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research paper

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FUNDAMENTAL RIGHTS AND FEDERALISM IN THE EUROPEAN UNION AND THE UNITED STATES: CHALLENGES, TRANSFORMATIONS AND NORMATIVE QUESTIONS

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ABSTRACT

The paper examines the protection of fundamental rights in the European Union (EU), in comparison with the federal system of the United States (US). The paper claims that a comparative, federal approach to the study of the European multi-layered regime for the protection of human rights is valuable for three reasons. First, it facilitates the identification of the main challenges that arise from the overlap between national and supranational human rights sources. Second, it sheds light on the dynamic transformations which constantly take place in such a compound system. Thirdly, it problematizes engrained theoretical assumptions on the role of the states and the EU in the protection of fundamental rights, allowing for a deeper conversation on the normative questions which are raised by the need to reconcile states' identity with citizens' equality in a Union of states and citizens.

Keywords: Fundamental Rights, Federalism, EU, United States, comparison

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1. Introduction. 2. Challenges. 3. Transformations. 4. Normative questions.

1. Introduction

The federal system of the United States (US) has long served as a comparative model to the study of the European multilevel system for the protection of fundamental rights.[1] Fundamental rights in Europe are simultaneously protected in the constitutions of the states, in the law of the European Union (EU), as well as in the European Convention on Human Rights (ECHR). Moreover, each of these overlapping layers of human rights norms is policed by institutions – particularly courts – which are interconnected, but independent. This state of affairs presents analogies with the situation in the US. In the American system, rights are codified in state constitutions as well as in the federal Bill of Rights. Moreover, two connected but separate orders of jurisdictions – state and federal courts – are empowered to enforce the rights enshrined in their respective basic documents. Both the European multilevel human rights architecture and the US federal system, therefore, are structurally characterized by the existence a plurality of sources and institutions for the protection of fundamental rights, as well as by a plurality of conceptions of what rights ought to be.[2]

Despite these similarities, however, the European and American human rights systems are the result of different constitutional experiences, and have evolved over a diverse historical time-span. So, what is the added value of comparing the European multilevel human rights architecture with the US federal rights' regime? Why is it helpful to compare and contrast these two cases? The benefits of a comparative approach in the field of constitutional law are many.[3] But this chapter claims that a comparative study of fundamental rights and federalism in the EU and the US is useful for at least three specific reasons. First, the comparison make possible the elaboration of an analytical model of the *challenges* that arise in multi-layered human rights regime, thus explaining the tensions that are at play both in the European multilevel and the US federal regimes. Second, it helps to contextualize the *transformations* that occur on an ongoing basis in multi-layered regime, shedding light on the cycles of centralization and decentralization that shape both the US and the EU human rights systems. Third, the comparison permits to question some theoretical assumptions which are ingrained in the European law scholarship about federalism and rights, thus allowing for a deeper conversation on the *normative questions* which are triggered by the need to reconcile states' identity and citizens' equality in a union of states and citizens.

The purpose of this paper is to discuss these three ways of comparing the European multilevel and the US federal systems. Section 2 explains how a comparison between the EU and the US can provide essential insights to develop a model which conceptualizes the challenges at play in a

[1] See Jochen Frowein, Stephen Schulhofer and Martin Shapiro, 'The Protection of Fundamental Rights as a Vehicle of Integration', in Mauro Cappelletti Cappelletti, Monica Seccombe and Joseph HH Weiler (eds), *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 3* (de Gruyter 1986) 231.

[2] See Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

[3] See Vicki Jackson, 'Narrative of Federalism: Of Continuities and Comparative Constitutional Experience' (2001) 51 Duke Law Journal 223 (explaining the advantages of comparative law).

multi-layered regime. Here I identify what I consider the key constitutional dynamics emerging from the overlap between state and suprastate human rights norms, and I provide some evidence to exemplify them. Section 3, then, uses the comparison between the EU and the US systems for the protection of rights to emphasize the dynamic (rather than static) nature of multi-layered human rights regimes and to challenge the view that federal regimes tend to develop in a linear fashion. Based on the analysis of the US historical experience I underline how cycles of centralization – where fundamental rights standards have been mostly set at the center, promoting uniformity – have co-existed with cycles of decentralization – where states have been returned crucial competences, fostering diversity – and I suggest that, in fact, the same kind of dynamics seems to be at play also in the EU: as of late, multiple evidence exist that the EU political and judicial institutions have allowed more centrifugal movements in the field of human rights.

