

OXFORD

Studies In European Law

Fundamental Rights in Europe Challenges and Transformations in Comparative Perspective

Federico Fabbrini

EUROPEAN

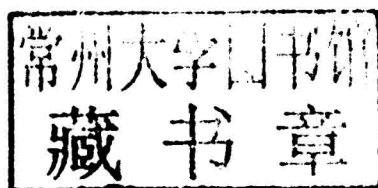
EURO

EUROPEAN

Fundamental Rights in Europe

*Challenges and Transformations in
Comparative Perspective*

FEDERICO FABBRINI



OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© F Fabbrini 2014

The moral rights of the author have been asserted

First Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013952040

ISBN 978-0-19-870204-7

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Series Editors' Preface

This book is simultaneously an account of the development of European Union human rights law over recent decades, and a work of comparative federalism.

Focusing on the multi-level systems of human rights protection in the EU and in the US, and on the interaction between the federal and the state levels, the author examines the dynamics at play in the emergence over time of standards of human rights protection in Europe. He suggests that problems of ineffectiveness in standards of protection may arise when the 'federal' level sets a ceiling in relation to a particular right, and that problems of inconsistency may arise where the federal level merely sets a floor, leaving individual states to develop their own standards. He suggests that a look at the practice of the United States, particularly in relation to the interaction between the state and federal levels, can be instructive for the EU going forward, particularly as its human rights system grows more complex with the accession of the EU to the European Convention on Human Rights.

Drawing on what the author terms a 'neo-federalist narrative', the substance of the book is built around four interesting comparative case studies, involving civil and political as well as socio-economic rights. The first is a study of due process standards for suspected terrorists, the second the right to vote for non-citizens, the third the right to strike, and the fourth the right to abortion.

This is a lively and readable work which sheds interesting light on the development of human rights standards in the European Union, focusing on the interplay between national, EU, and ECHR standards, and comparing these to relevantly similar developments in the United States. It should be of considerable interest to students and scholars of EU law, European human rights law, and comparative federalism.

Gráinne de Búrca
Paul Craig

Acknowledgments

This book is a revised and updated version of the PhD dissertation I defended at the Law Department of the European University Institute in Florence in June 2012. My interest in comparative law and fundamental rights dates back to my early years of research in Trento, Berkeley, Bologna, and Paris and is part of the luggage I carried with me to Tilburg Law School in the Netherlands. The four years (2008–12) I spent in Villa Schifanoia, however, provided the inspiring surroundings in which to think and write about the constitutional challenges and transformations facing the European system for the protection of fundamental rights from a comparative perspective. I would like to thank my supervisor, Miguel Poiars Maduro, as well as the other members of the jury of my PhD thesis defence, Marta Cartabia, Marise Cremona, and Vicki Jackson, for guiding, stimulating, and engaging me throughout the drafting of this work. In the course of my PhD, I had the privilege to work as the assistant to Martin Scheinin in his capacity as President of the International Association of Constitutional Law and to intern as a clerk in the chamber of Justice Sabino Cassese at the Italian Constitutional Court. Both experiences provided real-life input to my research and I am grateful to Martin and Sabino for their generosity and support. My sincere gratitude also goes to David Cole, for welcoming me to Washington D.C. for a research visit, sharing with me his knowledge on national security and human rights as well as enlisting me as the coordinator of the Research Group on “Constitutional Responses to Terrorism.” I concluded this book while at Tilburg Law School, and I wish to thank my institution and my colleagues Maurice Adams, Pierre Larouche, Randall Lesaffer, Anne Meuwese, and Corien Prins, for giving me new ideas, enthusiasm, and encouragement. This book would not have been possible if it were not for the help and advice of a number of friends and colleagues, who at any time of the day, and the year, were ready to answer my questions, comment on my drafts, or share their thoughts on a variety of issues that I faced during my research. Among many, I wish to thank Giuliano Amato, Miriam Aziz, Loïc Azoulay, Daphne Barak-Erez, Augusto Barbera, Leonard Besselink, Nicolas Cariat, Damian Chalmers, Monica Claes, Stephen Coutts, Deirdre Curtin, Giacinto della Cananea, Bruno de Witte, Akiko Ejima, Tiago Fidalgo Freitas, Michèle Finck, Tommaso Giupponi, Lech Garlicki, Kasia Granat, Daniel Halberstam, Ólaf Hanneson, Claire Kilpatrick, Eva Koundouraki, Mattias Kumm, Konrad Lachmayer, Joris Larik, Luigi Lonardo, Beppe Martinico, François-Xavier Millet, Andrea Morrone, Machteld Nijsten, Tuomas Ojanen, Nicky Owtram, Pasquale Pasquino, Ulli Petersmann, Jim Pope, Max Putzer, Siniša Rodin, Stephen Schulhofer, Robert Schütze, Martin Shapiro, Jo Shaw, Alec Stone Sweet, Diletta Tega, Roberto Toniatti, Aida Torres Pérez, Michel Troper, Maria Tzanou, Mathias Vermeulen, and Joseph H.H. Weiler. Paul Craig and Gráinne de Búrca were kind enough to accept this book into the Oxford Studies

