The European and American immigration struggle: How two continents endeavor to solve the immigration question

Austin Creal
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Both the European Union and the United States experienced an immigration crisis in the Early 2000's. Each has reacted with policies and judicial opinions based on their culture, circumstances, and geography. I conduct a comparative policy-based analysis with a multi-faced lens that will be analyzed with emphasis on the consequences of immigration and how each judicial system endeavors to solve the most pressing challenge of their times. Specifically, I compare various case law, directives, and precedent to provide a more in-depth narrative on how each system has reacted to circumstances before their respective Courts. An in-depth examination of both EU and US response to their crises helps provide relevant and accurate context to their current immigration challenges.

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The European and American Immigration Struggle: How Two Continents Endeavor to Solve the Immigration Question

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Abstract

Both the European Union and the United States experienced an immigration crisis in the Early 2000’s. Each has reacted with policies and judicial opinions based on their culture, circumstances, and geography. I conduct a comparative policy-based analysis with a multi-faced lens that will be analyzed with emphasis on the consequences of immigration and how each judicial system endeavors to solve the most pressing challenge of their times. Specifically, I compare various case law, directives, and precedent to provide a more in-depth narrative on how each system has reacted to circumstances before their respective Courts. An in-depth examination of both EU and US response to their crises helps provide relevant and accurate context to their current immigration challenges.
Introduction

Comparing distinct and separate judicial systems here is particularly unique as similar cultures and liberalist beliefs can result in different outcomes. These outcomes are heavily dependent on their proximity to large-scale immigration, that cultures response to immigration generally, and the different legal practices that result in a preference of legislative or executive action. Both the European Union’s Court of Justice (ECJ) and the United States’ Supreme Court are particularly different as one Court encompasses a nation-state while the other encompasses multiple under its sovereign jurisdiction. As the Court’s primary objective is to apply equal law, we can observe both Courts utilizing different sources of authority. Whereas the Supreme Court references and cites the Constitution in all of its opinions, the ECJ references and cites multiple international agreements. Among these include the Treaty on the Functioning of the European Union, the EU Charter of Fundamental Rights, the Directives of the European Union Parliament, and the Directives of the European Union Council. Thematically, observers can notice a trend a migrant-friendly opinions by the ECJ that are to the detriment of that nation-state’s sovereignty, autonomy, political independence, and security. On the other hand, the Supreme Court issues opinions that only interpret the Constitution and typically leave vague legal questions in the hands of the people through Congress. Each background section will give the reader an understanding of how each Court operates and provides
the relevant context to understand how each immigration opinion can have real-world consequences for the citizens of these two political and judicial systems.

**EU Background/Case Studies**

Formed in the aftermath of the Second World War, the increasingly authoritative European Union's judicial system is a remarkable case study as the Court of Justice encompasses both executive and judicial functions. In other words, it has the power to adjudicate disputes between member states and the European Union (EU) agencies, enforce those decisions onto the member states, and impose strict financial penalties for non-compliance. As the Court of Justice's prime directive is to enforce EU treaties, directives, and regulations, it has been given a wide breadth of authority to ensure the law is applied equally to all member states, regardless of its positive and negative benefits.

Before we can discuss recent consequences to its judicial decisions, especially with regards to immigration, we must first examine how the court is structured, how it gets its authority, and if there is any recourse to its decisions. With this context, we can discuss the interesting immigration cases sufficiently.

First and foremost, the European Union is not a single nation-state. This supranational entity, as it is commonly referred to, is a collection of individual states who have surrendered sections of their sovereignty to achieve a common European framework of cooperation, stability, and exchanges. As the European Commission and the European Council begin to make legislation and regulations, like other nations, there must be an
organization to settle disputes, appeals, and apply equal protection under the law. The
European Coal and Steel Community, the foundational entity of European cooperation
that later became the European Union through multiple treaties first ratified the Treaty of
Paris (1951). This Treaty gave rights of appeal by the member states towards the “high
authority” in Article 33, consultment with member nations before enacting penalties in
Article 36 and petition to annul decisions made by the European Council or the Assembly
in Articles 38/39 as well as jurisdiction on treaty validation, among others in Articles
41/42/43 (Treaty of Paris). To further underscore the power of the new “Court of
Justice”, within Article 38, the Court held the power to strike down decisions made by
the other institutions in this new European framework:

On the petition of a member State or of the High Authority, the Court may annul
the acts of the Assembly or of the Council. The petition must be submitted within
one month from the publication of such act of the Assembly or of the notification
of such act of the Council to the member States or to the High Authority. Such an
appeal may be based only on the grounds of lack of legal competence or

Arguably, the Court in the early version of the European Union received the most
power as it could punish member states with non-compliance of directives or laws,
regardless of their consequence to general society. This power in future treaties would
remain in place as the sole body with oversight of every member state and its distinct
bodies. Later treaties, which include the Treaty of Rome, Single European Act, and the
Treaty of Lisbon would all contribute to the growing power of the European Court of
Justice (European Commission).

Within the Treaty of Rome (1957), the Court of Justice received broad new
powers that include both reaffirming the Treaty of Paris and gave the Court new areas of
jurisdiction. As it will be further discussed, the Treaty of Rome gave more clarification
on the procedural rules of void decisions from the Court and how member states must react to them as shown in articles 169-176. Here, several articles are worth close observation. Article 182 allows the Court jurisdiction over disputes between member states, whereas Article 172 states that "regulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations". Next, Article 176 explains that "The institution whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice..." (Treaty of Rome, 1957). Slowly but surely, the European Court of Justice (ECJ) was gaining power to independently settle disputes in between the member-states and between themselves to the European Union apparatus. In addition to slowly losing their sovereignty, as the Court could now have discretion to impose penalties on member states without recourse based on its own interpretation of European Law and its several treaties. Unlike any other judicial system in the world at the time, another "Court" was added to the European Community's judiciary by the Treaty of Rome, which was named the Court of First Instance.

To better manage the exhausted resources of the European judicial system, another body was added the Court of Justice to handle preliminary disputes in which some could reach a higher body. Uniquely, the Court of First Instance hears complaints and disputes from both individuals and the members states to the European Union's institutions themselves, but has a position, compared to the Court of Justice as a lesser Court. The Court of First Instance is the first Court most entities encounter. If those entities appeal this Court's decision, it would be taken the Court of Justice, or "first
among equals”. Only in matters of law can the Court of Justice hear complaints from this Court (Maastricht Treaty, Article 168a).