Finally, Section 4 draws from the comparison between federalism and rights in the EU and the US to tackle also a normative view which is deeply engrained in European scholarship, namely the idea that EU norms and institutions for the protection of fundamental rights ought *as a rule* to defer to the human rights regime of the member states. As I claim, on the contrary, in multi-layered regimes, the decision whether standards of human rights protection should be set at state or suprastate level always requires a normative discussion about the identity and equality arguments at stake: while federalism does not provide a 'default' (much less a 'correct') answer to conflicts between state and suprastate human rights standards, these conflicts are just the epiphany of a deeper clash between arguments based on identity and arguments based on equality. Hence, it belongs to the state defenders to justify the case for a state-based solution of the challenge on the basis of identity arguments, as much as it belongs to the suprastate defenders to make the case for a suprastate-based solution to the same challenge on the basis of equality arguments. And these arguments ought to be weighted in every specific case – rather than in abstract terms – and without any presumption in favor of a state-based solution.

2. Challenges

A first advantage of the comparison between the EU and the US human rights systems is that it makes possible the identification of the constitutional challenges at play in a multi-layered regime. The US and the EU are characterized by the overlap between several layers of human rights norms and institutions. Contrary to unitary systems – where a single standard of human rights protection applies throughout the polity – in multilevel and federal systems, therefore, a plurality of standards can exist for the protection of the same given fundamental right (x). Diversity may occur horizontally, in the sense that the same fundamental right (x) can be more protected in some vanguard member states rather than in others, which are lagging behind.[4] But diversity also occurs vertically, in the sense that the suprastate standard for a fundamental right (x) may be

[4] Ann Althouse, 'Vanguard States and Laggard States: Federalism and Constitutional Rights' (2004) 152 University of Pennsylvania Law Review 1745. See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting, defining as "one of the happy incidents of the federal system [the fact] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

more or less protective that the state standard for the same right. When state standards for the protection of a fundamental right (x) differ horizontally, it is impossible for the suprastate standard of protection for that same right to simultaneously equate all state standards. While there may be exceptional cases where state and suprastate standards of protection for a given right (x) correspond in all layers of government, the room for horizontal/vertical divergence in the protection of rights inevitably creates tensions in the functioning of multilayered regimes.

The comparison between the EU and the US helps to analytically classify the synchronic challenges that arise in a multilayered system by clarifying the nature of the suprastate standard. In several circumstances the standard set at the suprastate level, and binding on the states, operates as a *floor* of protection – that is as a minimum: as long as states respect that floor, they are free to go beyond it extending an even more advanced protection to that right. This state of affairs has been recurrently acknowledged by the US Supreme Court,[5] and is formally recognized also by Article 53 ECHR as well as Article 53 of the EU Charter of Fundamental Rights (EUCFR). However, in other circumstances the emergence of a suprastate standard of protection may also work as a *ceiling* of protection – that is as a maximum: in this situation, states can provide less protection to the specific right (x) that the federal maximum, but cannot go beyond it. Although the potential of suprastate law to work as a ceiling of human rights protection is not codified in the EU, the point is acknowledged in the US:[6] in fact, this is an inevitable consequence of the fact that fundamental rights are often in a balance, so that the protection of a given right (z), or a public interest (y) may imply the restriction of another conflicting right (x).[7]

In two judgments both delivered on 26 February 2013, the EU Court of Justice (ECJ) has confirmed that EU human rights standards may sometimes serve as floor and sometimes as ceiling of protection. In *Fransson*,[8] the ECJ ruled that the principle of *ne bis in idem* enshrined in the EUCFR did not prohibit state authorities from imposing criminal sanctions for tax fraud against an individual who had already been subject to administrative sanction for the same offence. However, the ECJ left open to the referring court the possibility to apply a more protective standard. In *Melloni*,[9] instead, the ECJ ruled that Spain could not apply a more protective national standard in the field of due process rights with the effect of impeding the execution of a European arrest warrant issued by Italy because in the latter the convicted person had been tried in absentia – a practice considered in breach of fair trial under Spanish constitutional law. As the ECJ pointed out, the EU standard of protection in this case trumped the more advanced state standard, since otherwise the interest in the effective and uniform application of the European arrest warrant legislation throughout the EU would have been impaired.

