BUILDING INTEGRATION THROUGH THE BILL OF RIGHTS? THE EUROPEAN UNION AT THE MIRROR

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I. INTRODUCTION

Comparative constitutional law studies between the European Union and the United States, which are equally numerous within American and European literature, have frequently taken as their object of inquiry the overall structure of the two legal systems.[1] Alternatively, they have focused on selected issues concerning the standard of protection of fundamental rights.[2] This Article intends to contribute to these studies, by comparing the European Union and the United States on the ground of the interpretative methodologies that the U.S. Supreme Court and the Court of Justice of the EU ("CJEU") adopt to incorporate the Bill of Rights into their systems.[3] The purpose of such a comparison is to explore the contribution of fundamental rights adjudication to the integration processes in either system.

The central claim here is that fundamental rights adjudication can be the catalyst of the integration process because it works as the key factor in the federalization and in the constitutionalization of both legal orders.

The underlying assumption of comparative studies on the United States and the European Union is indeed that, albeit at different stages of evolution, both systems are confronted with two dynamics. The first may be defined as "federalizing process", namely the dynamic process tending towards political integration, which is not necessarily (and in fact, tends not to be) destined to result in the creation of a unitary and centralized state.[4] The second is the process of constitutionalization of a legal system, understood as a progressive transformation at the end of which the legal system becomes fully 'impregnated' by constitutional norms.[5]

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[1] For one of the first systematic studies of the process of European integration *see* MAURO CAPPELLETTI ET AL., INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (1986). For a more recent study *see* Cary Coglianese & Kalypso Nicolaides, *Securing Subsidiarity: the Institutional Design of Federalism in the United States and Europe*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 277 (Kalypso Nicolaides & Robert Howse eds., 2001) and Walter van Gerven, *Federalism in the US and Europe*, 1 VIENNA ONLINE J. ON INTERNATIONAL CONSTITUTIONAL LAW 3, 33 (2007).

[2] *See* e.g. FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE (Oxford University Press 2014).

[3] Michael Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CON. L. 618, 651 (2006) (arguing for the comparability of the two courts on the ground of constitutional review).

[4] CARL J. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1968) (explaining that the *Federal Process* is a concept with specific regard to the American case). Today, European legal scholarship uses the concept to explain processes of federal aggregation of various kind. *See* Anna Gamper, *A Global Theory of Federalism: The Nature and Challenges of a Federal State*, 6 GERMAN L. J. 1297, 1318 (2005).

[5] Such a process is not completed by the adoption of a constitution. In fact, such a process is completed when constitutional norms affect the laws, which govern both public-

This Article compares the two systems along two trajectories connected with the federalization and the constitutionalization of the legal order. The first trajectory tests the progressive federalization by addressing the techniques whereby the bill of rights is enforced even when the application of federal law or EU law is not in question.[6] The second trajectory analyzes the constitutionalization of the systems by focusing on the justification for the horizontal effects of the bill of rights, with the assumption that one of the indicators of a fully constitutionalized legal order is the applicability of the bill of rights in legal relationships between private parties.

The comparison will be carried out by doing the following. First, Section II will explore what makes the two systems comparable notwithstanding the structural differences. Secondly, Section III will assess the comparability of the U.S. Supreme Court and the CJEU. Sections IV and V will examine the interpretative approaches of the two courts along the aforementioned trajectories to elicit the scope of the application of the bill of rights and the justification of horizontal effects. Finally, Section VI will provide some comparative outcomes.

II. ASSESSING THE COMPARABILITY OF THE UNITED STATES AND THE EUROPEAN UNION IN THE FIELD OF RIGHTS

This Article applies the comparative method in its classic function, namely to compare solutions adopted within different legal systems in response to similar practical or theoretical problems resulting from social, economic and political developments within their respective societies.[7] Similarities of practical and theoretical problems between the United States and the European Union need to be carefully assessed.

In the past, the experiences of the United States and European Union were perceived as being of a uniquely similar position as to their federalizing processes: the European Union seemed to move along the path of the United States.[8] Today, Brexit and the increasing questioning of the integration

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private relationships and relations between private parties. *See* William B. Fisch & Richard S. Kay, *The Constitutionalization of the Law in the United States*, 46 AMERICAN J. COMP. L. SUPP. 437, 451 (1998) (arguing that the constitutionalization of the American legal system also rests upon the ability of constitutional norms to impact the interpretation of the common law).

[6] HANS KELSEN, ALLGEMEINE STAATSLEHRE 208 (Verlag Von Julius Springer 1925) (discussing that within the step towards federalization the so called *Kompetenz zur Verfassunggebung* is inescapable).

[7] Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, *in* METHODS OF COMPARATIVE LAW 26-27 (Pier Giuseppe Monateri ed., 2012).

[8] CAPPELLETTI ET AL., *supra* note 1, at 11 (conceding that there is a clear difference between a community of States (uniting peoples) and a federal state (constituting one

process caused a strong skepticism as to the success of an authentically federal project. [9] One is thus tempted to believe that any comparison between the United States and the European Union on the ground of the bill of rights is prevented by the different level of federalization and, thus, by the necessarily incomplete constitutionalization of the Union.

Nevertheless, the comparability of the two systems still stands for three reasons. The first concerns the fact that, in both systems, the bill of rights did not exist, and had not even been conceptualized, at the time the Union was founded.[10] The delineation of the institutional framework exhausted any political energy, and in some way the cultural impetus of the founding fathers when the architecture of the legal order was being designed. Furthermore, in both cases the catalogue of rights was perceived as being unnecessary. On the one hand, it could lead to an alteration of power allocation among state and central institutions.[11] On the other hand, the existence of previous

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people), while at the same time pointing out that such a difference expresses nothing more than different accommodation of the same problem, which is the tension between federalism and integration).

[9] Neil Walker, *Never Glad Confident Morning Again: Europe after the Brexit Referendum*, 23 MAASTRICHT J. EU. COMP. L. 571, 572 (2016) (arguing for the need to reconceptualize supranationalism in order to avoid the risk of *disintegration* after Brexit).

[10] The text of the US Constitution adopted in 1787 did not include a Bill of Rights. The Bill of Rights was adopted only a few years later, in 1791. The Constitution of 1787 included a range of specific guarantees, including: the prohibition on the suspension of *habeas corpus* (U.S. CONST. art. I, § 9, cl. 2); the prohibition on retroactive legislation and the prohibition on bill of attainder are criminal laws *ad personam* and they prescribe the loss of civil and political rights (U.S. CONST. art. I, § 9, cl. 3). Finally, U.S. CONST art. IV, § 2, cl. 1 grants all citizens the same privileges and immunities. However, far from amounting to a clause acknowledging the rights and freedoms recognized at the federal level, U.S. CONST article IV, § 2, cl. 1 was essentially intended to ensure inter-systemic integration. As a matter of fact, the prevailing interpretation of this provision focuses on the fact that its original purpose was guaranteeing loyal cooperation between the states and free movement of persons and goods within the federal territory. *See* WILLIAM M. MEIGS, GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED (Lippincott Company 1900)(reporting that the debate was originally focused on the problem of property in slaves and on the related issue of their circulation); For a contemporary interpretation of the clause *see* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARVARD L. Rev. 1468, 1485 (2007). Similarly, the founding treaties of the European Community did not include a Bill of Rights. *See* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, 1992 O.J. (C 191).