By the creation of the European Council in 1989, this new Court, which was later named the General Court, was partially formed for the purpose of alleviating the case load stresses on the “higher court”, the ECJ. This new court of limited jurisdiction primarily held cases of individual complaints brought against the European Community, competition law disagreements, and smaller financial penalty cases that were not significant enough to appear at the ECJ. Essentially, this act created a two-tier judiciary at the national level that was further complicated by the later creation of the European Union Civil Service Tribunal in 2006. Nonetheless, later discussions between European parties on if the Court should have more broad or strong powers to deal with non-compliant states resulted in the Maastricht Treaty of 1993 that permitted the ECJ to “impose a lump sum or penalty payment” on member states that did not comply with its decisions within Article 171 (Maastricht Treaty):

If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice...If the Member State concerned fails to take the necessary measures to comply with the Court’s judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

In previous treaties, the Court was not given the literal power to impose financial penalties although its meaning was alluded to in the 1957 Treaty of Rome. This gives the Court a dangerous power to impose large financial penalties to punish the member states into compliance of any and all decisions made by an entity of the European framework.
In keeping with the theme of overlapping traditional separation of powers, the Court gained another power as the institutionalization of the Court of Auditors allowed it to audit all financial transactions of the European Community and submit their reports annually to the larger Community. In Article 188(c) of the Maastricht Treaty it describes its power:

The Court of Auditors shall examine the accounts of all revenue and expenditure of the Community. It shall also examine the accounts of all revenue and expenditure of all bodies set up by the Community in so far as the relevant constituent instrument does not preclude such examination...The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Community...It shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

As I will later discuss, this power, which overlaps into both the executive and judiciary functions, converts the judiciary from an arbiter of disputes to an authoritative, dictatorial body with little to no accountability for its actions. With the later introduction and ratification of the Treaty of Lisbon, the European Union succeeded in its aim of “legal entity” status where the union of the European States would henceforth have equivalent sovereign standing as a nation-state such as the United States (Treaty of Lisbon). The Treaty of Lisbon which entered into force in 2009, officially combined all of the previous courts mentioned such as the Civil Service Tribunal and the General Court into the Court of Justice:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specializes courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation with the Commission (Treaty of Lisbon, Article 211).
Through the combination of these previous treaties, it became possible for the Court of Justice generally to enforce, adjudicate, and assign penalties to the member states and individuals within the EU for violations of regulations, statues, and the treaties themselves.

Starting chronologically from 2011 onwards, the European Union was plagued by a vast migration crisis through its south-east borders of Greece and Italy, among others. Some factors that have contributed to the waves of immigration include the Libyan Civil War, the Syrian Civil War, Arab-Israeli conflicts, and the international disturbances caused by ISIS’ terroristic actions. Regardless of their country of origin, the ECJ has decided a series of opinions either against the member states or on behalf of individuals bringing a claim to address this crisis and its myriad of side-effects.

First, the ECJ in separate cases in April 28th and March 8th of 2011 separately concluded that member states cannot criminally punish illegal migrants who refuse to be deported and that if European Union citizens had migrant parents, they are allowed to stay with the European Union:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State’s legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period (April 28 Decision).

Article 20 TFEU [Treaty on the Functioning of the European Union or Treaty of Lisbon] is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those
children of the genuine employment of the substance of the rights attaching to the status of European Union citizen (March 8 Decision).

In the April 28 case, Italy enforced a policy of a four-year prison sentence for illegally entering and refusing to leave. Italy imposed a sentence of one year in this matter. This policy, in the views of the ECJ, violated Articles 15 and 16 of the 2008 Directive which declares that the migrant can only be in detention for a “maximum duration of detention at 18 months” and that his detention has to accompany “an order to leave that territory within a given period (Dridi v. Italy). In other words, the migrant has to be on a list to leave the country as soon as possible and cannot be imprisoned for his illegal entry. Next, in the March 8 case, Belgian officials denied the asylum request of Mr. Zambrano and his wife and ordered them to leave their children and be ejected from Belgium. He then countered with an argument of “right of residence” within the EU. The ECJ decided that Article 20 of the Rome Treaty can be interpreted to mean that parents have the right to reside and work in the EU if their children are EU citizens (Zambrano v. Belgium). These court actions can have dangerous and looming consequences for the sovereignty and territorial integrity of a country. If a supranational entity can dictate the right of anyone to live in the nation if they have children there and no criminal action can be taken against them, then what message does it send to those who wish the nation harm? Especially in the dangerous and fluid context of the modern-age of terrorism, a few individuals are all that is needed to bring devastating effect to a nation and its citizens. One need to only look at examples of the American 9/11 attacks, the Spanish train attacks, the British bus bombings, and the Iranian Cinema fire. All events killed hundreds with little manpower needed to execute their dastardly mission. Later European
Court of Justice opinions would have the same trend of migrant protections that include welfare, migrant settlement, and family unification.

This exposition on the migration effect into the European Union does not include a notable section about the effect of welfare payments, although that is a fascinating case study. Instead, we will observe an overlap of migration and welfare in the Germany case study of 2016. Before the March 1st, 2016 ruling, German law determined those receiving social welfare payments and subsidiary protection can be relocated to another area to insure integration and a more-balanced cost distribution across several regions. Here, subsidiary protection is a term given to immigrants who are not EU citizens, do not specifically qualify as a refugee, but in any case, want to receive asylum. In the German point of view, if those social welfare costs were centralized in one location, then the social welfare system would collapse from overuse in one region and be operable in another. However, the ECJ determined that these persons can move freely within the territory in which they receive these benefits. This also includes the option to choose their residency. Further, the Court stated that the law must apply equal application to both citizens and non-citizens under the European Convention on Human Rights and of Articles 29 and 33 of Directive 2011/95:

Article 33 of Directive 2011/95/ EU of the European Parliament and of the Council of 13 December 2011..., must be interpreted as meaning that a residence condition imposed on a beneficiary of subsidiary protection status, such as the conditions at issue in the main proceedings, constitutes a restriction of the freedom of movement guaranteed by that article, even when it does not prevent the beneficiary from moving freely within the territory of the Member State...Articles 29 and 33 of Directive 2011/95 must be interpreted as precluding the imposition of a residence condition, such as the conditions at issue in the main proceedings, on a beneficiary of subsidiary protection status in receipt of certain specific social security benefits, for the purpose of achieving an appropriate distribution of the burden of paying those benefits among the various institutions competent in that regard, when the applicable national rules do not provide for the
imposition of such a measure on refugees...on grounds that are not humanitarian or political or based on international law or nationals of that Member State in receipt of those benefits.