[5] William Brennan, 'State Constitutions and the Protection of Individual Rights' (1977) 90 Harvard Law Review 489, 495. See also *Prunyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (US Supreme Court affirming "the authority of the State to exercise its police power [and] its sovereign right to adopt in its own Constitution individual liberties more expansive that those conferred by the Federal Constitution.")

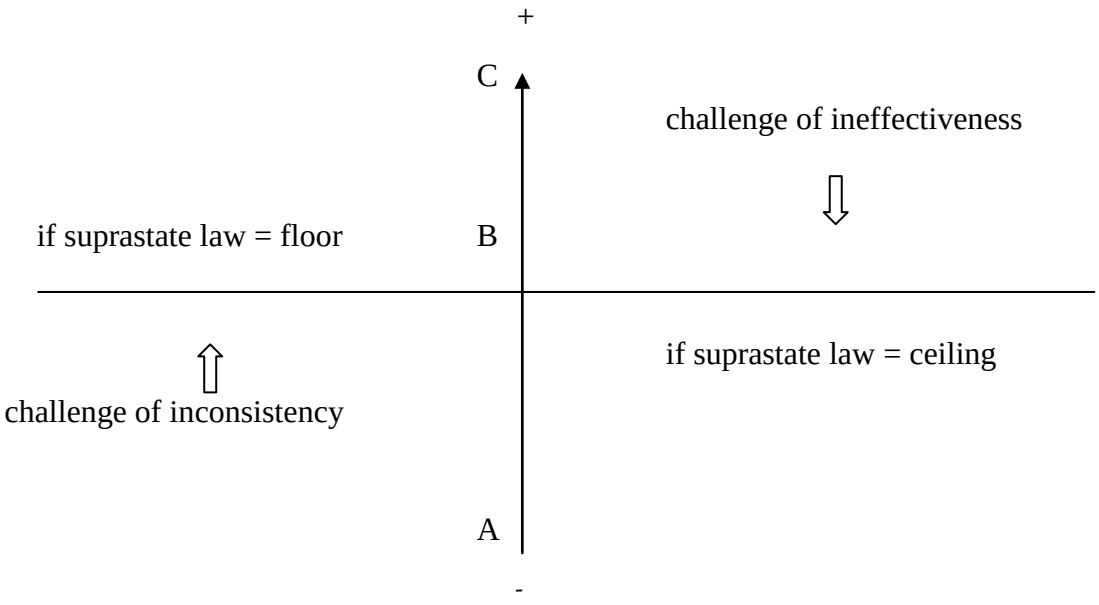
[6] On the difficulty of detecting federal floors and federal ceilings in US law see William Buzbee, 'Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction' (2007) 82 NYU Law Review 1547

[7] See also Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the United States* (OUP 2007) x (explaining how conflicts of rights are unavoidable and "adjudication in these matters necessarily imposes sacrifices and losses on the part of one or both right-holders, or the state as the party to the conflict.")

[8] Case C-617/10, *Åkerberg Fransson*, judgment of 26 February 2013, nyr

[9] Case C-399/11 *Stefano Melloni*, judgment of 26 February 2013, nyr

Based on these comparative insights, in my book I have endeavored to design a model that explains the constitutional tensions at play in a multi-layered human rights regime.[10] The graph below seeks to offer in a graphical form a snapshot of the synchronic dynamics that arise from the overlap between diverging human rights standards. The graph isolates a hypothetical right (x) reporting along the vertical axis the degree of protection that (x) receives at state level, aligning states from the vanguard (C=most protective of right x) to the laggard (A=least protective of right x). The horizontal line indicates the standard of protection of right (x) set by suprastate law – which is here drawn for practical reasons midway between A and C. However, the left side of the graph identifies a scenario when suprastate law works as a floor of protection, whereas the right side of the graph reflects the scenario at play when suprastate law works as a ceiling of protection. This illuminates the two key challenges emerging in a multilevel system of human rights protection: what I call the challenge of inconsistency and the challenge of ineffectiveness.



A *challenge of inconsistency* emerges in the case of interaction between different state laws and suprastate law, when the latter operates as a floor of protection. The left side of the graph depicts a situation where a given right (x) is protected to different degrees at the state level, and where suprastate law comes into play by setting a floor of protection. By introducing a minimum standard for the protection of a specific human right, suprastate law challenges the less protective standards existing in some laggard states and pressures them to enhance their levels of protection at least up to the degree provided by suprastate law. At the same time, by drawing only a minimum standard of protection, suprastate law leaves free other vanguard states to go above the suprastate floor by providing more advanced protection to the right de quo.