[11] Indeed, at the time the Constitution was written, the existence of state Bills of Rights provided arguments to those who wished to avoid including a catalogue of federal rights, out of fear it might strengthen the central government to the detriment of states. In fact, the initial exclusion of a catalogue of rights was primarily a result of the widespread conviction

exhaustive catalogues of rights at the state level supported the widespread opinion that the Bills of Rights were of limited usefulness in both formal and substantive terms. Indeed, in the United States, constitutions containing declarations of rights already existed in Virginia,[12] New Hampshire,[13] North Carolina,[14] and Pennsylvania[15] when the Bill of Rights was adopted.[16] The state charters of rights provided a source on which the Founding Fathers could draw when drafting the amendments to the Constitution.[17] Similarly, in Europe the protection of rights was secured by the national constitutions and, later on, by the European Court of Justice, which was able to draw normative materials from constitutional traditions of Member States to justify the existence of EU fundamental rights.[18]

The second reason why it is appropriate to compare the United States to the European Union is based on the fact that, at the time the respective Bills of Rights were finally adopted, both systems were forced to deal with the problem of the *metabolisation* of the catalogue of rights within the overall framework of their legal order. It is true that in the United States, the Bill of Rights was immediately vested with legal effect. Nevertheless, the binding nature was not due to a general enthusiasm supporting the Bill of Rights.

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that such a catalogue would have aggrandized federal power. Some federalists shared the same view as they feared that a debate on the Bill of Rights would compromise the entire federal project. *See* THE FEDERALIST NO. 84, at 183 (Alexander Hamilton)(Clinton Rossiter ed., 1982)("The Constitution is itself in every rational sense, and to every useful purpose, a Bill of Rights"); *See also* SUE DAVIS & J.W. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 211 (2000).

[12] Virginia Declaration of Rights, adopted by the Virginia Constitutional Convention on June 12, 1776, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

[13] New Hampshire Bill of Rights, adopted on Oct. 31, 1783, https://www.nh.gov/glance /constitution.htm.

[14] A Bill of Rights was included in the North Carolina Constitution of 1776, http://avalon.law.yale.edu/18th_century/nc07.asp.

[15] A Declaration of Rights was included in the Pennsylvania Constitution of 1776, http://press pubs.uchicago.edu/founders/documents/bill_of_rightss5.html.

[16] Moreover, the State of New York adopted a Charter of Liberties and Privileges in 1683 which, supplemented by several concluding provisions, was subsequently referred to by the 1777 state Constitution. For the text of both the New York Charter and Constitution of 1777 *see* 1 C.Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK STATE FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905 (1906).

[17] This is clearly demonstrated by the recurrence of similar phraseology, above all in relation to guarantees under the criminal law. *See* Robert F. Williams, *'Experience Must be Our Only Guide'. The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L. Q. 403, 422 (1988); *See also* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEXAS L. REV. 1081, 1094 (1985).

[18] Grainne de Burca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AMERICAN J. INT'L L. 649, 693 (2011) (explaining the path from the debates during the *travaux préparatoires* of the EU treaties, through the decisions *Stauder* and *Nold* up to the Charter).

Rather, it derived from the willingness to rebalance the federal power by reinforcing the position of the citizen *vis-à-vis* "big government".[19] The amendments were thus embraced as a sound compromise by the Anti-Federalists and the catalogue of federal rights was by no means intended to extend the existing powers of the central legislature, nor to establish new powers. In parallel, in the European Union, the binding nature of the Charter of Fundamental Rights of the EU ("Charter") was finally recognized only in December 2009, 9 years after its adoption. Furthermore, the caution against the possible effects of a Bill of Rights, felt in the United States by the Anti-Federalist, was articulated in Article 51 of the Charter, which limits the field of application of the Charter to the existing powers of the Union.

Finally, the third reason for comparison is that in both legal systems more than one institution is involved in the interpretation of provisions concerning the protection of rights. Such involvement has sometimes taken the form of a real competition, at least as a matter of fact, among courts or between courts and political institutions. In the United States, this competition depends upon the diffused constitutional review of legislation and upon the unresolved question over the body that is vested with the ultimate authority to interpret the Constitution. There are many American lawyers who claim the need to perform constitutional interpretation outside the courts on the assumption that Congress, the President, and the people have the power to guarantee the efficacy of the Constitution.[20] Within the European Union, this competition has always involved the CJEU and the constitutional courts that ensure the application of their national constitutions.[21]

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[19] *See* ESSAYS ON THE MAKING OF THE CONSTITUTION xii (Leonard W. Levy ed., 2d ed., Oxford Univ. Press 1987) (thoroughly explaining the debate on the approval of both the Constitution and the Bill of Rights).

[20] *See* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 5 (2015). *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that within the U.S. system, the justification for the constitutional review of legislation is based on the theory of the Constitution as the Supreme Law of the Land); For a discussion on how this argument was legitimized by the Supreme Court as "court of rights" *see* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 27 (4th ed., 2008). *See also* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 96 (1957) (linking the theory of judicial review of legislation to the common law court's practice of not recognizing the effects of laws too "impertinent to be observed", namely laws exceeding the competences of temporal power or contrary to common right and reason). Nevertheless, for a discussion on how the counter-majoritarian difficulty remained a 'central obsession' of American scholarship *see* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153, 260 (2002); Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 333 (Jeffrey L. Dunoff & Joel P. Trachtman eds., Cambridge Univ. Press 2009).

[21] *See* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY, LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 102 (Oxford Univ. Press 1999); Neil Walker, *The Idea*

From this threefold perspective the two systems are similarly placed as far as both the interpretation and application of the bill of rights are concerned. This conclusion justifies the comparison on the basis of the likeness of practical and theoretical problems, but thus far says nothing about the comparability of the two Courts' interpretative techniques.

III. THE COMPARABILITY OF THE TWO COURTS: A CROSS-CULTURAL APPRAISAL OF THE UNITED STATES AND EUROPEAN UNION CONCEPTUALIZATIONS OF RIGHTS

Assessing the comparability of the Supreme Court and the CJEU requires a closer look into their interpretative techniques and their conceptualization of rights.[22]

Truth be told, the codification of rights already reveals some differences between the European Union and United States in terms of conceptualization. Indeed, there is virtually no doubt that the Charter is very distant from the culture instilled by the U.S. Bill of Rights.[23] This conclusion is justified by the absence of the right to the pursuit of happiness, which is generally regarded as one of the most original contributions of American constitutionalism.[24] Moreover, Member States' choice to avoid any hierarchy among rights in the Charter, and in fact to assert their indivisibility, is a far cry from American constitutionalism. For example, the liberal framework of American

of Constitutional Pluralism, 65 MODERN L. REV. 317, 359 (2002) (arguing that integration among legal systems has consequences on both the sources of law and the interpretation of law).

[22] This statement takes for granted the inability to test affinities and differences from phenomena of open cross-fertilization in the form of cross-references. There has been scholarly debate on the reluctance shown by both the CJEU and the Supreme Court to engage with international and comparative law. Grainne de Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168, 184 (2013).

[23] The cultural differences between common law and civil law systems are all the more emphasized in the EU context. Lord Neuberger, President of the Supreme Court of the U.K., Speech at the Cambridge Freshfields Annual Law Lecture (Feb. 12, 2014). Nevertheless, it is worth mentioning the penetration of some methodological solutions of the common law into European Union law, mostly, in the case law of the CJEU. *See* Vassilios Skouris, *Common Lawyers and Their Influence on the EU Court of Justice*, 14 DIRITTO DELL'UNIONE EUROPEA. 685, 697 (2014).

[24] Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 276 (1952) (arguing that the salient features of the American constitutional model are properly synthesized by the formula of the "pursuit of happiness"). *See also* Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURISPRUDENCE REV. 195, 262 (2015) (arguing that the reference to the "pursuit of happiness" derives from the influence of enlightenment culture and its faith in human rationality).

constitutionalism[25] conceive of social rights as "imperfect rights",[26] which "do not belong in a Constitution".[27] On the contrary, the Charter dedicates the entire Chapter IV to social rights.