The only exception to the rule is if the process would help “integration into society” which by itself is so vague that the German government cannot utilize it for a practical purpose (Kreis Warendorf, et al v. Hannover.). Here, another section of national sovereignty is eroded by this judicial supranational entity. In both cases we have seen, it is clear that the ECJ has prevented criminal action against illegal migrants, generated a “right to residence” if you have children who are EU citizens, and prevented nation-states from controlling their generous welfare policies. Additionally, we can see instances in this one example of how a society’s social infrastructure can collapse under the pressure of migration. Since the ECJ took this opinion, it is very likely that the German welfare system will decrease its funds distributed or the personnel who receive it because the ECJ will give the privileges of citizenship to migrants receiving subsidiary protection. Cases involving refugees and their benefits frequently adhere to the European Convention on Human Rights and arguably will continue to do so.

One example is the recent June 2017 ECJ rejection of Hungary and Slovakia’s suit against the European Union for its unilateral migrant redistribution. In 2015, the European Council mandated that all European Union nations must accept a certain number of migrants proportional to their populations and their ability to integrate these immigrants. Hungary and Slovakia, among other Eastern European nations, refused to relocate the sizeable number of migrants the Council demanded. In the original proposal, Hungary was ordered to accept 1,294 migrants and Slovakia 902 migrants. Below is a
In the opinion of some Eastern European nations, the migration relocation scheme must be controlled, slowed, and orderly in order for these migrants to slowly assimilate into their respective societies. Failure to do so would result in a degradation of their heritage, culture, and traditions. For example, Slovakia's government in 2011 published a report named: *Migration policy of the Slovak Republic: Perspective until the year 2020* in which it highlights cultural assimilation and very limited immigration from non-culturally aligned nations:
The Slovak Republic inclines to an integration model based on the full acceptance by migrants of the current situation in the Slovak Republic...The basic principle will involve providing for efficient integration of aliens in the society, which will eliminate their marginalization and increase their individual motivation to become integrated...The Slovak republic applies repressive measures, in the form of forced returns, as concerns the migrants who violate the country’s legal order...The Slovak republic fully supports all activities aimed at the adoption of a Common asylum system of the European Union, making use of the best experience of individual member states. At the same time, this system respects the right of each member state to decide independently on the terms and conditions of provision of international protection to aliens...If we underestimate or ignore[igration], it may cause problems in the political, economic, and social life of our country.

Hungary’s especially principled immigration stance has come under fire for its strict demands for migrants to assimilate while forcing their assigned migrants to settle elsewhere in the EU. The ECJ’s silence on the suit brought by Hungary and Slovakia reinforced their stance of slowly but surely forcing their will on all nation-states regardless of the pushback. This interesting case study of self-determination and independence of a nation-state, for better or worse, will be the deciding factor if the future EU will allow nation-states to have the right to act as a nation or if all nation-states in the EU must strictly adhere to its policies under threat of fines and penalties. Later, Hungary’s future legal interactions with the EU generally will be examined with the controversial “Stop Soros” law. The European Union’s discussions of the exact definition of subsidiary protection and its role in society was further put to the test in an April 2018 case where the ECJ ruled that foreign nationals, if proven to be tortured or under the threat of torture, could be given this protection in the EU with the added bonus of health care coverage.
On April 24th, the ECJ ruled that an individual who was tortured in his home country and facing the risk of being intentionally deprived of adequate medical treatment can be classified as an individual who receives subsidiary protection in the EU:

Articles 2(e) and 15(b) of Directive 2004/83/EC..., read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine. (April 24).

As mentioned before, an individual under this classification is allowed a residency permit for a limited period of time and in Germany especially, receives generous welfare payments. The referral from the Supreme Court of the United Kingdom brings the remarkable claim of protection by the EU even though they are not under the EU's jurisdiction. Here, the EU cites Article 4 of the Charter of Fundamental Rights of the European Union as well as Articles 2 and 15 of Directive 2004/83 (MP v. Home Secretary). This extraordinary case is the first time in which a supranational entity has determined that its sovereignty, legal reach, and territorial integrity over legal persons can exist to a sizeable amount of the world's population. Hypothetically, if State A tortures an individual and refuses to give them medical treatment, that individual can then be eligible for subsidiary protection in the EU without having to encounter Hungary's tough immigration stances or traverse Italy's rough seas in a life raft. Unfortunately, since a large segment of Asia's and Africa's governments adopt a policy of torture without proper treatment, the ECJ is expanding the immigration doors for the European Union to unintentionally lose their culture, way of life, and sovereignty in a wave of multi-
culturalism. Within our lifetimes, we will see if a European nation-state can withstand the number of eligible migrants who fall under the subsidiary protection status in addition to supporting them through costly relocation and welfare schemes. Short of completing controlling all aspects of a European state’s national immigration policies, the ECJ held in the next month that states cannot refuse immigration applications if the purpose is for “family reunification”, regardless if they are currently banned within that before-mentioned state.

Continuing with the topic of family solidarity and reunification, the Court ruled in May 8th of the same year that a state is not permitted to deny an “application for residence” if their purpose is for family reunification, despite their banned or not banned status (K.A. et al. v. Belgische Staat):

Directive 2008/115/EC of the European Parliament and of the Council, ... in particular Articles 5 and 11 thereof, must be interpreted as not precluding a practice of a Member State that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a third-country national family member of a Union citizen who is a national of that Member State and who has never exercised his or her right to freedom of movement, solely on the ground that that third-country national is the subject of a ban on entering the territory of that Member State. Article 5 of Directive 2008/115 must be interpreted as precluding a national practice pursuant to which a return decision is adopted with respect of a return decision, accompanied by an entry ban that remains in force, without any account being taken of the details of his or her family life, and in particular the interests of a minor child of that third-country national, referred to in an application for residence for the purposes of family reunification submitted after the adoption of such an entry ban, unless such details could have been provided earlier by the person concerned.

The Court once again cites Articles 5 and 11 of Directive 2008/115 and Article 20 of the Rome Treaty. Regrettably, this is another case study in how the EU supersedes the direct will of a nation-state to bar entry or to impose a ban on individuals inside their jurisdiction that now forces them to take into account their family members. Typically, if
a state bars entry of a foreign national that individual should not be able to file suit
against the host nation to force their entry inside. Here, this is exactly the case in which
family members are used as an excuse to allow entry where all EU nations, including
Hungary, must include examining the second and third-order effects of deportation orders
on a family structure. This action would be tolerable if it was imposed on a foreign
national who has not been labeled as a threat to the state and hence barred, but this
strangely applies to those who have even been banned from entry. Potential terrorists and
other risks to that nation now have the privilege of that state utilizing extra resources on
research and administration costs to make the obvious conclusion that if they are barred
from entry, their family should not be looked after for or provided benefits from the state.
In a worst-case scenario, a known terrorist could have family in a European state, be
denied entry in advance, and that state is later told that person cannot be denied entry if
their stated reason is for family reunification. That hypothetical terrorist actor now has
their application examined thoroughly before they are denied. In continuing with the
topic of contention between the EU and Eastern European Nations, Hungary currently
has an ongoing case where it was referred to the ECJ for its commonly known “Stop
Soros” Law.

