law or practice, or risk criminal penalties.⁹²¹ Moreover, non-governmental organizations may only be permitted to file a lawsuit in “exceptional circumstances” such as extreme vulnerability so as not to be

⁹¹² Translation of the term used by Sudre “Droit International”, *op. cit.*, p. 531, “ossature”.

⁹¹³ ECtHR, *Golder v. United Kingdom* [Plenary], Appl. No. 4451/70, 21 Feb. 1975.

⁹¹⁴ ECtHR, *Kostovski v. Netherlands* [Plenary], Appl. No. 11454, 20 Nov. 1989.

⁹¹⁵ “In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision”, ECtHR, *Delcourt v. Belgium*, Appl. No. 2689/65, 17 January 1970, at § 25. See also that “it cannot be sacrificed to expediency”, ECtHR, *Kostovski v. Netherlands*, *op. cit.* at §44.

⁹¹⁶ ECtHR, *Bellet v. France*, Appl. No. 23805/94, 4 December 1995.

⁹¹⁷ Thus far, the Court has refused to recognize a right to third parties in domestic proceedings to be included as a party in European proceedings, but she has granted them a right to be informed.

⁹¹⁸ Sudre, “Droit International”, *op. cit.*, p. 579.

⁹¹⁹ Third party intervention can also be defended based on the right to an effective remedy before a court, protected at Article 13 of the Convention. This right provides that exhausting useful legal venues suffices to exhaust domestic remedies and be admissible at European level.

⁹²⁰ Note that the court doesn’t set an *actio popularis*. ECtHR, *De Becker v Belgium*, Appl. No. 214/56, 27 mars 1962, and ECtHR, *Klass v. Germany*, Appl. No. 5029/71.

⁹²¹ ECtHR, *S.A.S. v. France*, Appl. No. 43835/11, 1st July 2014, woman who is prohibited to hide her face with a veil for religious reasons can claim herself a victim of the law that prohibits it).

able to defend his own rights in Court.⁹²² The third-party avenue would be an interesting and complementary alternative to an overbroad enlargement of the notion of victim to potential and abstract victims of a law that has not yet been applied.⁹²³

354. With such a liberal acceptance of third-party intervention, potentially all possible aspects of being a victim of a violation of human rights would be taken into account, and no human rights violation would have a chance to be ignored: All aspect of rights violations may be represented in court, and any person concerned could express its apprehension in the public sphere through the media of a judicial procedure by supporting a plaintiff challenging the same or a similar violation. However, it could also become problematic to the Court. By encouraging third-party interventions too much, the Court would expose itself to an exponential growth in the numbers of third-party filings, which could dramatically increase the administrative and time costs of adjudicating single cases, were it to continue to consider all information provided by third-party briefs. The European court cannot selectively adjudicate, thus by welcoming too many interveners—a threshold that is visibly far from being reached yet—the court might transform them from a precious substantive tool to an additional burden.

2.2. Third Parties as Possible False Friends. The Problem of Interest Involvement and the Danger to Judicial Authority

355. Despite continued adaptations, both Supreme Court and European Court scholars challenge third-party participation rules and claim that they are not adapted to the current needs. Despite the existing rules, petition numbers still increase in the United States, while third party intervention is strengthening in Europe. In the United States, and now increasingly in Europe, because of elaborate group cooperation among organizations who communicate the demands of their movements, third party participation has been criticized as a form of potentially harmful interest group participation.⁹²⁴ Moreover, the reliability of the substantive input third parties provide to courts was also challenged.

⁹²² ECtHR, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, Appl. No. 47848/08 [G.C.], 17 July 2014.

⁹²³ ECtHR, *Burden v. U.K.* [GC], Appl. No. 13378/05, 29 April 2008.

⁹²⁴ For critiques, see Anderson, ““Frenemies” of the Court”, *op. cit.* p. 365.

2.2.1. *Third-Party Intervention as A Cooperative Endeavor Activity*

356. Over the course of history, the patterns of amici interventions have evolved followed and preceded by regulation norms. Many scholars made attempts at classifying the different role third-party interveners can play in U.S. proceedings. In a recent article, Helen Anderson listed five types of interveners in Supreme Court adjudication.⁹²⁵ First, there is the governmental amicus, submitted by an attorney general. Following the most traditional role of some lawyers, he can be appointed by a court to argue a particular issue. As he is tasked to advocate positions that are not defended by the parties, the court's lawyer works in the interest of the court, as an expert.⁹²⁶ Second, the "invited friend" can be invited by a court to give his own outlook on a legal issue. Of the five types of friends, the one which number grew the most over time is the third type, the "friend of a party", who clearly takes side, fighting for a party's cause. Such "friends" are often partakers in a very elaborated legal strategy together with other organizations, sometimes across states, to make sure that the party's cause is defended comprehensively. Oftentimes more than one additional "friend" is necessary to defend arguments that could not be used by the party's lawyer. Sometimes, the party's lawyer draft both the party and his friend's brief. Hence the courts rule of disclosure. The "independent friend" submits his own legal brief, fighting for no specific party's cause but possibly their own.⁹²⁷ Such elaborate strategies are so engrained in the American system that scholars consider them as a new form of interest groups activity.
357. In human rights adjudication today third parties intervene both to defend their own interpretation of civil rights, and to enlighten the Court as expert in a legal and social field. In some cases, and especially the most politically salient, it is not rare that third parties join resources and lend their names to a common strategy, signing a common brief. Cases sometimes mobilize groups beyond single issues and borders, giving courts the signal that a wide movement of opinion has assembled to support an outcome. All strategies have their upsides, and all can be abused.

⁹²⁵ Note that those types apply to American federal adjudication across the board and is not limited to Supreme Court constitutional or civil rights adjudication. However, data shows that most adjudicated cases, at least in constitutional adjudication, concerns civil rights issues. Therefore, I assume that Anderson's research is a good resource for my needs.

⁹²⁶ Anderson, *op. cit.*, p. 376.

⁹²⁷ The last type, Near interveners are groups that are not allowed to intervene in all federal or state courts (the law varies over the US. Territory). They are not relevant in our study. *Ibid.* p. 363.

2.2.1.1. *Third-Party Cooperation Towards a Common Goal*

358. When looking at salient cases amici and the names of their sponsors, it is striking to observe not only the great numbers of joiners but also the diversity of individuals, institutions, businesses and issue groups publically involved. Two main practices bring such diversity: joint strategizing, and the reliance on the good name of a sponsor.
359. Firstly, the diversity of amicus participation in the United States is dependent upon the goal of the potential interveners. Third parties aiming at influencing the outcome of the case can adopt two different strategies, or combine both: influencing in *substance*, and influence in terms of *numbers*. Interveners who try to influence in terms of substance will focus on the arguments submitted to the Court, and on making sure all kinds of arguments supporting their case are brought to the Court's attention.⁹²⁸ Given the constraints on amicus briefs forms, they sometimes opt to divide up the work.⁹²⁹ Many times this type of strategy is adopted by several organizations working together or working with a party. Each intervener opts to submit specific arguments, leaving the most important ones to the party, and respecting each organization's expertise⁹³⁰. This strategy is adopted based on the fact that the Supreme Court welcomes briefs that bring new light to a case and consider others as a burden.⁹³¹ Organizations will often provide social facts based on their specific expertise. Thus substance-based influence-focused

⁹²⁸ According to Scott Simon, the attention of the Court to a friend of court intervention also depends on the phase of the procedure at which the brief is submitted. At cert stage, it might not have as much impact as at merits stage. Scott Simons *op. cit.*, p. 214.

⁹²⁹ On group coalitions in supreme court litigations, Caldeira and Wright in 1988-1989 note that in most cases, organizations prefer to file multiple briefs (for public statement purposes) rather than save on cost and cosign. Only in highly political and salient cases will they do broad coalitions with multiple co-signing amici. However, Susan Behuniak-Long contradicted this statement in her study of highly controversial abortion case Webster, where if most briefs were signed by a single sponsor, numerous briefs were cosigned by several sponsors (2 to 4) and about a dozen of briefs were cosigned by more than 7 and as many as 77 or 115 sponsors.

⁹³⁰ See M. Schachter, "The Utility of Pro Bono Representation of U.S.-Based Amicus Curiae in Non-U.S. and Multi-National Courts as a Means of Advancing The Public Interest", *Fordham International Law Journal*, Vol. 28, 88 (2004-2005), p. 95 ("First, the litigant's counsel may deem it a disservice to his client to urge the court to adopt a broader ruling, lest doing so dilute the impact of the client's primary objective. The amicus party can fill such a void or complement the range of perspectives presented to the court.") According to Collins, "Amicus participants may raise issues not addressed by the direct parties to litigation, and often do. A classic example of this was the American and Ohio Civil Liberties Unions' amicus brief in *Mapp v. Ohio* (1961). In it, the amici argued for the application of the exclusionary rule to the states, a position that the Court subsequently adopted." P. Collins, "Friends of the Supreme Court", *op. cit.*, p.27.

⁹³¹ "In 1990, after being overwhelmed with 78 amicus curiae briefs in the abortion rights case Webster v. Reproductive Health Services, the U.S. Supreme Court revised its Rule 37 to remind parties that "relevant matter not already brought to its attention by the parties may be of considerable help to the Court [but that][a]n amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored". Van den Eynde, "Interpreting Rights Collectively", *op. cit.*, p. 86.

strategies also bring diversity in terms of interveners. Increasingly, organizations focused on different policy issues originating from the United States or from foreign countries and also businesses intervene and bring their experience and legal expertise on similar legal issues to other courts' attention.⁹³² The diversity brought into the proceedings through the involvement of foreign organizations and participants also had the effect of increasing the movement of crosspollination of the law, or judicial dialogue, i.e. using foreign law and case law as argument to support a given interpretation, in amicus briefs in the United States and in Europe. While the legitimacy of such practices is disputed in the United States, especially when judicial opinions directly refer such foreign sources,⁹³³ it is naturally more welcomed in an international court with a universal calling such as the European Court.⁹³⁴ The movement towards more international involvement has been truly visible in the last decades. While in abortion case *Webster v Reproductive Health Services*,⁹³⁵ the names of the 425 sponsors filing 74 briefs were all American, in cases such as *Lawrence v. Texas*⁹³⁶ more international organizations and institutions have intervened.⁹³⁷

360. Do such practices cause controversies? In an enlightening article looking at public interest litigation in a constitutional perspective, British scholar David Feldman explained in 1992 that legitimacy of public interest litigation is regarded differently depending on a country's constitutional culture.⁹³⁸ Today these practices are very common, and perhaps accepted. In Supreme Court litigation, public interest organizations seem to believe that judges are sensitive to the democratic principle, that their participation embodies this principle, and that they have impact on the judges'

⁹³² See for example A. Garapon, J. Allard, *Les juges dans la mondialisation. La nouvelle révolution du droit*, Paris, Seuil, (2005), 300p.

⁹³³ Crosspollination of the law also make dissent among judges more likely, and unanimous decisions less likely.

⁹³⁴ The increase of references to foreign norms by third party NGO is the very topic of van den Eynde's dissertation work "Interpreting Rights Collectively", *op. cit.*

⁹³⁵ *Webster v Reproductive Health Services*, 92 U.S. 490 (1989)

⁹³⁶ As Paul Collins has noted, "religious organizations (e.g., Agudath Israel of America), public interest law firms (e.g., Institute for Justice), medical societies (e.g., the American Public Health Association), public policy organizations (e.g., Centre for Arizona Policy), academics, members of Congress, and U.S. states." See Collins, "Friends of the Supreme Court", *op. cit.*, p. 166.

⁹³⁷ For example, Interights (organization based in the United Kingdom) and or Human Rights Watch (international organizations that started as "Helsinki Watch" underlining human rights violation of the Soviet Union, authored a common brief in that case. See Van den Eynde, "Interpreting Rights Collectively", *op. cit.* Annex, Table 33, p. 36.

⁹³⁸ D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *Modern Law Review*, Vol. 55, No 1., (1992), pp. 44-72.

thinking.⁹³⁹ The practice of the third-party litigation introduced by what Feldman calls a “surrogate plaintiff”, who initiates a lawsuit for the good of the broader public does, not fare well in a tradition of liberalism: “for third parties to use their economic or political power on behalf of litigants has traditionally been held to interfere with fairness and the integrity of the judicial process [...] If everyone is permitted to raise public interest issues, litigation becomes an alternative or a supplement to orthodox political processes, taking the courts beyond their core function of adjudicating on individuals' rights and duties”.⁹⁴⁰ This issue is at the very core of the American debate over judicial restraint or activism, and this is why third parties are not granted standing in Supreme Court proceedings and at the European Court, although in practice, the line between standing and third-party intervention has become very thin.⁹⁴¹ By allowing extensive third-party intervention in the judicial process, potentially tolerating “test cases” initiated by individuals who often would never have initiated a lawsuit were it for the impulse of public interest law firms or various political organizations, do the court not open the door to more interference in the integrity of the legal process?

361. Secondly, reputation and sponsorship are interrelated key factors in terms of substantive influence on courts. Reputable sponsors are indeed believed to strengthen the case of litigants.⁹⁴² Studies have proven that repeat players, *i.e.* organizations and law firms repeatedly litigating, gain in visibility in court and build a reputation that improves their briefs' likelihood to be taken into consideration by the Supreme Court.⁹⁴³ For example, Corley demonstrated that the Court's judgments “draw their language more heavily

⁹³⁹ Those are the hypothesis of Susan Behuniak-Long in her study of Webster. S. Behuniak-Long, “Friendly Fire, Amici Curiae and Webster v. Reproductive Health Services”, *Judicature*, Vol. 74, No. 5 (1991), p. 262.

⁹⁴⁰ Feldman, *op. cit.*, p. 48.

⁹⁴¹ In this regard let us note that by having no standing, a third party cannot initiate litigation on a legal issue. She has to wait for a plaintiff to initiate the lawsuit to support his claim.

⁹⁴² Thus, the support of international institution such as the European Union would be a strengthening factor. In the past, European Union submitted amicus brief to a few important cases including *Roper v. Simmons*, 543 U.S. 551 (2005).

⁹⁴³ Those studies take as starting point Galanter's 1974 study on the facts that the “haves” are better treated in American courts than the “have nots”. according to Collins, “In the years following Galanter's (1974) conjectures, numerous studies accumulated confirming the ability of party capability theory to account for litigant success (among others) in the U.S. Supreme Court”. P. Collins, “Friends of the Supreme Court”, *op. cit.*, p. 21. For example, in 1995 Kevin McGuire “propose and test a theory in which the informational needs of the Court are better met by more credible litigators. Thus, for example, a more experienced lawyer significantly raises the probability of a party's success. The findings testify to the efficacy of experienced counsel, irrespective of the parties they represent.” K. McGuire “Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success”, *The Journal of Politics*, 57 (1995), pp 187-196.

from higher quality/more experienced advocates”.⁹⁴⁴ The prestige of professional groups intervening in certain cases as sponsors can be a significant support.⁹⁴⁵ Indeed as Anderson reported: “One “prominent law firm partner” was quoted even thirty years ago as saying that —[i]n today’s world, effective representation of your client requires that you at least seriously explore the possibility of enlisting persuasive amicus support on your client’s behalf”.⁹⁴⁶ Some groups play with this factor in an ethically questionable manner.⁹⁴⁷

2.2.1.2. *Third Parties as a Manifestation of Public Opinion*

362. Not all third parties participate in litigation to secure a substantive outcome. In the United States, some “friends of court” file in the Supreme Court because they want to show their members and donators that they are socially active, working to reach their social and political goals.⁹⁴⁸ Here, their presence is the most important, not the quality of their brief.⁹⁴⁹ Joining other groups behind one of the parties, they sometimes intervene to bolster a party’s weaknesses.⁹⁵⁰ They also show to the outside world their belonging to a social movement, and promote the public interest.⁹⁵¹ To this extent, they play the role of a barometer to the Court.⁹⁵² Collins also believe that the participation

⁹⁴⁴ J.M. Box Steffenmeier, “Quality Over Quantity: Amici Influence and Judicial Decision Making”, *American Political Science Review*, Vol. 107, No. 3 (2013), p. 447, referencing P. Corley, “The Supreme Court and opinion content— The influence of parties’ briefs.” *Political Research Quarterly*, Vol. 61 No. 3 (2008), pp. 468–78.

⁹⁴⁵ On the support of international organizations, see an older study by A. A. Mohamed, “Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights, *Journal of African Law*, Vol. 43, No. 2 (1999), pp. 201-213.

⁹⁴⁶ Anderson, *op. cit.*, p. 370.

⁹⁴⁷ For example, Allison Orr Larsen stresses that the name of a group can falsely mirror professional expertise, prestige, and neutrality. explains that in a case, a group called American College of Pediatricians had relied on the assumed professional reputation a national expert board could possess to advocate against adoption of children by homosexual couples, while the national prestige in fact belongs to the American Academy of Pediatrics, who supports adoption by gay couples. A. Orr Larsen, “The Trouble with Amicus Facts”, *Virginia Law Review*, Vol. 100, 1757 (2014).

⁹⁴⁸ Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p. 83.

⁹⁴⁹ “A large number of amicus briefs just don’t have anything special to say beyond what the parties are saying. They are being filed only because an entity wants to assert their views as an organization on a matter.” Wohl, *op. cit.*, p.48, citing interviewee Dean William L. Robinson of the District of Columbia school of law and chair of the American Bar Association committee on amicus curiae briefs at the time he wrote his article.

⁹⁵⁰ Scott Simmons, *op. cit.*, p. 203.

⁹⁵¹ Wohl, *op. cit.*, p. 46. He stresses also that some public interest groups file briefs to bolster their reputation to be “players in the big league of the Supreme Court”, *op. cit.*, p. 48.

⁹⁵² Scott Simmons, *op. cit.*, p. 207. On the same note, Schachter claims that “Amicus participation may be a means of influencing a court because increased attention has been brought to a case.” *op. cit.*, p. 110.

of third parties provides a gauge of public opinion for Supreme Court justices: “First, because such briefs are targeted at the issues surrounding a particular case, they enable the justices to make precise calculations regarding public opinion on the issue... Second, because these briefs are filed and signed by interest groups, the number of groups cosigning such briefs may serve as a reliable indicator to the justices as to the number of potentially affected individuals”.⁹⁵³ This is because of the existence of such groups that the Court changed its rules after *Webster* and gave a clear signal that she only welcomed substantial input.⁹⁵⁴

363. The spectacular increase in amicus participation in the United States thus proceeds from such strategy of apparent participation. In cases where over fifty, sometimes over a hundred of third parties file a brief, high numbers in third-party filings can be interpreted as a signal of a strong movement of public opinion communicating the public importance the legal issue has in the broader society, and the significance of the movement they belong to. For example, in *Webster*, a total of 335 sponsors filed briefs in support of the pro-abortion side, against 90 sponsors supporting the Missouri statute protecting life from conception. In a similar way, some cases have attracted a significant increase in third-party participation in Europe, although numbers are pale in comparison. In the case of *Lautsi v. Italy*, a few briefs were filed on behalf of significant numbers of persons—33 members of the European Parliament, 11 contracting states were represented by New York University professor Joseph Weiler, and various organizations cosigning, three or four at a time, a legal brief defending either side of the legal battle on the compatibility of religious signs in public school classrooms with European human rights. Conversely, in *Eweida and others v. the United Kingdom*,⁹⁵⁵ 13 briefs were filed by 13 individuals, organizations, and states, all separately.

⁹⁵³ P. Collins, “Friends of the Court, Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation”, *Law & Society Review*, Vol. 38, No. 4, (2004), p. 813.

⁹⁵⁴ Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p 86.

⁹⁵⁵ Freedom of religion and discrimination case involving penalization for the display of religious signs in a professional environment. On the charge of discrimination based on religious convictions, the European court found in favor of some of the applicants but not all of them, see ECtHR, *Eweida and Others v. United Kingdom*, App. Nos. 48420/10 36516/10 51671/10, 15 January 2013. B. Steffensmeier, *op. cit.* Topic of his article is the influence of amici and related strategy. He claims: “Resources, organizational prowess, and status can all theoretically explain why some groups can successfully obviate the need for electoral victories, and achieve policy gains that may not be supported by a majority of citizens.” p. 447.

364. Not only the numbers count in terms of revealing the existence of a social movement but also the origin and occupation of the interveners. The diversity of third-party interveners in Europe depends greatly on the type of issue that is litigated. As the literature on the strategies and identities of third parties is rare in Europe,⁹⁵⁶ we can only rely on the assumption that since the movement was launched in Europe by organizations based in common law countries, and as U.S. organization now increasingly intervene in European cases, American strategies does, or will, greatly inspire European potential third parties. Third parties' intervention in Europe mostly involves third-party states and non-governmental organizations. But it also involves private groups. In cases where businesses were concerned by the outcome, such as *von Hannover v. Germany*, media outlets participated as third parties to defend their preferred interpretation of freedom of expression. Third parties of course include other contracting states, but also non-governmental organizations, many of them are based in the United Kingdom.⁹⁵⁷ However changes are under way, and the "landscape" of organizations is increasingly diversified. According to van den Eynde, some new actors are coming in, such as law school clinics and university programs.⁹⁵⁸
365. Also, organizations based abroad increasingly intervene in European cases, anticipating that their European successes may be used to influence Supreme Court case law in their favor, or *vice versa*.⁹⁵⁹ Such is the case of counter-movements using the courts as a forum to fight the culture wars raging at home. Conscious of the increasing movement of crosspollination of judicial decisions, they anticipate that European case-law will eventually influence their local law, and ally with European like-minded organizations in European courts to defend their position at both levels. According to Christopher McCrudden, "a strategy has been developed of seeking to ensure that soft-law standards

⁹⁵⁶ "Before the European Court, amicus briefs emanate from States, international organizations, the European Commissioner for Human Rights, 'sister bodies' of the Council of Europe, national human rights institutions, non-governmental organizations, professional associations and individuals, but again, no comprehensive empirical research with a detailed breakdown of all their presence is available", Van den Eynde, "Interpreting Rights Collectively", *op. cit.*, p. 95.

⁹⁵⁷ "Some are transnational NGOs while others are small, local associations. The largest group of NGOs active before the Court is based in the United Kingdom and the second largest group of NGOs comes from the United States. The remaining NGOs are dispersed over Central, Eastern and Southern Europe with only very few Scandinavian groups." *Ibid.*, p. 95.

⁹⁵⁸ Van den Eynde, "Interpreting Rights Collectively", *op. cit.* Annex. Van den Eynde provides a list of participants in the different cases analyzed, among which several law clinics.

⁹⁵⁹ Schachter notes that group also rely on their reputation to influence adjudication abroad "in Europe and the Americas have exploited the concept of the amicus curiae as a mechanism for participating in, and shaping the course of, human rights adjudication before the European Court of Human Rights and the Inter-American Court of Human Rights." See for example A. A. Mohamed, *op. cit.*

developed by one side are met by soft-law standards developed on the other side, in order to attempt to disrupt the hardening of the soft-law instruments into hard law by showing them not to reflect a settled consensus”.⁹⁶⁰ United-States based conservative organizations intervened for example in *Lautsi v. Italy*, the abortion case *A.B. and C v. Ireland*, or the freedom of religion case *Eweida*.⁹⁶¹ Thus the fight for human rights is not a monopoly of progressive organizations, since it was penetrated by conservative groups that intervene mostly to defend freedom of religion and the right to life.⁹⁶²

366. According to McCrudden, in the contestation over the “right” interpretation of human rights, “both sides see themselves as proponents of human rights, often claiming different human rights in support of their positions”.⁹⁶³ It can be concerning to see European human rights litigation politicize; the presence of conservative groups as representatives or third-party repeat players in European litigation is a symptom of this phenomenon.⁹⁶⁴ It may understandable that culture battles rage within a national constitutional system. However, it could be more difficult to keep politicization in check beyond borders. If the European Court certainly benefits from hearing new perspectives on litigated rights, the “globalization of culture wars”⁹⁶⁵ might distract the Court from its main mandate: the protection and enforcement of human rights and fundamental freedoms in Europe. Besides, the participations of many groups in human rights litigation could give courts a false sense of the importance of the international “public opinion” mobilized in favor of a specific interpretation of European human rights provisions.⁹⁶⁶ Moreover, the involvement of organizations in initiating or sustaining litigation is concerning by its lack of transparency.⁹⁶⁷ If the movement solidifies, that will be because interveners either believe that they do have an influence, which in Europe is assumed given the explicit references to third-party briefs a special

⁹⁶⁰ C. McCrudden, “Transnational Culture Wars”, *International Journal of Constitutional Law*, Vol. 13 No. 2, (2015), p. 438.

⁹⁶¹ Van den Eynde, *op. cit.* p. 97.

⁹⁶² See Van den Eynde. “Interpreting Rights Collectively”, *op. cit.* p. 406, referring to Bob Cliffords’ study of conservatives’ participation in international proceedings in the last decades. B. Clifford, *The Global Right Wing and the Clash of World Politics*, Cambridge University Press, 2012, p.75.

⁹⁶³ C. McCrudden, “Transnational Culture Wars”, *International Journal of Constitutional Law*, Vol. 13 No. 2, (2015), p. 434

⁹⁶⁴ Some are religious conservative groups, European branches of the Alliance defending Freedom or the European Center for Law and Justice originally based in the United States and in the United Kingdom.

⁹⁶⁵ See generally McCrudden, *op. cit.*.

⁹⁶⁶ One could apply Box Steffenmeiers statement to Europe: “Resources, organizational prowess, and status can all theoretically explain why some groups can successfully obviate the need for electoral victories, and achieve policy gains that may not be supported by a majority of citizens.” *Op. cit.*, p. 447.

⁹⁶⁷ McCrudden, *op. cit.*, p. 439.

section of European Court's opinions, or that their absence will be detrimental to them or their case. It can also be that, as in Webster, "the belief that the justices are susceptible to the democratic principle that the majority should rule" also applies to international litigation.⁹⁶⁸ One can only wonder whether, were the third-party participation movement to intensify like it did in the United States, commentators might conclude that "amici curiae may be more popular than persuasive".⁹⁶⁹

2.2.2. Reliability Issues and the Normative Consequences of Third-Party Lobbying on Judicial Authority

367. When amici become court lobbyists, normative issues arise in terms of judicial legitimacy. Firstly, the reliability of evidence that third parties submit to the Court, but also the way issues are framed may necessitate reforms of legal constraints on third-party submissions. Second, third parties also frame issues with a view of convincing judges to adopt a certain interpretation. Seeing them as "experts" obscures the bias behind their factual assertions, while seeing them as interested parties only downplays the usefulness of their input. Scholars have started to raise concerns about this issue in the 1990s. Instead of being a precious resource to the court, showing in the meantime that judges are receptive to arguments and concerns expressed by the public, it is feared that third parties may become a liability, detrimental to the legitimacy of the judiciary.

2.2.2.1. The Supreme Court's Evidence Problem: Lack of Constraints on Amici Briefs and the Problem of Reliability

368. We have shown above the concerns about Supreme Court interest group activity.⁹⁷⁰ In the context of judicial decision-making and because of the special function high courts protecting rights play in democracy, amicus advocacy triggers ethical concerns. Today, "*amicus curiae* is generally acknowledged as something of a misnomer, in that very few amici intend primarily to help the court", claims Banner.⁹⁷¹ The neutral amicus is

⁹⁶⁸ Behuniak-Long explained in 1991 what motivates third parties to intervene in block in Supreme Court civil rights litigation, *op. cit.*, p. 261.

⁹⁶⁹ Wohl, *op. cit.*

⁹⁷⁰ See Kearney and Merrill, *op. cit.* p. 200. References to Justice Jackson's comments in 1947 (for example in *Craig v. Harney*, 331 U.S. 367 (1947)) footnote 9 p. 746, to Judge Posner's comments in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), p. 745, and to Justice Scalia's qualifying amici briefs as "self-interested organizations" in his dissent in the case of *Jaffee v. Redmond*, 518 U.S. 1(1996) where he was complaining about the lack of balance between the numbers of briefs on each side of the controversy.

⁹⁷¹ Banner, *op. cit.*, p. 111.

a “unrealistically nostalgic version of the history of American legal practice.”⁹⁷² Thus beside the increasing demand for more “democracy” in the form of third-party participation in constitutional adjudication, in the last decades, the legal world has undergone a shift: from law as a matter of logic in the early 1920s to law as a matter of data.⁹⁷³ In the words of Ann Woolhandler, “[a]fter all, it only makes sense to provide courts with data to assist in their lawmaking function if one sees courts as having such a function, as distinguished from a function of discovering law that is dictated by text, precedent, and principle.”⁹⁷⁴

369. The best proof of the lack of neutrality of amicus participation is the content of amici briefs. In the 1990s, American scholarship began documenting amicus curiae activity⁹⁷⁵ and the reliability of the data they submit to the Court.⁹⁷⁶ A few years after the explosion in amicus involvement in *Wesbter*, Rustad and König published a now widely referenced article deploring the unreliability of the data many amicus briefs submitted through amici briefs. Far from providing information on “unfamiliar precedents” to the Court, as they traditionally had before the Court begun accepting social science as fact in the 1930s,⁹⁷⁷ amici are now practicing “advocacy disguised as social science in amicus curiae briefs”.⁹⁷⁸ The function of amicus briefs changed since Brandeis. They are “filed to educate the Court on non-legal matters”.⁹⁷⁹
370. Acceptance of social science in Supreme Court adjudication occurred under the Warren Court, the most famous case to use social science data extensively being *Brown v.*

⁹⁷² *Ibid.*, p. 112.

⁹⁷³ Orr Larsen, *op. cit.*, p. 1771. She explains the shift to a need for proof as a broader societal trend.

⁹⁷⁴ Woolhandler, quoted by Orr Larsen, *ibid.*, p. 1771. A. Woolhandler, “Rethinking the Judicial Reception of Legislative Facts”, *Vanderbilt Law Review*, Vol. 41, 111, 115 (1988);

⁹⁷⁵ See for example above-mentioned studies by Caldeira and Wright, *op. cit.*, Behuniak-Long, *op. cit.*, or Lowman, *op. cit.*, and one on group’s success as amici: D. R. Songer & Reginald S. Sheehan, “Interest Group Success in the Courts: Amicus Participation in the Supreme Court”, *Political Research Quarterly*, Vol. 46, 339 (1993), pp. 339–40.

⁹⁷⁶ See for example M. Rustad and T. Koenig, “Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs”, *North California Law Review*, Vol. 72, 91 (1993-1994) (Claiming a lack of neutrality and reliability of amicus content is not limited to the supreme court but to others.)

⁹⁷⁷ *Ibid.*, p. 96 (claiming that this evolution of widespread use of social science in amici curiae brief is a result of the legal realist movement. The movement goal was to “replace armchair legal philosophy with an awareness of social context” “Realists were united by a belief that judges devoted too much attention to the language of prior cases and too little to understanding the social reality behind their own decisions.” p. 102-3). According to them, the Court took a realist turn after the nomination of Brandeis to the Supreme court and support brought by Justice Oliver Wendell Holmes. *Ibid.*, p. 108.

⁹⁷⁸ Rustad and Koenig, *op. cit.* p. 99.

⁹⁷⁹ Orr Larsen, *op. cit.*, p. 1769.

Board of Education of Topeka.⁹⁸⁰ After this case, Rustad and König report that the use of social science was common in all kind of civil rights cases.⁹⁸¹ In 1991, Huber complained that amici were submitting “junk science”, which he defines as the “mirror image of real science, with much of the same form but none of the substance”.⁹⁸² The debate is still ongoing today, as show two recent article by Helen Anderson and Allison Orr Larsen.

371. Is social science reconcilable with advocacy? Rustad and König report that the scholarly discontent in the use of social science in amici briefs results from the different goals that drive the use of social sciences by lawyers and social scientists: the latter are bound to an objective scientific method, while the former are first and foremost advocates driven by a cause.⁹⁸³ As a result, legal ethics cannot seem to evade the debate between a “truth” model – where the rules of acceptable data would be based on the solidity and reliability of it – and a “battle” model of adjudication – where data would be subject to the adversary system.⁹⁸⁴ Amici briefs are “delusively innocuous”⁹⁸⁵ for those ill-equipped in training and time to sort facts from science. One of the reasons amici are in position to influence judges with fake social science is the difference of standards their briefs are bound to follow. Orr Larsen warns that amici are “not bound

⁹⁸⁰ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Rustad and Koenig stress that “The Brown studies have been assailed on methodological grounds and for selectively ignoring social science data finding that no harm results from segregation.” *Op. cit.*, p. 116. If the turn into acceptance of social science into Supreme Court adjudication is attributed to the leadership of Brandeis in *Muller v. Oregon*, his data were submitted in a party brief as opposed to an amicus brief. F. Schauer, “The Decline of “The Record”: A Comment on Posner”, *Duquesne Law Review*, Vol. 51, 55 (2013) (referenced by Orr Larsen, *op. cit.*, p. 1770).

⁹⁸¹ Rustad and König (*op. cit.*, p. 111-2) extensive and “modern” use in death penalty cases in the 1980s.

⁹⁸² See P. W. Huber, *Galileo’s Revenge: Junk Science in The Courtroom*, New York, Basic Books, (1993). Rustad and König *op. cit.* p. 97. Among others scholars have criticized the use of statistics in briefs.

⁹⁸³ Conversely the goals of social sciences are : “1) [to gain] familiarity with phenomenon or to achieve new insight into it ... [:] 2) to portray accurately the characteristics of particular phenomena... [:] 3) to determine the frequency with which something occurs or is associated with something else; and 4) to test a hypothesis of a causal relationship between 130 variables.” Rustad and Koenig, *op. cit.*, p. 119 and 154-55 quoting p. 118, C. Sellitz et al, *Research Methods In Social Relations*, Methuen & Co. (1965).

⁹⁸⁴ Rustad and Koenig, *op. cit.* p. 118. quoting W. Simon, “The Ideology of Advocacy”, *Wisconsin Law Review*, Vol. 29, 75 (1978). They also refer to Michael Saks distinction between a “guild brief,” described as a partisan amicus brief that quotes scientific findings in the interests of a party, and a “science translation brief,” which is a disinterested summation of research in the field.”, p. 118. Reference from M. J. Saks, “Improving APA Science Translation Amicus Briefs”, *Law & Human Behavior*, Vol. 17, 235, 238 (1993), pp. 237-38.

⁹⁸⁵ Orr Larsen, *op. cit.*, p. 361, reference to Krislov, *op. cit.*, p. 694 (1963) (referencing “elusive innocuous” in the context of the amicus briefs —seemingly static function and . . . offhand manner of . . . use in court”).

by rules of standing and justiciability, or even rules of evidence, and who can present the court with new information and arguments”.⁹⁸⁶

372. She underlines: “The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. And with the vast amount of information and studies available online now, it is not hard to assemble evidence to support a pre-existing point of view.”⁹⁸⁷ Orr Larsen deplores the widespread use of assertions of facts by amici, which she defines as “one that in theory can be true or false and that is followed by evidence (“Go ahead, Google it”).”⁹⁸⁸ This phenomenon is accompanied by an increased empiricism in the Supreme Court.⁹⁸⁹ She finds for example that “78% of the cases decided in the 2012-2013 Term had an amicus participate who brought a factual authority to the Court's attention, be it medical, historical, or social science.” Such facts have an undeniable impact: of the 124 amicus briefs citations found in the Supreme Court’s decisions, 97 were outcome determinative and central to the Court’s reasoning.⁹⁹⁰

373. The reliability of information is highly questionable.⁹⁹¹ Orr Larsen recent study lists a few new trends. Firstly, more often than not, and even in reputable amicus briefs such as the Solicitor General’s briefs, sources are quoted that are not publically available.⁹⁹²

⁹⁸⁶ Orr Larsen, *ibid.*, p. 361.

⁹⁸⁷ Orr Larsen, *op. cit.*, p. 1763-4. She adds, “Times have changed, however. The Internet now presents a wide- open forum for “working papers.” It is theoretically possible for anyone with an iPhone and an agenda to assemble data convenient to his policy position and then post it to the world.” *Ibid.*, p. 1790.

⁹⁸⁸ *Ibid.*, p. 1773.

⁹⁸⁹ *Ibid.*, p. 1774. She adds : “American culture has always equated science with legitimacy, but the Internet makes that intuition more pronounced and the effects become more visible. Modern audiences, in other words, demand authorities supporting factual observations. These authorities-be they studies or statistics or just amicus briefs-essentially communicate: “I am not making this up.” . . . This may partially explain why others have observed an increase in empiricism on the Court and an increase in citation to non-legal authorities.’Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void”, p.1777.

⁹⁹⁰ *Ibid.*, p. 1775. She adds that “1 in every 5 citations to amicus briefs by the Justices in the last 5 years was used to support a factual claim-something I define as a theoretically falsifiable observation about the world”, p. 1762. Moreover, the Court cites the amicus as authority rather than authorities contained in the brief (*ibid.*) Therefore she treats amici briefs as more than a research tool. This is confirmed by Collins’ research who in 2008 found that the Court borrowed language from amici briefs, especially “high quality” ones. See generally P. Collins, Jr., “Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation”, *Law & Society Review*, Vol. 38, 807, 815 (2004).

⁹⁹¹ The form can have a high degree of creativeness. Anderson reports that some amici have delivered comic book briefs in federal court. See Brief of B. Kohn as Amicus Curiae, *United States v. Apple, Inc.*, 952 F.2d 638 (S.D.N.Y. 2013) (No. 12-2826).

⁹⁹² Orr Larsen, *op. cit.*, p. 1787-8 refers to a study by Morawetz, who shows that the reputation of the Solicitor to deliver high qualify briefs might not be as deserved as it seems. See N.

Secondly, some amici have created sources in anticipation of litigation.⁹⁹³ Thirdly, references to easily searchable working papers are widespread. Or “the Internet now presents a wide-open forum for “working papers””.⁹⁹⁴ Finally, amici briefs authored by persons with minority views in their fields are also referenced in Supreme Court’s opinions. She admits that in some cases, such references are made on subjects that are extremely divisive, such as abortion, discrimination, or sexual orientation. It is therefore possible that even reputable institutions would be reluctant to fund studies that could strengthen the claim of a minority position. Moreover, on some topics, even reputable specialists disagree on a consensus position. Hence she asks: “If even the sociologists cannot agree on what is “generally accepted” in their field, how can the Justices sort it out for themselves?”⁹⁹⁵

374. The lack of reliability of amici information would not be such a dire issue could the parties challenge them according to the adversary tradition. However, this would only be possible if the numbers of amici and questionable assertions of facts were not so overwhelming.⁹⁹⁶ In a nutshell, the tool is ill-adapted to the need. “We are using an old court-educating tool to address a new data-rich and data-hungry world”.⁹⁹⁷
375. Does the European Court experience the same problem? Although the Court seems to take amici briefs into account by dedicating them a special section in its opinions, since amicus briefs are much less numerous, it is easier to challenge them when the information submitted unreliable. Moreover, decisions often confirms that states responded to third-party assertions. There is little literature commenting on the assessment of evidence by the European Court of Human Rights.⁹⁹⁸ As an international court, the Court is bound by no domestic norms of evidence and has to detail its own rules. According to Rüdiger Wolfrum, rules of evidence can be found in the Rules of

Morawetz, “Convenient Facts: *Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts”, *NYU Law Review*, Vol. 88, 1600 (2013), p. 1602.

⁹⁹³ *Ibid.* p. 1788. She refers to sources available on the internet on a “fishy timing”.

⁹⁹⁴ *Ibid.*, p. 1790.

⁹⁹⁵ Orr Larsen, *op. cit.*, p. 1800.

⁹⁹⁶ *Ibid.*, p. 1801.

⁹⁹⁷ *Ibid.*, p. 1795. Scholars have not only criticized amici. They value their potential input and have therefore proposed reforms. In the 1990s, several scholars proposed to reform the court by funding a specially trained research team⁹⁹⁷ so as to allow amici as a safeguard against abuse of power while making sure that judges are able to give their information its fair value. See Rustad and Koenig, *op. cit.*, p. 162.

⁹⁹⁸ We see below that the core of the debate surrounds the strength that the European Court gives foreign law and jurisprudence in the decisions.

Court, which “stipulate which factual or legal information has to be produced by the parties, the reaction of the Court if it is felt that the information is not adequate”.⁹⁹⁹ Some rules of Court are specifically dedicated to the taking and assessment of evidence.¹⁰⁰⁰ However, neither are directed at information provided by third parties. The directives on third-party interventions give the Court a broad leeway on managing the content and length of third-party interventions, but they do not extend to the quality of information provided.¹⁰⁰¹ Perhaps the modest role of third parties and their influence in today’s outcomes has not yet induced scholars to scrutinize the issue of third-party information reliability at the European Court. Studies questioning third-party participation and in particular non-governmental organizations are limited to the problem of legitimacy brought by their lack of accountability, that contrasts with their claim of representation and their role as ‘conscience of the world’.¹⁰⁰²

2.2.2.2. *Comparativism and The Problem of Authorities: Working on Solutions to Improve Reliability*

376. In the United States, the core of the debate on third-party participation surrounds the issue of evidence reliability. In Europe, the reliability issue is focused on the use of the comparative method to establish the existence or non-existence of consensus among contracting states, *i.e.* comparing domestic laws of contracting states. Another issue is the use of foreign authorities—in the European Context, the use of extra-European laws and judicial decisions—to advocate a particular legal solution. That second issue involves comparability to a lesser extent than the legitimacy of referencing non-binding

⁹⁹⁹ R. Wolfrum, “The Taking and Assessment of Evidence by the European Court of Human Rights”, *Human rights : Democracy and the rule of law: liber amicorum Luzius Wildhaber* (Zürich, Baden-Baden: Nomos, 2007), p. 916.

¹⁰⁰⁰ “Concerning the ECtHR, the most relevant provisions on the taking and assessment of evidence are contained in the Rules 44A, 44C, 44D, 45, 46, 47, 54, 58, 59, 60 of the Rules of the Court as well in its Practice Direction”, *ibid.*

¹⁰⁰¹ The website the representation of Armenia to the Court gives some indication: “If the request is granted, the Court will almost invariably set out certain conditions for intervening. These conditions are likely to include a maximum length for the written submissions (commonly 10 to 15 pages), a specified time limit for lodging the submissions and, importantly, conditions as to the matters which can be covered by the intervention. It is usual for the Court to indicate that the intervention should not comment on the particular facts or merits of the case (as those are matters for the parties).” See <http://agent.echr.am/en/functions/representation/third-party-intervention.html> (Last accessed 19 of April 2016).

¹⁰⁰² A. Wilkowska-Landowska, “‘Friends of the Court’: The Role of Human Rights Non-governmental Organisations in the Litigation Proceedings, *Human Rights Commentary*, Vol 2 (2006) Online access, <http://beta.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2006/friendsofthecourt.pdf> (accessed last March 2018).

foreign authorities to justify a specific judicial outcome. Both trends have been brought in through the influence of third-party intervention.

377. Before inquiries into materials introduced by third parties and their influence were brought to light, concerns over the weak methodology used by the European Court in handling comparative materials were formulated. In 1997, Paolo Carozza inquired whether the use of comparative law—by the European Court itself—in human rights adjudication lived up to its promises.¹⁰⁰³ To him, the comparative work accomplished by the Court as it discusses the existence or nonexistence of a consensus within the laws of contracting states is in practice too superficial. This is due to the fact that the use of comparative material in human rights law inevitably pulls the Court in two directions: what draws laws and traditions together, and what separates them.¹⁰⁰⁴ Thus using comparative law in human rights adjudication is a delicate endeavor. To Carozza, a misuse of comparative material exposes the court to the danger of relativizing the universality of human rights:

Comparative study can in some cases relativize "universal" international standards by showing them to be contingent and particular solutions to problems that in fact could have a variety of answers. Thus, the European Court's recognition and privileging of any one view regarding the scope of a human rights norm would lose its air of necessity and determinacy and be seen for what it is: a political choice among competing visions of the requirements of human dignity and the common good.¹⁰⁰⁵

378. This concern over methodology within the court can only be intensified given the fact that a substantial amount of comparative material brought to the Court's attention originates from third-party briefs. But if the methodological issue over the use of

¹⁰⁰³ To him, "comparative law will always fall short of providing the principled justification for imposing unity or respecting diversity that the Court claims for it. It reveals the basic fact that the Court is at one and the same time caught between the need to uphold a set of normative principles that are outside of the will of the Member States and the need to ground its decisions to some degree in the consent of the Member States. P. Carozza, "Uses and Misuses of Comparative International Human Rights. Some Reflections on the Jurisprudence of the European Court of Human Rights." *Notre Dame Law Review*, Vol. 73, No. 5, 1217 (1997-1998), p. 1232.

¹⁰⁰⁴ "Deeper understanding is predicated upon a fuller understanding of what makes each particular. At the same time, the comparison itself, bringing the differences of each to bear on the other, presupposes some level of unity, some commonality, otherwise there would be no comparability. Thus, it is not, epistemologically-speaking, even possible to genuinely compare law without being pulled toward both unity and diversity", *ibid.*, p. 1233.

¹⁰⁰⁵ Carozza, *op. cit.*, p. 1236.

comparative law in human rights adjudication subsists, has the practice improved since Carozza's article?

379. According to Dzehtsiarou, "the Court has used external expertise in deciding a number of cases; these include third-party interventions from NGOs, universities and non-respondent governments and international organizations. Most often, however, the Court deploys comparative analysis from *amicus curiae* briefs prepared by NGOs".¹⁰⁰⁶ Dzehtsiarou stresses that judges, in assessing the material submitted by third parties, are mindful of the agenda that drives the content of their input as well as their limitations in terms of focus on single countries.¹⁰⁰⁷ However, third parties are no longer the only or main contributors:¹⁰⁰⁸ the Court set up an increasingly sizable Research Division after 2001 tasked with comparative studies the Court may need.¹⁰⁰⁹ The fact that the Court prefers to use good quality comparative reports by showing among others concern over the others representativeness of the comparative sample¹⁰¹⁰ shows its receptiveness to criticisms regarding the methodological quality of studies on which it bases assertions on the existence of a European consensus. Nevertheless, the workload keeps the Research Division from accomplish all the reports in the quality that would be demanded.¹⁰¹¹
380. Dzehtsiarou raises an interesting question with regards to the legitimacy of court-initiated comparative reports.¹⁰¹² Because of the hybrid nature of the court, between inquisitorial and adversarial traditions, the European Court has to balance the need to

¹⁰⁰⁶ Dzehtsiarou, "Consensus", *op. cit.*, p. 98.

¹⁰⁰⁷ Dzehtsiarou: interviews with judges Myjer and with judges Tulkens reveals that judges are mindful of lack of neutrality. "That said, NGOs are agenda driven, and, therefore, their assessment can be affected by the aims they are striving to achieve. Moreover, some NGOs may operate only within one jurisdiction and may not have sufficient awareness of foreign legal systems. This can lead to inadequate conclusions." *Ibid.*, p. 99.

¹⁰⁰⁸ "Third, the Court itself produces independent comparative analysis and summarizes it in the text of the judgment. . . . Fourth, in some cases, especially in the past, the Court has relied on data provided by third parties. It is safe to suggest that the Court has recently professionalized comparative research and now mostly relies on comparative law reports that it prepares for itself." Dzehtsiarou, "Consensus", *op. cit.*, p. 82.

¹⁰⁰⁹ Research is carried out upon request from juge-rapporteur to the case by research division of the Court, form specifies 4 types of studies that might be requested. European case law, comparative law, international law, European Union law). If it is not possible to cover, they can ask national lawyers working at the registry to do the research instead. Reports are confidential. More means have been involved in the research division since the 2000s. *Ibid.*, pp. 86-87.

¹⁰¹⁰ Judge Tulkens reveals that the Court tasks comparative studies to a specialized staff but that they aren't always comprehensive. *Ibid.*

¹⁰¹¹ Dzehtsiarou notes that the European Court can also use other means to get comparative information – such as by asking state or conducting fact-finding missions that she can delegate.

¹⁰¹² Dzehtsiarou, *ibid.*, p. 79.

rely on internal studies (inquisitorial) or relying exclusively on parties' input (adversarial). Moreover, as is an international human rights court, it has to mind the views of respondent states while protecting potential victims of human rights breach who don't always have the resources to proceed to such resources-intensive studies, while tackling difficult interpretative questions on often politically charged topics. Thus, balancing internal research with input of the parties is necessary.¹⁰¹³ Most importantly, internal studies help assessing the input provided by third-parties.

381. In the United States, the core of the debate on constitutional interpretation surrounding judicial activism and self-restraint is really a debate on favored sources of law. In this regard, foreign law is not contemplated as legitimate source of law.¹⁰¹⁴ This explains the intense and emotionally charged debates¹⁰¹⁵ over the practice of referencing foreign laws in judicial opinions, which is believed to have an effect of “disconcerting the traditional sources relied on in adjudication and influencing the judges”.¹⁰¹⁶ Conversely, in Europe formalist methods of interpretation, *i.e.* originalism and textualism have been rejected by the Court very early on in the *Golder case* to favor a teleological approach, a method aimed at fulfilling the “goal and purpose of the treaty”, which consists in protecting but also “promoting” universal human rights.¹⁰¹⁷ In its search for European consensual approaches to human rights, the European Court usually first tries to find common standards among contracting states' laws and then includes international standards.¹⁰¹⁸ “These interpretation choices and this openness in legal reasoning promote the possibility and extent of dialogue and ultimately the integration of foreign elements in the judgments”.¹⁰¹⁹ Considering the extent of the division of scholarship on the legitimacy of such practice in the United States, and the

¹⁰¹³ Dzehtsiarou notes: “Since the ultimate decision will have consequences for all 47 Contracting States to the ECHR, it makes sense for consensus analysis to factor in all of these States. Otherwise, a majority of perhaps no more than seven States out of ten ‘for whom the issue exists’ could lead to an interpretation being adopted that applied to 37 other States whose positions were not even considered”, *op. cit.*, p. 103.

¹⁰¹⁴ Van den Eynde, *op. cit.* p. 162

¹⁰¹⁵ In the United States, the practice of referencing foreign authorities and the use of comparative law are intricate, because comparative elements usually stem from foreign legal systems. In Europe, comparative studies involve both domestic laws to find a European consensus, and foreign legal solutions on a similar problem.

¹⁰¹⁶ *Ibid.*, p.4. See L. Connell, “The Supreme Court, Foreign Law and Constitutional Governance”, *Widener Law Review*, Vol. 11 (2004), p. 68. (who believes that advocacy organizations use foreign references to impose their values to the American people and “seek to have them imposed through the courts.”)

¹⁰¹⁷ *Ibid.*, p. 169.

¹⁰¹⁸ *Ibid.*, p.176.

¹⁰¹⁹ *Ibid.*, p. 172.

extent of the discussion on judicial openness to foreign sources, parties and third parties alike seem to have chosen to use every avenue possible to convincingly plead their case, and the use of foreign sources is one of them. They use them to convince courts to follow or avoid following the example of another country on both sides of an argument.

382. In the United States, the use of foreign sources also raises concerns over “cherry-picking” because of the risk that convenient foreign authorities may be used by judges as additional argument to overturn existing case-law to suit their assumed preexisting political convictions.¹⁰²⁰ This criticism is also existent in Europe.¹⁰²¹ Third parties like Courts rely on foreign authorities in their briefs, and also selectively,¹⁰²² some openly embracing the practice of “cherry picking”.¹⁰²³ A telling example of third parties’ utilization of “parts in judgments which fits ones’ argumentation better, is the [European] case of *Schalk and Kopf* which is used by opposing sides to support different positions.” Van den Eynde notes that briefs are rarely completely transparent regarding their methodology in authority selections.¹⁰²⁴ As regard the geographic diversity of cited foreign authorities in death penalty and sexual orientation cases both in Strasbourg and in Washington D.C., it seems that what are assumed to be influential foreign authorities are the main allied nations and international organizations each Court considers authoritative. This suggests that the choice of authorities is tailored to the legal and social issue at stake in the case.¹⁰²⁵

¹⁰²⁰ Some oppose the citation of foreign law because of concerns regarding judges’ power to overrule decisions on the basis of unknown rules. See van den Eynde, p. 141. See also J. Waldron, “Rights and the Citation of Foreign Law”, in Tom Campbell, K.D. Ewing, and Adam Tomkins, (eds), *The Legal Protection of Human Rights: Skeptical Essays*, Oxford, Oxford University Press (2011), p. 412. See, for example, C. Saunders, ‘Judicial Engagement with Comparative Law’ in T. Ginsburg and R. Nixon (eds.), *Comparative Constitutional Law* (Edward Elgar, 2011), p. 587.

¹⁰²¹ In her interviews with European judges, van den Eynde collected rebuttals to the accusations that judges “cherry-pick” foreign authorities. Two of the main responses are reported here: “A second strand nuanced the term ‘cherry picking’, which can also simply refer to the process of selecting authorities that help resolving the issue at hand. Chief Justice Chaskalson explained that each judgment reflects the author’s best effort to arrive at the most reasonable outcome, using whatever opinions provide support for the solution chosen. Others took as a point of departure that cherry-picking is in a way inevitable.” Van den Eynde, “interpreting rights collectively”, *op. cit.*, p. 143”

¹⁰²² “This confirms that from the perspective of the public interest litigants’ argumentation too, the oft-mentioned “global community of courts often does not (...) include all courts from all countries”. Van den Eynde, *ibid.*, p. 429. It was confirmed by her thorough analysis of third party briefs intervening in cases of the United States Supreme Court, the European Court and the South African Supreme Court.,

¹⁰²³ *Ibid.*, p. 433.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ In the sexual orientation cases though the countries that referenced are geographically and culturally much more diverse, as if to imply that the consensus on sexual orientation acceptance is global and reach accross all culture.

383. Although the impact of third-party briefs references to foreign sources on judges has been the object of very few empirical studies thus far,¹⁰²⁶ it has been suggested that third-party participation had an influence on the judicial movement of cross-pollination.¹⁰²⁷ By insisting on the authority of “cherry-picked” authorities, third-party may introduce courts to convenient foreign norms suiting their purposes by conveniently forgetting about others. This should not be surprising: because of their role of advocates and of the formal constraints on their briefs, parties and third parties “frame” their argument strategically¹⁰²⁸ by advocating the adoption of best practices of role-model countries, or by discouraging undesirable policies by pointing to counterexamples, bad laws of countries any Court would want to distance herself from.¹⁰²⁹ In so doing, they inevitably “forget” inconvenient examples.
384. However, such practice becomes a problem in an international court where judges are neither expected to know all the laws of contracting states, and less so the law of foreign states. This is why the creation of a research unit within the European Court of human rights was a positive development. This “inquisitorial” side of the European Court does convey a spirit of prudence on the part of the judges who do not blindly trust parties and third-parties’ contributions and make efforts to be fully informed.
385. If what Collins shows in the case of the Supreme Court, and what many scholars have claimed about Europe is true, *i.e.* that third-party briefs have an influence on high

¹⁰²⁶ Most notable research on this topic is van den Eynde’s dissertation, which focuses on fundamental rights and non-governmental organizations in 2015. “Interpreting Rights Collectively”, *op. cit.*

¹⁰²⁷ This is Van den Eynde’s hypothesis: “The hypotheses of this thesis are first that public interest litigants participate in the interpretation debate and are a key actors in conveying comparative material to the judges.” p. 4. For Europe see for example L. Burgorgue-Larsen, “Les interventions éclairées devant la Cour européenne des droits de l’homme ou le rôle stratégique des amici curiae” in *La conscience des droits - Mélanges en l’honneur de Jean- Paul Costa* (Paris, Dalloz, 2011), pp. 67–82. A. Schahmanèche, “Pluralisme et motivation des arrêts de la Cour européenne des droits de l’Homme”, *Pluralisme et juges européens des droits de l’Homme*, Bruxelles, Bruylant, (2010), p. 100; K. Dzehtsiarou, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal*, Vol. 12 (2011), pp. 93–98. For the United States, see M. Ramsey, “International Materials and Domestic Rights: Reflections on Atkins and Lawrence”, *American Journal of International Law*, Vol. 98, No. 1 (2004), p. 69. (He believes that the use of comparative material is not brought by foreign organizations or institutions but by American-based advocacy organizations).

¹⁰²⁸ J. Wedeking, “Supreme Court Litigants and Strategic Framing”, *American Journal of Political Science*, Vol. 54, No. 3, (2010) pp. 210-17. The substance of the arguments. He defines as “Frame” as a “small collection of related words that emphasize some aspect of an issue at the expense of others. Framing is the selection of one particular frame over another, and framing effects occur when a frame shapes the thoughts and behavior of others”. Wedeking, *ibid.*, pp. 617-9

¹⁰²⁹ Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, pp. 126-8

courts' judges,¹⁰³⁰ then it is possible that judicial “cherry-picking”, to whatever degree it is actually practiced, is related to selective references by third parties.¹⁰³¹ Both practices, could arguably be mutually reinforcing: if third parties perceive that courts value foreign references, they will frame their briefs strategically to call upon preferred arguments. Note that third-party do not only rely on foreign authorities but on the state of public opinion—be it national or international—on a certain legal issue. However, Van den Eynde stresses that judges do not consider public opinion as an authoritative source of law, although it might be considered by some as persuasive source.¹⁰³² Therefore, the only manner in which courts could prevent criticism over “cherry picking” would be to adopt some of the solutions put forward by scholars, *i.e.* to clarify for what reasons a specific authority has been referred to and which ones are not considered authoritative.¹⁰³³ Overall, if third parties “cherry pick” their references to fit their claims, then they cannot be considered experts, but rather advocates of a cause, possibly representing a potentially important or very marginal segment of local, domestic or even international public opinion. In this case, Courts must be vigilant in their assessment of third party claims and the quality of their arguments and authorities. But are courts equipped, in time and resources, to accomplishing such scrutiny?

Conclusion

386. This chapter discussed the manner in which Courts include their public through their internal rules of access. I addressed three publics: the first included the plaintiffs and their lawyers and addressed the evolution of rules of access and standing at the European and Supreme Courts. Secondly, I addressed access of the first organ of public opinion, communicating the workings of Courts to the public: the press. Finally, I discussed the access of another organ of public, communicating Courts concerns of public society, as well as their concerns to the public: third-parties.

¹⁰³⁰ See generally Collins, “Friends of the Supreme Court”, *op. cit.* and in Europe see Cichowski, *op. cit.*, p. 96, and van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p. 280.

¹⁰³¹ As of today, there is now comparative study of party briefs and amici briefs, that would inform as to which ones references foreign authorities the most. In the case of the United States, scholars have stressed their presence in amici more than in party briefs. Based on studies applied to Supreme Court adjudication, one can assume that third parties have more flexibility to make risky and original arguments than parties who aim at winning their case.

¹⁰³² Van den Eynde, *op. cit.*, p.161 and 376.

¹⁰³³ Van den Eynde, “Interpreting Rights Collectively”, *op. cit.*, p. 174.

387. The section discussed of the relationship civil and human rights courts entertain with their first public, *i.e.* potential litigants, in the conduct of their daily business, and the public at large in the management of their public image. To tackle this question, I first addressed the foundations. The discussion of the history the Supreme Court and European Court reforms was aimed at highlighting how deep impacts small changes had in increasing each Court's autonomy and authority, and how this growth participated to an increase in popularity and new needs to ensure the Supreme Court's efficiency. The problem of backlog was solved in the case of the Supreme Court by the introduction of the Certiorari procedure, which made access to Supreme justice exceedingly difficult. Backlog is still burdening the work of the European Court of Human Rights, where access is no easier. Addressing admissibility showed that despite the difficulty of access, both courts have developed a case law aimed at giving relief to a wide range of situations in which rights violations can occur. They seemed to realize that enforcing too stringent standing criteria could hinder relief on potentially serious violations and prevent society from finding needed solutions. I concluded Courts had been trying to navigate the narrow path of being selective on cases they hear without harming the public's trust in their capacity to obtain relief. In this way they set solid foundations to their relationship to the public.
388. Courts' public image reveals how well they communicate the nature of their work to their public. As public institutions of a special kind, *i.e.* a power without a purse, courts' authority partially rests on what the public sees. In some cases, the concern for transparency is satisfied with public hearings. However, publicity today does not have the same meaning as it did yesterday. Not only are open doors not wide enough to contain their public, but new technologies technically allow the broadcasting of arguments. Both the European Court of Human Rights and the Supreme Court have to a certain degree accepted to comply with new demands of transparency. The degree to which they allowed the broadcasting of their arguments was adapted to the degree of media scrutiny they could afford each in their own institutional context. Thus, the very private Supreme Court oral arguments have attracted much more media scrutiny than the European Court, despite the fact that European arguments are broadcasted live online.

389. The discussion of media scrutiny of oral argument in the United States and in Europe highlighted interesting differences. If both courts have developed over time a strong authority while tackling controversial societal questions,¹⁰³⁴ they seem to have been exposed to very different levels of media scrutiny and consequently, of politicization. Such difference may be due to the fact that both courts practice at different levels of governance, and that continental legal cultures do not lend themselves to the same kind of public debate over the powers of judges. Surely other various factors might be in play that I gladly leave to political scientists to study. However, it suggests that the relationship of courts to their public and the role that both the Supreme Court and the European Court are willing to give to public opinion in their considerations on the merits of cases. I suggest that such role may be revealed by the room both Courts have made for third party participations in proceedings.
390. In the second section, I relied on existing literature to obtain a representative view of the role and the debates over third-party intervention in the United States and in Europe. Focus was placed on the court's openness to third parties as a sign of openness to different forms of democratic participation in judicial proceedings, and as a tool for improvement of judicial decision-making. I first outlined the history of third-party intervention from its origins to today's practice in the United States and in Europe. I tried to underline how the evolution of legal practices and the increased acceptance of such briefs encouraged a broad reliance on this tool by organizations to try to bear on the substance of the courts decisions, first in the United States and now increasingly in Europe.
391. The intensity of today's third parties' involvement in proceedings has received mixed reviews. Third-party briefs were once presented as an educative tool for judicial information, defended as a democratic input from non-parties, as an instrument of

¹⁰³⁴ Many examples can be named such as abortion (in the United States, *Roe v. Wade*, 410 US 113 (1973) or in Europe, ECtHR, *A.B. and C. v. Ireland* [GC], Appl. No 25579/05, 16 December 2010), segregation in the United States (*Brown v. Board of education*, 347 US 483 (1954)). The Role of religious signs in public schools triggered much social unrest in Italy triggering the intervention of members of the European Parliaments in the Lautsi case Grand Chamber proceedings. For a study focusing on public opinion reaction to the Lautsi decisions, see B. Joyeux, *The Politics of European Human Rights Review. The Role of Public Opinion in European Court of Human Rights Decision-making*, Masters Thesis, Europa University Viadrina (Germany) and Uniwersytet im. Adama Mickiewicza w. Poznaniu (Poland) (2010). Most recently the problem of the legal status of gay relationships were discussed both by the Supreme Court and the European court. Both reached different conclusions. This topic is discussed supra, in Chapter Four.

deliberative improvement, and as evidence of concern expressed by a fraction of public opinion. But it was also described as a non-concealed and now very salient form of self-interested advocacy activity in the American context. Although the degree of participation of third parties in proceedings is not nearly as important in Europe as in the United States, American practice now directly influences third parties' participation in Europe in form and strategy. Beyond the great potential input of third parties, American scholars have also challenged their participation on substantive ground, pointing at the lack of reliability of third parties' input. Such criticism has not yet plagued the credibility of third parties in European proceedings, although scholars are now starting to inquire into the substance of third-party briefs.

392. As I have showed, the influence of third-party briefs on judicial decisions is no longer debated in the United States, although the presence of references in judicial decisions does not always reveal the depth of such influence. Laura van den Eynde recently demonstrated that third parties often used foreign legal sources to make their arguments. They also often rely on different form of "public opinion" to convey the force of public support for a specific outcome. Whether or not such arguments hold truth, it will be instructive to inquire how they translate into judicial opinions of the European and Supreme Courts, on which the next chapters focus.
393. I hope to have showed that third parties have gladly accepted the challenge of becoming strong participants in judicial decision-making, transforming courts into a new form of democratic institution. In so doing they have also broadened the audience of fundamental rights courts, moving debates on fundamental rights from the courtroom to the court of public opinion. If its thus to be expected that Courts will be to some degree attentive to opinion's response on adjudicated issues.

Chapter Three: Public Opinion and Democracy : Freedom of Speech as Indispensable Tool to The Enlightenment of The Public

394. While considered a “precious right” in Europe, in the United States, freedom of speech is “sacred right”.¹⁰³⁵ Such contention by scholars also reveals, in my view, the different role that judges allocate to public opinion in public life. Since freedom of speech or expression is the very condition for the existence of public debate, only freedom of speech also permits public opinion to be formed. To this extent, courts’ conception of public opinion and of its importance in society to some extent bears upon their protection of freedom of expression. This chapter is meant to inquire to what extent “public opinion” bears upon such protection.
395. In the United States, freedom of speech guaranteed by the First Amendment obtained the status of “fundamental” right, that is a right enjoying special protection because of “the importance of preventing the restriction of [its] enjoyment”.¹⁰³⁶ However, before the Supreme Court gave it such status in *Gitlow v New York*,¹⁰³⁷ at common law, freedom of speech was a “residual freedom”,¹⁰³⁸ meaning a liberty not expressly protected, but granted as long as it is not exercised in a way that is prohibited. Thus, what changed with its consecration as “a fundamental” right is that States cannot inhibit it. Secondly, freedom of speech is protected both at federal level and from state infringement, as asserted by the Supreme Court in *Lovell v. City of Griffin* in 1938.¹⁰³⁹ Thus the protection of this right has developed mostly at federal level, while European law of freedom of expression advances in parallel at national *and* European level, according to different domestic conceptions of freedom of expression.¹⁰⁴⁰ In the United

¹⁰³⁵ See generally E. Zoller, “Freedom of Expression: “Precious Right” in Europe, “Sacred Right” in the United States?”, *Indiana Law Journal*, Vol. 84 (2009) p. 803 (hereinafter “Precious Right”).

¹⁰³⁶ *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

¹⁰³⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁰³⁸ See E. Zoller, “The United States Supreme Court and the Freedom of Expression”, *Indiana Law Journal*, Vol. 84, No. 3, 885 (2009), p. 889 (hereinafter “Freedom of Expression”).

¹⁰³⁹ *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). “Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by State action,” at 450.

¹⁰⁴⁰ Zoller, “Precious Right”, *op. cit.*, p. 807.

States' tradition, freedom of speech now "passes for an absolute".¹⁰⁴¹ The status of "fundamental right" gave freedom of speech the capacity to change society. As Elisabeth Zoller contends, virtually nothing is unpunished in the United States, including racist speech.¹⁰⁴² To Paul Horwitz:

Much of our current free speech jurisprudence is based on the assumption that the government should not regulate speech because, in an unregulated marketplace, people will be perfectly capable of responding rationally to speech. We protect speech to ensure "that the people are aware of all the issues before them and the arguments on both sides of these issues."¹⁰⁴³

396. Zoller summarizes the core difference between American and European judicial protection of freedom of expression: "The European Court leaves the European states a margin of judgment, while the Supreme Court concedes the American states almost none".¹⁰⁴⁴

397. Comparatively, in Europe expression is not sacred. Rather, it is a "precious" right. Elisabeth Zoller contends that "in France, where free expression adjusts to the imperatives of a more unified but, according to Americans, less free-society, freedom of expression is not merely an individual freedom; it can become a veritable social freedom",¹⁰⁴⁵ especially in labor law. Thus, the individual liberty can be sacrificed for the good of the group. Moreover, Article 10 (2) of the European Convention on Human Rights admits "formalities, conditions and restrictions or penalties as are prescribed by law and are necessary in a democratic society". Therefore, in the European perspective, although not explicitly allowed, "abridging" freedom of expression is not inevitably incompatible with democracy.

398. This brief outline of the two continents' different perspectives with regard to freedom of speech and expression is necessary to explain the focus of this chapter. Its emphasis

¹⁰⁴¹ *Ibid.*

¹⁰⁴² *Ibid.*, pp. 807-8, referencing J. Bell, "Restraining the Heartless: Racist Speech and Minority Rights", *Indiana Law Journal*, Vol. 84, No.3, 963 (2009).

¹⁰⁴³ P. Horwitz, "Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment", *Temple Law Review*, Vol. 76, No. 1 (2003) (hereinafter "Heuristics") Citation from O. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power*, Boulder, Colorado, Westview Press (1996), p. 5. (describing, but not subscribing to, the traditional social view of free speech).

¹⁰⁴⁴ Zoller, "Precious Right", p. 807.

¹⁰⁴⁵ *Ibid.*, p. 805.

on public opinion within the different degree of protection afforded to freedom of expression and speech in Europe and the United States aims at shedding a new light on the understanding the main differences between both continents' democratic and right-protective traditions. I contend that the courts' definition(s) of public opinion and their positions as to their role in American or European democracies is, deliberately or unconsciously, at the center of their standard of protection.

399. This section enquires into and compares the role allocated to public opinion by the United States Supreme Court and the European Court in a specific portion of their civil-rights-related judgments. As explained at more length in Chapter One, democracy is “government by the people”, “public opinion” is often used as a synonym of this very “People”, be it on both extremes an enlightened and informed people, or a passionate and dangerous crowd. It is hoped that focusing on a constitutional court and an international court will shed light firstly on the different roles public opinion can legitimately play both at national and international governance level. Through their judicial statements, the courts also should inform us on the importance public opinion possess in their own decisions. Additionally, this section, by ascertaining the judicial definitions of public opinion, sets a baseline of expectations for the next section where I will analyze judicial discourse regarding the role of public opinion in legal evolution.
400. This comparative approach focuses on similar provisions of the two legal sources protecting fundamental rights in each legal system. The First Amendment Speech Clause of the U.S. Constitution and Article 10 of the European Convention on Human Rights. However, both Articles protect several freedoms beyond freedom of speech or expression. Therefore, I will only focus on some aspects of the First Amendment that correspond to the area of application of Article 10 of the European Convention. It thus excludes case law pertaining to *lex specialis* of Article 10, *i.e.* Article 9, protecting freedom of religion and belief, and Article 11 of the European Convention protecting freedom of association on the one hand, and the First Amendment Establishment Clause protecting religious freedom on the other. For the needs of this study, I chose to focus on a small number of cases. Indeed, although freedom of religion and belief oftentimes has a bearing on the functioning of democracy, it is otherwise less informative on the relationship the public entertains with various public institutions. Secondly, in order to narrow down the number of cases requiring study and to improve the potential for in-

depth analysis, I excluded other areas in which the First Amendment and Article 10th were applied that did not directly pertain to the functioning of democracy. Therefore, speech applied to business is not included, although both courts developed their case law also in this area. Also, cases related to labor disputes are excluded, as the goal of labor unions to inform public opinion relates to the relationship between workers and their employer, an area of public concern less directly relevant to public opinion and democratic institutions. Finally, as the number of cases referencing public opinion in freedom of expression cases is high, this section focuses on general trends indicating how opinion shapes the direction of jurisprudence.

401. Most of the cases used in this chapter are cases where the expression “public opinion” and “the public” was found, or close synonyms. They belong in each case to Freedom of Speech or Expression jurisprudence. As explained in the introduction, many cases were classified as irrelevant because of the use of “public opinion” or “the public” in the wrong context, or in a way that is not indicative of its role in democracy or judicial decision-making. Therefore, my analysis does not straightforwardly follow classical legal analysis, dividing analysis by subject of a right, object, rules and exceptions. By looking into the usages of the term “public opinion” and its synonyms in decision making, I hope to find indications of the role public opinion plays in the European and American democratic systems, how it drives the focus of courts on public debate, on the type of debate that is ideal in a democracy, and on the level of speech that is expected to result from speech protection.

1. Fundamentals of Expression Protection in a Comparative perspective

402. The first step in a comparative endeavor is to set up the stage to permit a better understanding of the two objects of comparison. This is the goal pursued in this section.

1.1. European Protection of the Process of Opinion Building

403. Article 10 (1) of the ECHR protects freedom of expression. The central idea behind the concept is summarized in these short words: “This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Information is seen as a process (“receive and impart”) between an individual and a provider of information that participates to the

individual's building his own opinion ("hold opinions"). Its therefore not surprising that this freedom is seen as the central material allowing for the existence and sustenance of democratic political debate. Contrary to the First Amendment of the United States Constitution, Article 10 ECHR includes provisions concerning authorized rights restrictions. In her case law, the European Court has been insisting that in restricting this right, public authorities have to be politically neutral.¹⁰⁴⁶

404. European freedom of expression protection methodology is more clear and systematic than in the United States. It is helped by the wording of the European Convention that already circumscribes the grounds on which public authorities are allowed to restrict freedom of expression in Article 10 (1) and 10 (2). It has three dimensions: the strength of protection depends on the message being communicated—information may be included in many types of discourse—the media through which it is communicated to the public¹⁰⁴⁷ and the public's right to receive pluralistic information.¹⁰⁴⁸ Emphasis is put particularly on freedom of the press. Contrary to the United States, it has an inter-individual dimension, in which public authorities have a duty to facilitate protection of expression and public debate. Failure to comply with that duty may result in a finding of violation. Prior restriction to freedom of the press is also possible so long as they comply with the "necessary in a democratic society" test.
405. Although the "press" is not explicitly mentioned at Article 10 ECHR, it enjoys high protection from the Court. Translating into American terminology, the press would qualify as a "protected" category of speech and enjoy "strict scrutiny" protection from the Courts, while most other types of speeches satisfy a "rationality" test. Considered a "watchdog" of democracy and public debate, the press, its sources are deemed to enjoy quasi absolute protection, unless it doesn't contribute to general interest debate. Such cases are rare, as the Courts maintains a very "lax" definition of "general interest debate".¹⁰⁴⁹

¹⁰⁴⁶ See ECtHR, *Vogt v. Germany* [GC], App. No. 17851/91, 26 September 1995. Also Regulations of communications are approved (Article 10-1) and restrictions to the freedom are allowed for legitimate reasons (Art 10-2) and in very specific circumstances, and under certain types of conditions such as public order and reputation protection under art 10-2. Hannover, Lindon).

¹⁰⁴⁷ ECtHR, *Müller and others v. Switzerland*, App. No 10737/84 (A/133), 24 May 1988.

¹⁰⁴⁸ ECtHR, *Jersild v. Denmark* [GC], Appl. No. 15890/89, 23 September 1994.

¹⁰⁴⁹ F. Sudre, *Droit Européen et International des Droits de l'Homme*, Bruylant, 11th Ed. p. 794.

406. In Europe, freedom of expression mostly is understood as a freedom of information, a message that is meant to be communicated to the public.¹⁰⁵⁰ Thus, the freedom is most importantly protective of political discourse, or topics deemed of general interest to be discussed in public and in the press.¹⁰⁵¹ The protection philosophy of the European Court gives paramount importance to the contribution of the message to public debate. As a consequence, if what is published in the press makes no contribution to public debate the court, the ECtHR tends to protect the “freedoms of others” that have been negatively affected by speech. Over the years, the balancing of protection between of interests of freedom of speech and competing rights of others has been fluctuating. Freedom of the press generally enjoys stronger protection than the freedoms of others that could be invaded in the process of information, unless, as stated above, the topic at stake does not serve public debate.¹⁰⁵²
407. Since the focus on public debate is meant to protect the whole process of creating a strong public forum and individual opinions, the Court gave specific attention to the press, considered “watchdog” of democratic society.¹⁰⁵³ However the Court has recently developed a more careful jurisprudence towards possible abuse of journalism, and new emphasis on journalistic ethics, deontology and responsibility has been enforced.¹⁰⁵⁴ Also, the Court developed new case law regarding whistle-blowers, in particular when they are state agents. They are protected under strict conditions.¹⁰⁵⁵

1.2. American Protection and the Duty of State Neutrality

408. Speech protection in the United States has many levels of complexity. Firstly, the structure of the Amendment is centered on a prohibition directed at federal public authorities, now applying to all public authorities¹⁰⁵⁶ to interfere in an existing freedom, without defining it. The strong and almost absolute wording of the First Amendment

¹⁰⁵⁰ Sudre, *ibid.*, pp. 788 and 794

¹⁰⁵¹ See ECtHR, *Oberschlick v. Austria*, Appl. No. 11662/85 (A/204), 23 May 1991.

¹⁰⁵² ECtHR, *Von Hannover and von Hannover v. Germany*, Appl. No. 40660/08, 7 February 2012, at §124. The ECtHR here agrees with the German Constitutional Tribunal on the criterion of contribution to a debate of general interest.

¹⁰⁵³ ECtHR, *Jersild v. Denmark*, *op. cit.*, at §31.

¹⁰⁵⁴ See ECtHR, *Couderc and Hachette Filipacchi Associés v. France* [GC], Appl. No. 40454/07, 10th November 2015, and ECtHR, *Stoll v. Switzerland* [GC], Appl. No. 69698/01, 10 December 2007.

¹⁰⁵⁵ See cases such as ECtHR, *Bucur and Toma v. Roumania*, Appl. No. 40238/02, 8 January 2013, more generally this chapter *supra* at section 3. p. 25

¹⁰⁵⁶ The incorporation of First Amendment to the Bill of Right directly applicable to the states occurred in *Gitlow v. New York*, *op. cit.*

(“Congress shall make no law... abridging the freedom of speech, or of the press ...”) has triggered many debates as to whether freedom of speech should be protected in such absolute ways as its constitutional formulation invites. Can anything be expressed in any manner, or not? The lack of criteria circumscribing this right in the wording of the Amendment was such that the Court had to develop its own philosophy and tests over the last two centuries. To that end, the Supreme Court first proceeded by defining speech that did *not* deserve constitutional protection, such as illegal speech, such as opposition to war efforts in war times.¹⁰⁵⁷ Understanding the First Amendment’s protection of freedom of speech requires envisioning it as a long evolving process of defining what speech deserved more or less protection, and what were the legitimate grounds to restrict what type of speech.

409. Secondly, the Supreme Court applies a very broad definition of the term “speech” which includes physical expression and behavior as long as it considers that a message is being communicated through it: burning a flag for example is a “conduct that communicates”.¹⁰⁵⁸ Thus, the Supreme Court does not so much protect “speech” as words uttered, but more “expression” of a message through speech (written or unwritten) or conduct.
410. Thirdly, the legal terminology is confusing. Farber notes that until the *Chaplinsky* case in 1942, speaking in public could expose people to all kind of abuse by public authorities, which a rule-based approach based on the “clear and present danger” doctrine was meant to appease.¹⁰⁵⁹ The clear and present danger doctrine introduced in *Schenck* in 1919 was meant to allow public authorities to take measures directed against speech meant to and likely to provoke illegal conduct.¹⁰⁶⁰ However, at that time the dominant terminology used by the Supreme Court to establish whether a certain type

¹⁰⁵⁷ In the First World War, the Espionage Act prohibited anti-war advocacy. Challenges to this act triggered legal challenges through which the Supreme Court created its “Clear and present danger” test in the *Schenck* case. See *Espionage Act*, ch. 30, tit. I, § 3, 40 Stat. 219 (1917) (repealed 1948) and *Schenck v. United States*, 249 U.S. 47 (1919)

¹⁰⁵⁸ For example, flag desecration is a communicative conduct ruled the Supreme Court in *Street v. New York*, 394 U.S. 576 (1969). More in-depth decision on state regulation of communicative conduct can be found in *Spence v. Washington*, 418 U.S. 405 (1974), and *United States v. O’Brien*, 391 US 367 (1968).

¹⁰⁵⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰⁶⁰ See *Schenck v. United States*, 249 U.S. 47 (1919). Doctrine promoted by Justices Brandeis and Holmes in their opinions and dissent such as in *Abrams v. United States*, 250 U.S. 616 (1919).

of speech deserves more or less constitutional protection, the categorical methodology, is confusing.

411. The categorical approach divides speech into two types for the purpose of heightened or lessened protection. “Protected” speech deserves that the Court applies special constitutional scrutiny on public authorities’ speech restrictions, and “unprotected” speech does not. This confusing terminology implies that “unprotected” speech is not protected at all by the Constitution. However, in Farber’s words, ““Protected” speech is sometimes unprotected, and “unprotected” speech is sometimes protected.”¹⁰⁶¹ On the one hand, the word “unprotected” means that public authorities may constrain or regulate “unprotected” speech more freely because such type of speech deserves lesser constitutional protection.¹⁰⁶² “Protected” speech on the other hand enjoys higher scrutiny of public authorities’ justifications in court.
412. However, since the 1960s, the Court has withdrawn many speeches from its “unprotected” category.¹⁰⁶³ Despite this, these categories weren’t officially abandoned.¹⁰⁶⁴ Some plaintiffs still attempt to add new types of speech to the unprotected category. For example, in 2010 the Supreme Court judged a statute aimed at making depictions of animal cruelty based on a new classification of unprotected speech “overbroad”, *i.e.* potentially applicable to too many types of speech and hence too restrictive of freedom of speech,¹⁰⁶⁵ to the point that it could had been construed to limit speech based on its content.¹⁰⁶⁶ The Court added: “Our decisions in *Ferber* and

¹⁰⁶¹ D. Farber, “The Categorical Approach to Protecting Speech in American Constitutional Law”, *Indiana Law Journal*, Vol. 84, No.3, 917 (2009), p. 925.

¹⁰⁶² *Ibid.*, pp. 917-8.

¹⁰⁶³ See T. Hochmann, “Chronique des arrêts de la Cour suprême des États-Unis en matière de droits fondamentaux, Octobre 2008-Juin 2010”, *op. cit.*, p. 87. For example, defamation case law has evolved from being an unprotected category of speech, based on the assumption that a speech was based on a false statement of fact, to a partially protected category, because “defaming” speech participated to the edifice of a “vigorous public debate.”

¹⁰⁶⁴ See *United States v. Stevens*, 559 U.S. (2010), 130 S. Ct. 1577. See also Hochmann, “Chronique des arrêts de la Cour Suprême des États-Unis en matière des droits fondamentaux, Octobre 2008-Juin 2010”, p. 89. Hochmann claims that if the “unprotected” category has not die, the court should not add more types of speech to it any time soon.

¹⁰⁶⁵ According to the “Overbreath doctrine” doctrine, “if a statute is so broadly witten that it deters free expression, [i. e. overbroad] then it can be struck down on its face because of its chilling effect – even if it also prohibits acts that may legitimately be forbidden.” *Black’s Law Dictionary*, *op. cit.*, 1278.

¹⁰⁶⁶ The Court judged that such new category could not be created, that exceptions provided by the challenged statutes were not specific enough, that the statute was not readily susceptible to narrow construction so as not to threaten too much speech. The Court concluded: “But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *United States v. Stevens*, *op. cit.*, at 18. Also, in June 2011, California argued that violent video games

other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment... We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them."

413. When the Supreme Court uses the categorical methodology, speech protection is proportional to the speeches' assumed public value. This methodology however is based on the public value the Court assigns to certain types of speech, which varies with communities and, of course, time and political context. For example, "public interest and concern" speech warrants more protection than "hate speech" or pornography involving children. Although the balancing-of-interest methodology was also left aside because of fears of judicial subjectivity,¹⁰⁶⁷ the court still uses an approach that balances government interests with societal importance and type of speech.¹⁰⁶⁸
414. Also, restrictions on speech based on its content are looked at with high suspicion and warrant strict scrutiny. In such cases, the Court controls the necessity of the restriction and the compelling quality of the goal to be achieved. The Court considers that public authorities have a duty to neutrality. Different standards of protection also exist depending on locations of speech, depending on whether it is considered a public forum historically or traditionally, or a limited or designed public forum, where more speech restrictions can apply.¹⁰⁶⁹

aimed at minors was unprotected speech. See *Brown, et al. v. Entertainment Merchants Association et al.*, 564 U.S. 786 (2011), p. 6.

¹⁰⁶⁷ G. Haarscher, "Liberté d'expression, blasphème, racisme, essai d'analyse philosophique et comparée", in J. Allard et al.(eds), *Juger les droits de l'homme, Europe et Etats-Unis face à face*, Bruxelles, Bruylant (2008) (hereinafter "Liberté d'expression") pp.139-230. According to Haarscher, weighing of interest was discredited in the US while adopted in Europe, p. 216.

¹⁰⁶⁸ For example, in 2010 in *Doe v. Reed*, the Court balanced freedom of speech with the interests of fights against fraud in a public petition requesting the organization of a referendum on a gay rights issue. See *Doe v. Reed*, 561 U.S. (2010), 130 S. Ct. 2811.

¹⁰⁶⁹ Perry for example summarizes the public forum doctrine in the following words: "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. In these quintessential public forums [such as streets or parks], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" (citations omitted). *Perry ed. Assn. v. Perry local Educators' Assn.* 460 U.S. 37, 38 (1983) at 38.

415. The Supreme Court speech protection methodology speaks to the American philosophy of the strong role of freedom of expression in this political system. Despite the exclusion of some types of speech from the “protected” category, protection is the rule, rather than the exception: as explained above, the United States’ Supreme Court progressively abandoned many “unprotected” categories.¹⁰⁷⁰ Additionally, even in the case of protected categories, public authorities are allowed some degree of regulation depending on circumstances, type of speech and identity of the speaker, such as broadcasting methods, if not based on content. However, contrary to the European system, the Supreme Court has not established a strong framework of protection in favor of traditional press, considering that the message communicated had not to be protected because of its provenance: all types of media could be as worthy to communicate a message.¹⁰⁷¹

1.3. Balancing of Interests

416. As Guy Haarscher notes, the method of protection of speech often entails balancing freedom of expression against other people’s rights and interests.¹⁰⁷² This is what the Supreme Court did when, following the sociological methodology most famously advocated by Roscoe Pound¹⁰⁷³, it adopted a risk formula, allowing regulation and restriction of speech based on the risks involved following that speech, such as public reactions. It was developed progressively through the elaboration and modification of the present danger test in the context of the First World War, in *Schenck v. United States*,¹⁰⁷⁴ *Frohwerk v. United States*,¹⁰⁷⁵ and *Debs v. United States*,¹⁰⁷⁶ and the change into the risk approach the *Dennis* case in 1951.¹⁰⁷⁷ In this latter case, the Supreme Court reformulated and pondered the test used at the time, i.e. the Clear and Present Danger test introduced in *Schenck*, asserting that the test should be applied not automatically, but considering existing circumstances. Justice Frankfurter’s concurrence explicitly introduced the concept of *weighing* of interests. However, the introduction of balancing

¹⁰⁷⁰ See T. Hochmann, “Chronique 2008-2010”, *op. cit.*, p. 87

¹⁰⁷¹ E. Zoller, “Freedom of Expression”, *op. cit.*, p. 886, quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

¹⁰⁷² See generally G. Haarscher, “Liberté d’expression”, *op. cit.*

¹⁰⁷³ See for example R. Pound, “Mechanical jurisprudence”, *Columbia Law Review*, Vol. 8, No. 8 (Dec., 1908), pp. 605-623, and R. Pound, The Scope and Purpose of Sociological Jurisprudence, *Harvard Law Review*, Vol. 25, No. 6 (1912), pp. 489-516.

¹⁰⁷⁴ *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁰⁷⁵ *Frohwerk v. United States*, 249 U.S. 204 (1919).

¹⁰⁷⁶ *Debs v. United States*, 249 U.S. 211 (1919).

¹⁰⁷⁷ *Dennis v. United States*, 384 U.S. 855 (1966).

in the U.S. jurisprudence didn't align with a more protective case law, but rather with a more constricting one, leaving public authorities more discretion to restrict speech in a context of fear of communism. Justices were to consider which interest at stake in the present case deserved more protection. Attacked for fear of judicial activism, balancing of interests was partially abandoned in *Brandenburg v. Ohio* in 1969,¹⁰⁷⁸ where the Supreme Court preferred a version of the "Clear and Present Danger test" more protective of freedom of speech.

417. In Europe, balancing is not explicitly adopted. However, Guy Haarscher argues that the three cumulative conditions laid out by the European Court so a contracting state can validly justify a restriction of freedom of expression have very tenuous boundaries and require from the court a balance of interests. The European Court uses balancing especially with regard to interests of the press and public or private interests— *e.g.* reputation, where interests of the press usually prevail so long as they contribute to "general interest debate". One example is the right to reputation: Courts have to balance the interest of the reputation of a person with freedom of the press based on six detailed criteria including the press' contribution to public debate, public notoriety of the plaintiff, circumstances, and severity of the constraint on speech.¹⁰⁷⁹ Thus the substance of the message is of importance in Europe.
418. Conversely it is not the substance, crystallized in the expression "public concern" speech,¹⁰⁸⁰ that motivates the Supreme Court to have a more protective stance towards speech.¹⁰⁸¹ The underlying value behind the practical differences in both courts' case law is the need to protect public speech at all costs in the United States, contrasted to the need to be a "democracy capable of defending itself in Europe".¹⁰⁸² In the United

¹⁰⁷⁸ *Brandenburg v. Ohio*, 395 US 444 (1969). For a history and critique of the "Clear and Present Danger" test in the Post September 11 context, see generally P. Horwitz, "Heuristics", *op. cit.*

¹⁰⁷⁹ See Sudre, "Droit International", *op. cit.*, p. 692.

¹⁰⁸⁰ *Thornhill v. Alabama*, 310 US 88 (1940), *Connick v. Myers*, 461 U.S. 138 (1983), where the Court is said to have created of a "public concern" test. see C. Estlund, "Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category", *George Washington Law Review*, Vol. 59, 1, 55 (1990), p. 3.

¹⁰⁸¹ If the "public concern" test existed, almost replacing the two "unprotected" and "protected" category of protected speech in *Connick v. Myers*, 461 U.S. 138 (1983), and if it can be compared to the focus on "general interest debate" in Europe, it was not a tool for weighing of interests, but to decide what speech deserved more constitutional protection, based on a new version of the public importance criteria.

¹⁰⁸² Reference to the post-national-socialist Germany new constitutional order of a "democracy capable of defending itself" (in German, "wehrhafte Demokratie"). The Court referred to this principle and assented to it in substance in ECtHR, *Vogt v. Germany*, Appl. No. 17851/91, 26 September 1995, at §51. Several times in later cases, the Court and judges in separate opinions referred to the same principle. See for example ECtHR, *Lehideux and Isorni v. France* [GC], Appl. No. 24662/9423, September 1998,

States, speech tends to have absolute protection. As Justice Brennan explained in *Roth*, the First Amendment is “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”¹⁰⁸³ so that “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion” are protected by the First Amendment”.¹⁰⁸⁴ Thus no substantive standard is needed for a speech to deserve constitutional protection.¹⁰⁸⁵ The overarching goal of the Supreme Court is avoid what might have a “chilling effect” on speech,¹⁰⁸⁶ i.e. what could prevent a citizen from even wanting to use his freedom of speech in an “uninhibited marketplace of ideas”.¹⁰⁸⁷ Although the European Court also proclaims to pursue that goal,¹⁰⁸⁸ it also allows more restrictions, for example in the realm of controversial historical debates.¹⁰⁸⁹ As Haarscher sums up: Europe restricts liberty with regards to speech

concurring opinion judge Jambrek at §3, (case pertaining to state sanctions of a public call to rehabilitate the memory of Maréchal Pétain, leader of France and collaborator of Nazi atrocities during France’s Nazi occupation.) See also more recent case of ECtHR, *Perinçek v. Switzerland* [GC], Appl. No., 27510/08, 15 October 2015 (The European Court had to decide whether public speech related to crimes of mass destructions such as the ones of the Second World War or the Armenian Genocide had been the object of excessive punishment or necessary in a democratic society on ground of a need for the democratic system to be “capable of defending itself” against enemies of democracy.)

¹⁰⁸³ *Roth v. United States*, 354 U.S. 476 (1957), at 484.

¹⁰⁸⁴ *Roth v. United States*, 354 U.S. 476 (1957), at 476.

¹⁰⁸⁵ That is what the “public concern” test could change, if judges were to choose to protect only speech they would deem of enough public interest. This is, to Robert Post, undesirable. For judges to decide what is of enough public interest would lead to “unattractive examples of self-serving class prejudice” Post, *ibid.*, at 672.

¹⁰⁸⁶ “The justifiability of putting such a high priority on avoiding the possibility of chilling speech may be debatable”, Farber, *ibid.*, p. 938.

¹⁰⁸⁷ *McConnell v. FEC*, 124 S. Ct. 619, 729 (2003) (Thomas, J. concurring in part, dissenting in part, and concurring in the judgment in part) (“The very ‘purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,’” (emphasis in original) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S., 367, 390 (1969)).