Nevertheless, this Article intends to focus on conceptualizations impact on arguments concerning both the application of the Bill of Rights and the justification for horizontal effects.[28] From this viewpoint, the Supreme Court and the CJEU reveal some peculiar differences in a context of methodological convergence, which is demonstrated by the general trend within the Western

[25] JAMES R. PENNOCK, DEMOCRATIC POLTICAL THEORY 16-44 (Princeton Univ. Press 1979) (discussing how the tension between liberty and equality in democratic states and specifically in U.S. American legal culture has been historically reluctant to maintain that *positive rights* belongs to a constitution, mostly because scholars seem to generally defend the classical liberal theoretical inspiration of the Constitution). Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1392-93 (1984) (arguing that the American legal scholarship's *rhetoric of rights* tends to systematically ignore positive rights and liberties). After all, the implementation of social reforms in crucial moments of U.S. history never translated into the attribution of constitutional rank to positive claims. This confirms the prevalence, both in legal doctrine and in judicial *mentalité*, of a conceptual frame akin to classical liberalism. *See* Desmond King & Fiona Ross, *Critics and Beyond*, *in* THE OXFORD HANDBOOK OF THE WELFARE STATE 53 (Francis G. Castles et al. eds., Oxford Univ. Press 2010).

[26] Neil MacCormick, *Rights, Claims and Remedies*, 1 LAW AND PHILOSOPHY 337, 344 (1982)(maintaining that the word "right" should be properly used only in the presence of justified claims).

[27] *Compare* Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35, 36 (1993) *with* Herman Schwartz, *Do Economic and Social Rights Belong in A Constitution?*, 10 AM. U. J. INT'L L. POL'Y 1233, 1243 (1995) (arguing against having positive rights not just in the constitution, but everywhere).

[28] There are indeed other clear cultural distances between the CJEU and the Supreme Court that deserve mentioning. An example is the CJEU's predilection for teleological interpretation, even in the field of fundamental rights. Within the American legal culture, this kind of interpretative technique is far from being the predominant method of construction both in constitutional and in statutory interpretation. Former Irish Advocate General Fennelly, writing in an American law journal, described the bewilderment of common lawyers when confronted with this method. *See* Neil Fennelly, *Legal interpretation at the European Court of Justice*, 20 FORDHAM INT'L L. J. 656, 676-77 (1997) (arguing that purposivism vests judges with a specific "mission" of fulfilling the political will of the legislature). Furthermore, purposivism risks becoming the expression of a highly invasive power, given its suitability for filling gaps in legislation by inferring precise meaning from a construction of the overall legislative plan, in the presence of little textual evidence. There may be some apparent points of contact between purposivism and originalism in constitutional interpretation insofar as the latter is understood as the search for the intent of the founding fathers. Originalism implies a certain degree of textualism, whilst purposivism is tethered to the text but also grounded in the study of the legal context. Consequently, the success of originalism in constitutional interpretation is not coupled with the predominance of purposivism in statutory interpretation.

Legal Tradition toward a unified methodology of constitutional interpretation and the circulation of the proportionality test formula. [29]

In the United States, the Supreme Court expanded the category of fundamental rights to justify the enforceability of the Bill of Rights against purely state conduct. Fundamental rights represent claims that are grounded in American cultural and legal tradition.[30] Their peculiar value affords federal judges the power to protect them against any public actions, and notably States' actions.[31] The logic of fundamentality strengthened the protection of individual rights and at the same time increased the Federation's prerogatives towards the States. The Supreme Court "expounded" the constitutional text and, in turn, justified judicial review of state legislation for breaches of federal fundamental rights.[32]

In the European Union context, fundamentality does not justify the full enforceability of rights at the European Union or Member state level. Rather, the CJEU grounds enforceability on the exact phrasing of the Bill of Rights, assessing whether the existing legal materials – the Bill of Rights, or a combination of Bill of Rights provisions plus other EU legislation and principles – concretize an enforceable claim. On the one hand, this approach enables the

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[29] Mark Tushnet, *Comparative Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press 2006) (arguing that studies in "generic constitutionalism", which compare how and why rights can be limited in constitutional law, demonstrated the wide circulation of the proportionality formula). Some indirect influence of the U.S. Supreme Court on the CJEU is plausible, if one considers: a) the influence of the German proportionality test, adopted by the *Bundesverfassungsgericht*, on the CJEU and b) the inspiration that the U.S. model has exerted, at least in a particular moment, on the German Constitutional Court's argumentation techniques concerning the proportionality formula. *See* Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 36-37 (2005); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U.PA.J.CONST.L. 284, 289 (1998) (arguing that the German Constitutional Court began borrowing from the Supreme Court's equal protection jurisprudence in the 1980s). Robert Alexy has conceptualized the German proportionality test, which in part differs from the U.S. model of proportionality, in highly rationalizing terms. *See* Robert Alexy, *Constitutional Rights, Democracy and Representation*, 3 RICERCHE GIURIDICHE 197, 199 (2014). At any rate, American influence to the CJEU is indirect, operating on a secondary level, and thus not enough to maintain that the CJEU and the Supreme Court share common methods of legal construction compared to the CJEU and other courts employing the proportionality formula.

[30] *Hebert v. State of La.*, 272 U.S. 312, 316 (1926); *Wieman et al. v. Updegraff et al.* 344 U.S. 183 (1952) (Frankfurter J. concurring); Gary S. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 520 (1973) (discussing the inconsistencies in Supreme Court's case law).

[31] *Hebert v. State of La.*, 272 U.S. at 316.

[32] Terrance Sandalow, *Constitutional Interpretation*, 79 MICH, L. REV. 1033, 1034 (1981) (arguing that the well-known admonishment of Chief Justice Marshall, "we must never forget it is the Constitution we are expounding", implied a certain degree of fidelity to the text).

CJEU to conclude that insufficiently codified fundamental rights require concretization to be enforced.[33] On the other hand, such an approach allows the Court to identify rights in the form of general principles[34] without necessarily implying that the right will receive a self-standing protection, *i.e.* regardless of its interaction with other provisions of EU law. More likely, the recognition of a right in such a form will represent a limit on the exercise of powers and competence by European institutions. At the same time, the right-as-general-principle may be enforced in the place of the corresponding article of the Charter.[35]

In the end, enforceability rests more on the level of concretization of a given claim than on the fundamental character of the claim.

The CJEU's resort to general principles has something to do with the Supreme Court's technique of identifying rights not expressly recognized under the Constitution. Indeed, the Supreme Court has sometimes grounded the emergence of unwritten rights, such as the right to privacy, either in express constitutional provisions that have 'penumbras' or in a substantive reading of the due process clause of the Fifth Amendment.[36] The penumbra theory, as

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[33] Association de médiation sociale v. Union locale des syndicats CGT, C-176/1245, EU:C:2014:2, ¶ 45.

[34] The CJEU method is premised on the suitability of principles to operate as rights, that is, to entail the recognition of legally enforceable claims actionable before courts. There seems to be some terminological confusion which may be clarified in the following terms: an EU principle is a norm that can determine the conditions for the applicability of other provisions of EU law, and of conflicting domestic law, thus giving space to the protection of fundamental rights. To identify general principles, the CJEU resorts to a wide range of legal materials, such as: constitutional traditions, EU primary legislation, and international sources. This choice is connected to the CJEU's inclination to resort to general principles for many reasons, including the purpose of filling normative gaps or grounding judicial review of EU legislation. *See* Koen Lenaerts & Jose A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629, 1636 (2010) (arguing that both the interpretative and the judicial review functions of general principles are grounded in their constitutional status in the hierarchy of norms).