[10] See Fabbrini (n 2)

A *challenge of ineffectiveness* emerges instead in the case of interaction between different state laws and suprastate law, when the latter operates as a ceiling of protection. The right side of the graph depicts a situation where a given right (x) is protected to different degrees at the state level, and where suprastate law comes into play by setting a ceiling of protection. By setting up a maximum standard for the protection of a specific human right, suprastate law challenges the effectiveness of the more protective standards existing in the vanguard states, pressuring them towards the bottom-level protection provided by suprastate law. At the same time, as long as it defines a maximum standard of protection, suprastate law leaves unaffected the other pre-existing state standards that do not exceed the suprastate ceiling.

As the graph points out, the implications of a multi-layered human rights regime are complex. In the European multilevel human rights architecture, as well as in the US federal system, the emergence of a suprastate standard may have relative and variable consequences. When suprastate law sets a new *minimum* standard for a specific fundamental right (x), this may create significant tensions in states which do not meet this standard – while leaving simultaneously wholly untouched the domestic human rights situation in states which are already more advanced in the protection of that right. Conversely, when suprastate law introduces a new *maximum* standard for a specific right (x) this may produce problems for state which are above that ceiling, while at the same time the situation in states which have a lower standard for the protection is left unchanged.

This state of affairs explain, for instance, why in the European context a judgment like *Viking* (setting a maximum protection for the right to strike in transnational labor-management disputes)[11] have caused outrage in those EU states which had a higher standard of protection – while being well received in those which had a lower standard; or why several abortion rulings by the European Court of Human Rights (ECtHR) extending women's reproductive rights[12] have put under pressures EU states which fell below the suprastate minimum – while being hardly noticed in those already providing discrete protection to a woman's right to choose. Similarly, this is why in the US, for instance, rage against *Roe* (recognizing a constitutional right to abortion)[13] has come from laggard states – not from vanguard ones;[14] or why action by the federal law enforcement authorities in the post-9/11 world has been resisted by states which abided by a domestic standards of due process and fair trial higher than the federal one.[15]

[11] Case C-438/05 *Viking* [2007] *ECR* I-10779

[12] *A., B. & C. v. Ireland*, ECHR [2010], Application No. 25579/05 (GC). See also *Open Door Counselling v. Ireland* ECHR [1992] Applications Nos. 14234/88 & 14235/88 (Plenary) (Irish prohibition to circulate information about abortion providers in other EU countries to be in violation of ECHR); *Tysiac v. Poland*, ECHR [2007], Application No. 5410/03 (Poland to be in violation of Article 8 ECHR for not having provided an effective legal framework by which a woman suffering from a serious health disease could obtain an abortion as provided by the Polish legislation)

[13] *Roe v. Wade*, 410 U.S. 113 (1973)

[14] See Robert Post and Reva Sigel, '*Roe* Rage: Democratic Constitutionalism and Backlash' (2007) Harvard Civil Rights – Civil Liberties Law Review 373

[15] William J. Stuntz, 'Terrorism, Federalism and Police Misconducts' (2001-2002) 25 Harvard Journal of Law and Public Policy 665

3. Transformations

A second benefit of comparing the EU and the US human rights system derives from the attention being placed on the dynamic nature of multi-layered human rights regimes. While the previous section has explored the synchronic dynamics at play in the European multilevel architecture and the US federal system, exposing the challenges of ineffectiveness and inconsistencies, multi-layered human rights regimes are also subject to important diachronic transformations. As a comparative approach emphasizes, because of the multiple sites in which, and authorities by which, rights are protected, multi-layered regimes are subject to continuous readjustment and adaptation. The result of this is that challenges such as ineffectiveness and inconsistencies may evolve over time: while old challenges may be overcome – due to pressure towards convergence, or harmonization – others may actually worsen, and still new challenges may emerge. In other words, when examining the development of a multi-layered human rights regime it is crucial to feature the time factor (t) and thus avoid considering the system as a static construct – rather a dynamic one.