¹⁰⁸⁸ At least regarding the press, the European Court aims at avoiding that states sanctions on speech originated in the press may not have a dissuasive effect and keep the press from playing its role of alert to the public. ECtHR, *Brasilier v. France*, 71343/01, 11 April 2006, at 43.

¹⁰⁸⁹ For example, public speech denying the existence of the holocaust during the Second World War does not benefit from the protection of Article 10, because it is considered to run counter to the ideals defended by the Council of Europe. On this topic see P. Lobba, “Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime”, *The European Journal of International Law*, Vol. 26, No.1, (2015) pp. 237-253. For an in-depth comparative study of “revisionism” or “holocaust denial”, see in particular T. Hochmann, *Le négationnisme face aux limites de la liberté d’expression, étude de droit comparé*. Paris, Pédone (2012), 753 p. and most recently, E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, Berlin, Springer-Verlag (2018), 217 p.

By Emanuela Fronza Publications de l’Institut International des droits de l’homme n°19 On the similar topic of the denial of the Armenian genocide, the Court was more protective of freedom of expression, considering that the shock created by speech denying the genocide in Swiss public opinion was not sufficient to impose a criminal conviction, since the speech regarded a matter of public interest, and that « the statements cannot be regarded as affecting the dignity of the members of the Armenian community

fundamentally inimical to democracy.¹⁰⁹⁰ In the United States, all speech deserves protection against public interference.

2. *Democracy, Public Opinion, and the Limits of the Majority Principle*

419. Before the founding of the Council of Europe, an organization devoted to peace and the strengthening of democracy in Europe, “democracy” had already been an ideal of government in the western world. No wonder then that the democratic principle is mentioned in judicial decisions that refer to “public opinion”, a term that, as explain in Chapter One, is commonly used as synonym as the “people” both in political philosophy and in day-to-day language of the 20th century. Since public opinion is a synonym of “The People”, the first relationship that courts address in their decision is public opinion’s relationship to the majority principle. It is arguably a result of the Twentieth Century tragic democratic failures—whether it is the Second World War and its genocide or the treatment of the African-American population in the United States in particular—that most strikingly induced an increased vigilance against the abusive calls to the majority principle in order to legitimize misguided public policies. Both courts have therefore taken upon themselves to insist that the democratic principle, defined as government through consent of the governed, also comprises an inherent limit to the majority principle. Despite such vigilance, they have not depreciated the validity of the principle of consent of the governed, but rather insisted that insuring the formation of an “informed public opinion” was the best guarantee of any good governance.

420. If none of the courts has given a specific and precise definition of democracy,¹⁰⁹¹ the development of their case-law has provided clues as to the limits of the democratic principle. “Democracy” is commonly defined as “government by the people either directly or through representatives elected by the people; specifically a system in which

to the point of requiring a criminal law response in Switzerland, ECtHR, *Perinçek v. Switzerland* [GC], Appl. No. 27510/08, 15 October 2015.

¹⁰⁹⁰ G. Haarscher, “Liberté d’expression”, *op. cit.*, p.185.

¹⁰⁹¹ Studies of the U.S. Supreme court relationship to democracy ususally focus on the role of the Supreme court in American democracy, i.e. is limited to the debate between activism and restraint. On the other hand, if the European court has regularly addressed the question of democracy, a comprehensive work was made by Florence Jacquemot, which explicits the “European standard of European society”. This model of society gives right their due central role, freedom of speech a central importance, a society where the judge is increasingly active in pursuing the progress of the most fundamental democratic values: fundamental rights. See generally F. Jacquemot, *op. cit.*

every citizen of the country can vote to elect its government officials”.¹⁰⁹² However, this abstract definition does not provide criteria as to the limits of the Will of the People, which both courts took upon themselves to check, whether as keeper of the Constitution and the separation of powers principle, or against abuses committed in the name of the majority in recent totalitarian times. Consequently, both courts have developed criteria as to the limits of the consent of the people and affirmed the importance of public debate to inform the public as a democratic goal.

2.1. The American Consent of the Governed and Its Limits

421. American law insists on a sovereignty based on the Will of the People. The system is based on a system resting largely on popular election at numerous levels of government. The value allocated to consent of the People is thus very strong. However, its limits are also acknowledged by the Court. They rest on the case law of the Court that seems to differentiate between the will of the electorate and public opinion itself, which is at the core of the communicative polity.

2.1.1. American Democracy and Public Control by Consent

422. The Supreme Court does not really give a definition of “democracy”. From *Marbury v. Madison* in 1803,¹⁰⁹³ most of the Court’s discourse on democracy relates to the role of the Judiciary in American democracy and the debate over judicial restraint and deference. However, the debate over democracy, the consent of the governed and public opinion is found early on in judicial decisions, albeit not always in Supreme Court decisions. For example, in his *Eakin v. Raub* dissent,¹⁰⁹⁴ judge Gibson of Pennsylvania’s Supreme Court debates the different roles of the legislative power and the judiciary in constitutional interpretation. Quoting British legal professor Sir William Blackstone, author of a *Commentaries on the Laws of England* that is well known to have had influenced the American Founding Fathers and others early American politicians.¹⁰⁹⁵ and referring to his writings pertaining to the philosophical origins and foundations of the American political system, he opposes Justice Marshall’s main statement on judicial supremacy in *Marbury* and declares that the legislature is

¹⁰⁹² *Black’s Law Dictionary*, 10th edition.

¹⁰⁹³ *Marbury v. Madison*, 5 U.S. 137 (1803)

¹⁰⁹⁴ *Eakin v. Raub*, 12 Serg & Rawle 300, 348-355 (1825)

¹⁰⁹⁵ D.R. Nolan, “Sir William Blackstone and the New American Republic: A Study of Intellectual Impact”, *NYU. Law Review*, Vol. 51 No. 5, 731 (1976).

superior than the two other branches, who have “no power of volition”¹⁰⁹⁶ in the performance of their function. He also asserts that “it cannot be said, the judiciary is co-ordinate, merely because it is established by the constitution; ... the acts of these officers will have the power of the people for their support; but no one will pretend, they are of equal dignity with the acts of the legislature.”¹⁰⁹⁷ Beside granting popular legitimacy only to the elected branch, he implies that only public support will ensure the efficiency of executive and judicial decisions. He also firmly asserts his trust and the American attachment in self-government, and in the virtues and strength of public opinion:

In the business of government ... a written constitution is an instrument of inestimable value also, in rendering its principles familiar to the mass of the people; for after all, there is no effectual guard against legislative usurpation, but public opinion, the force of which, in this country, is inconceivably great (and proved) to be a sufficient guard against palpable infractions ... Once let the public opinion be so corrupt, as to sanction every misconstruction of the constitution, and abuse of power, which the temptation of the moment may dictate, and the party which may be predominant, will laugh at the puny efforts of a dependent power to arrest it in its course.¹⁰⁹⁸

423. Hence are only legitimate acts decided by the organ elected by citizens and continuously checked by public opinion. Other organs of government cannot legitimately emit “acts of volition” because they cannot be checked. In other words, the single-issue focus of a party cannot, in itself, justify its banishment from the political scene if the party is seeking democratic solutions, willing to respect democratic rules in a manner devoid of violence, and seeks solutions that can satisfy everyone, i.e. not only the winning side of the issue.¹⁰⁹⁹ Thus minority “sections of public opinion” should be included in public debate so long as they seek consensual solutions to debated issues. There the Court acknowledges that public opinion is no monolithic unified voice but made of an agglomeration of many interacting voices.
424. Is this assertion expressing a blind trust in the consent of citizenry? Judge Gibson’s opinion does not pretend that public opinion is perfect; only that it is powerful. Besides

¹⁰⁹⁶ Quoted by H.L. Pohlman, *Political Thought and the American Judiciary*, Amherst, University of Massachusetts Press (1993), p. 148

¹⁰⁹⁷ Pohlman, *ibid.*, quoted p.149

¹⁰⁹⁸ *Eakin v. Raub*, (Gibson J., dissenting) quoted in Pohlman *op. cit.*, pp. 147-148.

¹⁰⁹⁹ *Ibid.*, §45.

declaring that the best check on legitimacy of government policies is public opinion, judge Gibson also accepts the possibility that public opinion can be corrupted, but that is in any case unstoppable. Thus, public opinion is not always good. Beside the debate over the hierarchy between the organs of American federal government, the trust in the public's role in government was thus publically acknowledged early on by judicial institutions. He implies a need for public opinion education.

425. American democracy is a system that allocates legitimacy to the “consent of the governed”. It trusts public opinion, but it also trusts in a dynamic polity, whose expression cannot lead to the “unanimity of the graveyard”, as mentioned below. This is the meaning of the protections afforded by the First Amendment that enable lively public debate and the expression of diverse opinions, that in turn ensure that public opinion can control public authorities. The following assertion is of paramount importance and very well shows the high value given by the Supreme Court in freedom of speech:

Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. *Authority here is to be controlled by public opinion, not public opinion by authority...* If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force *citizens* to confess by word or act their faith therein.¹¹⁰⁰

426. Here again the judicial vision of public opinion revealed by the Supreme Court in the *Barnette* case is intrinsically positive, although undetermined as to the exact nature of public opinion. Here the “public” is all but a monolithic force that would be animated by a single doctrine directly revealed from heaven and going in a single direction. It is however undoubtedly a force made of many citizens’ minds—which can be assumed based on the Court’s use of “citizens” in the plural form—who once associated are able to control the direction of public policy. Judges nevertheless give no indication as to

¹¹⁰⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Emphasis added).

how this federation of minds composing public opinion exercises this control over public authority. They just set a hierarchy between public opinion and governing institutions: if one has to prevail, it will be public opinion or what allows it to be not unanimous and silent as in a graveyard, but very much alive, loud and dynamic.

2.1.2. A Communicative Polity Focused on Autonomy of Public Opinion

427. The “central meaning of the First Amendment” as protected by the Court was defined in *New York Times v. Sullivan*,¹¹⁰¹ in the context of the troubles involved in the Civil Rights Movement in Montgomery, Alabama. The Court defines freedom of speech as an obligation resting on public authorities and the courts to safeguard the right to criticize the government,¹¹⁰² a guarantee for the existence of public debate and thus the good functioning of democracy. The case involved a defamation action against the publication by the New York Times of a solicitation to contribute to a “Committee to Defend Martin Luther King and the Struggle for Freedom in The South”. Since publisher of the could not prove every part of their advertisement was true, under Alabama Law it was held as libelous. According to Harry Kalven:

[The Supreme Court] found in the controversy over seditious libel the clue to "the central meaning of the First Amendment." The choice of language was unusually apt. The Amendment has a "central meaning"-a core of protection of speech without which democracy cannot function, without which, -in Madison's phrase, "the censorial power" would be in the Government over the people and not "in the people over the Government." This is not the whole Meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected.¹¹⁰³

That is what the court affirmed in, *Barr v. Matteo* on June 29, 1959.¹¹⁰⁴ However, after *Barnette*'s affirmation of the high value of public opinion, the question arises: if speech is so important, can some types of speech that are not criticism of government be restrained or prohibited? Public opinion could indeed regard certain kinds of speech as offensive and prohibit them democratically. To respond to this question, it must be

¹¹⁰¹ *New York Times Co. v. United States*, 376 U.S. 254 (1964)

¹¹⁰² Series of cases: *Brandenburg v. Ohio*, 395 US 444 (1969). and *New York Times co. v. United States*, 376 U.S. 254 (1964), on this point see subsection 2.2.

¹¹⁰³ H. Kalven Jr. "The New York Times Case: A Note on "The Central Meaning of the First Amendment"", *Supreme Court Review* Vol., 191, (1964), p. 208

¹¹⁰⁴ *Barr v. Matteo*, 360 U.S. 575 (1959), at 577.

determined if public opinion is embodied in “The People,” in the electorate, or if the People and public opinion are distinct.

428. Theorists have different views on the question. Robert Post asserts that depending on the type of definition of democracy chosen—majoritarian or self-determinatory, one can legitimately be led to consider that freedom of speech is not compatible with democracy.¹¹⁰⁵ Robert Post adopts the alternate view, since he espouses the self-determinatory, communicative, discursive concept of democracy in fashion at the time of his writings.¹¹⁰⁶ He explains that the existing tension in the regulation of public discourse concerns scholars’ views on public opinion formation. Public opinion is born through public discourse throughout the tension between majority and minority. Hence judges adopting an autonomous, self-determinatory concept of public discourse tend to dissociate public opinion from “the People.” In this way, they dissociate the electorate from the majority. Consequently, in order to build a strong public opinion, speech should not be restrained or prohibited, even democratically.
429. Therefore, to Robert Post: “[Kelsen’s] distinction [between autonomy and heteronomy] is manifestly at the root of the Court’s repudiation of seditious libel in *New York Times Co. v. Sullivan*¹¹⁰⁷ which turned on Madison’s differentiation of American and English forms of government: in England “the Crown was sovereign and the people were subjects,” whereas in America “the people, not the government, possess absolute sovereignty.” Therefore, the United States Supreme Court adopted an autonomous vision of freedom of speech that in practice differentiates between public opinion and the voting or elected majority.¹¹⁰⁸

¹¹⁰⁵ Unrestrained speech, or its incompatibility with democracy and the possible need by democracy to suppress unworthy speech or speech that would substantially not conform, would conform with a Meijkeljohnian conception of democracy. R. Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence”, *California Law Review*, Vol.88, 2353 (2000), p. 2367-2374. (Article assessing of the restriction on public discourse in certain fields such as racist speech and compatibility with democracy.)

¹¹⁰⁶ Like Habermas’ conception which I explained in see Chapter One.

¹¹⁰⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), at 67. *Ibid.*, at 275 (quoting 4 Annals of Congress 934 (1794)).

¹¹⁰⁸ As a recent example we can quote the British Brexit referendum which consequences were challenged by British parliament in the name of Parliament sovereignty: popular referendum would not be sufficient in order for the cabinet to make Brexit from the European Union effective. Thus, the British system adopts a heteronomous vision of democracy, where sovereignty is in the hands of Parliament and not “the People”.

430. Robert Post and proponents of an autonomous concept of democracy thus value less the majority principle than the communication and political dialogue principle, like the proponents of discursive democracy and the formation of public opinion through public debate within a vibrant civil society. However, if scholars and judges have adopted this concept, the inner tension between majoritarian and autonomous democracy is still prevalent in the United States and drives the judicial debate on democracy in terms of judicial activism and restraint, “restraint” being an expression of respect towards the majority principle.
431. The Supreme Court, if it upholds a rather positive vision of public opinion, also admits that opinion can be manipulated: this is a call for caution. If the people are to be differentiated from public opinion, then the state of public opinion is as vital to understand to as is the will of the people expressed through institutional methods. The Court understands this fact very well. This is revealed by a footnote in the case *Beauharnais v. Illinois*. In the context of a new Illinois law condemning group libel, the Court was called to decide if the federal Constitution allowed states to penalize group libel. The Supreme Court first quoted precedent *Cantwell*,¹¹⁰⁹ where it had previously reminded of “the danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal rights to the exercise of their liberties. These and other transgressions of those limits the states appropriately may punish”. To anchor this assertion, the Supreme Court uses an academic quote from Professor Riesman that differentiates the type of speech challenged in *Beauharnais* from what would legitimately qualify as political debate:

The utterances here in question “are not... the daily grist of vituperative political debate. Nor do they represent the frothy imaginings of lunatics, or the ‘idle’ gossip of a country town. Rather, they indicate the systematic avalanche of falsehoods which are circulated concerning the various groups, classes and races which make up the countries of the western world ... What is new, however, is the existence of a *mobile public opinion as the controlling force in politics*, and the systematic manipulation of that opinion by the use of calculated falsehood and vilification.”¹¹¹⁰

¹¹⁰⁹ *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940) at 310.

¹¹¹⁰ *Beauharnais v. Illinois*, 343 U.S. 250 (1952), at 262, quoted from D. Riesman, “Democracy and Defamation: Control of Group Libel”, *Colorado Law Review*, Vol. 42, 727 (1942), pp.727-780.

432. The Court through professor Riesman acknowledges the importance of public opinion in politics as a “controlling force,” i.e. a force giving substantial direction to the way leaders define politics. It also recognizes that this force is “mobile”, i.e. inherently variable and possibly unstable, and subject to intentional (“calculated”) and “systemic manipulation”, in short, the dangerous crowd. “Mobile public opinion as the controlling force in politics” seems to refer to the regular opinion polls often measured on a day-to-day in reference to current controversial debates, to determine the (passing) moods of citizens. Thus, if public opinion is a driving force, other forces can shape public opinion in a good way to inform and enlighten it, but also in a manner that could be very detrimental to society.
433. Therefore, public opinion’s autonomy from the people is valued, especially if it legitimately participates to the strengthening of public debate. But if the Supreme Court is mindful of the constant dangers that public opinion manipulation can bring about for democratic life, it strongly maintains a no-content-restriction policy: public debate must remain free, so the public search for the truth can occur and democracy remain strong. This positive albeit realistic conception of public opinion explains the Court’s strong protection of freedom of speech.

2.2. Freedom of Expression as a Foundation of European Democracy

434. Whereas Supreme Court Justices explain that American democracy is based on the consent of the governed and controlled by public opinion, European judges do not linger on the consent requirement of the democratic ideal. However, they insist that in Europe, democracy is first and foremost a process of governance open to “pluralism”, and “based on dialogue and a spirit of compromise”,¹¹¹¹ seeking solutions “capable of satisfying everyone concerned”.¹¹¹² To that end, freedom of expression deserves strong protection. They also stress that in a democracy, the majority principle is no absolute.

Professor Riesman continues: “Such purposeful attacks are nothing new, of course”. *Ibid.*, at 728. (footnote) (emphasis added).

¹¹¹¹ See ECtHR, *United Communist Party of Turkey* [GC] Appl. No. 19392/92, 30 January 1998; and ECtHR, *Refah Partisi and Socialist Party and others v. Turkey* [GC], Appl. Nos. 41340/98 41342/98 41343/98 41344/98, 13 February 2003, at §5. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society”.

¹¹¹² ECtHR, *United Communist Party*, *ibid.*, at §57.

2.2.1. *Speech as Foundation of European Democracy*

435. From the beginning, the European Court asserted that speech was the very “foundation of democratic society” and a “basic condition for its progress”.¹¹¹³ The Court also affirmed that freedom of expression: “is not only a safeguard against State interference [into an individual right], it is also a general fundamental principle of life in a democracy. Moreover, freedom of expression is not an end in itself but a means by which a democratic society is established”.¹¹¹⁴ Stressing its importance, the Court also went so far as to affirm that freedom of expression is an “acquired democratic right”.¹¹¹⁵
436. In European political terminology, an “acquired democratic right” reminds of the term “vested right”, a right which is so essential that its existence cannot be questioned, a right that cannot be come back upon, but as is rather implied, is to be going forward from. Here are the three main consequences of the fundamental essence of freedom of expression in the European system.
437. Firstly, freedom of expression is essential because it is indispensable to “freedom of thought”, which is built once “the public” had the possibility to “receive information”, so it can process it and form an opinion. Freedom to receive information is therefore considered a “right”.¹¹¹⁶ In short, the corollary of expression is information, which contributes to public thought formation.
438. Such was the response of the European Court to the United Kingdom House of Lords. The European Court also comforted Lord Bridge’s position, who in his *Observer and Guardian* domestic judgement dissent¹¹¹⁷ had criticized injunctions preventing a publication as censorship incompatible with free expression. In the so-called “Spycatcher” British litigation saga, multiple cases involving publication of the same

¹¹¹³ *Ibid.*, at §45. Also referred to as one of the preconditions for a functioning democracy: see ECtHR *Özgür Gündem v. Turkey*, Appl. No. 23144/93, 16 March 2000, § 43.

¹¹¹⁴ ECtHR, *Lindon, Otchakovsky-Larends and July v. France*, [G.C.], 22 October 2007, see dissident opinion of judges Rozakis, Bratza, Tulkens and Sikuta

¹¹¹⁵ Petitti and Pinheiro Farinha, JJ. Dissenting at §50. ECtHR *Observer and Guardian* at §50: “The Council of Europe has together with the organs of the European Convention a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the public’s right to receive information. This acquired democratic right must be preserved if we wish to protect freedom of thought!” (Judge Lord Bridge said that censorship is bad and that the UK will be judged “humiliated “by the ECHR and “in the bar of public opinion in the free world”. Indeed, the U.K. was condemned)

¹¹¹⁶ Article 10 was described as a “right to freedom of expression and freedom to hold opinions and to receive and impart information and ideas” in the case ECtHR, *Lawless v. Ireland* (No. 3), Appl. No. 332/5, 1st of July 1961.

¹¹¹⁷ House of Lords, *Attorney General v. Guardian Newspapers Ltd*, [1987] 1 WLR 1248, dissent.

book written by a former British spy were litigated. The British Attorney General had ordered an injunction against publication on grounds of public security. In dissent, Lord Bridge, considering free speech as essential to essentials freedoms, warned that the British decision would trigger a “humiliation” of the United Kingdom at the “bar of public opinion in the free world” and at the European Court of Human Rights. Lord Bridge’s words suggest that public opinion is dynamic and progressive abroad but lacks dynamism domestically. Lord Bridge’s farsighted dissent¹¹¹⁸ was confirmed by two European decisions condemning the United Kingdom at European Commission and Court level. The Attorney General’s injunctions against the book’s publication were qualified as “prior restraint” and judged incompatible with European standards of freedom of expression,¹¹¹⁹ and the Court found a partial violation of Article 10. Meanwhile, the dissenters—who found that the violation of Article 10 should have been found complete—declared : “The Council of Europe has together with the organs of the European Convention a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the *public’s right to receive information*. This acquired democratic right must be preserved if we wish to protect freedom of thought!”¹¹²⁰ This strong emphasis and exclamation is clear: protecting freedom of expression is the only means for public opinion to exist and remain strong and dynamic, which it is entitled to be.

439. Secondly, censorship in politics is hardly compatible with strong public dialogue. That is what is implied in the case *Socialist Party and others v. Turkey*.¹¹²¹ In this case, plaintiffs were challenging the dissolution of a Turkish political party on grounds of its public stance on the status of the Kurdish population in the country. They were complaining that the dissolution was an unlawful constraint on freedom of expression. They also argued that their party was “supported by a sector of public opinion which should have the right to accede to power”.¹¹²² In their statement, they used “public opinion” as a synonym of a part of the electorate, as opposed to the population generally, or to a public debate issue. As a response, the European Court emphasized

¹¹¹⁸ See B. Dickson, *Human Rights and the United Kingdom Supreme Court*, Oxford, Oxford University Press (2013).

¹¹¹⁹ See respectively ECtHR, *Observer and Guardian v. UK*, App. No. 13585/88, and Commission report of 12 July 1990 and ECommHR *Observer and Guardian v UK* (1991) 14 EHRR 153.

¹¹²⁰ ECtHR, *Observer and Guardian*, *op. cit.*, dissenting opinion of judge Pettiti, joined By Judge Pinheiro Farinha, at § 50.

¹¹²¹ ECtHR, *Socialist Party and others v. Turkey* [GC], Appl. No. 21237/93, 25th May 1998

¹¹²² *Ibid.*, at §37.

the European values of pluralism which freedom of expression seeks to strengthen. In the contracting states of the Council of Europe, ideas may be expressed that “offend, shock or disturb”. Only through expression of those ideas can dialogue resolve problems as long as ideas are communicated “without recourse to violence”.¹¹²³ The court also addressed the issue of whether a party having the support of “a section of public opinion” had a right to express opinion or to attempt to access power. It decided:

Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.¹¹²⁴

440. In other words, the single-issue focus of a party cannot, in itself, justify its banishment from the political scene if the party is seeking democratic solutions, willing to respect democratic rules in a manner devoid of violence, and seeks solutions that can satisfy everyone, i.e. not only the winning side of the issue.¹¹²⁵ Thus minority “sections of public opinion” should be included in public debate so long as they seek consensual solutions to debated issues. There the Court acknowledges that public opinion is no monolithic unified voice but made of an agglomeration of many interacting voices.
441. Third consequence of the essential function of freedom of speech to the European legal and political order is the debate over the type of “public interest” able to justify restrictions to this right. Such “public interest”, so dissenting judge Walsh, cannot be equaled with government policy.¹¹²⁶ This means that the Court believes government policy can be wrong, but also that the “public opinion” used to justify the way government design their public policies, can be wrong, or can be the wrong rationale

¹¹²³ *Ibid.*, at §45.

¹¹²⁴ *Ibid.* In this case the Court quotes previous cases Communist party at §57, which has seen become a classic statement in Article 10 jurisprudence. It was also quoted in ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 29225/95, 2 October 2000, at §88.

¹¹²⁵ *Ibid.*, §45.

¹¹²⁶ ECtHR, *Observer and Guardian*, Appl. No. 13585/88, 26 November 1991. “These are policy matters and are not grounds for invoking the restrictions permitted by Article 10 para. 2 (art. 10-2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom.” Walsch, J. Dissenting at §5 (emphasis added).

for public policy. Moreover, if any government policy could qualify as “public interest”, any government abuse could be justifiable.

442. Also, public interest may not be assimilated with the state of public opinion.¹¹²⁷ In the *Sunday Times* case, the Court made clear that “enlightened” public opinion was an ideal for a good functioning of democracy, and that to this end issues of public interest topics should be allowed to be discussed in public communications fora.¹¹²⁸ It happens however that domestic policies are accused of being steered by a misguided or “hysterical” local public opinion. In *Handyside* for example, the Court discerned to what extent public policies were grounded in hysterical “ultra-conservative” “fragment” of public opinion had in any way “impaired dispassionate deliberation”. Such event would have gone against its ideal of an “enlightened” or “informed” public opinion.¹¹²⁹ In light of the facts of the case at the time, the Court found with the government that protection of morals was a legitimate ground for restriction as they were exercised in this case, and that facts were hard to “reconcile with the theory of a political intrigue.” The Court did not clearly pronounce a judgement on whether it was important to the case that the challenged restriction on freedom of expression was based on an atmosphere of hysteria or on enlightened deliberation. However, its declaration that the evidence did not align with the plaintiff’s descriptions of political turmoil shows that the Court deems that conditions of opinion formation and political atmosphere leading to a restriction on freedom of expression *could legitimately* play an important role in policy-making. It suggests that it possibly could warrant some deeper and stricter scrutiny. This was confirmed in a few subsequent cases: in *Egitim*, the Court reasserted that public opinion sensibilities cannot be the basis for freedom of expression policy. In this way, the Court also said that majorities may not always prevail.¹¹³⁰

¹¹²⁷ I discuss “public interest” debate in sections below.

¹¹²⁸ ECtHR, *Sunday Times v. United Kingdom*, Appl. No. 6538/74, 26 April 1979 at §65.

¹¹²⁹ ECtHR, *Handyside v. the United Kingdom*, Appl. No. 5493/72, 7 Dec. 1976, the European Court declared: “The truth of the matter, he alleged, was that an attempt had been made to muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion. Proceedings were set in motion, said he, in an atmosphere little short of “hysteria”, stirred up and kept alive by ultra-conservative elements. ... The information supplied by Mr. Handyside seems, in fact, to show that letters from members of the public, articles in the press and action by Members of Parliament were not without some influence in the decision to seize the Schoolbook and to take criminal proceedings against its publisher. However, the Government drew attention to the fact that such initiatives could well have been explained not by some dark plot but by the genuine emotion felt by citizens faithful to traditional moral values when, towards the end of March 1971, they read in certain newspapers extracts from the book which was due to appear on 1 April”, at § 52.

¹¹³⁰ ECtHR, *Eğitim Ve Bilim Emekçileri Sendikası v. Turkey*, Appl. No. 20641/05, 25 September 2012 (hereinafter “Egitim 1”) (Note that Egitim 2 is only in drafted in French) “The Court recognises that such

Handyside is interesting in the light of the contrast between the complaints of the plaintiff, which freedom of expression would be restrained based on “hysteria”, and the government’s assertions that they were influenced by “the genuine emotion felt by citizens faithful to traditional moral values”. The court’s decisions shows that legitimate manifestation of public opinion may influence balancing of freedom of expression with public will. No violation of Article 10 was found. Also in *Egitim* the Court differentiated between public opinion and government policy. It also insisted that participation of minorities to public debate, although running counter to prevailing public opinion, may help building a public will satisfactory to all,¹¹³¹ a satisfactory outcome in a European culture of compromise. Assuming that government policy is based on the will of the majority of the electorate, the European ideal of public opinion, based on public debate and dispassionate deliberation, is also autonomous from majority will, and consequently, “the People”.

2.2.2. The Limits of the Majority Principle and the Role of Minorities

443. If at the foundation of democracy lays freedom of speech, it implies that speech should be free in all its diversity and plurality. As a consequence, political enforcement of the will of the majority is not an obligation. In the case of *Young James and Webster v. the U.K.* in 1981, the Court indeed asserted:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants’

a proposal may have run counter to majority beliefs in public opinion, certain institutions or certain State organisations, or even to government policy”, §56. “The Court notes with interest that the Employment Tribunal, for its part, dismissed the second dissolution application on the ground that a decision not to dissolve the union would have the effect of *calming the social tension, disorder and antagonism* that were prevalent in society, and of restoring social peace”, at § 58. Also, “Even supposing that the competent national authorities could have taken the view that education in one’s own mother tongue favoured the culture of a minority, the Court observes that, as it has previously found, the existence of minorities and different cultures in a country is a historical fact that a democratic society must tolerate, or even protect and support, in accordance with the principles of international law” *Egitim I, op. cit.*, at §59 (emphasis added).

¹¹³¹ “That being said, the Court reiterates that it is necessary for the proper functioning of democracy that the various associations or political groups are able to take part in public debates in order to help find solutions to general questions concerning political and public stakeholders of all persuasions” *Egitim I, ibid.*, at §56.

standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court.¹¹³²

444. In other words, not only mustn't majority will always prevail, but the fact that an opinion is held only by a minority, such as specialists in a field, it is no sufficient reason to stop it from being expressed and included into the making of public decisions. The Court acknowledges that majorities "on occasion" prevail¹¹³³ and minorities in these cases "must" be subordinated to them, provided treatment of minorities is fair and devoid of abuse¹¹³⁴. Hence the European Court does not support pure majoritarianism, but advocates a balanced vision of democracy, where decisions taken based on the majority principle do not muzzle expression of new, different or outrageous speech. This is shown in the *Stankov* case, where the Court concluded that since most of Ilinden's speech relying on "public debate and political pressure" and "expressly rejected violence", they did not pose a threat to democracy. Following the Court commanded "national authorities [to] display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be."¹¹³⁵
445. Indeed, the European Court confirmed in *Stankov* that no speech that would essentially run against the very principle of democracy could be protected under article 10.¹¹³⁶ It was also the case when the speech was originated by a minority. Such would have been the case, for example, if the minority group was "seeking the expulsion of others from a given territory on the basis of ethnic origin [which the Grand Chamber considered] is a complete negation of democracy."¹¹³⁷ Thus, the Court made clear that if a political party had advocated violence and not advocacy by peaceful means, its speech would

¹¹³² ECtHR, *Young James and Webster v. The United Kingdom*, Appl. No. 7806/77, 7601/76, 13 August 1981, at 63.

¹¹³³ *Ibid.*

¹¹³⁴ *Ibid.*

¹¹³⁵ ECtHR, *Stankov and The United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 29225/95, 2 October 200, at §101 (Hereinafter, "Stankov").

¹¹³⁶ ECtHR, *Perincek v. Switzerland*, [GC], Appl. No. 27510/08, 15 October 2015, at § 234 quoting ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, [GC], Appl. No. 23885/94, 8 December 1999, at § 40.

¹¹³⁷ *Stankov*, *op. cit.*, § 100. In this case, the Court found that the majority of the organization Ilinden statements expressly rejected violence, and "could not be interpreted as calling for violence or rejecting democracy" since members of the organization had diverging views and "not all the material cited necessarily reflected ideas and goals that dominated the applicant association's agenda." At §101.

not have been entitled to European protection.¹¹³⁸ However isolated statements couldn't be as such considered threatening enough to restrict expression.¹¹³⁹ With relation to public opinion, the Court declared that allowing restriction of expression on topics sensitive to public opinion would deprive the majority of a worthy public debate: "The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be".¹¹⁴⁰ The European court therefore suggested that freedom of expression of minorities thus serves public opinion capacity to make an informed decision.

446. However, the European Court seems conscious that the exercise of balancing between rights of majorities and minorities is not always straightforward. Therefore, it did not establish a rule of systematic protection of minorities against the expression of majority will in public opinion.¹¹⁴¹ This is demonstrated in the *Perincek* case, where a Turkish scholar and politician made a speech in Switzerland regarding the existence—or lack thereof—of an Armenian genocide. He had been criminally convicted in Switzerland for "racial discrimination" on account of several speeches denying the Armenian Genocide and asserting that massacres had also been perpetrated in Armenia against Turks.¹¹⁴² His speech has strongly impacted the Armenian community and the

¹¹³⁸ *Stankov, op. cit.*, § 90, citing ECtHR, *Incal v. Turkey*, [GC] Appl. No. 22678/93, 9 June 1998, Reports 1998-IV, p. 1566, § 48, and ECtHR, *Süreker v. Turkey* (no. 1) [GC], Appl. No. 26682/95, 08 July 1999 § 61.

¹¹³⁹ *Stankov, op. cit.*, § 101

¹¹⁴⁰ The Court considers that groups not advocating violence or oppose democracy should not warrant undue interference in their freedom of expression. "103. In the Court's opinion, there is no indication that the applicant association's meetings were likely to become a platform for the propagation of violence and rejection of democracy with a potentially damaging impact that warranted their prohibition. Any isolated incident could adequately be dealt with through the prosecution of those responsible... 106. It appears that Ilinden's meetings generated a degree of tension given the special sensitivity of public opinion to their ideas which were perceived as an offensive appropriation of national symbols and sacred values ...107. However, if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion. The fact that what was at issue touched on national symbols and national identity cannot be seen in itself – contrary to the Government's view – as calling for a wider margin of appreciation to be left to the authorities. The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be." *Stankov, op. cit.*, at §§ 103-106-107.

¹¹⁴¹ See also on balancing: "There these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society" (see *Chassagnou and Others* § 113).

¹¹⁴² *Perincek v. Switzerland*, [GC] *op. cit.*, at § 232.

European population in a context where the historical plight of the Armenian population was no longer historically and politically accepted.¹¹⁴³ Nevertheless, the Second Section of the European Court concluded that “it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community”.¹¹⁴⁴

447. There was doubt, however, as to whether the motivation behind the Swiss law had been to protect a minority (in this case the Armenian diaspora, present in many states of the Council of Europe) or to criminally sanction outspoken disagreement with mainstream public opinion on an historically sensitive topic. This doubt was expressed in subsequent Grand Chamber proceedings by third-party intervenant and state of origin Turkey, which considered that the “Swiss courts’ approach thus meant that the interference with the applicant’s right to freedom of expression had not been prescribed “by law” but “by public opinion””.¹¹⁴⁵ The Grand Chamber seems to have been receptive to this statement. After having determined that Perincek’s statements could not be considered as an injury against a minority, since they were not “so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland”; after determining that most contracting states did not condemn genocide denial and concluded that there was a lack of European Consensus on the question; finally after having determined that Switzerland was under no international obligation to criminalize genocide denial, it considered that :

As a result, it remained unclear whether the applicant was penalised for disagreeing with the legal qualification ascribed to the events of 1915 and the following years or with the *prevailing views in Swiss society* on this point. In the latter case, the applicant’s conviction must be seen as inimical to the possibility, in a “democratic society”, to

¹¹⁴³ In France for example, “23 January 2012 the French Parliament had passed an Act whose section 1 made it an offence to publicly condone, deny or grossly trivialise genocide, crimes against humanity and war crimes, as “defined non-exhaustively” in Articles 6, 7 and 8 of the [Rome Statute], Articles 211-1 and 212-1 of the French Criminal Code, and Article 6 of the Charter of the International Military Tribunal, “and as recognised by law, in an international treaty signed and ratified by France or to which France has acceded, in a decision taken by a European Union or an international institution, or as characterised by a French court, such decision being enforceable in France”. Summarized by the European Court Grand Chamber in ECtHR *Perincek v Switzerland*, [GC], Appl. No. 27510/08, 15 October 2015, at § 94. However that law was invalidated as unconstitutional by the French Constitutional Council 28 February 2012 (Décision no 2012-647 DC du 28 février 2012)

¹¹⁴⁴ ECtHR, *Perincek v. Switzerland*, [GC], Appl. No. 27510/08, 15 October 2015, at §3, referrals specifically to the solution retained by the Second Section at §3

¹¹⁴⁵ *Perincek v. Switzerland*, *ibid.*, § 129.

*express opinions that diverge from those of the authorities or any sector of the population.*¹¹⁴⁶

In short, freedom of expression is incompatible with criminalization on the ground of disagreement with prevailing opinion, even on historically sensitive questions. In this regard, the Court has been accused of adopting a “rudimentary reasoning” to conclude that the legitimate goal of protecting the rights of others, i.e. “namely the honour of the relatives of the victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards”¹¹⁴⁷ had been satisfied. It was said to have transformed the protection of the rights of others into “a catch-all legitimate motive [in] striking contrast to the one that had just justified a restrictive interpretation of the notion of “protection of order”. In such conditions, we might be witnessing diplomatic balancing – strict interpretation of one of the motives in order not to hurt Turkey, loose interpretation of the other to improve the morale of Armenia – rather than a global legal construction.”¹¹⁴⁸ In short, the Court was accused to have satisfied more the sensibilities of two third-party states rather than addressing the complexity of the topic and the needs of different parties and communities through its lack of a more substantial and structured reasoning.

448. Overall, the European conception of public opinion is in an interactive, dynamic, continuous movement that contributes to freedom of thought. It seems to be differentiated from its public opinion ideal, that results from deliberation in public fora, an ideal that complies with deliberative democratic ideals. Because majorities can be wrong, no elected majority or no prevalent opinion may restrict minority opinions from being expressed. The European Court seeks to strike a balance within the European space of debate so that both majority and minority opinions can coexist so long as the democracy is not threatened. That conception is at the heart of the Court’s balanced but vigilant protection of freedom of expression.

¹¹⁴⁶ *Ibid.*, § 271.

¹¹⁴⁷ *Ibid.*, § 141.

¹¹⁴⁸ J-P. Marguénaud, « L’arrêt de Grande Chambre Perinçek c/ Suisse relatif à la liberté de contester le génocide des Arméniens : un tête-à-queue méthodologique », *Revue de science criminelle et de droit pénal comparé*, (2016) p. 132.

3. Democratic Institutions and their Openness to Criticism

449. If freedom of speech is protected, that is because in a democracy, electoral results and the will of a ruling majority can only be built based on discussion of public matters. For democratic government to change and improve social situations, matters need to be addressed publicly, and thus current government's weaknesses pointed at. This is what criticism is. And it can apply to many topics, institutions and many people. In Europe, the Convention protects the right to criticize so as to form an opinion. In the United States, democracy very much depends on the freedom to criticize.

3.1. European Freedom to Criticize Public Institutions

450. A central element of democracy is the government institutional organization and its functioning, because representatives are democratically chosen by the citizens to represent them and take public decisions on their behalf. As a guardian of democracy, the European Court from the start actively sought to ensure that democracy would keep alive and well by making sure not only that an active and dynamic public opinion would be possible, but also that its relationship to public institutions also allowed for a vibrant democracy. It thus empowered public criticism of institutions, administrations, politicians, and public figures. The cases mentioned below suggest that freedom of expression entails freedom to criticize government, and with them, public institutions and their members. They teach us that this freedom applies to criticism from outside of government, but also from within institutions. Freedom to criticize also extends to the political process.

3.1.1. The Parliament

451. Freedom of members of parliament to express themselves within and outside of the democratic forum was most visibly proclaimed in 1992 in the *Castells* case.¹¹⁴⁹ Mr. Castells was a member of parliament in Spain. He had expressed opinions on public issues such as the sensitive question of the political climate in the Basque country. However, he chose to express himself to the public outside of the parliamentary forum through the medium of the press and was subsequently penalized for it. The government considered that the constitutional and political context of Spain at that time was sensitive. It relied on the public duties of Member of Parliaments and claimed that Mr.

¹¹⁴⁹ ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Series A No. 236, 23 April 1992.

Castells' speech was meant to destabilize the government and had crossed the limits of political debate and justified restriction of his speech on the basis of Art 10 (2).¹¹⁵⁰ Mr. Castells challenged the restriction of his right to free speech. The European court found that Castells' rights were not respected at Supreme Court level because evidence as to the veracity of facts he had been expressing in public had not been admitted in the procedure. The court concluded that the interference with his right to free speech was incompatible with democratic society's demands and did not consider that his speech had crossed limits of political debate the Spanish government was referring to. The European Court asserted:

While freedom of expression is important for everybody, it is especially so for an elected representative of the people, because he represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court... Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders.¹¹⁵¹ In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹¹⁵²

452. From this statement one can draw conclusions as to how, to the European Court, public opinion is important for democratic institutions. Firstly, the Court differentiates between the electorate and public opinion. A representative is to represent preoccupation and interests of his electorate. But public opinion is involved in so far as it is the location of "free political debate", which is "at the very core of the concept of a democratic society". The public "forms an opinion" on ideas and attitudes of their leaders: this statement suggests that forming an opinion is an effort for the public, and effort made only possible by free political debate, which includes the freedom of all to

¹¹⁵⁰ Article 10 (2) is worded as follows: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

¹¹⁵¹ Quote on freedom of the press from ECtHR, *Lingens v. Austria* [Plenary], Appl. No. 9815/82, 8 July 1986, Series A No. 103, at 42. It is discussed below in section on freedom of the press and public opinion.

¹¹⁵² ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Series A No. 236, 23 April 1992, at 42 and 43; and ECtHR, *Lingens v. Austria* [Plenary], Appl. No. 9815/82, 8 July 1986, Series A No. 103, p. 26, § 42.

criticize government, whether or not the latter is facing a period of fragility or transition. The court considers that democracy is made alive through the working interactions between democratic representatives and public opinion that in turn allow the existence of free political debate.

453. This was confirmed recently in the *Karácsony* case, where the Court provided some more information with regard to the freedom of democratic representatives to express themselves within the elected forum. Applicants, who were Hungarian members of Parliament, had been penalized not so much for expressing themselves on one contentious issue previously debated in Parliament, but for the manner—i.e. with a megaphone—in which they have expressed their minority views within the forum. Disciplinary measures including pecuniary sanctions were taken against them for their behavior, the severity of which was justified by “parliamentary autonomy”. This event was part of a recent trend in Hungary, where the governing coalition had taken measures to discourage democratic criticism within the Parliament, and which had been, so the plaintiff, criticized internationally.¹¹⁵³
454. Tasked with arbitration of the conflict with regard to the pecuniary sanctions, the European Courts’ Grand Chamber first acknowledged that efficiency in a democracy meant that elected minorities had to sometimes submit to the will of majorities while insisting that Democracy does not sustain abuse of a dominant position, and demanded proper treatment of minorities.¹¹⁵⁴ It made clear that it should not come at the cost of bad treatment and abuse, or even abolishment of freedom of expression within the democratic arena:

Accordingly, parliamentary autonomy should not be abused for the purpose of suppressing the freedom of expression of MPs, which lies at the heart of political debate in a democracy. It would be incompatible with the purpose and object of the Convention if the Contracting States, by adopting a particular system of parliamentary autonomy, were thereby absolved from their responsibility under the Convention in

¹¹⁵³ ECtHR, *Karácsony and others v. Hungary*, [GC] Appl. No. 42461/13 44357/13, 17 May 2016, at 86 “Not only domestic and international NGOs, but also international organisations and bodies such as the Venice Commission, the Commissioner for Human Rights of the Council of Europe and various bodies of the European Union, had criticised the Hungarian Government for changing the rules of democracy and for creating a political environment which was hostile to any criticism”, (plaintiff statement).

¹¹⁵⁴ Quoting ECtHR, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A No. 44.

relation to the exercise of free speech in Parliament...The Court attaches importance to protection of the parliamentary minority from abuse by the majority.¹¹⁵⁵

455. Therefore, not only does the Court confirm that democracy cannot be reduced to majority dominance of minorities but it stresses that this dominance can occur also within democratic institutions such as Parliament. Consequently, parliamentary autonomy, which is a democratic principle, cannot in itself justify damaging the very freedom that enables public opinion formation and free political dialogue among members of parliament, and down the road, democratic will to be born. It is to be assumed that it is important to make government scrutiny possible.

3.1.2. Government Scrutiny

456. Freedom of expression also applies to non-representative institutions when they criticize government. In the *Castells* case, the Court leaned on separation of powers theory to assert that actions by the executive was a natural object of scrutiny and criticism by other institutions, including the judiciary, “but also of the press and public opinion”. In this case, freedom of expression cannot be easily restrained on the basis of article 10 (2): although the state may have discretion with regard to the use of proceedings to fight “unjustified attacks”, it has to “react appropriately and without excess”.¹¹⁵⁶ The Court also justified the need of freedom to criticize and the obligation of self-restraint of government by the “dominant position” the government is in, in contrast to other institutions, the press and opinion. In that case, the Court rejected the Spanish Government’s assertion that the plaintiff had “overstepped the normal limits of political debate”.¹¹⁵⁷
457. Among the natural scrutinizers and critiques of government the Court lists “the press and public opinion”. Interestingly, despite talking about criticism within an elected institution, the European Court does not refer to the electorate but to *public opinion* and the press. The Court thus confirms that the notion of public opinion embraces a larger population than the mere electorate. Also, inclusion of public opinion in the list of critiques of government in this case implies that the public intervention of a member of

¹¹⁵⁵ ECtHR, *Karácsony and others v. Hungary* [GC] Appl. No. 42461/13 44357/13, 17 May 2016, at §147.

¹¹⁵⁶ ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Series A No. 236, 23 April 1992, at §46.

¹¹⁵⁷ We can therefore assume that the Court admits that public debate entails limits in a democracy. I discuss the limits of public debate in a democracy in a section below.

parliament in the press with a view of influencing opinion includes the public in the dynamic of rational criticism of governmental actions. To be well informed, the public needs to rely on members of parliament to inform them. Therefore, limiting representatives' intervention to the legislative forum limits the freedom of the public to be informed on topics that may be of public interest.

458. Criticism can extend to the highest level state personalities: Also *Guja v. Moldova*, the Court also asserted that the duty of discretion of civil servants could be overridden by the interest public opinion might have in disclosure, particularly with regard to comments involving a country's public prosecutor : "In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the *media and public opinion*. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence".¹¹⁵⁸

3.1.3. Judicial Scrutiny Versus Protection of Judicial Authority

459. Public scrutiny is also important when it focuses its attention on the judiciary in cases regarding issues of public interest. For this reason, restraints exercised on freedom of expression on the ground of a need to protect the authority of the judiciary are the object of stricter scrutiny by the European Court. That is what the Court demonstrates in *Dupuis v. France*, in 2007, a case involving publication of a book containing information on a state-run telephone tapping scandal that had involved the judiciary. The French government justified his appropriations of documents by the needs of investigations and the protection of reputation of others, as well as maintaining the authority of the judiciary.
460. The Court did not deem it a sufficient justification to censorship of a book containing information on the judicial treatment of this scandal. Rather it considered that the press had communicated "public interest" information pertaining to judicial proceedings "in a manner consistent with its obligations and responsibilities".¹¹⁵⁹ The European Court justified its statement by stressing the obvious. Firstly, to the European Court, judicial proceedings are a legitimate topic of public interest and debate, therefore "it would be

¹¹⁵⁸ ECtHR, *Guja v Moldova*, [GC] Appl. No. 14277/04, 12 February 2008, at § 74 (2008) (emphasis added).

¹¹⁵⁹ ECtHR, *De Hars and Gijssels v. Belgium*, Appl. No. 19983/92, 24 February 1997 at §37.

inconceivable to consider that there can be no prior or contemporaneous discussion of the subject matter of judicial proceedings elsewhere, be it in specialized journals, in the general press or amongst the public at large”.¹¹⁶⁰

461. Secondly, the strong emotional response and demand for information by the public only underlined how legitimate the public’s interest in this matter was:

The revelation of these facts aroused a considerable degree of *emotion and concern* among public opinion. The offending book, like reports on court cases, satisfied a concrete and sustained public demand in view of the increasing interest shown nowadays in the day-to-day workings of the courts. The public therefore had a legitimate interest in the provision and availability of information about these proceedings and, in particular, about the facts reported in the book.¹¹⁶¹

462. It appears that the Case of *Dupuis v. France* is a perfect example of a judicial case on which information may not be censored. The “considerable” degree of emotional involvement that created the sustained demand for information seems to be a key criterion defining what constitutes a “legitimate interest” to information by the public and restricts the discretion of the state in its constraint on freedom of speech.¹¹⁶² The legitimate interest of the public—here conceived as an audience—here trumps the legitimate interest of the state to protect the authority of the judiciary.¹¹⁶³ Note that in its use of the term “the public at large”, the Court here doesn’t refer to an attitude or opinion, but to a large and indiscriminate audience, rather than a rather binding political

¹¹⁶⁰ *Ibid.*, §35

¹¹⁶¹ ECtHR, *Dupuis and others v. France*, Appl. No. 1914/02, 7 June 2007, at §41, (emphasis added). The Court continues based on the principle: “*The promotion of free political debate is a fundamental feature of a democratic society. The Court attaches the highest importance to freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned*” (see Feldek, cited above, § 83). In the present case, the speech complained of concerned G.M., one of President François Mitterrand’s closest aides. Although G.M., who initiated the proceedings and judgment against the applicants, could not himself be described, strictly speaking, as a politician, he nevertheless had all the characteristics of an influential public figure, being clearly involved in political life and at the highest level of the executive,” at §42 (emphasis added).

¹¹⁶² see J-P. Marguénaud, “De l’extrême relativité des “devoirs et responsabilités” des journalistes d’investigation”, *Recueil Dalloz* (2007), p. 2506.

¹¹⁶³ This goes to confirm the general European trend, this time concerning criminal matters: See *Recommendation Rec (2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings* (Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers’ Deputies). It stresses the importance of reports made on criminal proceedings to inform the public and allow it a right of regard on the functioning of the criminal justice system.

force.¹¹⁶⁴ Additionally, it seems that in this case, the Court does not seem to believe that “strong emotions and concern” makes the public a dangerous force: only emotions that would be out of control, such as the “hysteria” discussed above in *Handyside*, would disqualify public opinion as a legitimate reason for decision-making, since “hysteria” would hinder discussion and deliberation. However, in this case, public opinion is neither the basis for decision, nor the initiator of constraints on freedom of expression. To the contrary, it is the reason for allowing freedom of speech to follow its natural course, so public opinion on a topic of public concern can be formed.

463. This is not to say that protection of the authority of the judiciary in Europe is not a legitimate reason for public authorities to restrain freedom of expression. In *Prager and Oberschlick*, The European Court considered that “the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them”.¹¹⁶⁵ Nevertheless, heavy reporting could be damageable to the formation of public opinion. It is especially the case when it comes to “pseudo-trials” in the Court of public opinion:

If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.¹¹⁶⁶

464. In other words, because the courts’ conclusions on a case heavily reported in the media may be different from the ones of the public, which does not have all information in its possession, and because the business of justice could in the long run become trivialized by too much attention, it might damage the public image of the Courts and therefore the efficiency justice. The use of the negative term “pseudo-trials” by the European Court also implies that too much media reporting would not contribute to an informed opinion and damage public confidence in the justice system.

¹¹⁶⁴ It is translated in French decisions as “grand public”.

¹¹⁶⁵ ECtHR, *Prager and Oberschlick*, Appl. No. 5974/90, 26 April 1995, § 34.

¹¹⁶⁶ ECtHR, *Handyside v. the United Kingdom*, Appl. No. 7 Dec. 1976 at §63.

465. If the Court does not support trivializing justice, it does not mean judges should not be the object of reports and public criticism: despite not being politicians, they still are public persons. However, for the sake of public confidence in the judiciary, this is to be done with caution. In the case of *Mustafa Erdogan v. Turkey* in 2014, where a professor and publisher had been condemned to pay fines for insult to three constitutional judges for his comments on a decision to dissolve a political party, the European Court concluded:

Whilst it cannot be said that they knowingly laid themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions, members of the judiciary acting in an official capacity, as in the present case, may nevertheless be subject to wider limits of acceptable criticism than ordinary citizens ... At the same time, however, the Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, *must enjoy public confidence if it is to be successful in carrying out its duties*. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject *to a duty of discretion* that precludes them from replying.¹¹⁶⁷

466. The Court here explains why protection of the reputation of the judiciary a more legitimate aim than the protection against criticism of governments. First, judges need public confidence to accomplish their duty, which unfounded criticism can damage. Second, it is because judges have a “duty of discretion” that keeps them from responding in public to unfounded accusations, in contrast with politicians who have no such duty, that establishing limits to speech on the judiciary can be legitimate. Thus, the Court concluded that courts could legitimately sanction insult rather than criticism,¹¹⁶⁸ but that value judgements that were sufficiently rooted in “sufficient factual basis” and object of “virulent public debate” in the country, published in good faith, should not have been punished by the Turkish court.¹¹⁶⁹ “Public confidence” in justice, i.e. confidence of the public towards the courts, was a worthy endeavor that

¹¹⁶⁷ ECtHR, *Mustafa Erdogan and Others v. Turkey*, Appl. No. 346/04 39779/, 27 May 2014 (emphasis added) at §42.

¹¹⁶⁸ *Ibid.*, at § 44. Note that the court had asserted this principle in see ECtHR, *Skalka v. Poland*, Appl. No. 43425/98, 27 May 2003, § 34.

¹¹⁶⁹ *Mustafa Erdogan, op. cit.* at § 44.

should be pursued with moderation. Only excesses, i.e. affirmations that are “essentially unfounded” and destructive, may therefore be punished.

467. Judges are the object of public reports because there is public interest in knowing how they perform their duty¹¹⁷⁰, or regarding enforcement of decisions.¹¹⁷¹ However, the European Court adds, confidence in the judiciary is not only related to judicial behavior, but to the whole legal profession generally: “For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation”.¹¹⁷² This is why lawyers also have the freedom to criticize judicial authorities in public, to ensure that judges rightfully fulfill their legal duty. Thus, in *Schöpfer v. Switzerland* in 1998, the European Court observed:

lawyers [enjoy] considerable freedom to criticise the judicial authorities, provided that this was done according to the correct procedures, and in the first place in the course of representing and defending their clients. When, however, a lawyer appealed to public opinion, he was under a duty, like any other person employed in the service of justice, to refrain from any conduct inconducive to the proper administration thereof.¹¹⁷³

468. Like judges, lawyers are to some degree a duty of discretion because they first and foremost serve justice. In this case, the Court decided that the tone of the plaintiff and his behavior denouncing so-called human rights violations had rightfully been found by a considerate Supervisory Board to be unjustified and found no violation of Article 10.

3.1.4. State Agents

469. The Court seems to establish a hierarchy as to who should be more tolerant to public criticism: *all* member of institutionalized government should tolerate some public criticism, which includes civil servants, members of local administrations and state-affiliated universities. For example, although state agents don’t exactly qualify as any

¹¹⁷⁰ ECtHR, *Marian Maciejewski v. Poland*, Appl. No., 34447/05, 13 January 2013 “As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying”, at §71.

¹¹⁷¹ See ECtHR, *Hachette Filipacchi Associés v. France*, Appl. No. 71111/01, 14 June 2007; at § 49.

¹¹⁷² ECtHR, *Kyprianou v. Cyprus* [GC], Appl. No. 73797/01, 15 December 2005, ECtHR, *Morice v France*, Appl. No. 29369/10, 23 April 2015, § 201.

¹¹⁷³ ECtHR, *Schöpfer v. Switzerland*, Appl. No.25405/94, 20 May 1998.

of the three institutionalized powers, they are part of the administration of the country. Therefore, their tolerance of public criticism should be greater. In *Siryk v. Ukraine* in 2011, the plaintiff was fighting defamation proceedings following a complaint to national tax authorities against a university administrator of the local law school. In the letter, she made many detailed complaints with regards to the administrator's behavior and accused her and her staff of systematic corruption and abuse of power. Ukrainian authorities supported the proceedings and limited the plaintiff's freedom of expression on the ground that they were protecting the professor, in her capacity of scholar and university administrator, because such complaint could seriously publicly damage her reputation in public opinion: "Ms S. was a well-known lawyer and a leading scholar in Ukraine and, therefore, any information about her was of great public interest and its dissemination was capable of giving rise to a *particular public opinion* concerning her personal and professional qualities."¹¹⁷⁴ The European Court considered the administrator as a state employee and concluded there had been a violation of her freedom of expression and asserted: "On the whole, it may reasonably be argued that the applicant's complaint did not go beyond the limits of acceptable criticism, especially since these limits may be, in certain circumstances, wider in respect of civil servants than in relation to private individuals".¹¹⁷⁵ In this context, the defending state referred to "particular" public opinion as a defense, implying that the administrator would no longer be considered well specifically among her peers and the student body. The Court did not address this justification, considering that the administrator's capacity as civil servant naturally exposed her to more public criticism. Thus, her reputation among the student body and her peers was exposed naturally through her official position.

470. The Court also used freedom of expression to protect whistle-blowers, especially when they are state agents. In above-mentioned case *Guja v. Moldova*, the European Court considered the problem of state agents reporting public misbehavior, particularly in the office of the public prosecutor. Stating its criteria for assessment as to the existence of a violation of Article 10, the court asserted:

In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose

¹¹⁷⁴ See ECtHR, *Siryk v. Ukraine*, Appl. No. 6428/07, 31 March 2011, at §29.

¹¹⁷⁵ *Ibid.*, at §45. Other cases also regard civil servants such as ECtHR, *Janowski v. Poland* [GC], Appl. No. 25716/94, 21/01/1999, § 33 (Emphasis added).

divulcation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the *public interest by alerting the employer or the public at large*.¹¹⁷⁶

471. The court verified, among other criteria,¹¹⁷⁷ whether the agent in question had regard to the public interest involved, if the public was likely to have an interest overriding his duty of confidence, if information were verified and had been reported in good faith.
472. This method was confirmed in later cases such as *Bucur and Toma v. Roumania*.¹¹⁷⁸ The Court also leaned on the Parliamentary Assembly of the Council of Europe Resolution 1729 (2010), inviting member states of the Council of Europe to take legislation protecting whistle blowers generally (and not only state-agent whistle blowers), and enabling them to have courage to talk in the public interest, because “Potential whistle-blowers are often discouraged by the fear of reprisals, or the lack of follow-up given to their warnings, to the detriment of the public interest in effective management and the accountability of public affairs and private business”.¹¹⁷⁹

3.1.5. *Politics: Criticism of a Politician*

473. Is a politician’s public position comparable to the one of members of various public institutions? If all member of institutionalized government should tolerate more public criticism than private persons, so should politicians.¹¹⁸⁰ Such is the case of a retired

¹¹⁷⁶ ECtHR, *Guja v. Moldova* [GC], Appl. No. 14277/04, 12 February 2008, at §72 emphasis added.

¹¹⁷⁷ Criteria listed in *Guja*, *Ibid.*, at §74-78.

¹¹⁷⁸ ECtHR, *Bucur and Toma v. Roumania*, at § 93. In this case an agent of the surveillance unit of the Romanian intelligence service on telephone recording, had discovered irregularities, particularly regarding the tapping of journalists, politicians and businessmen. He had unsuccessfully reported to his superior and a member of parliament. He then attracted the attention of the public to this problem through a press conference. Criminal proceedings were brought against him. The Court considered first the means used with due regards to means at the disposal of whistle blowers in Romania, second, the public interest involved in the information divulged—a strong one in a country acquainted with a past of communist surveillance—third, the accuracy of the information made public, where the qualification of information as “ultra secret” did not, in the Court’s opinion, prime over the interest of the public in receiving the information, and the good faith of the applicant and his willingness to “make a public institution abide by the laws”, and concluded that the interference constituted a violation of his freedom of expression.

¹¹⁷⁹ Council of Europe Parliamentary assembly “whistle blower” resolution, *Resolution 1729 (2010) Final version*, adopted by the Assembly on 29 April 2010 (17th Sitting).

¹¹⁸⁰ see ECtHR, *Karatas v. Turkey*, Appl. No. 23168/94, 8 July 1999, at § 50

politician questioned in his support of running politician suspected of past affiliations with the former Nazi regime:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. ... Requirements of protection [of one's reputation] have to be weighed in relation to the interests of open discussion of political issues.¹¹⁸¹

474. Thus, the interests of public debate always are to prevail until “imperious reasons” arise that call for restriction of freedom of speech. “Every word and deed” of a politician is of potential interest of “open discussion” by the “public at large”, i.e. the informed and the uninformed, in European democracies, including during political campaigns.¹¹⁸² The use of the “public at large” suggests that all movements and words of politicians may be the object debate by all, the informed and the uninformed, and consequently the object of potentially outrageous debate. Hence the more important the topic is to the public, the more legitimately it can be open and damageable to a reputation.
475. In the context of political campaigns specifically, the Court recognize that debate over the regularity of past elections is of public concern, and that assertions made in that context resemble more value judgments, allowed in the context of political debate, than assertions of facts, which could be ground for defamations proceedings. Moreover, a political competitor in election is “necessarily includes the possibility to discuss of the regularity of an election. Finally, in the context of political elections, the more animated tone of the debate is more tolerable than in other circumstances”.¹¹⁸³ Therefore, the Court is not only more protective of speech that in other circumstances would allow for

¹¹⁸¹ ECtHR *Lingens v. Austria* [Plenary], Appl. No. 9815/82, 8 July 1986, Series A No. 103, at § 42.

¹¹⁸² The needs of open discussion also apply to political competitions and campaigns. Therefore, strict scrutiny is applied in cases involving restrictions on freedom of expression and political campaigns. Since in this context, public speech tends to be contain more heightened criticism, criticism should be more tolerable than in other circumstances and discussions pertaining to the regularity of an election should be admitted. Even symbolical restrictions of public discussion in this matter of public interest is thus a violation of article 10 para. 2. The Court claims: “It is fundamental, in a democratic society to defend the free political debate. The Court attaches greatest importance to freedom of expression in the context of political debate and considers that political discourse should not be restrained without compelling reasons. Allowing large restrictions in any given case without a doubt would generally affect the respect for freedom of expression in the concerned state” (my translation). See ECtHR, *Brasilier v France*, Appl. No. 71343/01 11 April 2006, at §§42-44.

¹¹⁸³ *Brasilier v. France*, *ibid.*, at §43.

restrictions on speech, it also allows stricter scrutiny of the restriction, examining in the framework of its proportionality balancing test if the challenged State provided for “imperious reasons” for its restrictions on speech.

3.2. American Good Governance and Its Dependence Upon Public Criticism

476. Because good government requires the existence of public scrutiny, it is essential that the expression of criticism of public authorities is not hampered. In the United States, this freedom to criticize entails several dimensions: the possibility to bring public officials to the light of public criticism, and citizens’ freedom from public sanctions for uttering criticism. Based on these two principles, the Supreme Court seems to suggest that public opinion can thrive and become, in itself, an independent coercive force on public authorities.

3.2.1. Right to Bring Officials to the Bar of Public Opinion

477. Enabling public criticism of public authorities is one of the purpose of the First Amendment. This is what frequently quoted judge Cooley is indirectly asserting in *Wood v. Georgia* in 1962:

[It includes the need] to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in *authority to the bar of public opinion by any just criticism* upon their conduct in the exercise of the authority which the people have conferred upon them.¹¹⁸⁴

478. The picture judge Cooley draws of public opinion here is blurry. It is at the same time as a “bar”, a platform for speech, and almost a *tribunal* where public behavior and speech is judged. The image of the “tribunal” is also often used when referring to public opinion—for example the “court of public opinion”. It means that it is meant for speech, debate, but also *judgment*, and criticism of public authorities’ conduct in the fulfillment of their duties.

¹¹⁸⁴ T.M. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the state of the American union, Constitutional Limitations*, Boston Little, Brown, and Co., (8th ed. 1927). 1565 p.
p. 885, quoted in *Wood v. Georgia*, 450 U.S.261 (1962) and in *Elrod v. Burns*, 427 U.S. 347 (1976) (emphasis added).

479. The Supreme Court repeatedly reaffirmed this conception in following cases. Is it because of an underlying ideal of encouraging the formation of an informed opinion that the Supreme Court makes such effort to strongly protect public scrutiny of government and freedom of speech and criticism? That is what Justice Black observed in his concurrence in *Barr v. Matteo* in 1959:

The effective functioning of a free government like ours depends largely on the force of an *informed public opinion*. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.¹¹⁸⁵

480. American freedom to criticize “government” is therefore very expansive: it applies to all officials, from the least to the most important: employees and officials, elected or appointed. From the freedom of “criticize or applaud” governance in public depends public opinion’s possibility to understand actions of government, and possibility to exercise pressure to ensure “effective functioning”. However, one of the conditions for citizens to be able to criticize government freely is to be protected from abusive criminal or defamation lawsuits.

3.2.2. Citizens Freedom from Defamation Actions for Public Criticism

481. As a consequence of the freedom to criticize, officials should not be allowed to freely use libel and defamation actions against private persons and the press because of their criticism. This is what the Supreme Court declared in *New York Times v Sullivan* :

If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited..., then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. *Their ardor as citizens* will thus not be dampened and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important."¹¹⁸⁶

¹¹⁸⁵ *Barr v. Matteo*, 360 U.S. 564 (1959) (J. Black concurring), at 577.

¹¹⁸⁶ *New York Times Co. v. Sullivan* at 376 U.S. 254 (1964), quote is from Black concurrence in *Barr v. Matteo*, *op. cit.*

482. The Court is ambitious, echoing above-mentioned Justice Black’s concurrence in *Barr v. Matteo*, it wants to promote “the widest possible understanding” of government services by the population.¹¹⁸⁷ Such goal can only be achieved through an extensive protection of speech. The American ideal of public opinion is substantially contingent upon an effective freedom to criticize government, i.e. all public persons in a position of government, with “ardor”. Only in this way can a strong and arduous citizen body and an informed public opinion exist. In *Rosenblatt*, the Court commented on its own words in *Sullivan*, clarifying what public persons have to bear criticism of the way they fulfill their public duty: “[p]ublic official” designation applies at the very least to those among the hierarchy of government employees who have, *or appear to the public to have*, substantial responsibility for or control over the conduct of governmental affairs”.¹¹⁸⁸
483. Note that it does not matter that the person object of public criticism does have responsibility or control over public affairs. It matters that it does it the eyes of the public. The focus is therefore very much on public perception and judgment of government.
484. It does not matter in what tone criticism of public persons is expressed: even “outrageous” and satirical criticism is admitted. Consequently, the satirical interview of conservative politician Jerry Falwell—published in liberal magazine *Hustler* by intentionally controversial Larry Flynt—was deemed worthy of protection by the Supreme Court, even if the latter was outrageously depicted as practicing the opposite of the values he publicly defended. Not only is the constitutional value of public discourse independent of the motivations of the one expressing it, but:

in the world of public debate safeguarded by the first amendment, “[f]alse statements of fact are particularly valueless” because “they interfere with the truthseeking function of the marketplace of ideas.” It is especially important, on the other hand, “to ensure that individual expressions of ideas remain free from governmentally imposed sanctions,” particularly those opinions or ideas involved in the criticism of “public men

¹¹⁸⁷ *Barr v. Matteo*, *op. cit.*

¹¹⁸⁸ *Rosenblatt v. Baer*, 383 U.S. 75, (1966) (emphasis added), at 85.

and measures.” That freedom “is essential to the common quest for truth and the vitality of society as a whole.”¹¹⁸⁹

Thus in *Falwell*, the Supreme Court prohibit courts from enforcing against public discourse common standards of decency and morality or “civilized community”.¹¹⁹⁰ Post underlines that the Court approach to “truth” and public discourse suggested in *Falwell* had been proclaimed in 1974 in *Gertz v. Robert Welch, Inc.*:¹¹⁹¹

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of facts.¹¹⁹²

Those two decisions underline the Court opinion that public speech and criticism in no manner needs to comply with rules of rationality or discursive ideals to be deemed worthy of protection.

485. In order to criticize government, information must not be unduly restrained. In *Grosjean*, a freedom of the press case, Justice Sutherland quoted Judge Cooley’s discussion of one of the evils of democracy that should be prevented: “any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens”.¹¹⁹³ Therefore, preventing the press from communicating with the public through a tax on publications is to be prevented, since “a free press stands as one of the great interpreters between the government and the people”.¹¹⁹⁴ Note that Judge Cooley acknowledges the role of the press as organ of public opinion, that is communicator of government matters to the public, which contributes to opinion formation. Moreover, to him only restrictions meant to “prepare the people for an intelligent exercise of their rights as citizens”, and that are absolutely essential are admitted. We are in the dark as to what the meaning of this sentence is,

¹¹⁸⁹ *Hustler Magazine Inc. v. Falwell*, 485 US 46 (1988) at 879-80 (hereinafter “*Falwell*”), summarized by Post, “Public Discourse”, *op. cit.* p. 613.

¹¹⁹⁰ *Ibid.*, p.616.

¹¹⁹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹¹⁹² *Ibid.*, at 339-40, quoted by Post, “Public Discourse”, *op. cit.*, p. 621.

¹¹⁹³ *Cooley's 2 Constitutional Limitations* (8th Ed.) p. 886 quoted in *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936) at 249-250.

¹¹⁹⁴ *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936) at 250.

except to renew the ideal of an informed and “intelligent” citizen body, and to support application of a very high scrutiny on free speech restrictions.

486. The right to criticize governments and persons in position of power is so sacred that the Court refuses to grant a right of response in the press to public persons that have been criticized. In *Miami Herald Publishing Co. v. Tornillo*, plaintiffs contested the constitutionality of a law establishing a right of response in the Florida press, considering that it amounted to a content-based regulation of speech. Florida, to the contrary, justified it by the fear of press monopolies and the damaging effect with regard to the American ideal of an informed public opinion.¹¹⁹⁵ Moreover, the Florida Supreme Court had concluded that “free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the ‘broad societal interest in the free flow of information to the public’ ”.¹¹⁹⁶ The Supreme Court disagreed and concluded:

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak, because "the statute in question here has not prevented the Miami Herald from saying anything it wished," begs the core question. Compelling editors or publishers to publish that which "*reason' tells them should not be published*" is what is at issue in this case.... Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."¹¹⁹⁷

487. If even a right of response is seen as a threat on the free exchange of ideas, that is because public opinion is seen as a powerful, potentially coercive force of democracy.
488. The Court seems to believe that the ideal of informed public opinion cannot come at the cost of imposing upon the press an obligation to publish the response of a public person wishing to correct its public image. Public debate is hence the first ideal, the one that allows the second ideal of an informed public opinion to exist.

3.2.3. Judges’ Special Office and their Relations to Public Opinion

489. Does Freedom of Speech extend to judges? As in Europe, public confidence in the judiciary is important to American public governance. This issue was taken in several

¹¹⁹⁵ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), at 251-54.

¹¹⁹⁶ *ibid.*, at 245.

¹¹⁹⁷ *ibid.*, at 256-257.

Supreme Court cases. For example, in *Republican party of Minnesota v. White* in 2002, dissenting Justice Stevens treated the paradox between judicial elections and the specificity of the judicial mandate. At stake was the question whether the First Amendment allowed a state Supreme Court to prohibit candidates for judicial election from announcing their views on disputed legal and political issues. According to Stevens:

the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, *not his personal views or public opinion polls*. He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.¹¹⁹⁸

490. Hence to Stevens, the announcement of one's opinion on a controversial issue was intrinsically incompatible with the judicial office. In this case it is interesting to know why judges would be elected: most people seek to elect a candidate on his or her program, for the fulfillment of promises, instead of a personality, an integrity which should be the rationale behind the election of a judge. This explains Justice Stevens' assertion that judicial elections should follow neither "personal views" nor "public opinion polls". This begs the question, why allow for *elections of judges* if they are not elected based on personality and integrity but on political affiliations, promises and programs? Despite this, the Supreme Court decided that the Minnesota law was a content-based restriction on speech which was detrimental to the public, since it "places most subjects of interest to the voters off limits".¹¹⁹⁹

3.2.4. Public Opinion as Coercive Force

491. The force of public opinion is such that it can stand almost alone. Allied with other public actors such as the press, it has the force to uproot the truth into public life. Consequently, the ideal of an informed opinion doesn't impose upon public authorities the task to provide information on government activities. This is what transpires from case *Houchins KQED, Inc.* in 1978, when the Supreme Court asserted that public

¹¹⁹⁸ *Republican party of Minnesota v. White*, 536 U.S. 765 (2002), J. Stevens dissenting, at 799 (emphasis added).

¹¹⁹⁹ *Ibid.*, at 787

opinion was the only pressure that might compel anyone, including the media, to publish information potentially critical of public authorities—in that case, conditions of detentions and correlated rates of suicide.¹²⁰⁰ Although the press is an indispensable tool of information of public opinion, no previous case had “intimated that the Constitution compels the government to provide the media with information or access to it on demand”.¹²⁰¹ “Public bodies and public officers, on the other hand, may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known”.¹²⁰² It is practically difficult to see how public opinion would be able to become a pressure by itself to publish an information it did not possess without the help of the press. It is possible that the Supreme Court meant that in order for journalists to be allowed access by public authorities to the prison they wanted to report upon, they would have to rely on pressures and demands only public opinion could exercise and that public authorities couldn’t resist.

492. Criticism against government can take many forms: anti-war speech,¹²⁰³ burning flags,¹²⁰⁴ or criticism of public officials. It also can originate from public employees themselves, acting as whistleblowers.¹²⁰⁵ According to the Supreme Court, such forms of speech are all protected by the Constitution.
493. For example, in *Texas v. Johnson*, the Supreme Court protected flag desecration as a form of speech, an “expressive conduct” of a “political nature” that could not be criminalized by state authorities. Rather than criminalization, the Court advocated a more rational approach to what public responses to flag desecration should look like,

¹²⁰⁰ *Houchins KQED, Inc.* 438 U.S. 1 (1978).

¹²⁰¹ *Ibid.*, at 9.

¹²⁰² *Ibid.*, at 14.

¹²⁰³ See for example *Bond v. Floyd*, 385 U.S. 116 (1966) (case concerning the freedom of speech of a member of a state chamber of representatives and his freedom to criticize the United States war policy in Vietnam. The Court considered that the representative did not incite citizens to violate the law. Moreover the state could not limit a representative to express his views on local or national policy.)

¹²⁰⁴ *Texas v. Johnson*, 491 U.S. 397 (1989) (case concerning the burning of an American flag as a sign of protest. The Supreme Court considered this action as a form of speech, considering that expression of an idea could not be prohibited on the ground that it is found offensive by society).

¹²⁰⁵ For example in recent case *Lane v. Franks*, 573 U.S. __ (2014) (case pertaining to a public employee having been laid off in retaliation of his whistle-blowing testimony in a criminal case on information he had been made aware during his employment. Plaintiff contained that it was a violation of his freedom of speech. The Court considered that Lane’s testimony had been made in his capacity of citizen and not as a part of his employment duties. Thus, Lane’s speech was protected under the 10th Amendment. However, Lane was not protected against the lay-off as public employee testimony was not considered protected speech.)

through rational debate: “The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” Justice Rehnquist, however, disagreed with these conclusions, claiming: “The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government.” Justice Rehnquist disagreed with the Supreme Court decision, accusing his colleagues to treat Texas authorities as “truant schoolchildren” for having done what public opinion had commanded them to do: “one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people - whether it be murder, embezzlement, pollution, or flag burning”.¹²⁰⁶ Texas thus had legitimately enforced through law the will of the majority, i.e. punishing a profoundly offensive act that is flag burning. Rehnquist's dissent reveals the internal tension within the Supreme Court at the time between its members tendency to promote public debate as alternative to the criminalization of offensive speech and their willingness to respect of the consent of majorities. Once again, the Supreme Court privileged public debate and the prohibition of content-based speech restrictions over the will of majorities in a controversial and probably emotionally-charged case regarding the desecration of the main national symbol: the American flag.

4. Promoting the Ideal of an Informed Public Opinion

494. The Supreme Court and the European Court of Human Rights both protect the development of an ideally informed and rational public opinion. However, they protect freedom of expression differently to reach that end. I argue that in the United States, heightened scrutiny over restriction of public concern speech has been a tool used to that end. In Europe, following the Convention's guidelines, the Court gave special protection to the press in its capacity as provider of information to the public.

4.1. American Protection of Public Concern Speech

495. In the United States, the Supreme Court devised a variety of legal tests to balance the delicate goals of speech protection with the desire to avoid undesirable or abusive speech in the public forum. To this end, the Court had to decide what kind of speech

¹²⁰⁶ *Texas v. Johnson, ibid.*, at 435.

deserved reinforced protection, and which did not; or which speech deserved less or no protection. One of the first tools was the categorical approach of “protected” and “unprotected” speech (*Schenck* and *Abrams* approach)¹²⁰⁷ that I explained in the first section. Another was the risk approach (*Dennis v. United States*), allowing restriction on speech depending on its likely dangerous consequences.¹²⁰⁸ A third one was to determine what speech was deemed more protected as it touched topics of special importance to the public, or “public concern” speech. Indeed, to the Supreme Court “speech concerning public affairs is more than self-expression; it is the essence of self-government”. I maintain that the use of this loosen standard by the Supreme Court speaks to its philosophy of the kind of public opinion it deems worthy of protection. It also speaks to the dilemma of what it can protect in practice.

4.1.1. Public Concern Speech and the Promotion of the Ideal of Informed Opinion

496. Protecting speech, in practice, means potentially protecting many worthy causes, and many potential societal changes, for without public speech, citizens would not know they can gather with others for a common purpose. It also means protecting private persons and public figures from public lies, abuse, defamation, and scandalous utterances communicated in public, possibly in the media. Striking a balance between protecting speech and protecting people from damaging or abusive speech is one of the roles of tribunals. The doctrine of “public concern” was born for that purpose; striking a balance between the needs of reputation and publication of private information that is of interest to the public into the public forum. Protecting speech means shielding speech from legal actions so it can safely be proclaimed in public without fear of retribution, whether or not it is true, or damaging to the reputation. The Supreme Court decided that topic of public concern would be protected and could therefore be freely discussed in public, however what was not deemed in the public interest could legitimately be punished.

4.1.1.1. The Doctrine:

497. In *New York Times v. Sullivan*, for a unanimous court, Justice Brennan declared:

¹²⁰⁷ *Schenck v. United States*, 249 U.S. 47 (1919), *Abrams v. United States*, 250 US 616 (1919).

¹²⁰⁸ *Dennis v. United States*, 341 U.S. 494 (1951)

The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view *on matters of public concern* and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.¹²⁰⁹

498. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹²¹⁰ Justice Powell proclaimed the importance of public concern speech to First Amendment. In Arlen Langvardt's words, Justice Powell explained that:

all of the Court's earlier defamation cases which presented first amendment questions had involved matters of public concern. Speech on such matters was said to be at the core of first amendment protection, whereas speech on matters of private concern was regarded, in Justice Powell's view, as of lesser first amendment significance.¹²¹¹

499. The court explained more in *Rosenblatt v. Baer*. There it specified that criticism is meant to lead to public debate: "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues."¹²¹² This excerpt suggests that public debate, i.e. public discourse on issues of interests to the public, is the first step towards "resolution of issues" through common decision making, which is also to "engage in a process of "collective self-definition".¹²¹³

¹²⁰⁹ *New York Times Co. v. Sullivan*, at 376 U.S. 254 (1964), at 298-299.

¹²¹⁰ *Rosenblatt v. Baer*, 472 U.S. 749 (1985). The case involved the publication, sent to a limited number of subscribers, of a report containing false financial information about Greenmoss Builders, Inc. Greenmoss sued Dun & Bradstreet in defamation for publishing these damaging false statements. In *Gertz*, ten years later, the plurality held that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern", *Gertz v. Robert Welch*, 418 U.S. 323 (1974), at 2948.

¹²¹¹ A. Langvardt, "Public Concern Revisited, A New Role for an Old Doctrine in the Constitutional Law of Defamation", *Valparaiso University Law Rev.*, Vol.21, No.2, (1987)

¹²¹² *Rosenblatt v. Baer*, 383 U.S. 75 (1966), at 85.

¹²¹³ R. Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*", *Harvard Law Review*, Vol. 103, No. 3, 601 (1990), hereinafter "Public Discourse") quoting Hannah Pitkin, p. 671. H. Pitkin, "Justice: On Relating Private and Public", *Political Theory*, Vol. 9, 327, 346 (1981).

500. Protection of freedom of speech means protection of many means of persuasion. In *Cantwell* in 1940, the Court set the bar high. Its goal was to foster the building of an informed public opinion:

To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, *in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.* The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.¹²¹⁴

In other words, the very existence public debate demands freedom of speech about past and present public persons despite possibilities of abuse. This “probability” of abuse is not, however, unavoidable and still leaves room for an “enlightened opinion”. Therefore, public authorities may neither constrain (“unobstructed”) nor threaten (“unmolested”) speech in a way that could prevent it from being expressed. The process of opinion building is dynamic: citizen have to work and develop it.

4.1.1.2. Defining Public Concern

501. Over the years, the definition of “public concern” speech adopted by the Supreme Court varied from underinclusiveness to overinclusiveness.¹²¹⁵ It was defined in *Connick v. Myers* as “fairly considered as relating to any matter of political, social or other concern to the community”,¹²¹⁶ or in *Snyder v. Phelps* as “subject of general interest and of value and concern to the public”.¹²¹⁷ Those two definitions are general enough to be applied broadly or restrictively.

502. To better understand the stakes, let us use Robert Post’s discussion of the two types of “public concern” speech. To him one can distinguished between the “normative”

¹²¹⁴ *Cantwell v. Connecticut*, 310 US 296 (1940) at 310 (emphasis added).

¹²¹⁵ For a detailed history of public concern jurisprudence see C. L. Estlund, “Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category”, *George Washington Law Review*, Vol. 59, 1, 55 (1990).

¹²¹⁶ *Connick v. Myers*, 461 US 138 (1983).

¹²¹⁷ *Snyder v. Phelps*, 562 US __ (2011) quoting *City of San Diego v. Roe*, 543 US 77 (2004).

conception, where “the speech at issue is about matters that ought to be of interest to those who practice the art of democratic self-governance”, and the “descriptive” conception, where “the speech at issue concerns matters that large numbers of people already know, and thus are “public” in a purely empirical sense”.¹²¹⁸

503. In practice, the discernment is not always easy. For example in the *Connick v. Myers* case of 1983, an Assistant District Attorney was laid off because of her internal speech pertaining to the way her department, a public office, was run by her hierarchic superiors and the working conditions in that department. To the Supreme Court, Myers’ speech was not protected because it did not qualify as “public concern speech”; it regarded internal working conditions of a public office. Justice Brennan dissented on this issue, considering that public speech regarding the way a public office was run was a matter of public concern. In this context, the Supreme Court referred to the normative kind of public concern speech.
504. *Myers* reveals how delicate that standard is. In that case, protection of speech was dependent on whether it was a matter that was of public importance, issue on which Justices were divided. Brennan considered that “Myers’ questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities.” In a society striving to reach the ideal of informed citizenship, all speech related to management of public office, no matter how internal, would be deemed as public concern speech. This is probably where the Court wanted to strike a limit: considering the number of publicly run offices, and the special needs involved to insure efficiency, not all internal matters should be the object of public discussion.
505. Under constitutional jurisprudence, to qualify as “public concern” the speech also has to contribute to public information in some way. Consequently, in 2004, in *San Diego v. Roe*, the Court concluded that the speech in dispute was not protected as it “did nothing to inform the public about any aspect of the [employing agency’s] functioning or operation”.¹²¹⁹ In assessing whether speech deserves protection, it seems that the

¹²¹⁸ Post, “Public Discourse”, *op. cit.*, p. 669.

¹²¹⁹ Snyder, *op. cit.*, quoting *San Diego v. Roe*, 543 U. S. 77, 83 (2004).

Supreme Court hesitates between the nature of the speech, i.e. the fact that it concerns the public, and its ideal, i.e. that it informs or seeks to inform the public. This hesitation is due to the dilemmas Justices have to face when assessing public concern.

4.1.2. Le Dilemmas of the Public Concern Doctrine

506. The public concern doctrine was designed to protect speech with a view to allow a smooth functioning of American democracy. Here Justices seek to balance the protection of democracy, which needs an informed public opinion. It entails deciding what public concern entails or does not so as to protect speech the public needs information about. But the Court does not seek to select the substance of information needed by the public. Hence protecting speech also requires making space for speech that is not favored (yet) by mainstream opinion.

4.1.2.1. Protecting the Democratic Process

507. The problem facing the public interest and concern doctrine is similar than the one facing the categorical approach, with one main difference: while the categorical approach to speech is dependent on community norms—meaning majority opinion may ban certain types of speech from the public forum because they are “unprotected”—the definition of public concern depends on judicial subjectivity. It requires from judges to decide what topic is of sufficient interest to the public to deserve special protection, and therefore what is not.
508. If protecting speech on public concern issues is meant to facilitate the democratic process, leaving judges to decide what qualifies or not as of interest to the public is problematic. That is what Robert Post explains, when he uses as example an article of Justice Warren and Brandeis¹²²⁰ regarding public debate over the lifestyle of judges, which they had regarded as “idle” and therefore of no public import. Amused by the academic article since it was written on a topic pertaining to the Justices’ own private lives, Post remarked:

The fundamental theoretical difficulty faced by writers like Warren and Brandeis, who would place limits on what *ought* to be pertinent to the formation of a common democratic will, is that any effort substantively to circumscribe public discourse is

¹²²⁰ S D., Warren, L. Brandeis, “The Right to Privacy”, *Harvard Law Review*, Vol. 4., 193 (1890).

necessarily self-defeating, for it displaces the very democratic processes it seeks to facilitate.¹²²¹

509. Judges could, consciously or not, enforce their own *normative* ideal of enlightened public opinion by protecting only topics that are of sufficient interest *to them*, be tempted to withdraw protection to speech on topics they do not care about or that would not serve their own public standing, instead of protecting what Post calls the “descriptive” type of public concern speech.
510. In *Snyder v. Phelps* in 2011, the Supreme Court acknowledged that problem, considering that although “the boundaries of the public concern test are not well defined”,¹²²² “we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.” However, Courts always possess a certain degree of discretion: “In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate *all aspects of the speech*”.¹²²³ However, where the majority decided that attacks aimed at a deceased homosexual soldier and his family, in the proximity of its funeral, touched issues larger than homosexuality, i.e. respect for a grieving family, the United States army policy toward homosexuals, the Roman Catholic Church stance on homosexuality, and moral issues. Therefore, it qualified as public concern speech and was entitled to First Amendment protection.
511. Justice Alito dissented. Describing “*all aspects of the speech*” in dispute as going beyond the attacks at the funeral, since more attacks had been published online, and considering that they were specifically aimed at a private person and his family, he concluded the speech was of no “public concern”, and therefore should not be protected.¹²²⁴ The speech in dispute resembles more a “fighting word”, which under the categorical approach of *Abrams* was an unprotected category. Consequently, the Court was not compelled to protect it, unless it qualified as public concern speech. This case shows that the guiding principles do not suffice for judges to agree, and consequently

¹²²¹ Post, “Public Discourse”, *op. cit.*, p. 672.

¹²²² *San Diego v. Roe*, 543 U.S. 77, 83 (2004) (*per curiam*).

¹²²³ Test as defined in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 761.

¹²²⁴ *Snyder v. Phelps*, *op. cit.*, (Alito, J. dissenting).

do not prevent the courts from becoming “inadvertent censors” of the type of worthy speech that should or should not be protected in the public forum.¹²²⁵

4.1.2.2. *Protecting Speech Against Public Opinion Diktats*

512. The public concern criterion also serves the purpose of protecting speech against community norms, i.e. the type of speech that is deemed publicly acceptable. In his article on public discourse, Robert Post explains the unease of First amendment speech protection. The very existence of a “public”, and a “public discourse” within a political community depends, at least in theory, upon the existence of a few conditions, among which the existence of a space for “confrontation of divergent attitudes”¹²²⁶ through discourse with set standards of meaning and evaluation. The community norms of life and discourse, such as the standards of outrageous speech or public morals, may go against the very conditions of the existence of an unrestrained public discourse within which debate can flourish. We encounter a paradox, that of the “complex dependence of public discourse upon the very community norms that it negates, and by our queasy apprehension that those norms cannot entirely be maintained without the impersonal authority of law”.¹²²⁷ Thus, we need the law to set the standards of discourse for public debate unimpaired by community norms.

513. Therefore, leaving the law and judges to decide what qualifies as public concern, if they keep a liberal large view of it has several advantages¹²²⁸ since “every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern”.¹²²⁹ Firstly, because of its thirst for information, the public might decide it wants to hear everything about anything, but

¹²²⁵ That is what Marshall said in his dissent in *Rosenbloom*: The Court repudiated this proposal because of its doubts concerning “the wisdom of committing ... to the conscience of judges” the task of determining “what information is relevant to self-government.” *Gertz v. Robert Welch*, 418 U.S. 323 (1974) quoting *Rosenbloom*, 403 U.S. 29 (1971), at 346 (Marshall, J., dissenting).

¹²²⁶ Here Post uses Carroll Clark’s statements on the conditions through which a public can exist: “Carroll Clark noted that “[b]efore a group can become a public there must be a confrontation of divergent attitudes involving the tacit or expressed rules that set the pattern of behavior and fix judgment of consequences.” Post, “Public Discourse”, *op. cit.*, p. 633, quoting C. Clark, “The Concept of the Public”, *Southwestern Social Science Quarterly*, Vol. 13, 311, 314 (1933).

¹²²⁷ Post, “Public Discourse”, *op. cit.*, p. 643.

¹²²⁸ To this extent the Supreme Court had a fairly large view of public concern speech: it can be “fairly considered as relating to any matter of political, social or other concern to the community” *Connick v. Myers* 461 U.S. 138 (1983) at 146) or “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public (*Snyder v. Phelps*, 562 U.S.443 (2011) quoting *San Diego v. Roe*, 543 U. S. 77 (2004) pp.83–84.)

¹²²⁹ Post, “Public Concern”, *op. cit.*, p. 670.

ban speech it does not want to hear, thereby hindering democratic change. Therefore, protecting public concern speech protects debate from such risks. Secondly, speech is protected whatever its content and whether or not it is consistent with community norms: it protects minorities speech against public desire to restrict it. For example, in *Cantwell*, the Court refused to impose “civility rules” of religious communities on another, not only because it would seem unfair to one community, but also “because it perceived communities as labile and evolving”.¹²³⁰ Enforcing a community norm may fix the norm and keep it from developing.¹²³¹ But to protect the flourishing of public discourse, the law will go so far as to protect the burning of the American flag, “the very symbol of the values of individualism and diversity”.¹²³²

514. Another dilemma is that the broader the amount of speech the expression “public concern” contains, the less private reputation is protected against the press.

4.2. Free Press and the Protection of the Public Against Abuse

515. The press is an organ of public opinion, a communicator of public issues between government and the public. However, because of its freedom, the press is also no neutral entity. It is not neutral towards government, thereby protecting the public against abuse of public authorities. It is also not neutral private persons of politicians and could be caught to abuse its power of communications to the public, capable of deservedly or undeservedly damaging reputations of public and private persons. In assessing freedom of the press, courts have to balance the need to preserve press freedom in the name of dynamic public debate and democracy and avoiding abuse by the press of its power over the formation of public opinion.

4.2.1. The Need for the Press Against Government Abuse

516. In the 1930s, the Supreme Court had to decide many cases with regard to freedom of the press and set its boundaries. In *Grosjean*, the Court had to decide if a tax on newspaper based on numbers of published issues constituted an infringement on freedom of the press. Because of its irreplaceable role, *i.e.* on the fact that organs of the

¹²³⁰ *Ibid.*, p. 630, referring to this passage in *Cantwell*.

¹²³¹ “The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.” *Cantwell v. Connecticut*, 310 U.S. 296 (1940), at 310.