[35] In the *El Dridi* case, the CJEU invites the referring judge to apply the principle of retroactivity of lighter penalty, which is part of constitutional traditions common to the Member States, instead of referring to Article 49 of the Charter. *See* Case C-61/11/PPU, El Dridi, 2011 E.C.R. I-03015, ¶ 61.

[36] *See generally* EDWARD CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 466-67 (Princeton Univ. Press 1978). The emergence of rights from the common law is a rather different intellectual operation. On the one hand, judges deriving rights and principles from the common law are developing the common law, grounding any new addition to its body on decisional law. On the other hand, such a development does not, and in fact tends not to, entail the recognition of a new cause of action. This is true both in the United States and in the United Kingdom, even when such a development is determined by the interplay between the common law and human rights law. *See* Murray Hunt, *The 'Horizontal Effect' of the Human Rights Act: Moving Beyond the Public-Private Distinction*, *in* UNDERSTANDING HUMAN RIGHTS PRINCIPLES 161, 178 (Jeffrey Jowell & Jonathan Cooper

elaborated by Justice Douglas is based on the idea that some of the guarantees in the Bill of Rights have penumbras "formed by emanations from those guarantees that help give them life and substance."[37] Those penumbras represent rights inherent in some amendments. There is, however, a crucial difference between the two Courts' approaches.

In the U.S. context, the recognition of a right, even when derived from a principle, always implies a self-standing individual claim, which is protected *vis-à-vis* the federal government or, under certain conditions, the state.[38] As a consequence, a principle should always be capable of translation into a concretely enforceable claim. On the contrary, the CJEU concedes that general principles may require secondary legislation to concretize them into enforceable claims and thus "perfect rights." In addition, the CJEU clarifies that general principles may transcend concretization into written sources of law and determine the disapplication of conflicting norms. In this case though, principles *operate* as rights by determining the condition for the applicability of EU law (or domestic conflicting law), without entailing self-standing claims.[39]

This analysis has three implications for understanding federalization and constitutionalization through the Bill of Rights. The first implication is that both Courts have developed specific argumentative tools that enable them to use fundamental rights as a means of integration. The second implication is that differences in the conceptualization of rights rest upon the definition of the conditions for enforceability. The third implication is that the presumed "otherness"[40] of the American system neither prevents any comparison, nor renders comparative outcomes unreliable. Both the CJEU and the Supreme Court speak languages that have some harmony to them.

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eds., 2001)(arguing that the common law should be developed by judges in order to achieve the maximum level of compatibility with the European Convention on Human Rights without exceeding the legitimate bounds of common law development. When it is not possible to develop the common law in line with the ECHR without interfering with parliamentary discretion, judges should appeal to the Parliament for legislative amendments).

[37] *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

[38] *See infra* Section IV. A. that explains how the Bill of Rights applies to the states.

[39] *See* Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-09981 (deriving the general principle of prohibition of age discrimination from Council Directive 2000/78 (EC).

[40] The term "otherness" refers here to the debate on American exceptionalism, and more precisely to the idea that the United States expresses a unique and distinctive culture of rights. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STANFORD L. REV. 1479, 1482-83 (2003) (arguing that American exceptionalism has both a positive face that refers to the distinctiveness of rights culture, and a negative face which refers to the double standards in human rights obligations).

IV. THE FEDERAL QUESTION: THE APPLICATION OF THE BILL OF RIGHTS TO THE MEMBER STATES

A. The U.S. Supreme Court incorporation techniques

The first trajectory of the comparison is the application of the Bill of Rights *vis-à-vis* the states when there is no direct involvement of federal law.

The U.S. founding fathers conceptualized the system of rights in a strictly dualist sense. The individual legal rights enshrined in the federal catalogue of rights, specifically, the first eight amendments, constituted a limit only on the federal authorities, considering the existence of the Bills of Rights on the state level, almost all of which pre-dated the federal text.

This approach was subsequently confirmed by the Supreme Court in the first half of the Nineteenth Century in the decision of *Barron v. City of Baltimore*.[41] Justice Marshall developed a textual argument based on the Fifth Amendment by declaring that the relevant provision of the Bill of Rights was clearly addressed only to the general government.[42]

The perspective could have changed radically in the immediate aftermath of the Civil War with the adoption of the Fourteenth Amendment, which reformulates the due process clause and introduces the Equal Protection Clause, this time impinging upon the power of the states. And yet, the Supreme Court reiterated the dualist approach,[43] by relying on a purposive interpretation of the Civil War Amendments. The Justices maintained that a separation clearly existed between federal citizenship, along with its bundle of federal guarantees, and state citizenship, which entailed the recognition of "domestic" rights.[44] From the separation of the two citizenships stems the inability to derive limitations on state powers from a federal bill of rights.[45]

The change in approach finally came in the first half of the Nineteenth Century with the decision *Gitlow v. New York*.[46] The case concerned a New York law punishing advocacy to overthrow the government by force which was claimed to be an unconstitutional violation of the freedom of speech, enshrined in the First Amendment.[47] The Court held for the first time that some

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[41] *Barron v. Mayor of Baltimore,* 32 U.S. 243, 247-48 (1833).

[42] *Id.* at 249.

[43] *See Slaughter-House cases*, 83 U.S. 36 (1873).

[44] *Id.* at 74.

[45] *See Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 539 (1922)("[A]s this court more than once has pointed out, the privileges or immunities of citizens, protected by the Fourteenth Amendment against abridgment by state laws, are not those fundamental privileges and immunities inherent in state citizenship, but only those which owe their existence to the federal government, its national character, its Constitution, or its laws.").

[46] *Gitlow v. New York,* 268 U.S. 652 (1925).

[47] *Id*. at 666.

of the rights protected by the federal Bill of Rights could, through the Fourteenth Amendment, be guaranteed by the federal judiciary *vis-à-vis* the exercise of state powers.[48] If one looks for the justification for the new understanding of the Fourteenth Amendment, one may be surprised to find out that the metamorphosis was primarily cultural – it thus occurred without any change to the Constitution. The overruling of precedent delineating a dualistic system is somehow hasty and is not based on a different account of the purpose of the clause.

The argument for applying the Bill of Rights to states has been labeled the "incorporation doctrine" and is based on the concept of fundamental rights.[49] Fundamental rights are those set forth (*inter alia*) in the federal Bill of Rights and rooted within American legal and cultural tradition (i.e. fully incorporated under the concept of *ordered liberty*). Rights of this kind must be actionable against the states and against federal authorities.[50] In other words, the dual system is only set aside for rights that may be classified under what Judge Benjamin Cardozo defined as "implicit in the concept of ordered liberty";[51] namely those rights that are fundamental due to their ability to express claims rooted in the legal and cultural tradition of the Nation. [52]

The new approach has established a federal citizenship which does not replace state citizenship, but vests content in an integrated system of rights. Moreover, the incorporation doctrine contributed to the evolution of federalism from a strictly dualist approach towards the endorsement of an authentically cooperative framework.

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[48] *Id.*

[49] The Supreme Court has repeatedly used the incorporation doctrine. The latest decision in which the Court resorted to the incorporation doctrine dates back to 2010. *See McDonald v. Chicago*, 561 U.S. 742 (2010) (concerning the right to bear arms, protected by the Second Amendment).