in European Law series, and the staff at OUP—Alex Flach, Natasha Flemming, and Clare Kennedy—provided great help in transforming the original manuscript into this volume. I am glad to acknowledge that some of the chapters are based on my previous publications: sections of Chapter 3 were published as “Voting Rights for Non-Citizens: The European Multilevel and the US Federal Constitutional System Compared” (2011) 7 *European Constitutional Law Review* 392, while an earlier version of Chapter 4 appeared as “Europe in Need of a New Deal: On Federalism, Free Market and the Right to Strike” (2012) 43 *Georgetown Journal of International Law* 1175 (2012), and an earlier version of Chapter 5 as “The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: *Roe v. Wade* on the Other Side of the Atlantic?” (2011) 18 *Columbia Journal of European Law* 1. Several of the ideas forming the basis of Chapters 1 and 6 were first sketched out in “The European Multilevel System for the Protection of Fundamental Rights: A ‘Neo-Federalist’ Perspective,” Jean Monnet Working Paper 15/2010.

This book is dedicated to my family—my father Sergio, my mother Manuela, and my brother Sebastiano: for all their love, patience, and unrelenting support through this journey.

Federico Fabbrini

Tilburg Law School
August 2013

Table of Cases

AUSTRIA

Verfassungsgerichtshof (Federal Constitutional Court)

VfGH 7400 JBL [1974]	200
VfGH B3113/96, B3760/97 [1997]	109
VfSlg 17.264/2004 [2004]	102, 251

BELGIUM

Burgerlijke Rechtbank van Eerste Aanleg—Brussels (Court of First Instance—Brussels)

Civ. (4ème Ch.), 11 February 2005, <i>Sayadi and Vinck c. Etat belge</i> , not published	55
--	----

CALIFORNIA

Supreme Court

<i>People v. Abarbanel</i> , 239 Cal. App. 2d 31 (1965)	221
<i>People v. Belous</i> , 71 Cal. 2d 954 (Cal. 1969)	221
<i>Committee to Defend Reproductive Rights v. Myers</i> , 625 P.2d 779 [1981].	226
<i>County Sanitation District v. Los Angeles County Employee Ass'n</i> , 38 Cal. 3d 564 (1985).	171

CANADA

Supreme Court

<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	219
<i>R. v. Morgentaler</i> , [1993] 3 S.C.R. 463	219

COUNCIL OF EUROPE—EUROPEAN CONVENTION ON HUMAN RIGHTS

European Commission on Human Rights

<i>Brüggemann and Scheuten v. Germany</i> , ECommHR [1977] App. No. 6959/75.	213
<i>Confédération Française Démocratique du Travail v. EEC</i> , ECommHR [1978] App. No. 8030/77	87
<i>X. v. United Kingdom</i> , ECommHR [1980] App. No. 8416/79	213
<i>M and Co. v. Germany</i> , ECommHR [1990] App. No. 13258/87	87
<i>Open Door Counselling v. Ireland</i> , ECommHR [1991] App. Nos 14234/88 and 14235/88	213, 214
<i>R. H. v. Norway</i> , ECommHR [1992] App. No. 17004/90	213