¹²³² Post, “Public Concern”, *op. cit.*, p. 645.

press “have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity”,¹²³³ the Court concluded that freedom of speech had been infringed upon. The main motivator for this conclusion was its role as provider of information to public opinion:

Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern... *A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.*¹²³⁴

517. The press serves as an intermediary between government and the public. Freedom of the press serves to enforce the normative definition of public opinion: “an enlightened people”.¹²³⁵ Therefore, a tax on press prints is an unconstitutional restraint upon the press’ main means of information to the public. This information, the public entitled to receive it so as to fulfill its potential to become an “enlightened public opinion”.¹²³⁶
518. However, the Court also acknowledged that freedom of the press could be abused and that on such occasion, it deserved “the severest condemnation in public opinion”.¹²³⁷ If the press serves the public’s capacity to scrutinize government’s actions, it can also be the object of scrutiny. A condemnation of the press in public would dampen public opinion’s trust in the press and weaken democracy. However, the Court continues, despite its worse actions, the role played by the press is irreplaceable. Indeed, since the founding of American democracy,

the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that *the liberty of the press may be abused by*

¹²³³ *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936), at 250.

¹²³⁴ *Ibid.*, at 250-251.

¹²³⁵ *New York Times Co v. Sullivan*, 376 U.S. 254 (1964) at 305. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

¹²³⁶ *Grosjean, op. cit.*, at 247.

¹²³⁷ *Near v. Minnesota*, 283 U.S. 697 (1931) at 719.

miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.¹²³⁸

519. Once again, the liberty of the press plays as safeguard guarantor of good behavior among public servants through free public debate.
520. Other constitutional rights pertain to the importance the press plays in contemporary democracy: for example, the right to a public trial. In a footnote in *Houchins*, the Justices explain that the right to a free trial is meant as much for the accused than for the sake of the “public’s right to know”.¹²³⁹ It also works as a restraint on “possible abuse of judicial power”.¹²⁴⁰ The Supreme Court’s protection is therefore centered around public opinion.

4.2.2. Protecting the Public Against the Press

521. At its inception, the public concern doctrine discussed above often applied to cases pertaining to reputation and filed by public and private persons against the press. Protecting freedom of the press means protecting potentially truthful but also potentially highly damaging information that would be made very visible to the public.¹²⁴¹ In these cases, at stake was not only freedom of the press to disclose information, but also the press’ due diligence in making sure published information was accurate and not unnecessarily damaging to reputations. In such cases the Supreme Court had to determine where the freedom of the press stopped and where reputation protection started. The Supreme court deemed the need of free debate in American democracy to be a more compelling goal than private reputation and required that knowledge and malicious intent were proven by the victim of speech so as to qualify for damages. Any other option, so the Court, amounted to “saddling the press”.¹²⁴²

¹²³⁸ *Ibid.*, at 719-720.

¹²³⁹ *Houchins v. Kqed, Inc.* 438 U.S. 1 (1978). In the majority opinion, at Footnote 32, the court declares: "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake..." (cited from *Lewis v. Peyton*, 352 F.2d 791, 792 (CA4 1965)).

¹²⁴⁰ "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257 (1948), at 270.

¹²⁴¹ Like for example in the above-cited case of *Dun & Bradstreet, op. cit.*

¹²⁴² "We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself

522. In *Gertz v. Welch*¹²⁴³ again the Supreme Court had to weigh two types of interests. Firstly, it had to consider the interest of press to avoid libel actions after every contestable utterance about a private person. Secondly, it had to ensure eventual needs to protect private persons' reputation. The Court imposed on private persons such evidentiary constraints that their defamation case was more difficult to prove in Court. Justice White objected to this outcome. Citing *Near v. Minnesota ex rel. Olson*,¹²⁴⁴ where the Supreme Court had stated that "it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public",¹²⁴⁵ Justice White declared:

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. *This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth, but, on the contrary, may frustrate that search, and, at the same time, inflict great injury on the defenseless individual.*¹²⁴⁶

523. To Justice White, false information does neither serve public interest nor the search for truth. Note that Justice White does not emphasize the interest of public debate, which may lead to the truth but does not always lead to the truth, but the contribution of the press to the search for truth. Moreover, is in the interest of the public at large that the press, which he appears to see as a number of wealthy organizations with more means than the private person, should carry the burden of its mission as purveyor of information, i.e. "what is essentially a public benefit derived at private expense".¹²⁴⁷ It seems that in Justice White's view, the public needs protection against potential lies of the press.
524. *Gertz* is an example where the "public concern" criterion served to protect damaging speech at the expense of a private person's reputation. However, it would difficult to

affords no warning of prospective harm to another through falsity. Only knowledge of falsity will convict the press." *Time Inc. v. Hill*, 385 U.S. 374 (1967) at 389.

¹²⁴³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹²⁴⁴ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931).

¹²⁴⁵ *Ibid.*, at 715.

¹²⁴⁶ *Gertz, op. cit.* at 392 (White, J. Dissenting).

¹²⁴⁷ *Ibid.*

maintain that false information would do anything to maintain the ideal of an informed and enlightened opinion.

525. Overall, in its dealings with the balance between protecting freedom of speech or of the press and reputation, the Supreme Court always choses the one that allows more speech and more public debate, whatever the content. Whether the Supreme Court protection of speech is centered around building a strong public opinion, its promotion of an informed opinion used to enable more speech is not always clear, as both grow in symbiosis.

4.3. The Press as Watchdog of European Democracy

526. The press is at the center of political expression, an expression having at its core the discussion of public governance generally. According to Mathilde Hallé, when protecting political expression, the European Court aims at encouraging a free and enlightened political debate within society. It seeks to “favor, within the conscience of each citizen the formation of an independent opinion, not to discourage the expression of a political opinion even when uttered by the average citizen. [Moreover, the Court] correlates this goal with the personal fulfillment of the speaker, thereby lending freedom of political expression several dimensions”.¹²⁴⁸ In the meantime, the Court “seeks to ensure that the media always denounces excesses, bullying, deviations, even atrocities”. For this reason, a strong framework of protection of freedom of the press is necessary. Meanwhile, the concept of “public interest” is underlying the Court’s whole framework of protection.

4.3.1. Necessity of Press Protection

527. In Europe, the freedom of the press is heavily protected, because “In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion”.¹²⁴⁹ Freedom of the press is considered indispensable to the rule of law in a democratic

¹²⁴⁸ M. Hallé, “Discours politique et Cour européenne des droits de l’homme - Fondements et limites de la liberté d’expression politique dans la jurisprudence de la Cour de Strasbourg”, Bruxelles, Bruylant (2010), p. 16.

¹²⁴⁹ ECtHR, *Incal v. Turkey* [GC], Appl. No. 22678/93 at §54.

society,¹²⁵⁰ since it plays a role in “ensuring the proper functioning of a political democracy”¹²⁵¹ satisfying the need of the public to receive information¹²⁵² and to enable public debate.¹²⁵³ The press is considered a “watchdog” of democracy.¹²⁵⁴ Following, any restriction on freedom of the press is examined under strict scrutiny. It is especially the case when it comes to a “topic of general interest”.¹²⁵⁵

4.3.1.1. A Right to Be Excessive

528. Because of its public role of communicator and commentator of current events, the press has the privilege to choose its language:

In the context of a public debate the role of the press as a public watchdog allows journalists to have recourse to a certain degree of exaggeration, provocation or harshness. It is true that, whilst an individual taking part in a public debate on a matter of general concern – like the applicant in the present case – is required not to overstep certain limits as regards – in particular – respect for the reputation and rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements.¹²⁵⁶

529. The right to be excessive also exists at the cost of private persons’ reputation. In the case of *Kuliś v. Poland* in 2008, the abovementioned “harsh” statements were made by a journalist, Kuliś, in the context of Mr Kern’s communication to the media of the kidnapping of his daughter. Mr Kern was a public servant. He had accused the mother of his daughter’s boyfriend to be the author of the kidnapping. As a public person, and in the context of criminal proceedings, comments made in the press about Mr Kern qualified as “matters of public interest” since “issues relating to Mr Kern’s family life were closely linked to his standing as a politician and contributed to a public debate.” The journalist Mr Kuliś had been condemned for damaging Mr. Kern’s reputation through his public comments on his family life. The European Court considered that his freedom as a journalist had been infringed upon by the condemnation. The Court added “in that connection that, in this field, political invective often spills over into the

¹²⁵⁰ ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Series A No. 236, 23 April 1992, at §43.

¹²⁵¹ ECtHR, *Erdoğdu and Ince v. Turkey*, Appl. Nos. 25067/94 and 25068/94, 08 July 1999, at § 48.

¹²⁵² ECtHR, *Jersild v. Denmark* [GC], Appl. No. 15890/89, 23 September 1994, § 31.

¹²⁵³ *Ibid.*,

¹²⁵⁴ ECtHR, *Thorgeir Thorgeirson v. Iceland*, Appl. No. 13778/88, A 239, 25 June 1992, §63.

¹²⁵⁵ See ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Series A No. 236, 23 April 1992, §48.

¹²⁵⁶ ECtHR, *Kuliś v. Poland*, Appl. No. 15601/02, 18 March 2008, at §47.

personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society”.¹²⁵⁷ Therefore, in the case of public person, who consciously exposes himself and his reputation to the public eye, such as in this case through a press announcement and public accusation of the mother of the kidnapped girl’s boyfriend, is expected that public image could be damaged in the process of the free debate of ideas.

4.3.1.2. A Duty to Impart Information

530. The press does not have the privilege but the task, almost the duty to impart potentially disturbing and controversial information. For example, in *Erdoğu and Ince v. Turkey* in 2003, the court declared:

While the press must not overstep the bounds [of state interests], it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.*¹²⁵⁸

531. A few elements transpire from this excerpt: firstly, the press has a duty to inform. Secondly, the public has a right to receive information and to form an opinion on political leaders and their actions. Thirdly, while the European court does not indicate what sort of opinion it is referring to, public opinion does not seem idealized: opinion does not need to be “informed” or “enlightened”. Finally, while in the United States, the Supreme Court stresses more the indispensable role of the press, its freedom, its role as a counter-power and its contribution to public debate to the ideal of informed and enlightened public opinion, the European Court stresses the press’ duty towards the public more.

532. The role of the press is so important that:

[Unless the] publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion

¹²⁵⁷ Kulis, *ibid.*, quoting Lopes at §52 (see ECtHR, *Lopes Gomes da Silva v. Portugal*, No. 37698/97, 28 September 2000, at § 34.

¹²⁵⁸ ECtHR, *Erdoğu and Ince v. Turkey*, Appl. Nos. 25067/94 and 25068/94, 08 July 1999, at § 48.

of violence, ...Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.¹²⁵⁹

533. The main substantial restriction on freedom of the press in Europe therefore depends on its effect on the public. Thus, press speech inciting to violence may be restricted more easily.

4.3.3. *Protecting Speech Content*

534. Reporting on objectionable attitudes does not mean supporting them. Content-based constraints on the press impinges on public debate. This is the case in *Jersild v. Denmark*, where the dispute was provoked by the publication of an unamended interview of a group of Danish neo-Nazis. The plaintiff was a journalist who had reported the racist speech as it had been expressed, without commenting on it. He was subsequently fined because the absence of comment showing disagreement with racist speech was deemed a tacit agreement of the interviewer. The plaintiff claimed that “The public also had an interest in being informed of notoriously *bad social attitudes*, even those which were unpleasant. The program was broadcast in the context of a public debate which had resulted in press comments, for instance in Information, and was simply an honest report on the realities of the youths in question”.¹²⁶⁰ The Court agreed:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper *the contribution of the press to discussion of matters of public interest* and should not be envisaged unless there are particularly strong reasons for doing so. In this regard, the Court does not accept the Government’s argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.¹²⁶¹

535. The court therefore does not support content restrictions on speech, even if it is “bad social attitudes” reminding people of the darkest hours of contemporary history. Without saying it, the Court also implies that fining the press has a chilling effect on reporting, and consequently on public information. The Court confirmed that view *in*

¹²⁵⁹ ECtHR, *Şener v. Turkey*, Appl. No. 26680/95, 18 July 2000, at §42 (emphasis added).

¹²⁶⁰ ECtHR, *Jersild v. Denmark*, [GC], Appl. No. 15890/89, 23 September 1994, at §13.

¹²⁶¹ *Ibid.*, at § 31.

Timpul Info-Magazin and Anghel v. Moldova in 2007: “the Court takes note of [the fine’s] chilling effect on the applicant newspaper, and that its imposition was capable “of discouraging open discussion of matters of public concern”.

536. Therefore, the European content-protection of speech is based on the press’ contribution to public discussion on matters of public interest, without which public opinion could not be formed. Moreover, the seriousness of the sanction on speech does not matter as any sanction on speech may have a chilling effect on public discussion. Remains to be seen what public interest speech entails that the Court believes is needed in democratic society.

4.3.1.3. Freedom of the Press and Contributions to General Interest Debate

537. While public discussion of issues of “public concern and interest” strengthen freedom of speech in the United States by encompassing an endless variety of issues the public might – legitimately or not – be interested in being informed or entertained about, the European Court protection is more focused on debate on issues of general interest that apply to public governance-related issues.
538. “General interest” is underlying the whole framework of protection of general or political interest debate in Europe. It is, however, a very vague notion that is used on a case by case basis. It resembles more a “process, dynamics, a spur that guides judges rather than a fixed immanent value”.¹²⁶² As mentioned above at section two, the essential function of freedom of speech to the European legal and political order limits the types of general interest that justify restrictions to this right. It cannot, according to dissenting judge Walsh, be equated with government policy.¹²⁶³ Also, public interest

¹²⁶² Hallé, *op. cit.*, p. 16.

¹²⁶³ Dissent : J walsch: dissent in Observer and Guardian : " 5. In view of the fact that the claim of confidentiality made in support of the initial application for a restraining order never made clear that a true breach of confidentiality was imminent, namely that true facts were threatened with disclosure, the Attorney General’s position, which it was sought to protect, was never really made known at that stage. In my opinion the circumstances were insufficient to bring the case within the area of restrictions permitted by Article 10 para. 2 (art. 10-2) of the Convention. It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The public interest invoked by the Government appears to be equated with Government policy. That policy may very well justify, in the Government’s view, making every effort to stem leakages from the Security Service or indeed in the interests of that service to take no action at all to deal with the allegations or indeed to pursue Mr Wright in any way available. These are policy matters and are not grounds for invoking the restrictions permitted by Article 10 para. 2 (art. 10-2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom." Walsch J. dissenting, at § 5.

may not be assimilated with the state of public opinion: public opinion intolerance is no reason for offensive speech restriction.¹²⁶⁴ In the *Sunday Times* case, the Court made clear that “enlightened” public opinion was an ideal for the smooth functioning of democracy, and that to this end issues of public interest topics should be allowed to be discussed in public communications fora.¹²⁶⁵

539. Public interest topics are clearly topics of interest to public opinion or the wider public i.e. not only the electorate. That is what the Court implies in *Timpul*: “The Court notes that, in the present case, public opinion could be legitimately interested in the integrity of the transaction since the public authorities had failed to disclose any details concerning the purchase of the cars, the more so as D.H.'s president held an important advisory function within the Government.”¹²⁶⁶ However, public interest alone is not enough. In *Von Hannover v. Germany* in 2012, the European Court mentioned that in order for press speech to be protected, the press must also contribute to the formation of public opinion or a debate of general interest.¹²⁶⁷ However in *Tierbefreier* in 2014, where an association was constrained from publishing footages secretly taken from a pharmaceutical facility using animals for testing, the Court further explained the meaning to a contribution to public opinion formation, putting emphasis on the freedom of individuals to form an opinion without undue disturbances:

The rules of intellectual battle of ideas were not subject to an express definition. They derived from the principle that an expression of opinion warranted special protection if it contributed to a debate of public interest. The rules were breached if the outcome of the intellectual debate was influenced by unfair means. Polemic statements or statements provoking specific emotions and moods did not yet constitute unfair means. Unfair means were, however, employed if a public exchange of opinion was suppressed

¹²⁶⁴ For more on public interest see Section 4 below.

¹²⁶⁵ ECtHR, *Sunday Times v. United Kingdom*, Appl. No. 6538/74, 26 April 1979, at §65.

¹²⁶⁶ ECtHR, *Timpul Info-Magazin And Anghel v. Moldova*, 42864/05, 27 November 2007, at §34.

¹²⁶⁷ On the topic of public image contribution to public opinion formation, see von ECtHR, *Hannover v. Germany* [GC], Appl. Nos. 40660/08 60641/08, 07 February 2012 (Hereinafter “Von Hannover 2”), at §§119-125: “The Court also observes that the Federal Constitutional Court stated in its judgment that where an article was merely a pretext for publishing a photo of a prominent person, no contribution was thereby made to the formation of public opinion and there were therefore no grounds for allowing the interest in publication to prevail over the protection of personality rights... The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.” The Court also observes that the national courts explicitly took account of the Court’s relevant case-law.”

by intimidation or agitation, or if a distorted impression was created through misinformation. The consequence of a breach of the rules of intellectual battle of ideas was that the weight of freedom of opinion was reduced.¹²⁶⁸

540. The contribution to public debate can never be so strong as when involving the improper conduct of a public prosecutor: “The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”.¹²⁶⁹ In the case of *Guja v. Moldova*, the nature of the contribution to public debate by a civil servant made his dismissal disproportionate to the aim to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State.¹²⁷⁰
541. Public interest debate is often the threshold to the protection of reputation of public persons. For example, the lack of contribution to the public interest justifies a constraint on reputation damaging speech.¹²⁷¹ Conservatory measures holding the publication date of a book on a matter of public interest may be admitted by the court insofar as they do not inform on the final decision of a legal issue. However, condemnation of the publisher for disclosing an information of public interest, in that case the medical condition of a candidate and his ability to be president of a country, constitutes an infringement on freedom of speech. In *Editions Plon v. France*, a publisher printed a book on the past public secret surrounding the health of deceased former French president François Mitterrand. The public interest justifying condemnation of France for keeping the publisher from continuing to distribute his book consisted in “the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office.” Also, the Court continued:

the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life.¹²⁷²

¹²⁶⁸ ECtHR, *Tierbefeier E.V. v. Germany*, Appl. No. 45192/09, 16 January 2014, at § 45

¹²⁶⁹ ECtHR, *Guja v. Moldova*, Appl. No. 14277/04, 12 February 2008, at §74.

¹²⁷⁰ *Ibid.*

¹²⁷¹ see ECtHR, *Tammer v. Estonia*, Appl. No. 51205/98, 6 February 2001, at §66.

¹²⁷² ECtHR, *Editions Plon v. France*, Appl. No. 58148/00, at §44.

542. Moreover, the time elapsed since the death of the president increased the interest of the public in the disclosure of information.¹²⁷³

4.3.1.4. *The Need for an Ethical Press*

543. Because of its important role, the European Court grants strong protection to journalistic sources,¹²⁷⁴ putting any obligation imposed by public authorities on a journalist to give the name of a source under very strict scrutiny. However, the press is also obliged to ethical standards, which the court increasingly scrutinizes in the context of defamation cases. In *Tonsberg*, the European Court stated:

The protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism... Special grounds are required before the media can be dispensed from their ordinary *obligation to verify factual statements that are defamatory of private individuals*. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations.¹²⁷⁵

544. To verify whether journalists fulfill their ethical obligations in defamation cases, the Court takes a close look into the whole context in which the reports were written: words, context, manner, good faith, verification of facts, proportion.¹²⁷⁶ In other words, the journalist is under strict scrutiny before the contracting states justifications are strictly scrutinized. The Court hopes thereby to strike a balance between information and reputation.
545. The case of *Stoll v. Switzerland* is the best example of judicial ethical scrutiny. In dispute was a newspaper article making truncated and false allegation on a sensitive

¹²⁷³ *Ibid.*, at §53. However, when it comes to personal information, restrictions to freedom of speech are the object of a wider margin of appreciation. see ECtHR, *Leempoel et S.A. ed. Ciné Revue v. Belgium*, Appl. No. 64772/01, 9 November 2006, at §77.

¹²⁷⁴ ECtHR, *Goodwin v United Kingdom* [GC], Appl. No 17488/90, 27 March 1996.

¹²⁷⁵ ECtHR, *Tønsbergs Blad As And Haukom v. Norway*, Appl. No. 510/04, 1 March 2007, at §89.

¹²⁷⁶ “The Court will consider the newspaper report as a whole and have particular regard to the words used in the disputed parts of the report and the context in which they were published, as well as the manner in which it was prepared. The Court must examine whether the applicants acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation. This obligation required that they should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be”, *ibid.*, at §90.

topic. It regarded the content of a state secret document on the negotiation between a Swiss ambassador to the United States and the United States of some unclaimed funds owed to Jewish victims of the Second World War. Contrary to other newspaper reports that took the matter more seriously without truncating important contextual facts, the article severely damaged the reputation of the ambassador, to the point of resignation.

546. The court stressed the fact that the topic at issue was very relevant to its considerations. The court mentioned the “importance of the public debate” on the topic, and twice “the deep divisions in Swiss public opinion on the question of the role actually played by Switzerland during the Second World War”.¹²⁷⁷ The topic was thus controversial, and the journalist conscious of the seriousness of the scandal he was about to provoke in domestic public opinion by publishing this article. More damagingly, the journalist’s assertions were wrong in fact: After considering the nature of state interest motivating the constraints on the journalist’s freedom of speech, and having a close look at the controversial article, the Court looked closely at the ethical mindset of the journalist. The Grand Chamber took issue with the fact that “the applicant, in capricious fashion, started a rumour [on the issue of unclaimed assets, for which she asserted the] need to deal firmly with allegations and/or insinuations of that nature”.¹²⁷⁸
547. It appears that to the Court some issues have too serious public repercussions to grant too much freedom to the press. On such burning topics, the press is bound respect more closely journalistic ethical constraints. The Second World War period is one of these topics. Among others aspects, the Court also took issue with the tone of the article, which it found “hardly fitting for a subject as important and serious as that of the unclaimed funds”.¹²⁷⁹ The plaintiff had adopted “sensationalist style” that “confirm the trivial nature of the applicant’s articles”, in clear contrast to the seriousness “of the subject matter”.¹²⁸⁰ Most importantly in to the realm of ethics, “the articles written by the applicant were also inaccurate and likely to mislead the reader by virtue of the fact that they did not make the timing of the events sufficiently clear.” The Court concluded

¹²⁷⁷ ECtHR, *Stoll v. Switzerland* [GC], Appl. No. 69698/01, 10 December 2007.

¹²⁷⁸ *Ibid.*, at §148.

¹²⁷⁹ *Ibid.*, at §149.

¹²⁸⁰ *Ibid.*

that “the applicant’s chief intention was not to inform the public on a topic of general interest but to make Ambassador Jagmetti’s report the subject of needless scandal.”¹²⁸¹

548. The seriousness of the topic, the likelihood of enflaming public opinion, the inaccuracy of the facts reported and the sensationalist tone together were many reasons for the Court to consider that freedom of the press could not be used as a trump card so as to allow journalists to relay false information to the public. European journalists are just legally bound to follow a duty of ethical behavior and standard of responsibility in the exercise of their profession. Their behavior is the object of scrutiny before the Court scrutinizes the justifications provided by contracting states for speech restrictions.
549. The European Court tolerates but does not condone a press focused on scandal. On sensitive issues the Court accepts that a journalist be censored for breach of journalistic ethics, provided of course the Contracting State passes the tests of strict scrutiny. The same year in *Lindon, Otchakovsky-Laurens and July v. France*,¹²⁸² the Grand Chamber had upheld the condemnation of a writer that had published a defaming novel on French extreme right party leader Jean-Marie le Pen.¹²⁸³ The Grand Chamber found that the criticism found in the fictional book on Jean-Marie le Pen contained description that had overstepped the permissible bounds of political comment, having “regard to the nature of the remarks made, in particular to the underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum.” Thus, political comment that incites to violence, in American terms “fighting words” do not deserve protection. Therefore:

¹²⁸¹ *Ibid.*, at §151.

¹²⁸² ECtHR, *Lindon, Otchakovsky-Laurens and July v. France* [GC], Appl. Nos., 21279/02 36448/ 22 October 2007.

¹²⁸³ “Apart from the argument that he had reproduced passages previously judged to be defamatory, the judicial authorities justified the third applicant’s conviction by the fact that the polemical aim of a text could not absolve it from all regulation of expression, when, far from being based merely on an academic debate, its line of argument was built around reference to precise facts, and that the applicant had therefore been under an obligation to carry out a meaningful investigation before making particularly serious accusations, namely that Mr Le Pen could be regarded as the “chief of a gang of killers” or as a “vampire”. In other words, for the applicant to have acted in good faith he should have adduced evidence to substantiate his offending allegations. Such an obligation, in our view, seems to run counter to the Court’s case-law concerning the duties and responsibilities of the press.” *Ibid.*, Rozakis, Bratza, Tulkens And Sikuta, JJ, dissenting, at §2.

regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, especially as the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention.¹²⁸⁴

550. It seems that the European Court, without explicitly saying it, does want to promote not only an informed opinion but also a civilized and enlightened public opinion. In so doing, it is ready to allow speech restriction based on ethical rules, which seem to apply to methods and content. In the United States, the Supreme Court would have left the tone and the allegation, whichever their content, to the discretion of the journalist and editor, so as to set free the marketplace of ideas and the public search for the truth.¹²⁸⁵

Conclusion

551. In this chapter, I worked with the hypothesis that that the courts' definition(s) of public opinion and their positions as to its role in American or European democracies is, deliberately or unconsciously, at the center of their standard of protection. To that end I took a close look into the United States' Supreme Court and the European Court freedom of speech judgments containing direct references to public opinion and analyzed the role public opinion plays in these decisions. I chose to focus on the few dominant themes transpiring throughout these decisions that relate to democratic life. For this reason, some areas of freedom of speech and expression that are relevant to democracy may not have been covered.
552. With regard to the role of public opinion in its relation to democracy. I found that the Supreme Court generally holds a positive view of public opinion, acknowledging that it is a force that can nonetheless be manipulated. The Supreme Court also separates its definition of public opinion from its definition of the electorate, thus the will of the majority is differentiated from prevailing views in public opinion. This means that public debate is not a privilege reserved to the electorate. I concluded that public opinion's autonomy from "the People" is valued, especially if it legitimately participates to the strengthening of public debate. But if the Supreme Court is mindful

¹²⁸⁴ *Ibid.*, at §57.

¹²⁸⁵ See Falwell for example in Post words "Falwell is drafted quite narrowly and holds only that nonfactual ridicule is constitutionally privileged from the tort of intentional infliction of emotional distress if the plaintiff is a public figure or public official, and if the ridicule occurs in "publications such as the one here at issue." Post, "Public Discourse", *op. cit.*, p. 662. *Hustler Magazine Inc. v. Falwell*, 485 US 46 (1988), at 882.

of the constant dangers that public opinion manipulation can bring about for democratic life, it strongly maintains a no-content-restriction policy: freedom of speech must remain the first priority of the Court, so public debate can thrive and an informed public opinion arise, and so the public search for the truth to be possible and democracy to be real. Consequently, freedom of speech and freedom of the press will be protected at the expense of reputation, even this freedom keeps the press from communicating an information it is unwilling to communicate to the public, such as the response of a public person to some damaging and possibly erroneous press allegations. Therefore, the positive albeit realistic conception of public opinion and of its important role in democracy explains the Supreme Court strong protection of freedom of speech.

553. On the other hand, in Europe, decisions emphasize two aspects of the democratic dilemma. Firstly, the majority principle underlying today's democratic system is not absolute. It is sometimes wrong. Secondly, freedom of expression is considered indispensable to freedom of thought, and thus to an informed opinion. Public opinion is not a monolithic voice, but an agglomeration of many interacting voices. Public opinion formation is therefore the result of an ongoing dynamic debate. Therefore, the limits to freedom of expression are intrinsically linked to what contributes to the formation of an informed public opinion. However, the European Court tends to be selective with regard to the content and quality of information brought to the public and adapts protection of speech based on the way contributors bring information to the public. Overall, the European conception of public opinion is in an interactive, dynamic, continuous movement that contributes to freedom of thought. Because majorities can be wrong, no elected majority or no majority opinion can restrict minority opinions from being expressed. The European Court seeks to strike a balance within the European space of debate so that both majority and minority opinions can coexist so long as democracy is not threatened. That conception is at the heart of the Court's balanced but vigilant protection of freedom of expression.

554. In the third section, I argued that freedom of expression and speech entailed, both in Europe and in the United States, a freedom to criticize. This freedom is indispensable to the formation of an informed public opinion. Freedom of expression in Europe holds a built-in freedom to criticize public institutions, i.e. government, parliament, high level public officials, state agents, political figures, and under conditions, even judges. This

freedom also exists within institutions, and particularly parliaments. The European Court aims at keeping a space for free political debate, which is “at the very core of the concept of a democratic society”.¹²⁸⁶ In this framework, public opinion is one of the actors of a rational process of criticism of governmental actions. However, they are cases in which public opinion is not considered beneficial to the democratic process: when it is focused on scandal and on sensational news, or when it is not well informed by the media. In those cases, the European Court is less protective of speech.

555. In the United States, the Court clearly aims at facilitating speech. Freedom of speech entails the right to bring officials to the bar of public opinion, in an open, unrestricted public forum. This means that citizens are strongly protected against defamation proceedings by public officials or people generally perceived to be public officials. The protection of speech hangs upon public perceptions of the influence a person has on government. Public opinion is seen as a force capable of exerting pressures so as to uproot the truth into the public spotlight, if working in cooperation with actors of public debate such as the media. For this reason, the Supreme Court is more protective of speech than of reputation, even when the speech is outrageous.
556. In a fourth section, I tried to show how both the Supreme Court and the European Court promote an ideal of informed public opinion. The development of the public concern doctrine put an emphasis on protection of speech on topics of interest or concern to the public. The Supreme Court applies this criterion very liberally, thus protecting a wide diversity of topics even when they don’t benefit from the assent of majority community views. However, the wider the public concern category expands, the harder it is for private reputations to be protected. Even striking a balance between protecting freedom of the press and reputation, the Supreme Court always choses the one that allows more speech and more public debate, whatever the content. Whether protection of speech is centered around building an opinion, or promoting an informed opinion used to enable more speech is not always clear, as both grow in symbiosis.
557. In Europe, the goal underlying protection of expression is to allow for the formation of an independent opinion, the fulfillment of the speaker, and a space for the press to denounce excesses in public life. For that reason, the press is allowed a freedom of an

¹²⁸⁶ ECtHR, *Lingens v. Austria* [Plenary], Appl. No. 9815/82, 8 July 1986, Series A No. 103, p. 26, § 42.

excessive tone when imparting information or debating public life. However, the European court is more duty-minded when scrutinizing the press. The media has a duty to inform the public in an ethical way. Therefore, the Court tends to be less protective of reason of state when the public has an interest to be informed about secrets. However, the methodology and ethics of the press, as well as the accuracy and information and local social context in which information is imparted are also the object of judicial scrutiny, when balanced against the reputation of others, or the information imparted. Overall, the European protection always rests on a balance between debate and informed opinion, and the legitimate need to protect private reputations and democracy.

558. These observations lead me to a main conclusion: the vision of public opinion each court holds and its democratic philosophy are at the very core of their protection of freedom of expression. While the European conception of public opinion is more discursive, reason centered, and content centered, the American vision is more positive and focused on more speech. Therefore, the American protection focuses on freedom, no matter the content of speech, whereas the European Court sets limits, in particular when speech threatens the very core principles of democracy. The Supreme Court tends to see public opinion more as a fallible force, susceptible to manipulation, it also acknowledges that it is that freedom to express criticism and false information, even perhaps “fake news”, that has the potential to bring about truth. It thus refuses to impose limits on speech content. On the other hand, the European Court focuses on the public’s right to be informed: the public is therefore dependent on trustworthy and ethical information. Finally, while the American ideal of public opinion is an informed public, this information comes about without restriction, leaving public opinion the duty to sort truth from false information by itself. European opinion becomes informed through a free, although duty and ethically-bound media, which action can also be scrutinized. While it transpires that the Supreme Court trusts the public’s ability to sort information out, it is not clear what the European Court thinks public opinion is capable of it on its own, since it seems to be promoting it but also somewhat sheltering it throughout the whole process of opinion building. The next chapter will reveal how strong each court trusts public opinion as it includes it in the process of legal evolution.

Chapter Four: Public Opinion as Justification for a Progressive Interpretation. The Legal Evolution of Gay Rights

[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. . . . Courts, in particular, are mainly reactive institutions.

Sandra Day O'Connor,
Justice of the U.S. Supreme Court¹²⁸⁷

Introduction

559. This chapter investigates the role of public opinion in the evolution of the law pertaining to same-sex relationships in European Court and American Supreme Court case-law. As explained previously, the selection of cases involving the rights of homosexuals is explained by the political salience of the issue of homosexuality for rights, and by the fast-paced legal evolution that has occurred regarding homosexuality in the last decades.
560. Cases were selected along the methodology explained in the introduction. I also explained how I had narrowed down the number of cases so as to make sure that judgements that would be analyzed contain mentions of public opinion and their direct synonyms that are relevant to the reasoning and arguments in each case. In order to proceed to an in-depth analysis of the cases, I had to ensure that the number of cases to be analyzed would be much lower than in the previous chapter. For this reason, I decided to focus on themes that could be found in both courts' case laws. On both continents, national courts may have tackled similar legal issues pertaining to same-sex relationships, but not all were brought to the attention of both the national highest court of the United States on the one hand, or the international human rights' Court in Europe.

¹²⁸⁷ S. Day O'Connor, *The Majesty Of The Law: Reflections Of A Supreme Court Justice*, Craig Joyce ed., (2003) p. 166. see also *ibid.* ("Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus."). Cited by C. Barrett Lain, "Upside Down Judicial Review", *op. cit.* p. 165.

Therefore, although the issue of exclusion of homosexuals from the army was tackled in many European cases,¹²⁸⁸ none containing public opinion references was included in my Supreme Court database. Thus, I will not analyze European army related cases that are in my database.

561. Ultimately, I will focus mostly on homosexuality rights cases pertaining to criminalization of homosexuality, and on the evolution of homosexuals' legal status under Federal American constitutional law and European Human Rights law from an era of criminalization to celebration of same-sex unions. These themes are particularly appropriate as they are representing well the themes discussed at different times throughout the evolution of the legal status of homosexual persons in Europe and the United States.
562. I will start with a short legal summary of gay rights situation on both continents. In a second section, I will study decriminalization cases and the evolution of the criminal status of homosexual relations and look at the evolution of the legal status of same-sex family life, especially with regard to same-sex unions. The choice of two very specific themes was deemed necessary for the sake of thematic and comparative coherence, but also because not all same-sex cases contain direct references to homosexuality. In a third section, out of concern for completeness, I will also examine how doctrines attached to evolving interpretation were used in homosexuality cases. In particular the use of the living instrument doctrine in European case law was developed significantly in sexual orientation cases. The use of 'public opinion' as an argument will be correlated to the presence of representatives of public opinion and civil society in the procedures in which references to public opinion are present.

1. Short Legal History of Gay Rights

563. Both in Europe and in the United States, family law is the matter of states' internal policy. In the United States, until federal bans on same sex marriage were judged unconstitutional in 2015 in *Obergefell v. Hodges*,¹²⁸⁹ the legal status of LGBT persons'

¹²⁸⁸ See for example ECtHR, *Lustig-Prean And Beckett v. The U.K.*, Appl. Nos. 31417/96 and 32377/96, 27 September 1999, and ECtHR, *Smith and Grady v. the U.K.*, Appl.No. 33985/96 and 33986/96, 27 September 1999. (These cases concern the investigation and administrative discharge of armed forces personnel relating to the implementation of an absolute policy against the participation of homosexuals in the armed forces of the United Kingdom. References to "changing attitudes" found at § 48 in facts.)

¹²⁸⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

relationships and same sex marriage varied from state to state. The law pertaining to same sex relationships evolved from state-originated regulations until the Supreme Court decision of 2015 and its enforcement. In Europe, contracting states have to comply with the European Court of Human Rights case law in all areas of the law: no jurisdiction is divided between the Council of the Europe and the States.

1.1. United States

564. In a study of the political and legal movement of same-sex couples from decriminalization to legal consecration of their relationship in the United States, Michael Klarman describes the main stages followed by LGBT activists to effect political, social and legal changes since the mid-20th century.¹²⁹⁰ Supreme Court litigation is part of this evolution.

1.1.1. The evolution of Same Sex Litigation

1.1.1.1. Decriminalization

565. In the McCarthy era, persons self-identifying as homosexual fought policies criminalizing homosexuality, such as professional dismissals for moral turpitude, obscenity laws applied to gay materials, or obstacles to obtaining alcohol licenses in gay bars. The fight began being effective as it received more press coverage in the 1960s and activist groups began organizing. At federal level, the D.C. Court of Appeal stroke down a blanket policy on employment of homosexuals in 1969.¹²⁹¹ The gay rights movement officially appeared on the occasion of a brutal police raid at a gay bar in June 1970 in New York City's Greenwich Village, what is referred to as "Stonewall".¹²⁹² Although a few homosexual couples sought to obtain marriage licenses already in the 1970s,¹²⁹³ most of them were not preoccupied by marriage at that time, whether for lack of interest or disbelief in its possibility, or opposition to

¹²⁹⁰ M. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, Oxford, Oxford University Press, (2013), (hereafter referred to as "From the closet"). For a reference on the road to same-sex unions internationally see K. Kollman, *The Same-Sex Unions Revolution in Western Democracies*, Manchester, Manchester University Press (2013). E. A. Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*, University of Michigan Press, (2005).

¹²⁹¹ Klarman, *op. cit.*, p. 23

¹²⁹² *ibid.*, p.16-17. Various police operation against gay bars occurred in the summer of 1970.

¹²⁹³ Klarman gives as example a minister celebrating marriages in 1968 in Los Angeles without the official state documents that are normally required by law in the United States before the ceremony can be celebrated by a licensed minister, in order for marriage to be recognized by the state. *Ibid.*, p. 22.

traditional family structures.¹²⁹⁴ However, the Supreme Court victories of African Americans on the issue of interracial marriage in the late 1960s were inspirational.¹²⁹⁵ Same sex couples worked on removing social obstacles to their normalization within the population, such as the stigma of mental disease plaguing homosexuality,¹²⁹⁶ laws criminalizing homosexuality through the medium of anti-sodomy laws¹²⁹⁷ that, although left mostly unenforced, were sometimes enforced specifically against them. Klarman counts as gay litigation victories: first amendment litigations aimed at gaining the right to establish university gay student organizations,¹²⁹⁸ and the invalidation of anti-sodomy laws (most famously in *Lawrence v. Texas*).¹²⁹⁹ According to Jane Schacter, the post-*Stonewall* period consisted in a battle over “the legitimacy of suppressing gay presence in public life”.¹³⁰⁰

566. As homosexuals were decreasing the “aura of criminality” around their orientation, backlash and new policies were emerging to react against normalization of homosexual behavior.¹³⁰¹ Legal measures against homosexuality kept multiplying across the American territory, such as new fear-inspired laws aimed at barring homosexuals from teaching positions in public schools or from becoming foster parents.¹³⁰² In 1986, in *Bowers*, judges hesitated to strike down an anti-sodomy law. Considering that it might be interpreted as giving homosexuals a “right to sodomy”, Justice Powell retracted and

¹²⁹⁴ **Ref klarman**

¹²⁹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967) (Unconstitutionality of the ban on interracial marriage)

¹²⁹⁶ Removed by the American psychological association in 1973. See Klarman, *op. cit.*, at 23.

¹²⁹⁷ In 1975 the U.S. Civil Service Commission eliminated its policy of exclusion of homosexuals? *Ibid.*, p. 23.

¹²⁹⁸ *Ibid.*, at p. 25.

¹²⁹⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003)

¹³⁰⁰ Schacter, *op. cit.*, p. 371, *Romer v. Evans*, 517 U.S. 620, 632, 644 (1996).

¹³⁰¹ On the rhetoric of opposition and the discourse of equivalents. see generally J. S. Schacter, “The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents”, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 29, 283, 299 (1994), pp. 313-17 The author analyses the discourse of opposition to the extension of civil rights to homosexuals in the United States (a few years after case *Bowers v. Hardwick* was decided), that she calls the “rhetoric of equivalents” as reversing the description of homosexual persons, reducing them to a sexual identity only, distinguishing the legal problems facing homosexuals from the ones facing racial minorities, and reducing their approach of civil rights to a protection of non-chosen features of an individuals, as opposed to chosen behaviors. According to her, “The inquiry about choice depends upon a clear distinction between “nature” and “nurture,” and on the corollary idea that sexuality attributable to “nurture” may be treated as a matter of “choice.” Both of these propositions are problematic. The idea that aspects of personality attributable to environmental factors are necessarily “chosen” is strikingly naive; it ignores rudimentary learning about psychology, sociology, and culture... “While the question of how people come to be attracted to same-gender partners is thus profoundly difficult, the discourse of equivalents once again exploits the uncertainty through reductive characterizations.”” (pp. 310-311).

¹³⁰² Klarman, “From the closet”, *op. cit.* p. 30.

did not strike it down.¹³⁰³ *Bowers* and backlashes against gay normalization gave the gay movement political salience and helped mobilize activists and funding. Homosexual organizations gained influence throughout the 1992 campaign, where democratic party candidates had to mobilize support to win the nominations. Bill Clinton became the gay movement's "Messiah" as he promised to repeal the ban on gays in the military.¹³⁰⁴

1.1.1.2. Normalization of Same Sex Relationships

567. In the 1990s the question of legal recognition of same-sex relationships came to the forefront with new legal issues, for example the problem of survival of a same-sex partner in the case of death,¹³⁰⁵ or the existence of children living with a homosexual parent.¹³⁰⁶ In some states, couples started applying for marriage licenses. At that time already, litigation efforts focused on classifying marriage between a man and a woman as a "sex classification", implying that limiting marriage to a man and a woman was discriminatory, while opponents' efforts consisted in voting statutes and amendments excluding same-sex relationships from marriage. Thus, in May 1996, Congress voted a federal Defense of Marriage Act (or DOMA),¹³⁰⁷ that provided that no state was required to give faith to any law or judicial decision recognizing same sex marriage, and that the federal definition of marriage was limited to a man and a woman. Benefitting of a limited political good-will after imposing his veto on the law banning partial-birth abortion, Bill Clinton let DOMA pass.¹³⁰⁸ The same year, the Supreme Court heard the case of *Romer v. Evans*,¹³⁰⁹ and stroke down a Colorado state constitution amendment overturning ordinances that forbade discrimination based on sexual orientation.¹³¹⁰ After *Romer*, many gay-protecting hate-crime laws were enacted across the country, and the anti-sodomy laws were repealed. In 2003, in *Lawrence v.*

¹³⁰³ *Bowers v Hardwick*, 478 U.S. 186 (1986).

¹³⁰⁴ Klarman *op. cit.*, p. 43.

¹³⁰⁵ See the Kowalski case, in Klarman, *op. cit.* p. 50.

¹³⁰⁶ *Ibid*, at 51.

¹³⁰⁷ The Defense of Marriage Act (DOMA), Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

¹³⁰⁸ Klarman, *op. cit.*, p. 62.

¹³⁰⁹ *Romer v. Evans*, 517 U.S. 620 (1996),

¹³¹⁰ *Ibid*. The Court considered that this amendment was motivated by animus, that moral disapproval was not enough to justify discrimination based on homosexuality, believed at the time to be an immutable trait of homosexual orientation.

Texas,¹³¹¹ the Supreme Court stroke down one of the last state anti-sodomy laws that had been enforced against a homosexual couple in the privacy of their own home, thus effecting an official legalization of homosexuality. From that case on, the march took the direction of same-sex unions and gay marriage.

1.1.1.3. Towards Legal Recognition of Gay Unions

568. In November 2003 in *Goodridge*,¹³¹² after Ontario and a few European states had already adopted gay marriage, the State of Massachusetts Supreme Court decided that the State constitution prohibited the state from excluding gay marriage, and gave the legislature 180 days to take appropriate measures to remedy the problem. In 2004, the Massachusetts Supreme Court concluded that legalizing a form of same-sex union that was not marriage was not sufficient as it treated gays as “second-class citizens”.¹³¹³ Political backlash across the nation was very vivid, and national polling support retracted to show two third of opponents.¹³¹⁴ In the meantime, in some liberal states, including California and Massachusetts or New York, marriage licenses were distributed to same sex couples, and people started marrying as a political statement.¹³¹⁵ For the first time, president Bush endorsed voting an amendment to exclude same sex couples from marriage while leaving legislature the discretion to arrange other type of civil unions. In a 2009 lawsuit, *Varnum v. Brien*, the Iowa Supreme Court confirmed a 2007 summary judgment that endorsed gay marriage despite the fact that most citizens of the state opposed it.¹³¹⁶ Although backlash was strong, liberal support for gay marriage grew steadily, as gay activists worked hard to change attitudes, and opponents on repeals and amendments. After Proposition 8, a popular initiative overturning Californian gay marriage by referendum was judged unconstitutional by the North

¹³¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³¹² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

¹³¹³ M. Klarman, “From the closet” p. 91, citing Opinions of the Justices to the Senate, 802 N.E.2d 565,571 (Mass. 2004). The opinions of the Massachusetts Supreme Judicial Court were released in reaction to the proposal to vote the legalization of same-sex civil union as a compromise following the backlash against judicial legalization of same-sex marriage in *Goodridge*.

¹³¹⁴ Data from Klarman, *Ibid.*, pp. 97-99. Klarman takes as example a survey conducted by the Pew Study Center in November 2003 and others conducted in 2004. Pew Research Center, news releases, 27, February 2004, 21 July 2004, 24 August 2004).

¹³¹⁵ Klarman *ibid.*, p.103.

¹³¹⁶ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009),

Californian District Court in 2012,¹³¹⁷ and the state refused to defend the law, proponents of the ballot initiative tried to appeal in the Supreme Court. In *Hollingsworth v. Perry*,¹³¹⁸ the Supreme Court decided that the citizens sponsors of the ballot initiative did not have standing to appeal the district court decision repealing Proposition 8. In effect, in *Perry* the Court avoided delving into the substantive merit of the case. As of 2010, 52% of Americans were said to support same sex marriage, while the military slowed down enforcement of “don’t ask don’t tell” policy.¹³¹⁹ Federal DOMA was being legally challenged in many states and failed in federal court in California. It was stricken down in 2015 in *Obergefell v. Hodges*.¹³²⁰

1.1.1.4. Other Legal Issues

569. In parallel to marriage, homosexuals continued to litigate for their rights on other basis, such as protection of speech and association (First Amendment). For example, in *Boyscout of America v. Dale* in 2000,¹³²¹ the Supreme Court declined to compel the American Boy Scout Association to reintegrate Scoutmaster Dale, 19 years old, who had come out as gay at university, a short time after being granted the prestigious title of “Eagle Scout”. There, he had become a leader in its university gay and lesbian group. He had subsequently been excluded from the Boy Scouts because his orientation, openly displayed in a newspaper interview, was inconsistent with the values the organization was working to instill in young people. The Supreme Court decided that compelling the organization to reintegrate a member against their will would go against their freedom of expressive association. The legal fight on freedom of speech continues today in the realm of business, where a wedding cake-baker has been sued for declining to bake a wedding cake to homosexuals because it goes against his faith.¹³²²
570. Note that Supreme Court databases do not contain any case involving public opinion with regard to same-sex adoption outside of marriage. This is not to say that none was litigated at federal or Supreme Court level. However none matched research criteria

¹³¹⁷ United States Court of Appeals for the Ninth Circuit, *Perry v. Brown*, No. 11-17255, 7 February 2012.

¹³¹⁸ *Hollingsworth v. Perry*, 570 U.S. (2013) (No. 12-144), 26 June, 2013.

¹³¹⁹ Klarman, “From the Closet”, *op. cit.* at 156.

¹³²⁰ *Obergefell v. Hodges*, 576 U.S. (2015), 135 S.Ct. 2584.

¹³²¹ *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000).

¹³²² On the ongoing Supreme Court hearing of arguments, see Adam Liptak “Justices Sharply Divided in Gay Rights Case”, *The New York Times*, (New York, 5 Dec. 2017). <https://www.nytimes.com/2017/12/05/us/politics/supreme-court-same-sex-marriage-cake.html>

applying “public opinion” and its synonyms to the text-search of Supreme Court databases. Although such cases would be relevant to the evolution of same-sex couples’ rights in the Supreme Court and the European Court of human rights as a step towards the establishment of a right to marriage, I can only proceed to a study of such cases within the jurisdiction of the European Court.

1.1.2. Doctrine

571. With regard to doctrine, same-sex cases often were litigated on the basis of privacy rights. Since the case *Griswold*, privacy cases usually are based on the “penumbra” of unenumerated rights discovered in the Ninth Amendment.¹³²³ The level of scrutiny usually depends on whether a right is considered or not as ‘fundamental’ among rights protected by the Bill of Rights. American ‘fundamental’ rights enjoy high scrutiny protection by the Supreme Court. Public interference with a fundamental constitutional right must satisfy a compelling reason to restrict a right, and be narrowly tailored to the goal pursued. The same standard of scrutiny is enjoyed under the Fourteenth Amendment Equal Protection clause for suspect classifications such as classifications on the basis of sex, or age. As discussed below, the Supreme Court increasingly examined same-sex applications on the basis of the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment, the Fourth Amendment, and the First Amendment.

1.2. Council of Europe

572. In order to investigate same-sex related decisions by the European Court of Human Rights, a few essential facts have to be introduced first. One concerns the social premises with which the European Human Rights Commission first, and the European Court later, worked with before making decisions. The Second is the 1998 European Court reform that allowed individual applications to be introduced and reach the Court more directly.¹³²⁴ I will specify the legal basis on which cases were litigated, and briefly introduce the doctrines used by the Court to decide these cases.

¹³²³ The Ninth Amendment is indeed worded in very general terms, and in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the court used the “penumbra” of its wording as an open door to the discovery of new constitutional rights, particularly the right to privacy, nowhere explicitly protected in the U.S. Constitution.

¹³²⁴ Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, European Treaty Series - No. 155.

1.2.1. Ontological Conception

573. According to Paul Johnson,¹³²⁵ the evolution of gay and lesbian's rights in the Council of Europe has been largely dependent on the Human Right's Commission and the Courts preconceptions on the origins of homosexuality. At the beginning, conventional wisdom believed that homosexuality was a mental disease, and that it was acquired. Associating mental diseases with the carrier's guilt was pretty common, therefore thinking ill of homosexuality and the desire to criminalize homosexual behavior, especially during the AIDS crisis, was the logical corollary of that conception.¹³²⁶ From the moment a new philosophy prevailed, according to which homosexuals were born with a same-sex inclination, or 'essentialism', no one could decently point at their guilt for being 'born this way'.¹³²⁷ After 1981, an ontological struggle started, where the European Court considered homosexuality as an immutable characteristic. The definition and manifestation of homosexuality became an important dimension of the legitimacy of a state interference in the life of homosexual subjects, which explained the radical turn the European case law after 1981. According to Johnson, by adopting this essentialist vision of homosexuality,¹³²⁸ the Court legitimized a particular ontological understanding of homosexuality, which is why applicants "look to the Court as a mechanism through which to challenge not just domestic law, but the wider social and cultural relations that underpin legal inequalities".¹³²⁹

1.2.2. Court formations

574. First homosexuality-related cases were decided by the European Human Rights Commission. Before the 1998 reform of Protocol 11, which consolidated the Human Right Commission and the European Court into a full-pledged court,¹³³⁰ only the

¹³²⁵ P. Johnson, *Homosexuality and the European Court of Human Rights*, New York, Routledge (2013) pp. 31-39.

¹³²⁶ Johnson *ibid.*, p. 53.

¹³²⁷ *Ibid.* p. 60.

¹³²⁸ On the debate between constructionist and essentialist visions of homosexuality, see among others "Forms of Desire: Sexual Orientation and the Social Constructionist Controversy (Edward Stein ed., 1990).", or D. R. Ortiz, "Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity", *Virginia Law Review*, Vol. 79, 1833, 1833 (1993)."

¹³²⁹ Johnson, "Homosexuality", *op.cit.* p. 43.

¹³³⁰ On the Protocol 11 reform, see generally Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, (2010), p. 460.

Commission could receive individual applications through a different procedure.¹³³¹ Only through referral by the Commission could individual petitions reach the Court. Therefore, most applications did not make it through to the Court, which explains the small number of cases litigated in the European Court at the time *Dudgeon* was decided. After 1998, all admissible individual applications went directly to the Court—although the rate of inadmissibility decisions remained very high—and could exceptionally be contested with the Grand Chamber,¹³³² the rehearing procedure being conceived by some contracting states as “safety-check on quality” and to some degree an increased control of the European Court decisions.¹³³³

575. Litigation at European level began in the Commission, and cases targeted mainly the United Kingdom and Germany. Homosexuals fought against criminalization of gay acts,¹³³⁴ the difference between ages of sexual consent between men and women,¹³³⁵ custody cases, pension laws,¹³³⁶ discrimination in the army,¹³³⁷ adoption cases,¹³³⁸ and

¹³³¹ Under the original procedure before 1 November 1998, the procedure in the Court was more State-centered. Individual applicants had to send their request to the Commission first under Article 25 of the former version of the European Convention, and only if the defending state had previously accepted the jurisdiction of the Court. After a report was released following a decision of admissibility (Article 31), a Committee of three judges examined the case and could transfer the case to the Court (Article 48). This possibility was open by Protocol 9, after October 1994, which was signed and ratified by only a few States. Protocol 11 allowed individuals to send their applicants directly to the three judges committee (Article 34 ECHR), which would decide on the admissibility of the case and send it to a Chamber for review. The case could also be reviewed upon acceptance by a College of 5 judges (Article 43 ECHR) by the Grand Chamber, who would make the final decision on the case (Article 44). See Sudre at § 291 (p. 634 – ed. 2008).

¹³³² For a comprehensive analysis of Grand Chamber rehearing procedure and practice: Mowbray, ‘An Examination of the Work of the Grand Chamber of the European Court of Human Rights’, (2007) *Public Law* 507.

¹³³³ Ed Bates, “Evolution”, *op. cit.*, p. 465.

¹³³⁴ ECtHR, *Johnson v. The U.K.*, Appl. No. 10389/83, 17 July 1986 (criminalization of group sex).

¹³³⁵ ECtHR, *Sutherland v. The U.K.*, Comm Rep, App. No. 25186/94, 1st July 1997. (The Commission found a discrimination in the minimum age of consent for male and female homosexual acts: violation of Article 8 in conjunction with Article 14). See P. Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Court of Human Rights*, Oxford, Oxford University Press, (2016), p. 204

¹³³⁶ ECtHR, *Mata Estevez v. Spain*, Appl. No. 56501/00, 10 may 2001 (wide MNA because little common ground)

¹³³⁷ For army, see cases ECtHR, *Smith and Grady v. The United Kingdom*, Appl. Nos. 33985/96 33986/96, 27 September 1999, ECtHR *Lustig-Prean and Beckett V. The United Kingdom*, Appl. Nos. 31417/96 32377/96, 27 September 1999.

¹³³⁸ For adoption cases see ECtHR, *Fretté v. France*, Appl. No. 36515/97, 26 February 2002, puis ECtHR, *E.B. v. France [GB]*, Appl. No. 43546/02, 22 January 2008.

finally, civil status,¹³³⁹ and the difference in legal forms of recognition between heterosexual and same-sex couples.¹³⁴⁰

1.2.3. Legal basis

576. Same-sex couples are confronted to differential treatment in many aspects of life—criminal, relationships, social—partly because the consequences of marriage touch a multitude of dimensions of life including adoption, divorce, parental leave, parental authority, medical procreation, different social protections, property and speech. Hence criminalization of homosexuality or lack of identical access to the same rights heterosexual couples are entitled to create a multitude of legal issues. For this reason, litigation was not limited to one article under the Convention.
577. Cases were litigated with regard to the most important protections of the Convention: those pertaining to the right to life and the protection against inhuman and degrading treatment under Article 2 and 3 of the Convention (condition of detention,¹³⁴¹ lack of public intervention after bad treatments motivated by sexual orientation,¹³⁴² applications complained of risks involved with deportation in a country criminalizing homosexuality).¹³⁴³ Also, Article 5 protecting security was used in *O.M. v. Hungary*.¹³⁴⁴ Article 10 and 11 protecting speech and assembly are used in many instances (offensive speech,¹³⁴⁵ declined authorization to permit march against discriminations).¹³⁴⁶ Also,

¹³³⁹ On the civil status of homosexuals, see ECtHR, *Cossey v. the United Kingdom* [Plenary], Appl. No. 10843/84, 27 September 1990 and ECtHR, *Christine Goodwin v. the United Kingdom* [GB], Appl. No. 11/07/2002, 11 July 2002.

¹³⁴⁰ See for example, ECtHR, *Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010, ECtHR, *Pajic v. Croatia*, Appl. No., 68453/13, 23 February 2016, ECtHR, *P.B. and J.S. v. Austria*, first section Appl. No. 18984/02, 22 July 2010, ECtHR, *Vallianatos v. Greece*, [GC], Appl. Nos. 29381/09 32684/09 7 November 2013.

¹³⁴¹ ECtHR, *Stasi v. France*, Appl. No. 25001/07, 20 October 2011 (rape and torture of an homosexual prisoner)

¹³⁴² ECtHR, *M.C. and C.A. v. Romania*, Appl. no. 12060/12, 12 April 2016.

¹³⁴³ Most such applications were struck down or dismissed. See P. Johnson, “Going to Strasbourg”, Chronological List of Decisions and Judgments (homosexuality related cases), pp. 201-206

¹³⁴⁴ ECtHR, *O.M. v. Hungary*, Appl. No. 9912/15, 5 July 2016 (violation).

¹³⁴⁵ ECtHR, *Vejdeland and Others v. Sweden*, 9 February 2012; ECtHR, *Mladina D.D. Ljubljana v. Slovenia*, Appl. No. 20981/10, 17 April 2014.

¹³⁴⁶ ECtHR, *Bączkowski and Others v. Poland*, Appl. No. 1543/06, 3 May 2007; ECtHR, *Alekseyev v. Russia*, Appl. Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010; ECtHR, *Genderdoc-M v. Moldova*, Appl. No. 9106/06, 12 June 2012.

were mobilized Article 1 protecting property,¹³⁴⁷ and Article 12 guaranteeing the right to marriage.¹³⁴⁸

578. However, most cases are litigated under the protection of privacy and family life provided under Article 8, sometimes in conjunction with Article 14 that protects against discrimination in the enjoyment of Convention rights. Cases based on Article 8 were first successfully used to attack criminal offences targeting homosexual acts,¹³⁴⁹ dismissal from a profession,¹³⁵⁰ denial of parental authority,¹³⁵¹ refusal of residence permit¹³⁵² and a wide array of diverse issues. Nevertheless, Johnson helpfully stresses that the Court homosexuality-related jurisprudence focused mostly on privacy side of Article 8, brushing to the side the concept of family life. The European Court considered that interferences in homosexuals' lives most of the time involved a problem of privacy, and not of family life. This was the case even in cases pertaining to adoption such as in *E.B. v France*, a case involving discrimination of a homosexual woman applying for single-parent adoption.¹³⁵³
579. Two provisions of the European Convention are used to challenge discriminations. The one that is most relied upon is Article 14, which for lack of being autonomous must be combined with any substantive right protected by the Convention. Article 1 of Protocol 12 protects against discrimination in the enjoyment of any right, *i.e.* it has the potential to be combined to any right protected by the law of contracting states.¹³⁵⁴ However, its usage is conditioned by signature and ratification of contracting states, which laws are being challenged under the Convention.¹³⁵⁵ Moreover, if Article 14 does not protect

¹³⁴⁷ ECtHR, *J.M. v. the United Kingdom*, Appl. No. 37060/06, 28 September 2010, property and difference in alimony obligations between former spouses in the case of divorce.

¹³⁴⁸ ECtHR, *Schalk and Kopf v. Austria*, *op. cit.*, also more recently *Oliari and Others v Italy*, Appl. Nos. 18766/11 and 36030/11.

¹³⁴⁹ ECtHR, *Dudgeon v. United Kingdom* (Plenary), Appl. No. 7525/76, 22 October 1981.

¹³⁵⁰ ECtHR, *Smith and Grady*, Appl. Nos. 33985/96 and 33986/96, 27 September 1999.

¹³⁵¹ ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999.

¹³⁵² ECtHR, *Taddeucci & McCall v. Italy*, Appl. No. 51362/09, 30 June 2016.

¹³⁵³ ECtHR, *E.B. v. France*, Appl. No. 43556/02, 22 January 2008.

¹³⁵⁴ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177, Rome, 04 November 2000, entered into Force on First of April 2005 with 10 Ratifications.

¹³⁵⁵ To this day 9 states have not signed the Protocol and 27 states have not ratified it. List of Contracting states having signed and ratified it at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=IDngzv64 (Accessed 10 January 2018).

against discrimination on the basis of sexual orientation, the grounds of discrimination are not comprehensive¹³⁵⁶ and can be extended to sexual orientation.¹³⁵⁷

580. In order for a violation to be found, the restriction of the right has to be pursuing no legitimate aim, or the means employed and the legitimate aim sought are not proportionally related. In *Kozak v. Poland*, the Court added that where intimate and vulnerable spheres of individual private life is touched, weighty reasons need to be advanced for the Court to justify the challenged measure.¹³⁵⁸
581. According to Johnson, in many cases where both Article 8 and Article 14 were used, if the Court found a violation of Article 8, it decided not to address the violation of Article 14, and not to decide legal questions under review.¹³⁵⁹
582. In my inquiry, I will focus on the main legal basis used for litigation: Article 3, Article 10 (speech) and Article 8.

1.2.4. Doctrines

583. To decide homosexual cases, the European Court mostly relies on two types of analysis;¹³⁶⁰ the Margin of Appreciation doctrine and Consensus Analysis.¹³⁶¹ According to Johnson, the Court uses the margin of appreciation doctrine to legitimize its decisions while avoiding to outline its reasoning – especially when it comes to moral reasoning.¹³⁶² The Court couples the margin of appreciation doctrine with the state of

¹³⁵⁶ The wording of Article 14 is open-ended and can be interpreted as including an ‘other status’.

¹³⁵⁷ That is what the court says in ECtHR, *Kozak v. Poland*, Appl. No. 13102/02, 2 March 2010, at § 92.

¹³⁵⁸ “Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of.” *ibid.*, § 92 (emphasis added).

¹³⁵⁹ P. Johnson, “Homosexuality”, *op. cit.*, pp.126-128.

¹³⁶⁰ On original methods of interpretation of the European Court, see generally F. Ost, “The Original Canons of Interpretation of the European Court of Human Rights”, in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights*, Nijhoff, Dordrecht (1991), pp. 283-318.

¹³⁶¹ According to Dzehtsiarou and Mahony, the Supreme Court also relies on a consensual doctrine to effect legal change, relying on majority of states to assess the state of the law within the country. They rely on Sunstein contention, shared by many scholars, that when the Supreme Court “entrenches a new constitutional principle or a novel understanding of an old principle, it is never acting in a social vacuum. Often it is endorsing a judgment that long attracted widespread social support from many minds”. See C. Sunstein, “A Constitution of Many Minds”, *op. cit.* p. 4.

¹³⁶² Based on Loucaides criticism in his dissent of *Laskey, Laggard and Brown v. the U.K.*, Johnson claims that “Loucaides shows that the ‘weighty reasons’ offered by states and accepted by the Court as justifications for interfering with Convention rights are themselves founded on moral judgments and that these require scrutiny. By using the margin of appreciation to bypass an elucidation of its own moral reasoning, the Court invites the charge of inconsistency.” Johnson, “Homosexuality”, *op. cit.* p.74 quoting ECtHR, *Laskey, Laggard and Brown v the United Kingdom*, Appl. Nos. 21627/93; 21826/93; 21974/93, 19 February 1997, (Loucaides, J. dissenting).

European consensus on the legal question at stake.¹³⁶³ The two are inversely proportional: the more European consensus among states, the narrower the state margin of appreciation becomes; the more European states are divided on one issue, the wider the margin will be. However in practice, the Consensus has been criticized for being used too restrictively and conservatively or, to the contrary, too liberally, and for the lack of certainty and unpredictability in the Court's methodology.¹³⁶⁴

584. Another doctrine is the Living Instrument doctrine, where the Court uses the teleological reading of the Convention to take a progressive approach to rights and extend their protection.¹³⁶⁵ As discussed below, in the area of same-sex relationships, the doctrine of living instrument has evolved to include "social attitudes" considerations.

585. According to Johnson, the consensus doctrine is the one that most openly involves an assessment of public opinion.¹³⁶⁶ According to Helfer, this assessment is the third step of a three-stages inquiry involving first an examination of the statutory development among European states, and secondly a consideration of expert opinions on the legal question.¹³⁶⁷ But the European Court use of the consensus doctrine is not consistent,

¹³⁶³ On consensus and evolving interpretation, see among others K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal*, Vol. 12, pp. 1730-1745 (2011); J. Kratochvíl, "The inflation of the margin of appreciation by the European Court of Human Rights", *Netherlands Quarterly of Human Rights*, Vol. 29 No. 3, 324-357, (2001); A. Mowbray, "The Creativity of the European Court of Human Rights", *Human Rights Law Review*, Vol. 5, No. 1 (1 January 2005), pp. 57-79.

¹³⁶⁴ See among others, Brauch, J.A., "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law", *Columbia Journal of European Law*, Vol. 11, 113, 121 (2004) (criticizing the lack of predictability in particular with regard to the use of arbitrarily selected trends outside of the Council of Europe);

¹³⁶⁵ As Dzehtsiarou and Mahony note, the living instrument doctrine appears in the European Case law in more than one formula. However, it is not always linked to the legal evolution across contracting states, and can appear in a pure teleological form, relying instead only on the goal of the treaty, which is to ensure the protection of "concrete and effective rights" in the Council of Europe. See Dzehtsiarou and Mahony, p.1: Kanstantsin Dzehtsiarou; Conor O'Mahony, "Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court", 44 *Columbia Human Rights Law Review*, 309 (2013) at pp. 356-7.

¹³⁶⁶ Dzehtsiarou and Mahony contend that it is also the case for the Supreme Court: "It can be seen that where an evolutive interpretation of a provision is based on consensus, the court handing down the decision is following, rather than leading, public opinion", *op. cit.*, at p. 334.

¹³⁶⁷ L.R. Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights", *NYU Law Review*, Vol. 65, 1044, 1100 (1990). At that time, Helfer grounded his assertion on two cases: ECtHR, *Winterwerp v. the Netherlands*, Appl. No. 6301/73, 24 October 1979, a detention case based on the prohibition of inhuman and degrading treatment under Article 3 of the European Convention, and ECtHR, *Marckx v. Belgium*, [Plenary], Appl. No. 6833/74, 13 June 1979, an Article 8 case. See Helfer at 1057, quoting at footnote 93 *Winterwerp*, at 16 ("[A]n increasing flexibility... is developing [regarding] society's attitude to mental illness... so that a greater understanding of the problems of mental patients is becoming more wide-spread.") and *Marckx*, at 20

which has warranted extensive criticism.¹³⁶⁸ According to Johnson, the Court will bypass the lack of consensus among contracting states and leave a narrow margin of appreciation in respect of what it believes to be an (albeit newly discovered) right.¹³⁶⁹

586. The use of public opinion in the reasoning undoubtedly reveals how the European Court balances the views of the majorities with protections of minorities in the field of homosexuality. Also revealing over the years has been the increasing involvement of civil society in European cases, especially regarding gay rights. As it supports my hypothesis that increased amicus participations demonstrates a greater openness of the courts to “democratic” participation, this aspect will be taken into consideration on the side of the following discussion of these cases.

2. The Personalized Pace of Decriminalization of Homosexuality

587. Among American criminal cases involving homosexuality and public opinion references, only three emerge: *Bowers v. Hardwick* (1986), *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003).¹³⁷⁰ It is remarkable that those three cases are also major precedents in American civil rights law. These cases arose after a series of cases had been decided by the Supreme Court with regard to privacy and many aspects of family life, including contraception and abortion.¹³⁷¹ These precedents became important legal sources for litigation on homosexuality generally. Despite being only three cases, the

("[P]ublic opinion [is] becoming increasingly convinced that the discrimination against [illegitimate] children should be ended.").

¹³⁶⁸ On the consensus doctrine see for example D. Spielmann, “Consensus et marge d’appréciation nationale”, *Journal des tribunaux* (2012), pp. 592-593 ; H. Surrel, “Pluralisme et recours au consensus dans la jurisprudence de la Cour européenne des droits de l’Homme” in Michel Levinet, *Pluralisme et juges européens des droits de l’Homme*, Bruxelles, Bruylant, (2010), I. de la Rasilla del Moral, “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine”, *German Law Journal*, Vol. 7, No. 6 (2006), p. 618 (stressing the lack of justification in the use of extra-European law), G. Letsas, “Two Concepts of the Margin of Appreciation”, *Oxford Journal of Legal Studies*, Vol. 26, No. 4 (2006). For a recent contributions to the current debate on the consensus doctrine see A. Follesdal, N. Tsereteli, “The margin of appreciation in Europe and beyond”, *The International Journal of Human Rights*, Vol. 20, No. 8 (2016). Criticism of the doctrine extends beyond the European territory. For example after the European Court case law was cited by the Supreme Court, scholars have focused on what to learn from the European doctrine, about what to do and what not to do. See for example “The Dangerous Search for and Elusive Consensus: J. A. Brauch, “The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights”, *Howard Law Journal*, Vol. 52, No. 2, 277 (2008-2009).

¹³⁶⁹ According to Johnson, the Court will bypass the lack of consensus among contracting states and leave a narrow margin of appreciation in respect of what it believes to be a—albeit new—right, Johnson, “homosexuality”, p. 83.

¹³⁷⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³⁷¹ Privacy law cases include, among others, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion), *Poe v. Ullman*, 367 U.S. 497 (1961), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

battle against criminalization of sodomy, homosexuality and discrimination generally in federal court lasted a few decades. In the first decision, the Court did not consider criminalization of homosexuality unconstitutional. *Romer v. Evans* introduced the concept of privacy to the homosexual debate. Finally, in 2003, in *Lawrence v. Texas*, the Supreme Court decided that criminalization of sodomy and enforcement of criminal laws to homosexuals was unconstitutional.

588. In Europe, cases involved essentially the same problems, although a few decades earlier. Before the Court decided *Dudgeon v. the United Kingdom*, the Human Rights Commission was the first institution dealing with applications contesting criminalization of sodomy and discrimination in the age of consent to sexual relations. *Dudgeon* in 1981 was the first breakthrough. Like in the United States, European applicants heavily relied on privacy rights to advance their cause. In contrast with the United States however, the European Convention explicitly spells out a right to privacy in its Article 8.¹³⁷²
589. Since European decriminalization cases were decided earlier, this section will start with European cases, continue with American cases, and contrast the role of public opinion in the reasoning as a conclusion.

2.1. Fast-Paced European Decriminalization of Homosexuality

2.1.1. Before *Dudgeon*

590. Before *Dudgeon*, only one case related to homosexuality had made reference to “public opinion”. It was decided by the Human Rights Commission, and made direct reference to the *Handyside* case.¹³⁷³ Hence in *X v. The United Kingdom*,¹³⁷⁴ a case where a twenty-six-year-old adult male had been complaining of an “unjust, archaic, old-fashioned” age-of-consent law condemning buggery, the British government referred to the case *Handyside*, where the Court had specified that there was no single definition of morals in Europe, which entitled contracting states to a broader margin of appreciation. The government stressed that “our era is characterised by a rapid and far-

¹³⁷² Article 8 of the European Convention on Human Rights: “1. Everyone has the right to respect for his private and family life, his home and his correspondence.” (Convention as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13).

¹³⁷³ ECtHR, *Handyside v. the UK*, Appl. No 5493/72, 7 December 1976.

¹³⁷⁴ ECtHR, *X v. the U.K.*, Com., Appl. No. 7215/75, 7 July 1977.

reaching evolution of opinions on the subject of morals and that a margin of appreciation is left to the domestic bodies that are called upon to apply the laws in force”.¹³⁷⁵ The Court used this very consideration in *Dudgeon*, turning it to the disadvantage of the defendant state by imposing an obligation to prove the existence of a “pressing social need” to justify the challenged criminal law. After *Dudgeon*, the Human Rights Commission itself referred to public opinion in an admissibility ruling. *X and Y v. the United Kingdom*¹³⁷⁶ was a case involving threats of deportation of a foreign homosexual partner. The Commission this time referred to *Dudgeon* after making direct reference to ‘public opinion’:

Despite the *modern evolution of attitudes* towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8. On the other hand, as the Commission and Court have recognised in the case of *Dudgeon*... certain restraints on homosexual relationships could create an interference with an individual's right to respect for his private life ensured by Article 8.¹³⁷⁷

591. Despite the vagueness of the formula, the Commission clearly refers to European “attitudes”, and not only to the attitudes of the citizens of Great Britain. It implies that new attitudes could not have justified qualifying homosexual relationships as belonging to the realm of family life. One can wonder, although the formulation does not suggest so, if the evolution of local attitudes would have been deemed sufficient for the Commission to qualify homosexuality as “family life”. However, the Commission seems slightly apologetic to the applicants, finding that despite this impossibility to qualify as family life, they could advocate their rights under the banner of privacy rights. It then proceeded to a first examination of the case and declared their application admissible.

2.1.2. Innovations in Dudgeon v. the United Kingdom

592. Applicant *Dudgeon* was contesting a criminal law proscribing two aspects of homosexual relationships: homosexual acts between consenting adults over 21 years of age, and homosexual acts with minors under the age of 21. The law had existed in

¹³⁷⁵ *Ibid.*, at § 39.

¹³⁷⁶ ECtHR, *X and Y v. the U. K.*, Com, Appl. 9369/81, 3 may 1983.

¹³⁷⁷ *Ibid.*, p. 40 (emphasis added).

Northern Ireland and other parts of the UK, but after some measure of autonomy was given in this matter to Northern Ireland, local authorities had considered, but decided against a reform. This decision was based on the belief that local constituents would be opposing such reform. The applicant attacked this law under Article 8 ECHR: the very existence of its law was a threat to him and an undue interference in his private life. The applicant had not been personally prosecuted nor charged of any crime on the basis of it, but been questioned by the police on his private homosexual life and other matters within the framework of another inquiry. The Human Rights Commission had recommended that legal prohibition of homosexual sexual acts under 18 was not a violation of the Convention, but that prohibiting these acts over 21 years of age constituted was a violation of Article 8.¹³⁷⁸

593. The government of the United Kingdom used local public opinion and opposition to reform as an argument to justify keeping the law unaltered. In this case, reference to public opinion was accompanied with considerations of moral behavior and protection of society. The government's rationale for not reforming and liberalizing the law on homosexuality was based on "the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society".¹³⁷⁹ However, the defendant government admitted that the assessment of opinion was not certain, the report stating that society was evenly divided on the topic.

2.1.2.1. Local Public Opinion as Relevant

Consideration

594. The European Court did directly address the rationale of public opinion¹³⁸⁰ while assessing the necessity of the interference with the applicant's private life. The necessity, the European Court claimed based on previous case *Handyside*, implies a

¹³⁷⁸ *Ibid.*, at § 61: "Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features."

¹³⁷⁹ *Ibid.*, at § 46.

¹³⁸⁰ *Ibid.*, at § 57.

pressing social need. The European Court began by acknowledging that policy differences were not illegitimate, both moral and social, and authorities had to deal with them¹³⁸¹ and their social consequences. The Court listed relevant aspects of government decision-making to assess the “necessity”. Firstly, one of the aspects relevant in state decisions is diversity of communities in a country. “Where there are disparate cultural communities residing within the same State, it may well be that different requirement, both moral and social, will face the governing authorities.”¹³⁸² Second, the moral climate may legitimately be taken into account.¹³⁸³ Third, with regard to public opinion, the strength of opposition, the numbers of people it represents,¹³⁸⁴ and the fact that its belief is genuine all matter.¹³⁸⁵ The European Court added that local points of view may be wrong or out of line with attitudes other (national) communities; but that this was not illegitimate. Finally, the Court decided that the defendant State’s good faith in attempting to take a “balanced decision” despite strong opposition by “such a substantial body of opinion”¹³⁸⁶ was also relevant. After such considerations, we could expect that the Court would conclude that the decision was legitimate. However, if these considerations with regard to popular beliefs, will and social contexts are relevant, the Court contended, they are not sufficient to conclude that the measure was necessary.¹³⁸⁷

¹³⁸¹ The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (at §56 *quoting Handyside v. the U.K.*)

¹³⁸² *Ibid.*, at § 56.

¹³⁸³ *Ibid.*, at § 57.

¹³⁸⁴ “There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society (see paragraph 25 above). This opposition reflects as do in another way the recommendations made in 1977 by the Advisory Commission (see paragraph 23 above a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards. Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2 (art. 8-2).” *Ibid.*, at §57 (emphasis added).

¹³⁸⁵ *Ibid.*, at §57.

¹³⁸⁶ “Balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken”

¹³⁸⁷ “Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant’s private life resulting from the measures being challenged” *Ibid.*, at § 59.

2.1.2.2. Local Public Opinion Alone as Insufficient Justification

595. The Court henceforth proceeded to proportionality analysis, *i.e.* a strict standard of review deemed necessary to examine interferences into “essentially private manifestation of the human personality” and examined “whether the interference complained of was proportionate to the social need claimed for it”.¹³⁸⁸ The Court usually looks if the justifications of the challenged measure are sufficient before proceeding to proportionality (necessity) analysis.

596. Faced with very vague justifications provided by the defendant state—local opinion demands—the Court responded with an equally vague one. First, to counter the government justifications based on the specificity of local opinion, the European Court leaned on European opinion, namely the recent evolution in European opinion towards “more understanding and increased tolerance”,¹³⁸⁹ and the fact that this evolution was mirrored in changes in the laws of member states through a decrease of criminalization. Matching the vagueness of the defendant state’s arguments, the Court didn’t quote evidence of change in European opinion, and did not specify which contracting states and how many changed their law to reflect this opinion.¹³⁹⁰ Secondly, in addressing specifically the state of North Irish opinion, the European Court stressed the absence of evidence that a lack of enforcement had a bad effect in North Irish opinion, or that there was a demand to enforce it. In other words, the Court affirmed that that there would be no difference felt between on the one hand, a dead law in the books, and on the other hand, no law in the books, and therefore *there would not necessarily be a lot of opposition*. Thirdly, the Court pointed at the lack of other more pressing justifications, such as protection of vulnerable persons and evidence of opposition: “it cannot be maintained in these circumstances that there is a “pressing social need” to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.”¹³⁹¹ The Court did not say that such justifications did not exist, simply that they were not specified by the defendant state. It thus encouraged defendant states to bring

¹³⁸⁸ *Ibid.*, at § 59.

¹³⁸⁹ *Ibid.*, at § 60.

¹³⁹⁰ Note that France was in the middle of a public debate with regard to the necessity to lowering the age of consent to sexual relations, both heterosexual and homosexual at the time the Court published her opinion. A new law to that effect was voted a few months later, in July of 1982.

¹³⁹¹ *Dudgeon, op. cit.*, at § 60.

more substantial justifications beyond opinion and morals, such as the protection of vulnerable persons. Therefore, public opinion and morals cannot be sufficient argument against interference in private life:

In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, *without more*, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.¹³⁹²

597. Because the states' margin of appreciation is more restricted if it "concerns a most intimate aspect of private life", the state has to give "particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2)". To conclude, the Court affirms that the feelings of public opinion cannot warrant criminal sanctions. These justifications are outweighed by the harm caused to homosexual persons:

Although *members of the public* who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of *penal sanctions* when it is consenting adults alone who are involved.¹³⁹³

2.1.2.3. Clear European Opinion as Weightier

Argument

598. Upon close examination, the reasoning of the Court is puzzling, insofar as it is not certain what among the different "relevant" reasons provided by the state tipped the balance towards a finding of violation. The Court did not specifically make mention of an existing or new consensus, but considered the fact that no criminalization of homosexuality occurred in the "great majority of member states".¹³⁹⁴ Five years after

¹³⁹² *Ibid.*, at § 61 (emphasis added).

¹³⁹³ *Ibid.*, at § 60.

¹³⁹⁴ "As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which

Dudgeon, the Court decided that an isolated Swiss divorce law justified by local cultural and historical “deeply held beliefs” did not constitute a violation of the convention. This law also involved intimate relationships, but it did not involve imposing a criminal sanction for a crime justified by public opinion considerations.¹³⁹⁵ In that case, public opinion was deemed a sufficient consideration. Therefore, the evolution of consensus is a determining factor.

599. Public opinion cannot, in itself and without an existing penal sanction, be sufficient to justify clear isolation from European consensus. It is what transpires from the 2013 case *Vallianatos v. Greece*, where the Grand Chamber decided that an isolated law to be judged conform with the Convention couldn’t go against a “clear” “trend emerging” in the legal systems of Europe.¹³⁹⁶ In short, local Greek cultural particularities couldn’t legitimately justify excluding homosexuals from civil pact of common life and found a violation.¹³⁹⁷ However, in this case, the Court provided specific evidence of the isolation of Greece in this area, and confirmed that the justifications provided by the State were not weighty and convincing enough to justify exclusion.¹³⁹⁸ Moreover, if *Dudgeon* referred to European opinion evolution as being “mirrored” in new legislations, European public opinion is, in *Vallianatos* also, a heavier factor than

the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States”, *ibid.*, at §60.

¹³⁹⁵ ECtHR, *F. v. Switzerland* [Plenary], Appl. No. 11329/85, 18 December 1987, at §33.

¹³⁹⁶ ECtHR, *Vallianatos v. Greece* [GC], Appl. Nos. 29381/09 32684/09 7 November 2013, at §91.

¹³⁹⁷ Note that Greece did not offer any justification involving public opinion, and neither did the Court discuss it. In addition, the Court would point to the fact that, although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to civil partnership for same-sex couples. As to the specific issue raised by the present case ..., the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. ... In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same- sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec (2010) 5”, *Vallianatos*, *ibid.* (references omitted).

¹³⁹⁸ *Ibid* at §92: “The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention ... Nevertheless, in view of the foregoing, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 in the present case.”

national particularities. In short, the existence of a clear consensual trend contradicting a law that is not supported by strong reasons suffers no outliers.

600. In his dissent, Judge Walsh took issue with this line of argument, considering that in matter of morals, privileging one public opinion (in that case European) over another (local) was a value judgement: “Even if it should be thought, and I do not so think, that the people of Northern Ireland are more ‘backward’ than the other societies within the Council of Europe because of their attitude towards homosexual practices, that is very much a *value judgment* which depends totally upon the initial premise”.¹³⁹⁹ Hence the knowledge of the local conditions would give government authorities more leeway to assess whether the challenged criminal law was necessary in the country. Consequently, as long as European public opinion or local opinion are not the sole arguments justifying a policy, there is no danger of falling into value judgement jurisprudence.

2.1.2.4. Public Opinion and Teleological Interpretation

601. Along this decision, the Court refers to public opinion in a neutral way: neither is it compared to an angry crowd nor is it lauded for its qualities. However, in conclusion, the Court stresses the insufficiency of justifications used to harm the applicant: that the public is merely “shocked, offended or disturbed” seems too light to justify a criminal sanction. Despite the Court neutrality and prudence with use of words, Judge Walsh, interprets the decision of the Court as a value judgment about Irish opinion being “backward” for its attitudes toward homosexuality.
602. Judge Walsh’s dissent interestingly stresses that there can be two legitimate readings of the “necessity in a democratic society” criterion of paragraph 2. According to Judge Walsh, “necessity” does not imply a “pressing social need”, as in claimed *Handyside*, but that the means employed are “necessary” to the accomplishment of the goal. The Court’s reading, on the other hand, implies that unless there is a “pressing social need”, the goal may not simply be enough to justify an interference into the applicant’s rights. The two readings imply two very different philosophies: one of restraint and one of activism. If “necessity” just represented a simple fit between goal and means, the Court

¹³⁹⁹ Walsh, J, Dissenting at §19.

may legitimately exercise a moderate scrutiny so as to avoid that the justification becomes a reasonably related pretext to reach a goal. On the other hand, by reading the wording “necessity” strictly in combination with “*in a democratic society*” and putting an emphasis on the democratic ideal, the Court allows itself a more teleological reading. This explains why in *Handyside*, the Court set the cap to a “pressing social need” interpretation of “necessity”, although the sense of emergency communicated in the word “necessity” is not as tangible than its interpretation, “pressing social need”. This difference of interpretative methods is what opposed applicants to proponents of a teleological and evolving reading of the convention. As demonstrated above, the latter reading is the one that is most compatible with discussions of public opinion. The Court openly showed its preference for it in later cases, such as Norris.

2.1.3. Confirmation in Norris v. Ireland

603. The applicant, Mr Norris complained against the existence in Ireland of laws criminalizing certain homosexual practices between consenting adults.¹⁴⁰⁰ Norris had discovered his irreversible homosexuality and suffered of anxiety attacks. Because of these laws punishing homosexuals with up to 10 years of penal servitude, as a homosexual he was considered a criminal. He had been the object of abuse following a complaint against his advocacy in favor of decriminalization on a public channel. He mentioned his fear of prosecution as basis of his application. The government stressed that the law was unenforced and that prosecution were only brought in cases of public misconduct or absence of consent. The applicant pressed the Court to apply *Dudgeon* and condemn Ireland for criminalizing homosexual acts because it regarded it as an infringement on his right to respect of his private life. The Irish Supreme Court had refused to apply *Dudgeon* at national level, considering that the Human rights convention was no domestic law. Domestic high court judge Mr Justice McWilliam, on the witnesses’ evidence, found:

One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension *and general prejudice of the public* and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.¹⁴⁰¹

¹⁴⁰⁰ ECtHR, *Norris v. Ireland* [Plenary], Appl. No. 10581/83, 26 October 1988.

¹⁴⁰¹ *Ibid.*, at §33 (emphasis added).

604. In turn, describing the procedure before the Human Rights Commission, the European Court explained that neither a relevant justification *i.e.* a “large body of opinion... hostile or intolerant towards homosexuality” nor “special need” displayed by Irish society had been presented¹⁴⁰² and that on the basis of this absence, the Commission had concluded that the interference was disproportionate to the aims.
605. Echoing Judge Walsh’s *Dudgeon* dissent, the Irish government contested the use of “pressing social need” analysis to assess the necessity of legal measures applying in the realm of morals.¹⁴⁰³ The Court responded to this by declaring:

The Government are in effect saying that the Court is precluded from reviewing Ireland’s observance of its obligation not to exceed what is necessary in a democratic society when the contested interference with an Article 8 (art. 8) right is in the interests of the “protection of morals”. The Court cannot accept such an interpretation. To do so would run counter to the terms of Article 19 (art. 19) of the Convention, under which the Court was set up in order “to ensure the observance of the engagements undertaken by the High Contracting Parties. . .”¹⁴⁰⁴

606. Henceforth, the court applied *Dudgeon*’s test and looked for “particularly serious reasons” for interferences in the “most intimate aspect of private life”. The European Court quoted the rationale of its *Dudgeon* decision, excluding criminal penalties from the array of legitimate measures contracting states could take for the protection of public opinion’s preferred morals: “Although *members of the public* who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved”.¹⁴⁰⁵

2.1.4. Additional cases features

607. As Van den Eynde notes, at the time *Dudgeon* was decided in 1981, there was no procedure opening European Court proceedings to third party interventions. It is hence noteworthy that the applicant in *Dudgeon* found a sponsor, NIGRA,¹⁴⁰⁶ to support him through the procedure. Norris himself was an activist and the founder of the Irish Gay

¹⁴⁰² *Ibid.*, at §43.

¹⁴⁰³ *Ibid.*, at §44-46.

¹⁴⁰⁴ *Ibid.*, at §45.

¹⁴⁰⁵ *Dudgeon, op. cit.*, at §60 quoted in Norris, *op. cit.*, at §45.

¹⁴⁰⁶ The term stands for Northern Ireland Gay Rights Association, *Dudgeon, op. cit.*, §21.

Rights Movement. The National Gay Federation, filing the application with *Norris*, was declined victim status by the Commission, but can also be said to have acted as a sponsor.¹⁴⁰⁷

608. In conclusion, can it be said that European opinion forced the pace of decriminalization? From the Court's conclusions, one can infer that the dominant factor for its *Dudgeon* judgment that criminalization of homosexual relationships was an infringement to European human rights, was the legal evolution towards a decriminalization of homosexual relationships in a "great majority of member states". Nevertheless, the Court makes clear that local and European opinion both are relevant factors for its final decision effecting a legal change. Without more justifications on the Irish government's part, the fact that attitudes had proven more tolerant in Europe as opposed to the local level strengthened the case of homosexuals and weakened the case of the government defending the policy of keeping criminal laws in force. The Court confirmed the relevance local public opinion in governance or judicial decisions in later cases such as *Norris* or recently in *Vallianatos*, as had the Human Rights Commission in its *X. and Y.* inadmissibility decision. The following cases will show which importance public opinion takes in American decisions and legal change.

2.2. The Slow Pace of Decriminalization in the United States

609. In 1986, a few years after *Dudgeon* had been decided in Europe and the European Court had condemned the United Kingdom for criminalizing homosexual acts between consenting adults, the United States Justices were confronted to a similar case. In *Bowers v. Hardwick*,¹⁴⁰⁸ the challenged law was a Georgia statute directed at the act of sodomy between consenting adult homosexuals. The Supreme Court had to decide whether the applicants right to privacy had been infringed upon, in some Justice's words if there existed a "fundamental right to homosexuals to engage in acts of consensual sodomy", in Justice White's words,¹⁴⁰⁹ under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. Ten years later, in *Romer v. Evans*,¹⁴¹⁰ the Court had to decide on the constitutionality of a new State Constitution Amendment in Colorado constitution that prohibited any antidiscrimination measure

¹⁴⁰⁷ *Ibid.*, p. 294.

¹⁴⁰⁸ *Bowers v. Hardwick*, *op. cit.*

¹⁴⁰⁹ *Ibid.* at 192.

¹⁴¹⁰ *Romer v. Evans*, 517 U.S. 620 (1996).

protecting homosexual persons at local level, and repealed all measures already taken to this effect. In 2003 in *Lawrence v. Texas*, homosexuals celebrated their victory when the Supreme Court decided that a law generally criminalizing sodomy and enforced only against homosexuals was unconstitutional. These three major cases are the best example of legal change because they are groundbreaking precedents. In three steps towards homosexual decriminalization, from judicial denial of constitutional violation to recognition of the existence of discrimination. They all contained direct or indirect references to public opinion.

2.2.1. Bowers v. Hardwick and the Refusal to Change

610. In *Bowers*, the applicant contested a Georgia law criminalizing homosexual acts between consenting adults and claimed that it entailed a violation of his right to privacy based on the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.
611. Such claim that the anti-sodomy law violated a ‘fundamental right’ was bold. Under American constitutional law, ‘fundamental rights’ are civil rights with special value, comparable to rights which, under the European Convention, do not suffer exceptions because they touch bodily integrity such as among others the right to life (Article 2) or prohibition of torture and inhuman and degrading treatment (Article 3). Thus, only strong justifications would be capable of satisfying strict scrutiny.¹⁴¹¹ At a time when many states still had criminal laws on sodomy in the books, a change from considering homosexuals as criminals to granting them a quasi-sacred right was very ambitious.
612. The Supreme Court decided that the Constitutional right to privacy did not extend to homosexual relations. Contrary to Europe, no constitutional provision specifically refers to a right to privacy, and the Supreme Court defined privacy as containing the right to a respect to family life: until then, cases had been decided that applied to issues

¹⁴¹¹ “Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the State’s and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection”, *Bowers*, at 191.

such as child rearing and education,¹⁴¹² family relationships,¹⁴¹³ procreation,¹⁴¹⁴ marriage,¹⁴¹⁵ contraception¹⁴¹⁶ and abortion¹⁴¹⁷, no which applied to homosexuality. Additionally, there was no historical ‘deeply rooted’ ‘right to homosexual sodomy’, a condition for declaring that a right was ‘fundamental’. “Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable”.¹⁴¹⁸

613. The Supreme Court markedly expressed its reluctance to discover new rights under the Constitution out of concern for its legitimacy by referring to the public. It declared itself “striving to assure itself and the public that announcing rights not readily identifiable in the Constitution involves much more than the imposition of the Justices own choice of values on the States and the Federal Government”.¹⁴¹⁹ Judicial legitimacy and responsibility to the public thus demands from the judges an attitude of self-restraint especially when finding new rights. The Supreme Court considers itself bound to follow its own guidelines created to guide the discovery of new rights. These include fundamental rights “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed” and that are “deeply rooted in this Nation’s history and tradition”.¹⁴²⁰
614. The Supreme Court also referred to the majority moral views of the Georgian electorate:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a *rational basis* for the law and that there is none in this case other than

¹⁴¹² See on child rearing *Pierce v. Society of Sisters* 268 U.S. 510 (1925) (State may not force parents to put their children in public school only), *Price v. Massachusetts*, 321 U.S. 510 (1925) (“There is a private realm of family life that the state may not enter”, at 166), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (deference to parents in their child-rearing decisions).