[50] Also, when faced with the scenario of newly protected legal rights, Justices justify the protection of rights on the basis of a change that has already occurred within American society at a given moment in time. The fundamental character of a right always relates to the legal position as rooted in history and in the culture of the U.S. socio-political community. Traditionalism is not an option pursued on the basis of an almost mystical conception of the common law, on the contrary, traditionalism is grounded in the rational choice to endorse solutions that have been used over time. *See* David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[51] *Palko v. Connecticut*, 302 U.S. 319, 329 (1937).

[52] Within the EU context, the recourse to common constitutional traditions is guided by a similar logic, namely one that is conducive to the creation of a legal system that synthesizes the state's legal traditions by channeling their scope into a new framework. Nevertheless, the purpose of such an interpretative operation is not to extend the scope of the Charter of fundamental rights of the EU. The technique of recourse to common constitutional traditions is rather needed in order to bind together in harmony the European legal order with national constitutional identities: *See* Lenaerts & Gutiérrez-Fons, *supra* note 34 at 1632-1633.

The process of incorporation must not be imagined as being rigidly top-down, with the Supreme Court autonomously identifying a bundle of fundamental rights. On the contrary, incorporation is based on a bottom-up approach. The Supreme Court generally draws on the need to find a consensus among states, with the goal of finding a legal solution that is grounded in the American legal and cultural tradition.[53]

This account may be considered as the end of the story in the sense that the protection of fundamental rights in the United States are always explained in such terms. However, what may be the missing part of the story is the interaction between state and federal constitutional law. The Supremacy Clause naturally prevents state courts from endorsing solutions that are at odds with the Constitution. State constitutional law however is far from being irrelevant. The so-called primacy approach implies that a question of law must be examined in the first instance with regard for the compliance with state's constitutional law,[54] and only on an ancillary basis to federal constitutional law.[55] One may simplistically assume that this interpretative technique has given rise to systematic controversies or lack of dialogue between supreme courts. On the contrary, the Supreme Court has frequently referred to the decisions of the state supreme courts, above all in relation to hard cases where it becomes essential to root the solution of the case in American legal tradition.[56]

The primacy approach is thus justified by the perspective of a search for a better standard of protection but cannot however entail the weakening of constitutional guarantees. The logic of a better standard applies even in the absence of a horizontal clause such as the one enshrined in Article 53 of the EU Charter.

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[53] In doing so, the Supreme Court seems to rely on two of the typical elements of the common law constitutional interpretation, namely conventionalism and traditionalism. Strauss, *supra* note 50, at 877.

[54] *See* Ken Gormley, *Exploring a European Union Constitution: Unexpected Lessons from the American Experience*, 35 RUTGERS L. J. 69 (2003). *See also* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALTIMORE L. REV. 379, 382 (1980). *See* William Brennan. Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) (explaining that Justice Brennan emphasized that between 1970 and 1980 state Supreme Courts delivered 250 decisions. "[H]olding that the constitutional minimums set by the Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.").

[55] *See*, *e.g., Sterling v. Cupp*, 290 Or. 611 (1981); *Com. v. Edmund*, 526 Pa. 374 (1991).

[56] *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (explaining sexual discrimination); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (explaining the Fourth Amendment and the limitation of personal freedom); *Batson v. Kentucky*, 476 U.S. 79 (1986) (touching on racial discrimination); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990) (explaining the right to die).

The primacy approach represents the operational implementation of the "adequate and independent State ground doctrine."[57] In other words, state courts are free to apply only their constitutions when the solution of the case does not imply or require the application of federal law. This may also be the case for reasons of mere procedural economy. However, the Supreme Court retains the power to overturn the judgments of the state courts, unless the state courts have clearly asserted that the decision was reached in the case without applying federal law.[58] State courts must demonstrate that the legal solution endorsed is not, or rather, does not have to be, rooted in the Constitution or federal law.

In any case, irrespective of the scope of the rights guaranteed in the Bill of Rights, the contribution by state courts, above all in terms of the development of the legal tradition, has not halted, but has in fact fueled a process of enrichment of the U.S. Supreme Court's case law.

B. The CJEU strategic moves to justify the application of the Charter

In the EU context, the delimitation of the scope of application of the Charter has been obsessively stated to secure the existing perimeter of Union competences. There are at least five different legal sources defending the current allocation of competences. Article 6, paragraph. 1 of the Treaty on the European Union clarifies that the Charter provisions do not expand the Union competences as defined in the treaties.[59] Article 51, para. 1 states that both the Union and the States shall respect rights set forth in the Charter "in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."[60] The subsequent paragraph reiterates that the "Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."[61]

Aside from the primary sources, one should reference the declarations concerning provisions of the treaties annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon. Declaration n. 1 directly addresses the Charter by specifying that the latter "does not extend the field of application of Union law beyond the powers of the Union or establish

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[57] *Murdock v. City of Memphis*, 87 U.S. 590 (1874).

[58] *Michigan v. Long*, 463 U.S. 1032 (1983). For an account on the application of the doctrine *see* Matthew G. Simon, *Revisiting Michigan v. Long after Twenty Years*, 66 ALA. L. REV. 869 (2003).

[59] 2012 O.J. (C 326) 1.

[60] 2012 O.J. (C 326) 391.

[61] *Id.*

any new power or task for the Union, or modify powers and tasks as defined by the Treaties."[62]

Furthermore, a declaration was added to the Final Act which adopted the Treaty of Lisbon in order to specifically underline that competences not conferred upon the Union in the treaties would remain with the member states.[63]

When called upon for interpreting Article 51, paragraph 1 of the Charter, the CJEU defined the perimeter of application of the Charter, by excluding in principle national law from its scope.[64] The approach was initially strict, with the Court stating that the provisions of the Charter are addressed to member states only when they were implementing Union law.[65] The Court adjusted the interpretation to avoid a situation where general principles would have a broader scope than the one recognized by the provisions of the Charter. In response, the CJEU clarified that the Charter was applicable also when Member States were acting within the field of Union law.[66]

There are basically two different situations in which the process of federalization of the Bill of Rights can be tested. The first is when a claimant seeks the unmediated application of the Charter *vis-à-vis* domestic law. The second are circumstances in which a plaintiff claims a Charter guarantee by stating that national law, which has some sort of connection with Union law, is violating the Charter. The Court addressed the first case in the well-known *Fransson* judgment, concerning a proceeding for tax fraud, which was claimed to be in violation of Article 50 of the Charter. This case followed a criminal trial that was based on the same circumstances that had originated in the civil proceeding. [67] The application of the Charter was justified because the tax fraud included a Value Added Tax (VAT) evasion that implied a loss of revenue for the Union budget.[68] Thus, the situation triggered Union law as the fraud directly impacted the European Union.[69]

However, the *Fransson* decision is by no means paradigmatic. The Court has been reluctant to find a tenuous connection on such a basis since then. The Court's case law concerning the field of application of the Charter focuses on the link a given national rule has with Union law and whether that link is sufficient to be within the scope of the Charter.

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[62] 2010 O.J. (C 83/335) 309.

[63] *See* Declaration no. 18 in relation to the delimitation of competences, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, *supra* note 62.

[64] Case C-256/11, Dereci v. Bundesministerium für Inneres, 2011 E.C.R. I-11315.

[65] *Id.*

[66] Michael Dougan, *Judicial review of Member State action under the general principles and the Charter: defining the 'scope of Union law*, 52 COMM. MKT L. REV. 1201 (2015).

[67] Case C-617/10, Åklagaren v. Fransson, 2013 E.C.R. I-105.