European Court of Human Rights

<i>National Union of Belgian Police v. Belgium</i> , ECHR [1976] App. No. 4464/70 (Plenary)	155
<i>Schmidt and Dahlström v. Sweden</i> , ECHR [1976] App. No. 5589/72	155
<i>Swedish Engine Drivers' Union v. Sweden</i> , ECHR [1976] App. No. 5614/72	155
<i>Tyrer v. United Kingdom</i> , ECHR [1978] App. No. 5856/72	42
<i>Mathieu-Mohin and Clerfayt v. Belgium</i> , ECHR [1987] App. No. 9267/81 (Plenary)	104
<i>Open Door Counselling v. Ireland</i> , ECHR [1992] App. Nos 14234/88 and 14235/88 (Plenary)	214, 231, 254
<i>Matthews v. United Kingdom</i> , ECHR [1999] App. No. 24833/94 (GC).	87, 104, 105, 123, 124

<i>UNISON v. United Kingdom</i> , ECHR [2002] App. No. 53574/99.....	155
<i>Wilson and others v. United Kingdom</i> , ECHR [2002] App. No. 28212/95	155
<i>Boso v. Italy</i> , ECHR [2002] App. No. 50490/99	215
<i>Vo v. France</i> , ECHR [2004] App. No. 53924/00 (GC)	215
<i>Sante Santoro v. Italy</i> , ECHR [2004] App. No. 36681/97.....	104
<i>Von Hannover v. Germany</i> , ECHR [2004] App. No. 59320/00.....	39
<i>Py v. France</i> , ECHR [2005] App. No. 66289/01	104
<i>Hirst v. United Kingdom</i> , ECHR [2005] App. No. 74025/2001 (GC).....	18, 104, 266
<i>Bosphours Hava Yollari Turizm v. Ireland</i> , ECHR [2005] App. No. 45036/98 (GC).....	87, 88
<i>D. v. Ireland</i> , ECHR [2006] App. No. 26499/02.....	216
<i>Demir & Baykara v. Turkey</i> , ECHR [2006] App. No. 34503/97.....	174
<i>Evans v. United Kingdom</i> , ECHR [2007] App. No. 6339/05 (GC)	215
<i>Tysic v. Poland</i> , ECHR [2007] App. No. 5410/03	205, 215, 216, 230
<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> , ECHR [2007] App. Nos 71412/01 and 78166/01 (GC)	88
<i>Demir & Baykara v. Turkey (No. 2)</i> , ECHR [2008] App. No. 34503/97 (GC).....	49, 143, 174, 175, 176, 177, 178, 179, 180, 181, 193, 253
<i>Enerji Yapi-Yol Sen v. Turkey</i> , ECHR [2009] App. No. 68959/01.....	143, 174, 177, 178, 179, 180, 181, 193, 253
<i>A., B. & C. v. Ireland</i> , ECHR [2010] App. No. 25579/05 (GC).....	49, 197, 198, 228, 229, 230, 231, 233, 234, 236, 242, 243, 247, 254
<i>Schalk and Kopf v. Austria</i> , ECHR [2010], App. No. 30141/04	36
<i>Al-Jedda v. United Kingdom</i> , ECHR [2011] App. No. 27021/08 (GC)	89
<i>R. R. v. Poland</i> , ECHR [2011] App. No. 27617/04	197, 228, 234, 235, 236, 247
<i>P. & S. v. Poland</i> , ECHR [2012] App. No. 57375/08	197, 228, 235, 236, 247
<i>Von Hannover v. Germany (No. 2)</i> , ECHR [2012] App. Nos 40660/08 and 60641/08 (GC) ...	39
<i>Sitaropoulos & Giakoumopoulos v. Greece</i> , ECHR [2012] App. No. 42202/07 (GC)	130, 133
<i>Nada v. Switzerland</i> , ECHR [2012] App. No. 10593/08 (GC).....	49, 53, 89, 90, 93, 251