The history of the protection of fundamental rights in the US federal system and the European multilevel architecture, in fact, highlights how multi-layered regimes are subject to continuous diachronic transformations. As is well known, the US system was originally endowed with two strictly separate mechanisms for the protection of fundamental rights.[16] Every state in the federation had its own constitutional text codifying fundamental rights and entrusting the state's judiciary to enforce it. A federal Bill of Rights – drafted in 1791 and attached as the first ten amendments to the 1787 Constitution – then bound the action of the federal government in its spheres of competence. The federal Bill of Rights was, however, inapplicable in the states[17] – some of which, in fact, even allowed slavery[18] – although state courts sometimes referred to it as a source of inspiration for general principles.[19]

After the Civil War, a major constitutional transformation occurred in the US with the adoption in 1868 of a new amendment to the federal Constitution.[20] The Fourteenth Amendment extended the application of the federal Bill of Rights to the states, empowering the federal government to ascertain and remedy possible violations by the states of the fundamental rights recognized in the federal Constitution.[21] The so-called "incorporation" of the federal standards of fundamental rights protection within the legal orders of the states was however a gradual and contested process,[22] that took more than a century and was mainly achieved, after World War II (WWII),

[16] Jean Yarbrough, 'Federalism and Rights in the American Founding' in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 57

[17] See the decision of the US Supreme Court in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)

[18] On the problem of slavery and for an account of the infamous decision of the US Supreme Court in *Dred Scott v. Sandford*, 19 U.S. (How.) 393 (1857) see Paul Finkelman, Dred Scott v. Sandford. *A Brief History with Documents* (Bedford/St.Martin's 1997)

[19] See Jason Mazzone, 'The Bill of Rights in the Early State Courts' (2008) 92 Minnesota Law Review 1

[20] Compare William Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Harvard UP 1988) with Bruce Ackerman, *We the People. Volume 2: Transformations* (Harvard UP 1998)

[21] See John Paul Stevens, 'The Bill of Rights: A Century of Progress' in Geoffrey Stone et al (eds), *The Bill of Rights in the Modern State* (Chicago UP 1992) 13.

[22] Three major doctrines of incorporation faced each other in the last century. A first one – the so-called doctrine of selective incorporation (mainly advocated by US Supreme Court Justice Brennan) – favoured the incorporation in the law of the states (only) of specific rights contained in the federal Bill of Rights. A second

through the jurisprudence of the US Supreme Court.[23] Congress then played a crucial role in enforcing the mandate of the Reconstruction Amendments.[24] Nonetheless, despite the increasing role played by the federal standard of protection of fundamental rights, the states maintained their own systems for the protection of fundamental rights,[25] and in a number of areas these are still the main sources of protection of human rights.

Relevant historical transformations have also occurred in Europe. While the role of supranational institutions in the protection of fundamental rights also vis-à-vis the states were arguably more central since the beginning of the European integration project[26] – especially considering that the EU and the ECHR were the result of the post-WWII effort to restore peace and human rights in a war-devastated continent[27] – it is only after a series of historical events that suprastate human rights norms and institutions have acquired a more central function within the European multilevel human rights system. In particular, the end of the Cold War and the enlargement of the EU to the east triggered a strengthening of the supranational machinery of human rights protection[28] – as witnessed in the EU by the acknowledgment of human rights in the 1992 Maastricht Treaty and the 1993 Copenhagen European Council conclusions, and then by the adoption of the EU Charter of Fundamental Rights in 2000;[29] and in the ECHR by the enactment of Protocol No. 8 in 1998, transforming the ECtHR into a last instance court for human rights.[30]

These institutional developments, in turn, have fostered a judicial expansion in the case law of the ECJ and the ECtHR – as evidenced by key rulings delivered by the European courts during the last two decades on crucial issues such as human dignity,[31] non-discriminations on the basis of

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one – the so-called doctrine of total incorporation (mainly advocated by US Supreme Court Justice Black) – supported the incorporation of all the federal Bill of Rights in the law of the states. A third doctrine (advocate by US Supreme Court Justice Frankfurter), finally, was essentially against the incorporation of the federal Bill of Rights, except in extraordinary circumstances for reasons of fundamental fairness. On this debate cf. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale UP 2000) 218 ff

[23] See Richard Cortner, *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Incorporation of Civil Liberties* (Wisconsin UP 1981)

[24] On the role of Congress in enforcing the mandate of the Fourteenth Amendment through appropriate legislation, see Steven Calabresi and Nicolas Stabile, 'On Section 5 of the Fourteenth Amendment' (2009) Pennsylvania Journal of Constitutional Law 1431

[25] See John Dinan, 'State Constitutions and American Political Development', in Michael Burgess and Alan Tarr (eds), *Constitutional Dynamics in Federal Systems: Subnational Perspectives* (McGill-Queen's UP 2012) 43

[26] See Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 American Journal of International Law 649 (explaining that human rights represented a fundamental pillar of the project for the establishment of a European Political Community discussed during 1952-1953 but that, after the rejection of the European Defence Community Treaty by France in 1954, the founding member states decided to pursue a path toward integration focused on economic issues, in which human rights were not specifically considered)

[27] See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217.