[68] *Id.*

[69] *Id.*

In the *J. McB* decision, the CJEU was presented with a case in which the interplay between domestic law and EU law was peculiarly complicated.[70] An Irish national seeking the return of his children, who were taken by their British mother off Ireland, relied on the Brussels II Regulation (No. 2201/2003), which determines jurisdiction when a child has been wrongfully removed from one Member State to another.[71] The British courts required a declaration stating that the removal of the children had been wrongful as it is required by the Regulation.[72] The Irish Court however held that the removal was not wrongful because the claimant did not have custodial rights of his children due to Irish law does not recognizing such rights for unmarried natural fathers.[73] Regulation No. 2201/2003 was interpreted as meaning that whether a child's removal is wrongful for the purposes of its application is entirely dependent on the existence of rights of custody, conferred by the relevant national law. The removal, then, had taken place in in violation of domestic law.[74] At this point, the Irish claimant's argument, on which the preliminary reference was based, was that the Irish rule on custody was incompatible with Union law, interpreted in light of Article 7 of the Charter.[75] The Court considered the link between the situation at issue and Union law to be established, but specified that the assessment of compatibility was limited to the Regulation, and more specifically to the peculiar interpretation given in the Irish context.[76] Therefore, the Court did not address national law.[77]

The circumstances of the *Torralbo Marcos* decision were similar to that of the *McB* case.[78] The plaintiff claimed payment of wages from an insolvent employer in Spain.[79] However, the plaintiff still needed a declaration of insolvency in order to access the guarantee institution, as required by Directive 2008/94.[80] Under Spanish law, he was further required to pay judicial fees for lodging an appeal to obtain the legal declaration of insolvency.[81] At this point, he claimed that the payment was a violation of the right to an effective remedy enshrined in Article 47 of the Charter.[82] However, the CJEU declared that the connection was not established since, in absence of the declaration of

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[70] Case C-400/10, J. McB v. L.E., 2010 E.C.R. I-08965.

[71] Council Regulation 2201/2003, 2003 O.J. (L 338) (E.C.).

[72] Case C-400/10, J. McB v. L.E., 2010 E.C.R. I-08965.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Case C-400/10, J. McB v. L.E., 2010 E.C.R. I-08965, ¶ 52.

[78] Case C-265/13, Emiliano Torralbo Marcos v. Korota SA, Fondo de Garantía Salarial, 2014 E.C.R. 187.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

insolvency, the Directive was not involved in the case.[83] The Court specified that the domestic law concerning the judicial fee relates to the administration of justice and is not intended to implement EU law.[84] Furthermore, EU law does not contain any rule in that field nor dictates rules affecting national legislation in that matter.

The argument is revealed at paragraph 32 of the *Torralbo* judgment but was consistently elaborated on by the Court in a few more cases. Both in the *Siragusa* and in the *Hernández* decisions, the CJEU was presented with situations in which domestic laws were not implementing EU laws but were still affecting a field related to one occupied by EU law.[85] The Court specified that the connection with EU law must be established beyond the mere relation between the matters covered respectively by domestic and EU law. The CJEU took it a step further and articulated a test with a view to establish the existence of such a connection. The test looks at the purpose of the legislation, whether it is intended to implement a provision of EU law and at the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law. Finally, the test assesses whether there are specific rules of EU law on the matter or capable of affecting it.[86] In both *Siragusa* and *Hernández*, the Court did not find the connection to be in place, clarifying the rationale for such a test: the purpose of the protection of fundamental rights within the European Union is to safeguard the unity, primacy and effectiveness of Union law.[87]

When the connection with EU law is found, the operation of the Charter rests somehow on its suitability to promote unity, primacy, and effectiveness.[88] In the *N.S.* case, the Court considered whether a member state was implementing EU law, and thus the Charter, even when it is not acting by an EU regulation, but in fact exercising a reserve of sovereignty.[89] The case concerned a group of asylum seekers in the United Kingdom resisting the return to Greece, which was their first port of entry for the purpose of the Dublin II

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[83] *Id.*

[84] *Id.*

[85] Case C-206/13, Siragusa v. Regione Sicilia, 2014 E.C.R. I-126; Case C-198/13, Hernández v. Reino de España, 2014 EU:C:2014:2055.

[86] Case C-206/13, Siragusa v. Regione Sicilia, 2014 E.C.R. I-126. On the articulation of the test *see also* Eleanor Spaventa, *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*, Policy Department Citizens' Rights and Constitutional Affairs, 24-25 (2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf.

[87] *Id.*

[88] Case C-411/10, N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, 2011 E.C.R. I-13905.

[89] *Id.*

Regulation, out of fear of being subjected to degrading and inhuman treatments in breach of Article 4 of the Charter, and of Article 3 of the European Convention on Human Rights.[90] Claimants asked the United Kingdom to process their asylum applications instead of sending them back to Greece pursuant to the Dublin II Regulation.[91] The Court found that a member state is under an obligation to exercise discretion, and thus it should not apply the mechanism provided in the Regulation in order to transfer the responsibility to process asylum claims to another member state, when the former are not aware of systematic violations of human rights.[92] According to the Court, the situation falls within the concept of "implementation of EU law" since the discretionary power conferred to member states is part of the mechanism for determining the state responsible for examining the asylum application.[93] Therefore, the Charter is applicable to a situation in which the member state is not acting by a regulation. However, this statement does not imply that any violation of fundamental rights enables member states to not apply the Dublin system. On the contrary, only exceptional and emergency situations justify this conclusion. From this viewpoint, the Court seems to suggest that the application of the Charter cannot compromise the functioning of the whole system and thus the effectiveness of EU law.[94] In the end, the Court endorses a fundamentally dualistic system in which the Charter needs to be triggered by a certain degree of involvement of EU law in any given case.

The arguments used by the CJEU are less linear than what may be perceived from a quick review of the case-law. In the *Dano*[95] decision, concerning the status of EU inactive citizens, the Court found that Member States are not implementing EU law when they lay down the conditions for accessing social benefits that they are not obliged to guarantee under EU law, even if the relevant regulation mentions the benefits at issue in the list of those that shall be provided to the EU citizens residing in the Member State concerned, according to its legislation.[96]

The engagement of EU fundamental rights is not independent from the interest that is at stake. So harmonizing measures are more likely to trigger the application of the Charter than coordinating measures.[97] Unlike the U.S. case, citizenship does not make any difference. Indeed, the Court specified that the status of citizen of the Union is destined to be the fundamental status

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Spaventa, *supra* note 86.

[95] Case C-333/13, Dano v. Jobcenter Leipzig, 2014 E.C.R. I-2358.

[96] Regulation of the European Parliament and of the Counsel (EC) No. 883/2004 of 29 April 2004, art. 70, 2004 O.J. (L 166) 4.

[97] Spaventa, *supra* note 86, at 24.

of nationals of the Member States;[98] at the same time though the CJEU is always concerned with the existing allocation of competencies. This implies there is a functionalization of the Charter to the integration process on an ancillary basis. The Charter is not the picklock to unhinge the allocation of competences; it is rather an instrument to push integration further or to dismiss obstacles to the process.

V. THE CONSTITUTIONALIZATION OF THE LEGAL ORDER: THE QUEST FOR THE HORIZONTAL EFFECT OF RIGHTS

The second trajectory of this comparative study focuses on the horizontal effect of the provisions of the Bill of Rights. The horizontal effect of rights provides a good indication of the degree of constitutionalization within a legal system.[99] Nevertheless, one may argue that the issue of the horizontal effect of constitutional rights is not conceptually self-standing, and hence cannot logically be separated from the problem of the direct effect of fundamental rights in general.[100] In other words, if fundamental rights have a direct effect at all, they must also have a horizontal effect.