The Law directly states that if anyone is caught helping illegal migrants enter
Hungary without authorization, they can be held criminally responsible:

Any persons who assist illegal migrants to unlawfully enter and residence in
Hungary or who fund such organizations may be subject to restraining orders. In
accordance with the act, any persons who help illegal migrants to unlawfully enter
and residence in Hungary or who support such persons or organizations
performing such acts with financial or property benefits may be banned by the
Ministry of the Interior from entering the area of Hungary in an 8-kilometer zone
from the external frontier of the EU...In particularly justified cases, the Minister
may also impose a restraining order on a third-country national banning him/her from the entire territory of Hungary (Stop Soros Act Package).

Additionally, a series of laws were made in the “Stop Soros package of bills” that also includes denying any migrant quota resettlement within its borders. To date, both cases were sent to the ECJ for their opinion on the matter. Based on their previous decisions as listed above, it is unlikely that the ECJ will rule for national sovereignty and territorial integrity. Other consequences to the package would be a loss of voting rights for Hungary as in September 12, the European Parliament recognized Hungary’s lack of EU values that set-in motion a process that lead Hungary to lose their voting rights, effectively denying them a voice in the greater EU.

**USA Background/ Case Studies**

Since its inception in 1789 as the chief law-binding document of governance, the Constitution has striven to provide liberty to the individual while at the same time putting restrictions on the power of government. Under Article 3 of the Constitution, the Court is given jurisdiction of some crimes of a federal nature (treason, state v. state disputes, et al.) while particular topics remain unspoken. The Court is unique in this respect as their power of judicial review over governmental regulations and statutes are not expressly stated in the Constitution. Starting with *Marbury v. Madison* (1803), the Court asserted this power in addition to the sovereign integrity of the Court as a separate branch of government. Court opinions since 1803 have typically cited this case as it provides the authority for the Court to strike down both legislative and executive decisions as they, in the view of the Court, violated the Constitution of the United States.

Beginning in the 20th century, we can see the Court issuing mandatory opinions with regards to immigration in the aftermath of the Immigration and Nationality Acts of the 1950s. Before this Act of Congress, regulations and statues were in existence, but loosely spread across the federal bureaucracy without centralization in one legislative act.
The following case law below highlights the key Court opinions made in the aftermath of this act and how the Court generally influences federal immigration policy.

Closely following this legislation was the *Shaughnessy v. USA* (1953) case which gave clarity to the role of the non-citizen to the citizen. Through a constitutional lens, the Court ruled here that non-citizens do not possess constitutional rights and that the government does not have to detain a non-citizen internally before his subsequent deportation:

the Attorney Generals’ continued exclusion of the alien without a hearing does not amount to an unlawful detention, and courts may no temporarily admit him to the United States pending arrangement for his departure aboard...the alien’s continued exclusion on Ellis Island does not deprive him of any statutory or constitutional right...the Attorney General therefore may exclude this alien without a hearing, as authorized by the emergency regulations promulgated pursuant to the Passport Act and need not disclose the evidence upon which that determination rests (*Shaughnessy v. USA* 1953)

In a more modern context, this opinion, with the added context of others, is heavily utilized by Customs and Border Protection (CBP) to deter non-citizens (illegal immigrants) from the border and prevent entry. Since this Court ruled that “the continued exclusion of the alien without a hearing does not amount to an unlawful detention”, which would be unconstitutional, the government is constitutionally empowered to deny entry of illegal citizens and encourage them to enter through legal ports of entry to be in-processed. The Court, with the opinion of Justice Clark, made the point that illegal immigrants seeking entry into the United States do not possess constitutional rights and hence, the lack of a hearing does not by itself constitute an unlawful detention. Moreover, Justice Clark cited the pre-existing notion of a government to control immigration and to be “largely immune from judicial control”.
Subsequently, the Court did draw a fine line on the sub-classes of non-citizens. Resident aliens are those with permission from the government to reside in the territorial United States while non-legal aliens are those without permission. These non-legal aliens are commonly referred to as illegal immigrants even if they are discovered to be residing in the United States. The Court in the opinion *Graham v. Richardson* (1971), made this distinction with the view that a state cannot deny societal benefits, namely welfare, to resident aliens as this violates the Equal Protection Clause of the Fourteenth Amendment. Justice Blackmun in the unanimous decision ruled that ultimately these aliens provide tax revenues, the same as a citizen, so they should be able to collect welfare, if they are eligible:

...Congress’ power is to ‘establish an uniform Rule of Naturalization’. A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement for uniformity...Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual states to violate the Equal Protection Clause. (Graham v. Richardson 1971)

*Kleindienst v. Mandel* (1972) solidified the plenary power of the Federal Government in regulating immigration as the case ruled that the United States can deny illegal immigrants the right of entry into its territory:

In the exercise of Congress’ plenary power to exclude aliens or prescribe the conditions for their entry into this country, Congress in Title 212(a)(28) of this Act has delegated conditional exercise of this power to the Executive Branch. When as in this case, the Attorney General decides for a legitimate and *bona fide* reason not to waive the statutory exclusion of an alien, courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien...It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise (Kleindienst v. Mandel 1972).
has been found ineligible for admission under...the Immigration and Naturalization Act of 1952.

Once again, the Court cited the Immigration and Nationality Act of 1952 to prescribe the Executive Branch with the authority to regulate its borders under the Constitution. Mark Levin, in an article published by the Center for Immigration Studies concurrently argues that “Congress’ rational for keeping naturalization an executive branch function is that deportation hearings do not determine whether an alien is guilty of any crime.” By having the executive branch of government enforce Congressional acts, “the federal government is not, in a legal sense, punishing that person” (Levin). This opinion would be later strengthened by the Arizona v. United States (2012) case to argue that the national government has the final say in the maintenance in its international borders. However, although the federal government has the final say, future cases would address the constitutionality of, to name a few, immigration policies, restrictions, deportations, and detentions. Chronologically, the Mathew v. Diaz (1976) case next addressed this topic of how the non-citizen and citizen benefit scheme can be managed without compromising the privilege of citizenship.