[28] See Wojciech Sadurski, 'Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2010) 16 Columbia Journal of European Law 385

[29] See Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 Common Market Law Review 1307

[30] See Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme' (2009) 80 Revue trimestrielle des droits de l'homme 923

[31] Cfr. Case C-36/2002, *Omega* [2004] ECR I-9609 (recognizing a fundamental right to dignity as a justification for the limitation of the freedom of movement of goods).

gender[32] or sexual orientation,[33] freedom of expression,[34] social rights,[35] political entitlements,[36] – as well as privacy and data protection.[37] In the area of national security, in particular, the ECJ has turned out to be a bastion for the protection of human rights – despite the pressures emerging from the EU political branches of government for judicial deference and accommodation of counter-terrorism concerns[38] – and the ECtHR has largely followed suit.[39]

The transformations occurring in multilayered human rights regimes have however prompted academic concerns about harmonization. Notably, European scholars looking at the US experience have interpreted the rise in importance of the federal standard of protection as a linear development toward centralization, and have vowed to prevent the same evolution in the EU. Nevertheless, precisely a comparison between the European and the American human rights system helps to dispel this concern. While the federal standard of protection has certainly grown in importance in the US, the US states remained – and still are largely today – relevant loci in which the protection of fundamental rights takes place.[40] In fact, cycles of centralization – in which the federal standards has progressively displaced states standards of protection, favouring harmonization – have historically co-existed in the US with cycles of decentralization – when the federal standard has stepped back and returned to the states the autonomy to set for themselves the relevant human rights norms applying with regard to a plurality of fundamental rights.

The most explicit – and more striking (from a European perspective)[41] – example of this state of affairs is offered by the case of the death penalty and the right to life: The decision whether to

[32] Cfr. e.g. Case C-285/1998, *Kreil* [2000] ECR I-69 (declaring incompatible with EU law a provision of the German Constitution prohibiting women from serving in the military); Case C-46/07, *Commission v. Italy* [2008] ECR I-151 (declaring incompatible with EU law a provision of the Italian social security legislation setting up a different retirement age for men and women).

[33] Cfr. e.g. Case C-117/2001, *K.B*. [2004] ECR (recognizing the right of transsexuals); Case C-423/2004, *Richards* [2006] ECR II-3585 (idem).

[34] Cfr. e.g. Case C-112/2000, *Schmidberger* [2003] ECR I-5659 (recognizing the right to freedom of expression as a justification for the restriction of the freedom of movement); Case C-380/05, *Centro Europa 7* [2008] ECR I-349 (declaring incompatible with EU law a provision of the Italian media law which did not ensure pluralism in the broadcasting system).

[35] Cfr. e.g. Case C-184/99, *Grzelczyk* [2001] ECR I-6193 (recognizing the right of migrant students to obtain social security benefits in the host state); Case C-438/05, *Viking* [2007] ECR I-10779 (recognizing a fundamental right to strike).

[36] Cfr. e.g. Case C-300/04, *Eman & Sevinger (Aruba)* [2006] ECR I-8055 (holding a Dutch law restricting the franchise to the EU Parliament of Dutch citizens residing in Aruba incompatible with EU law).

[37] Cfr. e.g. e.g. Joined *Cases* C-293/12 and C-594/12 *Digital Rights Ireland* [2014] (striking down the EU Data Retention Directive of 2006, which allowed the retention of meta-data for national security purposes as in violation of the right to privacy) and C-362/14 *Schrems* [2015] (striking down the European Commission Decision on Safe Harbour, which allowed the free flow of data from the EU to the US, because the level of privacy protection in the US is not adequate and thus fails to respect EU data protection laws).

[38] Cfr. Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351 (on due process in the field of counter-terrorism). Now see also Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi*, judgment of 18 July 2013 nyr.