As it will be further explained, the U.S. Supreme Court and the CJEU have taken quite different stances on this and these differences can be explained precisely in light of the way in which horizontality is conceptually framed.

Both in the European Union and in the United States, horizontal effects are not generally recognized in connection with the provisions of the Bill of Rights. However, there are extremely significant differences between the two legal systems as to the justification for limitation of the effects of fundamental rights.

In the United States, the violation of fundamental rights only triggers federal guarantees to the extent that it is possible to identify a state action.[101] A different regime obviously applies to individual legal rights that are not governed by the text of the amendments.

Resistance to the acceptance of full horizontal effects of rights laid down in the federal catalogue may depend on the concurrent protection of the principles of pluralism and individual freedom. These principles preclude the possibility of conceiving a full penetration of constitutional constraints into

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[98] Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottiginies-Louvain-la-Neuve., 2001 E.C.R. I-06193.

[99] The centrality of such an issue in constructing a legal order that is permeated by constitutional rules remains the same irrespective of the conceptual framework that is to be given horizontal effect *i.e.* whether the theory of direct or indirect horizontal effect is endorsed. *See* Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law,* 7 GERMAN L. J. 351 (2006).

[100] ROBERT ALEXY, A THEORY OF CONSTITUTIONL RIGHTS 349-351 (Julian Rivers trans., Oxford Univ. Press 2010).

[101] *The Civil Rights Cases*, 109 U.S. 3 (1883).

inter-subjective dynamics, thus preventing the transformation of constitutional rights into claims actionable between private parties.[102]

The concept of state action has been interpreted as to maintain that a private actor exercising functions "traditionally exclusively reserved to the State" is performing a state action, thus involving the responsibility of the state.[103]

In some cases, the Supreme Court has recognized horizontal effects to some provisions with a view to protect constitutional guarantees and values, such as equal protection of the law. The Supreme Court did so by giving a broader interpretation of "state action." More specifically, the Supreme Court clarified that a state is responsible for private actions when it "has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of a state."[104] On this basis, a divided Court found that the adoption of a state constitutional amendment, prohibiting governmental interference with everyone's right to refuse to sell or rent real estate to any other person as they choose, constituted state action.[105]

In the area of anti-discrimination law, this broad interpretation has been used to enforce desegregation. In *Burton v. Wilmington Parking Authority*, the Justices maintained that a nexus existed between a private restaurant owner and state action when the former leased its premises from a state agency, which owned the building and an automobile parking lot.[106] Therefore, the restaurant cannot refuse to serve food or drink on the basis of race.[107]

Finally, state action exists when courts enforce private covenants including discriminatory clauses.[108] Similarly, the notion of state action includes the application by state courts of a rule of law, whether statutory or not, to award judgment in a civil action. In this regard, case law is not always consistent. The Court has yet to clarify whether any court order or any application of rules amount to state action.[109]

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[102] *See generally* Kumm, *supra* note 99, at 352 (discussing the German scholarly debate on the so-called *Drittwirkung)*.

[103] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

[104] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[105] *Reitman v. Mulkey*, 387 U.S. 369, 392 (1967) (concerning a California constitutional amendment).

[106] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[107] *Id.*

[108] *Shelley v. Kraemer*, 334 U.S. 1 (1948). It is worth mentioning that the Supreme Court has held the failure to exercise legislative power or legislative inertia regarding the adoption of measures for the prevention of violation of the Bill of Rights can be classified as state action. *See Bell v. Maryland*, 378 U.S. 226 (1964); *DeShaney v. Winnebago City. Dep't. of Soc. Servs.*, 489 U.S. 189 (1989).

[109] *See* Stephen Gardbaum, *The 'Horizontal Effect' of Constitutional Rights*, 102 MICH. L. REV. 387, 414 (2003) (arguing that the Court, by taking a different stance in *Evans v. Abney*, 396 U.S. 435 (1970), confirmed the generally shared opinion that *Shelly v.*

The "constitutional axiom" of the state action doctrine has been challenged by scholars and somehow shaped by the Supreme Court with a view to enforce some constitutional guarantees, namely some fundamental rights and the Equal Protection Clause.[110] However, state action is still the conceptual frame the Court uses to make sense of the horizontal effects of the Bill of Rights.

The existence of the horizontal effect has not been clearly asserted within the Union with reference to the provisions of the Charter, while a different regime applies to the four freedoms provided for in the Treaties.[111] When it comes to the Charter, the CJEU seems to disregard the difference between horizontal and vertical effects and to focus on the *direct* effects of the Charter provisions. When such effects are recognized, they apply equally to vertical and horizontal legal relations. As a consequence, horizontal effects have not been conceptualized as principally inapplicable. Here, the CJEU's conceptualization of rights becomes relevant; indeed, the CJEU closely looks at the specific content of the Charter provisions as well as the interplay between them and secondary EU legislation.[112]

The approach is exemplified by decisions concerning Articles 7 and 8 of the Charter. In *Google Spain,* the CJEU recognized that data subjects can claim fundamental rights on the basis of the two aforementioned Charter provisions.[113] However, such direct effect seems to be grounded in the combination of two elements. On the one hand, the exact wording of Articles 7 and 8 helps specify data subjects' rights and data controllers' obligations. On the other hand, the existence of secondary legislation further details the content of rights and obligations. Thus, providing the Court with clear guidance on the proper balance to strike between the conflicting interests involved in the case. Both the way in which provisions are phrased and the existence of implementation measures contribute to the horizontal effectiveness of rights, by relieving the CJEU from the burden of providing with detailed contents the otherwise general, and principle-like, provisions of the Charter.

Kraemer, 334 U.S. 1 (1948) should be confined to its facts). A case that could have impacted this issue is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), concerning whether the application of Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment. The decision, however, did not openly address whether applying Colorado's law amounts to state action.

[110] Gardbaum, *supra* note 109, at 388.

[111] Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5 GERMAN L.J. 294 (2004). *See* Case C-438/05, Int'l Transp. Workers Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779 (clarifying the existence of horizontal effects for the four freedoms).

[112] *See* Eleni Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality,* 21 EU. L. J. 657 (2015).

[113] Case C-131/12, Google Spain, SL, Google Inc v. Agencia Espanola de Proteccion de Datos, 2014 E.C.R. 317.

Some recent developments within the case law suggests that the Court may not be ready to go a step further. In CJEU's view, the characteristic phrasing of the Charter provisions is still an obstacle to the enforcement of horizontal effects. Advocate General Cruz Villalón clarified that the provisions of the Charter are capable of having horizontal effects in the case of Association *de mediation sociale v. Union locale des syndicats CGT* ("*AMS"*).[114] According to the Advocate General, the thesis that seeks to exclude horizontal effect as a matter of principle is based on an *a contrario* argument inferred from Article 51.[115] Specifically, when the latter limits the application of the Charter to the Union institutions and the member states, it clearly intends to exclude private persons.[116] In the Advocate General's view, the argument is mistaken. The rights protected by the Charter are actionable in court and in disputes between private parties as they have the nature of fundamental rights.[117]

However, when giving judgment in the *AMS* case, the CJEU held that Article 27 of the Charter was not actionable in proceedings concerning disputes between private persons seeking the disapplication of conflicting national law as Charter provisions are not sufficiently specific and would be incapable of conferring detailed rights and obligations on individuals. [118]

A similar view was taken by Advocate General Trstenjak in her opinion delivered in the *Dominguez* case concerning a claim to annual leave brought by a worker against his employer.[119] The Advocate General asserted that the direct horizontal applicability of fundamental rights in the form of general principles presupposes that the Court is always able, through ordinary interpretative operations, to formulate the claim in sufficiently precise terms, which according to the Advocate General would imply the exercise of powers reserved to the EU legislator.[120]

Thus, in spite of the declarations of principle, horizontal effects tend to be excluded according to arguments based on the absence of direct effects. This approach may derive from the CJEU's attitude to frame the applicability of EU norms in terms of direct versus indirect effects.[121] Such an attitude is clear

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[114] Opinion of Advocate General Cruz Villalón, Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT*, EU:C:2013:491, ¶ 24.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Opinion of Advocate General Cruz Villalón, Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT*, EU:C:2013:491.