Diaz, a non-citizen of the United States was denied federal insurance because of his immigration status and filed suit to receive this benefit. The Court in this 1976 ruling determined that once again, the Congress and Executive Branch hold plenary power over immigration and that since the appellate is a non-citizen applying for a federal benefit, no violation of due process violation has occurred:

Congress, which has broad power over immigration and naturalization and regularly makes rules regarding aliens that would be acceptable if applied to citizens, has no constitutional duty to provide all aliens with the welfare benefits provided to citizens... The requirements chosen by Congress render eligible those
aliens who may reasonably be assumed to have a greater affinity with the United States, and this Court is especially reluctant to question such as policy choice of degree (Mathew v. Diaz 1976)

Justice Stevens in a unanimous opinion stated that illegals have equal protection under the Fifth and once again, under the Fourteenth Amendment, but are not allowed every benefit of citizenship. Here, the issue at hand was the eligibility of non-citizens to receive Medicare benefits. Practically, this has the effect of permitting Congress to use its volition in deciding the amount of benefits federally prescribed to these non-citizens. Although these benefits can be denied, the Court reaffirmed the position that having due process under the law does not mean that non-citizens can accumulate all the privileges of citizenship. To this end, the non-citizen category can be divided into sub-categories of illegal immigrant, resident alien, and permanent resident. The Government has the power, in this case, to deny these non-citizens federal Medicare benefits based on the will of Congress and the federal government. In the next year, the Supreme Court in Fiallo v. Bell (1977) held that Congress has the right to grant special preferential treatment to immigrants and not the judiciary generally:

Whether Congress’ determination that preferential status is not warranted for illegitimate children and their natural fathers results from a perceived absence in most cases of close family ties or a concern with serious problems of proof that usually lurk in paternity determinations, it is not for the courts to probe and test the justifications for the legislative decision...The distinction is one of many (such as those based on age) drawn by Congress...[and] The decision as to where to draw the line is a policy question Congress’ exclusive province.

Justice Powell, in the majority opinion, noted that migrant children with their mothers or children with their parents should be given preferential treatment over migrant fathers with their children. The child in question is a United States citizen. Although the Court favored one section of non-citizens over the other, they delegated all similar and
future cases to Congress. As we will see with further cases, the Court begins to adopt a pattern of referring general immigration questions to Congress and only intervene when violations of the Constitution occur by the Executive Branch through its various enforcement mechanisms. Other instances of Court intervention occur to clarify legal proceedings and the status of illegal immigrant personnel at the border. Otherwise, the Court demands that Congress write legislation to target specific policies as they are the branch with quick accountability as the voices of the citizenry.

Beginning in 1982, the Court started to examine the equal protection of illegal immigrant children and if the state can impose restrictions on them simply because of their immigration status. One such case is *Plyler v. Doe* (1982), where the Court forbid states denying educational benefits to illegal immigrant children that are typically available to legal residents:

A Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment… it is true that, when faced with an equal protection challenge respecting a State’s differential treatment of aliens, the courts must be attentive to congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the legislative record, no national policy is perceived that must justify the State in denying these children an elementary education (*Plyler v. Doe* 1982).

Texas, in this case, began to limit benefits to illegal immigrant children as well as imposing a 1,000-dollar fee to discourage illegal immigration in its state. The statute in question further permits local schools in Texas to not admit non-citizen children into its classrooms and to deny state funds to those children if they exist in the system already. In
the majority opinion, the Court inserts its opinion about the effectiveness of the Texas statute as well as the potential impact of illegal immigration on society:

While the State might have an interest in mitigating potentially harsh economic effects from an influx of illegal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration... The record does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State.

Additional cases in the 1980's such as *I.N.S v. Lopez-Mendoza* (1984) and *I.N.S. Cardoza-Fonseca* (1987) began to apply standards and rules on how certain hearings and procedures have to operate under a constitutional framework. For instance, the 1984 case ruled that deportation hearings are civil not criminal cases and therefore criminal defenses to a person under United States custody would not be applicable:

A deportation proceeding is a purely civil action to determine a person’s eligibility to remain in this county. The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of immigration laws... The mere fact of an illegal arrest has no bearing on a subsequent deportation hearing... The exclusionary rule does not apply in a deportation proceeding.

Justice O'Connor in the majority opinion declared that deportation hearings have the sole purpose of expulsion from the country, not to investigate their past, and thus those in custody do not have criminal arrest protections. This topic will be addressed in the comparison chapter as the European Union adopts a similar policy to immigrants caught entering illegally. Later in 1987, to continue in the theme of classification clarification, the Court reduces the threshold of asylum eligibility by demanding these individuals to only show “a well-founded fear” of persecution by their home government and not the intent to do so. Alien asylum seekers cannot utilize a “clear probably of persecution” standard for their application as only Title 243(h) governs their status. On
the other hand, Title 208(a) defines the standard for refugee asylum seekers. If there is a slightest indication of the intention to be persecuted, then that individual can be eligible for asylum in the United States:

Section 243(h) of the Immigration and Nationality Act requires that the Attorney General withhold deportation of an alien who demonstrates that his “life or freedom would be threatened” thereby on account of specified factors...the Title 243(h) “clear probability” standard of proof does not govern asylum applications under Title 208(a)...the legislative history demonstrates the congressional intent that different standards apply under Titles 208(a) and 243(h)

In a key case of the exact limits of immigration federalism, the Court in Arizona v. United States (2012) ruled that a state within the jurisdiction of the United States cannot determine its own immigration power as that power rests solely with Congress. Here, the Court only allowed the individual states to work within the policies of the national government:

The Federal Government’s broad, undoubted power over immigration and alien status rests, in part, on its constitutional power to “establish an uniform Rule of Naturalization”,...(ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens...removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials...The Supremacy Clause gives Congress the power to preempt state law...States are precluding from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance...state laws are preempted when they conflict with federal law, including when they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”...Section 3 [of State Bill 1070] intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate...Section 5(c) criminal penalty stands as an obstacle to the federal regulatory system.

Justice Kennedy writing for the majority made it clear that that the Supremacy Clause of the Constitution as well as the Federal Government’s leading authority on immigration, prevents individual states with making different immigration policies. To be specific, the Court only struck down three provisions of the Arizona Law: legal
immigrants must have registration documents on their persons at all times, (Section 3) immediate arrest if a police officer suspected an individual of being an illegal immigrant (Section 6) and prevented illegal immigrants having any jobs in the state (Section 5c). Only Section 2 of the State Bill was permissible as it only required police officers to check the citizenship of a person stopped, which was a common practice at the time.