[39] Cfr. *Nada v. Switzerland*, [ECHR] App. No. 10593/08, Grand Chamber judgment of 12 September 2012

[40] See Alan Tarr, 'State Supreme Courts in American Federalism' in Hans Peter Schneider et al (eds), *Judge Made Federalism? The Role of Courts in Federal Systems* (Nomos Verlag 2009) 192

[41] See Article 2 ECHR (right to life) and Article 1, 13th additional Protocol to the ECHR (total abolition of the death penalty); Article 2 Charter (right to life and prohibition of the death penalty) as well as Andrea Pugiotto,

ban the death penalty was traditionally a matter for the states.[42] In 1972, the US Supreme Court held that capital punishment was unconstitutional, arguing that the imposition of the death penalty violated the prohibition on "cruel and unusual punishment" of the federal Bill of Rights, and it imposed a moratorium on state capital punishments.[43] In 1976, however, the power to set the relevant right to life standard was handed back to the states, most of which have now reinstated the death sentence.[44] Other examples however abound. In the field of social rights, the New Deal federalized the standards of protection of the right to strike – notably through the Wagner Act.[45] Yet, ever since, political efforts have worked to weaken these mechanisms of centralized enforcement.[46] Similarly, in the area of voting rights, while the two Reconstructions placed important limits on the ability of the states to regulate the ballot box,[47] recent US Supreme Court case law has contentiously struck down the centrepiece of the federal Voting Rights Act returning to the states the power to set conditions on voting.[48]

Alas, similar centralizing and decentralizing cycles are at play in the EU. Contrary to the concern voiced by many, a dynamic analysis of the European multilevel architecture for the protection of fundamental rights does not reveal a clear linear tendency toward more supranational human rights protection. Recent developments, rather, point towards the opposite. In a number of crucial judgments in the field of civil and political rights both the ECJ and the ECtHR have turned down the invitation to harmonize states' human rights standards, refusing for example to recognize the existence of a ECHR right to same sex marriage,[49] or an EU right for felons to vote.[50] At the same time, the broader political climate in Europe has exposed increasing divergence in the interpretation of key principles such as democracy and the rule of law – notably as a result of the rise of illiberal democracies in Hungary and Poland[51] – and the EU institutions have arguably reacted to this only with a light touch.[52] All in all, therefore, after a few decades of integration, with clear centralizing dynamics, the European human right system may be today facing an opposite movement, with pressure pulling toward greater heterogeneity in the protection of fundamental right at the level of the member states.

'L'abolizione costituzionale della pena di morte e le sue conseguenze ordinamentali' [2011] Quaderni Costituzionali 573

[42] See David Garland, *Peculiar Institution: America's Death Penalty in the Age of Abolition* (Harvard UP 2010)

[43] *Furman v. Georgia*, 408 U.S. 238 (1972)

[44] *Gregg v. Georgia*, 428 U.S. 153 (1976)

[45] National Labor Relations Act (Wagner Act), 49 Stat. 452 (1937), codified as amended at 29 U.S.C. paras 151-169

[46] See Cass Sunstein, *The Second Bill of Rights. FDR's Unfinished Revolution and Why we need it more than ever* (Basic Books 2004)

[47] See Alexander Keyssar, *The Right to Vote* (Basic Books 2000)

[48] *Shelby County v. Holder*, 570 U.S. __ (2013) at 10 (of the slip opinion)

[49] Applications nos 18766/11 and 36030/11, *Oliari*, ECLI:CE:ECHR:2015:0721JUD001876611

[50] Case C-650/13 *Delvigne* ECLI:EU:C:2015:648

[51] See Kim Lane Scheppele, 'Hungary and the End of Politics', The Nation, 6 May 2014.

[52] See Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512.

4. Normative questions

A third way in which a comparison between the European and American human rights systems is helpful occurs at the normative level. The previous sections have explained that multilayered human rights regimes such as the European architecture and the US federal system face constitutional challenges – due to the tensions between state and suprastate human rights standards – and are subject to constant transformations. However, a different question is how multi-layered human rights regimes ought to develop de jure condendo: how should these regimes solve conflicts between state and suprastate human rights standards? The normative question of how should multilayered human rights regime work is different from the empirical question of how they do work. But theoretical reflection on this issue in the US can inform, and question, normative assumptions in the EU. In this regard, in fact, it is interesting to notice a difference between American and European scholarship on federalism and fundamental rights. While American scholars tend to be more pragmatic – debating the normative values of centralization and decentralization in every specific cases[53] – Europeans tend to embrace more categorical rules: in particular, a common refrain in European scholarship is that supranational authorities entrusted with the protection of fundamental rights should defer as much as possible to the states.