[119] Case C-282/10, Dominguez v. Centre informatique du Centre Ouest Atlantique, 2011 E.C.R. 559.

[120] *Id.*

[121] A role may have been played by the academic debate on the need to overcome the dichotomy of vertical versus horizontal effects, which is consistent with the separation of the public and private sphere. Such a separation though is what the fundamental rights discourse intends to dismantle. *See* Hunt, *supra* note 36, at 162-163.

if one considers the progressive overcoming of the rigid alternative between vertical and horizontal effects when it comes to EU secondary legislation.[122]

At the state level, there are courts going even further. Examples include the civil division of the English Court of Appeal that on at least two occasions recognized the direct horizontal effects to Articles 7, 8 and 47 of the Charter, by setting aside national law in contrast with those provisions.[123] The U.K. Supreme Court has recently affirmed the Court of Appeal's decision in the *Benkharbouche* case, recognizing direct effects to Article 47 of the Charter and thus disapplying domestic law.[124]

Even if Brexit will impact decisions like these, the gradual emergence of an approach that associates the direct effect of fundamental rights with the creation of effects within relations between private persons is clear. Such an outcome is precluded in the United States by the prevalence of theoretical views rooted in Liberalism, which exalt individual freedom and construe the *judicialization* of relations between private persons as an intolerable intrusion of the state into the sphere of private autonomy. Nevertheless, there are also exceptions in the United States, which are justified by the need to make the Constitution an instrument with some "militant" attitude in the face of the most serious breach of the rights guaranteed in it.[125]

VI. COMPARATIVE OUTCOMES

The analysis carried out so far may be useful for testing possible consequences of a certain legal solution, namely the adoption of a federal bill of rights. However, the comparison was not intended to dwell on simplistic predictions as to whether the American experience can be replicated within the EU context. Rather, it was aimed at addressing the role of fundamental rights adjudication in the integration process of a multilevel legal system.

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[122] Case C-555/07, Kücükdeveci v. Swedex, 2010 E.C.R. I-00365 (recognizing horizontal effects to a directive on two grounds: the wording of the directive was precise, and it gave expression to a general principle, namely the principle of equal treatment in employment and occupation).

[123] *Benkharbouche v. Embassy of the Republic of Sudan* [2015] EWCA (Civ.) 33 and *Vidal-Hall v. Google Inc.* [2015] EWCA (Civ.) 311.

[124] *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah*, [2017] UKSC 62, para. 78. The Supreme Court overcame arguments such as the one maintaining that horizontal effects lead to a limitation of private autonomy by avoiding disapplication of domestic law "through interpretation". The Court simply applied EU law without interpreting or manipulating domestic law. On this issue *see* A. Young, *'Benkharbouche and the Future of Disapplication'*, U.K. CONST. L. BLOG (Oct. 24, 2017), https://ukconstitutionallaw.org/.

[125] And more precisely when it comes to the duties of non-discrimination *see supra* notes 104-110.

The U.S. path to federalization consisted of the progressive extension of the field of application of the Bill of Rights to state conduct. From this viewpoint, the federalization of the system coincided with its constitutionalization, in the sense that the Bill of Rights gradually permeated all the levels of government. This occurred when the Supreme Court acted as the "enforcement authority" of the constitutional standard. The clearest example of this militant attitude was certainly the justification of the horizontal effects of fundamental rights in the field of antidiscrimination law.

The argument which fundamentally comes with horizontal effects has been put forward by Advocates General, but not yet accepted by the CJEU. In the context of the EU, the two processes, federalization and constitutionalization, follow somehow different routes, with the constitutionalization being pushed forward even in the absence of an authentic project of federalization.

One may argue that the different approach simply derives from the incomplete federalization of the European Union as opposed to the United States. At a closer look though, it seems quite clear that what pushed federalization forward in the United States were two driving and complementary forces. The first one is the elaboration of the category of fundamental rights, which overcome the formal boundaries of the application of the Bill of Rights. The second one is citizenship, which has been used as a driver for fully federalizing the legal system.

Both the catalogue of fundamental rights and citizenship represent political choices that the Union has already made. The consequences however are still somehow frozen by skepticism as to the plausibility of a full integration.

Political reasons play a major role in freezing enthusiasm for integration. However, the lack of political enthusiasm is sometimes coupled by a legal argument: the risk that national courts, and hence domestic constitutional traditions, may be set aside in a scenario of competing constitutional or "quasi-constitutional" courts within the same legal system.

In this regard, the comparison may provide an answer: the American experience refutes the facile assertion that the Bill of Rights inevitably has the effect of swallowing up state catalogues or the state courts contribution to the development of case law on fundamental rights.[126] In the United States, the state supreme courts have not abdicated their role and, far from passively suffering jurisprudential dictates "from the center", have devised techniques for preserving their constitutional traditions. At least since the 1980s, these courts have occupied the terrain of constitutional interpretation of rights. Indeed,

[126] *Arizona v. Evans*, 514 U.S. 1 (1995) (urging state courts to use the U.S. Constitution when performing the interpretation of state bill of rights, with a view to foster a judicial dialogue between the two judiciary systems).

American scholars have coined the expression of "New Judicial Activism"[127] to describe state courts' inclination to resolve disputes by a broad reference to state constitutional traditions, so long as they are aligned with the Constitution and federal constitutional case law. State courts thus remain the laboratory for the recognition of new rights or new limits for the protection of existing rights.[128]

In parallel, the Bill of Rights has not even scaled back the significance of constitutional traditions, as is demonstrated by the reluctance of the Supreme Court to make the final push to declare the death penalty unconstitutional, precisely acknowledging the lack of consensus regarding the evolution within American legal tradition.[129]

Political integration through the bill of rights does not imply the systemic effect of centralizing the guarantee of rights within a single judicial body at the pinnacle of the system. Integration through the bill of rights does not bring about a reduction in debate between the variety of voices and constitutional cultures within a complex legal order. On these preconditions, the case for resisting domestic reluctances and entrusting the bill of rights with the task to develop full integration exists.

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[127] Shirley S. Abrahamson & Diane S. Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88 (1987); Hans A. Linde, *Does the 'New Federalism' Have a Future*, 4 EMERGING ISSUES IN STATE CONST'L L. 25 (1991).

[128] Graziella Romeo, *The Recognition of Same-Sex Couples' Rights in the US Between Counter-Majoritarian Principle and Ideological Approaches: A State Level Perspective*, *in* SAME-SEX COUPLES BEFORE NAT'L, SUPRANATIONAL AND INT'L JURISDICTIONS 15 (Daniele Gallo et al. eds., 2014).

[129] *Glossip v. Gross*, 135 S. Ct. 2726 (2015). Anyhow, this sort of cultural-based claim has become the main argument of those Justices who are reluctant to use international and comparative law. *See* Brian Anderson, *Roper v. Simmons: How the Supreme Court of the United States Has Established the Framework for Judicial Abolition of the Death Penalty in the United States*, 37 OHIO N.U.L. REV. 221 (2011); John Bessler, *Tinkering around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012).