Judicial Immigration Comparison

Certainly, comparing and contrasting two separate and unique judicial systems is no small feat. Nonetheless, here, key distinctions and similarities between these two bodies will be examined, discussed, and analyzed in detail with remarks on how they apply in a modern context. From the previous examination of Court decisions from these two bodies, this section will review overlapping Court determinations or background circumstances that will have outstanding implications on their respective citizenry. Only through this thorough examination will the reader gain valuable knowledge and insight in how two quasi-democratic Courts endeavor to assert their judicial philosophy into everyday life while at the same time interpreting their founding documents to apply the law equally in their sovereign borders.

Before we can observe overlapping Court cases of interest with regards to sovereignty and immigration, a quick recollection of their separate foundational functions is necessary. In the Supreme Court of the United States, we have, as of now, nine justices appointed for life-time appointments, the President nominates them, and only with the consent of the Senate of the United States may those justices be appointed. In this
manner, the executive branch would nominate officials to be on the Court with the Senate, as direct representatives of the States, approving these officials. Uniquely, these individuals do not have to be legal officials, but since the Supreme Court examines legal questions, lawyers are preferred. However, the contemporary nine, as opposed to the original six, was determined by acts of Congress not directly through Article Three of the Constitution. Although the specifics may be muddled with later notions of international law, the jurisdiction of these justices' court opinions is to individuals within the territorial integrity of the United States as well as to United States' citizens. As stated in Article 3, Section 1, "the judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish" (Constitution). The section makes clear that the Supreme Court has judicial supremacy over all congressionally designated Courts. No other structural or organizational schematics for the function of the Supreme Court exist in the Constitution.

Conversely, the European judicial framework has multiple courts in its Court of Justice of the European Union. Namely, in the European Court of Justice, it is composed of the General Court and the Civil Service Tribunal with the third court, the Court of Justice, having the role of "first among equals" in having the final determining factor in all legal questions. Unlike the Article Three of the United States Constitution which only prescribes "...one supreme Court..." with no assigned numerical quota, the European Union mandates one judge per member state of their Union (Constitution, Treaty of Lisbon). Moreover, a panel of officials from the European Union determines who is appointed to the European Court of Justice with each justice serving in six-year increments that can be reappointed by the same panel. Unlike the virgin nature of the
original tenets of the Constitution of the United States, the European judicial framework was adjusted over time with specific intentions on the number of judges and justices, specific names for Courts and their distinct roles, and specific rhetoric of cooperation between all branches of the European Court of Justice apparatus.

The reader can observe from this simple introduction on the comparison of these two systems how each Court functions in their cultures. In the United States, the Court does have limited functions as listed in Article 3 and its nomenclature for “one supreme Court” but leaves interpretation and other lower Courts up to Congress. Moreover, they rely on common law as it relates to legal questions. In the European Union, through a network of treaties and their amendments, the member states composed a series of treaties that directly specify, without any measure of doubt, of the exact role and responsibility of each Court, how they apply in the European Union judicial framework, and the specifics on how the Court will function. Furthermore, these specifics go further into the bureaucracy as President, Vice President, Advocates General, and Registrar are all listed in these amendments. In this fashion, the treaties serve as exact codification of the supranational judicial construct, with little interpretation available for either the European Parliament, Council, or Commission to apply. With this proper context, it is now appropriate to examine, discuss, and analyze their separate judicial systems as it applies to sovereignty and immigration.

As each international treaty was signed by the precursor member-states to the European Union, the power and sovereignty of the Court expanded. No judicial decisions reached by the Court of Justice furthered its own power, rather, the collection of the European States, through treaties, gave the Court the power of judicial review, among
other powers. On the other side of the Atlantic Ocean, the Supreme Court, with suggested power of judicial review and with no language in the Constitution to assume otherwise, asserted its constitutional functions. In Federalist 78, Publius, a false name whose real author was Alexander Hamilton, demands that the Court uphold the Constitution by judgements: “Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” (Publius). He also states that even though the Court is foundationally weak the Court must uphold the most basic and foundational law in the United States, the Constitution:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law... Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former (Publius).

Through this rationale, the Court adopted *Marbury v. Madison*, to most remarkably, give itself more power to overrule the other branches of government. Meanwhile, the ECJ is nervous about this rationale and relies on its European Union apparatus to give it power for the sake of legitimacy and authority. For without legitimacy, the Court loses its effectiveness and has to rely on the other branches of government, in addition to its good standing among the citizenry, to give it meaningful sway. Otherwise, it is just a panel of older citizens giving opinions that are futile, pointless, and valueless to the country it is serving.

The cultural and literal beginning of the United States as a separate nation, on distant shores and on a new continent, began with constant and controlled immigration through designed ports of entry. If students look at history books, the most common
example will be Ellis Island in the 19th-20th centuries. Despite the fact that immigration was occurring at a constant rate to facilitate population growth and there were some statutes in place to process these new immigrants, there was no meaningful acts until the Immigration and Nationality Acts of the 1950s that defined legally puzzling terms such as legal immigrant, non-citizen, and citizen. Subsequently, the Supreme Court began to rule predominately in the latter half of the 20th century with regards to immigrant classification, their civil benefits, and various other bureaucratic actions. On the other hand, the ECJ, as a response by governments to respond to the mass migration challenges in the 21st century, ruled on now forbidden laws practiced by nation-states, immigrant classification in society, and in what manner can these new immigrants be settled in the European Union. Here, to present these findings in a clear and concise manner, we will examine ECJ rulings sequentially with either their counterpart in the Supreme Court or cases of their like nature.

Beginning in April 28, 2011 the ECJ ruled that a member-state of the EU cannot criminally imprison an illegal immigrant who refuses to voluntarily comply with deportation orders from that government. In the Case of the USA’s Supreme Court, this equivalent would be the *Shaughnessy v. USA* (1953) and the *I.N.S. v. Lopez Mendoza* (1984) cases that ruled that no detention is necessary before deportation and deportation actions are only civil actions by the government, respectively. From these two case studies, it is apparent that the Supreme Court tolerates law and order by allowing imprisonment for these immigrants that violate standing United States law, but also clarifies that deportation actions are civil in nature. Civil actions are told to mean that even though the individual in question is brought before a court, they do not have as many constitutional protections as they might have in criminal courts. Such examples can include the Fourth Amendment to
the Constitution’s exclusionary rule principle and the guarantee to an attorney is not always a privilege offered to the individual being deported (Justia). Deportations are for removal from the country in question, not imprisoning the individual directly, as is the case in the European Union. Although both Courts reached separate conclusions, the reader can view that both Courts’ aim is to deport these immigration violators post-haste without criminal prison time beforehand, although the USA Supreme Court does not say this directly.