¹⁴¹³ On family relations, see for example *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Right to keep the family together)

¹⁴¹⁴ Right to intimate association (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)) and procreation (*Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942)). In this case, the right to procreate was declared fundamental and forced sterilization for moral turpitude was prohibited).

¹⁴¹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁴¹⁶ *Griswold v Connecticut*, 381 U.S. 479 (1965).

¹⁴¹⁷ *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁴¹⁸ *Bowers, op. cit.*, at 190-1.

¹⁴¹⁹ *Ibid.*, at 191-2.

¹⁴²⁰ *Ibid.*

the *presumed belief of a majority of the electorate* in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that *majority sentiments* about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.¹⁴²¹

615. The Supreme Court stated that “majority sentiments” on the morality of a law could not be disregarded, firstly on the ground that many other laws are based on morality, secondly because a majority of states (more than 25 counting Georgia) do have such laws. It implied that it would need to to set aside majority sentiments and to declare the existence of a new fundamental right despite public opinion’s opposition. However, the Court does neither assert nor deny that majority sentiments should have a bearing on public decisions.
616. “Majority sentiments” here is used to talk about the sentiments of the majority of the electorate, not public opinion generally, although it could be interpreted as meaning “public opinion” generally.
617. The court applied a low standard of scrutiny, and seems to consider that morality itself was an adequate rationale for the law and satisfied the standard of rationality. Additionally, the numerical majority of member states criminalizing homosexuality was enough in itself to show the measure was not constitutionally illegal: in European terminology, the “consensus” was still on the side of criminalization.
618. Public opinion was also indirectly referred to in dissents. This dissent by Justice Blackmun, joined by Justices Brennan, Marshall and Stevens was to inspire future applicants and constitutional reversals in the United States.
619. The dissent did not delve into the legal problem of granting or not a new “fundamental right” to homosexuals. Justice Blackmun contended instead that it was about “the most comprehensive of rights and the right most valued by civilized men” namely, “the right

¹⁴²¹ *Ibid.*, at 196.

to be left alone”.¹⁴²² Instead, the Justices focused on whether the kind of relationship the applicant wanted protection for belonged the sphere of privacy protected by the Constitution was meant to protect. If it was about protecting his “private sphere of individual liberty” from “the reach of government”, it did not matter how history or tradition had treated homosexuality for centuries. Justice Blackmun contested the use of history and tradition as criteria to discover new rights.¹⁴²³

620. Blackmun inquired into the legitimacy issue raised by the majority in a later section of his dissent:

Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that 16-6-2 represents a legitimate use of secular coercive power. A State can no more punish private behavior because of *religious intolerance* than it can punish such behavior because of *racial animus*. "The Constitution cannot control such *prejudices*, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty".¹⁴²⁴

Making reference to religious arguments found in an amicus brief supporting the maintenance of the law, Blackmun severely criticized an imposition of religious beliefs

¹⁴²² *Ibid.*, at 199, (reference omitted).

¹⁴²³ Heavy reliance on history and tradition was too easy to rely upon and to Blackmun a “blind” way to dismiss potentially legitimate applications. To dismiss the authority argument of history and tradition, he used another strong authority, and cited one of the most quoted Jurist of American Jurisprudence: Justice Oliver Wendell Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past", (*ibid.*, at 199). In essence, the fundamental right to privacy already had been found. What remained was to see if homosexual intimacy belonged to the sphere of protection, whether it “denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity”. Blackmun concluded that other right, namely “the right of the people to be secure in their... houses”, more textually supported and informed the right of privacy. He stressed past decisions’ rationale to support privacy because sexual intimacy is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,” and that “while it is true that these cases may be characterized by their protection of the family...we protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they for the central part of an individual’s life”, (*ibid.*, at 204). Specifically targeting religious arguments, he added “we protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations of the Bible’s command to be fruitful and multiply” (*ibid.*, at 205).

¹⁴²⁴ *Ibid.*, at 211-212 (references omitted)(emphasis added).

to justify “secular coercive power”. He proceeded to compare the “religious intolerance” motivating this law with “racial animus” and refused to give effect to “private biases”. From his tone, the public will behind this law was no more than an embodiment of an angry and dangerous crowd displaying “public intolerance or animosity” that Justices had to resist, “no matter how uncomfortable the majority of this Court” may have been made to feel. Blackmun accused the majority of having given in to “mere public intolerance”.

Justice Stevens’ dissent, joined by Justices Brennan and Marshall, also addressed the issue of public opposition to homosexual sodomy, by making reference to the majority of the electorate. Like Justice Blackmun in his dissent, Justice Stevens repeated that a governing majority, tradition, morals and history alone¹⁴²⁵ do not suffice to prohibit a practice. Justice Stevens more specifically contested the defendant’s assertion that the existence of the law was proof of disapproval of homosexuality, since the law was aimed at sodomy.¹⁴²⁶ Like the European Court in *Dudgeon*, the Supreme Court dissents stress the lack of evidence of public opposition—i.e. opposition of the electorate or public opinion—to homosexual sodomy specifically, and the fact that the law had remained unenforced in several decades.¹⁴²⁷

2.2.2. Romer v. Evans and the Path Towards Anti-Discrimination Law

621. After a few districts, towns and other local authorities had taken legal measures to protect homosexuals against various sorts of discrimination, Colorado had voted

¹⁴²⁵ To stress, without explicitly spelling it out like Blackmun, the intolerance of such a law, he proceeds to comparing the enforcement of a prohibition of sodomy to homosexuals to the prohibition of racial miscegenation. “First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack”, *ibid.*, at 216 (emphasis added).

¹⁴²⁶ “The Court has posited as a justification for the Georgia statute “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.” *Ante*, at 196. But the Georgia electorate has expressed no such belief - instead, its representatives enacted a law that presumably reflects the belief that all sodomy is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment”, *ibid.*, at 219. Note that it is possible that the public opposition to sodomy in general was aimed to condemn homosexuality in particular, as the practice at the time was generally associated to homosexuality.

¹⁴²⁷ “Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, simpliciter, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met”, *ibid.*, at 220 (emphasis added).

Amendment 2 of the Colorado Constitution, repealing and prohibiting such protective measures. The state's Supreme Court had examined Amendment 2 under a strict scrutiny standard, finding that it constituted an infringement of homosexuals' fundamental right to participate in the political process as it forced them to override a constitutional amendment to advocate their rights in Colorado.¹⁴²⁸

622. From the wording of the new State Constitution Amendment,¹⁴²⁹ the Supreme Court majority, led by Justice Kennedy, drew a "fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings".¹⁴³⁰ Contrary to government authorities, the Justices were not convinced that laws of general application prohibiting discriminations would protect homosexuals enough. They concluded that the Amendment "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint".¹⁴³¹
623. The majority opinion then discussed the Fourteenth Amendment and the applicable standard of review. Significantly, it was the first time the Supreme Court used the Equal Protection Clause to a gay and lesbian case.¹⁴³² Finding that no fundamental right as such was burdened, the Justices applied a lower standard of review, searching only a rational relation to the legitimate state interest. They found that the challenged state constitutional amendment was "too narrow and too broad", resulting in a "disqualification of a group of persons from the right seek specific protection from the law is unprecedented in our jurisprudence."¹⁴³³ Looking at usual jurisprudential practices, the majority of the Court found that it was an "unusual" law,¹⁴³⁴ and

¹⁴²⁸ "The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *ibid.*, at 627.

¹⁴²⁹ "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing", at 4, quoted in *Romer*, at 624.

¹⁴³⁰ *Ibid.*, at 630.

¹⁴³¹ *Ibid.*, at 631.

¹⁴³² J. S. Schacter, "Romer v. Evans and Democracy's Domain", *Vanderbilt Law Review*, Vol. 50, 361 (1997), p. 363 (hereafter "Democracy's domain").

¹⁴³³ *Romer*, *op. cit.*, at 633.

¹⁴³⁴ *Ibid.*, at 633.

expressed his disagreement with it in well-drafted formulas such as the “equal protection of the laws is not achieved through indiscriminate imposition of inequalities”.¹⁴³⁵

624. Most remarkably, the majority went further than a simple rational basis review by looking closely at the motivations behind the law. Unconvinced that it was simply to force them to work harder to obtain anti-discriminations measures by overriding the constitutional amendment, Kennedy claimed that the law was “born of animosity toward the class of persons affected”¹⁴³⁶ and concluded that since a “bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest”,¹⁴³⁷ the Amendment was unconstitutional. The author of the majority opinion implicitly accused the Colorado authorities to have enforced a constitutional amendment approved by popular referendum by voters animated by “animosity” and a “desire to harm” the homosexual minority. Colorado opinion was, it was implied, intolerant. Beyond moral opposition, it had acted to harm a political enemy. Such opinion and harmful disposition did not satisfy the criterion of a legitimate governmental interest.
625. Is “animus” an equivalent to negative prevalent public opinion, or does it refer to intolerance by a small but powerful segment of the population? Does it apply to voters or to the drafters of the law? It is uncertain, as the majority opinion is enigmatic, however close enough to warrant discussion under the “public opinion” analytic approach. Scholars also have questioned this term, including Schacter: “the opinion also raises, but does not answer clearly, the critical question whether intolerance of homosexuality framed in terms of traditional values is the same thing as anti-gay animus.”¹⁴³⁸ Moreover, the use of the term “animus” in connection to references to an “unpopular group” confirms this approach.
626. Justice Scalia, in his dissent challenged such consideration. Contesting the majority’s statement, he was convinced by the state’s argument that the Amendment was not animated by a “bare desire to harm” but voted to “preserve the sexual more against a

¹⁴³⁵ *Ibid.*, at 632 (reference omitted).

¹⁴³⁶ *Ibid.*, at 634.

¹⁴³⁷ *Ibid.*, at 634 quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, (1973) (underlining emphasis added).

¹⁴³⁸ J. Schacter, “Democracy’s domain”, *op. cit.*, p. 381.

politically powerful minority to revise those more through use of the laws”.¹⁴³⁹ Justice Scalia considered the amendment as a “modest attempt” to politically bar a political adversary from a political win.¹⁴⁴⁰

627. Rather than keeping the debate within the frame of “minority discrimination” level, Scalia moved the question to the political battle domain. He contended that homosexuals may belong to a minority but that it had a very important political power, thereby stating that being a minority in number does not necessarily correlate with the belonging to a political minority.¹⁴⁴¹ Consequently, any political technique aimed at making a political adversary’s work difficult would be fair political practice: “The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the State Constitution”.¹⁴⁴²
628. With regard to the possibility to discriminate, Justice Scalia criticized the new *Romer* decision, heavily inspired of *Bowers*’ Blackmun dissent, “In holding that homosexuality cannot be singled out for disfavorable treatment, the Court ... places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”¹⁴⁴³ In other words, according to Scalia, the majority inferred that the enforcement of public opinion’s morality resulting in a “disfavorable treatment” –here Scalia does not refer to criminalization but discrimination¹⁴⁴⁴—is equivalent to the worst expression of intolerance, opposition to homosexuality being compared to racial hatred. “First, as to its eminent reasonableness. The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of “animus” or “animosity” toward homosexuality, as though that has been established as un-American.”¹⁴⁴⁵ Justice Scalia implied that the Court’s pretense to be a more “reasonable” institution than the State legislatures was unwarranted.
629. Like the European Court in *Dudgeon*, Justice Scalia stressed that “decriminalization” does not imply approval, nor does it follow that there will be no more political battles.

¹⁴³⁹ *Ibid.*, at 636 (Scalia, J. dissenting).

¹⁴⁴⁰ *Ibid.*

¹⁴⁴¹ *Ibid.*, at 652 (Scalia, J. dissenting).

¹⁴⁴² *Ibid.*, at 638.

¹⁴⁴³ *Ibid.*, at 636 (Scalia, J. dissenting).

¹⁴⁴⁴ Below he asserts that “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” (emphasis added), at 641 (Scalia, J. dissenting).

¹⁴⁴⁵ *Ibid.*, at 644 (Scalia, J. dissenting).

“There is a problem, however, which arises when criminal sanction of homosexuality is eliminated *but moral and social disapprobation of homosexuality* is meant to be retained”.¹⁴⁴⁶ Referring to other political battles over education and public disapproval of the attempts to introduce in schools possibly controversial teachings on homosexuality, result of the fact that homosexuals “quite understandably...devote this political power to achieving not merely a grudging social toleration, but *full social acceptance*, of homosexuality”.¹⁴⁴⁷ According to Scalia, homosexuals use the law to gain “full social acceptance” from public opinion rather than obtain from the public reluctant toleration. To resist such political pressure, Scalia implies, the majority, as much as homosexuals, is entitled to use political means at its disposal, including forcing homosexuals to overturn a state constitutional amendment to reach their goals.¹⁴⁴⁸

630. Justice Scalia tried to show that while pointing at the bias of the segment of public opinion that originated the challenged amendment, the majority of the Supreme Court was showing preference for a new development in public opinion. With regard to application by the Court of the standard of review, Scalia took issue with the Court’s jump over the *Bowers* precedent that did not hold criminalization of homosexual sodomy unconstitutional, and accuses the Court, particularly Kennedy, to give in to new developments in public opinion: “That holding is unassailable, except by those who think that the Constitution changes to suit current fashions”.¹⁴⁴⁹ Scalia accused the majority to belong to the *avant-garde* of public opinion, and to force current public opinion forward with it. He added a quote from a decision drafted by majority opinion author Justice Kennedy himself, once seating at the Court of Appeals, and holding “rational” the discriminatory practice of discharging homosexuals from the army.¹⁴⁵⁰ Finally, Scalia concluded by deploring that the Court was taking side in a culture war by looking down on local traditional public opinion, and qualified its decision as an act of political will:

¹⁴⁴⁶ *Ibid.*, at 645 (Scalia, J. dissenting), (emphasis added).

¹⁴⁴⁷ *Ibid.*, at 646 (Scalia, J. dissenting).

¹⁴⁴⁸ “I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well”, *ibid.*, at 646 (Scalia, J. dissenting).

¹⁴⁴⁹ *Ibid.*, at 640-1 (Scalia, J. dissenting).

¹⁴⁵⁰ Quotes from *Beller v. Middendorf*, 632 F.2d 788, 808–809, n. 20 (C.A.9 1980) (note that this decision from a lower federal Court predates *Bowers*)

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war. But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry *adherence to traditional attitudes*... When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.¹⁴⁵¹

631. In a nutshell, not only does Justice Scalia warn the majority against taking sides for or against a segment of opinion—traditional or arising—but he deplores the bias exhibited by the majority in favor of ideas prevailing in the Justices’ own circles, or “current fashions”, away from legal neutrality. According to Justice Scalia, such activist judgment, taking away decisions from democratic forces would be illegitimate as it is incompatible with American popular democracy.¹⁴⁵²

2.2.3. Lawrence v. Texas and the Final Blow on Worst Types of Discriminations

632. The challenged law in *Lawrence v. Texas* was, like in *Bowers*, a law criminalizing sodomy and enforced specifically against homosexual consenting adults. *Lawrence* effected the official reversal of *Bowers v. Hardwick*,¹⁴⁵³ and found Texas sodomy law unconstitutional on the basis of the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment, for violating the privacy of homosexuals by inflicting on

¹⁴⁵¹ Romer, *op.cit.*, at 651-2 (emphasis added).

¹⁴⁵² According to Jane Schacter (“Democracy’s domain”), the very concept of illegitimacy of Supreme Court decisions that thwart the will of majority itself is questionable: “majoritarianism is assailable because it categorically places the imprimatur of “majority support” on all enacted legislation without any critical inquiry about the extent to which a law can or does necessarily reflect majority sentiments”, at 392. Indeed, not only can the will of the people be manipulated through political discourse (*ibid.*), but even electoral outcomes might misrepresent the majority opinion on a specific issue and at different times: “Evan Gerstmann studied public-opinion polling done in Colorado before and after passage of the initiative. That polling revealed that, contrary to the outcome of the vote on Amendment 2, there appeared to be high public support for the notion that people should not be denied a job or housing based on sexual orientation.” Schacter is referring to a study performed within the framework of a PhD dissertation by E. Gerstmann, *At the Constitutional Crossroads: Gays, Lesbians and the Failure of Class Based Equal Protection* 179-83 (1996), (unpublished Ph.D dissertation at the University of Wisconsin-Madison, on file with the Author). Schacter, citing Gertsman,*ibid.*, p. 393. Schacter contrasts the questionable value of electoral outcomes with polling results, which value also might be questioned depending on source and methodology of the survey that is referred to. Barry Friedman has pointed out, laws often represent, at best, a static snapshot of public sentiment that cannot account for the ways in which that sentiment is dynamic, changing, and always in flux, *ibid.*, citing B. Friedman, “Dialogue and Judicial Review”, *Michigan Law Review*, Vol. 91, 577 (1993) at 640-42.

¹⁴⁵³ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

them a criminal penalty for no sufficiently legitimate reason.¹⁴⁵⁴ The decision triggered much discussion and criticism for doctrinal and jurisprudential reasons, on every side of doctrinal and political spectrums.¹⁴⁵⁵ It was no less than a spectacular legal change to the benefit of homosexuals, suddenly free of criminal threats overhead, removing them at least from official and perhaps later social opprobrium of being called and treated as criminals. In its language, *Lawrence* also had deeper repercussions, encouraging the perspective of scholars approaching the Fourteenth Amendment within the framework of a more Rawlsian-inspired “respectful democracy”,¹⁴⁵⁶ which “horizontal dimensions” encourage “the role of democratic ideas and practices in social spheres of collective life beyond the [formal] political process.”¹⁴⁵⁷ In a nutshell, a perspective that does not approach legal change only through a restrictive and majoritarian democratic processes.

633. Applicants argued the law criminalizing sodomy was unconstitutional. The crime was described as a “deviate sexual intercourse, namely anal sex, with a member of the same sex (man)”.¹⁴⁵⁸ The Court of Appeals, applying *Bowers*, had not deemed the law unconstitutional. Applicants based their complaints on the Fourteenth Amendment Due Process—protection of liberty and privacy interests—and Equal Protection Clauses.

¹⁴⁵⁴ “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Casey, *op. cit.*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” (*Lawrence*, *op. cit.*, at 578)

¹⁴⁵⁵ For example: J. Leo, The Supremes' Sophistry, *U.S. News & World Report*, 14 July 2003, at 7 (criticizing the judgment for being elitist); K. Thomas, “The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*”, *Virginia Law Review*, Vol. 79, No. 7, Symposium on Sexual Orientation and the Law (Oct., 1993), pp. 1805-1832; T. Grey, “*Bowers v. Hardwick* Diminished”, *University of Colorado Law Review*, Vol. 68, 373 (1997) (questioning *Hardwick*’s leftover authority after the *Romer* decision based on the incoherence between the substance of both decisions); T. B. Stoddard, “*Bowers v. Hardwick*: Precedent by Personal Predilection”, *The University of Chicago Law Review*, Vol. 54, No. 2 (Spring, 1987), pp. 648-656 (defending the decision against critiques).

¹⁴⁵⁶ Jane Schacter argues that the *Lawrence* majority, through its numerous references to respect, displays affinities to Rawlsian theory of Justice (1971) and other theorists such as Dworkin. Rawls had emphasized the centrality of mutual respect within a polity, “to render “mutual aid” in setting the conditions under which it is possible for persons with different moral and political conceptions to coexist and to live with collective results that they may not have chosen.” J.S. Schacter, “*Lawrence v. Texas* and the Fourteenth Amendment’s Democratic Aspirations”, *Temple Political & Civil Rights Law Review* Vol 13, 733 (2004) (hereafter “Democratic Aspirations”) p. 749.

¹⁴⁵⁷ *Ibid.*, at 734.

¹⁴⁵⁸ *Lawrence v. Texas*, *op. cit.*, at 563.

634. Like in *Romer*, *Lawrence* was drafted by Justice Kennedy. The Justice started by defining the concept of liberty, part of the reasoning behind the discovery of potentially new fundamental rights “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed”.¹⁴⁵⁹ “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. ... Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”.¹⁴⁶⁰
635. Since the Court of Appeals’ decision was based on *Bowers*, the author of the majority opinion chose to address *Bowers*’ claims with the clear intent to overturn it. He found “demeaning” the claim that the issue was about whether the case involved a “fundamental right to engage in a certain sexual conduct”.¹⁴⁶¹ Interestingly, Justice Kennedy compared this claim to saying that “marriage is simply about the right to have sexual intercourse”,¹⁴⁶² which would be a partial and superficial definition of marriage. He emphasized that gay marriage was recently legalized in a few countries, including neighboring Canada.¹⁴⁶³ In so doing, he underlined the gap existing between American law, which in 2003 still, in several states, enforced criminal laws against homosexuals, and the United States’ neighbors, that just celebrated complete equality between homosexual and heterosexual relationships. He also underlined that these laws were not enforced against homosexuals acting in private. These remarks remind us other decisions where the majority referred to foreign standards¹⁴⁶⁴, of “international opinion” such as in *Coker v. Georgia*¹⁴⁶⁵ where Justice Byron White’s majority opinion invited its audience to “note the climate of international opinion concerning the acceptability of a particular punishment. It also recalls a famous majority opinion Justice Kennedy would draft two years after *Lawrence* in *Roper v. Simmons*,¹⁴⁶⁶ where

¹⁴⁵⁹ See among others *Bowers*, *op. cit.*, at 191-2.

¹⁴⁶⁰ *Ibid.*, at 562.

¹⁴⁶¹ *Ibid.*, at 558.

¹⁴⁶² *Ibid.*

¹⁴⁶³ *Ibid.*, at 604.

¹⁴⁶⁴ *Trop v. Dulles*, 356 U.S. 815, 838 (1988) (where the majority referred to the English declaration of rights and the Magna Carta, or to the standards of decency “revealed by the fact that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime The United Nations survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.”

¹⁴⁶⁵ *Coker v. Georgia*, 433 U.S., 584 (1977).

¹⁴⁶⁶ *Roper v. Simmons*, 543 U.S. 551 (2005). At 101-103, cited by S. Breyer, *The Court and the World, American Law and the New Global Realities*, New York, Random House, (2015) p. 242. Justice Breyer parallels the use of foreign laws with references to international opinion in different 8th Amendment cases.

he would deplore that his country “stands alone in a world that has turned its face against the juvenilendeth penalty”,¹⁴⁶⁷ and added that it was “proper that we acnowlege the overwhelming weight of international opinion against the juvenile death penalty”.¹⁴⁶⁸

636. Justice Kennedy compared public opinion condemnation of homosexual sodomy with condemnation of “nonprocreative sex”, which the Constitution protected under the right to privacy since *Griswold v. Connecticut*.¹⁴⁶⁹ “The longstanding criminal prohibition of homosexual sodomy upon which the Bowers decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.”¹⁴⁷⁰ It logically follows that both nonprocreative sex and homosexual acts should be protected against public opinion’s “general condemnation”, especially in the privacy of their own homes.
637. Acknowledging the fact that many references condemning homosexuality and sodomy had religious and moral origin, he added: “The issue is whether the *majority may use the power of the State to enforce these views on the whole society* through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.””¹⁴⁷¹ To oppose the argument of longstanding majority support for these laws he advances an “*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. [Moreover], “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry”.”¹⁴⁷² This “emerging awareness” is reminiscent of the “emerging consensus” language used by the European Court of Human Rights when leaning toward legal change.¹⁴⁷³

¹⁴⁶⁷ *Ibid.*, (at 577)

¹⁴⁶⁸ *Ibid.*, (at 578)

¹⁴⁶⁹ *Ibid.*, at 559.

¹⁴⁷⁰ *Ibid.*

¹⁴⁷¹ *Ibid.*, at 571, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁴⁷² *Ibid.*, at 572, ending with a self-quote from *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (Kennedy, J., concurring).

¹⁴⁷³ Language used first in ECtHR, *Chapman v. The United Kingdom* [GC], Appl. No. 27238/95, 18 January 2001 at §70, and other decision released the same day, in reference to ECtHR, *Cossey v. the U.K.*, where the Court asserted its dynamic doctrine of interpretation: “Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions (see, amongst several authorities, the judgment

638. Also, to counter non-legal and non-national sources of authority quoted in support of the challenged law, Justice Kennedy in turn referred to “other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct.”¹⁴⁷⁴ The report Justice Kennedy refers to is one of the domestic authorities mentioned by the parties in the case *Dudgeon v. the U.K.* in support of their argument that a change of public opinion regarding the necessity to criminalize sodomy was occurring. With this phrasing, Justice Kennedy implied that religious authorities were no more legitimate than foreign authorities, and confirmed it explicitly in a later part of his decision: “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere”.¹⁴⁷⁵
639. The majority continued by giving a source of “even more importance”: the *Dudgeon* judgment itself, which it insisted predated *Bowers*, and was decided by a Court that has authority over many nations “21 nations then, 45 nations now”.¹⁴⁷⁶ He stressed the inadequacy of *Bowers* with a “Western civilization” argument, suggesting that a country that does not follow the lead of most progressive Western countries is not civilized.¹⁴⁷⁷
640. The Supreme Court proceeded by quoting the two later cases that undermined the precedent: *Planned Parenthood v. Casey*,¹⁴⁷⁸ which consecrated constitutional protection for decisions relating to marriage, procreation, and more generally the “respect Constitution demands for autonomy”,¹⁴⁷⁹ and *Romer v. Evans*, in which “we concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose”.¹⁴⁸⁰ Kennedy thus reaffirmed his statement that a law justified by public

in ECtHR, *Inze v. Austria*, 28 October 1987, Appl. No. 8695/79, Series A No. 126, p. 18, at § 41)” at § 81 (emphasis added).

¹⁴⁷⁴ Other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (1963). The United Kingdom Parliament enacted the substance of those recommendations 10 years later.

¹⁴⁷⁵ *Lawrence, op. cit.*, at 576.

¹⁴⁷⁶ *Ibid.*, at 573.

¹⁴⁷⁷ *Ibid.*, at 573. He responds to the references made by Chief Justice Burger to the criminal sanctions being grounded in the history of Western civilization (*op. cit.* mentioned at 571). The decision is at odds with the premise in *Bowers* that the claim put forward was “insubstantial in our Western civilization.”

¹⁴⁷⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

¹⁴⁷⁹ *Lawrence, op. cit.*, at 574.

¹⁴⁸⁰ *Ibid.*, at 574.

opinion's distaste for a behavior may not, without additional legitimate purpose, justify a discriminatory criminal policy. It its core, Kennedy thus follow the same reasoning than the European Court in *Dudgeon*.

641. He added that an unenforced criminal law may also cause damage by its mere existence insofar that the stigma associated with the behavior continues to affect homosexuals.¹⁴⁸¹
642. With regard to the need to follow or overrule *Bowers*, the majority looked into the very legitimacy of that decision. Besides *Casey* and *Romer*, which weakened *Bowers*, widespread and “substantial and continuing” criticism had been expressed against the decision “in the United States” which was “disapproving of its reasoning in all respects”. The majority leaned on amici briefs and foreign authorities to stress that “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent”.¹⁴⁸² The majority thus leans on the universal arguments suggesting a reference to human rights through the use of the term “human freedom” to strengthen its position.
643. After questioning the inexorability of the stare decisis doctrine, the majority declared that even the drafters of the Bill of Rights knew that they could not anticipate all details and freedoms and let new generations decide; in other words, we should not be slaves to the opinions of the past. In a sentence reminding of the song herald to the anti-slavery movement in Great Britain, *Amazing Grace*: “I was blind but now I see”,¹⁴⁸³ he concludes:

Had [the drafters] known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁴⁸⁴

¹⁴⁸¹ *Ibid.*, at 575.

¹⁴⁸² *Ibid.*, at 560.

¹⁴⁸³ “Amazing grace (how sweet the sound), That sav'd a wretch like me! I once was lost, but now am found, Was blind, but now I see.” J. Newton, Olney Hymns (1779).

¹⁴⁸⁴ *Lawrence, op. cit.*, at 578-9.

644. Justice O'Connor's concurrence was based on equal protection grounds rather than privacy. She also quoted *Romer* to stress the inference that the Texas statute was born of animosity toward the class of persons affected".¹⁴⁸⁵ Contradicting the assertion that decriminalization would be a first step towards legalization of same-sex marriage, she also insisted that inimical public opinion toward homosexuality may not be considered a legitimate justification for such a policy aimed, according to Texas, at protecting marriage: "Unlike the *moral disapproval* of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond *mere moral disapproval* of an excluded group".¹⁴⁸⁶ Moreover, by enforcing sodomy against private consensual acts of homosexuals, Texas had made "homosexuals unequal in the eyes of the law".¹⁴⁸⁷ More remarkably, Justice O'Connor proposed a standard higher of review, even under more deferential Equal Protection Clause, to scrutinize policies aimed at "harm[ing] a politically unpopular group".¹⁴⁸⁸ In a nutshell, dominant public opinion animosity toward a group, whether or not it can be protected under suspect classifications, or a group displaying an assumed behavior—here sodomy—would be illegitimate under the United States Constitution.
645. Two aspects of Justice Scalia's dissent are worth noting in relation to public opinion. Firstly, Scalia began his dissent by challenging the majority's concern that blindly following old precedent is not mandated by law. He quoted Kennedy's own words in *Casey*, a decision where the Court had decided not to overrule its own abortion decision *Roe v. Wade* partly out of concern for its legitimacy: "Liberty finds no refuge in a jurisprudence of doubt",¹⁴⁸⁹ had the majority declared. Scalia explained that that the

¹⁴⁸⁵ The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *Lawrence, op. cit.* at 583 (emphasis added), citing *Romer, op. cit.*, at 634,

¹⁴⁸⁶ *Ibid.*, at 2487-8 (emphasis added).

¹⁴⁸⁷ *Ibid.*, at 2485 and 2487, Justice O'Connor refers to *Romer v. Evans, op. cit.*, at 635.

¹⁴⁸⁸ *Lawrence, op. cit.*, 2485. Under the Equal Protection Clause, which prohibits discriminations, the standard of scrutiny commonly used is "rational basis review" unless the scrutiny applies to a suspect classification (such as gender discrimination). On the different degree of severity and proliferating numbers of standards of scrutiny under American Constitutional Law, see generally M. S. Paulsen, "Medium Rare Scrutiny", *Constitutional Comment*, Vol. 15, 397 (1998).

¹⁴⁸⁹ This stance itself had warranted criticism of the minority in *Casey*, led by Justice Rehnquist: "Apparently realizing that conventional stare decisis principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect the "legitimacy" of this Court. . . . Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, . . . the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests. . . .

majority's concern for the Supreme Court's legitimacy and the criticism plaguing *Bowers* had warranted the exact opposite conclusion in *Planned Parenthood v. Casey*: that the Court should not overturn its precedent despite "widespread criticism".¹⁴⁹⁰ Nevertheless, a decade later in *Lawrence*, the majority seemed to have changed its mind and decided that criticism of the decision was a relevant reason to overrule a precedent. Secondly, after questioning the soundness of the legal reasoning of *Lawrence*, Scalia attacked the evolving interpretative stance adopted by the majority.¹⁴⁹¹ The 'emerging

This is so, the joint opinion contends, because, in those "intensely divisive" cases, the Court has call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution, and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. . . . This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the original decision has died away. . . . In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of stare decisis when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions." (Rehnquist, J. dissent, joined by Justice White, Scalia and Thomas at 959)(emphasis added). Unsurprisingly, Justice Scalia also had taken issue with *Casey*'s legitimacy and resistance to social pressures statement: "The only principle the Court "adheres" to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of Realpolitik - and a wrong one, at that. I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced - against overruling, no less - by the substantial and continuing public opposition the decision has generated." *Ibid.*, at 998. Justice Scalia concluded his *Casey* dissent by declaring: "Of course, as the Chief Justice points out, we have been subjected to what the Court calls 'political pressure' by both sides of this issue. . . . Maybe today's decision not to overrule *Roe* will be seen as buckling to pressure from that direction. Instead of engaging in the hopeless task of predicting public perception - a job not for lawyers but for political campaign managers - the Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled." *Planned Parenthood of Southeastern Pa. v. Casey*, *op. cit.*, at 999 (Emphasis added).

¹⁴⁹⁰ *Lawrence*, *op. cit.*, at 587.

¹⁴⁹¹ In *Planned Parenthood v. Casey*, *op. cit.*, at 848-9, the Majority refers to this evolving interpretation by quoting a dissent from Justice Harlan in *Poe v. Ullman*, a decision regarding legal use of contraceptives by married women (*Poe v. Ullman*, 367 U.S. 497 (1961), at 543) (Harlan J, dissenting from dismissal on jurisdictional grounds). Other doctrines, such as the living document doctrine – although rarely explicitly mentioned in decisions – are at the forefront of evolving doctrines of interpretation. The living instrument doctrine of the European Court is used first since ECtHR, *Tyrer v. The United Kingdom*, 25 April 1978, Appl. No. 5856/72, on the other hand, explicitly used by the European Court since ECtHR, *Stafford v. the U.K* [GC], 28 May 2002, Appl. No. 46295/99, at the service of its evolving and dynamic interpretation, when not using the "emerging consensus" approach. The living instrument approach was first used as a consensual interpretation (using mostly legal development prevailing in contracting states, see ECtHR, *Guzzardi v. Italy* [Plenary], Appl. No. 6367/74, 06 November 1980, has become a constructive interpretation. See F. Sudre, "Droit International", *op. cit.*, at § 154 p. 232-235.

awareness’¹⁴⁹² expression, is not, according to Scalia, relevant to American law. Indeed, “‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s],’ as we have said ‘fundamental right’ status requires”.¹⁴⁹³ In short: both are a contradiction in terms. He also criticized the use of the expression “value shared with a wider civilization”, i.e. the Western civilization, which he regarded as legally irrelevant to satisfy the criterion that a fundamental right should be “deeply rooted in this Nation’s history and tradition”.¹⁴⁹⁴ We do not know if the majority used foreign authorities while considering it binding law—although they are certainly used as a powerful argument to overrule precedent—but Justice Scalia seemed to think the majority did. Justice Scalia emphasized that “(t)he Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court should not impose foreign moods, fads, or fashions on Americans’ ”.¹⁴⁹⁵ Lastly, Justice Scalia considered that the progress enforced by the Court was equivalent to taking side in a culture war and an undemocratic step:

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. ... But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.¹⁴⁹⁶

646. Justice Scalia added that the Court’s impatience toward homosexual discrimination was not reflected in the attitudes of the wider American population, and reflected rather the

¹⁴⁹² Expression utilized several times in the majority opinion, *Lawrence*, *op. cit.* at 559, 572, ‘emerging’ alone is used at 572, also a quote of ‘emerging recognition’ from other supportive sources at 598. Justice Scalia discusses the use of this ‘emerging’ evolution several times in his dissent.

¹⁴⁹³ *Lawrence*, *op. cit.*, at 598.

¹⁴⁹⁴ *Ibid.*, quoting *Bowers v. Hardwick* (at 193–194).

¹⁴⁹⁵ Scalia J. dissenting, at 598, quoting *Foster v. Florida*, 537 U.S. 990, n., 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (Thomas, J., concurring in denial of certiorari).

¹⁴⁹⁶ *Ibid.*, at 603 (Scalia J. dissenting) (emphasis in original)(underline emphasis added).

dominant “attitudes of that [elite] culture” that is not, as believed, “mainstream”.¹⁴⁹⁷ In saying so, he also did not provide evidence for his assertion. In other words, the Supreme Court would privilege a section of public opinion over another according to its own preferences. In saying so, like the majority opinion, Justice Scalia did not offer any evidence of either group’s attitudes. Ultimately, Justice Scalia associated this open display of ideological preferences by the Supreme Court with an undemocratic tendency: by using an ‘emerging’ standard to discover new fundamental rights, the Supreme Court showed its lack of neutrality and that it is “impatient of democratic change”, said Scalia, instead of letting change take its course by classic democratic means. This is not the Supreme Court’s role.

647. Justice Thomas, in his additional dissent, stressed that, like Scalia, he did not oppose homosexual advocacy by democratic means. However, despite agreeing that the challenged law is “uncommonly ...silly”,¹⁴⁹⁸ he voted not to overrule *Bowers*.

2.3. Comparative Analysis

648. A few patterns transpire from this section. In European case law, the weight of public opinion is intrinsically linked to European consensus. Firstly, public opinion may be relevant to decision making, but not sufficient. When contracting states use national or local public opinion as an obstacle to legal evolution, the European Court looks at the state of consensus within the Council of Europe. If no consensus is to be found, the European Court will use the trend of new changing legislations and ally the parallel growth of public opinion support for change to decide that only strong reasons could justify being an outlier within that trend. Secondly, the Contracting State carries the burden of proof that local public opposition to change exist in combination with legitimate justification supporting the challenged legal norm or practice. Some European judges believe that if it has to be relevant, the actual state of (local) public opinion opposition to legal change needs to be proven; and most of the time the European Court uses the fact that it is not sufficiently proven as evidence of its non-

¹⁴⁹⁷ “Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously ‘mainstream’ ...” *Lawrence, ibid.*, at 602 (Scalia, J. dissenting) (emphasis added).

¹⁴⁹⁸ *Lawrence, op.cit.*, at 605.

existence. In contrast, to show the existence of a consensus in favor of change, the European Court does not positively show its existence, but just enumerates a few examples (European or International). Moreover, the court does not seem to impose the same standard of evidence on states as it does on applicants. The European Court seems to believe that since the Contracting States have to prove that they do not discriminate, they have to carry the burden of proof that Public Opinion leans one way or another

649. In the above-mentioned Supreme Court decisions, references to public opinion follow the dualistic patterns of constitutional dilemma of dominant majority against victimized minority, or activism against self-restraint judicial philosophy. Majority is often accused of victimizing a minority in number or popularity because of its misguided animosity. Social acceptance is the goal sought by the minority. According to formalist Justices, judges changing the law to protect a minority are activist judges. In any case, like the European Court, the United States Supreme Court does not consider that the stance of public opinion towards homosexuality is enough justification for criminalizing. Judging from the manner in which majority public opinion is referred to in its decisions, the Supreme Court does not seem to consider public opinion alone as a relevant justification either. Another type of opinion, such as “criticism”, might, however, strengthen the case for legal change
650. With regard to evolving interpretation, in *Bowers* the Supreme Court refused to effect legal change and justified this decision based on the state of the law in the majority of American states: consensus supports criminalization. Also in American case law, the state of consensus drives prospects of legal change. Although evolving interpretation was not used in the two cases effecting legal changes, the majority interpreted the Constitution differently by using a stricter than “rational basis” standard of review to the legal problem at hand. In *Lawrence*, the majority advocated change by referring to “emerging awareness” and the changes in the meaning of “liberty” since the Constitution was drafted, and by emphasizing the strong differences between an American law motivated by “general condemnation” and “disapproval” and more progressive civilized countries.¹⁴⁹⁹ It also stressed that there was no longer a numerical majority of states criminalizing homosexuality in the United States. Finally, compared to the European Court, the Supreme Court does not demand evidence of the state of

¹⁴⁹⁹ *Ibid.*, at 577.

public opinion favoring or opposing a policy. Rather, statements with regard to the motivations that underlie public opinion are mostly presumed based on their effect: imposing a disability on a minority group is assumed to be motivated by animus. Therefore, it seems that the motivation behind majority support of the law carries more weight in Supreme Court case law than in European case law, and that protection of victimized minorities against intolerant majorities, whether in the electorate or in public opinion, is a stronger argument altogether than consensus among American states.

651. In a general sense, both courts consider public opinion in their decisions, particularly valuing new developments in public opinion. However, the European Court seems stricter and more systematic in its considerations of public opinion as an argument, imposing on the responding state the burden to prove its existence and importance so as to motivate a policy detrimental to individual freedoms. In sum, public opinion is a legitimate and influential argument, but does not command European outcomes. In the Supreme Court's, it seems that although "mere disapproval" of homosexuality is not sufficient to impose criminal sanctions, criticism "substantial and continuing"¹⁵⁰⁰ of a decision is relevant to legal change. Thus, public opinion is relevant to American constitutional legal change, depending on its intensity, substance, and on its focus.
652. Where the European Court effected an end of criminalization of homosexuality in one decision, the Supreme Court needed three steps. Moreover, *Lawrence* majority decision was heavily inspired by *Bowers*' dissents and the European *Dudgeon* judgment itself. Finally, the state of European or American consensus heavily influenced the possibility to effect legal change in both Courts. It may be that legal change can occur faster in a court that was built with the goal to effect human rights improvements, while it can be impeded within the framework of a national legal system more concerned with issues of separation of powers and institutional legitimacy. The next section might confirm or contradict this assumption.

3. Towards Recognition of Same Sex Unions

653. While decriminalization occurred at much slower pace in the United States than in Europe, complete celebration of homosexual relationships is now a reality in the United States, and has yet to occur in Europe. Besides the different institutional framework of

¹⁵⁰⁰ *Ibid.*, at 560.

both Courts, a few factors explain the different paces of legal change. For example, the U.S. Supreme Court has the capacity to choose its cases from the docket, whereas all admissible cases come to the European Court, which is obliged decide them so long as they are deemed admissible. Of course, the new European priority policy¹⁵⁰¹ can help prioritize cases, but does not give the European Court a true choice as to which case it can decide. The pace of legal change also depends on the speed at which the European Court is able to decide cases dealing with same-sex relationships, on the legal approach taken by applicants and the possibility to use them as a frame to effect legal change. The relative slow pace of legal change towards legal recognition of same-sex unions in Europe compared to the United States can also be explained by the fact that legal and social consensus is more complex within a territory made of multiple countries and different democratic systems, histories and cultures than in one.

654. In this section, I want to comment on the evolution toward legal recognition of same-sex relationship in the United States and in Europe, and the role public opinion considerations played in this evolution. In the United States, I gathered very few cases because family law is usually defined at state level. Nonetheless, the cases were extremely politically salient. In Europe, multiple cases were submitted to the European Court that related to same-sex relationships before the Court had to examine whether States were under the obligation to recognize some kind of legal status for them. Cases on which the European Court draws upon for its same-sex jurisprudence were very diverse, they involve among others privacy, transsexual cases, social security cases, leases cases, or adoptions.
655. The status of same-sex relationships in Europe evolved in conjunction with cases involving many of the daily practical consequences of living as a couple in societies where the legal framework had been planned over a long period of time with heterosexual families in mind. To advocate their cause, same-sex applicants used precedents that possessed the highest amount of similarity with their own situations.
656. They had to compare their daily situations to the cases of transsexuals, unmarried heterosexual couples in *de facto* long-term relationships because they could not compare their situation to married couples, despite being legally not able to access

¹⁵⁰¹ For an explanation of the Court's Priority Policy, see explanations at Chapter One, subsection 2.1.2.1.

marriage if they had wanted to. Because the legal evolution of same-sex relationships is so intricately linked to the case of transsexuals and cases involving single homosexuals making adoption claims, I cannot completely set these cases apart from analysis. I will however keep the study of these cases to a minimum, or only treat aspects of the cases that are relevant to the evolution of same-sex relationships status under European law. Cases that are analyzed henceforth contain references to “public opinion” that involve the relationship status of homosexuals and cases that inspired European jurisprudence with regard to same sex relationships.

3.1. A Steady Advancement of the Same-Sex Cause in Europe

657. Marriage and its associated benefits, within or outside of the marriage institutional framework, were at the center of most same-sex couple applications. These included social benefits as well as adoption. I will show that in treating applications regarding homosexual couples and family life, the European Court’s jurisprudence has evolved towards a recognition of same-sex unions in a mostly equal way to marriage, while at the same time including public opinion considerations to its doctrine. This evolution was attached to a few changes in the legal doctrine of the Court: Firstly, the change of classification of same-sex relationships from the realm of privacy to family life; secondly, the insertion of “social acceptance” considerations into the Court’s assessment of consensus in the case of transsexuals’ right to marry; and thirdly, inclusion within the “living instrument” doctrine of the state of “social attitudes” and “perceptions”.

3.1.1. Same-sex De Facto Partnerships: Becoming “Family Life”

658. The first same-sex union case was decided by the European Court in *Mata Estevez v. Spain* in 2001.¹⁵⁰² It did not regard a request to marry specifically, but concerned one of the consequences of the lack of legal access to marriage for same-sex couples: the impossibility of inheriting survivor’s pensions. Since the death of the applicant’s long-term partner, Spain had legalized same-sex marriage. However, not having enjoyed the legal capacity to be married to his partner, the applicant could not *a posteriori* benefit from married survivors’ privilege. His situation had some similarity with the one of

¹⁵⁰² ECtHR, *Mata Estevez v. Spain*, Appl. No. 56501/00, 10 May 2001.

unmarried heterosexual couples that had long been unable to remarry after a divorce. Spain had allowed the latter survivor's privilege after the law allowing them to remarry had been voted. In order to decide if the substance of the application had any merit, the Court had to decide on its admissibility, i.e. if same-sex life in *de facto* partnership qualified as "family life" so as to qualify for Article 8 protection. However, the Court did not find that it did and concluded:

The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation. Accordingly, the applicant's relationship with his late partner does not fall within Article 8 in so far as that provision protects the right to respect for family life.¹⁵⁰³

659. In this decision, the European Court, in order to find a wide margin of appreciation, pointed at the lack of common ground between States, despite an increasing trend toward "legal and judicial recognition" of same-sex partnerships. At that time, the Court did not include any direct or indirect reference to public opinion in her treatment of consensus analysis of Article 8.¹⁵⁰⁴
660. The Court partly changed its decision in *Aldeguer Tomás v. Spain* in 2016,¹⁵⁰⁵ leaning on the 2010 decision *Schalk and Kopf* and considering "that, in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples following the decision in *Mata Estevez*, 'it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex

¹⁵⁰³ *Ibid.*

¹⁵⁰⁴ Two years later in ECtHR, *Karner v. Austria*, Appl. No. 40016/98, 24 July 2003, protection of family life of same-sex unmarried couples arose indirectly through the medium of Article 14. The case was not argued on the basis of Article 8 specifically, but on Article 14 in the enjoyment of the right to private and family life (Article 8). Therefore, the Court did not officially protect same-sex couples under the concept of 'family life', but implied that a change could occur in the future, when concluding: "The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it.... The Court cannot see that the Government have advanced any arguments that would allow such a conclusion [that a difference of treatment unmarried same-sex couples compared to unmarried heterosexual couples was necessary]" at §41. Moreover, although not directly referring to public opinion, the Court relied on amici assertions that "a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions" at §36. The Court thus acknowledged that a legal question that was object of a widespread debate in society in and beyond Europe should not be avoided in Europe. See also Van den Eynde, *op. cit.*, "Interpreting Rights Collectively", p. 301.

¹⁵⁰⁵ ECtHR, *Aldeguer Tomás v. Spain*, Appl. No. 35214/09, 14 June 2016.

couple [could not] enjoy ‘family life’ for the purposes of Article 8”.¹⁵⁰⁶ In *Aldeguer Tomás*, the European Court noted the “rapid evolution” in member states, but did not specify whether it referred to European attitudes in addition to the legal measures that had been taken since the ruling precedent. However, the European Court did distinguish the situation of same-sex survivors’ rights to inheritance from the situation of divorced people’s claim to inheritance without being able to remarry. Consequently, despite being protected in their family life, the same-sex life-partner survivor of a non-married homosexual still could not claim inheritance rights on the basis of his right to respect of family life.

661. Since the beginning of claims being brought to the European Court under Article 8 or the Convention, the European Court had only considered the rights of homosexuals under privacy lenses, even in the cases pertaining to adoption requests.¹⁵⁰⁷ This recent development is justified not only by the legal evolution in member states but also by social evolution. This key change and its legal potential show the pertinence of a hypothesis that human rights interpretation is, in perhaps greater extent than suspected, contingent upon public opinion. The following comments will explicit how.

3.1.2. The Right to Marry and the Case of Transsexuals: The Increasing Observation of Social Evolution

662. The second issue pertaining to sexual identity and marriage involved transsexuals. While the comparability of transsexual legal issues with the ones encountered by homosexuals is contestable, it is relevant insofar as transsexuals were considered as being born with another gender than biological, while homosexuals were assumedly born with another sexual orientation. The legal issue facing transsexuals was linked to their gender more than their orientation: they lived the life in the “skin” of another gender, and as a consequence could not marry, like all heterosexuals, a person of the

¹⁵⁰⁶ ECtHR, *Aldeguer Tomás v. Spain* at §75 (quoting *Schalk and Kopf*, *op.cit.* at § 94, a case concerning a cohabiting same-sex couple living in a stable, de facto, union). Indeed, in *Schalk and Kopf* the Court declared: “The Government accepted that Article 14 taken in conjunction with Article 8 of the Convention applied to the present case. Thus far, the Court’s case-law had considered homosexual relationships to fall within the notion of ‘private life’, but there might be good reasons to include the relationship of a same-sex couple living together within the scope of ‘family life’”, at §79.

¹⁵⁰⁷ Although the Court has not yet declared the existence of an obligation to legalize gay-marriage to contracting states, the application of the right to respect of family life to same-sex relationships may open this door.

opposite gender than the one they felt they belonged to. On the other hand, homosexuals sought legal recognition of their orientation and access to all legal privileges attached to the legal recognition of their commitment in a transsexuals' post-operative heterosexual relationship. Their obstacle was simply that marriage was restricted to commitments between persons born of different genders.

663. Both cases *Cossey v. the United Kingdom*¹⁵⁰⁸ and *Christine Goodwin v. the United Kingdom*¹⁵⁰⁹ involved transsexuals born males and living as female, which were in no capacity to marry a male because their birth certificate could not legally be amended to reflect their sex change into a female gender.
664. In *Cossey*, the Court left the United Kingdom a wide margin of appreciation, based on the “little common ground” between member states and the “same diversity of practice” as in a previous judgement of 1986.¹⁵¹⁰ The Court also stressed that this interpretation was “in line with present-day conditions” and that overruling precedent decisions was not yet warranted.¹⁵¹¹ However, this was not the opinion of dissenting judges Palm, Foighel and Pekkanen. They noted that transsexuals had not succeeded in having their new sexual identity “be accepted by the legislature and by the courts” and found it easily explainable by the fact that “(t)his *negative attitude towards transsexuals* is based on deeply rooted moral and ethical notions which, nevertheless, seem to be slowly changing in European societies”.¹⁵¹² After pointing at the fact that local public institutions opposed this recognition, they acknowledged the period of transition European societies were going through, seeing a “growing awareness of the importance of each person’s own identity and of the need to tolerate and accept the differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one’s own life undisturbed are increasingly accepted”.¹⁵¹³ Here the dissenting judges were not specific when noting to whose ‘negative attitude’ or increased acceptance they were referring to: these may be local and European opinions and attitudes, or public institutions’ attitudes. The dissent suggests a combination of local and European attitudes, since the judges refers to “new, more tolerant attitudes...

¹⁵⁰⁸ ECtHR, *Cossey v. the U.K.*, Appl. No. 10843/84 [Plenary], 27 September 1990.

¹⁵⁰⁹ ECtHR, *Christine Goodwin v. the United Kingdom* [GC], Appl. No. 28957/95, 11 July 2002.

¹⁵¹⁰ *Cossey*, *op.cit.*, at §40.

¹⁵¹¹ *Ibid.*, at § 40.

¹⁵¹² *Ibid.*, Palm, Foighel and Pekkanen JJ., dissenting at §3.

¹⁵¹³ *Ibid.*, at §4.

reflected in modern legislation as well as administrative and court practices”.¹⁵¹⁴ The dissenting judges’ reference to European evolving attitudes is vague, and they seem to refer to tangible evolutions in the law as evidence of opinion change.¹⁵¹⁵ One can only speculate if the judges consider legal evolution or recent attitudes as more relevant to the direction legal change should take.

665. Dissenting Judges Macdonald and Spielmann also referenced the evolution of social acceptance for transsexuals: “There is an ever-growing awareness of the essential importance of everyone’s identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered “normal”.”¹⁵¹⁶ Both judges stressed that the evolution was recent, but hard to prove.¹⁵¹⁷ They justified this position with a few examples of legal reforms and case-law in contracting states.¹⁵¹⁸ “This shows, I think, an important “societal development”, viz. a marked increase in public acceptance of transsexualism and a clearly wider sharing of the convictions set forth in section 2 of this opinion.”¹⁵¹⁹ To the judges, the state of public acceptance and public opinion, that they called a “kind of feeling”, was evidenced by the legal changes in different contracting states. For this reason, they disagreed with the European Court that these changes warranted a legal evolution¹⁵²⁰ based on an unconvincing acknowledgement of the remaining “diversity of practice”.¹⁵²¹
666. The question arose again in *Christine Goodwin* about a decade later. The case revolved around whether acceptance of transsexualism had occurred since *Cossey* and justified

¹⁵¹⁴ *Ibid.*, at §4.

¹⁵¹⁵ Referring to state laws: “Several European States have accepted the possibility of recognising a change of sex on the part of transsexuals and have, subject to certain conditions, acknowledged their right to marry (Sweden 1972, Denmark 1973-75, Federal Republic of Germany 1980, Italy 1982 and the Netherlands 1985). In some States the same result has been achieved through administrative or court practice (e.g. Finland and Norway). In addition, rectification of the birth certificate following a change of sex can be obtained in some European countries (e.g. Belgium, Luxemburg, Spain and Turkey). This comprises in some States also the right to marry”, *ibid.*, at §3.

¹⁵¹⁶ Macdonald and Spielmann, JJ. dissenting at § 5.5.

¹⁵¹⁷ “This kind of feeling is, of course, hardly capable of proof. Nevertheless, there are some facts which may at least convincingly illustrate what I mean.”, *ibid.*

¹⁵¹⁸ *Ibid.*

¹⁵¹⁹ *Ibid.*

¹⁵²⁰ *Ibid.*, at §6.5.1.

¹⁵²¹ *Ibid.*, at §5.6.2.

legal change. The issue of social acceptance was brought up by the applicant,¹⁵²² which the British government contested.¹⁵²³

The applicant argued that rapid changes, in respect of the scientific understanding of, and the social attitude towards, transsexualism were taking place not only across Europe but elsewhere. She referred, *inter alia*, [to reforms in the Netherlands and New Zealand]. The applicant also pointed to increasing social acceptance of transsexuals and interest in issues of concern to them reflected by coverage in the press, radio and television, including sympathetic dramatisation of transsexual characters in mainstream programming.

667. The applicant, to prove the existence of social changes, referred to scientific and social understanding, legal changes, and coverages in the press and entertainment reflecting “increasing social acceptance of transsexuals”. The government disputed the applicant's assertion that scientific research and “massive societal changes” that “had led to wide acceptance, or consensus on issues, of transsexualism”.¹⁵²⁴ The court acknowledged the need to “respond, for example, to any evolving convergence as to the standards to be achieved”,¹⁵²⁵ and adopt an evolving interpretation true to the “present-day conditions”,¹⁵²⁶ without which the Court “would indeed risk rendering it a bar to reform or improvement”.¹⁵²⁷ To assess the state of consensus, the Court acknowledged a “continuing international trend towards legal recognition [of sex reassignment]”, taking as examples two countries outside of the Council of Europe.¹⁵²⁸ The European Court also stressed the remaining lack of consensus:

While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising.... The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in

¹⁵²² *Christine Goodwin, op. cit.*, at § 63.

¹⁵²³ *Ibid.*, at § 64.

¹⁵²⁴ *Ibid.*, at § 64.

¹⁵²⁵ *Ibid.*, at § 74.

¹⁵²⁶ *Ibid.*, at § 75.

¹⁵²⁷ *Ibid.*, at § 74. The expression “present day conditions” is usually used in conjunction with the “living instrument doctrine” when the Court contemplates legal change. Initiated in ECtHR, *Tyrer v. The United Kingdom*, Appl. No. 5856/72, 25th April 1978, at § 31.

¹⁵²⁸ The court cites the case of two countries Australia and New Zealand. However, it does not specify if these countries are the only one that recognized sex reassignment or some of many within the international community. *Ibid.*, at § 84.

favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.¹⁵²⁹

668. While member states may have different solutions to the problem of transsexuals, the court here implied that it attaches importance to the trend toward social and legal acceptance and recognition of transsexuals. Moreover, the European Court specifically attached importance to social acceptance *beyond* Europe: the manner in which international opinion seems to consider transsexuals was, therefore, relevant and more so than diversity within Europe. The Court combined both criteria of social acceptance and legal status to decide whether the applicant's complaint has merit.
669. The Court henceforth concluded that since the United Kingdom had not taken steps towards legal recognition of post-operative transsexuals since the last cases "despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted",¹⁵³⁰ it could no longer consider that legal measures to that end fell within its margin of appreciation and had effected a breach of its obligations under Article 8. The Court implied that authorities of the United Kingdom's should follow the trend of acceptance in its own country and abroad in order not to infringe on Convention rights.

3.1.3. Living Instrument and Equality of Heterosexual and Same-sex Relationships

670. European litigation surrounding same-sex relationships and family life was, since the beginning, aimed at obtaining full equality between same-sex and heterosexual relationships. Although they have not yet reached that goal, their litigation outcomes have succeeded at making sure that any difference of treatment based on sexual orientation put on the state the burden of a strongly convincing justification. To reach equality, same-sex applicants have started with contesting difference of treatment with single heterosexual persons in adoption cases, then with heterosexuals living a *de facto* marital relationship, civil partnerships and finally, marriage. Although they have not reached full equality with marriage, they have obtained in 2013 that the creation of domestic partnerships could not legitimately exclude same-sex couples,¹⁵³¹ and in 2015

¹⁵²⁹ *Ibid.*, at §85.

¹⁵³⁰ *Ibid.*, at §92.

¹⁵³¹ ECtHR, *Vallianatos and others v. Greece* [GC], Appl. Nos. 29381/09 32684/09, 7 November 2013.

that the law could not exclude homosexuals from any legal recognition of their relationship. The following case studies show how the European Court of Human Rights has involved public opinion considerations into its case law in this field, and how public opinion or attitudes, or perceptions were slowly but fully included into the Court's Article 8 and 14 doctrines.

3.1.3.1. Single Homosexuals Access to Adoption

671. From the moment decriminalization occurred in 1981 in *Dudgeon*, homosexuals have been working at reaching equality status with heterosexual orientation in all legal aspects involved in their relationship. One of these aspects is the possibility to adopt.
672. Adoption is not directly related to sexual orientation, in particular when single applicants are given the legal capacity to apply for adoption. However, a few cases demonstrated that it could be in question when some individual homosexual applicants lodged complaints for having been denied authorization to adopt on the ground of their sexual orientation. Because a potential adoptive parent must demonstrate a capacity to host a child, its daily life and lifestyle can be the object of a detailed inquiry by social authorities in order to determine if the household is suitable to a child's need. In *Fretté v. France*¹⁵³² and *E.B. v. France*,¹⁵³³ the sexual orientation of single applicants became an issue in the adoption process.
673. The denial of prior authorization to adopt that Mr. Fretté received did not include any explicit mention of his sexual orientation. However, is "lifestyle" was in question. Therefore, he complained of an arbitrary interference with his private and family life based on Article 14 and Article 8 ECHR. He considered that the decision was based exclusively on an unfavorable prejudice about his sexual orientation. To decide if Mr. Fretté had been victim of discrimination based on sexual orientation, the European Court looked at European consensus, considering that in issues where little common ground was found or where the law was in a transitional phase, Contracting States enjoyed a wide margin of appreciation.¹⁵³⁴ The Court also noted that the scientific community was divided on the interest of the child and the compatibility of adoption

¹⁵³² ECtHR, *Fretté v. France*, Appl. No. 36515/97, 26 February 2002.

¹⁵³³ ECtHR, *E.B. v. France* [GC], Appl. 43546/02, 22 January 2008.

¹⁵³⁴ *Fretté, op.cit.*, at §36.

within a homosexual household.¹⁵³⁵ Without more specificity, as to what “opinion” she referred to, but arguably meaning “public opinion,” the European Court added that “there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand”.¹⁵³⁶ The Court went on to name the criteria on which its decisions are based to decide if there has been a discrimination. In connection with the criteria of “legitimate aim” and proportionality, the court noted “the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions”.¹⁵³⁷ The court did not, however, say more on the issue. It noted the absence of current consensus on the ethical question of child rearing in a homosexual household—whether or not the prospective parent was single—and added that consensus commanded the amount of appreciation the Court would leave to the State.¹⁵³⁸ Applying these considerations to the facts of the case, the European Court declared:

It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely . . . By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.¹⁵³⁹

674. The assessment of consensus seems to be, at that time, a purely legal evaluation, although the Court acknowledges that the delicate focus of the case explains that “opinions may reasonably differ widely”. In short, the Court considers the existence of support of European and domestic opinion as a criterion strengthening the position of

¹⁵³⁵ *Ibid.*, at §42.

¹⁵³⁶ *Ibid.*, at §42.

¹⁵³⁷ See, among other authorities, ECtHR, *Johnston and Others v. Ireland*, Appl. No. 9697/82, Series A, No. 112, 18 December 1986, pp. 24-25, at § 53. Note that the court mentioned this doctrine in the evaluation of compliance with Article 8 and 14 rather than just with applicability, as she usually does.

¹⁵³⁸ “The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States”, *Fretté, op.cit.*, at §40.

¹⁵³⁹ *Ibid.*, at §41 (emphasis added).

the domestic authorities' decision that, in this case, the applicant's household was generally not suitable for adoption. It concluded that there had been no violation.

675. *E.B. v. France*, is in essence, the same case, with a notable difference: the applicant, a woman, applied for adoption as a single applicant despite the fact that she was living with her homosexual partner. Authorization to adopt was denied among others because of her lifelong partner's disengagement toward the adoption. The court considered the admissibility of the of claim pertaining to a "right to adopt" could be examined under Article 8 and applied the living instrument doctrine: had the development in the laws of Contracting states changed enough to warrant an examination of this potential right under the Convention?¹⁵⁴⁰ The Court concluded positively.
676. With regards to the merits, the European Court was more enigmatic. The State acknowledged and responded to arguments the European Court had used in *Fretté*: the situation in the scientific community and public opinion had not changed.¹⁵⁴¹ However, it seems that the only elements differentiating *Fretté* from *E.B.* in the eyes of the European Court was that in *Fretté*, the applicant did not to consider the problem that the applicant had not provided authorities with a referent of the other sex because the applicant was not deemed capable of emotionally dealing with consequences of adoption. Therefore, the presence of a referent of the other sex would not have changed the decision of adoption authorities. In *E.B.*, the applicant was deemed capable to adopt, but contested the state-imposed obligation of to name referent of another sex for the child. The Court deemed that this obligation was a pretext to deny authorization to adopt, and that sexual orientation was an important consideration in this case, which was forbidden since the case *Salgueiro da Silva Mouta*.¹⁵⁴² For this reason alone, it

¹⁵⁴⁰ "The Court is not therefore called upon to rule whether the right to adopt, having regard, inter alia, to developments in the legislation in Europe and the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions ... should or should not fall within the ambit of Article 8 of the Convention taken alone." *E.B. v. France*, *op. cit.*, at §46.

¹⁵⁴¹ "The conclusion reached by the Court in *Fretté* regarding the division in the scientific community was still valid today. The Government justified the failure to produce studies identifying problems or differences in development in children raised by homosexual couples by the fact that the number of children raised by a homosexual couple was unknown and the estimated numbers highly variable. Besides the complexity of the various situations that might be encountered, the existing studies were insufficiently thorough because they were based on insufficiently large samples, failed to take a detached approach and did not indicate the profile of the single-parent families in question. Child psychiatrists or psychoanalysts defended different theories, with a majority arguing that a dual maternal and paternal referent in the home was necessary. There were also still wide differences in public opinion since *Fretté*." *E.B.*, *op. cit.*, at § 66-67.

¹⁵⁴² ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999.

seems, the Court did not find that the division in scientific community and wide differences in public opinion that France claimed existed were, this time, relevant “in the light of present-day conditions”.¹⁵⁴³ However the Court did not discuss the current legal and social context. Without discussing France’s arguments, the Court found that in “present-day conditions...[they] cannot be regarded as particularly convincing and weighty”.¹⁵⁴⁴ However the “present-day conditions” in practice and within the scientific society and opinion, as well as the existence of a European consensus were in dispute in that case.¹⁵⁴⁵ The Court either did not find that the existence of a European consensus was relevant, or implicitly adopted the opinion of the applicant that had claimed its existence: the reference to “present-day conditions” would, in itself, suggest that latter hypothesis. In this case, one cannot conclude that public opinion led the Court to effect legal change, however, previous cases show that the division of public opinion does not constitute an obstacle to change for the Court.

677. *X and others v. Austria*¹⁵⁴⁶ is another adoption case decided in 2013, and which significance lays in the way the European Court uses both consensus and the living instrument doctrine. The case applies European human rights law differently than other same-sex adoption cases insofar that it involves a child already living within a homosexual household. In this instance, the second mother of the child wanted to adopt the child to facilitate its care on a daily basis. However, such adoption procedure incidentally would have severed the legal relationship with the child’s father, which the child’s father refused to consent to. The applicant and the child’s mother, who was acting on the child’s behalf, contended that the refusal to authorize the natural mother’s partner to adopt was discriminatory on the ground of her sexual orientation and infringed on her right to respect for her family life. The applicants were not allowed to marry in Austria, and the new registered partnership law open to same-sex couples did not grant same-sex couples access to adoption either. Because they were a same-sex couple and they could not legally adopt, the domestic court had not overridden the natural father’s refusal to relinquish his paternity rights. The government claimed that

¹⁵⁴³ *Ibid.*, at §§ 64-66.

¹⁵⁴⁴ *Ibid.*, at §§ 92 and 94: “The Court points out that French law allows single persons to adopt a child (see paragraph 49 above), thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.

¹⁵⁴⁵ *Ibid.*, at §§53-69 (Court summary of the parties’ arguments).

¹⁵⁴⁶ ECtHR, *X. and others v. Austria* [GC], Appl. No. 19010/07, 19 February 2013.

adoption by the mother's same-sex partner would not have been in the best interest of the child since it still had a relationship with its father. According to the applicants, the domestic courts did not inquire whether the adoption was in the child's best interest and refused to override the father's wishes on the basis of the mothers' sexual orientation. Hence, they had suffered a discrimination.

678. In *X and others*, the Court based its assessment on the living instrument doctrine as formulated in *Kozak v. Poland*,¹⁵⁴⁷ referring to the “developments in society and changes in the perception of social, civil-status and relational issues”.¹⁵⁴⁸ This formulation refers here not only to legal changes but mostly to public attitudes changes, whether they occur in one State or across Europe. The European Court henceforth assessed the state's margin of appreciation. It declared that despite the lack of consensus on the issue, the State's margin discretion was narrow because it involved discrimination on the basis of sexual orientation.¹⁵⁴⁹ Thus despite the delicate nature of

¹⁵⁴⁷ ECtHR, *Kozak v. Poland*, Appl. No. 13102, 02 March 2010 was a case involving succession to a lease after the death of a long-term homosexual partner. The applicant complained that the main consideration in the eyes of the Polish courts in assessing if he was justified in claiming a right to lease succession was not the debate over the stability of his relationship and the nature of economic ties between him and the deceased as the state claimed, but the fact that he was in a same-sex relationship, which was not recognized by Polish law in the way a de facto marital cohabitation would be if it involved a man and a woman. (*Kozak* at §§96-98) Consequently, the applicant could not successfully apply for lease succession for de facto marital cohabitation. The European Court found that decision was based on discriminatory grounds by relying on the living instrument doctrine without reference to the existence of a consensus: “The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment ... However, in pursuance of that aim a broad variety of measures might be implemented by the State [to protect it]. Also, given that *the Convention is a living instrument, to be interpreted in the light of present-day conditions*, the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily *take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.*” *Ibid.*, at §98 (emphasis added). Since it was established in other decisions that Article 14 covered discrimination on the basis of sexual orientation, the Court does not seem to need to appeal to the existence of a consensus to penalize such discrimination. However, the European Court still relied on the living instrument doctrine instead, communicating that it is merely responding to “present-day conditions”, therefore that its assessment has to evolve with “developments in society and changes in the perception of social, civil-status and relational issues”, *ibid.* The European Court seems to refer here not only to legal but mostly to public attitudes changes, no matter whether they occur in one State or across Europe.

¹⁵⁴⁸ *Ibid.*, at §142, and *X. and Others*, *op.cit.*, at §139.

¹⁵⁴⁹ “The Court observes that the breadth of the State's margin of appreciation under Article 8 of the Convention depends on a number of factors. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. *Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider* ... However, the Court reaffirms that when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14, the State's margin of appreciation is narrow”(references omitted, emphasis added), *X and others*, *op. cit.*, at §148.

the issue, which “may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition”, the Court declared itself unconvinced by the State’s justifications.¹⁵⁵⁰

679. Note that in previous same-sex cases, the Court had not explicitly combined “consensus” and “living instrument” doctrines. After introducing the new formulation of the living instrument doctrine where it refers to “changes in social attitudes” in *Kozak*, another case involving same-sex relationships, the Court did combine both interpretative methods.

3.1.3.2. *Same Sex Unions*

680. *Schalk and Kopf v. Austria*¹⁵⁵¹ involved a same-sex couple who wished to marry but was denied the right to marry a person of the same gender. They contended that they suffered a discrimination based on their sexual orientation in their enjoyment of the right to marry protected at Article 12 of the Convention.¹⁵⁵²
681. The Austrian government argued that despite the changes in the institution of marriage, there was yet no consensus in Europe on the existence of a right to marry for same-sex couples.¹⁵⁵³ The applicants considered the changes justified allowing same-sex couples the right to marry, and that the European Convention did not grant States unlimited discretion.¹⁵⁵⁴ Third parties relied on the living instrument doctrine,¹⁵⁵⁵ some to stress the lack of consensus (United Kingdom government), some to assert that the state of European consensus on this issue had increased, although “considerably less weight should be attached” to it.¹⁵⁵⁶ The court examined the case law pertaining to the right to marry of post-operative transsexuals. In previous cases, the court had considered that “the fact that the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of”.¹⁵⁵⁷

¹⁵⁵⁰ *Ibid.*, at §151.

¹⁵⁵¹ ECtHR, *Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010 (hereinafter “*Schalk and Kopf*”).

¹⁵⁵² Article 12 stipulates: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

¹⁵⁵³ *Schalk and Kopf*, *op. cit.*, at § 42.

¹⁵⁵⁴ *Ibid.*, at § 44.

¹⁵⁵⁵ *Ibid.*, at § 46.

¹⁵⁵⁶ *Ibid.*, at § 47 (Arguments of the four third-party NGOs).

¹⁵⁵⁷ “The Court concluded that it fell within the State’s margin of appreciation as to how to regulate the effects of the change of gender on pre-existing marriages. In addition, it considered that, should they choose to divorce in order to allow the transsexual partner to obtain full gender recognition, the fact that

However, this did not support an extension of the right to marry to same-sex couples. Applicants relied on the possible interpretation of Article 12 allowing same-sex marriage, and on the living instrument doctrine, advocating a legal change to adapt the law to present-day conditions. However, the Court was unconvinced, considering that if the social changes in the institution of marriage had occurred, and if the standards regarding transsexuals right to marriage had converged in Europe, it was not the case for same-sex marriage.¹⁵⁵⁸ Hence the Court decided it could not “rush to substitute its own judgement in place of the national authorities” in this matter.¹⁵⁵⁹

682. Taking their arguments to the prohibition of discriminations in the enjoyment of private and family life (Article 8 and 14), the plaintiffs argued that “the remaining differences between marriage on the one hand and registered partnership on the other were still discriminatory”.¹⁵⁶⁰ Thus, introduction of legal recognition of same-sex couples in Austria was still deemed unsatisfactory to them. Third parties requested the Court to “address the question whether there was an obligation under Article 14 taken in conjunction with Article 8 to provide alternative means of legal recognition of a same-sex partnership”,¹⁵⁶¹ which they believed the current state of European consensus supported.¹⁵⁶² Leaning on the “rapid evolution of social attitudes towards same-sex couples” since *Mata Estevez*, and the legal recognition that occurred in a “considerable number of member States”,¹⁵⁶³ the Court considered that same-sex relationships fell within the ambit of “family life”.¹⁵⁶⁴ On the merits, the Court relied on the premise, inspired by third parties, that “same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal

the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of.” *Schalk and Kopf, op.cit.*, at § 12.

¹⁵⁵⁸ *Ibid.*, at § 60.

¹⁵⁵⁹ *Ibid.*, at § 62.

¹⁵⁶⁰ *Ibid.*, at § 78.

¹⁵⁶¹ *Ibid.*, at § 85.

¹⁵⁶² *Ibid.*, at § 86: Thirdly, they asserted that the state of European consensus increasingly supported the idea that member States were under an obligation to provide, if not access to marriage, alternative means of legal recognition. Currently, almost 40% had legislation allowing same-sex couples to register their relationships as marriages or under an alternative name.

¹⁵⁶³ *Ibid.*, at § 93.

¹⁵⁶⁴ *Ibid.*, at § 79. “The Government accepted that Article 14 taken in conjunction with Article 8 of the Convention applied to the present case. Thus far, the Court’s case-law had considered homosexual relationships to fall within the notion of “private life”, but there might be good reasons to include the relationship of a same-sex couple living together within the scope of “family life””, at § 93 and § 94.

recognition and protection of their relationship”.¹⁵⁶⁵ The Court refused to read Article 8 as allowing to recognize a right to same-sex marriage, since such right could not be read into Article 12, which on the whole would be incoherent. The European Court examined if a lack of alternative recognition would constitute a discrimination.

683. In this case, the Court did not rely on the living instrument doctrine, although third parties invited it to. Applicants also relied on the meaning of marriage in “present-day perceptions” in their domestic judicial argument.¹⁵⁶⁶ This time however, the Court noted the “rapid evolution of social attitudes toward same-sex couples”,¹⁵⁶⁷ to find the Article 14 and 8 applicable. This expression was found in later cases involving legal consequences of same-sex partnership, in *P.B. and J.S. v. Austria*,¹⁵⁶⁸ involving the right to subscribe one’s same-sex partner of a *de facto* partnership to one’s insurance, and in *Pajic v. Croatia*, involving same-sex couples’ right to family reunion. Instead of the living instrument doctrine, the Court assessed the state of European consensus to conclude that since no *majority* of states had provided for legal recognition of same-sex couples, states had a wider margin to implement a form of legal recognition of same-sex relations, which Austria had done.¹⁵⁶⁹ Remarkably, the Court seemed to contend that despite the lack of consensus, the States enjoyed a margin of appreciation limited to the “timing of the introduction of legislative changes”.¹⁵⁷⁰ Arguably, the European Court imposed an obligation to effect the changes without explicitly saying so, but at each State its own rhythm. Saying so, the Court could risk no anger from Austrian authorities, which “while not in the vanguard” had already effected the change.¹⁵⁷¹ However, in other cases where the Court had found no majority of states embracing legal changes, but a trend toward consensus, that fact had not stopped it from

¹⁵⁶⁵ *Ibid.*, at §99. The court used a wording very close to the one of the third parties, who contented that “it was generally accepted that same-sex couples had the same capacity to establish a long-term emotional and sexual relationship as different-sex couples and, thus, had the same needs as different-sex couples to have their relationship recognised by law”, at § 84.

¹⁵⁶⁶ *Ibid.*, at §11.

¹⁵⁶⁷ *Ibid.*, at §93.

¹⁵⁶⁸ ECtHR, *P.B. and J.S.*, Appl. No. 18984/02, 22 July 2010, at § 29, and ECtHR, *Pajic v. Croatia*, Appl. No. 68453/13, 23 February 2016, at §64.

¹⁵⁶⁹ *Schalk and Kopf, op.cit.*, at §105.

¹⁵⁷⁰ “The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”, *ibid.*, at §105.

¹⁵⁷¹ *Ibid.*, at § 106.

finding a violation. This may explain why the European Court granted the state leeway with regard of the pace of legal change. Consequently, the Court disagreed with the applicant's contention that any legal differences between civil partnership and marriage was discriminatory, and refused to examine every difference in the abstract.¹⁵⁷²

684. In *Vallianatos v. Greece*,¹⁵⁷³ applicants complained that the existence of civil partnership reserved to heterosexual couples marginalized them and constituted a discrimination in the enjoyment of their right to private and family life on the basis of sexual orientation.¹⁵⁷⁴ Being the only state in the Council of Europe to provide for domestic partnership while excluding same-sex couples from it, applicants contended that Greek law “cast a negative moral judgment on homosexuality as it reflected an unjustifiable reserve, not to say hostility, towards same-sex couples. Having decided to move away from marriage as the sole formal basis of family life, the legislature had shown a clear disregard for same-sex couples by excluding them from” civil partnership.¹⁵⁷⁵ They did not accept the government's argument that these partnerships were meant for the protection of children born outside of marriage. Instead they accused the state of “reinforcing prejudice” and negative opinions about homosexual couples.¹⁵⁷⁶ The government did not justify the absence of civil partnership recognizing same-sex couples in term of public opposition. It justified the existing civil partnership in technical terms, considering that it had been aimed at protecting children born out of wedlock whose parents did not wish to marry, therefore that it was not meant for homosexual couples, and that the exclusion of same-sex couples from the framework did not discriminate against homosexual couples in practical terms. In conclusion, it

¹⁵⁷² “the Court is not called upon in the present case to examine each and every one of these differences in detail. For instance, as the applicants have not claimed that they are directly affected by the remaining restrictions concerning artificial insemination or adoption, it would go beyond the scope of the present application to examine whether these differences are justified. On the whole, the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership”, at §109.

¹⁵⁷³ *Vallianatos, op. cit.*

¹⁵⁷⁴ They contended that “any compensation that might be awarded by the domestic courts would in no way alleviate their feeling of exclusion and social marginalisation caused by Law no. 3719/2008 [and] that only a finding by the Court of a violation ... of the Convention would be capable of redressing the damage they had suffered”. *Ibid.*, at §44.

¹⁵⁷⁵ *Ibid.*, at §60.

¹⁵⁷⁶ “Instead of taking positive steps to overcome prejudice against gays and lesbians in Greek society, the respondent State had reinforced that prejudice by enacting Law no. 3719/2008 without including same-sex couples.” *Ibid.*, at §60.

was the absence of a civil partnership framework for or open to same-sex couples that was in question, rather than discrimination of same-sex couples.

685. The European Court repeated its *Schalk and Kopf* assertion that same-sex and heterosexual couples were in a comparable situation since they were “as capable as different-sex couples of entering into stable relationships”,¹⁵⁷⁷ that despite the concern to provide a legal framework besides marriage meant to protect children born out of wedlock and single families, civil partnerships could prove also profitable to same-sex couples in its legal effects—property, maintenance and inheritance—and insofar that it would provide a legal status to same-sex relationships.¹⁵⁷⁸ The Court agreed that the protection of traditional marriage and of children was a legitimate goal under the Convention. However, with regard to proportionality, it relied on the “living instrument” doctrine, taking into account “developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life”.¹⁵⁷⁹ Greece was to show that the exclusion of same-sex couples from civil partnership was necessary, but the Court concluded that Greece needed not exclude same-sex couples of the partnership to protect children of different-sex couples in the same legal framework.¹⁵⁸⁰

686. The court proceeded to an examination of European Consensus. Despite a lack of consensus on legal recognition of same-sex relationships, a “trend is currently emerging” in that direction. The court gave the numbers of states recognizing same-sex couples, without specifying if a majority of states recognized same-sex relationships. Based on comparative law materials 22 of 47 states recognized them in one or more ways (marriage or/and civil partnership), which still did not constitute a majority. The Court found a violation of Article 8 and 14. In contrast, in *Schalk and Kopf*, the Court had found that since no majority of member states recognized of same-sex relationships, the state retained a wider margin of appreciation with regard to the form and recognition and timing of legal change.¹⁵⁸¹

¹⁵⁷⁷ *Ibid.*, at § 78.

¹⁵⁷⁸ *Ibid.*, at § 81.

¹⁵⁷⁹ *Ibid.*, at § 84.

¹⁵⁸⁰ *Ibid.*, at § 89.

¹⁵⁸¹ *Schalk and Kopf, op. cit.*, at §105.

687. The change in doctrine is inconsistent, but not surprising. In *Schalk and Kopf*, Austria had just provided for a legal recognition of same-sex relationships when the Court released its opinion, thus following the trend, while Greece had not in *Vallianatos*. In the former, the Court refused to oblige the state to provide a legal framework that, in effect if not in name, would have the same legal effects as a legal marriage, while an alternative means of recognition already existed.¹⁵⁸² In the latter, the Court obliged the state to compensate for the inexistent means of legal recognition of same-sex couples in the form of an inclusive partnership. Although the cases are different in substance, since the Court could not yet impose marriage on all states, the Court made instrumental use of the consensus doctrine: in one, ‘no majority’ meant ‘no consensus’ and in the second, a ‘trend’ was sufficient to produce an obligation to recognize. However, the Court could have done differently, since it had opened the door in *Schalk and Kopf* by declaring that the State had a margin of appreciation with regard to the timing of legal recognition.¹⁵⁸³ Following this line of reasoning, the court could simply have used on Greece the state of consensus to reduce the margin of appreciation with regard to the timing of legal recognition.
688. Overall, it is difficult to know how confirmed an emerging trend must be in order to trigger an obligation for outlier states to follow that trend, which is detrimental to legal certainty. The “developments in society and changes in the perception of social and civil-status issues”¹⁵⁸⁴, i.e. public opinion, could well be tipping the balance when it comes to the Court’s choice between trend and majority.
689. Finally, in *Oliari v. Italy*, the Court had to consider a contracting state that had not yet provided any legal means of recognition for same-sex relationships. Applicants, based on Articles 8, 12 and 14, complained that they could not marry in Italy and that the law did not even provide for an alternative framework of recognition of same-sex relationships. It was left to the Constitutional Court to intervene on case-to-case basis to implement equality between same-sex and heterosexual couples as long as Parliament would not enact a form of recognition. Such accommodations could not,

¹⁵⁸² *Ibid.*, at § 108.

¹⁵⁸³ The Court at noted at §14 that Parliamentary debates had revealed that authorities did not feel that society was ready to accept legal recognition of same-sex couples. “During parliamentary debates, the minister contended that Greek “society today [was] not yet ready to accept cohabitation between same-sex couples” despite warnings that Greece would be violating the Convention by excluding same-sex couples.” *Vallianatos, op.cit.*, at §14.

¹⁵⁸⁴ *Vallianatos, op. cit.*, at §84.

however, be effected through a creative interpretation of the Italian Constitution to include same-sex couples in the definition of marriage.¹⁵⁸⁵ At issue was the fact that Italy did not offer any civil status as an alternative to marriage, be it for heterosexual or homosexual couples, and that homosexual couples did not enjoy any form of legal recognition. According to applicants, the State had not justified failure to legislate to recognize same-sex couples.¹⁵⁸⁶ They also saw no relationship between protection of family and exclusion of same-sex couples from marriage, an intention that Italy denied.¹⁵⁸⁷

690. The case was really about public opinion. While the applicants framed the case in a minority *versus* majority oppression terms, Italy asked the Court to leave the state a margin of appreciation in order for the country to recognize same-sex relationships at a rhythm of its own citizen body could accept.
691. While applicants urged the Court to follow the newly formed European consensus in favor of a recognition of same-sex marriage,¹⁵⁸⁸ and to ask Italy to comply with it, they also stressed that the Court should not overly rely on a numerical majority¹⁵⁸⁹ when minority rights were at stake. The applicant pressed the Court to protect the minorities against an intolerant opinion, partly because the majority refusal to allow recognition was not based on “genuine democratic process”.¹⁵⁹⁰

The applicants noted that empirical evidence (submitted to the Court) showed that lack of recognition of same-sex couples in a given state corresponded to *a lower degree of social acceptance of homosexuality*. It followed that by simply deferring normative choices to the national authorities, the Court would fail to take account of the fact that certain national choices were in fact based on *prevailing discriminatory attitudes*

¹⁵⁸⁵ ECtHR, *Oliari and others v. Italy*, Appl. Nos.18766/11 36030/11, 21 July 2015, at §17.

¹⁵⁸⁶ *Ibid.*, at §105.

¹⁵⁸⁷ *Ibid.*, at §132.

¹⁵⁸⁸ Applicants stressed that at the time of last same-sex marriage related decision, *Schalk and Kopf*, 49% of states had recognized same-sex marriage. Despite the lack of majority, the Court had chosen to give ‘more importance to the clear and uncontested evidence of a continuing international trend’. Bare majority of member states give some kind of recognition to same sex couples (24 out of 47), of which 11 recognize same-sex marriage.

¹⁵⁸⁹ *Oliari, op. cit.*, §113. The applicants contended that the Court could not be reduced to being an “accountant” of majoritarian domestic views. On the contrary, it had to be the guardian of the Convention and its underlying values, which include the protection of minorities.

¹⁵⁹⁰ *Ibid.*, at §113.

against homosexuals, *rather than the outcome of a genuine democratic process* guided by the consideration of what is strictly necessary in a democratic society.¹⁵⁹¹

692. Applicants contested the reliance of the state on the lack of public and social acceptance for same-sex couples to justify a denial of legal recognition of their relationship. Conversely, they considered that a recognition of same-sex relationships and the existence of ceremonies celebrating these relationships would bring them “social legitimacy and acceptance”.¹⁵⁹² Thus they argued that using the law against the wishes of public opinion would ultimately bring social acceptance to their condition through the law; in sum, democracy reversed. In this case, the law would not work to *follow* social change, but to *effect* social change. Further, they quoted European and foreign decision as evidence of an international change.¹⁵⁹³

693. Italy did not contest the need or interest to recognize a status for same-sex relationships. However, it requested to be left a margin of appreciation to leave competent representative institutions the choice of means and time to recognize same-sex couples:

This matter had thus to be left to the individual State (in this case Italy), which was the only entity capable of having cognisance of the “common sense” of its own community, particularly concerning a delicate matter which affected the sensitivity of individuals and their cultural identities, and where time was necessarily required to achieve a gradual maturation of a common sense of national community on the recognition of this new form of family in the Convention sense.¹⁵⁹⁴

694. In short, Italy asked the Court to leave the necessary leeway to recognize same-sex couples when Italian public opinion would be ready to accept it. The government stressed that other contracting states had recognized same-sex reality very recently at their own pace, after a process of “maturation”. It added that “it was difficult to reach a balance between the different sensitivities on such a delicate and deeply felt social

¹⁵⁹¹ *Ibid.*, at §113 (emphasis added).

¹⁵⁹² “They considered that such ceremonies brought social legitimacy and acceptance, and particularly in the case of homosexuals, they went to show that they also have the right to live freely and to live their relationships on an equal basis, both in private and in public.” *Ibid.*, at §116 (emphasis added).

¹⁵⁹³ They cited among others European Union recommendations (all European member states also belong to the Council of Europe and are bound by this law), Council of Europe recommendations (*Oliari, op. cit.*, at 142), a 2005 decision by the South Africa Supreme Court legalizing same-sex unions (*Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05)). and *Obergefell v. Hodges* decided the same year, *ibid.*, at 65. On the day of the decision the lower chamber of Italian Parliament had approved civil unions including same-sex couples.

¹⁵⁹⁴ *Ibid.*, at § 123.

issue... The delicate choices involved in social and legislative policy had to achieve the unanimous consent of different currents of thought and feeling, as well as religious sentiment, which were present in society.”¹⁵⁹⁵

695. Notwithstanding the fact that finding society-wide agreement on such delicate issue would be difficult task, reaching “unanimous consent” would probably prove impossible. Therefore, it is not surprising that the Court considered that the debate had lasted many years and had not led to a satisfying solution bringing legal certainty to homosexual couples’ lives.
696. It is a new development that in this case, the Court discovered a new positive obligation to enact a legal framework of recognition of same-sex couples.¹⁵⁹⁶ The Court had refused to use this doctrine in *Schalk and Kopf*, and needed not to in *Vallianatos*, since the discrimination framework had sufficed to condemn Greece for excluding same-sex couples from their new civil-union law. It is apparent that the Court was still reluctant to oblige states to recognize marriage—a consensus in Europe being yet inexistent—and used the positive obligation framework to make sure that same-sex couple’s legal situation will be resolved in Italy.¹⁵⁹⁷ To examine whether such obligation has been satisfied by Italy, it enquired on the competing interests between applicants and “the community as a whole”, i.e. the public.
697. The Court considered that the call for legal recognitions had been expressed by “highest judicial authorities”,¹⁵⁹⁸ and that contrary to Italy’s assertions, “such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys. . . The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection”.¹⁵⁹⁹ Here the Court placed a strong emphasis on the

¹⁵⁹⁵ *Ibid.*, at § 126.

¹⁵⁹⁶ The European Court had to “determine whether Italy, at the date of the analysis of the Court, namely in 2015, failed to comply with a positive obligation to ensure respect for the applicants’ private and family life, in particular through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law.” *Ibid.*, at § 164.

¹⁵⁹⁷ “In view of the above considerations, the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance.” *Ibid.*, at § 174.

¹⁵⁹⁸ *Ibid.*, at § 180.

¹⁵⁹⁹ *Ibid.*, at §181.

existence of “popular support” and “popular acceptance” for same-sex couple by the “majority” of the population. Moreover, the Court stressed that the Government had not denied the existence of a need for protection¹⁶⁰⁰ but also of the increased social consensus in favor of legal recognition mirrored in various cities new systems of recognition.¹⁶⁰¹ The only reason for the lack of legal recognition was the lack of consensus necessary to allow Parliament to enact a legal framework.¹⁶⁰²

698. The above-quoted excerpt is remarkable on two grounds. Firstly, the European Court considered that Italy had not made sure that its own Parliament had followed the evolution of its own public opinion, which now was supportive of a legal framework of recognition. In other words, the Italian Parliament itself was not democratic when not enacting the will of public opinion. The Court thus seemed to agree with applicants that accused the process of not being the result of a “genuine democratic process”. This is, in sum, a lesson in democracy. Note that the Supreme Court has been said to play such a countermajoritarian role in the interest of the will of the majority of constituents in several cases.¹⁶⁰³
699. Secondly, to assess the “community as a whole” the European Court leaned on some official domestic statistics focusing on Italian opinion regarding same-sex couples and the legal rights they should be entitled to.¹⁶⁰⁴ Considering the “community as a whole” in terms of public opinion surveys shows that “public opinion” has made its way into another European doctrine: the doctrine of positive obligations. The Court used evidence from an Italian official statistics institution, ISTAT, provided by a friend of court.¹⁶⁰⁵ As it is an official institution, it is fair to presume that official statistics are reliable. However, a few questions remain. First, what would the European Court have

¹⁶⁰⁰ *Ibid.*, at §182.

¹⁶⁰¹ *Ibid.*, at §130.

¹⁶⁰² *Ibid.*, at §183.

¹⁶⁰³ According to Corinna Barret Lain, this was the case in some very salient cases, such as *Roper v. Simmons*, 543 U.S. 551, 589 (2005), *Atkins v. Virginia*, 536 U.S. 304, 315-16, 321-323 (2002) and others. She contends, “And for constitutional doctrine, it presents a significant challenge to the Supreme Court’s reliance on legislation as “the clearest and most reliable objective evidence of contemporary values.” Legislation is not necessarily the most reliable evidence of contemporary values. Sometimes it is not reliable at all.”, Lain, Corinna, *The Countermajoritarian Classics (and an Upside Down Theory of Judicial Review)*, (August 31, 2010). Available at SSRN: <https://ssrn.com/abstract=1669560> or <http://dx.doi.org/10.2139/ssrn.1669560>

¹⁶⁰⁴ The statistics is from ISTAT- i.e. the Italian national institute of statistics (Istituto nazionale di statistica). Website accessible at <http://www.istat.it/en/> (last accessed 13 April 2018).