CZECH REPUBLIC

Ústavn soud esk republiky (Constitutional Court)

Pl. ÚS 5/12, judgment of 31 January 2012, <i>Slovak Pension XVII</i>	22
--	----

EUROPEAN UNION

Court of First Instance

Case T-306/01 <i>Ahmed A. Yusuf and Al Barakaat International Foundation v. EU Council and Commission</i> [2005] ECR II-3533	52, 62, 65
Case T-351/01 <i>Yassin A. Kadi v. Council of the EU and Commission of the EC</i> [2005] ECR II-3649	52, 62, 63, 64, 65, 66, 78, 79, 80, 84, 87, 88, 94, 95, 250, 258
Case T-228/02 <i>Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the EU</i> [2006] ECR II-4665	79, 80, 81, 85
Case T-253/02 <i>Chakif Ayadi v. EU Council</i> [2006] ECR II-2139	65

General Court

Case T-85/09 <i>Kadi v. Commission (Kadi II)</i> , judgment of 30 September 2010, nyr.	90, 91
---	--------

Court of Justice

Case 29/69 <i>Stauder</i> [1969] ECR 419	9, 210
Case 11/70 <i>Internationale Handelsgesellschaft</i> [1970] ECR 1125	9

Joined Cases C-21/72 and C-24/72 <i>International Fruit Company</i> [1972] ECR I-1219	63
Case 4/73 <i>Nold</i> [1974] ECR 491	9, 256
Case 175/73 <i>Union Syndicale, Massa and Kortner v. Commission</i> [1974] ECR 917	154
Case 18/75 <i>Syndicat Général du Personnel Organismes Européens v. Commission</i> [1974] ECR 933	154
Case 43/75 <i>Defrenne v. Sabena</i> [1976] ECR 455	42
Case 294/83 <i>Les Verts v. Parliament</i> [1986] ECR 1339	81
Case 222/84 <i>Johnston v. Chief Constable of the Royal Ulster Constabulary</i> [1986] ECR 1651	62
Case 314/85 <i>Foto-Frost</i> [1987] ECR 4199	65
Case 5/88 <i>Wachauf v. Bundesamt für Ernährung und Forstwirtschaft</i> [1989] ECR 2609	10, 210
Case C-260/89 <i>ERT</i> [1991] ECR I-2925	10, 210
Case C-159/90 <i>Society for the Protection of the Unborn (SPUC) v. Grogan</i> [1991] ECR I-4685	210, 211, 212, 213, 214, 223, 238, 240, 242, 254
Case C-369/90 <i>Micheletti v. Delegacion del Gobierno en Cantabria</i> [1992] ECR I-4258	112
Case C-168/91 <i>Konstantinidis</i> [1993] ECR I-1191	108
Case C-92/92 <i>Collins</i> [1993] ECR I-5145	107
Case C-84/95 <i>Bosphorus v. Minister of Transport</i> [1996] ECR I-3953	87
Case C-67/96 <i>Albany International</i> [1999] ECR I-5751	154, 157
Case C-285/98 <i>Tanja Kreil</i> [2000] ECR I-69	38
Case C-184/99 <i>Grzelczyk v. Centre public d'aide sociale</i> [2001] ECR I-6193	125
Case C-224/98 <i>D'Hoop</i> [2002] ECR I-6191	125
Case C-112/00 <i>Schmidberger</i> [2003] ECR I-5659	39
Case C-36/02 <i>Omega</i> [2003] ECR I-9609	39
Case C-148/02 <i>Garcia Avello</i> [2004] ECR I-11613	125
Case C-200/02 <i>Kungian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department</i> [2004] ECR I-9925	113
Case C-192/95 <i>Tas-Hagen en Tas</i> [2006] ECR I-10451	127
Case C-145/04 <i>Spain v. United Kingdom (Gibraltar)</i> [2006] ECR I-7917	98, 124, 129, 139
Case C-300/04 <i>Eman & Sevinger (Aruba)</i> [2006] ECR I-8055	49, 97, 123, 124, 128, 139, 252
Case C-355/04 <i>Segi and others v. EU Council</i> [2007] ECR I-1657	65, 66
Case C-438/05 <i>Viking</i> [2007] ECR I-10779	49, 142, 156, 157, 158, 159, 160, 161, 162, 173, 174, 180, 181, 182, 183, 184, 185, 186, 187, 188, 192, 193, 194, 253, 257, 258
Case C-341/05 <i>Laval</i> [2007] ECR I-11767	49, 142, 156, 159, 160, 161, 162, 173, 174, 180, 181, 182, 183, 184, 185, 186, 187, 188, 192, 193, 194, 253, 257, 258
Joined Cases C-11/06 and C-12/06 <i>Morgan</i> [2007] ECR I-9161	127
Case C-380/05 <i>Centro Europa 7</i> [2008] ECR I-349	262
Joined Cases C-402/05 P and C-415/05 P <i>Kadi & Al Barakaat International Foundation v. EU Council and Commission</i> [2008] ECR I-6351	49, 53, 79, 81, 82, 83, 84, 85, 86, 87, 89, 90, 93, 95, 251, 258
Case C-550/09 <i>Criminal Proceedings Against E and F</i> [2010] ECR I-6213	79, 83, 84, 85, 95, 251
Case C-271/08 <i>Commission v. Germany</i> [2010] ECR I-7091	161
Case C-135/08 <i>Rottmann v. Freistaat Bayern</i> [2010] ECR I-1449	98, 125, 126, 127, 128, 129
Case C-34/09 <i>Zambrano</i> , judgment of 8 March 2011, nyr	49, 126, 127, 129, 139
Case C-434/09 <i>McCarthy</i> , judgment of 5 May 2011, nyr	127
Joined Cases C-411/10 <i>NS</i> and C-493/10 <i>ME</i> , judgment of 21 December 2011, nyr	19
Case C-617/10 <i>Åkerberg Fransson</i> , judgment of 26 February 2013, nyr	39, 40, 238
Case C-399/11 <i>Stefano Melloni</i> , judgment of 26 February 2013, nyr	40, 41
Joined Cases C-584/10 P, C-593/10 P and C-595/10 P <i>Commission, Council and United Kingdom v. Kadi</i> , judgment of 18 July 2013, nyr	49, 91, 92, 93, 95, 251