Thematically, the next Court case in question is the March 8, 2011 ECJ ruling with the United States counterpart in the case of *Fiallo v. Bell* (1977).

The March 8, 2011 ECJ ruling stated that if European Union citizens have migrant parents, no member-state can deny them a right of residency within the Union. Separately, *Fiallo v. Bell* concluded that illegal immigrant children with their mothers should be given preferential immigration status over illegal immigrant children with their fathers. Additionally, the Court suggests that any likewise and future case should be referred to Congress for consideration and determination as Congress itself has plenary power over deciding immigration law, not the Judiciary generally. Through observation, we can deduce that the March 8 ruling will allow for chain migration if those migrants can obtain citizenship first by illegal entry into the European Union’s border states. If those migrants find citizenship, they can bring over their parents with little to no recourse by the host nation. In the case of the United States, mothers with their children should be given preferential treatment by the immigration authorities, but Congress itself, the national legislative body, should determine how these cases should be handled. As Congress is more accountable to the people who are the ones severely impacted by any national immigration change at the border, they should be the body to enact any purported changes. This is the
more appropriate response as the Court is appointed for life and therefore directly unaccountable to the citizenry of the United States. Contrarily, the ECJ is appointed for six-year increments as a part of the supranational European Union mechanism and also does not have direct accountability with the people most affected by its rulings. Although the Court makes dangerous assertions about giving preferential treatment to unknown personnel with unknown intentions, it makes the correct decision in deferring these decisions to Congress.

Concluding the argument in the case of the ECJ’s ruling here, allowing parents of children almost unfiltered access into the European Union without proper mechanisms to determine their intentions is an alarming and potentially perilous action to the European Union. This is especially true as the European nation-states are still reeling from the terrorist attacks in the 2015 Paris attacks, 2016 Brussels infrastructure bombings, and the 2016 Bastille Day celebration attacks in Nice, France. Separate nation-states under the command of any supranational entity, should be allowed to process any individual attempting to enter their borders. Especially when individuals enter the European Union, they can almost travel anywhere, thanks to the loose border security arrangements offered by the Schengen Agreement. At a minimum, the European Parliament should have the final determining factor as even though it is an international parliament, it is still the closest governing body to the people it represents in the supra-national European framework. Since the ECJ terminated the disallowance of governments to reject residency status requests to be with their asserted children, it allows a dangerous policy that did led or could lead to disastrous national security problems in the future.
In continuing with the comparison analysis between both judicial entities, comes the comparison between the ECJ's March 1st, 2016 ruling and on the USA side, is *Graham v. Richardson* (1971) and *Mathew v. Diaz* (1976). As a reminder, the March 1 ruling states that individuals receiving subsidiary protection status cannot also receive a restriction of movement as it directly relates to their benefits. *Graham v. Richardson* and *Mathew v. Diaz* conclude that, in part, that the state cannot deny welfare to resident aliens and that these aliens cannot receive every benefit offered to the citizenry. Even though this comparison isn't exact, the contrast is uniquely remarkable. As an apart of the argument on the part of the German government in the March 1 ruling, the movement restriction was necessary to prevent an overlord of the generous welfare payments on a national level and focus it locally so resources could be provided on a case by case basis. Strangely, this opinion was revoked and immigrants receiving this protection could travel anywhere they chose. Rationality lost its argument in favor of vague notions of dignity. The *Graham* and *Mathew* cases demonstrate that the Supreme Court takes a neutral stance in the matter at hand when the state both cannot deny welfare to resident non-citizens, yet they cannot receive every benefit of citizenship. Moreover, the Court makes the key point that the people in question are resident non-citizens and not all illegal immigrants. In this comparison both Courts make the case that illegal immigrants should be given some level of benefit offered by the state and that restrictions of movement and denial of all societal benefits cannot be tolerated. The United States make the additional point, however, that not all illegal immigrants can receive all benefits, as this is reserved for legal immigrants who follow law, order, and the notion of a civil society. Civil societies cannot persist if countries and nations continue to tolerate lawless behavior, regardless of the offender. As we have seen
thus far, the ECJ has taken a trend of adopting opinions and decisions that continue to benefit illegal immigrants and their privileges within EU nation-states. These decisions continue to do grave harm to their country of residence due to national security concerns. What is uniquely challenging about cases of allowance of illegal immigrants and national security, is that it is almost impossible to prevent these immigrants from committing crimes or egregious behavior since they are not processed into the immigration system of that specific country. Not all immigrants are criminals, but all illegal immigrants are since they knowingly and with intention, violated sovereign borders and entered that country without permission from that government. With the proper context of national security and sovereignty the conversation now moves to sovereignty and the role of states/countries and their role in the USA/EU.

In June 2017, the ECJ rejected arguments made from Hungary and Slovakia specifically for the right to refuse migrants based on the EU's unilateral migration relocation scheme. To scholars familiar with the dual themes of sovereignty and immigration, the most common Court case to use as a comparison must be *Arizona v. U.S.* (2012), that famously asserted the unquestionable powers of the United States' federal government to make immigration law and the subordinate power of local states to act within those provisions and statutes. States cannot make laws that go above their mandate under the law, as their only role is to apply the law within their states or risk negative action arising from the government itself. Both cases raise an interesting conversation of the concerning powers of both bodies to maintain their enormous powers and affirm that local states and member-states cannot have effective recourse against possible bad policies made by a panel of lawyers. It is tolerable when the national or supranational government makes
policies more favorable to the local entity, but it is reckless and risky when bad decisions are manufactured to the detriment of the population. Local states and more-and-more less sovereign member-states must have more efficient recourse to deal with problems that directly affect the safety of their citizenry. If transnational entities can dictate these decisions when those people are unknowable and their specific intentions unknown, that body has lost all authority and its legitimacy is highly questionable. Moreover, if the line of national sovereignty cannot be drawn at points of immigration and security, there is no further line that can be drawn because the first and primary role of any government is the safety and security of its people. Even though the EU has almost reached a point of no return for its citizenry, the United States government still had to “…insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity…”, or the solid foundation of the United States is shakable (Constitution). Adjacent to this conversation are the additional benefits offered to non-citizens in the EU and how society interacts with these benefits in the United States.