¹⁶⁰⁵ The survey was cited from the brief of Associazione Radicale Certi Diritti (ARCD) and referenced by the Court at § 144).

concluded without official statistics? Would it have so easily and explicitly relied on opinion statistics, had the evidence not been official or reliable? Would it have assessed the Italian community without reference to statistics, and simply trusted the statements of parties and friends of Courts? Reliance on statistics to establish whether a judicial criterion has been fulfilled is a perilous endeavor, as the Court opens itself to criticism as to its choice of statistics and how it reads it.

700. Moreover, a look at the survey report from ISTAT shows that the friend of court only partially cited the survey report. In particular, the friend of court reference to the ISTAT statistics only provides information with regard to positive opinion vis-à-vis homosexuals. However, it could have included information as to the negative or indifferent attitudes vis-à-vis homosexuals or legal recognition, thereby giving a more comprehensive and complex understanding of the way Italian public opinion considered the issue at hand.¹⁶⁰⁶ Finally, even an official survey is open to interpretation depending on the question asked and their clarity. Although it may change the results only a little, this flaw in the reading of the survey is not minor, as it opens to question the assertion that the population surveyed gives accurate picture of Italian public opinion in 2011. Finally, another statement in the decision seem to question the Court's assessment of the community. The applicants themselves suggest that public opinion was not supporting recognition of same-sex couples when saying that "certain national choices were in fact based on *prevailing discriminatory attitudes* against homosexuals".¹⁶⁰⁷

701. In this case, the European Court based its conclusion not on the "living instrument doctrine", but on the fact that the Italian government had failed to comply with its positive obligation to provide for a legal framework of recognition based on the lack of community interest to justify otherwise. In short, its decision relies to a great extent based on its perception of Italian public opinion's support for such a measure, and on its commitment to reflect current social conditions into European human rights law,

¹⁶⁰⁶ The report notably specifies "Tuttavia, il 55,9% si dichiara d'accordo con l'affermazione "se gli omosessuali fossero più discreti sarebbero meglio accettati", mentre per il 29,7% "la cosa migliore per un omosessuale è non dire agli altri di esserlo". Translation: "However, 55.9% stated that they would agree with the phrase: "if homosexuals were more discreet (less noticeable), they would be more acceptable," while 27.9% argued that "the best thing for a homosexual person is to not say that she is a homosexual" (my translation). The word "discreet" is open to interpretation, as the respondent may be meaning "closeted", which in no way would be interpreted as proof of support for homosexual couples.

¹⁶⁰⁷ *Oliari, op. cit.*, at § 112 (emphasis added).

since “to find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective”.¹⁶⁰⁸ Although the outcome is a progress for same-sex couples, the reasoning opens a dangerous door. For the Court to be able to use opinion surveys in the future, and particularly if they play such a substantive role in the outcome a ground-breaking decision, it would be advisable to outline criteria to ensure that such surveys are read and interpreted accurately, and to the extent possible, beyond criticism.

3.2. A Sudden Leap Forward in the United States

702. Of the three gay-marriage cases in Supreme Court jurisprudence, *United States v. Windsor*, *Hollingsworth v. Perry* and *Obergefell v. Hodges*,¹⁶⁰⁹ two contain a reference to public opinion, and one a few interesting references to “hundreds of thousands of” people. Although such reference is not equivalent to “public opinion”, it is I believe related enough to warrant mention, especially since the decision in which it was mentioned, *Hollingsworth v. Perry*, was released on the same day as *United States v. Windsor*.

3.2.1. *Windsor and Perry: When Public Officials Refuse to Defend Statutes*

703. The *Windsor* and *Perry* Supreme Court cases have many remarkable commonalities. Both were released on the same day. Both regard the problem of same-sex marriage. Both involve a serious problem of procedure, caused by the same phenomenon; that of public officials refusing to defend a law voted through the democratic process because they deemed it unconstitutional under federal law. Both cases, however, met different outcomes because the group invited to defend the challenged law was either deemed to have standing, or not.¹⁶¹⁰ Also, one case involved a challenge against a state constitutional provision, while the other involved a challenge against a federal statute. Besides the different outcome, the two cases were released by different majorities of

¹⁶⁰⁸ *Ibid.*, at § 186.

¹⁶⁰⁹ *United States v. Windsor*, 570 U.S. 744 (2013), *Hollingsworth v. Perry*, 570 U.S. 693 (2013) and *Obergefell v. Hodges*, 576 U.S. __ (2015), 135 S.Ct. 2584.

¹⁶¹⁰ In this case, having “standing” means being the appropriate party to defend a side on an adversarial law-suit. It is defined as “a party’s right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest meant to be regulated by the statutory or constitutional guarantee in question.” Definition for “standing”, in *Black’s Law Dictionary*, Tenth Ed, St Paul, MN: West (2009), p. 1625.

the Court. The author of *Windsor*, Justice Kennedy, stood in the minority in *Perry*, for which he drafted an remarkable separate opinion. Finally, both cases involved legal change to some degree: in *Windsor*, the federal law defining marriage as a union between man and woman for the purpose of federal law was deemed discriminatory. Because of a federal law defining marriage as between a man and a woman, the female applicant could not be treated as the widower of her deceased wife for purposes of federal law, which had important financial consequences with regard to federal taxes. In *Hollingsworth v. Perry*, an applicant had complained that he could not marry in California since a popular referendum initiative had defined marriage as a union between man and woman in the Californian Constitution. The organizers of the initiative were considered to have no legal capacity to defend the law in Federal Court on behalf of the citizens and public authorities. They could not replace reluctant authorities, reluctant to defend the referendum initiative. Therefore their application was denied, and as a consequence, the Californian Supreme Court decision striking down the initiative results made same-sex marriage legal again in California.

3.2.2. *United States v. Windsor*¹⁶¹¹

704. Petitioner was a widower, married in Canada, which marriage had been recognized in the state of New York where same-sex marriage has been legal since 2011. However, even with state recognition, she had to pay a substantial amount of taxes for inheritance since for federal purposes marriage was limited to a union between a man and a woman.

*A Standing for “Hundreds of Thousands” of People*¹⁶¹²

705. Since the Obama administration had enjoined the Solicitor General not to defend the Congress statute called DOMA (Defense of Marriage Act) that limited the definition of marriage to heterosexual couples for federal purposes,¹⁶¹³ the standing question under Article III of the Constitution was whether a committee of Congress had the capacity to defend the constitutionality of the law on Congress’ behalf in the place of the Solicitor General. American law requires adversity in order for both parties to vigorously defend their case on each side. Thus, it was considered that Congress was

¹⁶¹¹ *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675 (2013).

¹⁶¹² §761

¹⁶¹³ Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (hereinafter “DOMA”).

assumedly more qualified to defend its own statute vigorously than a reluctant administration that, in essence, agreed with the applicant's arguments.¹⁶¹⁴ The defense was hence assigned to a Congress "BLAG" committee.¹⁶¹⁵

706. The majority considered that "this case is not routine, and BLAG's capable defense ensures that the prudential issues do not cloud the merits question, which is of immediate importance to the Federal Government and to *hundreds of thousands of persons*".¹⁶¹⁶ Additionally, to make sure requirement of adverseness were satisfied, they appointed an *amicus* to defend the statute.¹⁶¹⁷ The Supreme Court showed concern for the separation of powers: In effect, the refusal of the executive to defend Congress' law would nullify that law unilaterally.¹⁶¹⁸ The majority opinion shows that the Supreme Court did everything in its power to conclude that the BLAG Congress Committee had standing, especially since the case was "not routine" and impacted "tens of thousands of people".

707. The majority visibly wanted to decide this question not only for the sake of the separation of powers, but to help "tens of thousands of people" against the majority that signed this federal law into force. Here no mention was made of public opinion's opposition, or of a shift in attitudes. The Court only stressed the fact that the minority was "unpopular",¹⁶¹⁹ i.e. potentially victim of the dictates of public opinion. However, the Supreme Court indicates its strong desire to defend the rights of the numerous members of a minority by voluntarily and repeatedly using the expression "tens of

¹⁶¹⁴ "While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a " 'real, earnest and vital controversy,' " the Court faces a "friendly, non-adversary, proceeding ... [in which] 'a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.'" . . . Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *United States v. Windsor*, 570 U.S. 744 (2013) at 759 (references omitted).

¹⁶¹⁵ "BLAG" stands for Bipartisan Legal Advisory Group (BLAG) of the House of Representatives. It was the Committee assigned with the defense of the challenged law.

¹⁶¹⁶ *Ibid.*, at 762 (emphasis added).

¹⁶¹⁷ *Ibid.*, at 758.

¹⁶¹⁸ "Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.", *ibid.*, at 762.

¹⁶¹⁹ Such references exist in the others decisions I comment below.

thousands” to stress the important number of people affected by this law in their daily lives, that belonged to a “politically unpopular group”.¹⁶²⁰

Legal Approach: Teleological and Evolving

708. The majority decision in *Windsor* is confusing, insofar as it does not clearly specify under which article it examines the validity of DOMA, only that it investigates whether it is “valid under the Constitution”. According to dissenting Justice Scalia, the central question in litigation was whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”. Assumedly, applicants based their case on the Equal Protection Clause.
709. However, the Justices examined the federal law to see if it was infringing “an essential part of the liberty protected by the Fifth Amendment”, i.e. an unenumerated right, which existence is discerned by Justices reflecting on the meaning of “liberty” on a case-by-case basis. The majority concluded: “DOMA seeks to injure the very class New York seeks to protect”.¹⁶²¹ To the majority, the constitutional protection “*must* at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, “ ‘[d]iscriminations of an unusual character’ especially require careful consideration”.¹⁶²² The use of “must” reveals the teleological approach of the majority willingly adopting an evolving approach of rights— although in this passage is quoted from a previous case, *Romer v. Evans*, commented above and that also advanced the rights of same-sex couples. The majority took issue with the fact that DOMA was a federal statute dealing with marriage, a topic normally left to the states to regulate:

DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage [in order to] deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of *disapproval* of that class. The avowed purpose and practical effect of the law here in question are to impose a

¹⁶²⁰ *Windsor, op. cit.*, at 795.

¹⁶²¹ *Ibid.*, at 769.

¹⁶²² *Ibid.*, at 768, from referring *Romer v. Evans, op. cit.*, at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38, 425, 72 L.Ed. 770 (1928) (references in text omitted).

disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.¹⁶²³

710. Justice Roberts disputed that assertion, distinguishing the difference of treatment based on sexual orientation with the different of treatment affecting applicants in previous cases involving the fundamental right to marry:

[N]one of those prior state-by-state variations had involved differences over something—as the majority puts it—“thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.” . . . That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the “principal purpose,” . . . of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm.¹⁶²⁴

The Supreme Court continued insisting on its perception of Congress’ intentions based on the adverse social impact of DOMA in the lives of “tens of thousands” of couples and children:

By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid *marriages are unworthy of federal recognition*. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates *tens of thousands of children* now being raised by same-sex couples.¹⁶²⁵

711. The majority added that “[t]he principal purpose is to impose inequality, not for other reasons like governmental efficiency”.¹⁶²⁶ The minority dissenters later disputed this vision, asserting that despite the name “Defense of marriage”, the goal of the statute is not to disparage same-sex couples or to impose on them a stigma¹⁶²⁷—although it would arguably be a side effect of the restricted definition and understandably perceived as a

¹⁶²³ *Ibid.*, at 770.

¹⁶²⁴ *Ibid.*, at 775-6 (Roberts, J. dissenting).

¹⁶²⁵ *Ibid.*, at 772.

¹⁶²⁶ *Ibid.*

¹⁶²⁷ *Ibid.*, at 797 (Scalia, J. dissenting).

“second-tier marriage”¹⁶²⁸——but to deal with all potentially unforeseen federal consequences involved with marriage such as tax issues and state recognition of marriages in other states that have different definitions and regimes.¹⁶²⁹

The Court as Rational Keeper of Constitutional Rights

712. The majority decided that the committee of representatives of Congress appointed to defend the law had enough standing so the issue concerning “tens of thousands” could be resolved. The Court expressed concern for the separation of powers, had the agreement between the Executive and the applicants diverted an important social question from being addressed in a Court of law. In essence, it is true that ideological agreement between the Executive and the applicant would cancel the exclusion of same-sex couples from the federal definition of the law and, in effect, cancel a Congress statute unilaterally. Therefore, granting standing albeit on fragile grounds protected the separation of powers, ensuring that this legal question would be decided and that the Supreme Court would retain its “primary role”, a vision for the institution not all Justices seem to entertain.¹⁶³⁰ If not, the Supreme Court’s “primary role in determining the constitutionality of a law” (at least one that “has inflicted real injury on a plaintiff”) would “become only secondary to the President’s.”¹⁶³¹ This passage reveals that the Court seeks to safeguard not only the separation of powers, but its own prevalent role in society and in helping decide social questions.
713. Justice Scalia, in his dissent, questioned not only the Court’s affirmation of primacy, but also the dramatic tone and legal vagueness of the reasoning, where the majority mixed up sources of law and standards of review.¹⁶³² He also questioned the Supreme

¹⁶²⁸ *Ibid.*, at 772.

¹⁶²⁹ “Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. DOMA’s definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation” *ibid.*, at 794 (Scalia J. dissenting).

¹⁶³⁰ Justice Scalia takes issue with this affirmation of primary role, *Windsor, op. cit.*, at 762 (Scalia J. dissenting)

¹⁶³¹ *Ibid.*, quoting the majority decision at 762

¹⁶³² As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework”, *ibid.*, at 794 (Alito, J. dissenting) (reference omitted). Justice Alito’s dissent contain explanations about the different standards of review applied to different legal basis, Equal Protection Clause in particular, on which the applicant based their case, while the majority resolved the case based on the “liberty” interest protected by the 5th Amendment, applying

Court's accusatory tone towards drafters of the law and the defenders of the hetero-exclusive definition of marriage:

But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to “disparage,” “injure,” “degrade,” “demean,” and “humiliate” our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.¹⁶³³

714. According to Justice Scalia, the majority portrayed itself as the rational keeper of the Constitution, and those who drafted the law—the President and Congress—are accused without evidence of bad intentions towards an unpopular group,¹⁶³⁴ devoid of capacity for “reasoned disagreement”.¹⁶³⁵ He also accuses the majority of the court to prefer portraying opponents to same-sex marriage as a “wide-eyed mob”¹⁶³⁶ rather than describe their arguments “as they see them”¹⁶³⁷ Also, Justice Scalia objected to the fact that the Court decided on this issue instead of letting public debate take its course and the people decided through democratic institutions.¹⁶³⁸

715. The majority, however, praised the democratic process provided that it is deliberative and reason-based. It first contrasted the “many citizens” or “most people” who oppose

strict scrutiny standard to a law that usually would be resolved under lower scrutiny, i.e. rational basis review. See, at 794.

¹⁶³³ *Windsor, op. cit.*, at 797 (Scalia dissenting) (underlining emphasis added)

¹⁶³⁴ *Ibid.*, at 795.

¹⁶³⁵ *Ibid.* at 798.

¹⁶³⁶ *Ibid.* at 796.

¹⁶³⁷ *Ibid.*, at 796.

¹⁶³⁸ “As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*.” *Ibid.*, at 801 (Scalia, J. Dissenting).

same-sex marriage with the “others” who came to have a “new perspective, a new insight”,¹⁶³⁹ and came to see the exclusion of same-sex couples as unjust. “After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to... correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood”.¹⁶⁴⁰ Here the majority presents the process of legal change as a reason-based citizen-initiated deliberative process of discovery and learning of the “evolving understanding of the meaning of equality”.¹⁶⁴¹ It thus intervenes to correct the process of deliberation when it does not result in a reason-based outcome.

3.2.3. *Hollingsworth v. Perry: Courts as Protector of Democracy*

716. *Hollingsworth v. Perry* also involves same-sex marriage, but tackles the issue at state level. In California, the Mayor had begun distributing marriage licenses to same-sex couples in 2004, bypassing the law that made it illegal. In August of the same year, the Supreme Court judged that the Mayor had no authority to distribute these licenses and that these marriages were void.¹⁶⁴² In May 2008, the California Supreme Court considered sexual orientation as suspect classification warranting stricter standard of review, and decided that the exclusion of same-sex couples from marriage was discriminatory since it effected a violation of the state’s equal protection doctrine. It also declared that sexual orientation was a suspect class warranting strict scrutiny under state law alongside race and gender.¹⁶⁴³ In 2008, a popular initiative was initiated which resulted in a state-wide referendum on same-sex marriage. Voters banned same-sex marriage at state constitutional level when they voted an amendment to the Californian Constitution stipulating “only marriage between a man and a woman is valid or recognized in California”.¹⁶⁴⁴ This constitutional amendment was challenged in federal courts by couples that wished to marry and obtain “official sanction” from the State. They contended that Proposition 8 violated their rights to due process and equal

¹⁶³⁹ *Ibid.*, at 763.

¹⁶⁴⁰ *Ibid.*, at 764.

¹⁶⁴¹ *Ibid.*, at 769.

¹⁶⁴² *Hollingsworth v. Perry*, 133 S. Ct. 2652, (2013) (hereinafter “Perry”).

¹⁶⁴³ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). For a commentary see “Recent cases”, *Harvard Law Review*, vol. 122, 1557, (14 April 2009).

¹⁶⁴⁴ Brief explanation of Proposition 8 to be found at Georgetown Law Library website: <http://guides.ll.georgetown.edu/c.php?g=592919&p=4182204> (Accessed December 9, 2017).

protection under the Fourteenth Amendment to the Federal Constitution. District Court for the Northern District of California found in favor of the plaintiff; on appeal, the Ninth Circuit certified a question to the U.S. Supreme Court. As in *Windsor*, a problem of standing was raised, as Californian officials delegated the task of defending the Amendment in Court to the Initiative organizers. The legal issue was framed by the Court in the following words:

They assert that even if *they* have no cognizable interest in appealing the District Court's judgment, the State of California does, and they may assert that interest on the State's behalf. It is, however, a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."¹⁶⁴⁵

The Court decided that the organizers of the initiative had no direct stake in the outcome¹⁶⁴⁶ other than being voters; they were no public officials despite being granted the right to defend the amendment, and their interest in the case being a “generalized one”,¹⁶⁴⁷ they did not have standing.

717. Besides these reasons, the Court considered that initiative organizers did not have standing also because they entertained no fiduciary obligation to the People of California:

As the California Supreme Court explained, petitioners are bound simply by “the same ethical constraints that apply to all other parties in a legal proceeding.” They are free to pursue a purely ideological commitment to the law's constitutionality without *the need to take cognizance of resource constraints, changes in public opinion*, or potential ramifications for other state priorities.¹⁶⁴⁸

The Supreme Court acknowledged that public officials are bound to take into account among others the changes in their local public opinion when they defend a law in Court. This acknowledgment is interesting since Californian authorities delegated the defense of the law to non-officials after refusing to defend it themselves while fulfilling their duty to enforce it. Could it be that California officials sensed that their public opinion

¹⁶⁴⁵ *Perry, op.cit.*, at 2663 (citations omitted).

¹⁶⁴⁶ *Ibid.*, at 2666.

¹⁶⁴⁷ *Ibid.*, at 2666.

¹⁶⁴⁸ *Ibid.*, at 2667 (original reference omitted) (emphasis added).

disagreed with Proposition 8, while the Californian voters had approved a constitutional amendment validating it, or was it simply an ideological disagreement? Like in *Windsor*, the refusal of officials to defend the validity of a democratically validated law creates problems when, by not defending it, they could *de facto* cancel the law or render it impossible to make any final decision on its constitutional validity. It was the case in *Hollingsworth v. Perry*, whereby the Supreme Court denied initiative organizers standing, and vacated the judgement that concluded that Proposition 8 was unconstitutional. No subsequent decision on the federal constitutionality of Proposition 8 occurred, until the Court decided similar issues in *Obergefell v. Hodges*.

718. If public officials feel bound either by their public opinion or their own ideology¹⁶⁴⁹ not to defend a law they disagree with, democracy could be endangered by *de facto* emptying democratic laws of any force.¹⁶⁵⁰ Provided that in both *Windsor* and *Perry* officials felt public opinion or democratic legitimacy did support their decision not to defend laws limiting marriage to heterosexual couples, two democratic legitimacy sources here collided: the one that mobilized enough voters to approve a federal statute or a state constitutional amendment through referendum, and the one brought to executive officials to be approved by democratic means and that wished to give leeway to the public opinion supporting them. Another sort of collision occurred: between results of a democratic vote and what public officials consider a ‘fundamental right’, in this case to marriage, that in no way may be restricted by voters or prevailing public opinion.¹⁶⁵¹

¹⁶⁴⁹ “The State may not wish to associate itself with proponents or their views outside of the “extremely narrow and limited” context of this litigation, or to bear the cost of proponents' legal fees.” *Perry, ibid.*, at 2671 (Kennedy J. dissenting, joined by Justices Thomas, Sotomayor and Alito) (references omitted).

¹⁶⁵⁰ “Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State's governmental structure. And in light of the frequency with which initiatives' opponents resort to litigation, the impact of that veto could be substantial (185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court). As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative's proponents when the State Executive declines to do so”. *Perry, ibid.*, at 2671, (references in text omitted) (Kennedy J. dissenting)

¹⁶⁵¹ If Justice Kennedy's dissent does not mention a fundamental right, it in substance his supposition, that officials might find the law invalid and unconstitutional because they consider it to infringe on a fundamental right: “The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative's proponent) arguing in favor of a law's validity while state officials (*e.g.*, the attorney general) contend in the same proceeding that it should be found invalid. *Perry, ibid.*, at 2671, (Kennedy J. dissenting).

719. It is remarkable that Justice Kennedy, who in *Perry*, pressed the Court to make an exception to its standing rule in the interest of popular democracy, seemed to change stances in *Obergefell*, considering that in issues involving a fundamental right to marry, demands of public opinion and democratic debate should be overridden by Constitutional law. However, his approach is consistent to the extent that under Justice Kennedy's penmanship, the Court portrays itself as protector of democracy and of constitutional rights against the demands of opinion that officials feel bound to follow. He confirmed this approach in *Obergefell v. Hodges*, this time writing for the majority.

3.2.4. *Obergefell v. Hodges*:¹⁶⁵² Courts as a Rational and Participatory Institution Solving Important Social Questions

720. Plaintiffs were same-sex couples residing in Michigan, Kentucky, Ohio and Tennessee, who considered that their constitutional rights under the Fourteenth Amendment of the Federal Constitution had been infringed upon because of the impossibility to be married in their state of residence, or have their marriage recognized across state borders. District courts had found in their favor but the Sixth Circuit federal court reversed all consolidated cases. The Supreme Court majority found that under the Bill of Rights, states had the obligation to allow same-sex marriage by providing marriage licenses to same-sex couples and to recognize marriages performed in other states. Since marriage was no longer limited to a union between man and woman for federal purposes after *Windsor*, only one obstacle to a generalization of same-sex marriage in the United States remained, namely the states, as long as they refused to legalize it or to recognize marriages performed in other states.
721. The cases originated in different states, but also from petitioners suffering from different types of obstacles caused by the impossibility to marry. Among others, one petitioner could not be buried with his partner and would be separated in death; for one petitioner, the impossibility to marry was an obstacle to adoption of children with special needs and day-to-day management; one petitioner was affected by travels across state-lines.

¹⁶⁵² *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (hereafter “*Obergefell*”). Justice Kennedy authored the decision.

722. The majority based its decision on four arguments. Firstly, the right to personal choice,¹⁶⁵³ secondly, the fundamental right to marry,¹⁶⁵⁴ thirdly better protection of children within a married household, and fourthly, the fact that “marriage is a keystone of our social order”. All these principles guided its inquiry into whether the limitation of marriage to heterosexual couples entailed a violation of the fundamental right to marry. In order to decide if this was the case, it examined the rationale behind the prohibition of same-sex marriage in the states.
723. The case was litigated generally under the Fourteenth Amendment, which includes the Equal Protection Clause and the Due Process Clause. Fundamental rights include privacy rights under the Due Process Clause. The Supreme Court this time explicitly applied the Due Process Clause and used its fundamental rights doctrine.
724. The majority adopted an evolving approach to fundamental rights, enlarging the definition based on ancient authorities such as Tocqueville: marriage was indeed important to the country in the revered writer’s time, although it was not defined in quite the same manner.¹⁶⁵⁵ The majority namely asserted that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present”.¹⁶⁵⁶
725. The Supreme Court insisted on the social evolution of marriage, starting with the empowerment of women, and relied on historical arguments to support its view that marriage was an evolving and progressive institution: marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress”.¹⁶⁵⁷ The Court also contended that the evolution had “strengthened” marriage, thereby contradicting same-sex marriage opponents’ main rationale: that it would be weakened by enlarging the definition.¹⁶⁵⁸ It stressed that the judicial process could be a channel for such evolution, considering that “new dimensions of freedom

¹⁶⁵³ *Ibid.*, at 2598.

¹⁶⁵⁴ *Ibid.*, at 2599.

¹⁶⁵⁵ *Ibid.*, at 2601.

¹⁶⁵⁶ *Ibid.*, at 2589.

¹⁶⁵⁷ *Ibid.*, at 2601 (references omitted).

¹⁶⁵⁸ These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process. *ibid.*, at 2596.

become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process”.¹⁶⁵⁹

726. Like in the case of the European Cour, the Supreme Court’s evolutive approach also relies on “new insights and social understandings” that can reveal the obsolescence and unfairness of old beliefs. The reference to “social understandings” suggests a more widespread attitude within a society than a new belief adopted by a progressively-minded *avant-garde*. Moreover, this expression is comparable to the European Court reference to a general reference to “developments in society and *changes in the perception* of social, civil-status and relational issues”.¹⁶⁶⁰

727. After stressing that marriage was an evolving and progressive institution, the majority took side for the new definition of marriage:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose *stigma and injury* of the kind prohibited by our basic charter.¹⁶⁶¹

This statement is unclear. It could be interpreted as claiming that the state definition of marriage should be consistent with a judge-defined the core meaning of the fundamental right to marriage. One would think that the meaning of a fundamental right is usually based on the definition of what the institution is meant to safeguard, but here the Court takes a new approach, according to which the fundamental right definition, i.e. the Court’s own definition, is to govern the permissible meaning of the institution it protects. The Court adds that this new “better informed” definition is dictated by “constitutional imperatives”, that of not enforcing “decent and honorable religious or philosophical premises”, as sincere as they may be, as law:

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.

¹⁶⁵⁹ *Obergefell v. Hodges*, *op. cit.*, at 2596.

¹⁶⁶⁰ *Kozak v. Poland*, *op. cit.*, at § 98, confirmed in *X and others v. Austria*, *op. cit.* at 139, and in *Vallianatos*, *op. cit.* §84. (emphasis added).

¹⁶⁶¹ *Obergefell v. Hodges*, *op. cit.*, at 2602 (emphasis added).

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.¹⁶⁶²

728. The Court’s evolving approach is also evidenced by its use of doctrine, integrating both the due process and equal protection clauses to improve its understanding of the new demands of the fundamental right to marry:

[Both clauses] are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.¹⁶⁶³

729. The use of the two clauses at once is puzzling, and this excerpt does not seem to clarify how both can be used at once. One can however venture an analysis. Indeed, “[i]f a law denies the right to everyone, then due process would be the best ground for analysis; but if a law but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected to under due process”.¹⁶⁶⁴ In short, the majority uses due process to define—or redefine—the fundamental right at stake, and due process to penalize its denial to same-sex couples. In any case, the Supreme seems to advocate a holistic reading of the Constitution, where each article informs the interpretation of others and strengthen the consistency of the whole document’s interpretation. To Justice Alito, the reasoning of the Court can be explained by more pragmatic reasons: “Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment.”¹⁶⁶⁵ Equal Protection indeed allows the definition of marriage to be changed by simply relying on the

¹⁶⁶² *Ibid.*, at 2602.

¹⁶⁶³ *Ibid.*, at 2602–3.

¹⁶⁶⁴ Chemerinsky, “Constitutional Law”, *Op. cit.*, p. 814.

¹⁶⁶⁵ *Ibid.*, at 2641.

prohibition of discrimination on the basis of sexual orientation in the enjoyment of a constitutional right, here the fundamental right to marry.¹⁶⁶⁶

730. As is made visible in the Supreme Court's explanation of "constitutional imperatives", the Court visibly favors progressive opinions over others.¹⁶⁶⁷ It is evidenced by its insistence on the evolution of attitudes towards same-sex couples since the "late 20th century".¹⁶⁶⁸ The majority seems to value progressive opinion, the one that has "shifted towards greater tolerance", willing to elevate the debate by involving the courts:

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors *and by a shift in public attitudes toward greater tolerance*. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.¹⁶⁶⁹

By saying so, the majority implied that the highpoint of democratic debate and discussion is when an issue can be "discussed in the formal discourse of the law". The majority reserved itself the right to decide when a quality democratic and social debate has lasted long enough to inform the constitutional debate that the Court thinks its duty to conclude, since "it has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law".¹⁶⁷⁰ Hence the Court portrayed itself as a rational keeper of social debate on questions of rights, against the demands of public opinion that wishes to enact its belief with "the imprimatur of the State".¹⁶⁷¹ It also stresses that oftentimes, "new perspectives on freedom [are often born] through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process"¹⁶⁷²,

¹⁶⁶⁶ While the majority makes every attempt to show that marriage is an ancient fundamental right, Alito insists that the definition of marriage never changed while the institution evolved. In effect, the majority does discover a new right by changing its core meaning through anti-discrimination.

¹⁶⁶⁷ *Ibid.*, at 2602. This point of view is confirmed by various scholars, including Barrett Lain, who among "majoritarian constraints" on the judges names the fact that "Justices are not average members of the public. They are well-educated elites, predominately of the upper socioeconomic class, and their views tend to reflect that fact. Thus, it should come as no surprise that when the Supreme Court departs from mainstream public opinion, it tends to favor elite policy preferences instead." C. Barrett Lain, "Upside Down Judicial Review", *The Georgetown Law Journal*, Vol 101, 113 (2012), p. 164.

¹⁶⁶⁸ *Ibid.*, at 2696.

¹⁶⁶⁹ *Ibid.*, at 2596 (emphasis added) (references omitted).

¹⁶⁷⁰ *Ibid.*, at 2605.

¹⁶⁷¹ *Ibid.*, at 2602.

¹⁶⁷² *Ibid.* at 2596.

thereby portraying the judiciary as an institution of progress. Additionally, it implied that as the institutional location where converged the intervention of numerous social actors such *amici curiae* participants, was best capable of concluding the debate:

Yet, there has been far more deliberation than this argument acknowledges . . . As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question.¹⁶⁷³

731. Here, the majority seemed to also portray itself as a participatory institution, opening its door to informed debate, assumedly best equipped to make “better-informed” decisions. By referring to its understanding as “reflected in the arguments now presented”,¹⁶⁷⁴ it also suggested that it played the role of a argumentatively participatory institution.
732. The majority manifestly ignored some legal scholars’ warnings that “[b]ecause the secret is out that the Justices value briefs that supplement their technical knowledge, the vast majority of amicus briefs stretch to make these factual claims—even if it is beyond their institutional capacity to do so”.¹⁶⁷⁵ Justice Scalia challenged the majority contention of being “better-informed”. To him, being “better-informed” does not suffice to respect a fundamental principle of democracy: representation. Justices are no representatives, declaimed Justice Scalia. Therefore “to allow [this policy question to be] resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation”.¹⁶⁷⁶
733. By referring the American Revolution anti-British slogan: “no taxation without representation”,¹⁶⁷⁷ Justice Scalia disputed the aristocratic claims of the Supreme Court and implied that it was very un-American.

¹⁶⁷³ *Ibid.*, at 2624.

¹⁶⁷⁴ *Ibid.*, at 2605.

¹⁶⁷⁵ Orr Larsen, “Trouble with Amicus Facts”, *op. cit.*, p. 1810.

¹⁶⁷⁶ *Perry, op.cit.*, at 2629.

¹⁶⁷⁷ For a brief history of “No taxation without representation”, see Congress-created website by the Constitution Center: <https://constitutioncenter.org/blog/250-years-ago-today-no-taxation-without-representation/> (accessed 27 December 2017).

734. Additionally, dissenting Justice Roberts contended that the Court should not end the democratic debate. If it did, same-sex couples would be stolen a victory they were just about to win through democratic means, and which would have entailed more sincere acceptance by opinion than being forced to accept marriage through a Supreme Court imposition.¹⁶⁷⁸ He added that although he would find support to the Court's conclusion in the evolution of public opinion and state public policy,¹⁶⁷⁹ even "stripped of its shiny rhetorical gloss", he had found no legal support in its conclusion that, in a nutshell, "gives same-sex couples a fundamental right to marry because it will be good for them and for society".¹⁶⁸⁰
735. Chief Justice Roberts warned the majority that the *Obergefell* decision was as radical in its use of Due Process as the infamous *Dred Scott*¹⁶⁸¹ decision, implying how difficult its acceptance might become.¹⁶⁸² In other words, the majority might have wrongly assessed on which side public opinion truly was leaning, although as I stressed above, the majority considered that public opinion should not have a say in matters of fundamental rights.¹⁶⁸³
736. Chief Justice Roberts also referred to the *Lochner*¹⁶⁸⁴ decisions that, according to then dissenting Justice Holmes, had obliged the court to adopt "an economic theory that a large part of the country does not entertain".¹⁶⁸⁵ With this reference, Justice Roberts stressed that a decision likely to go against, if not dominant public opinion, a large

¹⁶⁷⁸ Roberts, J. dissenting, joined by Thomas and Scalia, at 2625. He insisted on the issue of acceptance of social change at 2611-2612.

¹⁶⁷⁹ "Until recently, this new view of marriage remained a minority position." Confirmed by legal evolution in the states: "Over the last few years, public opinion on marriage has shifted rapidly." *Ibid.*, at 2615

¹⁶⁸⁰ *Ibid.*, at 2615.

¹⁶⁸¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (A Missouri slave, freed in Illinois, and sued Missouri for his freedom based on his place of residence, free territory. The Court denied his request, holding that no person descended from an American slave had ever been a citizen for Article III purposes. The Court held Congress law unconstitutional. It held the Missouri Compromise unconstitutional, hoping to end the slavery question once and for all. However, *Dred Scott* is generally considered have been a catalyst of the American Civil War of 1861 to 1865.).

¹⁶⁸² *Obergefell*, *op.cit.* at 2616

¹⁶⁸³ The majority declared: "The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943) . This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *ibid.* at 2606.

¹⁶⁸⁴ *Lochner v. New York*, 198 U.S. 45 (1905) (*Lochner* is one of the most famous case, through which the Supreme Court troke down progressive laws aimed at improving the social conditions to which workers were submitted in the early 20th century. Determining hours of labour was considered as an infringement on liberty).

¹⁶⁸⁵ *Ibid.*, at 198 U.S. 45 (1905), at 75 (opinion of Holmes, J.). see *Obergefell*, at § 2617.

portion of public opinion should not invalidate a law on unless strong reasons obliges it to.¹⁶⁸⁶ He specifically warned against using the doctrine of fundamental rights by “repeating *Lochner*'s error of converting personal preferences into constitutional mandates”.¹⁶⁸⁷ A Court that would repeat the error of *Lochner* against an important portion of public opinion would risk decreasing its standing in society and acceptance of its rulings, perhaps even trigger a court-packing plan.¹⁶⁸⁸ Roberts described the dilemma facing Court: if fundamental rights have to be discovered against the judgment of a significant portion of opinion, the Court needs to use solid arguments and consistent jurisprudence to maintain its authority and social peace, *i.e* self-restraint.

737. However, the majority saw another dilemma: fundamental rights could not be sacrificed by a on-progressive dominant opinion, since they are too important to be sacrificed on the altar of democracy. Hence the Supreme Court does not consider arguments of a public opinion that does not support progress in fundamental rights:

An individual can invoke a right to constitutional protection when he or she is harmed, even if the *broader public disagrees* and even if the legislature refuses to act. . . . This is why “fundamental rights may not be submitted to a vote; they depend on *the outcome of no elections*.” It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.¹⁶⁸⁹

738. The majority respects the view that the definition of marriage should remain the same, although it seems to consider it old-fashioned, even if it “has long been held . . . in good faith by reasonable and sincere people”.¹⁶⁹⁰ It stresses that despite this sincerity, these

¹⁶⁸⁶ “Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them “unwise, improvident, or out of harmony with a particular school of thought.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955).” at § 2617–18, (Roberts J. dissenting).

¹⁶⁸⁷ *Ibid.*, at 2618.

¹⁶⁸⁸ Justice Alito shows a similar concern: “If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.” *Ibid.*, at 2643 (Alito, J. dissenting).

¹⁶⁸⁹ *Ibid.*, at 2605–06.

¹⁶⁹⁰ “Opponents contend that “it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world”, *ibid.*, at 2594 (emphasis added).

people may be blind to their injustice as “(t)he nature of injustice is that we may not always see it in our own times”.¹⁶⁹¹ Consequently, the Court did not need to examine the state of American consensus on same-sex marriage, which according to Justice Roberts, would not support the Court’s conclusion, since fundamental rights would arguably exist with or without social consensus.

Section Conclusion

739. In the Supreme Court decisions pertaining to the legal status of same sex couples, a few patterns arise. Evolution happened in many steps because it required integrating same-sex couples’ issues into the field of family life.
740. Firstly, the Supreme Court gives importance to new trends in favor of same sex couples, whether it is the evolution of public opinion and social understanding, or legal evolution among member states. The rapid evolution of attitudes is one of the criteria that the European Court uses to assess whether states and their public are ready for legal changes. Secondly, the Court has integrated public perceptions, which participate to the construction of public opinion, into its doctrine of “living instrument” that govern evolving interpretations and its positive obligation doctrine. Public opinion was arguably integrated fully into the European Court jurisprudence, not only conceptually, but in numbers. For example, in the last analyzed case, *Oliari v. Italy*, the European Court relied on an official domestic survey assessing domestic public opinion to assess whether the difficulties faced by Italian parliament to reach an agreement on legal recognition of same-sex couples was justified. The Court implied that the Italian Parliament was not acting democratically by not following its public opinion, supporting the extension of a right to a minority. Such reliance on surveys being uncommon in European case-law, one can only wonder if the Court will continue using such references in the future. Thirdly, the living instrument doctrine has come to

¹⁶⁹¹ *Ibid.*, at 2598. Despite the progress accomplished, it seems equality was not achieved to the extent everyone wished. Melissa Murray deplored that extending marriage to same-sex couples now made non-married couples unequal to married couples, thereby effecting discrimination. See M. Murray, “Obergefell v. Hodges and Nonmarriage Inequality”, *California Law Review*, Vol. 104, No. 5, 1207 (2016). Obergefell was also criticized for not effecting sufficient protection to same-sex couples, see D. H.J. Hermann, “Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges”, *Indiana Law Review*, Vol. 49, 367 (2016). C. Huntington, “Obergefell’s Conservatism: Reifying Familial Fronts”, *Fordham Law Review*, Vol. 84, No. 23 (2015) 23-31 (claiming: “It unnecessarily disrespects people who in good faith have a different view of the social front of marriage. And it reifies marriage as a key element in the social front of family, further marginalizing nonmarital families”).

dominate over the consensus doctrine, that prioritized the occurrence of a certain degree of consensus among member states before the European Court would change its jurisprudence. Apparently, evolving trends towards consensus are now sufficient for the European Court to effect legal change, or to create new positive obligations, while the European Court has imposed on contracting states a heavy burden of proof that denying legal recognition to same-sex couples was necessary.

741. In the United States Supreme Court, the destiny of same-sex unions was decided in only three cases, although these do not include cases decided in lower federal courts, and of course in state courts. One of these decisions refused to effect legal change, while two changed the law to improve the legal status of same-sex couples. These decisions contain various types of references to public opinion. Firstly, two cases involved a standing issue, caused by the reluctance of public authorities to defend state or federal laws that assumedly the section of public opinion that elected them did not support. The Court denied the possibility for citizens organizations to represent public authorities on the ground they were not bound by the same constraints than elected officials, for example that of satisfying demands of public opinion. Secondly, the Supreme Court favored protection of minorities over non-supportive majorities. Also, Supreme Court majorities seemed to prefer progressive public opinions than majorities that would not welcome an improvement of the status of same-sex couples, assuming that despite their sincerity, they could be blind to their injustice. Indeed, fundamental rights protection was not open to democratic debate. Therefore, consensus among states was no longer relevant. Thirdly, the court used both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, alternately or simultaneously, as well provisions protecting fundamental rights through the open concept of liberty and the right to privacy. In *Obergefell*, the Court openly used the Due Process Clause, using the infamous doctrine of substantive due process combined it to the Equal Protection Clause to consider that same-sex couples had been discriminated against in the enjoyment of their fundamental right to marry. In these cases, the Court portrayed itself as a “primary” American institution which role consists in addressing social questions in the “formal language of the law”, aided it its task by hundreds of friends of courts sharing their opinion through the institution of *amicus curiae*. The extreme levels of amicus participation in all three cases bore witnesses to the public sensibility of the issue of same-sex unions, in which the Supreme Court was eager to demonstrate

its attachment to minority protection. Finally, the Supreme Court also confirmed its willingness to remain part of the progressive western civilization, which countries are at the vanguard of individual rights protection.

742. Dissenting Justices criticized the approach of the Court and its attachment to new ideas, considering that it was taking sides in a culture war. They also criticized the majorities demeaning stances *vis-à-vis* public opinions opposing same-sex couples' recognition. Assuming a position more favorable to democratic debate and the autonomy of the democratic process, they supported an approach leaving to democratic debate and elections the flexibility needed to make legal change at their own rhythm, making sure that convincing public opinion through debate and statutory law would result in more legitimate outcomes than judicial decisions could provide.

Chapter Conclusion:

743. Cases pertaining to homosexuality and same-sex couples occupied both the Supreme Court and the European Court for several decades, starting in the 1980s. Public opinion considerations were always part of both courts' reasoning, however the role such considerations played in both court's case-laws evolved. Not only did their role change, but they were also integrated in doctrine. At first, the European Court considered the state of local public opinion a relevant criterion for state decision-making, and a legitimate justification for states to keep an outlier law in force. However, the European Court considered it an insufficient criterion alone, and imposed on the defending state the burden to prove the necessity of criminal sanctions targeted at homosexual behavior. The European Court confirmed the relevance of the public opinion criterion in later cases. In cases pertaining to same-sex unions, references to public opinion were more often associated with European opinion, within the framework of evolving interpretation through the "living instrument" doctrine. The European Court acknowledged the concerns of local opinions reluctant to recognize the status of same-sex couples and transsexuals, before it took note of the changing opinion and period of transition of European societies. Eventually, it is the confirmed trends of evolution of European opinion that took priority over local public opinion concerns. Contrary to the Supreme Court, the European Court has now fully integrated public opinion into its dynamic interpretation of Article 8 of the European Convention in same-sex cases

within the “public perceptions” framework, making European opinion a full contributor to legal innovations.

744. The Supreme Court is less systematic in its use of public opinion. Many references to public opinion in cases pertaining to criminalization of homosexuality were made amid criticism of intolerance *vis-à-vis* homosexuality and of the willingness of opponents to homosexuality to have their religious or philosophical preferences imposed through the law. In these cases, opposition was often compared to racial hatred.
745. It is notable that in homosexuality cases, Supreme Court references to public opinion were mostly negative, accusatory, while the European Court considers both domestic and European opinions, in a quite neutral and balanced way. Although the European Court privileges’ European opinion over domestic opinion, it considers domestic opinion an important if not a sufficient criterion for states’ decision-making. This is perhaps the reason why the European Court has fully integrated “public perceptions” into its living instrument doctrine. Without integrating it into a full-fledged opinion, the Supreme Court also is mindful of that “new insights and societal understandings”¹⁶⁹²
746. This negative view of local public opinion is not cultivated by all Supreme Court Justices. In cases effecting legal changes in favor of homosexuals, dissenting judges have deplored the fact that the Supreme Court took sides in a “culture war” and entertained a demeaning view of opponents. Generally, most uses of public opinion by the Supreme Court were vague, providing no evidence to its assumption that challenged legal norm was based on intolerance or animus. In same-sex union cases, the Supreme Court’s use of public opinion considerations was less focused and more varied, involving the unpopularity of a political minority, the popular support behind a popular initiative or public opinion constraints on public officials. In *Obergefell*, the Court returned to its previous use of public opinion, considering that prevailing public opinion or the majority of the electorate’s opposition could not matter to the Court when the protection of fundamental rights was at stake, since no fundamental right could depend upon electoral outcomes. Its use of public opinion in this case was negative again. The Supreme Court also stressed the fact that many participants within society, assumedly representatives of many factions of public opinion, had participated to the proceedings

¹⁶⁹² *Obergefell v. Hodges*, *op. cit.* at 2590.

and shared their expertise with the Court, leaving to the Supreme Court the role of a rational keeper of the Constitution and the capacity to make the final decision on a long-standing social debate. The extent of participation, it was implied, granted the court more legitimacy to give the final solution to an impassioned social discussion. Overall, public opinion considerations were used along a dualistic framework of (oppressive) majorities as opposed to (unpopular) minorities, and judicial activism as opposed to restraint.

747. While the Supreme Court implied that participation to its proceedings impacts its decisions, one can wonder if increased civil society participation, i.e. the involvement of different sections of public opinion, correlates with legal change and progressive outcomes. If the majority in *Obergefell v. Hodges* implied that high levels of participation in Supreme Court proceedings influenced its willingness to solve difficult social questions, it did not specify to what extent. However, the Supreme Court suggested that it reflected on the arguments of participants, and that it considered itself a more participatory institution, which rational capacity qualifies it to decide difficult and divisive social questions.¹⁶⁹³ Moreover, the Annex No. 1 table we build to correlate references to public opinion use of dynamic or consensual doctrines, and third party participation shows that a steady increase in participation occurred throughout cases related to the rights of homosexuals, particularly rights of same-sex couples. Thus, it can be argued that the increased participation of civil society in Supreme Court cases influences legal outcomes, although no correlation is demonstrated. *Obergefell's* stress on important participation levels also suggests that some Justices among the Supreme Court consider the Court as a participatory if not (argumentatively) representative institution.

748. Among all European cases analyzed, none implied that the Court considered itself a participatory institution possessing legitimacy to make the final decision on difficult social questions. This is understandable, since despite a progressive increase in civil society's participation, levels of third-party intervention did not increase to the same degree in Europe as in the United States. Number of briefs submitted are not comparable, reaching five briefs in Europe and hundreds on the Supreme Court.

¹⁶⁹³ *Obergefell, op.cit.*, at 2605

Overall, the number of interventions has grown in same-sex union cases.¹⁶⁹⁴ Moreover, the European Court has shown itself more prudent when effecting legal change, always ensuring that a minimal level of numerical consensus among member states had been reached, and that minimal support existed within the defendant state.

749. However, the European Court increasingly considers arguments provided by civil participants, as shown in *Oliari v. Italy*, where the Court used a domestic opinion survey as analyzed by a friend of Court. This argument was used by the European Court to oblige Italy to make sure its Parliament would enact a legal framework of recognition for same-sex couples that its population was assumedly supporting. The Supreme Court, on the other hand, regularly refers to and uses arguments submitted by friends of courts, which contributes to the fact that some Justices consider the court to a certain extent as a participatory institution. However, if in none of the opinion analyzed, the Supreme Court cited a poll or survey in connection with Public Opinion, it has been known for the Court to use social sciences references.¹⁶⁹⁵ Nevertheless the method used to make such references is still controversial, and to quite a few scholars, not immune from criticism.¹⁶⁹⁶ Therefore, it might be preferable for the Supreme Court to use such data more openly and precisely so as to be subject to a higher scrutiny with regard to the method applied and verifiability of the claim.

750. If the European Court does not experience the same type of democratic legitimacy issue the United Supreme Court is daily confronted with—although legitimacy concerns were certainly expressed within member states, in particular in the context of controversial cases, it is arguably because its function is not in competition with other democratic institutions with comparable power: it is not bound by a separation of

¹⁶⁹⁴ See Annex 1: PUBLIC OPINION AND LEGAL EVOLUTION :

Refences of public opinion in ECtHR and Supreme Court decisions with regards to the rights of homosexuals in connection to evolving and consensual interpretation and third party participation rates

¹⁶⁹⁵ See for example R.J. Erikson, *The Use of Social Science Data in Supreme Court Opinions*, University of Illinois Press (1997), 200p. I also mentioned in previous chapter the referencenes to social siences in conjunction with amicus brief information: M. Rustad and T. Koenig, “Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs”, *op. cit.* (Claiming a lack of neutrality and reliability of amicus content is not limited to the supreme court but to others.) The Cout used social science in a great variety of cases: J. R. Acker, “Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae”, *Law and Human Behavior*, Vol. 14, No. 1 (Feb., 1990), pp. 25-42

¹⁶⁹⁶ See generally Rustad and König’s criticism of the use example the treatment of friends of court’s social science it ins opinion. *Op. cit.*

powers framework or constrained by an all integrated judicial system. Moreover, the Council of Europe system already assumed when creating the European Court that democracy could not be an excuse to infringe on fundamental rights: the Court is there to safeguard democracy from its own abusive tendencies. Therefore, relying on a better-informed, progressive opinion albeit marginal should not provoke “countermajoritarian” debates comparable to the United States. Also, the European Court’s jurisprudence is more systematic and consistent, even for cases of socially emotional dimensions such as same-sex marriage. The European Court makes sure to mobilize a confirmed consensus, at least numerically, before it declares democratic laws incompatible with the Convention. Since as an international court, its authority is more fragile, it must be more rational, reliable, legalistic. It does not have to hide its teleological approach nor its dynamic approach since it is supposed to be goal-oriented. Thus, it has more freedom to evolve in its time and does not have to rely on inconsistent reasoning like Justice Kennedy.

751. However, with regard to the legitimacy of dynamic interpretation, the constitutional lessons brought by the gay marriage debate in the United States should also be kept in mind in Europe. If the participation of friends of courts as well as the use of opinion surveys and polls, can be considered evidence the courts’ consideration of the state of public opinion in judicial decision-making, i.e. of the practice of a certain form of popular constitutionalism, the inclusion of current attitudes trends within a framework of dynamic interpretation can still be problematic. Courts can, in effect, be confronted to a “plural populace” i. e. the multiplicity of sections of public opinion that are not in agreement on a social question.¹⁶⁹⁷ Indeed, Jane Schacter stresses the problems that can be triggered by the use of popular constitutionalism in interpretation:

“The very idea of such popular sovereignty is compromised by the problem reflected in the marriage debate: the plural and often dissonant voices of the relevant polity or polities. Perhaps this cacophony of voices is part and parcel of popular constitutionalism, and the conflicts between plausible spokespeople are simply to be tolerated, if not encouraged. But it surely weakens the normative bite of popular

¹⁶⁹⁷ “The marriage debate provides a steady stream of examples of how different populaces can clash, as can different representatives for, or measures enacted by or in the name of, the same populace. This multiplicity makes it elusive to identify the relevant popular will on a question of constitutional meaning.” J. Schacter, Jane S. Schacter, “What Marriage Equality Can Tell Us about Popular Constitutionalism (And Vice-Versa)”, *Houston Law Review*, Vol. 52, No. 4, 1147 (2015), p. 1154.

constitutionalism if it is impossible at critical moments to determine who may, with authority, invoke its legitimating force. And if the power of courts is to be deemphasized, as popular constitutionalists typically argue, judges are presumably not supposed to play a central role in sorting out these clashes.”

752. On the other hand, an excessive reliance on historical arguments even within a dynamic interpretation framework, might result in equally contestable outcomes.¹⁶⁹⁸
753. In other words, are courts best equipped to sorting among differing voices the one that most legitimately represents public opinion? Should they rely on the “objectivity” of scientific public opinion surveys? Did the judges in *Obergefell* and *Oliari*, display a countermajoritarian tendency, or as is appearant, a more constitutional populist trend, striking a compromise between the rights of minorities and prevalent public sensibilities? The above-described contrast in the practice of the European and the Supreme Courts in their more or less open, systematic use of public opinion and the concern for evidence not only stresses the different institutional and political context each institution has to be mindful of (legitimacy, goal, and efficiency). It also underlines the dilemma associated with an unprincipled use of public opinion considerations within dynamic and progressive interpretation of rights. It is more acceptable for the European Court, which was instituted to combat majority abuses, to be more openly progressive and dynamic in its interpretation, while showing care and prudence in its open use of public opinion considerations, especially if it is more systematically anchored in doctrine, less rhetorical, and better justified and demonstrated. By clearly preferring enlightened European opinion over local possibly abusive majorities, the European Court plays the role of a ‘countermajoritarian’ institution, sidestepping altogether the problem of “plural populace”¹⁶⁹⁹ that have to be taken into account while making a choice for an interpretation or another. If the ‘countermajoritarian’ difficulty so dear to American scholars is so difficult or impossible to resolve beyond two incompatible affinities for, on one side, majoritarian democracy and, on the other, the constitutional judicial safeguards against abuse within a political system, perhaps it is too easily eluded within the European context.

¹⁶⁹⁸ *Ibid.* p. 1189.

¹⁶⁹⁹ See J. S. Schacter, “What Marriage Equality Can Tell Us about Popular Constitutionalism (And Vice-Versa)”, *Houston Law Review*, Vol.52, 1147 (2015).

General Conclusion

In the long term, the court is not antimajoritarian—it's majoritarian.

Justice Kennedy¹⁷⁰⁰

754. This dissertation discussing the role of public opinion in rights adjudication had the modest ambition to discover what judges competent with the protection of most essential rights, i.e. Courts having the ultimate interpretative authority with regard to an overarching normative rights-protective legal document over other public authorities, consider to be the appropriate role of public opinion in rights adjudication.
755. This topic was chosen in an acknowledgement among scholars and politicians alike of judge's increasing authority and public visibility and the increasingly prevalent discussions in politics and in different academic fields, from the law to political sciences and international relations, regarding the democratic legitimacy of judges. In the meantime, "public opinion" was deemed useful as an object of analysis, since it is often considered a synonym if not an equivalent of the "will of the people", and used as a measuring tool of public support for public policy. On the other hand, in the aftermath of the Second World War, the expression of democratic will through the electoral process was no longer considered infallible, but needed to be checked against essential principles and values. One of these values was the respect of individual rights. Judicial institutions were chosen all across the world to become a check on the democratic will and ensure the respects of essential human rights, and in case of need to penalize it. At a time when the legitimacy of judges is in question, and the infallibility of the electoral will is no longer accepted, the relationship between judges and their public, be it at constitutional or at international level, was deemed a more relevant topic of research than ever.

¹⁷⁰⁰ J. DeParle, "In Battle To Pick Next Justice, Right Says Avoid a Kennedy", N.Y. TIMES, June 27, 2005, at A1

756. Although research on the relationship between the Supreme Court and its public had already been accomplished, it was mostly in the field of empirical political sciences,¹⁷⁰¹ and did not include a study of the reasoning of the Court, or only partially.¹⁷⁰² Studies on the legitimacy of the European Court were also published, but did not expand to its relationship to public opinion.¹⁷⁰³ In order to explore not only the relationship of court to their public, but also the differences between this relationship in an domestic and international setting, I chose to proceed to a comparative study of the European Court of Human Rights and the Supreme Court.
757. In order to research the role of public opinion in rights adjudication, I chose to adopt a perspective that would apply to the whole process of adjudication; I thus included the various dimensions of the presence of public opinion or its organs throughout the process of rights adjudication, i.e. the actors directly and indirectly involved in the process from the application stage until the release of the decision: parties, judges, third parties, public authorities and politicians, the media and the broader public. In the context of this study, public opinion was understood as a synonym of the “will of the people”. However, since public opinion became such an important political element of today’s politics,¹⁷⁰⁴ it was necessary to clarify its definition and to discover to what extent it is a different reality than the electoral will.
758. I approached the significance of public opinion in relation to rights in a domestic and international context of governance at three different levels. At the first theoretical level, I attempted to clarify on the one hand to what extent public opinion could be considered as a source of democratic legitimacy generally, and on the other what were the sources of legitimacy of judicial decision-making on rights matters (Chapter One). At the second institutional level, I laid out the modalities of participation of the public

¹⁷⁰¹ Marshall started in 1989, and updated his findings in with a study of the Rehnquist Court’s case-law in 2008, but since 1989, many studies establishing a link between court decisions and public opinion have been published. T. Marshall, *Public Opinion and the Supreme Court*, Unwin Hyman (1989). This first study was updated Twenty years later: T. Marshall, *Public Opinion and the Rehnquist Court*, State University of New York Press (2009).

¹⁷⁰² See in particular J. G. Wilson, “The Role of Public Opinion in Constitutional Interpretation”, *Brigham Young University Law Review*, Vol. 1993, No.4, (1993) pp.1037-1138, and B. J. Roesch, “Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine”, *Suffolk University Law Review*, Vol 39, 379 (2005-2006).

¹⁷⁰³ B. Çali, A. Koch, N. Bruch, “The Legitimacy of The European Court of Human Rights: The View From the Ground”, *UCL Working Papers* (May 2011)..

¹⁷⁰⁴ S. Herbst, *Numbered Voices, How Opinion Polling Has Shaped American Politics*, Chicago, University of Chicago press (1993), p. 172.

of rights adjudication, i.e. public opinion and its organs, in judicial rights protection proceedings at the Supreme Court and the European Court of Human Rights. This included the evolution of individual access and group access, direct or indirect participants, and of participation of *amici curiae* or friends of courts (Chapter Two). At a third substantive level, I proceeded to case studies, trying to ascertain through an analysis of Supreme Court and European Court judgments, what role Justices and judges assign to public opinion in governance, which include judicial proceedings. I chose my case study themes along the structure of the main scholarly and judicial debates regarding judge's legitimacy in democracy: whether public opinion is a source of legitimacy in democracy, and the debate over judicial activism, restraint and legal evolution, whereby judges are often accused to enforce their own ideology to advance the law instead of respecting democratic will. Therefore, the first case study chapter focused specifically on the protection of a right essential to the formation of public will and public opinion in democracy: freedom of expression or speech (Chapter Three). The last chapter was devoted to another case study focused on the role public opinion plays in the evolution of rights protection, based on the fact that both the Supreme Court and the European Court of Human Rights have adopted a dynamic approach to rights protection. This chapter focused specifically on the rights of same-sex oriented persons and same-sex couples (Chapter Four)

759. After having first attempted to explain and summarize the complexity of the debate about the definition, the reality and the various dimensions of “public opinion”, which do not allow for a unitary definition,¹⁷⁰⁵ I laid out the different roles scholarship has assigned to this reality within democratic systems. First, I asked whether “public opinion” did identify in any significant way to “the will of the people” democratic regimes usually endow with the power of suffrage. I found that most scholars differentiated between public opinion and the electorate, public opinion being a more general strain of attitudes on a specific topic, that are generally adopted among a population larger in political affiliation than the electorate of a current government. Next, I tried to show that depending on the definition different scholars adopted, the role they assigned to public opinion in democracy differed significantly. This mostly rested on scholars and theorists' vision as to the potential of public opinion to become

¹⁷⁰⁵ Confirmed by Childs study on the various definitions of public opinion: H. L. Childs, *Public Opinion: Nature, Formation, and Role*, New york, Van Nostrand (1965), p.18.

educated.¹⁷⁰⁶ I concluded that in most theories, emphasis was put on the importance for democracy of public debate on matters of government. To this extent, public opinion was either feared as a potentially mob-oriented and manipulable entity, or valued if it was informed. Scholars explained the different stages through which opinion had to grow to become “enlightened” and educated, even rational, and be worthy of being heeded by public authorities.¹⁷⁰⁷ In such framework, most elements of the public were unlikely to qualify to the highest standards of a enlightened and informed public opinion of a John Stuart Mill, an Habermas’ or a Tönnies.

760. Despite all these hesitations among qualitative scholars about endowing public opinion with an important role in public decision-making rather than to the electorate, quantitative scholarship’s was not discouraged and attempted to positively discover the real substance of public opinion, preferred to the interpretations of elected representatives. They progressively transformed “public opinion” into the scientifically measurable embodiment of the will of the people in political life. Through constantly improving and continuous public polling, public opinion effectively took its independence from the electorate and became an instrument for legitimating government and diverse public society groups’ policy positions.¹⁷⁰⁸
761. With the advent of judicial supremacy in the United States, a country originally committed to the will of the people at every level of government,¹⁷⁰⁹ scholars began questioning the role of the will of the people in the framework of at times

¹⁷⁰⁶ For example, John Dewey claimed that there is “no way to identify the genuine potential of the general population and its capacity to act as “the public” as long as citizens have limited access to education and until “secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry and publicity”, quoted in S. Spichal, *The Transnationalization of the Public Sphere and the Fate of the Public*, New York, Hampton Press (2011), p.18.

¹⁷⁰⁷ Sartori, “Theory”, *op. cit.*, pp. 134-35. More on Tönnies in S. Spichal, *Public Opinion: Developments and Controversies in the Twentieth Century*, Rowman & Littlefield (1999), Chapter 2. Voir également J. Habermas, “Structural Transformation”, J. Habermas, *The Structural Transformation of the Public Sphere, An Inquiry into a Category of Bourgeois Society*, Cambridge, Polity Press (1989), p. 244.

¹⁷⁰⁸ See for example S. Herbst *Reading Public Opinion, How Political Leaders View the Democratic Process*, Chicago, University of Chicago Press, (1998), pp.125-26.

¹⁷⁰⁹ J. Fishkin, *The Voice of the People. Public Opinion and Democracy*, New Haven, Yale University Press (1995), p. 8-9.

progressive,¹⁷¹⁰ at time conservative¹⁷¹¹ “counter-majoritarian” judiciary. This secular debate is still current in the United States. With the creation of the European Court of Human Rights was born another deliberately “countermajoritarian” institution, which also adopted a generally dynamic and progressive approach to rights protection. This dissertation was therefore written with the underlying idea that the question of the rapport of the will of the different peoples of Europe with judicial rights protection could be transcribed to the international context of European rights protection.

762. To complete this research, several steps were followed. I first focused on the sources of judicial legitimacy, and more specifically on possible sources of democratic legitimacy. I discovered some strands of scholarship that believe public opinion to be a real-life inspiration in judges’ decision-making, if not also a legitimate inspiration for judicial decision-making, including rights protection. Other scholars also believe that the Supreme Court *should* adjudicate based on the will of the people to be truly legitimate (popular constitutionalism).¹⁷¹² Other strands of scholarship believe the Supreme Court to be, to some extent, a representative institution.¹⁷¹³ They can arguably be labelled as such because their social composition (geographical, sociological, possibly gender), and because of the representativeness of the arguments they use in their decisions, found in public debate or in briefs provided by various judicial actors such as parties, sponsors and friends of courts. Through their openness to the press as communicator of its work to the public, and through participation of civil society, another organ of public opinion, Courts would be more in tune with public opinion with regard to the acceptable interpretations of constitutional, in the case of the Supreme Court, or human rights in the case of the European Court.¹⁷¹⁴ Another strand of scholarship called “consensus constitutionalism” contends the judiciary is no countermajoritarian institution because

¹⁷¹⁰ Under the leadership of Chief Justice Warren, the Supreme Court gained a reputation of being “progressive”. Many of its most famous decisions significantly advanced constitutional rights protection based on a progressive notion of rights. See A. Bickel, *The Least Dangerous Branch*, Yale University Press ((1st ed. 1962)1986).

¹⁷¹¹ Under the leadership of Chief Justice Rehnquist, the Supreme Court gained a reputation of being “conservative”. See for example C. Smith, T. Hensley, “Assessing the Conservatism of the Rehnquist Court”, *Judicature*, Vol.77, 83 (1993-1994).

¹⁷¹² For example L. Kramer, *The People Themselves: Popular Constitutionalism And Judicial Review* (2004).

¹⁷¹³ C. L. Eisgruber, *Constitutional Self-Government*, Cambridge, MA, Harvard University Press (2009). See also the notion of “descriptive representation” developed by A. Lever, “Democracy and Judicial Review: Are They Really Incompatible?”, *Perspectives on Politics*, (2009) Vol. 7, No. 4, p. 810.

¹⁷¹⁴ Moreover, Annabelle Lever shows, democratic justification is a way for judges to show democratic accountability. Lever, *op. cit.*

it follows society's ongoing consensus.¹⁷¹⁵ Given the multiple rights philosophies existing today, the judiciary would also play a role of arbiter between different rights philosophies. Supporters of these various schools tend to conclude that the Supreme Court should no longer be characterized as “countermajoritarian” institution, i.e. an institution which, in order to protect individual and minority rights, have to frustrate the will of potentially oppressive majorities. Of course, such theories are not accepted by all or even uncontroversial, but they provide a good starting point to explore how, in real judicial life, judges convey public opinion and what role they deem it worthy to play first in democracy, and second, in the evolution of rights protection.

763. Looking more closely at institutional settings and how both the United States' Supreme Court and the European Court worked on improving plaintiff's access to relief amid concerns for efficiency, I found that despite statistics seeming to communicate the extremely low likelihood for an application to be heard, Courts at the same time worked on making sure that the admissibility criteria would not unnecessarily bar grounded applications from the possibility of being heard. Through the certiorari procedure, ensuring discretion in the choice of cases, the Supreme Court ensured that current social issues could be addressed in due time. In Europe, member states also ensured that the European Court could more efficiently address problems through a reorganization of its structure, the integration of judicial formations addressing with clear inadmissible applications, or cases involving settled case-law.¹⁷¹⁶ The European Court itself integrated a priority procedure allowing it to address most urgent rights violations.¹⁷¹⁷ Both courts also worked on ensuring public visibility, each in its own way: the American Court, by progressively allowing access by the press and by improving the public announcement of cases;¹⁷¹⁸ the European Court by allowing public access to

¹⁷¹⁵ J. Driver, “The Consensus Constitution”, *Texas Law Review* Vol. 89 (4) (2011), p.758.

¹⁷¹⁶ Protocol 14 (Treaty No.194, CTS No. 194 signed in Strasbourg on 13 May 2004 entering into force on 1st of June 2010) integrated the single judge formation ruling on inadmissible cases, and the committee of three judges ruling on settled case-law.

¹⁷¹⁷ European Court of Human Rights, The Court's Priority Policy, accessible at https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

¹⁷¹⁸ L. Greenhouse, “Telling the Court's Story: Justice and Journalism at the Supreme Court,” *Yale Law Journal*, Vol. 105 (1996), pp.1550. The Supreme Court typically announces all terms' decisions on the same day. However, on some occasions, the Court is known to have made special announcements for specific cases.

online broadcasts and or to public hearings. In each system, the appointment and screening of judges became more transparent,¹⁷¹⁹ but not public to the same extent.¹⁷²⁰

764. In order to determine if courts are becoming to some extent “participative” institutions, I also focused on access by “friends of courts” or amici curiae. Here again, amici participation began as a rare occurrence, public interest type of intervention, and became a political phenomenon where quantities of civil society organizations mobilized for a cause and communicated the Court their own vision of the stakes involved in a current case. To a lesser extent in Europe, participation by organizations although less numerous and politically salient, cannot be labelled as neutral, as organizations from different social, religious or philosophical backgrounds communicate to the Court their own vision and data regarding issues discussed in the cases. However, I concluded that both courts (although not all judges) to some degree value such participation, although scholars have warned as to the treatment by judges of information submitted in the friends of court’s briefs.¹⁷²¹
765. Moving to substantial textual analysis, my case studies established that direct mentions of public opinion in freedom of speech cases are informative as to what concepts of public opinions judges acknowledge, and which concept they adhere to. Both European and American judges first do not exclude public opinion from playing an important role in democracy. They may use “public opinion” references as a synonym of the will of the people, or the electorate, but most references differentiate the two. Moreover, both Courts adhere to a democracy where reigns will formation through public debate. In this framework, they encourage a concept of freedom of speech oriented toward allowing the formation of an informed or enlightened public opinion. Although American speech protection is more oriented toward a freedom of speech suffering no content restriction or obligation in the name of the freedom on the “marketplace of

¹⁷¹⁹ The hearing of candidates by the Senate in the United States is now broadcasted on television. However, this transparence came at the cost of an increased polarization of selection, and perhaps ultimately of the Court itself. See D. R. Stras, “Understanding the New Politics of Judicial Appointments”, *Texas Law Review*, Vol. 86, (2008) p. 1065.

¹⁷²⁰ There is no televised broadcasting of the procedure of selection of judges. Only curriculum vitae, and reports on the decisions of the Committee on the Election of Judges to the European Court of Human Rights of the Parliamentary Assembly are available on the Assembly’s website, at <http://website-pace.net/web/as-cdh>

¹⁷²¹ See for example A. Orr Larsen, “The Trouble with Amicus Facts”, *Virginia Law Review*, Vol. 100, 1757 (2014).

ideas”,¹⁷²² or the unhampered public’s discovery of the truth, European judges privilege a freedom of expression focused on an enlightened opinion, and are therefore more ready to sanction speech that would be deemed incompatible with democracy because advocating violence, or to impose upon the press ethical duties aimed at protecting a democracy-enhancing public debate.¹⁷²³

766. The case study of homosexuality-related rights cases underlined the evolution of the role of public opinion references in parallel with the evolution of the rights of same-sex oriented persons, from before decriminalization of homosexuality and homosexual acts to the official legal recognition of same-sex family life and relationships. In this study, I tried to account not only for the use of references to public opinion, but also in the use of dynamic, i.e. evolution-oriented interpretation and the use of the consensual doctrines by both the Supreme Court and the European Court. Also, bearing in mind that cases related to the rights of homosexuals were politically very salient both in Europe and in the United States, and that they involved increased third-party participation, I accounted for this increase by noting the levels of participation in my analysis. (For a brief summary of parallel use of public opinion references, doctrine and participation by case, see Annex No. 2.)
767. In the study of challenges to criminalization of homosexuality, I found that the Supreme Court (or the Justice drafting the decision in any given case) and the European Court treat public opinion differently. First, while the European Court regards public opinion in a balanced way, considering it as a legitimate if insufficient ground for public policy making, Supreme Court decisions, along a dualistic opposition between dominant majorities and victimized minorities, were usually negative in their assessment of public opinion. However, to adopt this attitude toward public opinion, the Supreme Court perspective had to change. When resisting change in *Bowers*, the Court considered that the combination of public support added to the numerical consensus among states was enough justification to justify judicial deference toward a state’s policy of criminalization of homosexuality.¹⁷²⁴ In contrast, when enforcing change in

¹⁷²² C. Salmon, T Glasser politics of polling, in T. Glasser, C. Salmon, *Public Opinion and the Communication of Consent*, NY, the Guilford Press (1995), p. 445, referring to Oliver Wendell Holmes famous expression introduced in *Abrams v. U.S.* 250, U.S. 616 (1919), p. 630.

¹⁷²³ See cases on press ethics, for example ECtHR, *Couderc and Hachette Filipacchi Associés v. France* [GC], Appl. No. 40454/07, 10th November 2015, and ECtHR, *Stoll v. Switzerland* [GC], Appl. No. 69698/01, 10 December 2007.

¹⁷²⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Romer and then *Lawrence*, public support for such policy was no longer considered relevant in view of the negative feelings motivating public support for criminalization of homosexuality. However an “emerging awareness” was deemed sufficient to set aside public support, and to step up the court’s scrutiny into public policy justifications.¹⁷²⁵ It appears that the substance of public opinion in itself and its assumed malevolence was what motivated the dismissal of the challenged criminalization policy. By contrast, in order to keep a benevolent perspective on arguments pertaining to local public opinion’s support for a policy less favorable to homosexuals, the European Court affirmed that public authorities concern about public opinion support for a policy was legitimate, but proceeded by imposing on the defendant state a burden of proof establishing the existence of such support, in addition to legitimate justifications. By contrast, and in absence of such proof, the European findings of a numerical consensus among contracting states was deemed a sufficient reason to dismiss the defendant’s claim.

768. In privacy and family life cases that led to the legal consecration of same-sex unions, I noted other trends. Both courts changed their doctrines substantially when acknowledging the fast pace of change within public opinion on homosexuality-related matters. The Supreme Court continued to describe the problem of same-sex couple’s right in terms of malevolent majorities opposed to oppressed minorities, this time in a different manner. It seemed to favor a progressive public opinion, in favor of an advancement in the status of homosexual couples, rather than a reluctant public opinion even if it was dominant in number, on the ground that it could be “blind to its own injustice”.¹⁷²⁶ The Supreme Court hence played the role of a countermajoritarian rational umpire, enjoying sovereignty and primacy¹⁷²⁷ as an institution; a protector of minorities not ready to endanger fundamental rights¹⁷²⁸ in the name of democratic debate. Its doctrine changed as well, however not to become a systematic doctrine fully integrating public opinion: the majority of the Supreme Court combined the Equal Protection Clause and the Due Process Clause, thereby opening the door to more rights-protective possibilities.

¹⁷²⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷²⁶ *Obergefell v. Hodges*, 576 U.S. __ (2015), 135 S.Ct. 2584.

¹⁷²⁷ *Ibid.*, at 2688.

¹⁷²⁸ *Ibid.*, at 2606.

769. In Europe, attention to “public perception” was integrated into the the Living Instrument doctrine to assess the meaning of respect of private and family life in present-day conditions.¹⁷²⁹ Additionally, “trends” towards a European consensus were now deemed sufficient to effect legal change.¹⁷³⁰ Remarkably, while not following the dualistic majority versus minority dynamic found in Supreme Court decisions, the European Court seemed to challenge not the substance of public attitudes themselves, even if they are reluctant to homosexual rights, but the defendant state’s interpretation and treatment of domestic public attitudes. That is what the Court shows in *Oliari*, when urging Italy to follow existing public support despite the division of its own elected parliament on the question. The European Court thus opposed elected majorities to their own public opinion. Therefore, contrary to the Supreme Court, the European Court does not challenge local or European public opinion, but rather public authorities’ reading of public support for a policy. It places itself in a position of ally of public opinion against seemingly untrusted elected majorities. However, when in order to justify its assertion that government didn’t heed its true public opinion, the European Court uses statistical data subject to interpretation and challenge, it can fragilize its authority. Indeed, if survey research and polling data have the advantage to rationalize and objectify an assertion about what where public opinion stands,¹⁷³¹ the use of polls can send an ambivalent message about the ideal of democracy it si defending. If the European Court’s case law signals its support for an informed public opinion, “(p)olls encourage a structured, reactive sort of participation, making it unneccessart to generate our own forms of public expression, our own questions, our own critiques...In a way, polls make many political discussion superfluous, since they give the illusion that the public has already spoken in a definitive manner”.¹⁷³² Therefore, uncritical use of polls and survey research may be discouraged, as it does not conform with the ideal image the European Courts want to give of an informed democracy based on dynamic and critical public debate.

770. From this analysis also transpires the fact that the courts’ different institutional settings affect the way they relate to public opinion. The Supreme Court, in its supreme

¹⁷²⁹ ECtHR, *Kozak v. Poland*, Appl. No. 13102, 02 March 2010, at §98.

¹⁷³⁰ G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (hereinafter “Living Instrument”) (2012), p 12-13, Electronic copy available at: <http://ssrn.com/abstract=2021836>

¹⁷³¹ S. Herbst, “Numbered Voices”, *op. cit.*,p. 12.

¹⁷³² *Ibid.*,. 166

domestic capacity, seems more severe, more ready to take a countermajoritarian stance against dominant public opinion if opinion's position comes at the cost of minorities' rights, although in the process it takes steps to demonstrate that it took participation of many factions of opinion into account, involved as *amici curiae*.¹⁷³³ It shows more strength in its role of countermajoritarian institution and shows less trust in popular majorities; it seems to only trust public support that is consistent with its own analysis of the case. The European Court, in turn, shows more concern for the existence of a consensus favorable to its decisions. In a same-sex union case,¹⁷³⁴ it shows that an outlier state cannot rely on the argument that democratically elected majorities support a policy if its own public opinion has been shown to follow the trends of European consensus. This suggests that the European Court is reluctant to force society towards change without some level of consensus, either among public authorities or if not, among public opinion.

771. Overall, this dissertation showed that both a domestic constitutional court such as the American Supreme Court, and an international human rights court, such as the European Court of Human Rights, do not ignore the importance of public support for public policy, and for their own decisions, remembering the wisdom of Aristotle, who remarked: "He who loses the support of the people is king no longer".¹⁷³⁵ Public perception of illegitimacy of their decisions has the potential to reinforce challenges to the democratic distance in which judges fulfill their duties. Because of their conscience of the delicate balance they have to strike in their decision making, both courts have taken steps to involve their public, or organs of the public through their decision-making process, to open their proceedings to participation, and to increase the level of transparency of decision-making. Most remarkably, they have also taken steps to involve public opinion in their arguments, and to assure the public that the law was taking "public perception" into account in legal evolution,¹⁷³⁶ making sure that even rights would not progress unless the public was ready to accept it. Because it is an international court and has a more fragile authority, the European Court displays more

¹⁷³³ *Obergefell, op. cit.*, at 2624.

¹⁷³⁴ ECtHR, *Oliari and others v. Italy*, Appl. Nos. 18766/11 36030/11, 21 July 2015.

¹⁷³⁵ Aristotle, cited par E. Noelle-Neumann, "Public Opinion and Rationality", in T. Glasser, C. Salmon (eds.), *Public Opinion and the Communication of Consent*, New York, The Guilford Press (1995), p. 40.

¹⁷³⁶ ECtHR, *Kozak v. Poland*, Appl. No. 13102, 02 March 2010, at §98.

prudence and proceeds more incrementally, making sure some level of consensus exists before enforcing change.¹⁷³⁷

772. Have courts succeeded at striking a balance between their vocation as “countermajoritarian” institution and the demands for popular legitimacy, which only ensures the enforcement of their judgments by reluctant public authorities ? Only accurate surveys as to their public support could respond to such question.¹⁷³⁸ To what degree should public opinion dictate the evolution of rights rather than electoral will? The response to this last question hinges not only on the type of authority public opinion represent for judges. It also depends on the accuracy and reliability of references to public opinion judges use to justify keeping the law as it is, or proceeding to legal change. The last chapter shortly touched this issue, and showed that the vagueness and unreliability of courts’ references to public opinion in their arguments could fragilize their decisions. The Supreme Court’s decisions were already the object of sharp criticism in its management and use of surveys.¹⁷³⁹ If such critiques were virtually non-existent for the European Court, future in-depth scholarly inquiries may more clearly establish what use the European Court makes of statistical data.¹⁷⁴⁰ Moreover, if

¹⁷³⁷ Bien que Letsas aAlthough Letsas contends that if the Court *looks* for consensus and common values, it also raises the standards above state practices. “Living Instrument”, *op. cit.*, p. 12.

¹⁷³⁸ Regular polls monitor support for the Supreme Court. See for example online trends on the website of the pollster Gallup : <http://news.gallup.com/poll/4732/supreme-court.aspx> (accessed 16 may 2018) For an academic treatment of Supreme Court support, see Or Bassok, “The Supreme Court at the Bar of Public Opinion Polls”, *Constellations*, Vol. 23, No. 4 (2016). Mais aucun sondage n’a été trouvé concernant la Cour européenne des droits de l’homme.

¹⁷³⁹ Salmon C., T Glasser, T., *op. cit.*, p.444.

¹⁷⁴⁰ The number of cases displaying such usage in the cases selected for this dissertation was too low to warrant any generalized critique. Such study would have to apply to a wider, if not comprehensive sample of European Court’s judgments than the one used in Chapter Three or Chapter Four . Among other cases quoting or referring to opinion polls, and that neither Article 10 or Article 8 cases, are for example ECtHR, *Campbell v. Cosans v. The United Kingdom*, appl. 7511/76, 22 March 1983. (case involving corporal punishment and referring to a poll on teacher’s support for corporal punishment) and ECtHR, *M.C. and A.C. v. Romania*, Appl. No. 12060/12, 12 September 2016 (A case where applicants, homosexuals persons, claimed that the investigation on their ill-treatment motivated by discrimination of LGBTI persons were not effective. The court referred to a study of the Commissioner for Human Rights of the Council of Europe making a general assessment of public opinion across Europe with regard to their attitudes towards homosexual persons.) In ECtHR, *A.B.C. v. Ireland*, *op. cit.*, applicants cited opinion poll results, and contended that the lack of majority support for abortion should not be judged relevant. They asserted that “In any event, *popular opinion could not be used by a State to justify a failure to protect human rights*, the European and international consensus outlined below being far more significant.” (§170)(emphasis added) As a response, the Court did “not consider that the limited opinion polls on which the first and second applicants relied (see paragraphs 82-88 and 170 above) *are sufficiently indicative of a change in the views of the Irish people* concerning the grounds for lawful abortion in Ireland, as to displace the State’s opinion to the Court on the exact content of the requirements of morals in Ireland”. (§226.) Other cases quoting polls are related to election laws, which does not necessarily pertain to the role of public opinion in democracy or the evolution of rights protection (see ECtHR, *Pierre Bloch v. France*, Appl. No. 24194/94, 21 October 1997, at §10-12). However the use of poll or

considerations of public support for public policies is legitimate within a domestic context, as rights are defined and modified within a domestic legal culture, according to domestic values which are arguably easier to define within the confines of a single country, is it truly their place within an universalist right-protecting context? If the European Court was clearly created with a view to enforce a dynamic vision of rights protection, interpreting the Convention progressively along with legal problems it would encounter, the Preamble of the Convention suggests that it is also clearly a countermajoritarian institution, called to protect rights that are universal and should be enforced independently of public support or reluctance.¹⁷⁴¹

[Indeed], one can trace the various stages in the Court's reasoning as the gradual severing of interpretive links with the beliefs of the following groups: the drafters (*Golder, Young, James and Webster*), the respondent state's legal authorities and their classifications (*Engel*), the respondent state's public opinion (*Marckx, Dudgeon*) and finally, the authorities and public opinion of the majority of contracting states (*Hirst, Goodwin*).¹⁷⁴²

In this context, and having regard to the realistic need for public support for an effective rights protection, would not a moral reading, as supported by George Letsas, be more suited to European protection, or is a consensual interpretation more suited to a compromise between the many competing philosophies of human rights?¹⁷⁴³ Letsas I a critique of consensual interpretation and a supporter of a moral reading of the Convention, along a dynamic and progressive discovery of what "human rights people *in fact* have," and not what "public opinion *think*" they have.¹⁷⁴⁴ However, in his descriptions of the cases he mentions, he does not differentiate between public opinion

surveys is sometimes only part of a general assessment of the facts in the case and is not relevant to the merits of the case. See for example ECtHR *Refah Partisi (The Welfare Party) and Others v. Turkey*, [GC], Appl. Nos. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003.

¹⁷⁴¹ Letsas (Letsas bases his moral reading theory applied to the ECHR on Dworkin's moral theory, which itself is not rejecting an evolution of interpretation receptive to social consensus). See G. Letsas, *A Theory of Interpretation of the European Court of Human Rights*, Oxford, Oxford University Press (2008).

¹⁷⁴² G. Letsas , *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (hereinafter "Living Instrument") (2012), p 12-13, Electronic copy available at: <http://ssrn.com/abstract=2021836>

¹⁷⁴³ On different philosophies of human rights, see for example voir M-B. Dembour, "What Are Human Rights? Four Schools of Thought", *Human Rights Quarterly*, Vol. 32, No 1 (February 2010), pp. 1-20.

¹⁷⁴⁴ "And I defended the moral reading of the ECHR against the charge of judicial activism, on the ground that it remains within the remit of the Court's legal function: contracting states have given the Court jurisdiction to protect whatever human rights people *in fact* have, and not what human rights domestic authorities or public opinion *think* people have." *Ibid.*, p. 13, referring to *A Theory of Interpretation*, Chapter 2 and 3.

and electoral majority, which this dissertation showed are not always assimilated to each other. As Pierre Brunet reminds us, some scholars consider that :

[T]he assumption that democratically elected powers are in the majority is not always verified, as it happens that elected [representatives] are not in agreement with the majority will. In these last cases, it is up to the Supreme Court to fill the gap separating the *real people from its representatives* by acting not as a countermajoritarian force, but as a *majoritarian force*.¹⁷⁴⁵

In the same way, it appears the European Court also is acting as a majoritarian force in *Oliari v. Italy*, when stressing the gap between the will of the Parliament, opposed to the recognition of a legal status for homosexual couples, and its own public opinion, which she assesses as supportive of such status. Therefore, having regard to the fact that the European Court does no longer use consensus interpretation in connection to conservative and deferential interpretation,¹⁷⁴⁶ it can in fact be used at the same time in a *progressive* and *majoritarian* fashion, while being mindful to maintain its public support level.

773. This dissertation involved many dimensions of judicial decision making: political, institutional, philosophical, and legal aspects all are involved when discussing the relationship of judges to their public, and to democracy. Far from the pretense of being comprehensive in my inquiry, I nonethemess attempted to address many questions, to get so far as possible a complete overview of the principal stakes at hand. The comparative study also raised interesting contrasts between the role of a court within a domestic system, and the role of an international court and the sensitive nature of its relation to its own audiences. This study could, of course, be completed, continued, within a comparative perspective, or through an individual study of each court. Much was written about the Supreme Court and its relationship to public opinion, but less was attempted with regard to an analysis of the role of public opinion in its doctrine. The material and number of available cases containing references to public opinion could permit a separate study of each court's case law. A comprehensive analysis of European

¹⁷⁴⁵ P. Brunet, "To Have and Have Not : de la difficulté contre-majoritaire et des moyens d'en sortir", in V. Champeil-Desplats et J.-M. Denquin (dir.), *La démocratie: du crépuscule à l'aube*, Actes du colloque Paris Ouest Nanterre 2013, manuscript with the author (my translation)(emphasis added), He refers to American scholar C. Barrett Lain, "Upside-Down Judicial Review", *Georgetown Law Journal*, vol. 101, 113-183 (2007). According to him, such "majoritarian" cases include *Brown v. Board of Education*, *Furman v. Georgia*, and *Roe v. Wade*. Op. cit.

¹⁷⁴⁶ Letsas, *op. cit.* p.11.

Article 8 case law on privacy and family life could shed much light on the relationship between public opinion and legal evolution, if one just looks at the variety of topics addressed in this case law on social topics that experience tremendous evolution since the 1950s, such as abortion,¹⁷⁴⁷ or artificial insemination¹⁷⁴⁸ to name a few.¹⁷⁴⁹ The same can be said of many Supreme Court decisions involving the same topics but decided in from the 1960s-1990s,¹⁷⁵⁰ to which belong some of the cases most famous for their open references to public opinion, such as *Casey*.¹⁷⁵¹ Moreover, adding religion and association cases in a study of freedom of expression compared with the First Amendment case law, which includes religion¹⁷⁵² and association, would also complete and deepen our understanding of the relationship between court's vision of the role of public opinion in democracy. Most other legal basis discuss dimensions of the Court's relation to public opinion already essentially addressed by Chapter Three and Four case studies, although not all.¹⁷⁵³ A more fruitful way to complete this dissertations findings would be to devote a study to the way courts use statistical references to public opinion; their source, their accuracy, their reliability, in relation to rules of evidence.

774. Not only does this dissertation improve the understanding of the relationship of domestic and international courts to their audiences, including public opinion. I believe it could be used and applied to other courts, including international human rights courts such as for example the interamerican Court of Human Rights.¹⁷⁵⁴ As explained in

¹⁷⁴⁷ ECtHR, *A.B.C. v. Ireland*, Appl. No 25579/05. 16 December 2010.

¹⁷⁴⁸ ECtHR, *Dickson v. the United Kingdom*, Appl. No. 44362/04, 4 December 2007.

¹⁷⁴⁹ Johnston, a case on marriage and divorce, could be added, although it is a freedom of religion case litigated under Article 9. . *Johnston and others v. Ireland* [Plenary] Appl. No. 9697, 18 December 1986.

¹⁷⁵⁰ *Poe v. Ullman*, 367 U.S. 497 (1961), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁷⁵¹ Casey was the decision that motivated Wilson's doctrinal defense of the majority opinion in 1993. J. G. Wilson, "The Role of Public Opinion in Constitutional Interpretation", *Brigham Young University Law Review*, Vol. 1993, No.4, (1993) pp.1037-1138.

¹⁷⁵² A case in point is the Lautsi case, a very politically salient case not only in Italy, but throughout Europe at large. ECtHR, *Lautsi v. Italy*, [GC], Appl. No. 30814/06, 18 March 2011.

¹⁷⁵³ Criminal cases include for example ECHR, *Kandzhov v. Bulgaria*, Appl. No 68294/01, 6 November 2008, a case regarding the transfer of a schizophrenic detainee from prison to hospital without time to stabilize. ECHR *McKerr v. United Kingdom*, req. n°2888395, 28 May 1998 regards the issue of « public confidence » in police forces after accusations of degrading treatment. ECHR, *Stafford v. United Kingdom*, [GC] Appl. No. 46295/99, 28 May 2002, regards the imposition of a criminal sentence base on the public sentiment.

¹⁷⁵⁴ On the dynamic interpretation of the Inter American Court of Human Rights see for example G. L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *European Journal of International Law*, Vol. 19, No. 1, (2008), pp. 101-123.

Chapter One, the issue of the legitimacy of international courts has been the topic of many academic discussions in the last years, and a focus on their relationship to the public could, I hope, contribute to feeding this debate. It also could contribute to the demystification of the thesis claiming that courts are necessarily “countermajoritarian” institutions, and show to which extent courts can, sometimes, act in fact as “majoritarian” institutions, where “majoritarian” takes a different meaning, while starting a reflexion on how to best practice such majoritarian interpretation in a way to strengthen rather than fragilize their authority.

775. Because the law does not evolve in a vacuum, judges cannot, despite some assertions, decide only according to their fancies or ideologies and use the law as “ex post facto” justification.¹⁷⁵⁵ But if social consensus and public opinion play a role in the way they protect and interpret rights against the will of the majority of the electorate and public authorities, just how do judges assess the extent of this consensus ? We have seen that they allow involvement of a multitude of different actors, which contribution they at times acknowledge, making the interpretative endeavor a participatory, perhaps even democratic practice. However, despite efforts, the manner in which this social consensus is involved is not always clear or consistent, which could give an impression of arbitrariness. Some courts could be strong enough institutionally to survive criticism triggered by this impression. Some which authority is more fragile and more dependent upon public authorities’ goodwill, should be encouraged to remain on their usual path of prudence, so that their contribution to the improvement of rights protection may endure and prosper.

¹⁷⁵⁵ Claim made by F. Cross, “Political Science and the New Legal Realism : A Case of Unfortunate Interdisciplinary Ignorance”, *Northwestern University Law Review*, Vol. 92, 251-326 (1997).



ECOLE DOCTORALE DE DROIT INTERNATIONAL ET EUROPEEN

TRADUCTION PARTIELLE DE THESE DE DOCTORAT

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**LE ROLE DE L'OPINION PUBLIQUE DANS LA FONCTION DE
JUGER LES DROITS DE FONDAMENTAUX**

**LES EXEMPLES DE LA COUR SUPREME DES ÉTATS-UNIS ET DE LA
COUR EUROPEENNE DES DROITS DE L'HOMME**

Bernadette Joyeux-Jastrebski

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Chapitre Introductif

*De tout temps les gouvernements
se sont préoccupés de l'opinion.
Les idées et l'opinion
ont préparé la révolution.*

Maurice Hauriou

1. Introduction et Hypothèses

1. Peu nombreux sont ceux qui ont échappé, de chaque côté de l'Atlantique, aux débats soutenus sur la reconnaissance d'un statut légal des relations entre personnes de même sexe. A grands renforts de publicité médiatique, la Cour suprême des États-Unis (ci-après, la Cour suprême) annonçait le 26 juin 2013 dans sa décision *United States v. Windsor*¹⁷⁵⁶, qu'elle annulait la Section 3 de la loi fédérale DOMA ou « *Defense of Marriage Act* », qui limitait en droit fédéral américain la définition du mariage aux couples constitués d'un homme et d'une femme. Cette définition empêchait *de facto* la reconnaissance des mariages homosexuels célébrés dans des États tiers ne l'ayant pas légalisé, et la possibilité pour les couples homosexuels de déclarer les impôts fédéraux en tant que couples mariés.¹⁷⁵⁷ Le même jour, la Cour suprême déclarait que les organisateurs d'un référendum citoyen approuvé par la population de l'État de Californie, qui avait rendu le mariage homosexuel illégal dans cet État par volonté citoyenne, n'avaient pas la capacité légale de défendre en droit fédéral la constitutionnalité de cette loi devant une cour fédérale, même si cette capacité leur était accordée en droit constitutionnel californien¹⁷⁵⁸. En leur refusant cette capacité, la Cour suprême permettait l'annulation du référendum et s'exposait à une critique plutôt habituelle : celle d'être « antidémocratique ». La même année, la Cour européenne des droits de l'homme (ci-après la Cour européenne), une cour internationale protégeant les droits fondamentaux européens dans quarante-sept États d'Europe, consacrait, sur le fondement de l'interdiction de la discrimination inscrit à l'Article 14 de la Convention, combiné au droit à la vie privée et familiale (Article 8), l'égale valeur entre les relations

¹⁷⁵⁶ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁷⁵⁷ *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

¹⁷⁵⁸ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (1996)

entre personnes hétérosexuelles et personnes de même sexe. La Cour obligeait la Grèce à étendre sa nouvelle loi sur les Union civiles, protégeant la vie familiale des couples non mariés, aux couples de même sexe¹⁷⁵⁹. Deux ans plus tard, la Cour suprême dans l'arrêt *Obergefell v. Hodges*, et la Cour européenne dans l'arrêt *Oliari c. Italie*¹⁷⁶⁰, pénalisaient les États pour avoir exclu ou n'avoir pas reconnu le droit des personnes de même sexe à accéder à un statut civil équivalent à celui reconnu aux couples hétérosexuels : le mariage dans le cas américain, et une Union civile en Italie. Ces arrêts sont des exemples récents d'affaires grâce auxquelles l'interdiction de la discrimination des personnes vulnérables a permis à des minorités d'emporter des victoires politiques importantes en utilisant la voie judiciaire¹⁷⁶¹.