FRANCE

Conseil Constitutionnel (Constitutional Court)

Décision 71-44 DC	8
Décision 75-17 DC	202
Décision 92-308 DC	111
Décision 92-312 DC	111
Décision 2001-446 DC	202
Décision 2001-449 DC	202

Conseil d'Etat (Council of State)

C.E., <i>Ministre de l'Equipment et du Logement c. Fédération des Défenses des Personnes Concernées</i> <i>par le Projet Ville Nouvelle Est de Lille</i> , judgment 28 May 1971	56
C.E. No. 262626, <i>Association Secours Mondial de France</i> , judgment 3 November 2004	56, 250

Cour de Cassation (Supreme Court)

Cass Soc. 7 June 1995 (RJS 8-9/95 no 933)	147
---	-----

GERMANY

Bundesverfassungsgericht (Federal Constitutional Court)

BVerfGE 37, 271 (1974) (<i>Solange I</i>)	9, 66
BVerfGE 39, 1 (1975)	204
BVerfGE 73, 339 (1986) (<i>Solange II</i>)	66
BVerfGE 63, 37 (1990)	102, 251
BVerfGE 63, 60 (1990)	102
BVerfGE 88, 203 (1993)	204
BVerfGE 59 NJW 751 (2006)	55
BVerfGE 1 BvR 653/96, (1999) (<i>Caroline von Monaco</i>)	39
BVerfGE 123, 267 (2009) (<i>Lissabon Urteil</i>)	18

Bundesgerichtshof (Federal Supreme Court)

BGHSt 49, 112 (2004)	55, 250
--------------------------------	---------

Bundesarbeitsgericht (Federal Supreme Labour Court)

BAG, 28.01.1955—GS 1/54	149
-----------------------------------	-----

GREECE

Symvoulío tis Epikrateias (Council of State)