This academic view is articulated in different forms and degrees. At one extreme, scholars grown in the tradition of sovereignty complain of supranational engagement with the states' human rights practice as an interference in a reserved domain of national self-governing communities[54] – and are usually able to find a supportive audience in (some) national high courts.[55] But also those scholars who reject the sovereigntist idea and rather endorse a pluralist view, which praises the interaction between multiple national and supranational human rights sources, often envision only a limited role for suprastate human rights norms.[56] As argued by Aida Torres Pérez, "the ECJ should defer to state courts for interpreting fundamental rights."[57]

In my view, however, the debate about federalism and rights in Europe tends to rush too quickly towards a final normative conclusion about which level of government ought to be entitled to take a decision on the protection of fundamental rights. However, this underestimates the importance of federalism as a framework in which deeper normative discussions about rights and obligations take place. In fact behind the federal debate whether the states – or rather the Union – should set the relevant fundamental rights norms lays a more profound clash between arguments in favor of identity and arguments in favor of equality. Leaving decisions on human rights to the states maximizes the capacity of local authorities to express their *identity*. Shifting decisions on human rights to the Union, instead, promotes transnational *equality*. Yet, both identity and equality are important normative values, worth protecting. If it is plausible to claim that states as unity of self-governance ought to be able to make decisions about rights, it is equally plausible to maintain that human rights ought to be secured as much as possible to all

[53] See Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996)
[54] See Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 German Law Journal 1241
[55] See BVerfGE 123, 267 (2009) (*Lissabon Urteil*) par 334
[56] Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 184
[57] Aida Torres Pérez, *Conflicts of Rights in the European Union* (OUP 2009) 92

individuals leaving in the same territory without discrimination. Because of this, it is not possible to define a categorical order between identity and equality which systematically privileges one by default on the other.

In other words, recurrent scholarly claims that European supranational authorities should defer to national human rights determination stands on the – unjustified – assumption that identity ought to prevail by default on equality. But what is the normative justification for claiming this? Why for example should the EU defer to the policy choices taken by the Orban government in Hungary? Why should the ECHR leave to Italy to decide whether homosexual people are entitled to marry or not? Or, ceteris paribus, why should EU law or US law defer to state decisions on access to the ballot box? These are difficult questions – and I don't have a clear answer to them. But my point is that the answer to these questions is less straightforward than what many think – a conclusion which is only strengthened by a comparison between federalism and rights in the EU and the US. Federalism offers an ideal framework in which debates about identity and equality are articulated – but it does not exonerate us for making the case why identity or equality should prevail *in every specific case*. Deference toward the state – as much as action by the suprastate authorities – cannot be a default position: it rather has to be the result of a reasoned and motivated assessment, justified on the basis of deeper normative values which are relevant in the specific circumstance.

My argument is thus that normative questions in a federal, multilevel human rights regime defy easy, one-size-fits-all solutions, and rather require constant engagement, and public justification. There may be good reasons why on some cases suprastate authorities should step back, and defer to the states – but there may be other circumstances when instead the justification for deferring to the states are razor-thin, and where therefore action by suprastate authorities is normatively very appropriate. Federalism frames this normative discussion by establishing the principle of supremacy: this principle, which is an indispensable feature of unions of states,[58] imposes acceptance by all interested parties on a decision, once this has been taken.[59] But federalism does not prevent old decisions from being reconsidered overtime, when the balance between conflicting normative claims may change. In fact, binding decisions of how to reconcile concerns for identity with concerns for equality are – as all human decisions – subject to adaptation, and can be reconsidered when necessary.[60] Identity may prevail on some occasions, while equality triumphs in others – the bottom-line being that federalism only provides the broader framework to debate human rights in the US and Europe, but does not exonerates debaters from engaging with the deeper normative questions that are at play.

[58] See further Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality Between the Member States' (2015) 16 German Law Journal 1003.
[59] Joseph HH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts', in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 8.
[60] Judith Resnik, 'Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations' in James Flemming and Jacob Levy (eds), *Nomos LV: Federalism and Subsidiarity* (NYU Press 2014).

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