2. L'importance grandissante des cours constitutionnelles et des cours internationales a intensifié l'intérêt des politologues spécialistes de la judicialisation des paysages politiques¹⁷⁶². L'étude des institutions judiciaires, qui était jusqu'il y a peu réservée à la recherche juridique, s'est étendue à d'autres domaines des sciences sociales, en particulier aux sciences politiques et aux relations internationales¹⁷⁶³. Elles révèlent un

¹⁷⁵⁹ Cour EDH, Gr. Ch., *Vallianatos c. Grèce*, req. n° 29381/09 32684/09, 7 Novembre 2013.

¹⁷⁶⁰ Cour EDH, *Oliari et autres c. Italie*, req. n°. 18766/11 et 36030/11, 21 juillet 2015, §17.

¹⁷⁶¹ Sur les usages stratégiques des cours internationales dans des buts politiques, voir le volume entire *Comparative Political Studies*, Vol. 39, Issue 1, (2006), en particulier K. Alter, Private Litigants and the New International Courts, *Comparative Political Studies*, Vol. 39, Issue 1, (2006), pp. 22–49, R. Cichowski, "Courts, Rights, and Democratic Participation", *Comparative Political Studies*, Vol. 39, Issue 1, (2006), pp. 50–75. La recherche politique sur les cours internationales, les participants et leur efficacité, ainsi que les nombreuses dimensions de leur fonctionnement interne et de leurs résultats a été très dynamique et continue à se développer de nos jours. E. M. Hafner-Burton, D. G. Victor and Y. Lupu "Political Science Research on International Law: The State of the Field", *American Journal of International Law*, Vol. 106, No. 1 (2012).

¹⁷⁶² Voir par exemple A. Garapon, J. Allard, *Les juges dans la mondialisation du droit*, Paris, Seuil, (2005) ; D. Salas, *Le Tiers Pouvoir*, Paris, Fayard (2013), 300 p. M. Shapiro, *Courts: A Comparative and Political Analysis*. Chicago, University of Chicago Press (1981). M. Shapiro, "The Success of Judicial Review and Democracy", in M. Shapiro and A. Stone Sweet (eds), *On Law, Politics and Judicialization*. Oxford, UK: Oxford University Press (2002), 149-183.

¹⁷⁶³ Pour une bibliographie complète de la politique de la protection judiciaire aux États-Unis, voir B. Friedman, "The Politics of Judicial Review", *Texas Law Review*, Vol. 84 Issue 2. (2005-2006). At global level, see for example A-M Slaughter, *A New World Order*, Princeton: Princeton University Press (2005). See also S. McLaughlin Mitchell, E. J. Powell, *Domestic Law Goes Global, Legal Traditions and International Courts*. D. Jacobson, G. Benarieh Ruffer, "Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy", *Human Rights Quarterly*, Vol. 25, pp. 74–92 (2003). On the European Court of Human Rights: E. Voeten, "Public Opinion and the Legitimacy of International Courts", in *Theoretical Inquiries in Law*, Vol 14, Issue 2 (2013), pp. 411-436. E. Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", *International Organization* Vol. 61 Issue 4, (2007), pp 669–701. A. Stone Sweet, T. L. Brunell, "Trustee Courts and the Judicialization of International Regimes. The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization", *Journal of Law and Courts*, Vol. 1, No. 1 (March 2013), pp. 61-88. Pour une étude comparative des cours constitutionnelles, voir R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, New York, Harvard University Press (2007). Pour une étude politique de la Cour

désir non seulement de comprendre la croissance de l'autorité judiciaire et des stratégies politiques intégrant les recours judiciaires, en particulier aux États-Unis et dans le domaine des relations internationales et de la science politique, mais aussi les transformations de la démocratie et de la gouvernance dans des sociétés perméables à la mondialisation. L'intérêt pour la justice est motivé par un désir de comprendre la croissance de l'autorité de la justice dans la société actuelle¹⁷⁶⁴, et participe également de l'étude des transformations de la démocratie et de la gouvernance dans un monde globalisé.

3. La recherche juridique considère que le récent développement du « pouvoir » judiciaire dans la vie politique a été renforcé par une interprétation dynamique du droit, accompagnée d'une évaluation de plus en plus poussée de la compatibilité entre les actes publics et les normes internationales, en particulier celles concernant les droits de l'homme.¹⁷⁶⁵ Tel était le cas en particulier de la Cour suprême après les années 1950, dans le cadre de ce que les Américains appellent l'ère Warren et l'ère Burger,¹⁷⁶⁶ du nom du président de la Cour suprême à la période mentionnée. Par ailleurs, par leurs arbitrages, les institutions judiciaires ont fait la promotion des idéaux démocratiques, eux aussi évolutifs. En effet, Florence Jacquemot a montré que le standard

constitutionnelle allemande, voir G. Vanberg, *The Politics of Constitutional Review in Germany*, New York, Cambridge University Press (2009).

¹⁷⁶⁴ Constatée notamment par Denis Salas, ou par Julie Allard et Antoine Garapon, *op. cit.*

¹⁷⁶⁵ Voir A. Vlachogiannis, *Les juges de la Cour suprême des États-Unis et la notion de constitution vivante*, Thèse de doctorat, Université Paris II Panthéon Assas (2011), et généralement F. Jacquemot, *op. cit.*

¹⁷⁶⁶ Cependant, l'inclusion du droit international dans les opinions de la Cour suprême est encore très controversée et provoque des remises en cause de sa légitimité. Voir D. Sloss, M. Ramsey, W. Dodge (ed). *International Law in the U.S. Supreme Court*, Cambridge University Press, (2012). Voir également See also J. Waldron, "Partly Laws Common to All Mankind": Foreign Law in American Courts", or Ernest A. Young, "Foreign Law and the Denominator Problem", *Harvard Law Review*, vol. 119, 148, (2005) p.150-51 (mettant en garde que l'usage du droit étranger pourrait conduire à des décisions de justices fondées sur le "comptage de nez" des droits étrangers favorable à une ou l'autre issue dans un conflit juridique). Voir encore R. P. Alford, *misusing international sources to interpret the constitution American Journal International Law*, vol. 98, 57, (2004) p. 58 (considérant que même si le droit étranger n'est pas de fait contraignant, il pourrait les influencer au détriment du peuple américain, qui n'est pas inclus dans le processus décisionnel de la Cour suprême). A ces objections, Justice Breyer a répondu que les institutions étrangères elles-mêmes s'inspirent des décisions de la Cour Suprême quand elles sont confrontées à un problème similaire, (p. 239). Par ailleurs, les juges américains se sont toujours inspirés du droit anglais (p. 241). Bien que les américains n'aient aucune connexion directe ou démocratique aux juges étrangers, « il y a peu de raisons de penser que la pratique conduira, pour le meilleur ou pour le pire, à l'émergence prééminence d'un droit universel kantien—un seul état de droit pour le monde entier [...] Dans le meilleur des cas, les références aux droits étrangers accélérera le développement de « groupes » ou de « poches » de nations de même sensibilité juridique, dont les juges apprennent des choses les uns des autres, soit en général soit dans des domaines spécifiques du droit, comme la sécurité, le commerce ou l'environnement. » (p. 245). Voir S. Breyer, *The Court and the World, American Law and the New Global Realities*, New York, Random House, (2015), 382 p.

démocratique promu par la Cour européenne dans le cadre de sa fonction est une conception transitoire de la démocratie, entre idéal représentatif, sans doute dépassé en pratique, et un idéal encore « inachevé » de démocratie « participative¹⁷⁶⁷». Dans l'exercice de ses fonctions, le juge européen participerait à une redéfinition pratique du système démocratique. Ce système, oscillant entre « démocratie participative » et « démocratie d'opinion », aménagerait progressivement une place de plus en plus centrale au juge.¹⁷⁶⁸ D'après Morton Horwitz, la Cour suprême joue un rôle similaire aux États-Unis : dans les années 1960, la Cour Warren ne s'est pas bornée à la définition minimaliste dominante de la démocratie, limité à une égalité politique formelle. La Cour suprême préférerait en effet donner à la démocratie, par le biais de sa jurisprudence, une substance en « privilégiant la dignité et l'égalité pour tous¹⁷⁶⁹». La justice s'est dès lors incontestablement établie non seulement comme un « tiers pouvoir », d'après les termes de Denis Salas, mais aussi comme un pouvoir dominant, puisqu'elle est l'institution qui, tout en interdisant au pouvoir exécutif et législatif toute ingérence dans l'exercice de la fonction de juger, joue le rôle de gardien, veillant à ce que la production normative de ces deux pouvoirs ne contreviennent pas, directement ou indirectement, aux normes constitutionnelles et aux droits fondamentaux¹⁷⁷⁰.

4. L'étude de la justice est d'une importance d'autant plus grande que son *autorité* s'est accrue au même rythme que son *pouvoir* politique. Dès lors, des recherches permettant une connaissance plus complète des institutions judiciaires sont nécessaires. Bien que l'étude des institutions judiciaires ait été déjà bien prise en main par les politologues et juristes américains, des études combinant l'aspect politique et l'aspect juridique de la fonction judiciaire sont récentes, qu'elles soient appliquées aux institutions nationales ou internationales¹⁷⁷¹. En France, des notions politiques s'insèrent désormais dans les études approfondies de droit public ; en témoignent les thèses de doctorat sur la « démocratie d'opinion » et celle sur le « standard européen de société démocratique »,

¹⁷⁶⁷ Voir en général, Jacquemot, *op. cit.*

¹⁷⁶⁸ S. Bénétière, *La démocratie d'opinion*, Thèse de doctorat, Université Lyon III, France (2008).

¹⁷⁶⁹ M. Horwitz, *The Warren Court in the Pursuit of justice*, New York, Hill and Wahng (1998), p. 82.

¹⁷⁷⁰ A. Cox, "Federalism and Individual Rights under the Burger Court", *Northwestern University Law Review*, Vol. 73, Issue 1 (1978-1979) p. 1. Dès lors, la Cour suprême est perçue comme protectrice de la liberté et un arbitre pour la société. Voir par exemple T. Clark, "The Supreme Court as a Protector of Liberty Under the Rule of Law", *Marquette Law Review*, Vol. 43, Issue 1 (1959).

¹⁷⁷¹ Pour des références, voir ci-dessus, note 6.

ou sur les « valeurs » véhiculées par les jugements européens¹⁷⁷². Notre sujet s'inscrit dans cette tendance, et s'intéresse au rôle d'un phénomène des plus politiques dans la vie judiciaire, qui a déjà fait couler beaucoup d'encre dans les sciences sociales : l'*opinion publique*.

5. Celle-ci y est abordée en tant qu'élément constitutif de la protection judiciaire des droits fondamentaux, aussi bien au niveau institutionnel que dans l'argumentation judiciaire¹⁷⁷³. Ainsi, sous ses différentes manifestations plus ou moins évidentes, l'opinion publique serait « saisie sous le prisme du droit¹⁷⁷⁴ ». Dès lors, la relation entre droit et opinion publique peut se manifester par le droit processuel, dans la pratique interne des cours, et au travers des décisions de justice elles-mêmes.
6. On suppose souvent que les élus ont le monopole de la décision s'inspirant de l'opinion publique. Le point de départ de ce travail est l'hypothèse selon laquelle la relation entre le droit et l'opinion publique est discernable en droit au travers des règles institutionnelles et de leur mise en œuvre pratique, ainsi que dans la substance des décisions du juge. Quelques éléments ont contribué à émettre une telle hypothèse. D'abord, si le monopole des décisions de principe semble laissé aux juges¹⁷⁷⁵, l'*opinion* n'est certainement pas étrangère aux règles de droit qui fondent la société démocratique, et par extension à la pratique judiciaire des gardiens des droits les plus essentiels, qu'on les appelle les droits « civils », « fondamentaux », ou même « humains¹⁷⁷⁶ ». D'après le philosophe du droit belge Chaïm Perelman, le juge n'est pas un acteur isolé de la vie publique et ses décisions ne s'adressent pas seulement à lui-même et aux parties en l'espèce. Elles sont également rédigées pour un auditoire. La « nouvelle rhétorique » de Chaïm Perelman « *repose sur trois principes fondamentaux : l'auditoire est une construction de l'orateur ; l'orateur doit s'adapter*

¹⁷⁷² C. Blanc-Fily, *Les valeurs dans la jurisprudence de la Cour européenne des droits de l'homme. Essai critique sur l'interprétation axiologique du juge européen*, Thèse de doctorat, Université of Montpellier I, Faculté de droit (2014).

¹⁷⁷³ C. Perelman considérait l'opinion publique comme un élément devant être pris en considération pour préserver ou renforcer l'autorité des juges. Pour convaincre le public que sa décision est correcte, les juges doivent démontrer que celle-ci est équitable, opportune et bénéfique pour la société. C. Perelman, *Logique Juridique, Nouvelle Rhétorique*, Paris, Dalloz (1976), pp. 155-8

¹⁷⁷⁴ *Ibid.*

¹⁷⁷⁵ Pour plus d'information sur le débat concernant le monopole de la décision rationnelle par les juges, voir le Chapitre Premier de cette thèse.

¹⁷⁷⁶ Sunstein affirme aussi que la Cour suprême « proclame un nouveau principe constitutionnel ou une nouvelle interprétation d'un vieux principe, elle ne fonctionne jamais dans un vide social. Souvent, elle confirme une décision qui a longtemps mobilisé le soutien de nombreux penseurs. » C. Sunstein, *A Constitution of Many Minds*, Princeton, Princeton University Press (2009), p.4 (notre traduction).

à l'auditoire ; il le fait en se fondant sur des points d'accord supposés et des prémisses entérinées¹⁷⁷⁷». Ensuite, la relation entre l'institution judiciaire et l'un de ses publics, l'opinion publique, peut être révélée par sa production la plus visible : le jugement écrit. C'est pourquoi cette thèse prendra soin de se concentrer sur la substance des jugements de la Cour suprême et de la Cour Européenne. Enfin, puisque les arrangements institutionnels ont un impact sur la fonction même de juger ainsi que le contenu des jugements, l'organisation dans le cadre duquel les décisions sont débattues, prises et rédigées, qui permet sous certaines conditions la participation du public et des acteurs de la société civile, sera-t-elle aussi l'objet de cette étude. En effet, ces arrangements révèlent l'ouverture de l'institution judiciaire à son public dans ses manifestations variées.

7. Cette thèse adopte pour objets principaux d'étude deux des institutions judiciaires les plus renommées dans le monde juridico-politique – la Cour suprême et la Cour européenne – pour leur efficacité, leur créativité juridique, et leur visibilité politique en tant que protectrices des droits les plus indispensables à la dignité de toute personne : les droits constitutionnels et les droits de l'homme.
8. Tout d'abord, si la Cour suprême des États-Unis a été une innovation de son temps, elle a rapidement mis en place son rôle prééminent dans un pays où le manque d'homogénéité culturelle dû à la diversité démographique et à l'immensité du territoire a été rapidement réduit par un système politique fort et le renforcement progressif d'une culture juridique commune¹⁷⁷⁸. Le rôle de la Cour suprême est monté en puissance, jusqu'à ce que celle-ci devienne l'arbitre de nombreuses batailles politiques et morales, réputées jusqu'alors insolubles par les voies politiques classiques¹⁷⁷⁹. Certains événements ont joué en faveur de l'accroissement de son autorité, en particulier la

¹⁷⁷⁷ Bénétullière, *op. cit.*, p. 632.

¹⁷⁷⁸ R. Ferguson prétend également que dans la culture américaine, le droit est si profondément présent que «le juriste a fini par remplacer le pasteur comme porte-parole de la culture américaine». R. Ferguson, *Law and Letters in American Culture*, Cambridge, Mass., Harvard University Press (1984) p. 9. Helle Porsdam affirme parmi les quelques éléments de ce que Kart appelle «idéologie de la culture américaine, la culture civique du droit a joué le rôle de «colle culturelle»». H. Porsdam, *Legally Speaking: Contemporary American Culture and the Law*, Amherst, University of Massachusetts Press (1999), p. 218, quoting K. Karst, *Belonging to America: Equal Citizenship and the Constitution*, New Heaven, Conn., Yale University Press (1989), pp.31-32 (notre traduction).

¹⁷⁷⁹ Lors de son audience de confirmation au Sénat, Justice Roberts déclarait qu'il pensait que les Justices étaient les arbitres du droit, n'élaborant pas des normes, mais s'assurant que tous les respectent. Être un arbitre politique est tout le contraire de cela, puisque les juges ne peuvent résoudre des questions politiques sans créer de nouvelle règle. T. Keck, *Judicial Politics in Polarized Times*, Chicago, University of Chicago Press (2014), p. 131.

ratification des treizième et quatorzièmes amendements, qui ont radicalement changé la structure de la constitution fédérale¹⁷⁸⁰. L'exemple le plus flagrant de ce changement est la progression rapide jurisprudence américaine pendant les années 1960, lors de laquelle sous l'impulsion de Justice Warren, la ségrégation raciale était jugée incompatible avec les quatrièmes, neuvièmes et quatorzièmes amendements de la Constitution fédérale.¹⁷⁸¹ Il est difficile d'exagérer en affirmant que ces changements ont métamorphosé la vie constitutionnelle américaine.

9. Alors que la Cour Warren étendait sans complexe les protections constitutionnelles, la Commission et la Cour européennes des droits de l'homme œuvraient à la mise en place de leur propre jurisprudence¹⁷⁸², travaillant à rendre les garanties de la Convention plus efficaces et adaptées aux situations concrètes européennes¹⁷⁸³. La cour européenne bénéficiait d'une nouvelle forme de légitimité, celle du gardien indispensable des droits les plus précieux qui avaient été si facilement enfreints pendant la seconde guerre mondiale. En quelques décennies, la Commission puis la Cour avaient solidement ancré l'autorité de ce nouveau régime de protection. Il reste que, contrairement à la Cour suprême – qui est une cour nationale bénéficiant d'une légitimité constitutionnelle et politique ancienne – la Cour européenne n'est pas une cour nationale, et n'arbore pas formellement l'allure d'une juridiction constitutionnelle¹⁷⁸⁴. Son autorité est donc fragile, en particulier quand elle est confrontée à des législations et gouvernements bénéficiant d'une forte légitimité démocratique fondée sur l'élection. Néanmoins, elle a acquis une notoriété telle et un rôle si central dans la recherche d'une unité européenne et le respect des droits de l'homme qu'elle a quand même été comparée à une cour constitutionnelle¹⁷⁸⁵. Le professeur Merrils déclarait ainsi dans les années 1990, faisant

¹⁷⁸⁰ Dans son ouvrage *The Bill of Rights*, Akhil Reed Amar affirme qu'il existe deux constitutions américaines : l'une rédigée en 1787, et celle qui a succédé à la période de "Reconstruction" suite à la Guerre de Sécession, à partir du moment où la Cour suprême a interprété le *Bill of Rights* comme protégeant les droits face aux autorités locales en les insérant au sein du Quatorzième Amendement. A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press (1998), p. XV.

¹⁷⁸¹ Pour une brève histoire de la Cour Warren, voir Horwitz *infra*, note 14. Pour plus de détails à propos du rôle de la Cour suprême dans la déségrégation de la population afro-américaine, voir M. J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Oxford University Press, New York (2006).

¹⁷⁸² Référence à la Commission européenne des droits de l'homme se limitera désormais au terme "Commission".

¹⁷⁸³ Cf. ECtHR, *Airey v. Ireland*, Appl. No. 6289/73 (A/32), 9 October 1979, at § 24.

¹⁷⁸⁴ Référence à la Cour européenne des droits de l'homme se fera ci-après sous le terme "Cour européenne".

¹⁷⁸⁵ Voir par exemple A. Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court", in A. Stone Sweet and al., *A Europe of Rights*, Oxford, Oxford University Press (2009). R. Harmsen, "The European Court of Human Rights as a 'Constitutional

écho aux propos de Tocqueville concernant la Cour suprême, « *Il n'existe aucun aspect des affaires nationales dont on puisse dire qu'il n'a aucune implication pour un ou l'autre droit protégé par la Convention, (et dès lors) il n'existe aucun sujet de droit ou de politique nationale qui ne puisse, un jour ou l'autre, atteindre la Cour européenne*¹⁷⁸⁶ ».

10. Les développements ci-après visent à présenter le sujet de cette thèse, à expliciter les notions principales sur lequel il se fonde, ainsi qu'à expliquer la méthodologie utilisée pour sélectionner les données.

2. Eléments structurants de la recherche

11. Cette thèse s'inspire de sources pluridisciplinaires variées, particulièrement dans le domaine du droit et de la science politique. Sa première inspiration est philosophique, car elle tire certains enseignements de l'œuvre du philosophe belge Chaïm Perelman, en particulier son approche de la logique juridique et sa prise en compte du public dans la fonction de juger. Par ailleurs, elle se fonde sur de nombreuses études politiques du fonctionnement des institutions judiciaires.

2.1. L'opinion publique dans le contexte du discours judiciaire

12. Puisque l'« opinion publique » n'est pas un terme légal (peu de dictionnaires juridiques y consacre une définition), une approche exclusivement juridique ne conviendrait pas au traitement du sujet de cette thèse. Dès lors, à l'image de Chaïm Perelman, l'approche du jugement judiciaire adoptée est celle d'un exercice de communication rhétorique. L'approche rhétorique du droit est un développement de l'après-guerre, alors que les juristes et théoriciens, confrontés aux excès du positivisme, travaillaient à trouver un nouvel équilibre entre la mise en œuvre de la volonté des institutions représentatives et les valeurs de leur époque. Partisan de la « nouvelle rhétorique », Chaïm Perelman

Court': Definitional Debates and the Dynamics of Reform" in J. Morison, K. McEvoy, G. Anthony (eds) *Judges, Transition, and Human Rights*, Oxford, Oxford University Press (2007). G. Ulfstein, *The European Court of Human Rights as a Constitutional Court?* (March 19, 2014), Festschrift to the 40th Year Anniversary of the Universität der Bundeswehr, Munich: 'To Live in World Society – To Govern in the World State', Forthcoming; PluriCourts Research Paper No. 14-08. Available at SSRN: <https://ssrn.com/abstract=2419459>

¹⁷⁸⁶ Merrils in J. Merrils, A. Robertson (eds.), *Human Rights in Europe: A Study of the ECHR*, (Manchester: MUP, 2001) p. 9, cité par Ed Bates, *The Evolution of the Convention of Human rights: From its Inception to the Creation of a Permanent Court of Human Rights*, New York, Oxford University Press (2010) p. 19 (notre traduction) .

proposait une nouvelle approche de l'analyse juridique, qui se fondait sur le besoin des juges de convaincre leur public du bien fondé et de la justesse de leurs décisions.

2.1.1. *L'après-guerre et la nouvelle logique juridique*

13. Dans les années 1970, le philosophe du droit Chaïm Perelman se lançait dans une nouvelle approche de la décision judiciaire. Citant Malinowski¹⁷⁸⁷, ce passionné de logique et de connaissance du raisonnement affirma tout d'abord que la « logique juridique » en tant que catégorie spécifique n'existait pas¹⁷⁸⁸. Pour lui, il n'existerait qu'une seule logique, et la logique « formelle » s'appliquerait à de nombreux domaines professionnels, dont le droit. Suivant Ehrlich, il estima ensuite que la « logique juridique » et la « logique formelle » n'avait que le terme « logique » en commun. La pensée juridique utiliserait en effet souvent des techniques de raisonnement spécifiques au domaine juridique. Selon les termes de Wetlaufer : « *le droit est rhétorique, mais la rhétorique particulière adoptée par le droit opère par la négation systématique du fait que [le droit] est une rhétorique* »¹⁷⁸⁹.
14. Pour justifier sa thèse, le professeur Perelman commençait par rejeter l'ancienne image hyperbolique (exagérée) attachée à la tradition de droit romain, réputés provenir d'une « *justice absolue, conçue à une époque comme ayant une origine divine, à d'autres comme naturelle ou rationnelle* »¹⁷⁹⁰. Perelman soulignait en outre l'évolution des pratiques juridiques après la Révolution Française, l'accent mis sur stricte une séparation des pouvoirs, le formalisme du positivisme juridique puis les changements de l'après-guerre lesquels avaient rejeté les conséquences inacceptables de l'application stricte du droit selon une acception positiviste.
15. Comme preuve du changement radical de la pensée juridique, il prenait pour exemple le juriste allemand de l'après-guerre Josef Esser¹⁷⁹¹, qui préférait une méthode d'analyse juridique libre de toute idéologie, et ciblée sur une étude du raisonnement judiciaire. A cause de la mise en œuvre judiciaire aveugle de lois injustes sous les

¹⁷⁸⁷ G Kalinowski, "Y a t'il une logique juridique", *Logique et analyse*, Vol. 5, 1959, p. 53, cité dans Perelman, "Logique juridique, la nouvelle rhétorique", *op. cit.*, p. 4.

¹⁷⁸⁸ *Ibid.*

¹⁷⁸⁹ G. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse", *Virginia Law Review*, Vol. 76, 1545 (1990), p. 1554.

¹⁷⁹⁰ Perelman, *op. cit.*, p.7.

¹⁷⁹¹ J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*, Tübingen, Germany: J. C. B. Mohr, Paul Siebeck, (1956).

régimes fascistes, les juristes de l'après-guerre rejetaient les prémisses suivantes : la première, selon laquelle la loi pouvait être appliquée comme une science exacte, et la deuxième, que la volonté des législatures et des majorités devait être appliquée par les juges de manière formelle et sans recours aux valeurs. Contrairement aux positivistes, les théoriciens du droit de l'après-guerre considéraient que « *la dogmatique juridique ne peut pas éviter de prendre position dans les controverses, où les jugements de valeur opposés viennent à se heurter dans un cas d'espèce. Son rôle est de fournir des arguments qui permettront aux praticiens, et surtout aux juges, de choisir une position et de la motiver en droit*¹⁷⁹² ». Si les théoriciens ont recherché des méthodes qui puissent guider les juges vers la pratique d'un type de raisonnement particulier pour motiver leurs décisions, le raisonnement juridique n'est pas une science exacte, dès lors il ne peut garantir un résultat spécifique. Au bout du compte, le raisonnement du juge consiste à trouver un équilibre entre déduction syllogistique et recherche d'une solution d'équité : c'est un « *va-et-vient de l'esprit* ¹⁷⁹³ », « *ni entièrement subordonné, ni simplement opposé au pouvoir législatif, il en constitue un aspect complémentaire indispensable, qui lui impose une tâche non seulement juridique mais aussi politique, celle d'harmoniser l'ordre juridique d'origine législative avec les idées dominantes sur ce qui est juste et équitable dans un milieu donné*¹⁷⁹⁴ ». Pour conclure, l'interprétation juridique n'est plus considérée comme une activité stricte et automatique. Les juges adaptent la loi aux besoins sociaux, lui permettant d'évoluer et de rester en accord avec les valeurs contemporaines. Cela la rend également plus acceptable aux yeux de la population. En définitive, ce qui importe est le droit tel qu'il est appliqué en pratique, même si cela va à l'encontre des textes tels qu'ils sont promulgués.

16. En mettant en évidence le bien-fondé et l'irréalisme du déni de l'existence d'une relation entre droit, besoins sociaux et valeurs contemporaines, ces théoriciens ont donc confirmé la viabilité de l'hypothèse selon laquelle un lien existe en pratique entre la mise en œuvre judiciaire du droit et l'opinion publique. C'est pourquoi l'évolution de l'opinion publique ainsi que l'évolution sociale, pourraient rentrer en ligne de compte dans une nouvelle vision du jugement judiciaire¹⁷⁹⁵.

¹⁷⁹² Perelman, *op. cit.*, p. 81.

¹⁷⁹³ *Ibid.*, p. 83.

¹⁷⁹⁴ *Ibid.*, p. 84 (nous soulignons).

¹⁷⁹⁵ Parmi les partisans de cette approche on compte le théoricien américain réputé Roscoe Pound. D'après Gardner, Pound était un partisan du changement, qui "se produit lorsqu'il existe assez de

2.1.2. *La nouvelle rhétorique et son attention pour le public*

17. La « nouvelle rhétorique » de Chaïm Perelman est une étude de la motivation judiciaire conçue comme une forme de rhétorique. D'après lui, les décisions de l'institution judiciaire ont pour but de convaincre ses publics non seulement que la loi a été appliquée correctement, mais également que la substance de la décision est juste. Les juges essaient de concilier la meilleure solution juridique avec la meilleure interprétation du droit, puisque « *la paix judiciaire est définitivement rétablie que lorsque la solution, qui est la plus acceptable socialement, s'accompagne d'une argumentation juridique suffisamment solide*¹⁷⁹⁶ ». Elle doit être acceptable aux yeux des autres institutions, en particulier celles qui est à l'origine de la norme appliquée, et des autres publics. En effet, dans un pays démocratique, l'expression de l'opinion publique et des groupes de pression ne peut être ignorée, puisqu'elle peut « *créer une opposition, qui ne manquerait pas d'être exploitée, entre le pays légal et le pays réel*¹⁷⁹⁷ », c'est-à-dire entre la majorité des représentants ayant promulgué la loi en question et la majorité de l'opinion de la population sur le problème juridique posé au moment du prononcé du jugement.

18. Le professeur Perelman étudie le raisonnement judiciaire afin de mettre en lumière la logique juridique. Son examen est axé sur une analyse des motifs. « *Motiver effectivement, c'est justifier la décision prise, en fournissant une argumentation convaincante, indiquant le bien fondé des choix effectués par le juge*¹⁷⁹⁸ ». La dialectique judiciaire a pour but d'obtenir l'adhésion de ses publics principaux, ce qui inclut les professionnels du droit, mais aussi les personnes qui n'ont pas de connaissance juridique, telles que les parties ou l'opinion publique. Cette adhésion ne peut cependant être jamais absolue.¹⁷⁹⁹ Dans cette optique, la justification judiciaire ne fera pas appel seulement à des arguments juridiques, mais à des valeurs sociales,

demande de changement pour changer ou élargir le nombre des d'affaires traitées au point d'avoir à réviser les postulats juridiques ». J. Gardner, "The Sociological Jurisprudence Of Roscoe Pound (Part I.)", *Villanova Law Review*, Vol. 7, Issue 1 (1961), p.18. Alexander Bickel a également expliqué que la Cour suprême avait adopté une vision progressiste de la protection des droits. A. Bickel, *The Supreme Court and The Idea of Progress*, New Haven, Yale University Press (1978). Cette thèse a été également confirmée par la doctrine européenne, par exemple J. Chevallier, "Les interprètes ne sauraient aller à l'encontre des représentations et des valeurs sociales dominantes, dont ils sont d'ailleurs eux-aussi imprégnés" cité par A. Schahmanèche, *La Motivation des décisions de la Cour européenne des droits de l'Homme*, Thèse de doctorat, Université of Montpellier I., Faculté de droit (2012) p. 140.

¹⁷⁹⁶ Perelman, *ibid.*, p. 141.

¹⁷⁹⁷ *Ibid.*, p. 149.

¹⁷⁹⁸ *Ibid.*, p. 162.

¹⁷⁹⁹ *Ibid.* p. 106.

morales, économiques et politiques. Les arguments des juges sont fondés sur des prémisses communément admises, afin que le droit puisse être respecté de par son acceptabilité sociale, et pas uniquement sur la base de l'obligation découlant de son imposition autoritaire par les institutions publiques¹⁸⁰⁰. D'après Wetlaufer, lorsque les « *arguments [du juriste] sont efficaces, ils obligent calmement et peut-être respectueusement son public* »¹⁸⁰¹. Dès lors, s'il existait une différence entre la loi promulguée et la volonté nationale, et « *quand il y a de bonnes raisons de croire que le législateur actuel ne peut partager les vues du législateur ancien, [...] en cherchant à se conformer à la volonté de la nation, le juge se conformera, en dernier ressort, à la volonté présumée du législateur actuel* »¹⁸⁰².

19. La nouvelle rhétorique est clairement anti formaliste. Au-delà de cela, elle souligne que le droit ne peut survivre au formalisme. D'après Peter Goodrich, elle « *tente [...] de s'abstraire dans l'idéal des techniques normatives de la justification juridique du jugement judiciaire et du processus législatif en général, de l'image que le droit se fait de lui-même et de sa manière propre de se représenter, et d'énumérer une liste générique des mécanismes rhétoriques, persuasifs et argumentatifs qui permettent au droit de postuler qu'il est fondé sur un consensus de valeurs et de justice sociale et le reflète de manière adéquate* »¹⁸⁰³. En d'autres termes, elle approche l'institution judiciaire d'une manière nouvelle, comme une institution recherchant une « légitimité rhétorique », c'est-à-dire consistant à convaincre un public, en prenant en compte ses attentes. Par la motivation, « *la justice est devenue comme une sorte d'enseignement public, qui rend la loi plus familière à ceux qui ont intérêt à la connaître* »¹⁸⁰⁴. Même les changements extérieurs contribuent à influencer les juges, même si cela reste inconscient. Ils permettent un « *dialogue plus ou moins direct, plus ou moins conscient, entre le juge et son auditoire [...] le contrôle démocratique externe sur la manière dont*

¹⁸⁰⁰ « Le jugement motivé remplace l'affirmation par un raisonnement et le simple exercice de l'autorité par un essai de persuasion. Il joue à ce titre dans ce qu'il est permis d'appeler l'équilibre juridique et moral de notre pays un rôle absolument essentiel », T. Sauvel, « Histoire du Jugement motivé », *Revue du Droit Public*, 1955, pp. 6, cité par Perelman, *op. cit.*, p. 154.

¹⁸⁰¹ G. B. Wetlaufer, « Rhetoric and Its Denial in Legal Discourse », *Virginia Law Review*, vol. 76, (1990), p.1558.

¹⁸⁰² Perelman, *op. cit.*, 176 (Souligné par nous).

¹⁸⁰³ P. Goodrich, *Legal Discourse, Studies in Linguistics, Rhetoric and Legal Analysis*, London, Macmillan (1987), p. 111 (ma traduction).

¹⁸⁰⁴ Schahmanèche, *op. cit.*, pp.128-9, quoting P. Texier, « Jalons pour une histoire de la motivation des sentences », in *Travaux de l'association Henri Capitant, La motivation*, Limoges, LGDJ, tome III (1998), pp. 5-15.

*le juge raisonne et exerce son office*¹⁸⁰⁵ ». En pratique, l'hypothèse selon laquelle la Cour suprême des États-Unis prend en compte l'opinion publique et les pressions extérieures se base sur cette vision de la motivation judiciaire. La prochaine étape de cette introduction consiste à expliquer comment la structure des jugements de la Cour européenne a poussé certains chercheurs à avancer la même hypothèse dans le cas de la Cour européenne¹⁸⁰⁶.

20. Cette thèse part du principe que l'approche proposée par l'école de la nouvelle rhétorique est très complémentaire de l'étude juridique classique, en particulier si on l'applique à des études de cas. D'une part, certaines études brèves ont déjà abordé les jugements de la Cour européenne¹⁸⁰⁷ et de la Cour suprême¹⁸⁰⁸, ou même le droit en général, sous l'angle du discours rhétorique¹⁸⁰⁹, même si leur approche n'était pas strictement Perelmanienne. D'autre part, l'approche rhétorique inclut la dimension politique du droit¹⁸¹⁰, ce qui contribue à une explication plus complète de l'ensemble des étapes qui conduisent au jugement, alors que l'analyse juridique classique en fait

¹⁸⁰⁵ *Ibid.*, p. 129.

¹⁸⁰⁶ Aurélia Schahmanèche suggère que trois publics, au moins, participant aux décisions de la Cour européenne « une opinion publique que la Cour a tout intérêt à rallier à sa cause dans la mesure où la pression que celle-ci exerce, généralement par le biais des médias, peut très bien encourager les États à accepter la jurisprudence européenne », p. 213. D'après Aurélia Schahmanèche et Marina Eudes, il est difficile de savoir jusqu'à quel point les juges de Strasbourg sont influencés par les pressions populaires, cependant c'est une « *forme de contrainte qu'ils intègrent plus ou moins consciemment dans l'exercice de leurs fonctions.* » M. Eudes, *La Pratique Judiciaire Interne de la Cour EDH*, Paris, Pedone 2005), p. 322, quoted by Schahmanèche, *op. cit.*, p. 139. Voir également S. Bénétière, *La démocratie d'opinion*, Thèse de doctorat, Université Lyon III, 2008, France.

¹⁸⁰⁷ J-D Mouton, "Les arrêts de la cour européenne des droits de l'homme comme actes de discours : contribution à la méthodologie de la fonction juridictionnelle", in *Mélanges offerts à Charles Chaumont : le droit des peuples à disposer d'eux-mêmes : méthodes d'analyse du droit international*, Paris, Pedone (1984) pp. 407-431.

¹⁸⁰⁸ E. Chemerinsky, "The Rhetoric of Constitutional Law", *Michigan Law Review*, Vol. 100, pp. 2008-2035 (2002).

¹⁸⁰⁹ Voir par exemple Wetlauffer, *op. cit.* Il décrit les conventions spécifiques de la rhétorique légale que suivent généralement les juristes (p. 1558-9).

¹⁸¹⁰ Wetlauffer différencie sa description Générale de la rhétorique juridique du raisonnement judiciaire, qui suit dans les grandes lignes le plan suivant: « *La voix du juge est plus impersonnelle que celle de l'avocat. Sa perspective est neutre et objective. Ses arguments sont très rationnels. Ils sont renforcés par autant de sources d'autorité que les circonstances l'exigent. Dès que possible, elles prennent la forme de preuves déductives et syllogistiques [...]. L'argument est contraignant en ce qu'il cherche à obtenir l'assentiment de son public. L'effet intentionnel ou réel est la clôture du conflit, une fois qu'une décision a été prise et que la réponse correcte a été trouvée [...]. Dès lors, par exemple, les Justices de la Cour suprême doivent parfois mettre de côté leurs syllogismes et écrire avec une passion qui ressemble plus à la rhétorique politique qu'à celle que je décris comme rhétorique juridique. Cette manière de rédiger peut être trouvée dans des opinions, en particulier dissidentes, dans des affaires ayant trait à des problèmes politiquement délicats tels que la discrimination en fonction de la race, le champ d'application du Premier amendement, le respect dû au drapeau [national], la peine de mort, ou les droits liés à la vie privée, et l'homosexualité. Selon mon analyse, ces passages sont [des exemples de] rhétorique politique et non de rhétorique juridique* ». *Ibid.*, pp. 1562-3 (notre traduction).

abstraction¹⁸¹¹. La rhétorique et l'analyse linguistique complètent l'analyse juridique en ce qu'elles « *offrent des outils qui assistent la réflexion sur les conventions discursives dans le cadre desquelles nous travaillons. De manière tout aussi importante, elles nous proposent également une série de renseignements spécifiques* »¹⁸¹². Allier la rhétorique et l'étude juridique de la jurisprudence fournit « *de nombreuses possibilités analytiques* », dévoilant certains aspects peu évidents de la motivation des juges¹⁸¹³, alors que se limiter à des « théories « objectives » de l'interprétation nous couperait de contributions précieuses » d'approches alternatives¹⁸¹⁴.

2.2. Intérêt académique pour le rôle du public dans la fonction de juger

21. Jusqu'à aujourd'hui, aucune étude juridique ne s'était intéressée au rôle du public (non juridique), tels que l'opinion publique, dans l'exercice de la fonction du juge européen ou dans le cadre de l'examen de ses décisions¹⁸¹⁵. Les développements ci-dessous seront donc consacrés à une mise au point sur les recherches existantes dans le domaine de la politique de la fonction de juger. Plus précisément, la seconde sous-partie de ce chapitre introductif explicite les aspects de la relation entre opinion publique et protection des droits qui ont été au centre de la recherche des deux côtés de l'Atlantique. De fait, les chercheurs américains ont été pionniers dans le domaine de l'étude politique de la fonction de juger. L'intérêt pour ce sujet est né parmi les politologues, rejoints après beaucoup de résistance par les juristes. Cependant, les recherches sur le rôle de l'opinion publique dans les décisions de justice sont encore incomplètes. Récemment,

¹⁸¹¹ « Si l'analyse textuelle des décisions de la juridiction européenne constitue le point de départ de notre recherche, celle-ci s'avère toutefois insuffisante pour retranscrire la réalité de la motivation mais aussi rendre compte de son extrême complexité. Derrière l'exposé des motifs que l'on peut lire, il y a en effet toute la question des ressorts psychologique, sociologique, culturel, politique, éthique, etc. du raisonnement du juge ». Schamaneche, *op. cit.*, p. 25.

¹⁸¹² Wetlaufer, *op. cit.*, p. 1548.

¹⁸¹³ D'après E. Jouannet, il existe en effet une différence entre le langage intérieur des juges et leur raisonnement et motivation. E. Jouannet, « La motivation ou le mystère de la boîte noire », in H. Ruiz Fabri et J.M. Sorel, *La motivation des décisions des juridictions internationales*, Paris, Pedone (2008), p. 257, quoted in Schamaneche, *op. cit.*, p. 11.

¹⁸¹⁴ Wetlaufer, *op. cit.*, p. 1595.

¹⁸¹⁵ Van den Eynde s'est penchée sur le rôle des contributions des tierces interventions dans la protection des droits de la Cour Européenne, la Cour suprême, et la Cour suprême d'Afrique du Sud, en tant que participants dans la procédure. L. Van den Eynde, *Interpreting Rights Collectively, Comparative Arguments in Public Interest Litigants' Briefs on Fundamental Rights Issues*, Thèse de Doctorat, Bruxelles, Université Libre de Bruxelles (2015).

certaines publications se sont intéressées à des cours non-américaines¹⁸¹⁶, des tribunaux nationaux en Europe¹⁸¹⁷ et encore plus récemment la Cour de Justice de l'Union Européenne et à la Cour européenne des droits de l'homme¹⁸¹⁸.

2.2.1. La recherche américaine sur le rôle de l'opinion publique dans la fonction de juger

22. L'intérêt universitaire pour le rôle politique de l'institution judiciaire n'est pas récent aux États-Unis. Cet intérêt est né, semblerait-il, de manière naturelle, du fait que les États-Unis sont un pays de *Common Law*, où le droit est, traditionnellement, considéré comme une création progressive du juge. Par ailleurs, une tradition populiste forte sollicite la participation fréquente des citoyens des représentants démocratiques et fonctionnaires, ce qui inclut les juges¹⁸¹⁹.
23. Dans ce contexte, il est important de souligner que le terme « populisme » ou « populiste » n'enferme pas une dimension aussi négative dans la culture politique américaine qu'en Europe. S'ils peuvent avoir une portée négative¹⁸²⁰, ils font simplement référence à une forme de démocratie engagée à protéger le peuple contre des gouvernements obnubilés par les intérêts particuliers de leur propre classe, et de connaître la volonté du peuple de diverses manières, en particulier par le biais de l'élection, avant de la mettre en œuvre. Akhil Reed Amar a montré par exemple que

¹⁸¹⁶ Voir par exemple Ran Hirschl, *op. cit.*

¹⁸¹⁷ A. Stone Sweet, "The European Court of Justice and the judicialization of EU governance", *Living Reviews in European Governance*, 5 (2010), 2. URL (cited on 11 April 2018) <http://europeangovernance-livingreviews.org/Articles/lreg-2010-2>

¹⁸¹⁸ Voir par exemple A. Stone Sweet, T. L. Brunell, "Trustee Courts and the Judicialization of International Regimes The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization", 1 *Journal of Law and Courts*, Vol. 1, 1 (March 2013), pp. 61-88 ; E. Voeten, "Public Opinion and the Legitimacy of International Courts", *Theoretical Inquiries in Law*, Vol. 14 (July 2013), p. 411; E. Voeten, "The Politics of International Judicial Appointments", *Chicago Journal of International Law* 9(2): 387-406 R. Cichowski, *The European Court and Civil Society*, Cambridge University Press (2007). Une thèse de doctorat a été publiée, qui compare dans les cas de la Suprême Cour Israélienne et la Cour européenne des droits de l'homme, et leurs stratégies utilisées pour améliorer leur réputation et le respect de leurs décisions. Cependant, cette thèse n'incluait pas l'opinion publique dans sa perspective. Voir S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts*, Cambridge, Cambridge University Press (2014).

¹⁸¹⁹ Pour illustrer le degré d'engagement que présuppose la citoyenneté américaine, concernant un suivi de la politique locale et fédérale, James Fishkin a dressé une liste du nombreuses d'élus qu'un citoyen Texan est invité à élire: 5 représentants pour le Congrès fédéral, 14 députés dans les instances représentatives du Texas, 13 représentants pour le comté, 7 représentants municipaux (dont six au conseil municipal) et 3 au conseil des écoles. J. Fishkin, *The Voice of the People. Public Opinion and Democracy*, New Haven, Yale University Press (1995), p. 8-9.

¹⁸²⁰ Selon la définition du dictionnaire politique *Oxford Concise Dictionary of Politics*, Oxford University Press (2009), p. 422.

même les protections constitutionnelles du droit d’être jugé par un jury populaire prévue au Cinquième (le grand jury), au Sixième (jury criminel) et au Septième Amendements (jury civil) de la Constitution ont été conçues comme « protectrices du peuple » (en anglais « populist protectors ¹⁸²¹»): “le jury résumait—incarnait même—les idéaux du populisme, du fédéralisme et de vertu civique qui étaient l’essence même du premier Bill of Rights”. Le débat sur la relation entre “le peuple” et la Cour suprême, ainsi que les chercheurs qui classifient eux-mêmes leur recherche sous l’étiquette de “*popular constitutionalism*”, abordée dans le premier chapitre, montrent que le débat sur la protection de la volonté populaire aux États-Unis a encore de beaux jours devant lui.

24. L’étude pionnière sur le rôle politique de l’institution judiciaire est sans aucun doute l’œuvre du politologue Robert Dahl, en 1957 ¹⁸²². D’après Rosenberg, son article doit sa popularité à son esprit innovant. Le professeur Dahl étudiait ainsi ouvertement une institution réputée « experte » comme il aurait étudié une institution politique. Au moment où Dahl faisait ses recherches, la Cour suprême ou « Cour Warren » œuvrait, sous l’impulsion du Chief Justice Warren, avec un esprit particulièrement innovant, améliorant à rythme soutenu sa protection des droits constitutionnels, en particulier dans le contexte de la déségrégation de la population afro-américaine¹⁸²³. D’après Morton Horwitz, la Cour Warren avait adopté une approche morale des droits constitutionnelle plutôt qu’une approche « originaliste », c’est-à-dire respectant la volonté des fondateurs de la République américaine¹⁸²⁴. Dès lors, il est peu surprenant que Dahl ait conçu la Cour suprême comme une institution politique travaillant avec des instruments juridiques¹⁸²⁵. La Cour suprême est aussi politique qu’elle est juridique. Ses décisions sont politiques à cause de la généralité des textes juridiques qu’elle doit appliquer, tant et si bien que les spécialistes et les membres de la Cour suprême souvent ne s’accordent pas sur la manière dont les dispositions constitutionnelles devraient être interprétées¹⁸²⁶.

¹⁸²¹ Amar, *op. cit.*, p. 83.

¹⁸²² R. Dahl, “The Supreme Court as Policy Maker”, *Journal Public Law*, vol. 6, 279, (1957). Pour une critique historique de la popularité du travail de Robert Dahl, voir : G. N. Rosenberg, “The Road Taken: Robert A. Dahl’s Decision-Making in A Democracy: The Supreme Court as A National Policy-Maker”, *50 Emory Law Journal* 613 (2001).

¹⁸²³ Voir en particulier *Brown v. Board of Education*, 347 U.S. 483 (1954),

¹⁸²⁴ Horwitz, *op. cit.*, note 9, p. 29.

¹⁸²⁵ Rosenberg, *op. cit.*, p. 619. See also R. G. McCloskey, *The American Supreme Court*, Chicago, University of Chicago Press, (5th ed, 2010 (1st ed. 1960)).

¹⁸²⁶ « Les juristes compétents en droit constitutionnel, dont les juges savants eux-mêmes, ne sont pas du même avis ; lorsque les termes de la Constitution sont généraux, vagues, ambigus, ou difficilement

25. L'article de Dahl a été précurseur : de nombreuses recherches universitaires ultérieures en sciences politiques se sont penchées en particulier sur les contraintes politiques et légales quotidiennes auxquelles la Cour suprême est confrontée dans l'exercice de sa mission. Nous devons au constitutionnaliste Barry Friedman un État complet de la recherche accomplie en droit et sciences politiques ayant pour objet la Cour suprême¹⁸²⁷. Cette recherche s'étend de la question de l'efficacité des contraintes juridiques sur la Cour suprême, au rôle des parties et des acteurs extérieurs au procès (en particulier les politiciens, groupes de pression, institutions représentatives fédérales et des États fédérés), aux règles de procédure, aux procédures de sélection des juges, aux profils professionnels et sociaux des juges, et enfin à l'opinion publique. Même si selon Friedman les juristes ont commencé à reconnaître la fragilité du mur de séparation entre droit et politique¹⁸²⁸, « *les théoriciens adoptant une approche normative ne peuvent arriver à des conclusions même préliminaires sur la manière dont les juges devraient agir sans comprendre les contraintes auxquelles ces juges font inévitablement face. C'est précisément ce que la recherche positive [qu'apporte la science politique] peut contribuer* »¹⁸²⁹.

26. Si le volume de la recherche politique est significatif, les études juridiques s'intéressant au rôle de l'opinion publique dans la fonction de juger sont rares. En 1993, James Wilson publiait un article sur le rôle de l'opinion dans l'interprétation constitutionnelle¹⁸³⁰. Son article paraissait quelques années après la déclaration du Chief Justice Rehnquist, selon lequel « les juges n'ont pas besoin [de trembler] et ne « *tremblent devant l'opinion publique* » de la même manière que le peuvent les élus,

applicables; ou lorsque des précédents existent en faveur de deux côtés [du conflit]. » Dahl, *op. cit.*, note 21, p.280 (notre traduction)

¹⁸²⁷ B. Friedman, "Politics of Judicial Review", *Texas Law Review*, vol. 84, 269 (2005-2006).

¹⁸²⁸ *Ibid.*, p. 269.

¹⁸²⁹ *Ibid.* (traduit par nous). L'opinion de Friedman confirme le bien-fondé de l'appel du théoricien et père de la « jurisprudence sociologique », Roscoe Pound à prendre en compte non seulement le texte, mais le contexte social. Selon les mots de Pierre Brunet, « *S'il veut le comprendre, le juriste doit certes étudier ce que décident les cours mais aussi les circonstances et conditions sociales et économiques de leurs décisions et celles auxquelles les principes sont appliqués.* » P. Brunet, "Argument sociologique et théories de l'interprétation: beaucoup d'interprétation, très peu de sociologie", in D. Fenouillet (ed.) *L'argument sociologique en droit. Pluriel et singularité*, Paris, Dalloz, coll. Thèmes et Commentaires (2015), p. 105.

¹⁸³⁰ J. G. Wilson, "The Role of Public Opinion in Constitutional Interpretation", *Brigham Young University Law Review*, Vol. 1993, No.4, (1993) pp.1037-1138.

*mais il serait remarquable qu'ils ne soient pas influencés par des sortes de courant de l'opinion publique tels ceux qui se sont formés pendant l'affaire du Steel Seizure*¹⁸³¹ ».

27. L'étude du professeur Wilson est en partie historique, en partie doctrinale. Elle part d'une affaire très controversée aux États-Unis, *Planned Parenthood v. Casey*¹⁸³², concernant la désirabilité de revenir sur une jurisprudence consacrant un droit constitutionnel à l'avortement – *Roe v. Wade*¹⁸³³ – et dans le cadre duquel la Cour avait fait plusieurs références aux critiques exprimées et aux pressions du public pour ou contre un changement de cap jurisprudentiel. La nouvelle décision *Planned Parenthood v. Casey* donnait lieu à une longue discussion sur la légitimité de la Cour suprême en cas de changement jurisprudentiel set notamment sur la question de savoir s'il était perçu comme une capitulation de la Cour face aux pressions du public. La majorité considérait ainsi qu'elle ne devrait pas "renverser [sa jurisprudence] sous le feu [des pressions]", car cela donnerait lieu à "une condamnation tout aussi raisonnable d'un nouvel échec : avoir renversé [sa jurisprudence] sans nécessité et sous pression"¹⁸³⁴ ». L'article de Wilson est donc une étude de la jurisprudence existante et des déclarations des juges de la Cour suprême jusque 1993, concernant la désirabilité d'une prise en compte de l'opinion publique dans les décisions constitutionnelles, et *in fine* une défense du positionnement de la majorité dans *Casey*¹⁸³⁵. Bien qu'éclairante, cette étude n'est plus à jour. Elle est aussi téléologique, en ce qu'elle est rédigée pour défendre le positionnement de la majorité. Cette thèse entend être plus systématique dans le traitement des études de cas, en se concentrant sur certains thèmes spécifiques de la jurisprudence.

28. Après James Wilson, d'autres études se sont intéressées à ce sujet, cependant elles n'étaient que partiellement intéressées au contenu des décisions de la Cour suprême. La publication la plus récente, de Benjamin Roesch, n'analyse que partiellement la

¹⁸³¹ W. H. Rehnquist, "Constitutional Law and Public Opinion", *Suffolk University Law Review*, vol. 20, (1986) pp. 751-69. L'affaire de la « Saisine de l'Acier » ou « Steel Seizure » concernait un ordre donné par le président des États-Unis de saisir toutes les aciéries américaines en anticipation d'une grève des employés des aciéries, en pleine guerre de Corée en 1952. L'affaire causait une grande controverse à cause au sujet de l'abus de pouvoir présidentiel. La Cour suprême décidait dans *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952) que le président n'avait pas l'autorité constitutionnelle de donner un tel ordre.

¹⁸³² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (hereinafter referred to as "Casey").

¹⁸³³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁸³⁴ *Casey. op. cit.*, at 867.

¹⁸³⁵ *Ibid.*, at 867-8

doctrine, et préfère débattre des raisons pour lesquelles les juges se réfèrent à l'opinion publique¹⁸³⁶. D'autres articles universitaires se sont concentrés sur certains aspects du sujet¹⁸³⁷. Le reste de la recherche est d'avantage historique ou quantitative¹⁸³⁸ que qualitative. Par exemple, le politologue Thomas Marshall¹⁸³⁹ a analysé le langage utilisé dans les décisions de la Cour suprême et l'a codé pour procéder à une étude comparée entre les résultats des décisions de la Cour suprême et l'État de l'opinion américaine sur le sujet. De ces comparaisons il tirait des enseignements sur la similarité entre le positionnement de l'opinion publique et la substance des arrêts de la Cour suprême sur des sujets spécifiques. Par ailleurs de nombreuses études se sont penchées sur l'influence de l'opinion publique sur la Cour suprême, ou de la Cour suprême sur l'opinion publique¹⁸⁴⁰. Ce sujet est tellement courant dans la société américaine que parfois, les journaux à grand tirage publient des articles¹⁸⁴¹ sur ce sujet comme pour rassurer le public que sa volonté n'est pas trahie par la Cour suprême. Cependant, peu sont les articles qui examinent le rôle de l'opinion publique dans la doctrine de la Cour suprême et tout au long du processus de protection des droits. Par ailleurs, le rôle que les juges font jouer à l'opinion publique pourrait être indicatif de son influence sur les

¹⁸³⁶ B. J. Roesch, "Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine", *Suffolk University Law Review*, Vol. 39, 379 (2005-2006). *See also* C. Barrett Lain, "The Doctrinal Side of Majority Will", *Michigan State Law Review*, Vol. 2010, 775 (2010) (focused on Supreme Court references to the prevailing position of states legislature to assess the degree of consensus among American States).

¹⁸³⁷ W. Sadurski, "Conventional Morality and Judicial Standards", *Virginia Law Review*, Vol. 73, 339, 340 (1987), R. Primus, "Public Consensus as Constitutional Authority", *George Washington Law Review* Vol. 78, 1207 (2009).

¹⁸³⁸ Voir en particulier B. Friedman, *The Will of the People*, New York, Farrar, Straus and Giroux (2009); N. Persily and J. Citrin, *Public opinion and Constitutional Controversy*, New York: Oxford University Press (2008).

¹⁸³⁹ T. Marshall, *Public Opinion and the Supreme Court*, Unwin Hyman (1989). This first study was updated Twenty years later: T. Marshall, *Public Opinion and the Rehnquist Court*, State University of New York Press (2009).

¹⁸⁴⁰ Voir par exemple V. Hoekstra, *Public Reactions to Supreme Court Decisions*, Cambridge, Cambridge University Press (2003), C. Casillas, P. Enns, P. Wohlfart, "How Public Opinion Constrains the U.S. Supreme Court", *American Journal of Political Science*, Vol. 55, No 1 (2011), pp. 74-88. J. Ura, A. Merrill, *The Supreme Court and Public Opinion*, in *The Oxford Handbook of U.S. Judicial Behavior*.

¹⁸⁴¹ Voir par exemple M. Klarman, "The Supreme Court Is Most Powerful When It Follows Public Opinion", *The New York Times*, 6 July 2015. <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-most-powerful-when-it-follows-public-opinion> (Dernier accès 7 avril 2018). Voir également K. Linos, K. Twist, "Controversial Supreme Court decisions change public opinion — in part because the media mostly report on them uncritically", *The Washington Post*, 28 June 2017, accessible sur https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/28/controversial-supreme-court-decisions-change-public-opinion-in-part-because-the-media-mostly-report-on-them-uncritically/?utm_term=.d7e54df50243 (Dernier accès 7 Avril 2017), E. Voeten, "How the Supreme Court Responds to Public Opinion", *Washington Monthly*, June 28, 2013, accessible at <https://washingtonmonthly.com/2013/06/28/how-the-supreme-court-responds-to-public-opinion/>

décisions judiciaire. C'est pour ces raisons que cette thèse procèdera à des analyses approfondies des décisions de justices, tout en prenant en compte les contraintes institutionnelles, politiques et juridiques encadrant la protection judiciaire des droits.

2.2.2. Naissance de l'intérêt universitaire pour la légitimité démocratique de la Cour européenne

29. Les juristes s'entendent généralement sur le fait que les juges sont soucieux de la légitimité et de l'application de leurs décisions par les autorités publiques.¹⁸⁴² Dans l'arène politique, des préoccupations concernant la légitimité des institutions internationales ont été exprimées dès le départ. La Cour européenne n'était pas une exception. Les auteurs de la Convention européenne des droits de l'homme étaient divisés entre les partisans d'une cour qui deviendrait un équivalent européen de la Cour suprême des États-Unis, appliquant de fait un nouveau *Bill of Rights* européen – et les pays de la *Common Law*, plus sceptiques et protecteurs de leur souveraineté.¹⁸⁴³ Ces préoccupations par rapport à la légitimité démocratique de l'institution judiciaire soulignent le besoin de définir, pour les besoins de cette étude, ce qu'est la légitimité judiciaire, et en particulier à l'échelle internationale.

30. La recherche ne s'est intéressée à la légitimité des cours internationales que récemment, ce qui a été dommageable à leur autorité : « *en ne comprenant pas et ne se souciant pas de répondre aux préoccupations quant à [leur] légitimité, nous mettons en danger les cours et le droit qu'elles interprètent et appliquent. Si les cours internationales manquent de justifications quant à leur autorité, cela s'étendra également à leur interprétation et au droit international [...]. Puisqu'il n'existe aucune législature mondiale pour contrebalancer les décisions des cours internationales, et aucune police mondiale pour les mettre en application, la légitimité des cours internationales est encore plus essentielle à leur succès* »¹⁸⁴⁴. Ces reproches ont obligé les chercheurs à

¹⁸⁴² Voir par exemple Wetlauffer, *op. cit.*, at 1561.

¹⁸⁴³ "C'est précisément parce que la Cour, et la Convention plus généralement, aurait [autrement] une faible influence sur le droit national qu'en janvier 1966, le gouvernement britannique décidait qu'il procèderait aux déclarations acceptant le droit de pétition individuelle et la juridiction de la Cour". Ed Bates, *op. cit.* p. 12.

¹⁸⁴⁴ N. Grossman, "The Normative Legitimacy of International Courts", *Temple Law Review* Vol. 86, (2013) p. 63 (hereinafter "Normative legitimacy").

retravailler le concept de « légitimité » afin de comprendre la substance de ces accusations, et prendre les mesures nécessaires pour y répondre¹⁸⁴⁵.

31. La légitimité des cours internationales explique sans doute – en plus du risque de mettre en jeu leur responsabilité internationale -- pourquoi les États acceptent de respecter et appliquer les décisions judiciaires qui vont à l’encontre de leurs intérêts stricts. Cette question a intéressé de nombreux chercheurs d’horizons divers et complémentaires, comme le droit, la science politique et les relations internationales. Pour cette raison, des politologues comme les professeurs Buchanan et Keohane ont exprimé la nécessité d’un « *concept de légitimité [qui] permette aux divers acteurs de coordonner leur soutien pour des institutions spécifiques en faisant appel à leur capacité commune à changer sur le fondement de raisons morales, plutôt que des raisons purement stratégiques ou exclusivement personnelles*¹⁸⁴⁶ ». Les chercheurs ont donc défini des critères de légitimité, qui parfois correspondent à certains de ceux de leurs collègues. La juriste américaine Nienke Grossman distingue d’abord entre légitimité *normative* et légitimité *sociale*. La légitimité normative est un standard objectif qui aide à déterminer si une institution mérite le soutien du public ; ce qui justifie son pouvoir de décision et son autorité. La légitimité sociale se fonde sur les perceptions sociales. Ensuite, Grossman présente un catalogue les critères procéduraux et substantiels, auxquels elle

¹⁸⁴⁵ Parmi les publications récentes sur la légitimité des cours internationales, voir par exemple A. von Bogdandy, I. Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, Amsterdam Center for International Law University of Amsterdam Acil Research Paper No 2012-10. (Ils affirment que le consentement des États ne peut suffire à légitimer les cours internationales. Ils procèdent dès lors à une analyse multifonctionnelle des cours internationales, rendant justice à leurs fonctions diverses. Les cours internationales stabilisent en effet les normes internationales, confirment la validité des normes juridiques, et légitiment les autres institutions.) Voir également G. Ulfstein, “International Courts and Judges: Independence, Interaction, and Legitimacy”, *NYU Journal of International Law and Politics* (2014); *PluriCourts Research Paper No. 14-13*; *University of Oslo Faculty of Law Research Paper No. 2014-14*. Accessible sur la base de donnée académique SSRN: <https://ssrn.com/abstract=2433584> (il distingue deux types de légitimité: normative et descriptive) ; A. von Bogdandy, I. Venzke, “In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification”, *European Journal of International Law* Vol. 23, 7, 8 (2012) (« *En tant qu'acteurs autonomes exerçant une autorité publique—ce qui est notre these principale—leurs actions requièrent une véritable méthode de justification qui soit en accord avec les principes de base de la théorie démocratique* » *ibid.*, p.8, notre traduction). Sur la légitimité démocratique des cours internationales : A. von Bogdandy, I. Venzke, “International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance”, in A. von Bogdandy, I. Venzke (eds), *International Judicial Lawmaking*, New York, Springer (2012), pp.4 72-509 ; N. Grossman, “*Sex on the Bench*”, *Chicago Journal of International Law*, Vol. 12 n°2 (Winter 2012). (Son article traite de la question de la légitimation des cours internationales par le respect des principes démocratiques)

¹⁸⁴⁶ A. Buchanan, R. O. Keohane, “The Legitimacy of Global Governance Institutions”, *Ethics & International Affairs*, Vol. 20, No. 4, 405 (2006), p. 409 (Ils suggèrent que des standards mondiaux de la légitimité publique pourraient aider les citoyens à distinguer les institutions légitimes des non légitimes).

inclut la reconnaissance d'autres acteurs internationaux non-gouvernementaux, le respect des règles de justice procédurale, et une capacité à obtenir des États un plus grand respect des droits de l'homme. C'est pourquoi les juridictions nationales doivent participer au développement des régimes de protection qu'ils se doivent de mettre en œuvre¹⁸⁴⁷. D'après Grossman, la légitimation des cours internationales ne sera possible que par le biais d'une démocratisation des institutions judiciaires internationales, bien qu'elle prenne note du fait que les cours ne sont que rarement accessibles aux forces démocratiques au niveau national¹⁸⁴⁸. Nienke Grossman défend l'accès aux cours internationales comme un droit individuel à être entendu. Elle considère qu'un tel droit devrait être respecté par les cours sur le fondement d'un droit universel à la participation, lui-même protégé par la plupart des instruments internationaux de protection des droits de l'homme. Cependant, sa théorie est limitée par l'inexistence d'un *demos* international. Comme solution à cet obstacle, elle transforme le droit à la participation à un droit d'être représenté¹⁸⁴⁹. Puisque l'accessibilité individuelle n'est pas toujours possible ou même souhaitable, l'auteur propose que les personnes directement concernées par des futures décisions soient également représentées au cours de la procédure, et qu'elles soient impliquées dans la sélection des juges¹⁸⁵⁰.

32. Geir Ulfstein, professeur de droit norvégien, a quant à lui développé un concept de légitimité comprenant plusieurs éléments. L'un inclut expertise, représentativité, et indépendance. L'autre est procédural, en ce qu'il garantit un accès égal aux tribunaux et un droit à un procès équitable¹⁸⁵¹. Cette légitimité peut être renforcée par le respect de certaines valeurs démocratiques, tels que la représentativité des candidats à la fonction judiciaire¹⁸⁵². Le concept de légitimité de G. Ulfstein inclut également une dimension démocratique. D'abord,

¹⁸⁴⁷ Grossman, *op. cit.* note 37, p. 65.

¹⁸⁴⁸ Elle conclut : « Although these instruments generally refer to the right of individuals to a fair and impartial hearing in a national court or tribunal, there is no difference in the adjudicative function that justifies limiting the right to a fair and impartial hearing only to those whose rights are being adjudicated domestically... Giving [international] courts authority to adjudicate the rights and obligations of voiceless rights holders is a serious threat to their legitimacy and fails to account for the wide recognition of individuals as subjects of international law. ». *Ibid.*, p. 84.

¹⁸⁴⁹ « En d'autres termes, le "*demos*" est un ensemble divers de bénéficiaires des décisions des cours internationales. Le *demos* peut être aussi appelé "*partie prenante*". Les parties prenantes peuvent avoir un intérêt de taille à la manière dont le droit peut évoluer dans le cadre d'un conflit particulier ». *Ibid.*, p. 92.

¹⁸⁵⁰ Afin de remédier aux conséquences potentiellement nocives de normes d'accès aux cours internationales potentiellement trop libérales, elle se prononce en faveur de la création de sauvegardes permettant jusqu'à un certain degré, un de droit de regard sur les personnes ou les groupes qui seraient autorisées à participer. *Ibid.*, p. 93-94.

¹⁸⁵¹ Ulfstein, *op. cit.*, p. 10.

¹⁸⁵² *Ibid.*

l'existence d'un législateur national ou international devrait être prise en considération. Ensuite, les perceptions du public sont importantes. Il considère ainsi que "l'efficacité des [cours internationales] dans l'accomplissement de [leurs] fonctions est largement le résultat des perceptions de sa légitimité¹⁸⁵³". Ainsi, tout en concédant que le soutien du public est essentiel à l'efficacité des institutions judiciaires et par extension, à leur légitimité¹⁸⁵⁴, Ulfstein ajoute un élément populaire à ses critères¹⁸⁵⁵.

33. Le critère de la perception populaire proposé par G. Ulfstein est proche du critère de légitimité sociale de N. Grossman. Si la recherche n'a pas développé plus avant cet élément de légitimité, elle a reconnu que sans elle, le travail des institutions judiciaires est plus difficile. Cela explique pourquoi le problème de la légitimité, qu'elle soit démocratique ou normative, n'est apparu que récemment dans la recherche juridique. D'après Michael O'Boyle, ancien greffier adjoint auprès de la Cour européenne des droits de l'homme, le problème est en général soulevé par les gouvernements, en particulier lorsque la Cour publie un jugement impopulaire¹⁸⁵⁶. Le greffier adjoint réagissait en particulier aux critiques sévères de l'élite et de la presse britannique. Parmi eux, Lord Hoffman déclarait que la Cour européenne ne jouissait d'aucune « légitimité constitutionnelle¹⁸⁵⁷ ». O'Boyle n'est pas le seul à exprimer sa préoccupation face à de telles critiques. Pour cette raison, la juriste et politologue turque Başak Çali et ses collègues se sont penchés sur la question de la légitimité sociale, normative et

¹⁸⁵³ *Ibid.*, note 38, p. 10.

¹⁸⁵⁴ Voir G. Vanberg, *op. cit.*, pp. 20-24. Voir également Grossman, citant juge Gladys Kessler, présidente de l'association américaine National Association of Women Judges, « *L'ultime justification pour chercher à obtenir des juges des deux sexes et de différentes couleurs [de peau] et origines sociales est de conserver la confiance du public. Le public doit percevoir que ses juges sont justes, impartiaux, et représentatifs de la diversité de ceux qui sont jugés.* » *Ibid.*, p. 673 (notre traduction). Citée par B. Wilson, "Will Women Judges Really Make a Difference?", *Osgoode Hall Law Journal*, Vol. 28, 507, 515 (1990).

¹⁸⁵⁵ Il n'est pas le seul. Amin von Bogdandy se penche également sur cette question. D'après lui, la légitimité démocratique croît également avec l'intégration de la société civile dans la procédure de sélection des juges, en particulier en l'absence d'institution internationale législative. A. von Bogdandy, I. Venzke, "International Judicial Lawmaking", *op. cit.*, p.472-509.

¹⁸⁵⁶ « Au cours des années, certains gouvernements ont découvert que les critiques des cours internationales étaient source de popularité, en particulier la Cour de Strasbourg : Ce sont des cibles faciles, en particulier puisqu'elles ont tendance, comme les autres cours, à ne pas répondre ». M. O'Boyle, "The Future of the European Court of Human Rights", *German Law Journal*, vol. 12, 10 (2011) p. 1862.

¹⁸⁵⁷ Lord Hoffman, "The Universality of Human Rights", in *Law Quarterly Review*, Vol. 125 (2009), pp. 416-32. L'élite politique représentée par l'ancien premier ministre David Cameron s'est également attaquée à la Cour au cours de la présidence britannique du Conseil de l'Europe de 2012. Heureusement, la Conférence de Brighton conférence de janvier 2012 n'a pas « coupé les ailes de la Cour de Strasbourg ». (L. Burgorgue-Larsen, "Actualité de la Convention européenne des droits de l'homme (janvier - juin 2012)", *Actualité Juridique Droit Administratif* (2012) p. 1726). Elle a conservé l'acquis de son développement, tout en réaffirmant l'importance de la doctrine de la marge d'appréciation..

constitutive de la Cour Européenne¹⁸⁵⁸. Cette étude propose des critères permettant d'évaluer la "popularité" de la Cour parmi l'élite et dans les cercles professionnels des États membres.

34. Sur la base d'interviews des élites politiques et professionnelles nationales, les professeurs Çali, Koch et Bruch ont définis plusieurs critères de légitimité. Cependant, leur rapport n'inclut pas le critère populaire. D'après eux, « *une analyse de la légitimité fondée sur des enquêtes d'opinion ne saisiserait qu'une seule forme de légitimité sociale : l'« approbation ». Elle négligerait les deux autres dimensions, que nous considérons importantes afin d'obtenir une image complète de la légitimité sociale et de ce que cela signifie*¹⁸⁵⁹ ». Néanmoins, dire que l'existence d'un soutien populaire facilite le travail des institutions judiciaire ne signifie pas pour autant qu'elles ne puissent fonctionner sans ce soutien, la recherche s'accorde sur le fait que les défis répétés à ses décisions peuvent avoir un impact négatif sur leur travail sur le long terme¹⁸⁶⁰. Pour toutes ces raisons, une étude approfondie de la relation entre les institutions internationales et l'opinion publique semble justifiée. De telles études manquent encore dans le paysage universitaire européen.

2.3. Le rôle de l'opinion publique dans l'évolution des droits au niveau national et international

35. Puisque la légitimité de l'institution judiciaire présente, même au niveau international, des dimensions sociales et populaires, il semble nécessaire de définir ce que l'on entend par « opinion publique ». Si le concept est aussi protéiforme que ses définitions sont nombreuses, il est impossible de nier son existence dans la vie quotidienne, et sa pertinence pour les décisions publiques, notamment judiciaires. Par ailleurs, l'importance de la protection des droits en Europe et aux États-Unis a été renforcée en partie grâce au soutien de mouvements populaires et à la participation auprès des institutions judiciaires.

¹⁸⁵⁸ B. Çali, A. Koch, N. Bruch, "The Legitimacy of The European Court of Human Rights: The View From the Ground", UCL Working Papers (Mai 2011).

¹⁸⁵⁹ *Ibid.*, p. 14.

¹⁸⁶⁰ D. Bodansky, "The Concept of Legitimacy in International Law", *Legitimacy in International Law*, 309, 313, Rüdiger Wolfrum & Volker Röben eds. (2008), p. 601. (Il considère que l'attitude de l'opinion publique vis-à-vis d'une institution est l'un des éléments de sa légitimité)

36. Peu de termes ont fait autant couler d'encre en sciences sociales que le terme d' « *opinion publique* », en particulier au cours du XXème siècle. Non pas que la notion soit une innovation du siècle de la science : elle est de fait bien plus ancienne, voire antique¹⁸⁶¹. Comme le souligne ci-avant Loïc Blondiaux, les raisons principales de l'engouement des deux derniers siècles pour ce phénomène, outre-Atlantique et plus tard en France, sont l'avènement du système représentatif, la démocratisation progressive du suffrage¹⁸⁶², les progrès de la mesure statistique de l' « opinion publique » à partir des années vingt. L'universalisation du suffrage et la transformation scientifique de l'opinion publique ont contribué au débat sur le rôle de la volonté populaire dans système représentatif. Le perfectionnement progressif de la technique des sondages en a fait, non sans résistances, un élément dominant de la vie démocratique dans la plupart des démocraties actuelles, dont la France¹⁸⁶³. La frénésie du débat sur l'opinion s'explique surtout par le flou de la notion, sa définition restant un casse-tête non résolu, voire impossible à résoudre.
37. Malgré cela, l'opinion publique est un élément important du droit public, puisqu'il révèle une dimension concrète de la démocratie : la relation entre le peuple réel et le peuple officiel, c'est-à-dire l'électorat, consacré par les textes constitutionnels. En bref, le public assure aux institutions publiques leur légitimité. D'après le doyen Vedel, il est besoin de « *correspondance entre l'opinion des gouvernés ou, du moins, de la majorité d'entre eux, et l'action des gouvernants*¹⁸⁶⁴ ». Dès lors, le système de la démocratie représentative fonde la gestion des affaires publiques sur le principe majoritaire. Or, d'ordinaire, la majorité simple élit les dirigeants, qui à leur tour prennent des décisions sur le fondement du principe majoritaire. Au bout du compte une « minorité » gouverne

¹⁸⁶¹ Pour un bref historique de la théorie de l'opinion publique, voir Dominique Reynié, « La théorie de l'opinion publique a la recherche d'un nouveau souffle », *Hermès, La Revue* 2001/3 n° 31, p. 21-27.

¹⁸⁶² En effet, pendant l'Age d'Or du consentement du peuple, la sélection au suffrage universel était plus même de refléter le choix populaire que par la pratique du tirage au sort, une pratique antique. B. Manin, *The Principles of Representative Government*, Cambridge, Cambridge University Press, (1997), p. 85 (traduction anglaise de B. Manin, *Principes du gouvernement représentatif*, Paris, Calmann Levy (1995)).

¹⁸⁶³ S. Herbst, *Numbered Voices, How Opinion Polling Has Shaped American Politics*, Chicago, University of Chicago press (1993), p. 172.

¹⁸⁶⁴ G. Vedel, « Le rôle de l'opinion en démocratie », *Semaines Sociales de France*, 53ème session, (1966), at 306. Dans le même esprit, voir le politologue américain V.O. Key qui définit l'opinion publique en 1961 comme « *ces opinions de personnes privées que les gouvernements pensent prudent d'écouter* », V.O. Key, *Public Opinion and American Democracy*, New York, Knopf (1961), p. 14, cité par Erikson and Tedin, *American Public Opinion*, New York, Longman (8th Ed. 2011), p. 7.

au nom d'une « majorité » de citoyens actifs¹⁸⁶⁵. Néanmoins, le suffrage universel n'implique pas une l'aptitude des dirigeants à discerner la volonté de la plupart des individus composant le « peuple ». En effet, selon Maurice Hauriou, « *l'opinion exprimée par le corps électoral, n'est pas à proprement parler l'opinion publique, car le corps électoral n'est pas le public, c'est une opinion déjà déformée*¹⁸⁶⁶ ». Si le contrat social, et dès lors l'obligation des citoyens de respecter les décisions des élus, est toujours valide juridiquement, la capacité des élus à gouverner efficacement dépend d'une connaissance réaliste de la volonté des citoyens.

38. Dans son ouvrage sur l'histoire des sondages, le politologue Loïc Blondiaux relate les défis qu'ont dû affronter philosophes, politologues, et sociologues pour définir l'« opinion publique », et la confrontation de ces définitions à la « réalité » révélée par la technique des sondages. L'*Encyclopedia Britannica* la définit comme « *agrégat de points de vue individuels, d'attitudes et de croyances sur un sujet particulier, exprimé par une partie significative d'une communauté. Certains chercheurs considèrent cet agrégat comme une synthèse des points de vue de tous ou d'un segment particulier de la population ; d'autres la voient comme une série de nombreux points de vue différents et parfois opposés* ». ¹⁸⁶⁷ Cette phrase introductive à l'article consacré à l'opinion publique dans l'*Encyclopedia Britannica* met clairement en lumière la division entre les différentes écoles sur la définition de cette réalité politique. Cette division est commune à de nombreuses langues. De façon plus concise, le *Petit Robert* définit « l'opinion » comme « *les idées partagées, les jugements portés par la majorité d'un groupe social* »¹⁸⁶⁸. L'opinion devient donc « publique » une fois exprimée dans le cadre de ce qu'Habermas nomme « l'espace public » de discussion¹⁸⁶⁹. C'est ce que traduit également la définition de Dicey « *Il existe à une époque donnée un ensemble de croyances, de convictions, de sentiments, de principes acceptés ou de préjugés fermement enracinés qui, pris ensembles, forment l'opinion publique d'une période particulière, ou que nous pouvons appeler le courant régnant ou dominant de*

¹⁸⁶⁵ Selon Maurice Hauriou, « *le fondement même de l'ordre social est le gouvernement par l'élite* ». M. Hauriou, *Précis de droit constitutionnel* (1922), p. 195.

¹⁸⁶⁶ M. Hauriou, *Précis de droit constitutionnel*, Paris, Sirey, (2ème Éd., 1929), p. 160, cité par Bénéttulière, *op. cit.*, p. 189.

¹⁸⁶⁷ "Public Opinion", *Encyclopedia Britannica Online* (2017). Accessible sur: <https://www.britannica.com/topic/public-opinion> (dernier accès en ligne, 17 Mai 2018).

¹⁸⁶⁸ « Opinion », *Petit Robert de la Langue Française*, (2012), version numérique.

¹⁸⁶⁹ Voir en général J. Habermas, *The Structural Transformation of the Public Sphere, An Inquiry into a Category of Bourgeois Society*, Cambridge, Polity Press (1989), 305 p.

l'opinion »¹⁸⁷⁰. Cette définition rend compte des différentes caractéristiques de l'opinion qui rendent cette notion non seulement difficile à définir, mais controversée. Elle renvoie d'abord à la dimension rationnelle par référence aux « convictions », irrationnelle ensuite avec les « croyances » et « préjugés », à l'émotionnel des « sentiments », et enfin à l'aspect moral des « principes » et à l'irrationnel exprimé par les « préjugés ». Dès lors, l'opinion est un phénomène composite aux dimensions contradictoires, à l'image de ceux qui la détiennent, les personnes humaines. Elle est potentiellement dangereuse, mais capable du comportement le plus noble. C'est ce que démontre avec brio le politologue américain Harwood Childs en 1965, l'opinion publique est un concept protéiforme, défini par la doctrine d'une multitude de manières, parfois incompatibles entre elles. Il recense une quarantaine de définitions qu'il classe en fonction des aspects qu'elles privilégient, tels entre autres le degré d'uniformité des opinions, leur processus de formation, leur qualité, les titulaires des opinions, l'objet des opinions. Le professeur Child met cette diversité et le nombre de définitions sur le compte des inclinations particulières des chercheurs pour un sujet précis : « *La plupart des définitions du concept « opinion publique » tentent de restreindre le sens du terme à un ensemble d'opinion individuelles d'un type particulier, doté de caractéristiques ou attributs spéciaux qui, selon l'opinion de l'auteur, sont significatives ou importantes*¹⁸⁷¹ ».

39. Le débat sur le rôle de l'opinion publique est directement lié à la définition adoptée par les auteurs. Il oppose les « croyants » et les « non croyants ». Figure de proue des premiers, Bryce, même s'il distingue dans l'opinion publique les faiseurs des suiveurs, en donne une définition inclusive¹⁸⁷², et considère qu'elle est au fondement de tous les pouvoirs et peut s'exprimer à tout moment de la vie démocratique, et non seulement au moment des élections. Les « non croyants », pour lesquels le concept d'opinion est insaisissable, pensent soit que « *l'opinion publique n'existe pas en dehors des discours*

¹⁸⁷⁰ A. Venn Dicey, *Leçons sur les rapports entre le Droit et l'Opinion publique en Angleterre au cours du dix-neuvième siècle*, Paris, Giard et Brière, Coll. Bibliothèque internationale de droit public, Éd. française, 1906, p. 18., cité par Bénéullière, *op. cit.*, p.17.

¹⁸⁷¹ Childs, *op. cit.* note 57, p. 15

¹⁸⁷² C'est pourquoi Bryce faisait confiance aux instincts et au bon sens de « *l'homme moyen* » : « ses instincts sont généralement sains, et il n'est pas insensible aux grands idéaux qu'on lui présente sous une forme qui les lui rend évidents. Ce dont il manque est le savoir qu'il compense par sa compréhension bienveillante des attitudes de ses semblables ». J. Bryce, *Modern Democracies*, Part I, New York, McMillan (1921), p.150.

*qui la questionnent ou affirment son existence*¹⁸⁷³ », soit que le gouvernement d'opinion est en tout temps dangereux, dans la mesure où il va à l'encontre du principe selon lequel tout gouvernement doit pouvoir résister à l'opinion de masse¹⁸⁷⁴. Certains se refusent à assimiler cette dernière à la volonté du peuple car l'« opinion publique » n'a pour eux qu'une acception péjorative¹⁸⁷⁵. Au milieu du gué, certains tels John Stuart Mill ou Dewey considèrent que la participation des masses au gouvernement est positive, mais ne peut être viable que si les masses reçoivent une éducation sur les affaires publiques¹⁸⁷⁶. Tous s'accordent à dire que la prise en compte de l'opinion dans la conduite des affaires publiques exige que celle-ci remplisse certaines caractéristiques : d'intensité¹⁸⁷⁷, de réalité¹⁸⁷⁸ et de publicité. D'autres, plus démocrates mais néanmoins réalistes, considèrent que la voix du peuple exprimée dans l'opinion est pertinente, peut être sensée voire éclairée, et susceptible d'être connue par les dirigeants¹⁸⁷⁹. C'est inspirés par ces derniers, et à l'usage de leurs sympathisants, que les ingénieurs de l'opinion vont développer une technique visant à améliorer les connaissances factuelles de l'opinion, et à aider les dirigeants à mieux satisfaire leurs citoyens en connaissant mieux leur système de pensée et leurs besoins.

40. Tout travail de recherche impliquant la notion d'opinion publique est dès lors compromis par la complexité à laquelle les diverses définitions et débats l'exposent. Or l'objet de cette thèse ne consiste pas à élaborer une définition rendant compte de toutes les subtilités du concept, ni à établir un lien de causalité entre une certaine perception

¹⁸⁷³ Blondiaux, *op. cit.*, note 56, p. 68.

¹⁸⁷⁴ *Ibid.*, p.77. Blondiaux fait référence au Britannique Edmund Burke.

¹⁸⁷⁵ Voir dans les années vingt le débat entre Lippmann et Dewey, résumé sur le site internet résumé par Daniel Schugurensky sur le site de l'université de Toronto <http://schugurensky.faculty.asu.edu/moments/1922lippdew.html>

¹⁸⁷⁶ Référence dans Blondiaux, *op. cit.* p. 75. En particulier, John Dewey affirme : Il n'existera « *pas de méthode d'évaluation du véritable potentiel de la population générale et de sa capacité à agir comme "le public" tant que les citoyens auront un accès limité à l'éducation et jusqu'à ce que le secret, les préjugés, les partis pris, la mal représentation et la propagande en plus de l'ignorance pure ne seront pas remplacés par l'investigation et la publicité* ». cité par S. Splichal, *The Transnationalization of the Public Sphere and the Fate of the Public*, New York: Hampton Press (2011), p.18.

¹⁸⁷⁷ « [Un] système politique construit avec sagesse adresse à l'opinion publique seulement les questions à propos desquelles on peut raisonnablement s'attendre à ce qu'une opinion existe ». Cf. A. Lawrence Lowell, *Public Opinion and Popular Government*, New York: Longmans, Green & Co, 1913, p. 53 (traduit par nous).

¹⁸⁷⁸ « *Afin dès lors qu'il y ait une opinion publique réelle sur quelque sujet que ce soit, qui ne concerne pas une question simple à propos d'une compatibilité ou contradiction avec des convictions enracinées, la plupart des gens doivent être en position de déterminer en fonction de leur propre savoir, ou en évaluant les preuves, une partie substantielle des faits nécessaires à la prise d'une décision rationnelle* », *Ibid.*, p. 22 (traduit par nous).

¹⁸⁷⁹ Bryce, *op. cit.*, note 64, p. 156.

de l'opinion et la doctrine juridique, une tâche plus adaptée à la recherche juridique empirique. Il s'agit d'analyser la conception et le rôle réservé à l'opinion publique par les institutions judiciaires, au niveau institutionnel et dans la substance de ses décisions. La structure de ce travail s'articule autour des réponses à trois questions. Premièrement, l'opinion publique peut-elle être considérée comme ayant une influence légitime dans le processus décisionnel judiciaire ? De cette première découlent les deux questions suivantes. Si l'opinion a une influence légitime sur le juge, sous quelles formes institutionnelles peut-on concevoir la participation de l'opinion publique dans la procédure judiciaire ? Enfin, les juges se réfèrent-ils à l'opinion publique dans leurs décisions, et quel poids attachent-ils à l'opinion publique ? De là découlent les thèmes qui seront traités au long de ce travail. D'abord, cette thèse abordera la légitimité démocratique de l'opinion publique en général, puis les sources démocratiques de la légitimité du juge en particulier. Sera ensuite traité, au niveau institutionnel, le processus de formation de l'opinion, tout en prenant en compte des sources d'inspirations telles que la famille la société et les médias, et les modalités d'expression de l'opinion par le biais d'opportunités de participation à la procédure judiciaire. Sur un plan substantif, une analyse de la manière dont les juges perçoivent le public sera incluse. C'est dans ce cadre que la perception des attitudes du public, selon que celles-ci sont considérées comme élément légitime de leur raisonnement ou incompatible avec celui-ci, sera aussi abordée. Soulignons que les termes utilisés par les juges pour se référer à l'opinion publique, tels que « foule » ou « sondage d'opinion », sont d'une importance capitale.

41. Nous avons discuté ci-avant les principaux aspects de la définition, les formes d'expression et d'engagement de l'opinion publique afin de visualiser les possibles rôles qu'elle pourrait jouer dans la vie judiciaire, ainsi que pour justifier notre hypothèse selon laquelle l'opinion publique jouerait un rôle important tout au long du processus judiciaire et dans le raisonnement des juges. Dans la partie suivante est explicité le choix des institutions qui seront l'objet de notre étude comparative.

2.4. L'égle importance des droits dans les systèmes juridiques américains et européens

42. Afin de mesurer l'importance de l'opinion publique dans la protection des droits, une approche confrontant deux systèmes juridiques assurant la protection judiciaire des

droits considérés comme les plus essentiels, et pour lesquels les droits revêtent une importance équivalente semblait appropriée. Pour une étude de la protection des droits à l'échelle nationale, la Cour suprême des États-Unis semblait le choix le plus logique au regard de la protection des droits civiques qu'elle assure. Au niveau international, la Cour européenne des droits de l'homme s'est révélée être le choix le plus naturel.

43. Pour les besoins de clarté de cette étude, nous ferons ci-après référence aux droits « civils », « constitutionnels » et « fondamentaux » en parlant « des droits » pour éviter toute confusion terminologique),
44. Les États-Unis sont un pays de droit : Tocqueville l'avait déjà constaté lors de son voyage outre-Atlantique en 1831¹⁸⁸⁰. Cependant, il était loin d'imaginer que le langage juridique irriguerait si profondément la vie politique du pays deux siècles plus tard. D'après Mary-Ann Glendon, « les personnages politiques font désormais essentiellement appel à des idées juridiques lorsqu'ils veulent convaincre, inspirer, expliquer ou justifier [leurs idées] en public¹⁸⁸¹ ». Pour elle, le Mouvement des Droits Civiques américain né dans les années 1950 a opéré un transfert du forum politique vers les tribunaux, au détriment de la qualité du discours politique¹⁸⁸². De manière similaire, les droits de l'homme ont acquis une importance centrale sur la scène politique européenne, en particulier grâce au travail soutenu des institutions judiciaires (et non judiciaires) protégeant les droits de l'homme¹⁸⁸³.

2.4.1. La protection des droits en Europe et aux États-Unis

45. Comparer l'œuvre de deux institutions judiciaires travaillant dans le cadre de régimes politiques et institutionnels différents n'est *a priori* pas chose évidente. Des régimes de

¹⁸⁸⁰ D'après l'analyse approfondie de la société américaine de la fin du 18^{ème} siècle élaborée par Tocqueville, « *Et tandis qu'en Europe ce même homme méconnaît jusqu'à l'autorité souveraine, l'Américain se soumet sans murmurer au pouvoir du moindre des magistrats.* » Par ailleurs, « *Il est impossible, au contraire, de ne point apercevoir que toutes les classes montrent une grande confiance dans la législation qui régit le pays, et ressentent pour elle une sorte d'amour paternel.* ». A. de Tocqueville, *De la démocratie en Amérique*, réimpression d'une œuvre du domaine public américain, Paris, Charles Gosselin, (la 5^{ème} édition, Tome Second, 1836) pp.118-122

¹⁸⁸¹ M.-A. Glendon, *Rights Talk, The Impoverishment of Political Discourse*, Free Press, (1993), p. 3.

¹⁸⁸² *Ibid.*, at 5-6.