460/2013, decision of 4 February 2013	102
---	-----

ILLINOIS

Supreme Court

<i>Spragins v. Houghton</i> , 3 Ill. (2 Scam.) 377 (1840)	117
---	-----

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

<i>El-Masri v. US</i> , IACommHR, Petition No. 419-08, 27 August 2009	77
---	----

INTERNATIONAL COURT OF JUSTICE

<i>Nottebohm (Lichtenstein v. Guatemala)</i> , I.C.J. Reports 1955, p. 4.	112
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding S/Res/276 (1970)</i> , Advisory Opinion, I.C.J. Reports 1971, p. 16	61

IOWA

Supreme Court

<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	36
---	----

IRELAND

High Court

<i>Society for the Protection of Unborn Children Ireland Ltd. v. Open Door Counselling</i> [1988] IR 593 (H. Ct.)	213
<i>Society for the Protection of Unborn Children Ireland Ltd. v. Grogan</i> [1989] IR 753 (H. Ct.) ...	210
<i>Attorney General v. X.</i> [1992] ILRM 401, 410 (H. Ct.)	207

Supreme Court

<i>McGee v. Attorney General</i> [1974] IR 284	206
<i>Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill 1983</i> , In re [1984] 1 IR 268.	100
<i>Society for the Protection of Unborn Children Ireland Ltd. v. Open Door Counselling</i> [1988] IR 618 ...	213
<i>Society for the Protection of Unborn Children Ireland Ltd. v. Grogan</i> [1989] 4 IR 760.	206, 210
<i>Attorney General v. X.</i> [1992] 1 IR 41	207, 208, 212
<i>Article 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill</i> , In re [1995] 1 IR 1	208

ITALY

Corte Costituzionale (Constitutional Court)

Sentenza 123/1962	147
Sentenza 183/1973 (<i>Frontini</i>)	9, 66
Sentenza 27/1975	202
Sentenza 290/1974	147
Sentenza 372/2004	101
Sentenza 379/2004	101
Sentenza 348/2007	12
Sentenza 349/2007	12
Sentenza 138/2010	36

Corte di Cassazione (Supreme Court)Cass. 30 gennaio 1980, n. 711 in *Giustizia Civile*, 1980, I 1088. 147**Consiglio di Stato (Council of State)**Sez. V, sentenza n. 4207/2005, *Federfarma* 18**MASSACHUSETTS****Supreme Judicial Court***Goodridge v. Department of Public Health*, 440 Mass. 309 (2003) 31**NETHERLANDS****Hoge Raad (Supreme Court)**

HR 30 May 1986, NJ 1986, 688 145

NEW JERSEY**Court of Appeal***ACLU of New Jersey v. County of Hudson*, 799 A.2d 629 (2002) 70**NEW YORK****Supreme Court—Appellate Division***Hope v. Perales*, 189 A.D.2d 287 (1993) 38, 226**PENNSYLVANIA****Supreme Court***Stewart v. Foster*, 2 Binn. 110 (Pa. 1809) 25 117**POLAND****Trybunał Konstytucyjny (Constitutional Court)**

TK, decision of 28 May 1997, K 26/96 206

TK, decision of 11 May 2005, K 18/04 101

SPAIN**Tribunal Constitucional (Constitutional Court)**

STC Sentencia 11/1981 145

STC Sentencia 53/1985 203

STC Recurso 4523-10 pending. 203

STC Recurso 4541-10 pending. 203

SWITZERLAND

Tribunal Fédéral (Federal Supreme Court)

- Youssef Nada v. SECO* 1A.45/2007/daa, judgment of 14 November 2007 90
A v. Département fédéral de l'économie 2A.783/2008/svc, judgment of 23 January 2008. 90

UNITED KINGDOM

Court of Appeal

- NURMT v SERCO, ASLEF v. London and Birmingham Railway Ltd.* [2011] EWCA Civ 226. . 179