In thematically conjoining cases a month apart in the year 2018, April and May respectively, the ECJ ruled that foreign nationals under the threat of torture at their home country or the perceived risk of their personal suicide can be given subsidiary protection in the European Union. In the May case, the ECJ also ruled that a member-state cannot dismiss applications for residency papers outright, if their purpose is for family reunification, regardless of the security risk of those individuals or their banned status. The Supreme Court case that will be analyzed in tandem with the ECJ in these cases is Plyler v. Doe (1982) that ruled that a state cannot deny education typically available to local
residents to illegal alien children. As it is now evident, the ECJ has open the door to an equally dangerous policy, without parliamentary approval, to give subsidiary protection to unknown foreigners who can claim, without a meaningful threat of extra-territorial jailtime, a threat to their phycological and physical wellbeing. In many third-world countries where the use and threat of torture can be utilized on a regular basis without major domestic repercussions, all of these individuals can now subvert the mandatory immigration practices and enter through unknown means to the government. Moreover, in an equally favorable and unfavorable opinion in May 2018, individuals who, theoretically entered through chain migration, can now find conditions more favorable for entry through the notion of family reunification. On one hand, this opinion was not on its face dangerous as it was not a decision “to allow all family reunification applicates” entry. But on the other, immigration officials in the member-states are now forced to disregard security concerns, alerts, and procedures about why and if there are banned with regards to family reunification. This is another possible overreach by the European Union on the sovereign and inherent right of all member-states to observe and record security risks that might pose a threat to their citizenry. Here, the ECJ has instructed local officials to disregard those concerns in favor of professed family reunification. No nation-state can ultimately survive in these conditions and the future might hold a reality in which the member-states, with all of their culture and history, will be absorbed into an oligarchic, multi-ethnic society in which the individual will be lost into the whims of a overreaching state. Furthermore, excuses of liberty and human rights will be used to destroy liberty and security of the citizenry with no effective internal mechanism to protect against terrorism by unknown individuals wandering throughout Europe.
Besides the bleak notion of assimilation and the lowering of security standards in Europe, the Supreme Court made both a rationale and reasonable response to the general education of individuals in society. The allowance of "typically available education", or public schooling, to illegal immigrant children in 1982 was the correct move by the Court, although there is a minor objection. The cost of the school districts will inevitably increase as non-taxpaying parents of these children overload the costs of the district and decrease the student-teacher ratio, possibly decreasing teacher-student performance. However, unless these children were born somewhere else, the 14th Amendment to the Constitution guarantees that individuals born in the United States' territory are citizens. Therefore, they should be allowed public schooling in the United States, the same as regular citizen children. Since the children cannot be expelled due to their sovereign standing in the United States, except in truly exceptional criminal circumstances, their subsequent education will provide a benefit to society as these immigrants will learn the language, critical information skills, and hopefully, assimilate into society performing the regular functions as a USA-born individuals with citizen parents. Even though this decision is favorable, it would have been preferential to have the federal government be the last resort to decide the allowance of illegal immigrant children into local schools. Since no blatant violation of the Constitution existed at the time of the Court decision by the local school board, this Court should not have been involved. The only possible allowance of a Court statement in this aspect would be in an advisory role not as the supreme overlords making national policy. When the Supreme Court makes national policy, as was the case in the European Union, it begins to openly subvert the accountable and permissible views of the representatives of the people. All of these previous Supreme Court decisions are not only dangerous to the
functioning of a democratic republic but make it possible for non-legislative and non-executive bodies make national policy. When the Courts are allowed and able to make national policy in direct contradiction with local and state governments with the Constitution used as an excuse, not the triggering aim for intervention, the republic has begun to fall into an unknowable state where sovereignty, liberty, and freedom are either unseen or not felt by its citizens.

Hungary, as a country with borders to immigrant-friendly nations, passed a law in its parliament in June 2018 that made it criminal for any individuals to help “facilitate illegal immigration” by providing a year in jail and a “...25 percent tax on foreign donations received by those deemed supporters of illegal migration...”, among other penalties (Stop Soros Act Package). This law is also commonly referred to as the “Stop Soros Law” with asylum seekers also possibly falling under this new legislation. The EU Parliament’s response was to condemn the legislation and provide an avenue in which groups could take Hungary’s government to Court, which it is now legally fighting. Its companion cases in the United States would be the cases of Kleindienst v. Mandel (1972) and I.N.S. v. Cardoza-Fonseca (1987) that, respectively, make illegal immigration illegal and lowered the standard of asylum seekers to “well-founded fear”. Hungary’s opinion to criminalize individuals who assist in illegal immigration is not only the correct move to safeguard their culture and society, but it provides an effective recourse to personnel and groups who ignore their natural sovereignty. Neither the European Union or Hungary can truly benefit from illegal immigration as undocumented personnel can put large strains on public infrastructure and its resources generally. Informed readers observing previous ECJ rulings, such as the ones provided in this exposition, can make the assumption that the
Court will rule unfavourably to national sovereignty and strike down Hungary’s “Stop Soros Law”. It is unknowable if Hungary will abide by a possible opinion with Victor Orban currently the Prime Minister of Hungary. The resulting confrontation will be the deciding factor if the member-states are doomed to be sovereign nation states with some limitations by the EU or if all member states will fall under a classification of second-tier status with no power against the EU leviathan.

In the case of the United States, Kleindienst made the case that the State can deny illegal immigration and that it is the responsibility of the government to enforce this. Meanwhile, the 1987 I.N.S. decision reduced the asylum standard from an intention by a foreign government to inflict harm to the individual only having a fear of it. Since this method cannot be legally or factually proved, as is the case with the EU, it opens the door for a flood of applicants to utilize this process, overwhelm the system, and possibly deny well-intending individuals the right of entry to the United States under this standard in favor of those with malicious intentions. Lowering the standard in this case can be compared to lowering the prestigious asylum standard for non-citizens to another second-tier classification alongside with those are given seasonal work permits or green cards. As long as individuals want to conduct harm against the United States, they will find means of entry. The reduction of the asylum standard gives these actors another available mechanism to do just this. Prestigious classifications, such as those receiving asylum, must be given a higher standard than a “well-founded fear” as those persecuted by their governments in South America can now fall in this classification, which they would otherwise would not.
Conclusion

The European Court of Justice’s geographical proximity to the Migration Crisis of the 2010’s, coupled with its migration-friendly behaviors due to its regular appliance of international agreements into its legal system, are all contributing factors in its judgments as it relates to security, territorial integrity, and sovereignty. The dictatorial nature of the ECJ shows it is inflexible and ineffective to deal with the threats as it assumes powers of the legislature. No system of government can run efficiently if the branches of government are constantly assuming the powers of the other. Conversely, the Supreme Court’s position of deferring unconstitutional questions to the Congress is representative of its appliance of one singular document, the Constitution, in all legal opinions. By deferring general immigration concerns to Congress, the Supreme Court allows this flexible body to change laws based on the will of the citizenry it represents. This contrast in behaviors is a remarkable case study in how similar cultures and liberalist ideals can have widely different applications of law and policy.
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