¹⁸⁸³ Au niveau régional, on compte par exemple la Cour Africaine des Droits de l'Homme et des Peuple, sur le continent africain, la Cour interaméricaine des droits de l'homme, basée en Amérique du Sud, statuant sur la protection des droits pour les États membres de l'Organisation des États Américains (OEA) ayant accepté sa juridiction. Au niveau mondial il n'existe aucune institution judiciaire protégeant les droits de l'homme. Le Conseil des droits de l'homme, institution récente créée en 2005, est un organe intergouvernemental, qui procède à des évaluations individuelles et périodiques du respect par les États membres de l'Organisation des Nations Unies.

protection des droits constitutionnels d'une part, et des droits de l'homme sont différents de par leur objet et leur vocation. D'une part, les droits constitutionnels américains protègent des individus sur un territoire national, et tirent leur légitimité d'un même *demos*, tout divers qu'il soit. Le régime américain de protection des droits a été construit dans le cadre d'un système politique et institutionnel national et fédéral, qui ne se limite pas à la protection des droits¹⁸⁸⁴. C'est pourquoi la protection des droits est souvent mêlée aux États-Unis à des questions constitutionnelles telles que la séparation des pouvoirs, ou encore le fédéralisme, et provoque parfois la résistance des États fédérés¹⁸⁸⁵. En effet les pouvoirs qui ne sont pas explicitement délégués aux institutions fédérales appartiennent par principe aux États, et au peuple¹⁸⁸⁶. Par ailleurs, certains considèrent que la doctrine de "suprématie judiciaire", c'est-à-dire le renforcement progressif de l'autorité de l'institution judiciaire dans l'interprétation de la Constitution fédérale, est une menace pour la démocratie¹⁸⁸⁷. D'autre part, les droits de l'homme européens, parce qu'ils font référence à l'humanité en général, ont une vocation plus universelle, même si leur protection s'applique à un territoire particulier¹⁸⁸⁸. Malgré cela, la Convention a été rédigée dans un contexte européen, prenant en compte

¹⁸⁸⁴ Cela est démontré par tous les débats concernant la légitimité des citations de sources de droits étrangères dans l'entreprise d'interprétation judiciaire.

¹⁸⁸⁵ Tel était le cas lorsque la Cour suprême a commencé à incorporer sélectivement et progressivement certaines dispositions du Bill of Rights au Quatorzième Amendement et à l'appliquer aux États. Pour une explication contextualisée de l'incorporation, selon une perspective théorique, voir A. R. Amar, "The Bill of Rights and the Fourteenth Amendment", *The Yale Law Journal*, Vol. 101, 1193 (1992). En plus de détails, voir une approche historique de la période de la Reconstruction: A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press (1998).

¹⁸⁸⁶ Conformément aux Dixième amendement, « *Les pouvoirs qui ne sont pas délégués aux États-Unis par la Constitution, ni refusés par elle aux États, sont conservés par les États respectivement ou par le peuple.* » Traduction de la Digithèque de matériaux juridiques et politiques, Université de Perpignan, accessible sur le site suivant <http://mjp.univ-perp.fr/constit/us1787a.htm>

¹⁸⁸⁷ L. Kramer en particulier considère que la doctrine de la "suprématie judiciaire" est l'ennemie du constitutionalisme populaire. Il la définit comme la « *notion selon laquelle les juges ont le dernier mot s'agissant de l'interprétation constitutionnelle et que leurs décisions quant au sens de la Constitution sont opposables à tous* ». L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004). Cited in R. Post et R. Siegel, "Popular Constitutionalism, Departementalism, and Judicial Supremacy", *California Law Review*, Vol. 92, 1027 (2004), p.1027.

¹⁸⁸⁸ Mise à part la mention très universaliste au terme "droits de l'homme", le préambule de la Convention européenne des droits de l'homme fait référence directe et extensive aux droits de la Déclaration universelle des droits de l'homme du 10 décembre 1948 (Résolution de l'Assemblée Générale 217 A), considérant la Convention européenne comme un « premier pas » vers l'application de les droits de la Déclaration universelle : « *Considérant la Déclaration universelle des droits de l'homme, proclamée par l'Assemblée générale des Nations Unies le 10 décembre 1948 ; Considérant que cette déclaration tend à assurer la reconnaissance et l'application universelles et effectives des droits qui y sont énoncés ; Considérant que le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres, et que l'un des moyens d'atteindre ce but est la sauvegarde et le développement des droits de l'homme et des libertés fondamentales ; Réaffirmant leur profond attachement à ces libertés fondamentales qui constituent les assises mêmes de la justice et de la paix dans le monde et dont le maintien repose essentiellement sur un régime politique véritablement démocratique, d'une part, et, d'autre part, sur une conception commune et un commun respect des droits de l'homme dont ils se réclament [...]* ».

les diverses traditions juridiques et l'histoire récente du continent. Du fait de la multiplicité des systèmes juridiques avec lesquels la Cour européenne doit travailler, et parce que la Cour européenne n'est pas partie d'un système institutionnel fédéral ou national, elle bénéficie de plus de flexibilité dans l'élaboration de ses propres méthodes, de sa doctrine, et de sa terminologie, travaillant à les rendre adaptables à tous les systèmes juridiques nationaux.

46. La comparabilité des régimes de protection constitutionnel d'une part, et des droits de l'homme d'autre part, pourrait également être affectée par leurs différentes philosophies. Cependant, les deux régimes protègent des droits qui de par leur statut sont hors d'atteinte de la volonté démocratique. Par ailleurs, les deux cours travaillent à réaliser un idéal similaire. Soulignons également que si les droits de l'homme et les droits constitutionnels ne doivent pas être assimilés, tel est le cas des droits de l'homme de la philosophie et des droits de l'homme protégés par les diverses conventions et déclarations dans le monde. Ces derniers qui trouvent leur fondation dans une « *conception du droit naturel selon laquelle l'homme, parce qu'il est homme, possède un ensemble de droits inhérents à sa nature.* »¹⁸⁸⁹ Paradoxalement, il n'existe pas d'unité parmi les conceptions philosophiques des droits de l'homme. Gunnar Beck résume le paradoxe que révèle la diversité des définitions des droits de l'homme : « ils sont individuels, égaux, universels, ou universalisables ; ils peuvent également être négatifs ou positifs, procéduraux ou substantiels. Cependant, même les caractéristiques partagées par ces deux théories ne sont pas incontestées ». ¹⁸⁹⁰ C'est ce qui poussait le professeur Wachsmann à affirmer : « les droits de l'homme sont donc un universalisme (ils s'adressent à tous les autres, sans distinction), ils ne sont pas universels »¹⁸⁹¹.

47. Selon Gunnar Beck, ce sont les déclarations officielles qui confèrent à ces valeurs « *le statut de droit de l'homme. Les raisons justifiant ce statut légal spécial aux droits sont d'une telle importance qu'elles leur confèrent [d'une part] une exemption de [l'obligation de passer par] le processus démocratique, généralement considéré comme le mécanisme approprié pour la résolution des conflits entre intérêts concurrents, et en confie [d'autre part] la juridiction exclusive aux tribunaux* »¹⁸⁹². De

¹⁸⁸⁹ M. Lévinet, *Théorie générale des droits et libertés fondamentales* Bruxelles, Bruylant (2 ed. 2008), p. 42.

¹⁸⁹⁰ G. Beck, "The Mythology of Human Rights", *Ratio Juris*, vol. 21 No. 3 September 2008, p. 328. For a systematic summary of different human rights schools of thought in the English-speaking world, see M-B Dembour, "Who Believes in Human Rights? Four Schools of Thought", *Human Rights Quarterly*, Vol. 32, No. 1, (2010), pp. 1-20.

¹⁸⁹¹ P. Wachsmann, *Les droits de l'homme*, « Connaissance du droit », Dalloz, 4^e éd., 2002, p. 50.

¹⁸⁹² *Ibid.* p. 313. Au contraire, si ce débat semble résolu dans le monde des droits de l'homme, le débat sur la question de savoir si les droits constitutionnels méritent une exemption du processus démocratique, c'est-à-dire si les cours peuvent décider d'annuler les législations ou même des amendements constitutionnels d'un État fédéré ratifiés par le référendum populaire sur le fondement des droits constitutionnels—en particulier des droits découverts récemment—n'est certainement pas clos aux États-Unis. Au centre de ce débat est toujours présent la question de la légitimité du pouvoir "contremajoritaire" de la Cour suprême.

tels arguments replacent l'universalité proclamée des droits de l'homme dans une perspective moins universelle, plus institutionnelle. Ils réconcilient également des droits constitutionnels avec les droits protégés par la Convention, leur assignant une importance plus équivalente, chacun dans son propre contexte.¹⁸⁹³

48. Par ailleurs, met en garde professeur jusnaturaliste John Finnis, les « droits de l'homme » reconnus par le droit international ne sont pas à identifier avec les véritables « droits de l'homme » de la philosophie. En effet, « *[l]a doctrine [américaine] fait parfois référence aux droits de l'homme (human rights), mais il s'agit alors davantage de désigner des exigences morales relevant du droit naturel, indépendamment de l'existence ou de la forme de leur garantie juridique* ». ¹⁸⁹⁴ La différence entre les droits de la philosophie et les droits de l'homme positifs réside dans le fondement des droits de l'homme du philosophe, qui d'après le professeur Finnis procède du partage par l'espèce humaine d'une égale dignité. ¹⁸⁹⁵ Pour résumer, le droit des droits de l'homme consacre donc « *les droits et facultés assurant la liberté et la dignité de la personne humaine et bénéficiant de garanties institutionnelles* » ¹⁸⁹⁶ selon différents régimes de protection, par exemple au niveau local (constitutionnel), régional (par exemple, la Convention européenne ou la Déclaration américaine et internationale (Pacte international des droits civils et politiques). ¹⁸⁹⁷ Cependant, on peut concevoir que « *des droits de l'homme légalisés injustement sont des « droits de l'homme », mais non des*

¹⁸⁹³ Notons que contrairement aux États européens, les États-Unis ne répondent pas des violations des droits de l'homme devant une cour internationale ou supranationale. Ils ont simplement signé la Convention Américaine des droits de l'homme, mais n'ont pas accepté la compétence contentieuse de la Cour Interaméricaine des droits de l'homme. Pour une information générale sur le système inter-américain, voir Inter-American Human Rights System, *The International Justice Resource Center*, accessible sur <http://www.ijrcenter.org/regional/inter-american-system/#Inter-American-Commission-on-Human-Rights>

¹⁸⁹⁴ T. Hochmann, « Chronique des arrêts de la Cour suprême des États-Unis en matière de droits fondamentaux (octobre 2008 juin 2010) » *Revue trimestrielle des droits de l'homme* Vol. 22, No. 85, (2011) p. 82.

¹⁸⁹⁵ J. Finnis, *Human Rights and Common Good: Introduction*. Oxford University Legal Research Paper Series, Paper No 29/2011 May 2011, (ci-après 'Introduction'), p.8. « *Ils sont attribués de toutes les personnes humaines et non de membres d'une classe, « notre race ou espèce » ; ni [attribués sur la base d'une] sympathie émotionnelle ou arbitraire entre personnes semblables, mais comme êtres qui chacun possède une dignité dans sa capacité de participer aux biens communs identifiés parmi les premiers principes de la raison pratique (et en premier lieu le bien de l'existence ou la vie en commun) et donner du sens à toutes les intentions humaines.* » (notre traduction).

¹⁸⁹⁶ Frédéric Sudre cité par Michel Lévinet, *op. cit.*, p. 43.

¹⁸⁹⁷ Les droits peuvent être garantis au niveau local ou national (constitutionnel), régional (en Amérique, en Afrique ou en Europe) ou au niveau Mondial. Voir au niveau régional la Convention Américaine des Droits de l'Homme ou "Pacte de San Jose, Costa Rica", adoptée le 22 novembre 1969 (ci-après CADH) et au niveau mondial le Pacte International des droits civils et politiques adopté par résolution 2200A (XXI) de l'Assemblée générale, le 16 Décembre 1966, et entrée en vigueur le 23 mars 1976.

*droits de l'homme [valides philosophiquement] (sauf pour les besoins d'un discours intra-systémique à ce même système juridique). On peut affirmer de même quant aux droits qui sont protégés légalement, dans un système donné, en tant que droits de l'homme, mais qui dans d'autres systèmes juridiques et en d'autres endroits pourraient aussi bien être différents dans leur contenu, force juridique et dans leurs effets »*¹⁸⁹⁸.

Le philosophe du droit allemand Robert Alexy formule une hypothèse similaire : les droits de l'homme positifs seraient une « substantiation » juridique des droits de l'homme – de la même manière que les droits constitutionnels seraient une « substantiation » des droits de l'homme : ils donneraient du sens aux droits de l'homme de la philosophie.¹⁸⁹⁹ En effet, « [l]a doctrine fait parfois référence aux droits de l'homme (*human rights*), mais il s'agit alors davantage de désigner des exigences morales relevant du droit naturel, indépendamment de l'existence ou de la forme de leur garantie juridique ».¹⁹⁰⁰ Partant de telles perspectives, supposant que les régimes juridiques de protection des « des droits de l'homme » auraient pour objectif ultime de se conformer à l'idéal philosophique des droits de l'homme, la Cour européenne et ses homologues seraient l'objet d'une attente supérieure : la réalisation d'un idéal. Nombreuses sont en effet les batailles judiciaires dans le cadre desquels les parties et leurs soutiens utilisent la terminologie des droits de l'homme¹⁹⁰¹ où les participants essaient de convaincre les

¹⁸⁹⁸ « *In all these ways, at least, what can be true of certain elemental human rights accurately defined is more or less clearly not true of many rights constitutionally, legislatively, or judicially declared to be human: that they are properly enforceable against anyone and everyone's conceptions of common good or public interest. Unjustly established legal human rights are 'human rights', not human rights (except for purposes of intra-systemic discourse within that legal system). And the same can be said for rights which are legally declared, in a given jurisdiction, to be human rights but which there and in other places could just as well be different in their content, force, and effect.* » J. Finnis, "Introduction", *op. cit.*, pp. 3-4.

¹⁸⁹⁹ D'après Alexy, la protection des droits constitutionnels est une institutionnalisation des droits de l'homme en droit positif. Il en conclut qu'une critique de la protection des droits constitutionnel, par exemple dans le cadre d'une requête constitutionnelle qui prétendrait qu'un droit de l'homme non officiellement reconnu par la constitution devrait néanmoins être protégé, est une critique concernant la substantiation des droits de l'homme. « *In any case, one point seems to be clear: one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights.* », R. Alexy, "Discourse Theory and Fundamental Rights", in A. J. Menéndez and E. O. Eriksen (eds.), *Arguing Fundamental Rights*, pp. 15–30, Springer (2006) p.17.

¹⁹⁰⁰ T. Hochmann, "Chronique des arrêts de la Cour supreme des Etats-Unis en matiere de droits fondamentaux (octobre 2008 juin 2010)" *Revue trimestrielle des droits de l'homme* Vol. 22, No. 85, (2011) p. 82.

¹⁹⁰¹ La théorie des "cadres" ou "encadrement", c'est-à-dire la reformulation d'un problème social dans les termes d'un problème spécifique, a été défini par D. Snow and R. Benford. "Ideology, Frame Resonance, and Participant Mobilization", *International Social Movement Research*, Vol. 1, No. 1 (1988), p. 198. Pour des exemples de débats sur l'opportunité de formuler les problèmes liés à l'homosexualité en termes de droits de l'homme, voir J. Mertus, "The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US", *Human Rights Quarterly*, vol. 29, No. 4 (2007), pp. 1036–64.

institutions de faire progresser leur idéal des droits de l'homme. Par ailleurs, les diverses cours s'émulent les unes les autres pour améliorer leurs standards de protection des droits.¹⁹⁰² Au bout du compte, cour constitutionnelle et cour des droits de l'homme ont suffisamment de points communs pour justifier une étude comparative.

2.4.2. Les droits protégés

49. La Cour européenne des droits de l'homme est une institution internationale dédiée à la protection de droits de l'homme qu'elle considère comme des droits « *objectifs* » issus d'un instrument de « *garantie collective* » des droits de l'homme¹⁹⁰³. La Convention européenne,¹⁹⁰⁴ cet « *instrument constitutionnel de l'ordre public européen* »¹⁹⁰⁵ contient un catalogue complet de droits protégés, se fonde sur une conception proprement européenne des droits de l'homme, vouée à la reconstruction d'une Europe en paix, à la démocratie, et au rapprochement de peuples souffrant de blessures de la guerre: « *Réaffirmant leur profond attachement à ces libertés fondamentales qui constituent les assises mêmes de la justice et de la paix dans le monde et dont le maintien repose essentiellement sur un régime politique véritablement démocratique, d'une part, et, d'autre part, sur une conception commune et un commun respect des droits de l'homme dont ils se réclament* »¹⁹⁰⁶. Le catalogue européen des droits de l'homme est plus détaillé que le *Bill of Rights* américain, en nombre de droits

¹⁹⁰² Il existe une importante bibliographie sur le dialogue des juges. Voir par exemple A.-M. Slaughter, "A Typology of Transjudicial Communication", *University of Richmond Law Review*, vol. 29 (1994), pp. 106 & 120. L. Burgorgue-Larsen, "De l'internationalisation du dialogue des juges", *op. cit.*, pp. 107-115.

¹⁹⁰³ Cour EDH, *Irlande c/ Royaume-Uni*, req. n° 5310/71, 18 janvier 1978, A. 25, §239.

¹⁹⁰⁴ LA Convention européenne des droits de l'homme et des libertés fondamentales a été ouverte aux signatures à Rome le 4 novembre 1950 et est entrée en vigueur en 1953. Les textes officiels sont accessibles sur le site de la Cour européenne : <http://www.echr.coe.int/pages/home.aspx?p=basictexts>

¹⁹⁰⁵ Cour EDH, Gr. Ch. *Loizidou c/ Turquie*, req. n°. 15318/89, 23 mars 1995, §70 et 75. Le droit de la convention européenne n'est pas considéré comme un « instrument constitutionnel » uniquement par la Cour européenne, mais par la doctrine, qui réfléchit dans ce cadre à une plus large métamorphose actuelle du droit. Par exemple, Michel Lévinet parle de « socle de la protection des droits de l'homme dans le droit constitutionnel européen », M. Lévinet, « La convention européenne des droits de l'homme socle de la protection des droits de l'homme dans le droit constitutionnel européen », *Revue française de droit constitutionnel*, No. 86 (2011-2012) pp 227- 263 Dominique Rousseau de « patrimoine constitutionnel européen ». Ce dernier fait partie d'un plus large mouvement de la théorie du droit qui conçoit le droit constitutionnel non plus seulement selon la hiérarchie formelle du droit, mais selon une conception normative du droit, particulièrement centre sur le droit des droits et des libertés. Dans ce cadre, le juge procède à un « approfondissement de la démocratie en définissant un espace ouvert à la création continue du droit et en constituant la base des autres droits par leur constitutionnalisation progressive ». D. Rousseau, « Une résurrection : la notion de constitution », RDP, 1990, p. 21.

¹⁹⁰⁶ Préambule de la Convention européenne des droits de l'homme, § 4.

protégés, et si l'on considère les conditions dans lesquelles les droits peuvent être soumis à conditions et restrictions par les autorités publiques.

50. Pour le chercheur européen, comprendre la protection judiciaire « droits civiques » américains peut être compliqué non seulement de par leur évolution historique, mais également au regard de la terminologie. D'une part, les droits civils et politiques américains qui sont l'objet de cette étude sont protégés par la Constitution fédérale. Cependant, la Constitution des États-Unis contient une liste de droits très brève, et remarquable par son manque de précision. Avant que le Bill of Rights soit ajouté à la Constitution par amendement en 1791, c'est la séparation des pouvoirs qui jouait le rôle de barrière contre les abus des autorités publiques. L'un des pères fondateurs de la Constitution, Alexander Hamilton, se référait ainsi à la Constitution en ces termes : « *La Constitution elle-même est, de par son sens et son objet, une DÉCLARATION DES DROITS* »¹⁹⁰⁷. La Constitution d'origine ne protégeait ainsi que cinq droits : elle prohibait les lois rétroactives, les bills of attainder,¹⁹⁰⁸ tout en garantissant l'habeas corpus comme recours à l'encontre des arrestations illégales (Article 1 Section 9), elle protégeait aussi les obligations contractuelles (Article 1 Section 10) et les droits civiques (Articles 4). En limitant les pouvoirs des institutions fédérales (Article 10), les rédacteurs entendaient limiter les risques de violation des droits par les autorités fédérales. Jusqu'à la ratification du Quatorzième Amendement en 1868, le *Bill of Rights* ne contraignait que les institutions fédérales. C'est seulement après ce tournant et la période de reconstruction suivant la Guerre de Sécession que la Cour suprême commença doucement à appliquer la première section du Quatorzième Amendement : la clause d'application régulière de la loi (« *Due Process Clause* »), et la clause de consacrant l'égalité de protection (« *Equal Protection Clause* »). C'est ainsi que le *Bill of Rights* devint un instrument de protection des droits face aux abus des institutions fédérales comme locales. Notons qu'en pratique, la Cour suprême n'a protégé les droits constitutionnels sous le terme de « droits civiques » qu'après la ratification du Quatorzième amendement.¹⁹⁰⁹

¹⁹⁰⁷ A. Hamilton, *Federalist Papers* n° 84., in *The Federalist Papers*, NY, Signet, (2003, 1st ed.), p. 250.

¹⁹⁰⁸ "Bills of Attainder" are defined as a « special legislative act prescribing punishment, without a trial, for a specific person or group » *Black's Law Dictionary*, *op. cit.* p. 198.

¹⁹⁰⁹ A. R. Amar, *The Bill of Rights*, Yale University press, 1998, *op. cit.*, p. 284. D'après Henkin, la Constitution à son origine, n'avait pas prévu une protection judiciaire des droits : « *Les rédacteurs de la Constitution ne s'intéressaient pas aux droits, la Constitution n'exaltait pas, ne célébrait pas ni ne proclamait des droits. De fait, la Constitution d'origine ne mentionnait presque aucun droit. Le Bill of*

51. La terminologie américaine applique les termes de « droits civiques » ou « droits fondamentaux » à des contextes spécifiques. Premièrement, les droits civiques incluent non seulement les droits protégés par les dix premiers amendements à la Constitution fédérale, mais également les droits garantis par le *Civil Rights Act* de 1964.¹⁹¹⁰ Pour les besoins de cette étude, les « droits » ou « droits civiques » américains seront désignés sous les termes de « droits constitutionnels » ou « droits civiques ». Cette étude ne s'étend cependant pas à la protection offerte par le Civil Rights Act. Par ailleurs, la protection constitutionnelle américaine fait classiquement référence à différents types de droits constitutionnels : les droits « énumérés », c'est-à-dire les droits explicitement nommés par les articles ou les Amendements de la Constitution, et les droits « non énumérés », garantis par la Cour suprême sur le fondement du Cinquième, Quatorzième et de la « pénombre » du Neuvième Amendement. Par exemple, Justice Douglas justifiait la protection du droit au respect de la vie privée et la liberté reproductive sur le fondement, entre-autres, du Neuvième Amendement¹⁹¹¹. Si cet amendement n'est pas considéré par la majorité comme protecteur de droits, la Cour suprême s'en est servie pour justifier sa protection de droits non explicitement garantis par la Constitution¹⁹¹². Deuxièmement, la Cour suprême utilise le terme de « droit fondamental » pour désigner un droit si important qu'il mérite une protection renforcée¹⁹¹³. En conséquence, son examen des requêtes pour violation est particulièrement strict et approfondi, selon un standard appelé « *strict scrutiny* » ou contrôle rigoureux, établissant une présomption d'inconstitutionnalité sauf à ce que les autorités publiques fournissent une justification valide et parviennent à convaincre la Cour suprême que l'objectif poursuivi n'aurait pu être atteint par des mesures moins

*Rights était une postface, sinon une pensée après coup, le prix à payer pour faire valider la Constitution [...] Mais ils n'envisageaient pas l'inclusion de droits à la Constitution, ou de donner aux droits une valeur ou une stature constitutionnelle. Personne n'avait pensé ou même exigé du gouvernement fédéral qu'il assure et protège les droits individuels, ou élève, promeuve ou encourage leur exercice et leur jouissance ». Henkin, op. cit., p. 411. However, it "was not an authentic, full-blown, expression of American constitutionalism (ibid., p. 406). L. Henkin, "Rights: American and Human", *Columbia Law Review*, Vol. 79, 405 (1979).*

¹⁹¹⁰ Pub. L. 88-352, 78 Stat. 241, promulgué le 2 juillet 1964. Cet acte « interdisait la discrimination dans les lieux publics, prévoyait l'intégration [raciale] des écoles et d'autres bâtiments publics, et pénalisait la discrimination à l'emploi ». Pour plus d'information, voir "Our Documents", accessible sur le site suivant : <https://www.ourdocuments.gov/doc.php?flash=true&doc=97>

¹⁹¹¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

¹⁹¹² E. Chemerinsky, *Constitutional Law, Principles and Policies*, NY, Wolters Kluwer, 4^{ème} ed. (2011), p. 815.

¹⁹¹³ Charlotte Girard explique que l'expression "droits fondamentaux", en droit anglo-saxon (et elle se réfère en général au droit britannique) n'est pas utilisée de manière systématique par les chercheurs, ce qui rend les études comparatives plus compliquées ». C. Girard, *Des droits fondamentaux au fondement du droit*, Paris : publications de la Sorbonne, (2010), p. 24.

restrictives.¹⁹¹⁴ Les droits « fondamentaux » américains pourraient être comparés aux droits européens dit intangibles, qui ne souffrent ni dérogation ni restriction ; entre autres le droit à la vie (article 2), qualifié de « valeur suprême dans l'échelle des droits de l'homme au plan international »¹⁹¹⁵ ou encore l'interdiction de la torture et des traitements inhumains et dégradants (article 3), qui « consacre l'une des *valeurs fondamentales* des sociétés démocratiques qui forment le Conseil de l'Europe ¹⁹¹⁶ ».

52. Cette étude est consacrée aux droits et libertés garanties par la Constitution américaine¹⁹¹⁷, et mis en application par la Cour suprême sous le titre « *Bill of Rights* », c'est-à-dire du premier au quinzième amendement à ma Constitution. Au long de cette étude, nous ferons référence aux droits protégés par la Cour suprême sous les termes « droits civiques » ou « droits constitutionnels ». Lorsque la Cour suprême se réfère à des droits qu'elle estime « fondamentaux », cela sera indiqué sous le même terme. En référence aux droits les plus essentiels à chaque système juridique, le terme utilisé sera « droit ». Plus spécifiquement, les droits protégés par la Cour européenne seront indiqués sous le terme « droits de l'homme » ou « droits conventionnels ».

2.4.3. Structures des Institutions Judiciaires et Doctrines Jurisprudentielles

53. Comme dans le cas des États-Unis, la Cour européenne n'a pas immédiatement protégé les droits de l'homme de manière efficace. Afin que cela puisse se produire, les Etats Parties à la Conventions ont dû consentir à réformer la Convention plusieurs fois.¹⁹¹⁸

¹⁹¹⁴ Chemerinsky, *op. cit.*, p. 812.

¹⁹¹⁵ Cour EDH, *Streletz, Kessler and Krenz c/ Allemagne*, req. n° 34044/96 35532/97 44801/98. 22 Mars 2001, §87 and 94 (souligné par nous).

¹⁹¹⁶ Cour EDH *Soering c/ Royaume Uni*, req. n°. 14038/88, 7 Juillet 1989, §88 (souligné par nous) Sometimes the burden of proof will be reversed and lay on the defending state (Cour EDH, *Tomasi c/ France*, req. n° 12850/87, 27 août 1992, A.241 A, §115). Ainsi, la Cour européenne est soumise à plus de contraintes que la Cour suprême, qui a protégé des droits non spécifiquement protégés par la Constitution (par exemple, le droit au respect de la vie privée dans *Griswold v. Connecticut*, 381 U.S. 479 (1965), et le droit de procréer ou de ne pas procréer dans *Carey v. Population Planning International*, 431 U.S. 678 (1977)).

¹⁹¹⁷ Constitution des États-Unis, approuvée le 17 septembre 1787. Les amendements du Bill of Rights amendement ont été signés le 25 Septembre, 1789, et officiellement intégrés à la Constitution le 15 décembre 1789. Les textes officiels sont accessibles sur le site suivant : <http://constitutionus.com/>

¹⁹¹⁸ Les réformes les plus importantes incluent celle introduite par le Protocole 11, entrée en vigueur en 1998, qui instaure le recours individuel de plein droit et la juridiction obligatoire de la Cour. Elle crée également une Cour permanente unique rassemblant l'ancienne Commission et l'ancienne Cour et réformant ses compétences. Le Protocole 14, signé le 13 mai 2004 et entré en vigueur en juin 2010 réforme la Cour dans le but de rendre son travail plus efficace. Elle crée un système de filtrage des requêtes par une formation à juge unique et une nouvelle formation de trois juges, compétente pour traiter

Pour assurer son efficacité, la Cour européenne est actuellement organisée en trois formations de jugement, tandis que la formation du juge unique, introduite par le Protocole 14, est chargée des cas d'inadmissibilité.¹⁹¹⁹ Le Comité de trois juges s'occupe des affaires répétitives en appliquant une jurisprudence constante ; les chambres de sept juges, réparties en six sections, se penchent sur les affaires non répétitives. La formation la plus solennelle, la Grande Chambre de dix-sept juges, est chargée de traiter les affaires qui posent des problèmes d'interprétation. Outre-Atlantique, la Cour suprême est organisée en une formation de jugement unique de neuf « *Justices* » nommés à vie. Par ailleurs, depuis qu'elle n'est plus soumise à l'obligation de traiter les appels, la Cour suprême a toute discrétion dans la sélection des affaires grâce à la procédure du *Certiorari*.¹⁹²⁰

54. Autre différence, la Cour suprême n'est pas autorisée à statuer *in abstracto*. Elle interprète l'Article III, qui détaille l'étendue de sa compétence dans le traitement des « affaires et controverses » tandis qu'elle a l'interdiction de délivrer des « opinions consultatives ». ¹⁹²¹ C'est pourquoi, il n'existe aucune formation consultative à la Cour suprême. En outre, pour montrer son respect pour la séparation des pouvoirs, la Cour suprême a développé une doctrine lui permettant d'éviter de se prononcer sur les questions politiques : la « *political question doctrine* »¹⁹²². Conformément à l'Article 31 de la Convention, la Grande Chambre de la Cour européenne peut délivrer des opinions consultatives, par exemple sur demande du Comité des Ministres, sur des questions d'interprétation de la convention (article 47 CEDH). Puisqu'en somme, la Cour suprême décide généralement de traiter des questions de droits posant des

les requêtes répétitives sur lesquelles la jurisprudence est clairement établie. Protocole 15, signé le 15 juin 2013 mais qui n'est pas encore entrée en vigueur, ajoute quelques modifications elle aussi conçue pour améliorer l'efficacité de la Cour, par exemple dans les délais de soumission des requêtes, l'âge maximal des juges, et les conditions d'admissibilité. Enfin, le Protocole 16 signé le 2 Octobre 2013, permet aux cours de dernier ressort des États membres de poser des questions à la Cour européenne dans sa compétence consultative sur des questions de principe.

¹⁹¹⁹ Depuis le protocole 14, (Traité N° 194, CTS signé le 13 mai 2004, et entrée en vigueur le 1er juin 2010, l'Article 27 de la Convention stipule : « 1. Un juge unique peut déclarer une requête introduite en vertu de l'article 34 irrecevable ou la rayer du rôle lorsqu'une telle décision peut être prise sans examen complémentaire. 2. La décision est définitive. »

¹⁹²⁰ Cela ne s'applique pas aux appels (28 U.S. Code §§ 1253), dans les affaires concernant plusieurs États, ou dans les affaires concernant les affaires étrangères ou un conflit entre un citoyen d'un État et celui d'un État tiers ou d'un individu non citoyen des États-Unis (28 U.S. Code §§ 1251).

¹⁹²¹ *Muskrat v. United States*, 219 U.S. 346 (1911). Cette interprétation est tirée d'une lettre du fondateur américain, George Washington. "Letter to George Washington From John Jay, Chief Justice", in H. P. Johnston, *The Correspondence and Public Papers of John Jay*. 4 vols. New York and London: G. P. Putnam's Sons, p. 1890-93.

¹⁹²² Dans *Baker v. Carr*, 369 U.S. 186 (1962), la Cour suprême concluait que les cours fédérales ne pouvaient pas se pencher sur les affaires dans des domaines explicitement confiés par la Constitution à d'autres branches gouvernementales.

difficultés particulières¹⁹²³, cette étude comparative se limitera également aux jugements publiés par les formations de jugement de la Cour européennes compétentes pour se prononcer sur des affaires non répétitives et où la jurisprudence n'est pas constante, c'est-à-dire ceux des chambres et de la grande chambre.

55. Il existe, bien sûr, d'autres aspects différenciant les protections de Cour européenne et de la Cour suprême. Cependant, malgré leurs différences historiques, institutionnelles, politiques et philosophiques, les deux institutions possèdent des similitudes parfois inattendues. Ces similitudes ont été jugées suffisantes pour justifier plusieurs études comparatives existantes entre les deux cours¹⁹²⁴. Par exemple, la Cour européenne considère que toutes les normes de droit interne doivent se conformer au droit conventionnel. Par exemple, la doctrine européenne de l'effet direct et celle de la primauté du droit conventionnel pourraient être comparées au principe de suprématie judiciaire. Tel est aussi le cas de l'interprétation consensuelle et de l'interprétation dynamique¹⁹²⁵ et qui sont toutes deux liées à l'autorité de la cour et à l'efficacité de sa protection judiciaire. Leurs approches renferment néanmoins des différences substantielles.

56. D'abord, la Cour suprême a élaboré sa doctrine de la suprématie très tôt. Nombreux sont ceux qui remontent au jugement de 1803, *Marbury v. Madison*, pour la fonder. Dans cette décision, le Juge Marshall déclarait : « *La fonction de dire droit est clairement de la compétence du pouvoir judiciaire*¹⁹²⁶ ». D'après Whittington, la

¹⁹²³ « Plus généralement, La discrétion absolue de la Cour pour gérer elle-même son rôle, choisissant non seulement quelles affaires elle traite, mais aussi quelles « questions présentées » elle décide, semble avoir contribué à un État d'esprit qui conçoit la Cour Suprême plus comme une institution siégeant pour résoudre des questions controversées que pour statuer sur des affaires [juridiques] », Hartnett, « *Questioning* », *op. cit.*, pp. 1733-34. See also, Lane, R. Black, « Agenda Setting and Case Selection on the U.S. Supreme Court. », in *Oxford Research Encyclopedia of Politics*, Dec. 2017, p. 18.

¹⁹²⁴ L. Hennebel, J. Allard, G. Haarscher, *Juger les droits de l'homme, Europe et États-Unis face à Face*, Bruxelles, Bruylant (2008). L. Van den Eynde a également effectué une étude comparative de la protection judiciaire des droits auprès de la Cour européenne des droits de l'homme, de la Cour suprême des États-Unis, et de la Cour suprême d'Afrique du Sud. Van den Eynde, *Op. cit.*

¹⁹²⁵ O'Mahony, K. Dzehtsiarou, « Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court », *Columbia Human Rights Law Review*, Vol. 44, 309 (2013).

¹⁹²⁶ « It is emphatically the province of the judicial department to say what the law is », (notre traduction). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Il existe plusieurs interprétations de ce passage. Certains chercheurs considèrent que la Cour a défini dans cette affaire son compétence d'interprétation de la Constitution. D'autres ont montré qu'elle y affirmait un monopole dans la fonction d'interprétation. Voir D. Douglas, « The Rhetorical Uses of *Marbury v. Madison* », *Wake Forest Law Review*, Vol. 38, 375 (2003). Douglas affirme que *Marbury v. Madison* n'a pas été considéré comme une décision remarquable pendant presque un siècle. Cette décision a commencé à être citée dans d'autres opinions de la Cour à la fin du 19^{ème} siècle, alors que la jurisprudence de la cour commençait à être controversée, et que la Cour

« *suprématie judiciaire consiste largement dans l'habilité de la Cour à effacer la distinction entre ses propres jugements d'interprétation de la constitution, et la constitution elle-même. La Cour revendique l'autorité non seulement pour s'inspirer de la Constitution en tant que guide pour les actions mêmes des Juges, mais aussi et surtout pour dire ce que signifie la Constitution, pour eux-mêmes et pour tous les autres* ¹⁹²⁷ ».

57. Conformément à l'Article VI de la Constitution américaine, qu'on appelle la « clause de suprématie », la « *Constitution, toutes ses lois d'application, et tous les traités rédigés sous l'autorité des États-Unis sont la « loi suprême du pays » et jouissent d'une autorité légale supérieure à toutes les dispositions incompatibles provenant d'une constitution ou d'une loi d'un État [fédéré]* ¹⁹²⁸ ». Dès lors, en tant qu'interprète de dernier ressort de la Constitution, la Cour est « en position d'avoir un pouvoir d'autorité supérieur ou le plus important ¹⁹²⁹ » s'agissant de l'interprétation du droit constitutionnel dans son ensemble, et ses décisions « *sont contraignantes vis-à-vis des branches coordonnées du gouvernement fédéral et des États [fédérés]* ¹⁹³⁰ ».

58. Sans élaborer une doctrine, la Cour européenne pour sa part que toutes les lois nationales doivent se conformer à la Convention ¹⁹³¹ (certains chercheurs parlent de « primauté » du droit conventionnel)¹⁹³². Le corollaire est que les États contractants peuvent être poursuivis pour toute violation de la Convention : « *Or elle ne fait aucune distinction quant au type de normes ou de mesures en cause et ne soustrait aucune partie de la «juridiction » des États membres à l'empire de la Convention. C'est donc*

commençait à annuler des législations protectrices des droits des travailleurs, ou à empiéter sur le droit de propriété et le droit des contrats. Il affirme que cette jurisprudence a servi à développer l'exercice de la fonction judiciaire au XIX^{ème} siècle, mais également la doctrine de la suprématie judiciaire, c'est-à-dire que «ses interprétations de la Constitution sont suprêmes par rapport à celles des autres acteurs gouvernementaux, une prétention que Justice Marshall n'avait pas exprimée dans sa décision Marbury » (p. 409) (notre traduction). Le développement de la doctrine de la suprématie débutait avec les affaires concernant la déségrégation de la population afro-américaine en 1958 avec *Cooper v. Aaron* 358 U.S. 1 (1958), dans un contexte de résistance à sa déségrégation forcée en Alabama (*ibid.*).

¹⁹²⁷ K. E. Whittington, *Political Foundation of Judicial Supremacy, the Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton, Princeton University press, (2009), p. xi.

¹⁹²⁸ *Black's Law Dictionary*, St Paul, MN, Thomson Reuters (10th ed. p. 1669 (2009)) (nous traduisons).

¹⁹²⁹ *Ibid.*

¹⁹³⁰ *Ibid.*, p.976.

¹⁹³¹ Cour EDH, Gr. Ch., *Parti Communiste Unifié et autres c/ Turquie*, req. N°. 19392/92, 30 janvier 1998, §30, confirmé par Cour EDH, *Zielinski, Pradal, Gonzalez et autres c/ France*, 28 Octobre 1999, req. n° 24846/94, 34165/96. (The court decided that the fact that a legal act conforms to the Constitution does not make it conform with the European Convention.)

¹⁹³² F. Sudre, «Droit international», p. 183.

par l'ensemble de leur « juridiction » – laquelle, souvent, s'exerce d'abord à travers la Constitution – que lesdits États répondent de leur respect de la Convention [...]. Aussi l'organisation institutionnelle et politique des États membres doit-elle respecter les droits et principes inscrits dans la Convention. Il importe peu, à cet égard, que se trouvent en cause des dispositions constitutionnelles [...] ou simplement législatives [...]. Dès lors que l'État concerné exerce par elles sa « juridiction », elles se trouvent soumises à la Convention¹⁹³³». La Cour semble donc considérer la Convention comme supérieure aux normes même constitutionnelles¹⁹³⁴. Cependant, d'après David Szymczak, une telle « primauté » de la Convention européenne ne doit pas être comprise comme une règle établissant une hiérarchie normative, comme le fait la doctrine de la suprématie judiciaire. Il la considère plutôt comme une norme de conflit de lois¹⁹³⁵. Puisque la Convention est une norme subsidiaire, les États sont libres de choisir la méthode d'intégration du droit Conventionnel dans leur ordre juridique national, directement ou par le biais de lois de transposition. Néanmoins, les États contractants sont tenus de respecter les droits protégés par la Convention, quelque-soit la méthode suivie pour intégrer les normes européennes dans leur hiérarchie normative¹⁹³⁶. En outre, la Cour européenne considère que toutes les normes nationales peuvent être l'objet d'un examen à la lumière des normes conventionnelles¹⁹³⁷. Toutefois, même si cette obligation de conformité à la Convention a été proclamée il y a presque vingt ans, elle est toujours contestée en droit interne, en particulier à cause de l'hétérogénéité des formes d'intégration des droits de l'homme en droit interne¹⁹³⁸.

¹⁹³³ Cour EDH, Gr. Ch., *United Communist Party of Turkey and Others v. Turkey*, *op. cit.*, at §§29-30 (références omises)

¹⁹³⁴ Sudre, "Droit international", *op. cit.*, p. 183.

¹⁹³⁵ Il est bon de rappeler que la doctrine de la suprématie judiciaire est intrinsèquement liée à la séparation des pouvoirs et au fédéralisme. Les pouvoirs sont confiés à la fédération par les États, et non pas l'inverse. La règle des pouvoirs énumérés, de l'Article I Section 8 de la Constitution limite en principe les pouvoirs du Congrès aux pouvoirs expressément confiés par la Constitution américaine. Cette disposition a été utilisée différemment par la Cour selon les périodes, dans un sens d'expansion ou de restriction des pouvoirs. Dans la période du New Deal, elle était utilisée pour renforcer le fédéralisme, Voir par exemple R. E. Barnett, "Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional", *NYU Journal of Law and Liberty*, vol. 5, 581 (2010). Plus tard, sous la direction du Chief Justice Rehnquist, la Cour changeait d'orientation en insistant sur le concept de la souveraineté des États fédérés. Voir en particulier H. K. Gerken, "Slipping the Bonds of Federalism", *Harvard Law Review*, vol. 128, 85 (2014).

¹⁹³⁶ D. Szymczak, "Applicabilité directe des dispositions de la Convention et de ses protocoles", *Répertoire de droit européen* (juillet 2007), § 16.

¹⁹³⁷ Cour EDH, Gr. Ch., *Parti Communiste Unifié de Turquie et autres c/ Turquie*, *op. cit.*

¹⁹³⁸ Some countries such as Austria, give the Convention Constitutional rank. Some such as France give it a legal rank superior to statutory law. Some give it a legal value equal to statutory law (Germany, Italy). Szymczak, *op. cit.*, §§19-23.

59. L'une des conséquences de l'obligation de conformité du droit interne à la Convention est similaire à celles de la doctrine de la suprématie judiciaire aux États-Unis. Sur le fondement de l'article 32 de la Convention, la Cour ajoutait ainsi la doctrine de l'autorité interprétative ; « *L'autorité interprétative conduit à imposer à l'État la solution contenue dans un jugement rendu contre un autre État faisant face à un problème similaire*¹⁹³⁹ ». Ainsi, les États savent que « *la cour entend clairement condamner l'État qui laisse subsister dans son droit interne des dispositions législatives similaires à celles qui ont valu à un autre État partie un constat de violation de la Convention*¹⁹⁴⁰ ». Par conséquent, malgré le principe de subsidiarité et l'autorité interprétative relative de la Cour européenne (Article 42 (1)), selon laquelle toute décision ne contraint que l'État partie au litige, la combinaison de la primauté et de l'autorité interprétative a permis à la Cour européenne d'assurer le respect de sa jurisprudence, comptant sur l'aversion des États à l'idée de faire l'objet d'une nouvelle condamnation devant la Cour européenne¹⁹⁴¹.

60. Au bout du compte, si l'obligation de conformité à la Convention et la « suprématie judiciaire » ne sont certes pas identiques et ne servent pas la même fonction, certains chercheurs tel Alec Stone Sweet, tout en se reconnaissant dans une minorité, affirme que « *La Cour européenne « se caractérise par ce que j'appelle la « suprématie judiciaire structurelle ». La Cour possède les pleins pouvoirs pour interpréter les droits protégés par la Convention avec autorité, tout en supervisant la manière dont la Convention est appliquée dans les systèmes juridiques nationaux. Les États parties pourraient renverser une interprétation de la Cour qui leur déplairait, mais seulement par la voie de la révision de la Convention. Au vu de la règle de décision gouvernant le régime de décision—l'unanimité—c'est impossible en pratique*¹⁹⁴² ».

61. D'autres doctrines s'appliquent à la substance des droits interprétés. Par exemple, l'interprétation consensuelle est utilisée des deux côtés de l'Atlantique, et pas uniquement dans une perspective progressiste. Elle est utilisée parfois comme signe de déférence à l'égard des autorités locales, et pour adapter le droit aux conditions

¹⁹³⁹ J-P. Marguénaud, "La Cour Européenne des droits de l'homme", p. 397 (notre traduction). Dernier accès sur <http://biblio.juridicas.unam.mx/libros/4/1978/16.pdf>

¹⁹⁴⁰ F. Sudre, *Droit européen et international des droits de l'homme*, Paris, PUF, 9th ed. (2011).

¹⁹⁴¹ Szymczak, *op. cit.*, at §10.

¹⁹⁴² A. Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court", *Yale University Selected Works*, (October 2009).

actuelles. En Europe, la doctrine de la marge d'appréciation est utilisée à la manière d'une doctrine « originaliste » ou conservatrice américaine, pour justifier cette déférence¹⁹⁴³. Par exemple, l'absence d'un consensus numérique parmi les États contractants permet à la Cour d'accorder à l'État défendeur une plus grande marge d'appréciation. L'utilisation de ces doctrines est révélatrice à notre sens des philosophies des droits préférées par les juges, et de leur vision du rôle de leur institution en démocratie.

3. Portée de l'analyse

62. La notion d'« opinion publique » est-elle propre à rendre compte de la protection des droits fondamentaux par l'institution judiciaire ? Est-elle, en particulier, adaptée à un contexte international ? Nous avons vu que l'opinion publique n'est plus aujourd'hui une notion limitée au contexte national¹⁹⁴⁴. La recherche en sciences sociales s'est penchée sur la globalisation de ce phénomène social et sur l'influence de l'« opinion mondiale » sur les politiques publiques, au niveau national comme international. Cette thèse cherche à montrer qu'une approche complète de la fonction de juger ne peut aboutir sans y inclure les environnements politiques et sociaux dans lesquels l'institution judiciaire opère. C'est pourquoi l'institution judiciaire est ici considérée

¹⁹⁴³ Il a été affirmé que la doctrine consensuelle est souvent utilisée pour éviter une nouvelle interprétation progressive. Dans le contexte des unions entre personnes de même sexe, il existe une bibliographie abondante : H. Fenwick, "Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court's authority via consensus analysis?", *European human rights law review.*, 2016 (3), pp. 249-272. C. Draghici, "The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?", *Public Law* (2017), pp. 11-29. (qui considère que des « droits à "géométrie variable" temporaire sont aussi préférables au règne de l'interprétation évolutive en attendant qu'un consensus européen se cristallise ». Les conclusions considèrent que le consensus local est un instrument d'interprétation légitime s'il maximise la protection des droits de l'homme dans un État où le processus démocratique est verrouillé ; autrement, il ne devrait pas accommoder une version d'objection persistante qui déstabiliserait l'orthodoxie du consensus européen et ce au détriment du projet quasi-constitutionnel de la Convention », p. 2, (traduit par nous); E. Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", *Journal of International Law and Politics*, vol. 31, 843, 852 (1999). Cependant, dès Cour EDH, *Tyrer c/ l-le Royaume Uni*, Req. N° 5856/72, 25 avril 1978, la Cour européenne "a déployé le consensus comme preuve dans l'interprétation évolutive", K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal*, Vol. 12, No. 10, 1730 (2011). p. 1736 (cet article est une tentative de systematization de la doctrine consensuelle, mais défend la capacité de la Cour d'ignorer ce consensus—son existence ou son inexistence—« s'il y a des raisons de le faire » (*ibid.*, p. 1745). Dans tous les cas, non seulement les chercheurs critiquent l'utilisation instable de la doctrine consensuelle, c'est également le cas de certains juges. Voir par exemple L. Burgorgue-Larsen "Le jeu ambigu du consensus européen dans la détermination de la marge d'appréciation: La vision critique de Françoise Tulkens", *Strasbourg Observers*, 2012, <<https://strasbourgobservers.com>>, <hal-01744352>

¹⁹⁴⁴ Sur ce sujet, S. Splichal, *Transnationalization of the Public Sphere and the Fate of the Public*, Hampton Press (2011); N. Fraser et al., *Transnationalizing the Public Sphere*, Cambridge, Polity Press (2014).

comme une institution politique et juridique, et part du principe que l'opinion publique joue un rôle, même indirectement, dans la protection judiciaire des droits au niveau national et international. Cette étude prend en compte les autres acteurs qui, directement ou indirectement, en interne ou de l'extérieur, participent à la procédure et à la formation de l'opinion publique au long de la procédure judiciaire : les juges, le demandeur, le défendeur, la presse, les tierce parties, et les organisations non gouvernementales.

63. La signification du terme « opinion publique » n'est ni unique ni consensuelle. Elle n'est pas non plus attachée à un objet, un sujet, un territoire ou un groupe particulier. Dès lors, elle a le potentiel d'apporter un éclairage à différentes étapes de l'analyse. Institutionnellement, elle permet de replacer la pratique de chaque cour dans un contexte plus large que la relation tridimensionnelle entre la victime de la violation, le juge, le défendeur, et le juge de dernier ressort. Des décisions comme *Brown v. Board of Education*¹⁹⁴⁵ ou en Europe *A.B.C. c. Irlande*,¹⁹⁴⁶ révèlent l'écho qu'une procédure judiciaire peut avoir sur le débat politique national et international. Dans ce cadre, ces acteurs indirects font le lien entre le public, les cours et les autorités publiques, et contribuent à la légitimité judiciaire. Quant à l'étude de la substance des décisions, l'inclusion d'une notion flexible et ajustable de l'opinion publique devrait élargir le champ analytique et enrichir notre connaissance du processus judiciaire. Sans réduire les droits constitutionnels et droits de l'homme à un phénomène exclusivement politique, il est important d'inclure l'impact que la perception des juges de leur environnement social et politique peut avoir sur leur raisonnement juridique. En assurant la protection des droits, les cours ne font pas seulement face aux autorités publiques, mais aussi aux plaignants, défenseurs, aux médias et à l'opinion nationale et internationale. L'analyse du rôle de l'opinion publique dans les décisions judiciaires permet de déterminer si les institutions judiciaires se réfèrent à l'opinion publique dans leurs jugements, directement ou indirectement, à quel type d'opinion publique ils font référence (locale, nationale ou internationale), et comment elles conçoivent chaque segment de l'opinion publique tout au long de leur raisonnement : comme une force positive ou négative, comme participant au processus décisionnel, ou comme force menaçante et irrationnelle. En effet, une lecture rapide de la jurisprudence montre que

¹⁹⁴⁵ *Op. cit.*

¹⁹⁴⁶ Cour EDH, *A.B.C. c/ Irlande*, req. n° 25579/05, 16 décembre 2010.

l'opinion peut être vue sous un angle positif ou négatif selon le droit en question. Enfin, une étude comparée permet de mesurer la différence d'importance que l'opinion publique peut avoir dans la protection judiciaire nationale et internationale.

64. Cette analyse du rôle de l'opinion publique dans le processus décisionnel de la Cour suprême et de la Cour européenne se fonde sur la prémisse selon laquelle les décisions des juges et l'opinion publique sont interdépendants, à différents degrés selon l'importance que l'institution judiciaire alloue à l'opinion publique.

4. Spécification des objets de la recherche

65. Cette thèse consiste en une étude du rôle assigné à l'opinion publique dans la protection judiciaire des droits. L'opinion publique peut être impliquée dans le processus de deux différentes manières. Au niveau institutionnel, par son inclusion dans la procédure, ou en substance, par des références à l'opinion au cœur des jugements.
66. Le droit institutionnel, qui consiste dans les règles de compétences et de fonctionnement des institutions étudiées, régit également la place des participants extérieurs au procès (tierces parties, sponsors, médias, etc). Certaines règles sont incluses au sein du document créateur de l'institution, comme par exemple la Convention européenne des droits de l'homme (Section II de la Convention), d'autres sont insérés dans les règlements intérieurs de l'institution judiciaire. Par exemple, les tierces interventions sont abordées dans la Convention européenne (art. 36) et dans le règlement intérieur de la Cour européenne (art. 44). Cependant, la politique de la Cour européenne concernant la participation des tierces-parties n'est pas régie uniquement par ces règles, mais a été élargie par une interprétation extensive des articles susmentionnés et l'inclusion de la participation de la société civile dans la procédure¹⁹⁴⁷. La participation extérieure, que ce soit au stade de l'envoi de la requête ou de son examen au fond, s'est intensifiée au fil des années¹⁹⁴⁸. Outre Atlantique, l'introduction des *amici curiae* dans la procédure *Certiorari* est régie par l'article 37 du

¹⁹⁴⁷ A propos du rôle des *amici curiae* ou tierces interventions dans la jurisprudence de la Cour européenne, voir L. Burgorgue Larsen, "Les interventions éclairées devant la Cour européenne des droits de l'Homme, ou le rôle stratégique des *amici curiae*", *La conscience des droits, mélanges en l'honneur de Jean-Paul Costa*, Paris, Dalloz, (2011), pp. 67-81, voir également Van den Eynde, *op.cit.*

¹⁹⁴⁸ Marina Eudes, *op. cit.* La question de la participation des tierces parties est abordée dans le chapitre deux. The issue of amici participation is the object of Chapter Two.

Règlement intérieur de la Cour suprême¹⁹⁴⁹. Cependant, la pratique de la Cour suprême a évolué au cours des années : alors qu'elle faisait face à un nombre croissant de demandes d'autorisation de soumettre un mémoire en tant qu'*amicus curiae*, les réformes rendaient la sélection des requêtes plus rigoureuse et discrétionnaire, poussant les avocats à imaginer des stratégies de plus en plus astucieuses et à encourager la coopération entre les parties et les *amici*.

67. C'est pourquoi l'objet principal de cette thèse sera la participation institutionnalisée de l'opinion publique dans la procédure, puis le rôle assigné à l'opinion publique au fond de l'affaire. Le critère institutionnel sera utilisé pour rendre compte aussi précisément que possible de la progression de la participation des divers acteurs, ainsi que de leur diversification, de la manière dont elle a contribué au débat judiciaire dans le domaine des droits, et quel impact ils ont eu sur l'évolution du droit.
68. Les prochains développements sont consacrés aux étapes suivies afin de mettre au point une base de données rassemblant les jugements qui contiennent des références directes à l'opinion publique ou à des synonymes de ce terme. Puisque le matériau principal de l'étude de cas est le jugement écrit du juge, nous procéderons à la description des principales différences entre les méthodes de rédaction de chacune des deux cours étudiées, puis à l'explication de la méthodologie utilisée pour choisir les jugements qui seront ensuite analysés.

4.1. Approche comparée de la rédaction des jugements Américains et Européens

69. Les développements qui suivent ont pour but de souligner les principales différences entre les manières de rédiger les jugements par la Cour européenne et la Cour suprême, et à mettre en évidence la manière dont ces méthodes affectent la place des arguments non-légaux ou même politiques dans les motifs judiciaires.

4.1.1. La structure hybride des jugements européens

70. Chaque Cour se différencie de ses homologues par le style adopté dans la rédaction de ses jugements. Ainsi, la Cour européenne a adopté une méthode hybride, entre la

¹⁹⁴⁹ *Rules of the Supreme Court of the United States*, 13 avril 2013, entrées en vigueur le 1er juillet 2013. La Cour reconnaît que « *Un ami de la Cour qui attire l'attention de la Cour sur une question pertinente peut être une aide considérable pour la Cour* » (notre traduction).

tradition de droit romain et celle de Common Law. C'est ce que montre Aurélia Schamahnèche dans son étude approfondie de la motivation de la Cour européenne, spécifiquement concentrée sur le profil de rédaction et la manière de raisonner qui transpire des jugements de la Cour européenne.

71. L'une des caractéristiques majeures du style rédactionnel de la Cour européenne est son plan clair et visible¹⁹⁵⁰. La Cour résume d'abord les faits principaux et circonstances de l'affaire, et cite de manière extensive le droit national pertinent, et autres informations pertinentes telles que des rapports des institutions et agences internationales locales, ou le droit international et la jurisprudence internationale pertinents. La Cour évalue systématiquement le bien fondé des prétentions des parties séparément pour chaque Article de la Convention qui a été invoqué. Les jugements sont rédigés dans un style très précis, complet et transparent, ce qui montre clairement l'intention de prendre toutes les préoccupations des parties au sérieux, et d'assurer *in fine* l'adhésion de ses lecteurs.
72. La méthodologie de la Cour européenne a évolué. D'après Schamahnèche la Cour se conformait au départ à un style rédactionnel français, plus bref mais aussi plus difficile à lire hors du monde juridique francophone. Afin de se rendre compréhensible dans de nombreux États membres, la Cour adoptait donc progressivement une structure plus hybride, utilisant le syllogisme français dans un style plus conversationnel inspiré de la tradition de Common Law. Cependant, le plan clair et visible est étranger aux deux traditions.¹⁹⁵¹
73. La Cour européenne s'inspire de traditions variées pour produire un résultat original. Cette pratique révèle sa vision du droit et de son propre rôle social en Europe¹⁹⁵². Quelques pratiques illustrent cette tendance. D'abord, et contrairement à la tradition française, la Cour européenne n'utilise pas le syllogisme dans le but de découvrir le bon résultat, mais plutôt pour le justifier¹⁹⁵³. Au bout du compte, ces pratiques ont l'avantage de rendre ses jugements moins autoritaires et énigmatiques¹⁹⁵⁴. Deuxièmement, bien que la Cour européenne ne soit pas liée comme les cours de

¹⁹⁵⁰ Schamahnèche ajoute qu'en pratique, la Cour européenne insère des résumés détaillés de ses décisions à la version papier de ses jugements. *op. cit.*, p. 391.

¹⁹⁵¹ *Ibid.* p. 543.

¹⁹⁵² *Ibid.*, p. 464.

¹⁹⁵³ *Ibid.*, p. 448-9. D'après Schahmanèche, cette pratique cultive la confusion plutôt que la clarté. Par ailleurs, des motifs abondants ne sont pas une garantie de décisions claires.

¹⁹⁵⁴ C. Grewe, "Le juge constitutionnel et l'interprétation européenne", F. Sudre (dir.), *L'interprétation de la CEDH*, Bruxelles, Bruylant, (1999), pp. 199-229, p. 214.

Common Law par la règle de *stare decisis*, elle utilise tout de même une approche casuistique et fonde ses décisions sur ses jugements précédents¹⁹⁵⁵, satisfaisant ainsi aux impératifs de la sécurité et de la prédictibilité du droit. Cette flexibilité lui permet de faire librement usage du droit étranger sans risquer de controverses comparables à celles auxquelles s'expose la Cour suprême quand elle cite le droit étranger dans ses décisions¹⁹⁵⁶. Enfin, contrairement au style judiciaire français, formaliste et laconique, la Cour européenne fait usage de considérations extra légales.

74. La structure stratégique des jugements européens est aisée à expliquer. Le jugement Européen n'a qu'une force déclaratoire. C'est pourquoi la Cour a besoin de convaincre son public, en particulier les États défendeurs, de la justesse et la nécessité du respect de ses jugements.

4.1.2. Des structures décisionnelles américaines non systématiques.

75. Après avoir cherché des études de la méthodologie et du style rédactionnel de la Cour européenne des droits de l'homme et constaté que la bibliographie était relativement abondante, l'inexistence d'une étude similaire, regardant le style rédactionnel, rhétorique, de la Cour suprême est remarquable. Seulement quelques articles se sont penchés sur la structure des opinions des justices en s'appuyant sur la rhétorique, cependant leur analyse regarde la stratégie judiciaire¹⁹⁵⁷ et l'acceptabilité de ses décisions par l'opinion publique et les autorités publiques plutôt leur structure.
76. Des explications à cette absence existent. D'abord, contrairement à la Cour européenne, les « opinions », comme on les nomme usuellement, de la Cour suprême ne sont pas rédigées par un service administratif spécialisé de la Cour, mais par les Justices eux-mêmes, assistés de clercs. C'est pourquoi chaque opinion est remarquable par son style

¹⁹⁵⁵ F. Matscher, "40 ans d'activités de la Cour EDH", *Recueil des Cours de l'Académie de Droit International* (1997), pp. 240-396, p. 304.

¹⁹⁵⁶ Schamahneche, *op. cit.*, p. 445. C'est une pratique courante de la Cour suprême. Par exemple, dans l'affaire case *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), elle examinait la conformité de la législation en question non à la lumière d'une disposition constitutionnelle spécifique, mais par rapport à un précédent sur le droit à l'avortement, *Roe v. Wade*, 410 U.S. 113 (1973)

¹⁹⁵⁷ Wetlaufer se concentre sur le langage juridique en tant que rhétorique, mais il l'aborde en comparant le langage juridique à d'autres types de littérature Classique. Son article n'est pas consacré aux arrêts de la Cour suprême ou aux usages rhétoriques et argumentatifs généralement. Cependant, ses observations peuvent être utiles à cette thèse. Wetlaufer, *op. cit.* Chemerinsky se concentre sur la stratégie de la Cour suprême pour assurer l'acceptabilité de ses décisions, plutôt que sur une analyse du langage de ses décisions. See Erwin Chemerinsky, "The Supreme Court of California 2007-2008. Foreword: Judicial Opinions as Public Rhetoric", *California Law Review*, vol. 97, (2009), p. 1763-1784. See also Erwin Chemerinsky, "The Rhetoric of Constitutional Law", *Michigan Law Review*, Vol 100 (2002), pp. 2008-2035. (Il souligne que le langage rhétorique peut améliorer la voix individuelle de chaque juge, et faire en sorte que leurs décisions aient l'air libre de tout jugement de valeur, et éviter l'indétermination, et les valeurs juridiques que les cours essaient de mettre en œuvre, comme la stabilité). Voir également Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings", *Chicago Law Review*, Vol. 62, 1995 p.1371-1419.

personnel et son propre mode de raisonnement¹⁹⁵⁸. Par exemple, le style de Justice Scalia est célèbre pour ses caractéristiques propres¹⁹⁵⁹. Selon Walds, « *comme Hemingway, les autres juges rédigent de manière lapidaire, et abhorrent les adjectifs descriptifs ; tandis que d'autres se délectent de glisser des mots exotiques dans leurs opinions, conçus pour que leurs lecteurs, dont les autres juges, se précipitent sur leur dictionnaire. On écrit ce que l'on est, et peut-être plus que les autres, les juges sont ce qu'ils écrivent*¹⁹⁶⁰. » La citation de Walds s'applique surtout au style que les juges utilisent dans leurs opinions séparées. La plupart du temps, leur style rédactionnel utilise un « ton impersonnel¹⁹⁶¹ », qui se concentre sur « la déduction, le syllogisme et les arguments très rationnels¹⁹⁶² ». Pour avoir l'air impersonnel, les juges utilisent « *des expressions telles « la cour ceci » ou « la cour cela »—le « nous » impérieux. Le style impersonnel a été conçu pour montrer que la Cour est une institution collective dont le rôle est de dire le droit, plutôt que trois, six ou douze individus*¹⁹⁶³ ». Cependant, la pratique des opinions séparées tend à fragiliser l'image collective de la Cour suprême en permettant l'individualisation des opinions et en exposant les Justices à des critiques, visant leur abus de discrétion, ou leur activisme. Le style de la Cour suprême est dès lors un compromis, puisqu'elle envoie à la fois le message qu'elle est une institution neutre et « collective », et une pratique pédagogique consistant dans l'explication par les juges de leur mode de pensée, et des autres approches existantes pour aborder une même question de droit.

¹⁹⁵⁸ Pour cette raison, de nombreuses études politiques se sont penchées sur le style littéraire de chacun des Justices, et ont tenté de prédire les futurs résultats en se basant sur leur idéologie et leur philosophie judiciaire depuis les années 1960. La bibliographie est importante, et ne peut donc être complète. Voir par exemple. G. Schubert, *Quantitative Analysis of Judicial Behavior*. Glencoe, Ill.: Free Press (1959), R. Johnston, "Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts", In Peabody Robert L. (ed.), *Cases in American Politics*, New York: Praeger (1976), pp. 71–110; C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978," *American Political Science Review*, Vol. 75, No. 2 (1981), pp. 355–367. Plus récemment: D. Katz, M. J. Bommarito II, J. Blackman, "A general approach for predicting the behavior of the Supreme Court of the United States", *PLOS* (April 12, 2017) <https://doi.org/10.1371/journal.pone.0174698> Noter que certains chercheurs ont commencé à étudier la Cour européenne sous cet angle: N. Aletras, D. Tsarapatsanis, D. Preotiu-Pietro, V. Lampos, "Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective", *PeerJ Computer Science* 2:e93 (2016) <https://doi.org/10.7717/peerj-cs.93>.

¹⁹⁵⁹ Wald, *op. cit.*, p. 1516. Le ton de Justice Scalia est connu pour être des plus sarcastiques. Aussi, pour Wetlaufer, parfois au lieu de la déduction et le syllogisme et les arguments hautement rationnels, les juges "écrivent avec une passion qui ressemble plus à de la rhétorique politique qu'à ce que je décris comme la rhétorique juridique », Wetlaufer, *op. cit.* p. 1563.

¹⁹⁶⁰ Wald, *op. cit.*, p. 1415.

¹⁹⁶¹ *Ibid.*, p. 1418.

¹⁹⁶² Wetlaufer, *op. cit.*, pp. 1562–3.

¹⁹⁶³ *Ibid.*, p. 1418.

77. La structure des jugements de la Cour suprême est visiblement moins systématique et constante que celle de la Cour européenne. Cependant, si on jette un coup d’œil rapide à des jugements rendus à différentes périodes, on peut constater une évolution. La plus visible a été l’introduction (ou la réintroduction) des opinions séparées¹⁹⁶⁴. Par ailleurs dans les années soixante, la Cour suprême a commencé à intégrer un résumé sommaire, contenant quelques faits de l’affaires, et des résumés de chacune de ses conclusions, et spécifiant l’existence ou non d’opinions séparées. Cela a rendu les opinions de la Cour suprême plus accessibles à son public et aux chercheurs. Par ailleurs, quelques opinions sont structurées en plusieurs parties numérotées, mais sans titre¹⁹⁶⁵. Néanmoins, cette structure n’est pas une règle, puisque même de nos jours, ce « plan » n’est pas une constante dans les opinions de la Cour suprême¹⁹⁶⁶. Cependant, il est possible de constater quelques constantes dans les jugements de la Cour suprême¹⁹⁶⁷.

78. La structure des opinions judiciaires est importante pour cette étude. La Cour européenne cite systématiquement et de manière extensive ses propres décisions passées, et souvent l’essence de ses décisions passées. Elle utilise aussi en règle générale les mêmes citations (arguments ou motifs) de ces décisions, qui deviennent partie prenante de ses nouvelles décisions. C’est pourquoi nombreuses sont les affaires contenant des références à l’opinion publique copiées au mot près dans d’autres décisions. Dès lors, si la même jurisprudence et les mêmes citations sont toujours les mêmes, la pertinence des références à l’opinion publique dans toutes les affaires n’est pas garantie. L’opinion publique n’est donc pas pertinente dans la décision finale dans toutes les affaires. Au contraire, la multiplication de ces citations tend à gonfler superficiellement le nombre d’affaires dans lesquelles la Cour européenne se réfère à

¹⁹⁶⁴ Pour une histoire des opinions séparées: B. Friedman, A. Marin, , T. Bennett, S. Navarro Smelcer : *Devide and Concur, Separate Opinions and Legal Change* (August 30, 2016). Accessible en ligne sur http://www.law.northwestern.edu/research-faculty/colloquium/law-economics/documents/2015_Spring_Friedman_Divide.pdf Ils y affirment qu’en Common Law, la manière de publier en “seriatim”, c’est-à-dire quand chaque juge publie sa propre opinion, était une tradition. Cependant, le justice Marshall avait uni la Cour en éliminant cette pratique en faveur de l’unanimité et la décision unique. Ses successeurs ont permis les opinions séparées, mais jusqu’aux années 1940, cette pratique était rare. *Ibid.*, p. 114.

¹⁹⁶⁵ Le plan est généralement organisé de la façon suivante: Les parties principales est intitulées en nombres romains, I II III, puis en sous-parties A, B, C, etc.
¹⁹⁶⁶ See for example *Furman v. Georgia*, 408 U.S. 238 (1972)

¹⁹⁶⁷ Dans la première partie, la Cour décrit généralement les faits et la procédure suivie par le requérant jusqu’à la soumission jusqu’à ce que la requête lui soit parvenu. Dans la deuxième partie, la cour fait le point sur le droit applicable et la question de droit dans l’affaire. Dans une troisième partie, la Cour discute généralement les arguments des parties, puis conclut sa décision par motif et dispositif. Certaines décisions contiennent plus de parties, ou n’utilisent simplement pas de plan visible.

l'opinion publique. La Cour suprême, si elle cite ou se réfère facilement à sa jurisprudence passée, n'en cite pas systématiquement, ni les mêmes parties des décisions. C'est pourquoi la présence de références à l'opinion publique est généralement plus pertinente dans ces affaires. C'est pourquoi la connaissance des pratiques rédactionnelles des deux Cours assiste l'analyse de la pertinence de chaque référence à l'opinion publique.

4.2. Mise en place de la base de données : le choix des indicateurs de l' « opinion publique »

79. Cette thèse examine les éléments institutionnels (règles de fonctionnement) et substantiels (jugement écrits) qui révèlent le rôle que les juges réservent à l'opinion publique dans leurs décisions. Bien qu'ayant mis en place des critères de sélection des affaires qui seront objets de l'analyse, cette thèse n'est pas une étude empirique. Les données statistiques sur la correspondance entre l'État de l'opinion publique sur des sujets donnés, et la solution contenue dans les opinions des juges n'est pas pertinente ici. Non seulement nous estimons que de telles données n'établiraient pas de lien de causalité entre l'opinion publique et les décisions des juges, puisqu'on ne pourrait savoir par exemple si l'opinion conduisait réellement les juges à décider d'une manière ou d'une autre, mais leur inclusion rendrait l'analyse comparative difficile voire impossible, puisque les données statistiques concernant l'État de l'opinion dans les 47 Etats membres du Conseil de l'Europe sur des questions européennes des droits de l'homme manquent encore. Les développements ci-dessous expliquent comment les affaires contenant des références à l'opinion publiques ont été identifiées. Deux critères ont été appliqués dans la recherche des termes : d'abord, un critère textuel et synonymique, puis un second critère institutionnel. Une fois ces critères mis en place, nous procéderons à une description des différentes étapes de construction de la base de données.

4.2.1. Critère textuel et synonymique

80. Ceci est une description des critères utilisés pour identifier les affaires incluses dans la base de données construite pour les besoins de cette thèse. Nous nous sommes d'abord attachés au développement de méthodes visant à identifier les affaires contenant des références directes à l'opinion publique et leurs synonymes dans les jugements sur le mérite de la Cour suprême et de la Cour européenne des droits de l'homme.

81. Le premier critère synonymique est, pour sa part, sans doute le plus logique : s'il y a pléthore de définitions de l'« opinion publique », le terme a également de très nombreux synonymes. En philosophie, le principal élément de la définition, « opinion », renvoie à une croyance, avec le présupposé que cette croyance est imaginaire ou fausse. En français, la signification de ce terme a évolué, partant d'un positionnement intellectuel ou d'une hypothèse, puis le terme a été progressivement exclu du langage scientifique. Au XIX^{ème} siècle, il acquiert un sens collectif. Dès le XVII^{ème} siècle, l'expression « opinion » faisait référence à un « *ensemble d'idées, de jugements partagés par plusieurs personnes (1563), par une partie du groupe social, notamment dans les expressions comme opinion publique (1590), puis absolument (1762). Il est employé spécialement en sociologie politique pour désigner le type de pensée sociale qui consiste à prendre position sur des problèmes d'intérêt général, et absolument, l'ensemble des attitudes d'esprit dominantes dans une société* ¹⁹⁶⁸ ». Ce bref résumé montre à quel point le terme « opinion » a évolué dans son usage, en particulier en science sociale, d'un sens intellectuel et positif à un mot possédant des connotations négatives. Encore aujourd'hui, l'étendue des significations données à ce terme est encore très large, selon le contexte.
82. D'autres termes sont utilisés dont la signification est proche. Ainsi, « l'opinion publique » se transforme vite en « l'opinion », ou l'« Opinion » ; elle s'applique à des publics particuliers, de différents territoires, on lui attribue « différents courants », il en existe des « mouvements ¹⁹⁶⁹ ». Elle devient également « le public », ou plutôt « le grand public », même si ce dernier terme ne s'applique pas spécifiquement à l'objet politique. Devant la Cour suprême, elle change de nom, devient le « *sentiment dominant* », semble dangereuse sous le terme de « *communauté enragée* » (« *an enraged community* »), mais peut être rationnelle lorsque qualifiée d'« *indignation publique bien justifiée* ». Elle peut être consensuelle, représenter le « *consensus des opinions de la société* », ou passagère, en parlant d'« *une grande vague de passions* ».

¹⁹⁶⁸ Alain Rey (ed.), « opiner », *Dictionnaire historique de la Langue Française*, Paris, Robert (2009), p. 1475 (souligné dans le texte original).

¹⁹⁶⁹ D'après les définitions d'"opinion" et "public", *Petit Robert de la langue française*, Paris, Robert, (2012). Ce dictionnaire propose d'autres exemples d'usages communs et populaires du terme « opinion publique », qui seront utiles dans notre tentative d'identification des différents usages qui peuvent être trouvés dans les opinions écrites.

publiques »¹⁹⁷⁰. Elle peut enfin simplement représenter un soutien précieux, sous la forme de la « *confiance publique* »¹⁹⁷¹.

83. En appliquant le critère textuel et synonymique, nous avons constaté que la Cour européenne comme la Cour suprême font également référence à l'opinion publique sous d'autres termes, tels les « *sondages d'opinion* ». Les « *pressions politiques* » ou la « *pression publique* » sont mentionnées, en particulier regardant les « *questions préoccupant le public* ». Les renvois directs et indirects peuvent donc varier : l'opinion publique peut entrer en considération par référence à des modes de mesure, « le sondage » ou les « enquêtes » d'opinion, elles-mêmes traitées plus ou moins précisément, avec ou sans référence à des données précises. Sur la base de cette recherche préliminaire, on peut conclure que l'opinion publique et ses synonymes plus ou moins lointains doivent être inclus à l'étude pour apprécier de manière la plus complète possible le rôle que joue celle-ci dans la protection des droits. En effet, sans les synonymes, la recherche est trop vite réduite et ne peut plus rendre compte de l'importance réelle du phénomène: les tribunaux ne nomment pas toujours toutes les autorités sur lesquelles ils s'appuient pour prendre une décision.

4.2.2. Construction de la base de données

84. La comparaison des références demande de choisir les termes qui seront comparés. Ce choix a été inspiré des publications existantes sur des sujets similaires, telle l'étude pionnière de Marshall en 1989, une étude du rôle de l'opinion publique dans les décisions de la Cour suprême utilisant des données statistiques. Marshall explique la méthode de construction de sa base de données, qu'il utilise pour définir le nombre et la fréquence des références à l'opinion publique dans les décisions de la Cour suprême en général. Bien que l'étude de Marshall soit empirique, sa méthode a contribué à définir celle qui est utilisée dans ce travail pour la sélection des affaires. Nous nous sommes donc inspirés des termes de recherche utilisés dans son étude à la Cour

¹⁹⁷⁰ *Ibid.* D'après Marshall, « *Parce que tant de synonymes de l'opinion publique sont apparus dans les décisions de la Cour, il est impossible de compter précisément les décisions qui se réfèrent à l'opinion publique. Au total, les synonymes proches semblent beaucoup plus nombreux que les mentions directes du terme « opinion publique* » ». T. Marshall, « *Public Opinion and the Supreme Court* » (1989), *op. cit.*, p.32.

¹⁹⁷¹ Cour EDH, *Stafford c/ Royaume Uni*, req. N° 46295/99, 28 May 2002, (opinion concurrente des juges Zagrebelsky and Tulkens).

européenne et à la Cour suprême, en limitant la recherche de la base de données américaine aux affaires concernant les droits constitutionnels.

85. La recherche s'est d'abord concentrée sur l'expression « opinion publique » dans les bases de données publiques de chaque Cour, puis s'est étendue à ses synonymes. Puis la recherche a été étendue en anglais aux expressions « opinion of the public » (opinion du public), « public sentiment » (sentiment du public), « prevailing sentiment » (sentiment dominant), « public passion » (passion publique), « majority opinion » (opinion majoritaire), « public confidence » (confiance du public), « changing attitudes » (attitudes changeantes), « evolving opinion » (opinion changeante), puis « informed opinion » (opinion informée), et « social attitudes » (attitudes sociales). Puisque le terme « opinion publique » peut être utilisée en référence à opinion locale, nationale ou même internationales, la recherche a été étendue également à « international opinion » (opinion internationale) et « European opinion » (opinion européenne).¹⁹⁷² Considérant également le fait que la science sociale utilise d'autres termes pour faire référence aux outils statistiques, nous avons inclus les termes de « opinion survey » (enquête d'opinion) et de « sondage d'opinion ». Seul, le terme de « poll » a été exclu car il est trop souvent assimilé au terme de « vote », et donc au droit de vote. Il existe également des synonymes plus courts du terme « opinion publique ». L'un est « the public » (le public). Cependant, celui-ci a inévitablement été trouvé trop fréquemment dans les jugements, et trop souvent associés à des termes non pertinents, c'est pourquoi il a été exclu de la liste des synonymes. Pour ne pas pour autant l'oublier complètement, nous avons préféré procéder à une recherche doublée, en cherchant dans les jugements présélectionnés, contenant déjà des références à l'opinion publique stricte, des références au « public », et en les incluant lorsque celles-ci étaient pertinentes pour les besoins de cette étude. En appliquant cette méthode, d'autres références secondaires ont été trouvées, comme par exemple « opinion of the public » (opinion du public)¹⁹⁷³. « Majority opinion » (opinion majoritaire) a également été trouvé. Cependant, dans la plupart des cas, « majority opinion »

¹⁹⁷² J'aurais pu également inclure le terme « communauté internationale », mais ce terme a plus d'un sens qui renvoie plus souvent dans son usage à une communauté d'États, et n'est pas toujours utilisé comme synonyme de l'opinion publique.

¹⁹⁷³ Par exemple, trop nombreuses sont les décisions qui sont utilisées en mentionnant « l'opinion du procureur de la république », ce qui en anglais contient les mots « opinion du public » : « in the *opinion of the public prosecutor* ».

renvoyait à l'opinion majoritaire des juges, c'est-à-dire au jugement de la majorité des juges de l'une ou de l'autre Cour.

86. Suivant la méthode de Marshall, le terme « consensus » a été inclus à la recherche, mais finalement exclu. En effet, dans le cas de la Cour Européenne, le « consensus » fait trop souvent référence à une doctrine jurisprudentielle utilisée pour décider si le droit a suffisamment évolué dans les États contractants pour justifier une évolution du droit européen. Même si cela ne manque pas de pertinence dans cette étude, les références à cette doctrine étaient trop fréquentes, en particulier du fait que la Cour européenne cite souvent le texte de ses propres jugements, et ce de manière systématique lorsqu'elle confirme une jurisprudence passée. C'est pourquoi, afin que notre étude soit la plus complète possible, le terme « consensus » a été inclus dans le cadre d'une double recherche, c'est à dire après une première sélection des affaires contenant déjà des références directes à l'opinion publique. Nous noterons en outre qu'une recherche plus poussée a identifié l'usage de références spécifiques, comme par exemple « anti-roma sentiment », un équivalent de « inimical public opinion » (opinion publique hostile) envers la communauté des gens du voyage, qui a été incluse à nos données. Dans le cas de la Cour suprême, le terme « consensus » a été trouvé dans de trop nombreuses affaires, doublant d'un coup le volume de la base de données et rendant l'étude potentiellement irréalisable. Après un examen des références, nous avons conclu que « consensus » était également utilisé comme doctrine jurisprudentielle dans les affaires appliquant le Huitième Amendement, ou au « consensus » parmi les juges, comme méthode de prise de décision. Le terme a donc été inclus en seconde recherche, comme c'est expliqué ci-avant, après présélection. La recherche a été également étendue aux synonymes des « views of a majority » (points de vue d'une majorité). Là, la Cour suprême révélait sa philosophie concernant la relation entre la volonté de la majorité et celle des minorités en démocratie.

87. Dans l'affaire *Borgers v. Belgium*, la Cour européenne s'était également référée à la « sensibilité du public » à l'administration de la justice¹⁹⁷⁴. Puisque la Cour européenne

¹⁹⁷⁴ Peu d'affaires ayant fortement mobilisé l'opinion publique et le débat public ont été répertoriées, même si aucune référence directe à l'opinion publique n'ait été faite dans la décision. Nous les avons donc mises de côté, gardant à l'esprit qu'elles seraient utilisées seulement comme exemple d'une pression externe de l'opinion publique, mais pas dans le cadre d'une analyse de la substance des décisions. Une de ces décisions est l'affaire *Lautsi c/ Italie*, qu'on a appelé "l'affaire du crucifix". Un premier jugement en chambre a été rendu en 2009, Cour EDH *Lautsi c/ Italie*, req. N°. 30814/06, 3

a deux langues officielles, certains jugements ne sont publiés qu'en une langue, en particulier en français. La recherche de certains termes (opinion publique, « opinion internationale », « sondage », et leurs équivalents français) a donc été appliquée à des décisions non publiées en anglais. Sept affaires ont donc été ajoutées à notre base de données.

4.2.3. *Tendances générales*

88. Lors de la première étape de sélection des affaires, de la base de données officielle de la Cour européenne, HUDOC, un total de 299 affaires (dont des affaires rédigées exclusivement en français) incluant des références à l'opinion publique ou des termes synonymes ont été sélectionnées. Sur les sites professionnels *Westlaw Next*¹⁹⁷⁵ et *FindLaw*¹⁹⁷⁶, nous avons compté 271 décisions de la Cour suprême¹⁹⁷⁷. La recherche de jurisprudence européenne a d'abord été limitée aux jugements au mérite rédigés en anglais, rendus par les chambres et Grande Chambre de la Cour européenne depuis sa création. La décision de se limiter aux jugements au mérite était basée sur le fait ces jugements sont plus détaillés, et l'analyse rendue plus riche par plus de visibilité, notamment des arguments juridiques et non juridiques. Notons que les décisions de la Commission européenne n'ont pas été incluses dans notre base de données, puisqu'une première recherche de ses décisions a montré que les mentions directes de l'opinion publique étaient quasi inexistantes.

89. Lors d'une deuxième étape, les affaires ont été classées par thème ou fondement juridique. Parmi les affaires de la Cour suprême, un grand nombre, 74, était basé sur une des clauses du Quatorzième amendement (clause d'égalité et clause d'interdiction de la discrimination), souvent combinée avec d'autres dispositions constitutionnelles. Avec 72 affaires, le deuxième groupe le plus important était celui rassemblant les affaires de liberté d'expression (Premier Amendement, liberté d'expression et d'association, à l'exclusion de la liberté de religion). Le troisième groupe rassemblait 32 affaires concernant l'interdiction d'amendes excessives, et des peines cruelles et

novembre 2009. Le jugement définitif a été rendu par la Grande Chambre en 2011 : Cour EDH, Gr. Ch., *Lautsi c/ Italie*, req. n° 30814/06, 18 Mars 2011.

¹⁹⁷⁵ Westlaw Next, accessible sur <http://next.westlaw.com/>

¹⁹⁷⁶ <http://caselaw.findlaw.com/court/us-supreme-court> Noter que la recherche n'a exclu aucune période, et incluait toute la jurisprudence depuis la fondation de la Cour suprême jusqu'aujourd'hui (la base de données inclut toutes les affaires jusqu'en juillet 2016)

¹⁹⁷⁷ J'ai également gardé de côté dans une base de données séparée des décisions auxquelles Marshall fait référence dans ses deux études datant de 1989 et 2008.

inusitées (Huitième Amendement). Le Cinquième (protection du droit de propriété) et le Sixième (droit à un recours rapide par un jury) Amendements ont rassemblé une dizaine de décisions chacun. Les décisions fondées sur le Huitième amendement rassemblent les références à l'opinion les plus directes et les plus variées. De nombreux jugements de la Cour suprême ont été exclus, puisqu'ils ne contenaient pas de question constitutionnelle liée aux droits, ou concernaient plutôt un appel devant la Cour suprême en sa fonction de Cour d'Appel. Ces affaires avaient des dimensions plus institutionnelles, concernant le commerce entre les États fédérés, le pouvoir présidentiel, ou le pouvoir du Congrès. Restaient tout de même un nombre substantiel de 264 affaires.

90. La tendance est assez similaire parmi les jugements européens, bien que la plupart des jugements soient fondées sur de multiples articles de la Convention, ce qui rend le classement moins aisé. Le groupe le plus important, avec 150 jugements, regarde la liberté d'expression (article 10). Environ 75 concernent le droit à un procès équitable et les droits de procédure (Article 6). Les autres groupes d'importance incluent les affaires fondées sur l'Article 14, qui doit être combiné avec un autre article de la Convention. Enfin, de nombreuses affaires concernent le droit au respect de la vie privée et familiale (Article 8). Ces deux derniers articles rassemblent respectivement 45 et 70 jugements. Beaucoup moins importantes sont les affaires concernant l'article 5 (droit à la liberté et sûreté), l'article 2 (droit à la vie) et article 3 (interdiction de la torture et des traitements inhumains et dégradants). Il est bon de souligner que du fait des multiples bases légales utilisées dans les requêtes européennes, il n'est pas toujours aisé de mettre de côté les affaires non pertinentes. Certaines références à l'opinion publiques pourraient en outre s'appliquer à une base légale plutôt qu'à une autre, ou être simplement incluses dans les faits. En outre, dans 15 affaires, l'article 8 était combiné à l'Article 14, qui ne peut être invoqué seul. Dans ce cas l'affaire pourrait être classée sous le thème « interdiction de discrimination ». Cependant, notre priorité n'était pas de « coder » les jugements, mais de les classer par ordre d'importance avant de faire des choix de thème d'analyse.

91. Cet aperçu du type d'affaires les plus à même d'être associées à des références à l'opinion publique est utile pour plusieurs raisons. Afin que l'analyse soit pertinente et à même d'enrichir la connaissance, nous avons préféré nous concentrer sur un thème

qui soit représentatif, sur des affaires qui contiennent le plus fréquemment des références à l'opinion publique. A notre sens, l'analyse des groupes où de telles références sont rares aurait peu de valeur de départ, mais apporterait des nuances intéressantes après l'analyse des groupes les plus importants.

4.2.4. Combinaison des thèmes avec quatre théories

92. L'étude de Marshall sur le rôle de l'opinion publique dans les décisions de la Cour suprême tentait de montrer l'existence d'un lien, bien que non causal, entre les résultats des décisions de la Cour et les tendances générales dans l'opinion publique américaine. Bien que son étude ne détaille pas la question du rôle que jouent les références à l'opinion publique dans le processus décisionnel, il élabore quatre théories expliquant comment la Cour suprême perçoit l'opinion publique et son rôle dans la société. Nous avons choisi de nous inspirer de ces quatre théories comme point de départ de notre analyse.
93. La première théorie de Marshall concerne les affaires de liberté d'expression. Pour lui, la Cour suprême considère que « *certain types de discours informant l'opinion publique, et que même des discours controversés et impopulaires méritent une protection juridique*¹⁹⁷⁸. » Selon cette théorie, la Cour suprême voit l'opinion publique d'un bon œil, dès lors elle possède une influence positive et légitime sur la démocratie américaine. La seconde théorie examine la relation entre opinion publique et protection des droits constitutionnels. L'opinion publique est conçue comme un « contrôle des gouvernements » en cas d'abus. Pour cette raison, il n'est pas besoin d'activisme judiciaire pour protéger les citoyens. En conséquence, les juges se doivent d'exercer une certaine modération dans leur protection des droits¹⁹⁷⁹. La troisième théorie est plutôt orientée vers une approche sociologique, c'est-à-dire dynamique et évolutive, du droit et de la fonction judiciaire. Dès lors, les juges sont appelés à abolir les législations qui sont incompatibles avec ce que pense l'opinion. Par contraste, la quatrième théorie semble considérer l'opinion comme une menace pour la démocratie. La force puissante de la majorité peut faire pression sur les minorités et les rendre silencieuses, au détriment de la liberté d'expression et des droits constitutionnels.

¹⁹⁷⁸ Marshall "Public Opinion and the Rehnquist Court", (2008), p.10.

¹⁹⁷⁹ *Ibid.*, p.11.

94. Parmi ces quatre théories, deux grands thèmes dominant : celui de la relation entre l'opinion publique et la démocratie, et celui de la relation entre l'opinion publique et l'évolution du droit. Ces deux thèmes dominant également le débat sur l'activisme et l'autolimitation des juges. La difficulté « contremajoritaire », comme l'appellent la doctrine américaine, se soucie du rôle des juges dans la démocratie, et de décider si les juges devraient laisser le peuple prendre toutes les décisions, avec tout le potentiel d'abus que cette forme de populisme pourrait provoquer pour les droits constitutionnels. Ce débat concerne aussi celui de l'évolution juridique, et la question de savoir si oui ou non les décisions des juges réagissent favorablement à l'expression de l'opinion publique, ou vont à son encontre lorsqu'ils font évoluer le droit. Puisque les groupes de décisions les plus importants dans notre base de données sont des affaires de liberté d'expression et de discrimination, le droit à la protection contre la discrimination ayant fortement évolué ces dernières décennies, nous avons décidé de sélectionner ces deux thèmes pour notre analyse.

4.3. Sélection des jugements en vue de l'étude comparée

95. Après avoir rassemblé un grand nombre de jugements contenant des références directes à l'opinion publique, une seconde sélection devait être opérée afin de pouvoir offrir une analyse assez approfondie de chaque thème. Les développements suivants décrivent la méthodologie suivie pour concentrer l'analyse sur les aspects les plus pertinents de ces affaires et de ces thèmes. La sélection des jugements a été axée sur l'analyse comparative projetée pour chaque thème.

4.3.1. Choix thématiques

96. L'aperçu décrit ci-avant des affaires rassemblant le plus de mentions directes de l'opinion publique est utile pour plusieurs raisons. Afin que l'analyse soit plus utile, et plus représentative, cette étude devra se concentrer sur l'échantillon le plus représentatif possible. On pourrait choisir d'analyser un échantillon représentatif au cas-par-cas, ou une approche thématique, qui se concentrerait sur le thème rassemblant les références à l'opinion publique les plus nombreuses. Puisque certains articles de la Convention sont sous-représentés, tels par exemple les articles 1, 2, 3 du Protocole 1, nous avons préféré une analyse thématique, axée en priorité sur les affaires de liberté d'expression et d'association (Premier Amendement d'une part, Article 10 de la Convention d'autre part), et sur une approche plus thématique et axée un domaine du droit ayant évolué de

manière substantielle lors des dernières décennies : les droits des personnes homosexuelles.