King's Bench

- R. v. Bourne* [1939] 1 KB 687 206

House of Lords

- Taff Vale Railway Co. Ltd. v. Amalgamated Society of Railway Servants* [1901] AC 426 151
Miles v. Wakefield Metropolitan District Council [1987] AC 539 152
A. and others v. Secretary of State for the Home Dept. [2004] UKHL 56 55
R. (On the application of Al-Jedda) v. Secretary of State [2007] UKHL 58 55, 56, 90, 250

Supreme Court

- R. v. Jabar Ahmed* [2010] UKSC 2 85

UNITED NATIONS

Human Rights Committee

- CCPR/CO/82/POL, Concluding Observations on Poland, 2 December 2004. 243
 CCPR/C/IRL/CO/3, Concluding Observations on Ireland, 30 July 2008 243
 CCPR/C/94/D/1472/2006, Decision in case *Sayadi and Vinck v. Belgium*, 22 October 2008 . . 55

UNITED STATES

District Courts

- KindHearts for Charitable Humanitarian Developments v. Geithner*, 647 F. Supp. 2d 857
 (N.D. Ohio 2009) 68
Kadi v. Geithner, 2012 U.S. Dist. LEXIS 36053 (D.D.C., March 19, 2012) 68

Courts of Appeals

- El-Masri v. US*, 479 F.3d 296 (4th Cir. 2007) 77
Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013) 38, 225

Supreme Court

- Marbury v. Madison*, 5 U.S. 137 (1803) 76
Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) 30
Dred Scott v. Sandford, 19 U.S. (How.) 393 (1857) 30, 117, 132
Minor v. Happerset, 88 U.S. 162 (1874) 118, 124
Plessy v. Ferguson, 163 U.S. 537 (1896) 42
United States v. Wong Kim Ark, 169 U.S. 649 (1898) 120
Pope v. Williams, 193 U.S. 621 (1904) 118, 121
Lochner v. New York, 198 U.S. 45 (1905) 166, 167, 172, 183

<i>Adair v. United States</i> , 208 U.S. 161 (1908)	167
<i>Loewe v. Lowlor</i> , 208 U.S. 274 (1908)	167
<i>Coppage v. Kansas</i> , 236 U.S. 1 (1915)	167
<i>Charles Wolff Packing Co. v. Court of Industrial Relations</i> , 262 U.S. 522 (1923)	167, 168, 172, 253
<i>Girlow v. New York</i> , 268 U.S. 652 (1925)	221
<i>Dorchy v. Kansas</i> , 272 U.S. 306 (1926)	168, 253
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	36
<i>Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	168, 191
<i>NLRB v. Jones and Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	169
<i>New Negro Alliance v. Sanitary Grocery Co.</i> , 303 U.S. 552 (1938)	169
<i>NLRB v. Mackay Radio & Telegraph Co.</i> , 304 U.S. 333 (1938)	170
<i>Consolidated Edison Co. v. NLRB</i> , 305 U.S. 197 (1938)	170
<i>NLRB v. Fansteel Metallurgical</i> , 306 U.S. 240 (1939)	171
<i>Eduards v. California</i> , 314 U.S. 160 (1941)	119
<i>Ex parte Quirin</i> , 317 U.S. 1 (1942)	70
<i>U.A.W. Local 232 v. Wisconsin Employment Relations Board</i> , 336 U.S. 245 (1949)	171
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	42
<i>Building Trade Council v. Garmon</i> , 359 U.S. 236 (1959)	170
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	119
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	119
<i>Carrington v. Rush</i> , 380 U.S. 89 (1965)	119
<i>Textile Workers Union v. Darlington</i> , 380 U.S. 263 (1965)	171
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	206, 221
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	119
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966)	119
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	119
<i>Shapiro v. Thompson</i> , 349 U.S. 618 (1969)	119
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	119, 128, 133, 252
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	44
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	38, 196, 197, 206, 221, 222, 223, 224, 226, 227, 228, 236, 241, 244, 245, 246, 247, 254, 255
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	222
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	223
<i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976)	223
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	44
<i>Maier v. Roe</i> , 432 U.S. 464 (1977)	223
<i>Prunyard Shopping Ctr. v. Robins</i> , 447 U.S. 74 (1980)	37
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	223
<i>City of Akron v. Akron Center for Reproductive Health Inc.</i> , 462 U.S. 416 (1983)	223
<i>Planned Parenthood Association of Kansas City v. Ashcroft</i> , 462 U.S. 476 (1983)	223
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	42
<i>Lyng v. Auto Workers</i> , 485 U.S. 360 (1988)	171
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	37
<i>Lechmere Inc. v. NLRB</i> , 502 U.S. 527 (1992)	171
<i>Gade v. National Solid Waste Management Association</i> , 505 U.S. 88 (1992)	70
<i>Planned Parenthood of South-eastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992)	224, 225, 227, 255
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995)	270
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	69, 250
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000)	225
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	42
<i>Yaser E. Hamdi et al. v. Donald H. Rumsfeld et al</i> , 542 U.S. 507 (2004)	52, 70, 71, 72, 73, 74, 75, 76, 77
<i>Salim A. Hamdan v. Donald H. Rumsfeld et al</i> , 548 U.S. 557 (2006)	72, 73, 74, 75, 77, 251