97. Ces deux thèmes ont été choisis en partant de l'hypothèse selon laquelle l'opinion publique jouerait un rôle différent selon le droit en question, et l'importance de ce droit. Par ailleurs, l'étude de deux thèmes est à notre sens plus à même de fournir une représentation plus complexe et complète de la conception que les juges se font du rôle de l'opinion publique. D'autre part, le choix de trois thèmes aurait rendu l'étude probablement plus difficile, dans le cadre d'une thèse ayant pour but de construire, en plus de l'approche institutionnelle, une analyse la plus complète possible du raisonnement des juges et de la conception qu'il se font de l'opinion publique et de son rôle dans la démocratie et dans leur processus de décision. Enfin, se limiter à deux thèmes suffisait à notre sens pour explorer les deux débats doctrinaux liés au rôle de l'opinion publique en démocratie, abordés dans le premier chapitre. De nombreuses écoles de pensée considèrent les tribunaux comme des modèles et gardiens de la rationalité, du raisonnable et de la civilisation, qu'ils opposent aux institutions politiques représentatives, et voient dans la qualité « contre-majoritaire » de l'institution judiciaire une sauvegarde plutôt qu'une menace pour la démocratie. La recherche considère également que les juges possèdent le savoir-faire nécessaire pour rendre le droit flexible et adaptable aux conditions et besoins actuels ainsi qu'aux attitudes contemporaines. La Cour suprême comme la Cour européenne montrent leur volonté d'agir en tant que protecteurs des droits des minorités contre les abus majoritaires, les pressions de l'opinion publique et les abus des gouvernements. En tant que protecteurs d'un droit flexible et adaptable, les deux institutions ont parfois adopté une approche dynamique de l'interprétation, et ont adapté la protection des droits aux besoins contemporains.

98. La première analyse de cas sera consacrée à la conception judiciaire du rôle de l'opinion publique en démocratie. Puisque l'opinion publique est souvent utilisée comme synonyme du « peuple », ou de la « majorité », certains présupposent qu'elle possède au moins partiellement une légitimité démocratique. Ainsi, la volonté du peuple ne peut se manifester dans la vie publique que si le public peut exprimer ses opinions, c'est-à-dire seulement dans le cas où la liberté d'expression est pleinement respectée. Dès lors, la manière dont l'institution judiciaire décrit l'opinion publique, d'une manière positive

ou négative, nous informe du pouvoir et de la liberté que l'institution judiciaire accorde à l'opinion dans son propre système juridique et politique. Elle révèle également la philosophie politique de la démocratie qui domine dans chaque institution.

99. Le choix du deuxième thème d'analyse était basé sur trois critères. D'abord, les jugements devaient avoir une importance numérique équivalente dans chacune des bases de données. Ensuite, le thème devait inclure un domaine du droit pour lequel les deux cours ont adopté une approche dynamique et évolutive. Enfin, le thème devait s'appliquer à des affaires récentes et pour donner une image actualisée de l'évolution du droit¹⁹⁸⁰. Les affaires concernant les droits des homosexuelles satisfont ces trois critères. Par ailleurs, elles concernent plus d'une base légale : liberté d'expression, droit au respect de la vie privée et familiale, et droit pénal étant les thèmes les plus invoqués dans la protection des droits de cette minorité. Cette diversité des fondements juridiques a l'avantage de fournir une analyse plus complète de notre approche du rôle de l'opinion dans l'évolution du droit en la rendant d'autant plus représentative de l'ensemble des affaires assemblées. Les droits des personnes homosexuelles ont souvent évolué avec l'aide des dispositions interdisant la discrimination. Enfin, les affaires concernant l'homosexualité ont provoqué un débat public vigoureux, qui ont rendu les arguments les plus répandus et « l'humeur du public » accessible aux juges.
100. D'autres raisons faisaient des droits de personnes homosexuelles un thème particulièrement pertinent. Aux États-Unis, la nature de la relation entre les États fédérés et la Cour est particulièrement prononcée dans les affaires de droits des personnes homosexuelles : le Quatorzième amendement a permis aux protections du Bill of Rights d'être applicables aux États fédérés (*Privilege and Immunities Clause*) et interdit la discrimination des groupes « discrets et isolés » (*Equal Protection Clause*). Pour la plupart, les droits ont d'abord évolué localement, et de nombreuses requêtes se remettaient en cause des législations des États fédérés¹⁹⁸¹. En Europe, des requêtes comparables ont elles aussi remis en cause les législations violant un droit protégé par la Convention basées sur le « *fondée notamment sur le sexe, la race, la couleur, la*

¹⁹⁸⁰ Certains thèmes ont également dû être exclus. Un de ces thèmes semblait évident : celui de la protection de la population afro américaine. Il est d'une part sans équivalente dans la jurisprudence européenne. Par ailleurs puisque cette protection date des années 1960 et 1970, elle n'est plus un thème des plus actuels. La même chose pourrait être affirmée au sujet de l'évolution du droit de la famille et du droit au respect de la vie privée.

¹⁹⁸¹ Le sujet de l'évolution des droits des personnes homosexuelles est abordé au chapitre quatre.

langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation ».¹⁹⁸² Dès lors, ces institutions doivent trouver un équilibre entre la protection des minorités et la préservation de relations positives avec les autorités nationales.

101. Des objections compréhensibles pourraient être soulevées concernant la décision de mettre de côté la jurisprudence du Huitième amendement et de l'Article 3 de la Convention. Les affaires concernant les « peines cruelles et inusitées » (Huitième Amendement) ou les « traitements inhumains et dégradants » (Article 3 de la Convention) contiennent souvent des mentions directes de l'opinion publique, même si c'est moins souvent le cas en droit européen. Il existe cependant des différences clef entre les deux jurisprudences, qui diminuent la pertinence d'une étude comparative dans ce domaine. D'une part, même si le caractère potentiellement évolutif des « peines cruelles et inusitées » apparaît évident car faisant référence à ce qui n'est pas commun (« inusité » ou « exceptionnel » selon les traductions), ce qui s'inscrit dans une évolution sociale¹⁹⁸³, le texte de l'Article 3 de la Convention n'inclut aucun qualificatif équivalent suggérant un caractère évolutif. Par ailleurs, le sujet de la relation entre l'opinion publique et l'évolution du Huitième Amendement a été traité et testé dans le domaine juridique comme social¹⁹⁸⁴. Ces différences importantes, ainsi que le petit

¹⁹⁸² Article 14 de la Convention.

¹⁹⁸³ Cependant, le caractère évolutif du Huitième Amendement est implicite au vu de sa rédaction : « Des cautions excessives ne seront pas exigées, ni des amendes excessives imposées, ni des châtiments cruels et exceptionnels infligés ». Huitième Amendement, traduction proposée par la Digithèque de l'Université de Perpignan. Accessible <http://mjp.univ-perp.fr/constit/us1787a.htm> Le terme ici traduit par « exceptionnel » est dans la Constitution originale, « unusual », qui dénote de la rareté de la sanction pénale. Cette rareté s'établit au moment de l'examen de la requête, elle est donc liée à une période donnée, et est appelée à évoluer. Le terme « unusual » implique l'existence d'une relation entre l'interprétation de cette disposition constitutionnelle et le passage du temps : ce qui était « usuel » ou « commun » il y a deux siècles ne l'est plus au XXIème siècle. Telle est l'opinion de Justice Marshall exprimée dans *Furman v. Georgia*, 408 U.S. 238 (1972) à 383 : « Le standard de la cruauté extrême n'est pas seulement descriptif, mais inclut nécessairement un jugement moral. Le standard lui-même reste le même, mais son applicabilité doit changer lorsque les mœurs fondamentales de la société changent. Cette notion n'est pas nouvelle pour le Huitième Amendement. Dans *Weems v. United States*, 217 U. S. 349 (1910), la Cour se référait positivement aux opinions de commentateurs selon lesquelles « la clause de la Constitution [...] peut dès lors être progressiste, et n'est pas attachée à ce qui est obsolète, mais peut acquérir du sens au fur et à mesure que l'opinion devient éclairée par une justice humaine. »

¹⁹⁸⁴ Voir par exemple A. Sarat, N. Vidmar, « Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis », *Wisconsin Law Review* 171 (1976); C.W. Thomas, « Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion », *Vanderbilt Law Review*, Vol. 30, 1005 (1977); N. Vidmar, T. Dittenhofer « Informed public opinion and death penalty attitudes », *Canadian Journal of Criminology*, vol. 23, (1981); R. Bohm, L. Clark, A. Aveni, « Knowledge and death penalty opinion: A test of the Marshall hypotheses », *Journal of Research in Crime and Delinquency*, vol. 28, No. 3 (1991), pp. 360-387. La bibliographie continue de

nombre de références à l'opinion publique dans les affaires fondées sur l'Article 3, même en y ajoutant la jurisprudence appliquant l'interdiction de l'esclavage et du travail forcé, contenue à l'Article 4, ne font que diminuer la pertinence d'une étude comparative de ce domaine, appliquée à la relation entre l'approche évolutive du droit et opinion publique.

4.3.2. Sélection précise de décisions pour les besoins de l'étude approfondie

102. La sélection peut être rendue compliquée pour cause de manque de correspondance exacte entre les droits protégés dans les différents régimes juridiques. Dès lors, afin de comparer le rôle des références à l'opinion publique dans la jurisprudence du Premier Amendement avec les droits équivalents protégés par la Convention, il faudrait inclure la jurisprudence de l'Article 11 (réunion et association) et de l'Article 9 en ce qui concerne la liberté de religion. Par ailleurs, requêtes concernant les droits des personnes homosexuelles ont été soumis aux deux cours sur de nombreux fondements. Le fondement dominant dans les deux cas était le droit à la protection de la vie privée et l'interdiction de la discrimination, souvent combinées à l'interprétation évolutive des droits. Par exemple, parmi les affaires de notre base de données, quatorze des dix-neuf affaires concernant l'homosexualité sont fondées sur l'Article 14 de la Convention¹⁹⁸⁵.
103. Pour la sélection des affaires sur l'homosexualité, l'objectif consistait dans l'obtention d'un petit nombre d'affaires, afin de pouvoir procéder à une analyse plus approfondie du raisonnement et de la doctrine¹⁹⁸⁶. En effet, l'analyse des affaires individuelles permet une analyse plus approfondie des divers éléments du raisonnement judiciaire. Puisque ces arrêts concernent de nombreux aspects des conséquences que peut avoir l'homosexualité sur la vie pratique d'une personne, dont la vie privée, le droit du travail,

nombreuses études de panel qui testent l'opinion concurrente de Justice Marshall dans *Furman* dans la vie réelle depuis 1976 ; par exemple R. Bohm, B. Vogel, "More than ten years after: The long-term stability of informed death penalty opinions", *Journal of Criminal Justice*, vol. 32, No. 4, (2004), pp. 307-327 ; J. Cochran, M. Chamlin, "Can information change public opinion ? Another test of the Marshall hypotheses", *Journal of Criminal Justice*, vol. 33, No. 6, (2005), pp. 573-584. Pour une remise de cause de l'usage des sondages d'opinion pour évaluer le soutien du public pour la peine de mort: P. Jones, "It's Not What You Ask, It's the Way That You Ask It: Question Form and Public Opinion on the Death Penalty", *The Prison Journal*, vol. 74, No. 1 (1994) pp. 32-50.

¹⁹⁸⁵ Notons que les dispositions interdisant la discrimination ne peuvent être utilisées de la même manière en droit constitutionnel américain et en droit conventionnel européen. Les requêtes européennes sont contraintes par l'obligation de fonder leurs prétentions sur un droit protégé par la convention et de le combiner avec l'Article 14 interdisant la discrimination dans l'exercice d'un droit protégé.

¹⁹⁸⁶ R. Yin, *Case Study Research: Design and Methods*, London: SAGE Publications Ltd., (2013)

le droit pénal, une étude thématique a été choisie sélectionnant des thèmes précis parmi les affaires des droits des homosexuels : celle de l'évolution des droits des homosexuels, de la pénalisation à la légalisation du mariage entre personnes de même sexe. Nous n'avons retenu que les affaires concernant le droit à la vie privée et les droits familiaux pour assurer une comparabilité substantielle dans les deux jurisprudences. Au total, six jugements de la Cour suprême et douze arrêts de la Cour européenne contenaient des références directes et indirectes à l'opinion publique. Cette différence numérique, quand on la compare à la correspondance en nombre pour les affaires de liberté d'expression, peut être surprenante. Cependant, même si les requêtes des personnes homosexuelles ont été soumises à peu près à la même époque en Europe et aux États-Unis, la Cour européenne ne bénéficie pas de la discrétion de la Cour suprême dans la sélection des affaires sur lesquelles elle statue. Ceci explique donc la différence en nombre d'arrêts.

104. La sélection des arrêts sur la liberté d'expression était aussi complexe, mais pour une raison différente. La base de données des arrêts européens compte 154 affaires fondées sur l'Article 10, 10 sur l'Article 9, et 20 de plus sur la liberté de réunion. Néanmoins, il est impossible de procéder à une analyse approfondie de plus de 180 arrêts. C'est pourquoi nous avons essayé, quand c'était possible, de réduire notre recherche à des « grands arrêts ». Puisqu'il n'existe aucun consensus sur la définition même d'un grand arrêt¹⁹⁸⁷, nous avons sélectionné les affaires abordées dans les manuels d'étude d'arrêts ou commentés par la doctrine. Ces grands arrêts sont en effet considérés comme des « jalons dans le développement du droit : ils consolident les pratiques fragmentées précédentes ou rompent ouvertement avec elles ; ils limitent [les effets] les doctrines établies ou les étendent à de nouvelles circonstances ; ou ils déclarent l'existence de nouvelles règles ou résolvent des nouvelles questions de droit¹⁹⁸⁸. » Ce choix était fondé sur la prémisse selon laquelle contrairement aux grands arrêts, les autres jugements appliqueraient le droit et les doctrines définis par les grands arrêts. Après cette étape, il ne restait que 34 jugements à analyser dans la base de données de la Cour européenne, contre 28 pour la Cour suprême.

¹⁹⁸⁷ Van den Eynde ajoute à ce sujet que les professeurs expliquent rarement leur méthodologie de sélection des jugements dans leur collections de décisions, au delà de la dimension pédagogique de leur enseignement. Van den Eynde, « Interpreting Rights Collectively », *op. cit.*, p. 27, footnote 196.

¹⁹⁸⁸ *ibid.*, p. 28

105. Ces étapes de sélections ont été volontairement basées sur des critères neutres, pour assurer une correspondance des affaires sans sélectionner des thèmes sur la base d'un intérêt personnel.
106. Chacune des bases de données contenait dès lors un nombre différent d'arrêts. Cependant, au lieu d'être une entrave à l'analyse, cela n'a influencé que l'approche adoptée pour analyser chaque thème. Puisque les mentions de l'opinion publique sont plus nombreuses dans les affaires de liberté d'expression, nous avons préféré consacrer un chapitre à l'exploration de la vision judiciaire du rôle de l'opinion publique en démocratie et dans la fonction de juger, dans ses différentes formes, ses différentes humeurs et manifestations. Celle-ci est susceptible d'informer leur propre vision du rôle de l'opinion dans leurs propres décisions. Elle serait donc, à notre sens, à la base de toutes les références à l'opinion publique dans la jurisprudence appliquée aux autres droits. Les mentions de l'opinion publique serviront d'indices, révélant comment l'opinion publique est perçue, comme par exemple une force positive ou négative dans les démocraties constitutionnelles. Avec une sélection bien plus restreinte d'arrêts concernant les droits des personnes homosexuelles, une étude plus approfondie est plus aisée à appliquer. Elle inclura le rôle des considérations d'opinion publique dans le raisonnement global des deux cours, les méthodes d'inclusion de ces références dans le raisonnement, dans les doctrines jurisprudentielles ainsi que l'évolution juridique.

5. Question de recherche

107. La question de recherche est la suivante : *Quel rôle l'opinion publique joue-t-elle dans le processus décisionnel de la Cour suprême des États-Unis et de la Cour européenne des droits de l'homme ?*

6. Description du plan

108. En leur capacité d'institutions judiciaires souveraines, c'est-à-dire ne répondant de leurs actes devant aucune autre institution, la Cour européenne des droits de l'homme et la Cour suprême des États-Unis entretiennent une relation ambivalente avec le public. Leur raison d'être est d'assurer le respect des droits par les autorités publiques, et de censurer les actes et comportements des autorités publiques qui sont incompatibles avec les droits qu'elles protègent. Elles remplissent ce rôle difficile en montrant leur

engagement ferme en faveur de la démocratie représentative (Chapitre Premier). Cependant, en jugeant parfois des actes démocratiques, c'est-à-dire des actes de gouvernements ratifiés par des représentants élus au suffrage universel, incompatibles avec la Convention ou les droits protégés par la Constitution, les deux cours censurent également, d'une certaine manière, la volonté institutionnalisée du Peuple, ce qui fait naître une « difficulté contre majoritaire ». Cependant, l'histoire nous enseigne que le monde, et bien sûr les institutions judiciaires, ont réalisé que la Volonté du Peuple institutionnalisée par le biais du suffrage universel majoritaire n'est ni parfaite, ni au delà de tout soupçon, ni encore parfaitement représentative de la volonté populaire, qui est un fait très complexe. En conséquence, elles ont à cœur leur mission de protéger les citoyens et résidents contre les politiques abusives des autorités publiques enfreignant les droits essentiels, même si ces politiques bénéficient d'un large soutien populaire. En remplissant leur mission, les deux cours ont montré leur ouverture à la participation de l'opinion publique sous ses différentes formes, dans le cadre de la procédure et en pratique (Chapitre Deux). Cependant, leurs décisions au fond révèle encore une certaine ambivalence quant à leur vision de l'opinion publique. Elle peut être considérée comme une force ayant le potentiel de renforcer la démocratie (Chapitre Trois), ou de guider l'évolution du droit (Chapitre Quatre).

7. Plan sommaire

Chapitre Premier : L'engagement judiciaire en faveur de la démocratie représentative

1. L'opinion publique dans une société centrée sur la volonté du peuple
2. L'institution judiciaire entre forum de principe et institution représentative

Chapitre Deux : L'institution judiciaire comme forum de participation du public

1. La responsabilité publique croissante des institutions judiciaires

2. Les tiers intervenants entre participants, experts et lobbys

Chapitre Trois : Opinion publique et démocratie : La liberté d’expression comme outil indispensable à l’information du public

1. Fondamentaux de la protection de la liberté d’expression : perspective comparée
2. Démocratie, opinion publique, et les limites du principe majoritaire
3. L’ouverture des institutions démocratiques à la critique publique
4. La promotion de l’idéal d’une opinion publique informée

Chapitre Quatre : L’opinion publique comme force modernisatrice des droits

1. Histoire brève des droits des personnes homosexuelles
2. Une dépénalisation de l’homosexualité progressive à vitesse variable
3. Vers la reconnaissance des unions entre personnes de même sexe

Conclusion Générale

*A long terme, la Cour n'est pas
antimajoritaire – elle est majoritaire*

Justice Kennedy¹⁹⁸⁹

109. Cette thèse aborde le rôle de l'opinion publique dans la protection judiciaire des droits. Sa modeste ambition consiste à déterminer ce que les juges dont la fonction est de protéger les droits les plus essentiels, c'est-à-dire des juges dont l'autorité interprétative d'un document légal protégeant les droits s'impose aux autres autorités publiques, considèrent être le rôle de l'opinion publique dans la protection judiciaire des droits.
110. Ce sujet a été choisi dans le contexte d'une prise de conscience académique et politique de l'autorité et de la visibilité publique croissantes des juges. Les discussions politiques et universitaires examinant la légitimité démocratique des juges se font de plus en plus fréquentes. Par ailleurs, l'« opinion publique » est un objet d'analyse utile, puisqu'étant considéré comme un synonyme, sinon un équivalent, de la « volonté du peuple », sa mesure mathématique est un instrument de choix dans la connaissance du soutien du public vis-à-vis des politiques publiques. En outre, après la Seconde Guerre mondiale, l'expression de la volonté démocratique par le biais de l'élection n'est plus réputée infaillible. Dès lors, des systèmes sont élaborés afin de l'encadrer en la confrontant à des valeurs et principes essentiels. Parmi ces valeurs figure le respect des droits individuels. Les institutions judiciaires sont donc choisies pour remplir la tâche de vérifier le respect par la volonté démocratique des droits humains essentiels, et si besoin de la sanctionner. A une époque où l'infaillibilité du corps électoral n'est plus acceptée, la relation entre les juges et leur public, qu'elle se situe à un niveau constitutionnel ou international, peut donc être considérée comme un sujet des plus pertinents.
111. Bien que des études sur la relation entre la Cour suprême des États-Unis et son public aient déjà été publiées, elles concernent dans leur grande majorité le domaine des

¹⁹⁸⁹ J. DeParle, "In Battle To Pick Next Justice, Right Says Avoid a Kennedy", N.Y. TIMES, June 27, 2005, at A1. (Traduit par nous de l'original: "In the long term, the court is not antimajoritarian—it's majoritarian.")

sciences politiques empiriques¹⁹⁹⁰. Certaines incluent, mais seulement partiellement, une analyse du raisonnement de la Cour suprême.¹⁹⁹¹ En Europe, quelques études se sont penchées sur la légitimité de la Cour européenne des droits de l'homme, mais sans s'attarder sur la relation entre les juges et l'opinion publique¹⁹⁹². Afin d'explorer non seulement la relation de l'institution judiciaire et de son public, mais aussi ce type de relation dans différents contextes, national et international, nous avons choisi de procéder à une étude comparative de la Cour européenne des droits de l'homme et de la Cour suprême des États-Unis.

112. Pour effectuer cette recherche sur le rôle de l'opinion publique dans la protection judiciaire des droits, la perspective choisie englobe tout le processus judiciaire de la protection des droits. Dès lors sont inclus les différentes manifestations de la présence de l'opinion publique et de ses organes tout au long de la procédure, c'est-à-dire les acteurs directement ou indirectement investis dans la protection des droits, de la soumission de la requête à la publication du jugement : les parties, les juges, les tiers-intervenants, les autorités publiques et politiciens, les médias et le grand public. Dans le contexte de cette étude, l'opinion publique est considérée comme un synonyme de la volonté du peuple. Cependant, puisque l'opinion publique est devenue un élément si important de la politique contemporaine,¹⁹⁹³ il a paru important de commencer par une clarification de sa définition et de déterminer si cette réalité politique se distingue de la volonté électorale.
113. Nous avons abordé l'importance de l'opinion publique dans le contexte de la gouvernance nationale et internationale à trois différents niveaux. A un premier niveau théorique, il s'est agi de clarifier dans quelle mesure l'opinion publique peut être considérée comme une source de légitimité démocratique en général, et quelles sont les

¹⁹⁹⁰ La première étude de Marshall a été publiée en 1989. En 2008, il publiait une seconde étude actualisant ses données, et appliquées à la période de la Cour Rehnquist. Depuis 1989, de nombreuses études concernant le lien entre opinion publique et jurisprudence de la Cour suprême ont été publiées dans le domaine des sciences politiques. , T. Marshall, *Public Opinion and the Supreme Court*, Unwin Hyman (1989). This first study was updated Twenty years later: T. Marshall, *Public Opinion and the Rehnquist Court*, State University of New York Press (2009).

¹⁹⁹¹ Voir en particulier l'étude de G. Wilson, "The Role of Public Opinion in Constitutional Interpretation", *Brigham Young University Law Review*, Vol. 1993, No.4, (1993) pp.1037-1138, ainsi que plus récemment B. J. Roesch, "Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine", *Suffolk University Law Review*, Vol 39, 379 (2005-2006).

¹⁹⁹² B. Çali, A. Koch, N. Bruch, "The Legitimacy of The European Court of Human Rights: The View From the Ground", *UCL Working Papers* (May 2011).

¹⁹⁹³ S. Herbst, *Numbered Voices, How Opinion Polling Has Shaped American Politics*, Chicago, University of Chicago press (1993), p. 172.

sources de légitimité du juge (Chapitre Premier). A un niveau institutionnel, ont été exposées les modalités de participation du public concerné par la protection judiciaire des droits, c'est-à-dire l'opinion publique et ses organes. Ont donc été inclus le droit d'accès individuel à la procédure, ainsi que les modalités de participation des tiers-intervenants (Chapitre deux). A un troisième niveau substantiel, des études d'arrêts ont tenté d'établir, par une analyse comparée des jugements de la Cour suprême et de la Cour européenne, le rôle approprié de l'opinion publique dans la gouvernance selon les juges européens et américains. Les thèmes de ces études d'arrêts ont été choisis en s'inspirant des principaux débats sur la légitimité du juge en démocratie. Le premier débat concerne la question de la pertinence d'inclure l'opinion publique parmi les sources de légitimité démocratique. Le second s'attarde sur la question de l'activisme et de l'autolimitation des juges dans le cadre de l'évolution du droit, et tente de répondre aux théories selon lesquelles les juges font évoluer leur jurisprudence et le droit en fonction de leur idéologie, au lieu de respecter la volonté démocratique. Dès lors, la première étude de cas se penche spécifiquement sur la protection d'un droit essentiel à la formation de la volonté du public et de l'opinion publique en démocratie : la liberté d'expression (Chapitre trois). Le dernier chapitre, pour sa part, aborde un domaine dans lequel l'évolution du droit a été rapide des deux côtés de l'Atlantique, grâce à une interprétation dynamique de la Constitution ou de la Convention européenne : les droits des personnes homosexuelles et des couples de même sexe (chapitre quatre).

114. Après avoir tenté d'expliquer et de résumer le débat complexe sur la définition, la réalité, et les différents visages que peut prendre l'opinion publique¹⁹⁹⁴, ont été exposés les différents rôles que la recherche lui attribue dans les systèmes politiques. A la première question de savoir si l'opinion publique peut être assimilée à la volonté du peuple, nous avons conclu que pour la plupart, la théorie distinguait l'opinion publique de l'électorat, l'opinion publique étant considérée comme une attitude générale de la population sur un sujet spécifique, généralement adoptée par une population plus large que par ses tendances et affiliations politiques que la portion de l'électorat ayant amené un gouvernement au pouvoir. Il était démontré ensuite que selon la définition adoptée, le rôle assigné à l'opinion publique dans la démocratie diffère de manière significative. Ce rôle dépend généralement de la capacité du public à être informé et de son degré

¹⁹⁹⁴ Confirmed by Childs study on the various definitions of public opinion: H. L. Childs, *Public Opinion: Nature, Formation, and Role*, New York, Van Nostrand (1965), p.18.

d'éducation, et l'évaluation de cette capacité varie selon les théories¹⁹⁹⁵. En général, les penseurs insistent surtout sur l'importance pour la démocratie du débat public sur les affaires de gouvernance. C'est pourquoi l'opinion publique est souvent crainte lorsqu'elle est perçue comme une entité qui peut devenir une foule potentiellement excessive et manipulable, et dont le comportement serait difficile à anticiper ou maîtriser. Au contraire, elle est mise en valeur lorsqu'elle est informée. La recherche s'est dès lors mise à l'œuvre pour tenter de déterminer les différentes étapes à suivre afin que l'opinion publique devienne éclairée ou informée, ou même rationnelle, et digne d'être prise en compte par les autorités publiques¹⁹⁹⁶. Cependant sauf à satisfaire à des conditions dignes d'un idéaltype, dans aucune définition et description de la recherche théorique comme empirique l'opinion publique est à même de se conformer aux standards exigeants d'un John Stuart Mill, Habermas ou d'un Tönnies.

115. Malgré toutes les hésitations de la recherche qualitative sur la question de confier à l'opinion publique un rôle important dans la prise de décision publique plutôt qu'à l'électorat seul, la recherche quantitative a cherché à découvrir la substance réelle de l'opinion publique, plutôt que faire confiance aux interprétations des représentants élus. A partir de ce moment, l'opinion publique, devenue un nombre objectif et scientifique, mesurable mathématiquement, pouvait incarner la volonté du peuple et guider la vie politique. Grâce à l'amélioration constante et progressive des techniques de sondage, l'opinion a fini par prendre son indépendance de l'électorat et est devenue un instrument légitime de la gouvernance, soutenant les politiques publiques et les positions politiques de divers groupes de la société civile¹⁹⁹⁷.
116. Avec l'avènement de la suprématie judiciaire aux États-Unis, un pays engagé à respecter la volonté du peuple à tous les niveaux de décision gouvernementale¹⁹⁹⁸, les

¹⁹⁹⁵ For example, John Dewey claimed that there is “no way to identify the genuine potential of the general population and its capacity to act as “the public” as long as citizens have limited access to education and until “secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry and publicity”, quoted in S. Spichal, *The Transnationalization of the Public Sphere and the Fate of the Public*, New York, Hampton Press (2011), p.18.

¹⁹⁹⁶ Sartori, “Theory”, *op. cit.*, pp. 134-35. Pour plus d'information sur le théoricien allemand Ferdinand Tönnies, voir S. Spichal, *Public Opinion: Developments and Controversies in the Twentieth Century*, Rowman & Littlefield (1999), chapitre 2. Voir également J. Habermas, “Structural Transformation”, J. Habermas, *The Structural Transformation of the Public Sphere, An Inquiry into a Category of Bourgeois Society*, Cambridge, Polity Press (1989), p. 244.

¹⁹⁹⁷ See for example S. Herbst *Reading Public Opinion, How Political Leaders View the Democratic Process*, Chicago, University of Chicago Press, (1998), pp.125-26.

¹⁹⁹⁸ J. Fishkin, *The Voice of the People. Public Opinion and Democracy*, New Haven, Yale University Press (1995), p. 8-9.

chercheurs ont commencé à débattre du rôle de la volonté du peuple dans les décisions d'une Cour suprême « contre-majoritaire » parfois progressiste¹⁹⁹⁹, parfois conservatrice²⁰⁰⁰. Ce débat séculaire est toujours d'actualité aux États-Unis. Avec la création de la Cour européenne des droits de l'homme naissait une nouvelle institution délibérément « contre-majoritaire », qui adoptait également une approche généralement dynamique et progressiste de la protection des droits. Cette thèse a donc été rédigée avec l'idée que la question du rapport entre la volonté des différents peuples d'Europe et la protection judiciaire des droits pouvait être posée également dans le cadre d'une protection judiciaire internationale.

117. Pour effectuer cette recherche, plusieurs étapes ont été suivies. La première consistait à se concentrer sur les sources de légitimité judiciaire, et plus spécifiquement sur les sources de légitimité démocratiques. Pour la plupart, la recherche existante s'appliquait à la Cour suprême des États-Unis. Selon certains chercheurs, l'opinion publique serait non seulement une inspiration réelle dans la décision des juges, mais une inspiration légitime, même dans la protection des droits. D'autres pensent également que la Cour suprême *doit* pour être légitime protéger les droits en se fondant sur la volonté du peuple (ce qu'on appelle le « constitutionalisme populaire²⁰⁰¹ »). D'autres encore considèrent que la Cour suprême est, dans une certaine mesure, une institution représentative²⁰⁰². Elle peut, d'après eux, être considérée comme telle à cause de sa composition sociale (géographique, sociologique, et représentation des sexes), et au regard de la représentativité des arguments utilisés dans ses arrêts, et que l'on peut trouver dans les débats publics ou dans les mémoires soumis par les parties, leurs soutiens et les tiers-intervenants. Grâce à leur ouverture à la presse, qui communique et explique au public le travail qu'elles accomplissent, et à la société civile, un autre « organe » de l'opinion publique, les institutions judiciaires seraient plus en phase les positionnements

¹⁹⁹⁹ Under the leadership of Chief Justice Warren, the Supreme Court gained a reputation of being “progressive”. Many of its most famous decisions significantly advanced constitutional rights protection based on a progressive notion of rights. See A. Bickel, *The Least Dangerous Branch*, Yale University Press ((1st ed. 1962)1986).

²⁰⁰⁰ Sous la direction du Chief Justice Rehnquist, la Cour suprême s'est faite une reputation de cour “conservatrice”. Voir par exemple C. Smith, T. Hensley, “Assessing the Conservatism of the Rehnquist Court”, *Judicature*, Vol.77, 83 (1993-1994).

²⁰⁰¹ Par exemple L. Kramer, *The People Themselves: Popular Constitutionalism And Judicial Review* (2004).

²⁰⁰² Voir C. L. Eisgruber, *Constitutional Self-Government*, Cambridge, MA, Harvard University Press (2009). Voir également la notion de “représentation descriptive” développée par Annabelle Lever. A. Lever, “Democracy and Judicial Review: Are They Really Incompatible?”, *Perspectives on Politics*, (2009) Vol. 7, No. 4, p. 811.p. 810

argumentatifs du public et pourrait anticiper quelles interprétations constitutionnelles seront acceptables ou non²⁰⁰³. Une autre école, celle du « constitutionalisme consensuel », affirme que l'institution judiciaire n'est pas « contre-majoritaire » puisqu'elle se conforme au consensus en vigueur dans la société²⁰⁰⁴. Au vu de la diversité et du nombre de philosophies concernant les droits de l'homme et droits constitutionnels,²⁰⁰⁵ l'institution judiciaire jouerait aussi un rôle d'arbitre entre les différentes philosophies des droits. Les partisans de ces différentes écoles ont tendance à conclure que la Cour suprême ne devrait pas être qualifiée d'institution contre-majoritaire, c'est-à-dire une institution qui pour protéger les droits des personnes et des minorités, doit passer outre la volonté de majorités potentiellement oppressives. Bien sûr, toutes les théories décrites ci-avant ne sont pas acceptées par la majorité de la doctrine, et ne vont pas sans provoquer de nombreux débats. Cependant, elles fournissent un bon point de départ à l'étude de la conception qu'ont les juges ont de l'opinion publique dans la vie réelle, du rôle qu'ils estiment être le sien dans la démocratie et dans l'évolution de la protection judiciaire des droits.

118. Après une étude de l'organisation institutionnelle de la Cour suprême et de la Cour européenne des droits de l'homme et de l'évolution de l'accès des plaignants à un recours dans le cadre d'une amélioration constante de l'efficacité judiciaire, nous avons conclu que malgré les statistiques communiquant une très faible probabilité pour les requêtes d'être examinées, les deux institutions ont œuvré pour faire en sorte que les critères d'admissibilité ne deviennent pas un obstacle insurmontable pour les requêtes potentiellement fondées. Par le biais de la procédure de *Certiorari*, qui assure à la Cour suprême une entière discrétion dans la sélection des affaires à examiner, cette dernière a fait en sorte que les questions sociales actuelles les plus urgentes puissent faire l'objet d'une décision rapide. En Europe, les États contractants ont également travaillé à fournir à la Cour les instruments nécessaires à un traitement efficace des requêtes en réorganisant sa structure, en intégrant de nouvelles formations judiciaires compétentes pour examiner les requêtes non recevables ou répétitives²⁰⁰⁶, afin de pouvoir se

²⁰⁰³ Par ailleurs, Annabelle Lever montre que la justification démocratique est une manière pour les juges de faire montre de leur responsabilité démocratique. Lever, *op. cit.*

²⁰⁰⁴ J. Driver, "The Consensus Constitution", *Texas Law Review* Vol. 89 (4) (2011), p.758.

²⁰⁰⁶ Protocol 14 (Treaty No.194, CTS No. 194 signed in Strasbourg on 13 May 2004 entering into force on 1st of June 2010) integrated the single judge formation ruling on inadmissible cases, and the committee of three judges ruling on settled case-law.

concentrer sur les requêtes les plus problématiques. La Cour européenne elle-même a intégré une procédure prioritaire lui permettant de remédier aux violations les plus urgentes²⁰⁰⁷. Les deux cours ont aussi travaillé à améliorer leur visibilité publique chacune à sa manière : la Cour suprême en permettant progressivement un accès à la presse, et en adaptant l'annonce de ses décisions au public²⁰⁰⁸, la Cour européenne en permettant un accès généralisé du public aux audiences publiques ou à des retransmissions vidéo en ligne de ces audiences. Dans chaque système institutionnel, la sélection et la nomination ou l'élection des juges est devenue progressivement plus transparente²⁰⁰⁹, mais n'est pas public à un même degré sur chaque rive de l'Atlantique²⁰¹⁰.

119. Afin d'établir si les institutions judiciaires sont de plus en plus « participatives », nous nous sommes également concentrés sur l'accès des tiers-intervenants et *amici curiae* à la procédure. A ses débuts, la participation des tiers intervenants à la procédure judiciaire américaine était rare et se limitait aux interventions dans l'intérêt du public. Cependant, elle est devenue progressivement un phénomène politique impliquant de nombreuses organisations de la société civile, mobilisées pour une cause politique, qui ont à cœur de communiquer à la Cour suprême leur propre vision du problème traité en l'espèce. En Europe, à un degré moindre mais non moins important, la participation d'organisations bien que moins nombreuses et politiquement visibles, a elle-aussi augmenté, et elle ne peut non plus être considérée comme politiquement neutre, puisque des organisations de tous les horizons soumettent à la Cour européenne leurs observations et leurs données sur les problèmes traités par la Cour. Malgré cela, nous avons conclu que les deux cours (mais pas tous les juges) accueillent ces interventions de manière bienveillante, même si certains observateurs ont mis en garde les juges

²⁰⁰⁷ European Court of Human Rights, The Court's Priority Policy, accessible at https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

²⁰⁰⁸ L. Greenhouse, "Telling the Court's Story: Justice and Journalism at the Supreme Court," *Yale Law Journal*, Vol. 105 (1996), pp.1550. D'ordinaire, la Cour suprême annonce toutes ses décisions annuelles le même jour. Cependant, elle a occasionnellement aménagé ses annonces pour certaines décisions spécifiques.

²⁰⁰⁹ L'audience des candidats à la fonction judiciaire fédérale par le Sénat des États-Unis est maintenant retransmise à la télévision. Cependant, cette transparence s'est faite au prix d'une polarisation accrue de la sélection, et peut-être même de la fonction judiciaire elle-même. The hearing of candidates by the Senate in the United States is now broadcasted on television. Voir D. R. Stras, "Understanding the New Politics of Judicial Appointments", *Texas Law Review*, Vol. 86, (2008) p. 1065.

²⁰¹⁰ La procédure européenne d'élection des juges n'est pas diffuse à la télévision. Seuls les curriculum vitae des candidats et les rapports du Comité sur l'élection des juges à la Cour européenne des droits de l'homme de l'Assemblée parlementaire du Conseil de l'Europe sont disponibles sur le site de l'Assemblée: <http://website-pace.net/web/as-cdh>

quant à leur manière de traiter l'information soumise par le biais des mémoires des tiers intervenants.²⁰¹¹

120. Le reste de la thèse était consacré à une analyse textuelle substantielle des arrêts contenant des références directes à l'opinion publique. Nous avons en effet considéré que leur jurisprudence concernant la liberté d'expression serait à-même d'informer notre étude de la conception judiciaire de l'opinion publique, et du rôle approprié qu'ils estiment être le sien dans la vie démocratique. D'après nos constats, les juges européens comme américains n'excluent pas l'idée que l'opinion publique puisse être un d'acteur important de la vie démocratique. S'ils utilisent parfois le terme « opinion publique » comme synonyme de la volonté du peuple ou de l'électorat, la plupart de leurs références différentient les deux. Par ailleurs, les deux cours adhèrent à une vision de la démocratie où règne la formation de l'opinion par le biais du débat public. Dès lors, les juges encouragent un concept de la liberté d'expression permettant la formation d'une opinion informée ou éclairée. La protection de la liberté d'expression aux États-Unis ne souffre aucune restriction sur le contenu du message transmis, et aucune obligation à la charge du communicant au nom de la liberté de « la place du marché des idées »²⁰¹² et d'une découverte libre de la vérité par le public. Par contraste, les juges européens privilégient une liberté d'expression orientée vers un idéal d'opinion éclairée, et sont prêts à sanctionner des modalités d'expressions jugées incompatibles avec la démocratie, par exemple quand elles font l'apologie de la violence, et à imposer à la presse des obligations éthiques visant à protéger un débat public favorable à la démocratie.²⁰¹³
121. L'étude des arrêts concernant les droits des personnes et des couples homosexuels visait à mettre en relation l'évolution du rôle des références à l'opinion publique dans les décisions de justices avec l'évolution de l'interprétation de leurs droits, de l'époque où l'homosexualité était encore un délit à la consécration d'un droit à un statut légal des

²⁰¹¹ Voir par exemple A. Orr Larsen, "The Trouble with Amicus Facts", *Virginia Law Review*, Vol. 100, 1757 (2014).

²⁰¹² C Salmon, T Glasser politics of polling, in T. Glasser, C. Salmon, *Public Opinion and the Communication of Consent*, NY, the Guilford Press (1995), p. 445, referring to Oliver Wendell Holmes famous expression introduced in *Abrams v. U.S.* 250, U.S. 616 (1919), p. 630.

²⁰¹³ Voir les arrêts concernant les obligations éthiques de la presse, par exemple Cour EDH, *Couderc et Hachette Filipacchi Associés c/ France*, req. n°. 40454/07, 10 novembre 2015, et Cour EDH, Gr. Ch., *Stoll c/ Switzerland*, req. n°. 69698/01, 10 décembre 2007.

couples homosexuels. Cette analyse a essayé de prendre en compte non seulement les références à l'opinion publique, mais aussi les doctrines jurisprudentielles, en particulier l'usage de l'interprétation dynamique, plus prône à l'évolution du droit, et celui de l'approche consensuelle aux États-Unis comme en Europe. Prenant également en compte le fait que les affaires ayant trait aux droits des personnes homosexuelles étaient politiquement controversées aux États-Unis comme en Europe, et qu'elles ont mobilisé de nombreux tiers-intervenants, la participation des tiers-intervenants a elle aussi été prise en compte dans l'analyse. (For a brief summary of parallel use of doctrine and participation by case, see Annex No 2.)

122. L'étude des arrêts concernant la pénalisation de l'homosexualité a démontré que la Cour suprême (ou le juge auteur de chaque décision d'espèce) et la Cour européenne traitent l'opinion publique de manière différente. D'une part, la Cour européenne aborde l'opinion publique d'une manière équilibrée, la considérant dans un certain cadre comme justification légitime mais insuffisante des politiques publiques. D'autre part, les arrêts de la Cour suprême, suivant une dialectique opposant les majorités dominantes aux minorités persécutées, considèrent généralement l'opinion publique, synonyme de majorité, de manière négative. Cependant, la Cour pour en arriver à cette attitude vis-à-vis de l'opinion publique, a changé de perspective. Lors de la première contestation de la pénalisation, dans l'arrêt *Bowers*, la Cour suprême avait considéré que le soutien du public combiné au consensus numérique dans les législations des États fédérés suffisait à justifier sa déférence vis-à-vis de la politique de criminalisation de l'homosexualité d'un État²⁰¹⁴. Cependant, dans ses décisions ultérieures où elle opérait deux revirements de jurisprudence, la Cour estima que le soutien public pour une telle politique n'était plus considéré comme pertinente, puisque c'était des sentiments négatifs qui avaient motivé le soutien du public à la criminalisation de l'homosexualité. Par ailleurs une « conscience émergente » avait été considérée comme suffisante pour mettre de côté ce soutien d'une opinion malveillante, et pour motiver un examen judiciaire plus approfondi et plus strict des justifications de la politique publique de criminalisation²⁰¹⁵. Il semblerait que la substance de l'opinion publique elle-même et sa supposée malveillance ait été la raison pour laquelle la Cour suprême ait refusé de valider la justification de la pénalisation. En Europe, afin de conserver une perspective

²⁰¹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁰¹⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

bienveillante vis-à-vis des arguments fondés sur l'État de l'opinion locale ou nationale défavorable aux homosexuels, la Cour européenne avait affirmé que le désir de respecter l'opinion du public sur une question de politique publique était certes légitime, mais l'État défendeur devait en apporter la preuve pour pouvoir légitimer sa politique. Par ailleurs, la politique devait en outre être fondée sur des justifications supplémentaires, l'État de l'opinion ne pouvant suffire comme justification à lui seul. En l'absence d'une telle preuve, la Cour européenne concluait que l'existence d'un consensus contraire parmi les législations des parties contractantes suffisait à rejeter la justification.

123. Dans les arrêts concernant la vie privée et familiale des personnes et couples homosexuels, les tendances se sont révélées différentes. D'une part, les deux cours ont changé leur doctrine de manière substantielle en constatant l'évolution rapide de l'opinion publique sur la question de l'homosexualité. La Cour suprême a continué à décrire les problèmes juridiques des personnes homosexuelles selon une dialectique opposant majorité malveillante et minorité discriminée, mais d'une différente manière. Elle semble maintenant mettre en valeur une nouvelle opinion publique favorable et l'homosexualité, et l'opposer à l'opinion publique défavorable, quelque-soit l'importance de chaque partie de l'opinion, partant du principe que l'opinion peut être « aveugle à sa propre injustice »²⁰¹⁶. La Cour suprême joue dès lors le rôle d'arbitre contre-majoritaire, sûre de sa souveraineté et de sa primauté²⁰¹⁷ en tant qu'institution ; une protectrice des minorités résolue à ne pas mettre en danger les droits fondamentaux²⁰¹⁸ au nom du débat démocratique. Sa doctrine a également changé, mais n'est pas devenue, à l'image de la Cour européenne, une doctrine systématique intégrant pleinement l'opinion publique. La majorité de la Cour suprême dans *Obergefell* combinait ainsi les deux clauses du quatorzième amendement, la *Due Process Clause* et la *Equal Protection Clause*, ouvrant la porte à plus de possibilités doctrinales pour une future protection des droits.
124. En Europe, l'attention de la Cour s'est portée sur la « perception du public », qui a été intégrée dans la doctrine de l'instrument vivant, utilisée pour déterminer le sens du

²⁰¹⁶ *Obergefell v. Hodges*, 576 U.S. __ (2015), 135 S.Ct. 2584

²⁰¹⁷ *Ibid.*, at 2688.

²⁰¹⁸ *Ibid.*, at 2606.

respect de la vie privée et familiale dans les conditions actuelles²⁰¹⁹. En outre, les tendances du nouveau consensus européen sont désormais considérées comme suffisantes pour justifier un changement jurisprudentiel²⁰²⁰. Alors qu'elle ne suit pas la dialectique dualiste de la Cour suprême opposant majorité et minorité, la Cour européenne semble remettre en cause non pas la substance des attitudes du public même si elles sont défavorables à l'homosexualité, mais l'interprétation des tendances de l'opinion publique et le traitement qu'en font les États membres. C'est ce que semble faire la Cour européenne dans l'affaire *Oliari c/ l'Italie*, en enjoignant à l'Italie d'écouter son opinion publique, qu'elle estime favorable à un statut légal pour les couples de même sexe, plutôt qu'un parlement élu divisé sur la question. La Cour européenne fait donc le distinguo entre l'opinion majoritaire des élus et l'opinion publique. C'est pourquoi, contrairement à la Cour suprême, la Cour européenne ne remet pas en cause l'opinion locale ou européenne, mais plutôt l'interprétation et l'usage qu'en font les autorités publiques. Elle se pose en alliée de l'opinion publique contre des majorités élues dans lesquelles la confiance ne règne plus. Cependant, lorsque pour justifier son opinion selon laquelle un gouvernement ne respecte pas son opinion publique réelle, la Cour se fonde sur des données statistiques partielles sujettes à interprétation, cela peut fragiliser son autorité. En effet, si les enquêtes d'opinion et les données des sondages ont l'avantage de rationaliser et objectiver une affirmation sur l'État de l'opinion²⁰²¹, l'utilisation par la cour des sondages envoie un message ambivalent à propos de l'idéal démocratique qu'elle défend. Si la jurisprudence de la Cour européenne laisse entendre qu'elle prête son soutien à une opinion publique informée, « *les sondages encouragent un type de participation structuré, réactif, dans le cadre duquel la production de nos propres formes d'expression publique, de nos propres questions, nos propres critiques, n'est plus nécessaire [...]. D'une certaine manière, les sondages rendent la discussion politique superflue, puisqu'ils donnent l'illusion que le public s'est déjà prononcé de manière définitive* »²⁰²². C'est pourquoi l'usage non critique des sondages et des enquêtes d'opinions devraient être découragé

²⁰¹⁹ Cour EDH, *Kozak c/ Pologne*, req. n° 13102, 2 mars 2010, §98.

²⁰²⁰ G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (hereinafter "Living Instrument") (2012), p 12-13, Copie digitale disponible: <http://ssrn.com/abstract=2021836>

²⁰²¹ S. Herbst, *Numbered Voices, How Opinion Polling Has Shaped American Politics*, Chicago, University of Chicago press (1993), p. 12.

²⁰²² *Ibid.*, p. 166.

s'il n'est pas en conformité avec l'image idéale que les juges européens veulent donner d'une démocratie informée, animée par un débat public critique et dynamique.

125. De cette analyse résulte également le constat que les différents arrangements institutionnels des institutions judiciaires affectent leur approche de l'opinion publique. La Cour suprême, avec son statut de cour nationale, adopte un point de vue sévère par rapport à l'opinion publique, se montrant prête à prendre une décision contre-majoritaire vis-à-vis d'une opinion publique dominante, si celle-ci pénalise les droits des minorités. Cependant, pour ne pas se mettre à dos l'opinion, elle prend bien soin de démontrer qu'elle a pris en compte la participation de nombreuses factions de l'opinion publique, qui participent en tant que tiers-intervenantes²⁰²³. Elle fait montre de plus de force dans son rôle d'institution contre-majoritaire, et de moins de confiance dans les majorités. Elle semble n'accorder de confiance qu'au public dont l'attitude correspond à sa propre analyse de l'affaire. La Cour européenne, pour sa part, montre plus d'égard pour la correspondance entre l'État du consensus européen et le soutien pour ses propres décisions. Dans un arrêt concernant les unions entre personnes de même sexe²⁰²⁴, elle affirme qu'un État dont la politique contraste avec tous ses voisins européens ne peut s'appuyer sur l'argument selon lequel les majorités élues soutiennent sa politique publique, alors que sa propre opinion publique suit les tendances du consensus européen. Cela conduit à penser que la Cour européenne n'est pas prête à forcer la société à changer son droit sans être assurée de l'existence d'un certain niveau de consensus, que ce soit parmi les autorités publiques, ou dans le cas inverse, dans l'opinion publique.
126. Dans l'ensemble, cette thèse a montré que ni une cour constitutionnelle comme la Cour suprême et ni une cour internationale, comme la Cour européenne des droits de l'homme n'ignore l'importance du soutien du public pour le respect de leurs décisions. Elles se rappellent donc de la sagesse d'Aristote, qui affirmait que « *celui qui perd le soutien du peuple n'est plus un roi* »²⁰²⁵. La perception par le public de l'illégitimité de leurs décisions aurait le potentiel de renforcer la défiance causée par la distance avec laquelle les juges exercent leur fonction. Du fait de leur conscience de l'équilibre délicat

²⁰²³ *Obergefell, op.cit.*, at 2624.

²⁰²⁴ Cour EDH, *Oliari et autres c. Italie*, No. 18766/11 et 36030/11, 21 juillet 2015, §17.

²⁰²⁵ Aristote, cité par E. Noelle-Neumann, "Public Opinion and Rationality", in T. Glasser, C. Salmon (eds.), *Public Opinion and the Communication of Consent*, New York, The Guilford Press (1995), p. 40.

qu'ils doivent maintenir, les deux cours ont décidé d'impliquer leur public et ses intermédiaires tout au long du processus de prise de décision, et d'élever le niveau de transparence de celui-ci. Il semblerait aussi qu'ils aient impliqué l'opinion publique dans leur argumentation, rassurant le public que le droit prenait en compte la « perception du public » dans son évolution²⁰²⁶, et qu'il ne progresserait pas tant que le public ne serait pas prêt à l'accepter. Parce que l'autorité d'une cour internationale est plus fragile, la Cour européenne se montre plus prudente et procède de manière progressive, s'assurant de l'existence d'un degré minimum de consensus avant de changer sa jurisprudence²⁰²⁷.

127. Les institutions judiciaires sont-elles parvenues à trouver un équilibre entre leur vocation d'institution « contre-majoritaire » et les besoins de légitimité populaire, qui seule peut contraindre les autorités publiques réfractaires à respecter décisions ? Seule des enquêtes précises déterminant l'importance du soutien public dont les cours bénéficient pourrait répondre à une telle question²⁰²⁸. Dans quelle mesure l'opinion publique devrait-elle guider l'évolution du droit, plutôt que la volonté électorale ? La réponse à cette question dépend de la précision et la fiabilité des références à l'opinion publique qu'utilisent les juges pour justifier leur décision de laisser le droit en l'État, ou de faire progresser la protection des droits. Le dernier chapitre a brièvement abordé ce sujet, et montré que des références vagues et peu fiables à l'État de l'opinion publique dans l'argumentaire judiciaire pourrait fragiliser leurs décisions. La pratique de la Cour suprême a déjà été l'objet de critiques acerbes quant à sa manière d'utiliser les données des enquêtes et sondages²⁰²⁹. Si de telles critiques de la Cour Européenne sont quasi inexistantes, de futures études pourraient fournir une connaissance plus approfondie de la manière dont la Cour européenne fait usage des données statistiques²⁰³⁰. Par ailleurs, si une préoccupation pour le soutien du public envers les

²⁰²⁶ Cour EDH, *Kozak c/ Pologne*, req. n° 13102, 2 mars 2010, §98.

²⁰²⁷ Bien que Letsas affirme que la Cour européenne *recherche* le consensus et les valeurs communes aux Etats contractants, elle élève également le standard de protection des droits au-dessus des pratiques nationales. Letsas, "Living Instrument", *op. cit.*, p. 12.

²⁰²⁸ Des sondages réguliers font le suivi du soutien public pour la Cour suprême. Voir par exemple les tendances de l'opinion sur le travail général de la Cour suprême sur le site internet de Gallup : <http://news.gallup.com/poll/4732/supreme-court.aspx> (accès en ligne le 16 mai 2018) Pour un traitement académique du soutien populaire pour la Cour suprême, voir see Or Bassok, "The Supreme Court at the Bar of Public Opinion Polls", *Constellations*, Vol. 23, No. 4 (2016). Mais aucun sondage n'a été trouvé concernant la Cour européenne des droits de l'homme.

²⁰²⁹ C Salmon, T Glasser, *op. cit.*, p.444.

²⁰³⁰ Le nombre d'arrêts contenant de telles mentions statistiques de l'opinion publique sélectionnés pour cette thèse était trop réduit pour justifier une critique générale. Une étude spécifique devrait s'appliquer

politiques publiques semble légitime dans un contexte national, puisque les droits y sont définis et modifiés au sein d'une même culture juridique et politique, selon des valeurs nationales sans doute plus aisées à définir dans un seul pays, est-ce vraiment sa place dans un contexte international de protection de droits? Si la Cour européenne a été clairement établie pour protéger les droits selon une vision dynamique des droits, interprétant la Convention petit à petit, en fonction des problèmes juridiques rencontrés, le Préambule de la Convention semble évoquer une institution contre-majoritaire, appelée à protéger des droits universels, qui doivent être appliqués indépendamment de tout soutien ou résistance du public ²⁰³¹. Par ailleurs, cela correspond à la pratique de la Cour : en effet d'après Letsas « *on peut retracer les différentes étapes dans le raisonnement de la Cour comme la rupture progressive des liens avec les convictions des groupes suivants : les rédacteurs (Golder, Young, James et Webster), le droit national de l'État défendeur, ses sources du droit et ses classifications (Engel), l'opinion publique de l'État défendeur (Marckx, Dudgeon) et enfin, les autorités et l'opinion publique de la majorité des États contractants* » (Hirst, Goodwin)²⁰³² ». Dans ce contexte, et conscients du besoin réaliste d'un soutien public propice à une protection efficace des droits, une lecture morale de la Convention, proposée par George Letsas ne serait-elle pas plus adaptée à la protection judiciaire européenne ? Ou bien une interprétation consensuelle est-elle plus à-même de guider les juges vers un compromis entre les différentes philosophies des droits de l'homme ²⁰³³? Letsas critique l'interprétation consensuelle de la Cour européenne et plaide pour une interprétation dynamique et progressive découvrant les « *droits de l'homme que les gens possèdent en fait* » et non pas ce que « *l'opinion publique pense* » qu'ils possèdent²⁰³⁴. Cependant, dans ses descriptions des affaires qu'il prend pour exemple, il n'opère pas de distinction

à un nombre plus important, sinon à tous les arrêts de la Cour européenne afin d'évaluer l'usage qu'en fait la Cour.

²⁰³¹ Letsas fonde sa lecture morale de la Convention sur la théorie morale de Dworkin, qui elle-même ne rejette pas une interprétation fondée sur le consensus social et l'opinion publique. See G. Letsas, *A Theory of Interpretation of the European Court of Human Rights*, Oxford, Oxford University Press (2008).

²⁰³² G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (hereinafter "Living Instrument") (2012), p 12-13, Electronic copy available at: <http://ssrn.com/abstract=2021836>

²⁰³³ Sur les différentes philosophies des droits de l'homme, voir M-B. Dembour, "What Are Human Rights? Four Schools of Thought", *Human Rights Quarterly*, Vol. 32, No 1 (February 2010), pp. 1-20

²⁰³⁴ "J'ai défendu ma lecture morale de la Convention contre les accusations d'activisme judiciaire, sur le fondement que cela fait partie des compétences juridiques de la Cour : les États contractants ont donné à la Cour la compétence de protéger les droits quels qu'ils soient dont les gens sont titulaires *en fait*, et non les droits de l'homme que les autorités nationales ou l'opinion publique *pensent* qu'ils possèdent. » *Ibid.*, p. 13, renvoyant à son ouvrage *A Theory of Interpretation* précité aux chapitres 2 et 3.

entre l'opinion publique et la majorité électorale, qui dans la théorie ne sont pas toujours assimilés l'une à l'autre. Or, comme nous le rappelle Pierre Brunet, certains ont montré que « *le présupposé selon lequel ce sont les pouvoirs démocratiquement élus qui sont majoritaires ne se vérifie pas toujours car il arrive que les élus ne soient pas en accord avec la volonté majoritaire. Dans ces derniers cas, c'est à la Cour suprême qu'il revient de combler le fossé séparant le peuple réel de sa représentation en agissant non comme une force contre- majoritaire mais comme une force majoritaire. Et c'est d'ailleurs ce que feraient apparaître certaines décisions importantes de la Cour*²⁰³⁵ ». De la même manière il semblerait que la Cour européenne ait agi en institution majoritaire dans l'affaire *Oliari c/ Italie*, en soulignant le fossé existant entre la volonté parlementaire, opposée à la reconnaissance d'un statut légal particulier pour les couples de même sexe, et sa propre opinion publique, qu'elle estime favorable à une telle reconnaissance. C'est pourquoi, puisque la Cour européenne n'utilise plus l'interprétation consensuelle dans le cadre d'une interprétation conservatrice et respectueuse des États membres²⁰³⁶, il semblerait qu'elle puisse l'utiliser dans le cadre d'une interprétation *progressiste et majoritaire*, tout en étant attentive à conserver le soutien public nécessaire.

128. Cette thèse a abordé de nombreuses dimensions de la fonction de juger : les aspects politiques, institutionnels, philosophiques et juridiques sont tous pertinents dans la discussion de la relation entre les juges, leur public, et la démocratie. Loin de prétendre avoir épuisé la discussion de ces divers aspects, nous avons tenté de traiter ces dimensions de la fonction de juger afin d'obtenir, autant que possible, une image la plus complète possible des enjeux principaux posés par ce sujet. L'étude comparative a également mis en évidence quelques différences intéressantes entre les contraintes propres à l'institution judiciaire dans un contexte national et dans un contexte international, ainsi que la nature sensible de la relation entre la Cour internationale et ses publics. Cette étude pourrait, bien-sûr, être complétée, poursuivie, dans une perspective comparée ou par une étude individuelle de chaque Cour. Beaucoup d'études ont été publiées sur la Cour suprême et sa relation à l'opinion publique, mais beaucoup

²⁰³⁵ P. Brunet, "To Have and Have Not : de la difficulté contre-majoritaire et des moyens d'en sortir", in V. Champeil-Desplats et J.-M. Denquin (dir.), *La démocratie: du crépuscule à l'aube*, Actes du colloque Paris Ouest Nanterre 2013, Manuscrit avec l'auteur, Il fait référence à un article de C. Barrett Lain, "Upside-Down Judicial Review", *Georgetown Law Journal*, vol. 101, 113-183 (2007). D'après lui, certaines affaires dans lesquels la Cour a joué un rôle « majoritaire » tout en censurant la volonté de la majorité électorale incluent *Brown v. Board of Education*, *Furman v. Georgia*, and *Roe v. Wade*.

²⁰³⁶ Letsas, *op. cit.* p.11.

moins nombreuses sont les analyses du rôle de l'opinion publique dans sa doctrine judiciaire. Dès lors, le nombre d'arrêts contenant des références à l'opinion publique dans la jurisprudence de chacune des cours est suffisant pour permettre une étude séparée des arrêts de chaque Cour. Par exemple, une étude complète de la jurisprudence de la Cour européenne sur la protection de la vie privée et familiale pourrait étoffer encore notre connaissance de la relation entre l'opinion publique et l'évolution du droit. En effet, parmi les arrêts faisant mention de l'opinion publique se trouvent de nombreux jugements abordant des questions sociales sur lesquelles les sociétés européennes ont énormément évolué depuis la création de la Cour dans les années 1950 par exemple, l'avortement²⁰³⁷ et l'insémination artificielle²⁰³⁸, pour n'en citer que certains²⁰³⁹. Le même constat peut être fait pour la Cour suprême, qui a dû se prononcer sur des sujets similaires depuis les années 1960²⁰⁴⁰. Parmi ses arrêts importants on peut compter des décisions célèbres comme *Casey*²⁰⁴¹. Par ailleurs, ajouter les affaires concernant la liberté d'association et de religion²⁰⁴² à l'étude des arrêts sur la liberté d'expression pourrait permettre d'approfondir l'étude comparée sur la vision des juges américains et européens du rôle de l'opinion publique en démocratie. En effet, la liberté d'association et la liberté de religion sont des droits qui influent également sur la formation de l'opinion publique, et dès lors sur la vie démocratique. Pour la plupart, le reste des affaires mentionnant l'opinion publique fondées sur d'autres articles concernent des aspects de la relation entre opinion publique et démocratie déjà abordés dans nos deux études d'arrêts, à l'exception des arrêts concernant les peines criminelles et traitements inhumains et dégradants²⁰⁴³. Néanmoins, procéder à une étude approfondie de la

²⁰³⁷ Cour EDH, *A.B.C. c/ Irlande*, req. n° 25579/05. 16 décembre 2010.

²⁰³⁸ Cour EDH, *Dickson c/ Royaume Uni*, req. n° 44362/04, 4 décembre 2007.

²⁰³⁹ *Johnston*, un arrêt concernant le mariage et le refus d'autoriser le divorce sur le fondement de croyances religieuses, pourrait être ajouté, bien qu'il ait été fondé sur l'Article 9 de la Convention, protégeant la liberté de conscience et de religion. Voir Cour EDH, *Johnston et autres c. Irlande, plénière*, req. n° 9697, 18 Décembre 1986.

²⁰⁴⁰ *Poe v. Ullman*, 367 U.S. 497 (1961), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²⁰⁴¹ *Casey* est l'opinion qui a motivé la rédaction par Wilson d'une défense doctrinale de l'opinion de la majorité de la Cour en 1993. Voir J. G. Wilson, "The Role of Public Opinion in Constitutional Interpretation", *Brigham Young University Law Review*, Vol. 1993, No.4, (1993) pp.1037-1138.

²⁰⁴² Une saga marquante est par exemple l'affaire *Lautsi*, une affaire très médiatique non seulement en Italie, mais dans toute l'Europe. Elle a mobilisé l'opinion italienne, mais également le débat politique européen et dans l'Union Européenne. Voir ECtHR, Gr. Ch., *Lautsi v. Italy*, Appl. No. 30814/06, 18 March 2011.

²⁰⁴³ Par exemple, des affaires à caractère pénal telles Cour EDH *Kandzhov c. Bulgarie*, req. n° 68294/01, 6 novembre 2008 fondées sur l'Article 3 et 6 concernant le transfert d'un détenu schizophrène de la prison à l'hôpital sans possibilité de stabilisation. Cour EDH *McKerr c/ Royaume Uni*, req. n°2888395, 28 Mai 1998 aborde la question de la "confiance du public" dans les forces de police après allégation de mauvais

manière dont la Cour européenne utilise les références statistiques à l'opinion publique (leurs sources, leur exactitude, leur fiabilité) en relation avec le droit de la preuve, aurait à notre sens un apport plus pertinent et intéressant.

129. Cette thèse ne fait pas que contribuer à la connaissance de la relation entre les cours nationales et internationales et leur public. Elle pourrait également servir de point de départ) à des recherches similaires concernant d'autres institutions judiciaires, internationales ou nationales, telle la Cour interaméricaine des droits de l'homme²⁰⁴⁴. Comme c'est expliqué dans le premier chapitre, la question de la légitimité des cours internationale est l'objet de débats universitaires et politiques depuis quelques années, et notre étude sur le sujet spécifique de leur relation à leur public pourrait, nous l'espérons, contribuer à nourrir ce débat. Elle pourrait également contribuer à la démystification des théories selon lesquelles l'institution judiciaire est nécessairement « contre majoritaire », le sens du terme « majoritaire » n'étant, nous l'avons vu, pas toujours univoque, en débutant une réflexion sur la meilleure méthode à suivre pour pratiquer une telle interprétation « majoritaire » d'une manière qui renforcerait au lieu de fragiliser son autorité.
130. Parce que le droit n'évolue pas dans un vase clos, les juges ne peuvent pas, malgré l'affirmation du contraire, prendre des décisions fondées uniquement sur leurs préférences ou idéologies et utiliser les règles de droit uniquement comme justification *ex post facto*²⁰⁴⁵. Mais si le consensus social et l'opinion publique jouent un rôle dans leur manière de protéger et d'interpréter le droit contre la volonté de la majorité de l'électorat et des autorités publiques, comment les juges évaluent-ils ce consensus ? Nous avons vu qu'ils permettent désormais à une multitude d'acteurs de participer au processus de décision, et qu'ils font parfois mention de leurs contributions, faisant de la protection des droits une activité participative, peut-être même démocratique. Cependant, malgré leurs efforts, la manière d'engager ce consensus social n'est pas toujours claire ou constante, et pourrait laisser une impression d'arbitraire. Certaines

traitement. Cour EDH *Stafford c/ Royaume Uni*, Grd Ch, req. n°. 46295/99, 28 mai 2002, concerne l'imposition d'une sanction pénale fondée sur les exigences de l'opinion publique.

²⁰⁴⁴ Sur l'interprétation dynamique de la Cour interaméricaine des droits de l'homme, voir G. L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *European Journal of International Law*, Vol. 19, No. 1, (2008), pp. 101-123

²⁰⁴⁵ Cette thèse a été exprimée par F. Cross, "Political Science and the New Legal Realism : A Case of Unfortunate Interdisciplinary Ignorance", *Northwestern University Law Review*, Vol. 92, 251-326 (1997).

cours, particulièrement les cours nationales, pourraient être assez fortes pour survivre aux critiques causées par une telle impression. Toutefois celles dont l'autorité est plus fragile et dépendante du bon vouloir des autorités locales devraient être encouragées à la prudence, afin que leur contribution à l'amélioration constante de la protection des droits puisse continuer à se développer sans heurt et dans la durée.²⁰⁴⁶

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1. Legal Sources:

- 1.1. American Legal sources: Constitutional and Statutory Law*
- 1.2. Council of Europe Legal Sources: Convention and Protocols, Recommendations, Resolutions, and Reports.*

2. Case Law

- 2.1. United States' Judicial Decisions*
 - 2.1.1. Decisions of the United States Supreme Court*
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Legal Sources and Case Law

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- ECtHR, *Refah Partisi and Socialist Party and others v. Turkey* [GC], Appl. Nos. 41340/98 41342/98 41343/98 41344/98, 13 February 2003.
- ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999.
- ECtHR, *S.A.S. v. France*, Appl. No. 43835/11, 1st July 2014.
- ECtHR, *Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010.
- ECtHR, *Schöpfer v. Switzerland*, Appl. No.25405/94, 20 May 1998.
- ECtHR, *Skalka v. Poland*, Appl. No. 43425/98, 27 May 2003.
- ECtHR, *Smith and Grady v. the U.K.*, Appl.No. 33985/96 and 33986/96, 27 September 1999.
- ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, 7 July 1989.
- ECtHR, *Socialist Party and others v. Turkey* [GC], Appl. No. 21237/93, 25 May 1998
- ECtHR, *Stafford v. United Kingdom*, Appl. No. 46295/99, 28 May 2002.
- ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 29225/95, 2 October 2001.
- ECtHR, *Stasi v. France*, Appl. No. 25001/07, 20 October 2011
- ECtHR, *Stoll v. Switzerland* [GC], Appl. No. 69698/01, 10 December 2007.
- ECtHR, *Streletz, Kessler and Krenz v. Germany*, Appl. No. 22 March 2001.
- ECtHR, *Sunday Times v. The United Kingdom*, [Plenary] Appl. No. 6538/74, 26 April 1979.
- ECtHR, *Sutherland v. The U.K.*, App. No. 25186/94, 1st July 1997.
- ECtHR, *Şener v. Turkey*, Appl. No. 26680/95, 18 July 2000.
- ECtHR, *Siryk v. Ukraine*, Appl. No. 6428/07, 31 March 2011.
- ECtHR, *Sürek v. Turkey* (no. 1) [GC], Appl. No. 26682/95, 08 July 1999.
- ECtHR, *Stoll v. Switzerland* [GC], Appl. No. 69698/01, 10 December 2007.
- ECtHR, *Taddeucci & McCall v. Italy*, Appl. No. 51362/09, 30 June 2016.
- ECtHR, *Tammer v. Estonia*, Appl. No. 51205/98, 6 February 2001.
- ECtHR, *Thorgeir Thorgeirson v. Iceland*, Appl. No. 13778/88, A 239, 25 June 1992.
- ECtHR, *Tierbefeurer E.V. v. Germany*, Appl. No. 45192/09, 16 January 2014.

ECtHR, *Timpul Info-Magazin And Anghel v. Moldova*, 42864/05, 27 November 2007
 ECtHR *Tomasi v. France*, Appl. No 12850/87, 27 August 1992, A.241 A
 ECtHR, *Tønsbergs Blad As And Haukom v. Norway*, Appl. No. 510/04, 1 March 2007.
 ECtHR *Tyrer v. the United Kingdom*, Appl. No. 5856/72, 25 April 1978.
 ECtHR, *Unified Communist Party of Turkey and Others (TBKP) v. Turkey*, Appl. No. 19392/92, 30 January 1998.
 ECtHR, *Vallianatos v. Greece*, Appl. Nos. 29381/09 32684/09 [GC], 7 November 2013.
 ECtHR, *Vejdeland and Others v. Sweden*, Appl. No. 1813/07, 9 February 2012.
 ECtHR, *von Hannover v. Germany* [GC], Appl. No. 59320/00, 24 June 2004 .
 ECtHR, *Von Hannover and von Hannover v. Germany*, Appl. No 40660/08, 7 February 2012.
 ECtHR, *Vogt v. Germany* [GC], App. No. 17851/91, 26 September 1995.
 ECtHR, *Winterwerp v. Netherlands*, Appl. No. 6301/73, 24 October 1979.
 ECtHR, *X. and others v. Austria* [GC], Appl. No. 19010/07, 19 February 2013.
 ECtHR, *X. v. the U.K., Com.*, Appl. No. 7215/75, 7 July 1977.
 ECtHR *Young, James & Webster v. UK*, Appl. Nos. 7601/76, 7806/77, 13 August 1981.
 ECtHR *Yvonne Etienne v. France*, Appl. No. 11396/08, 15 September 2009.
 ECtHR, *Zielinski, Pradal, Gonzalez and others v. France*, Appl. No. 24846/94, 34165/96, 28 October 1999.

2.4. Other Courts' Decisions

2.4.1. European Domestic Courts

Great Britain:

House of Lords, *Attorney General v. Guardian Newspapers Ltd*, [1987] 1 WLR 1248.

France:

Constitutional Council, 28 February 2012, Décision no 2012-647 DC du 28 février 2012, striking down the Law on criminalising denial of the existence of genocides recognised by law

2.4.2. Foreign Courts

South African Supreme Court:

Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project (Cases CCT60/04, CCT10/05)).

OTHER RESEARCH TOOLS

1. Databases

HUDOC, available at <https://hudoc.echr.coe.int/>

Westlaw Next, accessible at <http://next.westlaw.com/>

Find Law <http://caselaw.findlaw.com/court/us-supreme-court>

2. Statistical Data

ISTAT- i.e. the Italian national institute of statistics (Istituto nazionale di statistica).
Website accessible at <http://www.istat.it/en/>

ANNEX

ANNEX No. 1. Evolution of Third Party Intervention in European Court of Human Rights Cases from 1999 to 2016.

Sources: ECtHR yearly reports.

Explanation: *First column displays the number of judgments published by the European Court every year, and the number of cases where third-parties were allowed to submit a brief. Second column specifies the number of briefs submitted every year, the number of interventions (“interv”) per year, and an average number of briefs submitted per year. The same is specified in a third column in the case of the Grand Chamber. The author assumes that Grand Chamber cases will attract more third-party briefs, because they usually involve more important questions of interpretation and “hard cases”. Several cases are highlighted where the court accepted a higher number of briefs in number or on average.*

Abbreviations and symbols :

“#” : number

“ECtHR”: European Court of Human Rights

“interv”: interventions

| | # yearly judgments | total # cases with intervention | ECtHR - chamber | | | Grand Chamber | | |
|------|--------------------|---------------------------------|---------------------|--------|------------------------------|---------------------|--------------|----------------------------------|
| | | | # cases with interv | interv | average # of interv per case | # cases with interv | total Interv | average # interventions per case |
| 1999 | 177 | 2 | 0 | 0 | 0 | 2 | 4 | 2 |
| 2000 | 695 | 3 | 1 | 1 | 1 | 2 | 2 | 1 |
| 2001 | 888 | 17 | 8 | 9 | 1 | 9 | 8 | 1 |
| 2002 | 844 | 10 | 4 | 15 | 1,5 | 6 | 4 | 1,5 |
| 2003 | 703 | 11 | 4 | 7 | 1,41 | 7 | 8 | 1,2 |
| 2004 | 718 | 13 | 8 | 8 | 1,5 | 5 | 6 | 2,8 |
| 2005 | 1105 | 13 | 8 | 15 | 1,875 | 5 | 14 | 2,42 |
| 2006 | 1560 | 2 | 7 | 7 | 1,14 | 14 | 34 | 3 |
| 2007 | 1503 | 9 | 7 | 7 | 1,42 | 2 | 6 | 1,6 |
| 2008 | 1543 | 14 | 9 | 9 | 1,3 | 5 | 8 | 1,57 |
| 2009 | 1625 | 23 | 12 | 15 | 1,25 | 7 | 11 | 3,2 |
| 2010 | 1499 | 24 | 19 | 19 | 1,63 | 5 | 16 | 4,4 |
| 2011 | 1157 | 21 | 16 | 32 | 2 | 5 | 22 | 2 |
| 2012 | 1093 | 37 | 23 | 38 | 1,65 | 13 | 31 | 2,3 |
| 2013 | 916 | 22 | 15 | 34 | 2,26 | 7 | 23 | 3,2 |
| 2014 | 891 | 24 | 13 | 27 | 2,07 | 11 | 36 | 3,27 |
| 2015 | 823 | 33 | 21 | 35 | 1,12 | 10 | 25 | 2,5 |
| 2016 | 993 | 47 | 25 | 46 | 1,84 | 18 | 57 | 3,16 |
| 2017 | 1068 | 32 | 21 | 40 | 1,9 | 10 | 17 | 1,7 |

ANNEX No. 2: PUBLIC OPINION AND LEGAL EVOLUTION :

References to public opinion in ECtHR and Supreme Court decisions with regards to the rights of homosexuals in connection to evolving and consensual interpretation and third party participation rates

The annex contains one table per court.

1. European Court of Human Rights Cases

Explanation of method:

- *The cases contained in this tables are the cases that were analysed Chapter Four, in our case analysis pertaining to the evolution of rights applied to the rights of homosexual persons.*
 - *In Column 1:*
 - *Cases are classified chronologically.*
 - *Unless specified, all decisions were taken by the European Court . Other decisions originate from the European Commission of Human Rights (“ECommHR”).*
 - *In Column 2, excerpts of the European Opinion are quoted and the paragraph location of the quote is specified.*
 - *In Column 3, I specify if the decision resulted in a reversal of former cases (“legal changes”)*
 - *In Column 4, I specify the excerpts where the Court’s opinion uses an evolving approach.*
 - *In Column 5, I specify whether and where the Court’s opinion uses a consensual approach*
 - *In Column 6, “# interv”, i.e. “number of interventions”, I specify the existence of third-party participation, either through the support of a sponsor (“sp.”) or through the procedure of third intervention, with a brief (“br.”). In cases where several organizations submitted a brief together, I specify the number of briefs and the number of organizations (“org.”)*
- The table seeks to reveal the existence of a link (but not a causal relation) between the practice of referencing “public opinion”, and the use of dynamic interpretation or/and consensual interpretation. The reference to numbers of third parties is included to evidence the growth or third party participation over time.*

| 1 Name of case | 2. Public Opinion references in majority opinion, parties' arguments and dissents | 3. Legal Change | 4. Does the European Court use the evolving doctrine ? | 5. Does the European Court use the consensus doctrine? | # Interv. |
|---|--|--------------------|---|--|--------------|
| <i>ECommHR X v. The U.K.</i> (1977) (Commission) | "Far-reaching evolution of opinion on the subject of morals"(p.40) | No | - | - | - |
| <i>Dudgeon v. The U.K.</i> (1981) | Court: Local « opinion » is a relevant and legitimate consideration but not necessary. Evidence of state of local public opinion is required. (§60) "Members of the public's (position) cannot warrant...penal sanctions." (§61) Government : Local public opinion used as justification to keep existing law. Walsh, J. Dissent: privileging European Opinion over local opinion is a value judgment (§19) | Yes | Yes "the Court cannot overlook the marked changes" (§60) | Yes – indirectly: Reference to a "great majority of member states" § 60. | 1 Sp. |
| <i>ECommHR X. and Y. v. the U. K.</i> (1983) (inadmissible) | Despite the modern evolution of attitudes... (p. 221) | No. | - | - | - |

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|--|---|----------------------------|--|---|----------|
| Norris v. Ireland (1988) | Local “large body of public opinion” hostility or intolerance is irrelevant and insufficient reason to impose criminal sanctions (at §62.) – Also quotes Dudgeon passage above from §61 (at §46). | No. (Confirms Dudgeon.) | Yes: Quote <i>Dudgeon</i> at §46 | Yes: quotes <i>Dudgeon</i> at § 46 | 1 Sp. |
| Cossey v. the U.K. (1990) | Joint Dissent of judges Palm, Foighel and Pekkanen, JJ.: The negative attitude towards transsexuals is however slowly changing in European societies (at § 3). “New, more tolerant attitudes” reflected in the law” (at § 4). | No | Yes: No evolution of practice. In line with present-day conditions. (§ 40) Joint Dissent of judges Palm, Foighel and Pekkanen, JJ.: There is a growing awareness of need to accept differences (at § 4). | Yes. “Little common ground”. (§ 40) | |
| Mata Estevez v. Spain (2001) (inadmissible) | No. | No. | Yes: There is a trend toward legal and judicial recognition of same sex couple but it is insufficient (p?) | Yes. But lack of common ground between member states | |
| Christine Goodwin v. the U.K. (July 2002) | Applicant: Rapid changes in social attitudes in Europe and elsewhere (§63) “Continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition” of transsexualism (§ 85). The Court: “[I]ncrease in the social acceptance” of transsexuals and their problems (§ 92). | Yes | Yes. Need an interpretation true to present-day conditions (§74). “[C]ontinuing international trend towards legal recognition” outside of the Council of Europe (§ 84). | Yes. The Court overrides consensus: No common approach in Europe, but “continuing international trend towards legal recognition” outside of the Council of Europe (§ 84). “[I]ncrease in the social acceptance” of transsexuals and their problems (§ 92). | |

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|--|--|--|---|--|-------------------------|
| <p><i>Fretté v. France</i> (Feb. 2002)</p> | <p>The Court considers that “there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand.” (§42).</p> <p>The scientific community is divided on the issue (§ 42).</p> <p>On these social issues “opinions within a democratic society may reasonably differ widely” (§ 41).</p> | <p>No.</p> | <p>Yes:</p> <p>“The Convention is a living instrument to be interpreted in the light of present-day conditions” (§ 34).</p> | <p>Yes: “The total lack of consensus as to the advisability of allowing a single homosexual to adopt a child means that States should be afforded a wide margin of appreciation.” (§36)</p> | <p>1 br.</p> |
| <p><i>E.B. v. France</i> (2008)</p> | <p>Defendant : considers that public opinion is still divided (§ 67)</p> <p>Applicant: There was a steady development in the law in Europe since Fretté.</p> <p>Court: The division within scientific community and public opinion on the issue of homosexual adoption remains. (§ 70)</p> | <p>Yes</p> | <p>Yes – in the light of present day conditions (§ 92)</p> | <p>No: No mention of existence or inexistence of European consensus by the Court. Discussion by the parties only.</p> | <p>1 br. 4 Org.</p> |
| <p><i>Schalk and Kopf v. Austria</i> (2010)</p> | <p>The Court:</p> <p>1- Social changes have not yet occurred in Europe with respect to same-sex marriage (§ 70)</p> <p>2- “Rapid evolution of social attitudes toward same-sex couples” (§93)</p> | <p>1-No on marriage,</p> <p>2-Yes on “family life”</p> | <p>1-Yes : No, Social changes on the issue of same-sex marriage have yet occurred in Europe (§ 72)</p> <p>2- Yes:</p> <p>“In view of this evolution, the Court considers it artificial to maintain the view</p> | <p>1- Yes: - there is no European consensus regarding same-sex marriage. (58)</p> <p>2- Yes: No majority of states have provided for same-sex marriage, thus states have “wide margin” as to how to recognize same-sex couples (§46)</p> | <p>1 br. 6 org.</p> |

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|---|---|------|--|---|-----------------|
| | | | that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8.” (§94) | | |
| <i>X. and others v. Austria</i> (Feb. 2013) | New doctrine (based on <i>Kozak v. Poland</i>): The Court refers to “developments in society and changes in the perception of social, civil-status and relational issues” (§139). | Yes | Yes: the reference to developments in society and changes in the perception of social, civil-status and relational issues. | Yes: The Court overrides consensus: Lack of consensus (§147) but narrow margin due to the discrimination on the basis of sexual orientation | 5 br. |
| <i>Vallianatos v. Greece</i> (Nov. 2013) | The Court takes into account “developments in society and changes in the perception of social and civil-status issues and relationships” (§ 84). Applicant: “Instead of taking positive steps to overcome prejudice against gays and lesbians in Greek society, the respondent State had reinforced that prejudice by enacting Law no. 3719/2008 without including same-sex couples” (§ 60). | Yes. | Yes: “emerging trend” (§ 91), living instrument doctrine read in the light of development in society and changes in perception of social issues (§ 84). | Yes. The Court overrides consensus: No consensus but a trend is emerging (§ 91) | 1 br. 4 org. |
| <i>Oliari v. Italy</i> (2015) | Applicant: Evolution has occurred in many countries. Applicant: Certain national choices were in fact based on prevailing discriminatory attitudes. (§ 113) Recognition of same sex couples will bring “social legitimacy and acceptance” (§116) Defendant state: “social and cultural sensitivities of the issue” warrants margin of | Yes | On the right to private and family life: Yes: Existence of a “[European] movement towards legal recognition of same-sex couples has continued to develop rapidly” (§178) “The | On the recognition of a legal status for same-sex couples based on the right to private and family life (Article 8): Yes: No reference to “consensus” but to a “thin majority” of CoE states have legislated (§178). | 3 briefs |

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| <p>appreciation to the state (§ 123). The State is the “only entity capable of having cognisance of the “common sense” of its own community particularly concerning a delicate matter which affected the sensitivity of individuals and their cultural identities,” (§ 123)</p> <p>“They noted that the delicate choices involved in social and legislative policy had to achieve the unanimous consent of different currents of thought and feeling, as well as religious sentiment, which were present in society.” § 127</p> <p>“the different sensitivities on such a delicate and deeply felt social issue”</p> <p>“the fact that at the end of a gradual evolution a State was in an isolated position with regard to an aspect of its legislation did not necessarily mean that that aspect was in conflict with the Convention” (§124)</p> <p><u>Majority of the European Court:</u></p> <p>Reference to ISTAT survey on current Italian attitudes regarding homosexuals and same-sex couples (§ 144).</p> <p>“Such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys... The statistics submitted indicate that there is amongst the Italian population a popular acceptance of</p> | | <p>same rapid development can be identified globally” (§178)</p> <p>“To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective”(§ 186).</p> | <p>On the right to marriage (Article 12) and the recognition of and same-sex Marriage:</p> <p>Yes : “[D]espite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.” (§192)</p> | |
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| | homosexual couples, as well as popular support for their recognition and protection.” (§ 181). “[I]n the absence of a prevailing community interest being put forward”, state margin of appreciation has been overstepped and Italian authorities have “failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions” (§185). | | | | |
| <i>Aldeguer Tomas</i> (2016) | Court: “Rapid evolution” either of attitudes or of laws of member states (at §75.) | Yes. | Yes: “rapid evolution”. Same-sex couples enjoy family life | Yes: No established consensus. Margin of appreciation in the introduction of legislative changes (§82). | |

2. United States Supreme Court Cases

This table uses the same overall methodology as the one above.

The symbol “#” refers to “number”

Right hand side column displays the number of briefs submitted to the Supreme Court in the case at hand. This number does not reflect the number of organizations involved in submitting amici curiae briefs, as the data on this number was not found. The number of briefs submitted in U.S. v. Windsor is the same as in Hollingsworth v. Perry, because the briefs were submitted for both cases at once. This number refers to the combined number of third party briefs submitted in both U.S. v. Windsor and Hollingsworth v. Perry

| 1 Name of case | 2 Public Opinion Terms | 3 Does legal change occur ? | 4 Evolving Doctrine | 5 Consensus Among States | # ²⁰⁵⁰ |
|---|---|--------------------------------|---|--|-------------------|
| <i>Bowers v. Hardwick</i> (1986) | <p>“Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution” isn’t compatible with an imposition of the Court’s values (p...). Respondent “insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.” (at 196.)</p> <p>Justice Blackmun dissent: “No matter how uncomfortable a certain group may make the majority of this Court, we have held that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.”(at 212, citing <i>O'Connor v. Donaldson</i>, 422 U.S. 563, 575 (1975).)</p> | No. | No. | Yes: Numerical majority of states criminalizes homosexuality (25 states) (at 196.) | 12 |
| <i>Romer v. Evans</i> (1996) | <p>“A bare desire to harm a politically unpopular group cannot constitute a <i>legitimate</i> governmental interest”</p> <p>Justice Scalia dissent: Homosexuals are seeking “full social acceptance” (at 646). The Court reflects fashionable views of the lawyer class.(at 651-2)</p> | Yes | No (but higher standard or review applied) | - | 24 |

²⁰⁵⁰ Refers to the number of amicus briefs, not the number of organizations involved

| | | | | | |
|---|---|------------|---|---|---------------------------|
| <p><i>Lawrence v. Texas (2003)</i></p> | <p>Majority (J. Kennedy): Criminal condemnation consistent with “general condemnation” (at 559).</p> <p>Justice O’Connor’s concurrence: “mere disapproval” may not be the only reason to exclude a group. (at 585)</p> <p>Bowers was the object of widespread criticism, which is relevant (at 587).</p> <p>“In the United States, criticism of <i>Bowers</i> has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions.” (at 560)</p> <p>Justice Scalia’s dissent: Social perceptions change (at 603)</p> | <p>Yes</p> | <p>Yes - “Emerging awareness” that liberty protects personal privacy (at 572). The drafters did not know all possibilities included in the concept of liberty (at 579)</p> | <p>Yes: No Consensus (Number of States criminalizing homosexuality since <i>Bowers</i> has strongly decreased) (at 573)</p> | <p>31</p> |
| <p><i>U.S. v. Windsor (2013)</i></p> | <p>Majority:</p> <p>Standing for “Hundreds of Thousands” of People (at 762)</p> <p>“Tens of thousands of children now being raised by same-sex couples”. At 772</p> <p>“This is strong evidence of a law having the purpose and effect of disapproval of that class”. At 770</p> <p>The Constitution's guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group.” (at 770) citing <i>Department of Agriculture v. Moreno</i>, 413 U.S. 528, (1970) 534–535,</p> | <p>Yes</p> | <p>Yes: “evolving understanding of the meaning of equality”. At 769</p> | <p>Yes: “The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction</p> | <p>156²⁰⁵¹</p> |

²⁰⁵¹ This number refers to the combined number of third party briefs submitted in both *U.S. v. Windsor* and *Hollingsworth v. Perry*

| | | | | | |
|--------------------------------------|--|-----|--|--------------------------|-----|
| | Justice Scalia’s dissent, referring to a mob: “I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as they see them.” At 796 | | | with each other.” At 769 | |
| Hollingsworth v. Perry (2013) | Majority: “[Petitioners] are free to pursue a purely ideological commitment to the law's constitutionality without <i>the need to take cognizance of resource constraints, changes in public opinion</i> , or potential ramifications for other state priorities.” At 2667. | | Yes: “The definition of marriage has evolved” at 2601. | No. | 156 |
| Obergefell v. Hodges (2015) | Majority: “This development was followed by a quite extensive discussion of the issue in both governmental and private sectors <i>and by a shift in public attitudes toward greater tolerance</i> . As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.” At 2596. “An individual can invoke a right to constitutional protection when he or she is harmed, <i>even if the broader public disagrees</i> and even if the legislature refuses to act. . . . This is why “fundamental rights may not be submitted to a vote; they depend on <i>the</i> | Yes | Yes: “History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it <i>without allowing the past alone to rule the present</i> ”. (at 2589) « Recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and <i>unchallenged</i> , this Court has invoked equal protection | No. | 147 |

| | | | | |
|--|--|--|---|--|
| | <p><i>outcome of no elections.</i>” It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.” at 2605–06.</p> | | <p>principles to invalidate laws imposing sex-based inequality on marriage” 2590</p> <p>“These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process” at 2596</p> <p>“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. “ At 2603</p> | |
|--|--|--|---|--|

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Résumé – Abstract

Résumé :

Cette thèse s'inscrit dans un mouvement de reconnaissance de l'importance accrue de l'institution judiciaire, et de questionnement actuel sur la légitimité démocratique du juge. Dans ce cadre, elle enquête sur le rôle, dans la fonction et la pratique judiciaire, de l'opinion publique, largement considérée comme un élément de légitimité démocratique. Pour obtenir un éclairage plus complet de la sur cette question, une approche comparative est adoptée et appliquée à l'œuvre protectrice d'une cour nationale constitutionnelle et d'une cour internationale dans le domaine des droits et des libertés: la Cour suprême des Etats-Unis et la Cour européenne des droits de l'homme. Le raisonnement suivi est le suivant. Au niveau théorique, il s'agit de clarifier le concept protéiforme d'« opinion publique » et d'établir les différentes sources de la légitimité judiciaire, afin de déterminer si l'opinion publique peut en faire partie. Au niveau procédural, l'étude se penche sur la pratique judiciaire des deux cours, les différentes règles et pratiques qui permettent d'impliquer directement ou indirectement le public dans le processus judiciaire, que ce soit les parties, les tierces-parties, ou les médias. On se penche enfin sur la substance des décisions de justice, qui révèlent la manière dont les juges conçoivent le rôle de l'opinion publique dans la démocratie et dans l'évolution judiciaire des droits et libertés. L'étude de la substance des décisions se concentre d'une part sur la relation entre opinion publique et démocratie dans la protection de la liberté d'expression, et d'autre part sur le rôle de l'opinion publique dans l'évolution des droits des personnes homosexuelles.

Abstract :

This dissertation is part of a larger movement, both national and international, acknowledging the growing importance and inquiring about the democratic legitimacy of judicial institutions. In looking at the judicial office and its practice, it investigates the role of public opinion, largely considered an element of democratic legitimacy. To obtain a more complete perspective on judicial institutions and public opinion, a comparative approach is adopted and the United States Supreme Court, and the European Court of Human Rights are examined. This study adopts the following reasoning. At a theoretical level, it attempts to clarify the multifaceted concept of “public opinion” and to establish the different sources of judicial legitimacy, in order to determine whether public opinion can be considered such a source. At a process level, the study inquires about the judicial practice of both courts, and the different rules and practices that allow for a direct or indirect involvement of the public, whether parties, third-parties, or the media. It then studies the substance of judicial decisions, which reveal judges' conception of the role of public opinion in democracy and in the judicial evolution of rights and liberties. The content-study of judicial decisions focuses on first on the relationship between public opinion and democracy in the protection of freedom of expression and second on the role of public opinion in the evolution of the rights of homosexual persons.