<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	225
<i>Lakhdar Boumediene et al v. George W. Bush et al</i> , 553 U.S. 723 (2008).	52, 75, 76, 77, 251
<i>New Process Steel v. NLRB</i> , 130 S.Ct. 2635 (2010).	185
<i>Arizona v. Inter Tribal Council of Arizona, Inc.</i> , 570 U.S. __ (2013)	120
<i>Shelby County v. Holder</i> , 570 U.S. __ (2013)	120, 132, 262
<i>United States v. Windsor</i> , 570 U.S. __ (2013)	36

List of Abbreviations

ADRM	American Declaration of the Rights of Man
AG	Advocate General
ALI	American Law Institute
AUMF	Authorization for the Use of Military Forces
CCFSRW	Community Charter of Fundamental Social Rights of Workers
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CPFPL	Convention on the Participation of Foreigners in Public Life at the Local Level
CSRT	Combatant Status Review Tribunal
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECI	European Citizens' Initiative
ECJ	European Court of Justice
ECommHR	European Human Rights Commission
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
ERA	Employment Relations Act 1999
ESC	European Social Charter
EU	European Union
GC	General Court
HRA	Human Rights Act 1998
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ILO	International Labour Organization
JHA	Justice and Home Affairs
NIRA	National Industrial Recovery Act
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OFAC	Office of Foreign Assets Control
TEC	Treaty on the European Community
TEEC	Treaty on the European Economic Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TULCRA	Trade Union and Labour Relations (Consolidation) Act 1992
UK	United Kingdom
UNSC	United Nations Security Council
US	United States
VRA	Voting Rights Act

Contents

<i>Table of Cases</i>	xi
<i>List of Abbreviations</i>	xx
 Introduction	 1
 1. Of Floors, Ceilings, and Human Rights: The European Fundamental Rights Architecture in Comparative Perspective	 4
1. Introduction	4
2. The European multilevel architecture for the protection of fundamental rights	6
3. "Sovereigntism" vs. "Pluralism": the existing literature and its limits	14
4. The European multilevel system in comparative perspective	25
5. The dynamics of the European multilevel architecture recast	35
6. Challenges and transformations: a model	45
7. The structure of the book	48
 2. The Right to Due Process for Suspected Terrorists	 51
1. Introduction	51
2. Context: the protection of due process rights in the EU member states after 9/11	53
3. Challenge: the impact of EU counter-terrorism law on due process rights	57
4. Comparative assessment: due process and national security in the US federal system	67
5. Recent developments: the case law of the European Court of Justice	78
6. Future prospects: beyond the Lisbon Treaty	85
7. Conclusion	93
 3. The Right to Vote for Non-Citizens	 96
1. Introduction	96
2. Context: electoral rights for non-citizens in the EU member states	99
3. Challenge: the impact of supranational law on states' electoral laws	104
4. Comparative assessment: voting rights for non-citizens in the US federal system	114
5. Recent developments: the case law of the European Court of Justice	121
6. Future prospects: beyond the Lisbon Treaty	129
7. Conclusion	138