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## Comparing Supremacy: Sovereign Immunity of States in the United States and Non-Contractual State Liability in the European Union

Jose A/ Gutierrez-Fons

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# Comparing Supremacy: Sovereign Immunity of States in the United States and Non-Contractual State Liability in the European Union

José A. Gutierrez-Fons\*

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As a constitutional principle embodied in Article VI of the U.S. Constitution, supremacy instructs the judicial department to uphold federal law and ignore conflicting state law. Likewise, though primacy of EU law was not expressly recognised in the EC Treaty<sup>1</sup> (now replaced by the Treaty on the Functioning of the European Union (TFEU), which is also silent in this respect<sup>2</sup>) this circumstance did not prevent the European Court of Justice (ECJ) from introducing this principle into the

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1. Treaty Establishing the European Community, Mar. 25, 1957, 2006 O.J. (C 321) E/37 (Consolidated Version), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

2. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585. Although Article I-6 of the Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1, embedded this principle, the Treaty of Lisbon, is again silent. See Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Treaty of Lisbon entered into force on Dec. 1, 2009. It has amended the Treaty on European Union and replaced the EC Treaty with the Treaty on the Functioning of the European Union (TFEU). See Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 1. However, please note that the entry into force of the Treaty of Lisbon affects neither the content of the provisions of the EC Treaty nor the case law of the ECJ that are mentioned in the present contribution.

newly created EU legal order. Not only has primacy been interpreted, along with direct effect,<sup>3</sup> as the foundational constitutional principle,<sup>4</sup> but primacy has also become a legal basis bestowing national courts with all necessary powers to set aside conflicting national laws.<sup>5</sup> It follows from the foregoing that both the EU<sup>6</sup> and the U.S. legal orders mandate the judicial department to ensure that infringing states do not contest that federal law is “the supreme law of the land.” To this effect, there is an essential linkage between this principle and the constitutional law of remedies.<sup>7</sup> The perspective adopted to characterise this linkage will determine how much remedial power must be granted to the judiciary for it to accomplish its constitutionally assigned mission.<sup>8</sup> On the one hand, one may argue that supremacy is only ensured where there is a judicial remedy for every violation of a federal right. Thus, compliance with the maxim *ubi jus, ibi remedium* conditions the supremacy of federal law. Said differently, failure to provide an adequate remedy erodes the supremacy of federal law. On the other hand, one may consider that even if there is not always an available remedy for every violation of a federal right, the supremacy of federal law is ensured in so far as states remain bound by the rule of federal law. Allowing a certain degree of infringement does not deprive federal law of its supremacy. Rather, it gives equal importance to other constitutionally protected interests, such as the role played by states in the federal design, which may advise against granting judicial relief. Put simply, supremacy of federal law cannot be construed as an absolute remedial grant, but its supreme character is apprehended by weighing it against other constitutional principles.

By determining the availability of monetary relief against states for violation of federal or EU law, this article aims at determining which of the two aforementioned perspectives has been followed by the United

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3. Case 26/62, *Van Gend en Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 1.

4. See generally KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2d ed. 2001).

5. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629.

6. For the sake of clarity, the terms “European Union” (EU), and “Europe” are used as synonyms. For an introduction to the constitutional structure of the European Union, see generally GRAINNE DE BURCA & PAUL CRAIG, *EU LAW, TEXT, CASES & MATERIALS* (4th ed. 2007) and KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EU* (2d ed. 2004).

7. MONICA CLAES, *THE NATIONAL’S COURT MANDATE IN THE EUROPEAN CONSTITUTION* 97-119 (2006).

8. R. Fallon Jr. & D. Meltzer, *New Law, Non-retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788-90 (1991) (holding that claims in damages are only one of the many possible avenues to ensure that public authorities comply with federal law).

States Supreme Court and the ECJ respectively. In contrast to declaratory or injunction relief, monetary relief is more intrusive into state sovereignty. While a declaratory judgment or enjoining state action may seem sufficient measures in themselves to restore the legality of a federal system, awarding damages goes to the heart of states' financial dignity. Hence, monetary relief is the optimal example to compare the reach of the principle of supremacy in the United States and of primacy in the European Union. The article unfolds as follows. Section I is devoted to studying the principle of state sovereign immunity under the U.S. Constitution, in particular, its increasing constitutional importance. Once limited by the wording of the Eleventh Amendment, the U.S. Supreme Court now derives this principle from "fundamental postulates implicit in the constitutional design."<sup>9</sup> As a result, state sovereign immunity has become an important limitation on Congress, which may only rely on its limited Fourteenth Amendment powers and the Bankruptcy Clause to award damages. Monetary relief has been almost precluded. However, the U.S. Supreme Court considers that alternative remedies are sufficient to secure the supremacy of federal law, namely, suits brought by the Federal Government, the *Ex parte Young*<sup>10</sup> doctrine, and monetary relief against state officials. In Section II, the principle of state liability for damages under EU law is explored. In describing its harmonious evolution from *Francovich*<sup>11</sup> to *Köbler*,<sup>12</sup> it will be asserted that state liability for damages has developed into a general principle by which the ECJ merged the concepts of primacy and judicial protection. Section III argues that both structural differences and an attitude towards state financial implications explain why both courts give a different answer to the same question.<sup>13</sup> While in the U.S. the federal legislature

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9. *Alden v. Me.*, 527 U.S. 709, 729 (1999).

10. *Ex parte Young*, 209 U.S. 123 (1908).

11. Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

12. Case C-224/01, *Köbler v. Republik Österreich*, 2003 E.C.R. I-10239.

13. This is not the first time that a comparative study on this topic is undertaken. Although previous contributions provide an excellent overview and reveal interesting insights, they do not focus on the interplay between the principle of supremacy and the law of remedies. In contrast, this last aspect is central to this contribution. For a previous studies, see James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237 (2003). The author posits that different federation-building dynamics in the United States and in the EU explain the two Courts' approaches. *Id.* at 240. In trying to complete the European project, the ECJ has adopted a more assertive stand towards integration. *Id.* Conversely, in a mature and consolidated federal system, such as the one in the United States, the same approach is not needed. *See id.* at 240-41. In particular, whereas in the EU the accession of new states is seen as a source of legitimacy for the evolving jurisprudence on federalism, the same does not hold true in the United States. *Id.* See also Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT'L J. CONST. L. 39 (2006) (explaining why both Courts have

may not command either the state executive or legislature, liability for damages was born in the EU as a reply to the non-implementation of Directives. Additionally, in extending the principle of state liability, the ECJ pays little attention to the possible financial implications upon the member states. On the contrary, the U.S. Supreme Court only accepts monetary implications on the state treasuries when prospective relief is seen as necessary to ensure the supremacy of federal law. Finally, it is concluded that while the primacy of community law is seen through the lens of judicial protection, the U.S. Supreme Court considers that for the federal law to be supreme, it is not always necessary to have an effective remedy.

## I. THE PRINCIPLE OF SOVEREIGN IMMUNITY OF STATES UNDER U.S. LAW

### A. *Concept*

In the American federal system, each state is a sovereign entity. Since it is inherent in the nature of sovereignty not to be amenable to suit without consent,<sup>14</sup> the principle of sovereign immunity of states implies that both federal and state courts lack jurisdiction in cases where an individual files a suit against a non-consenting state.<sup>15</sup> Thus, this principle operates as a limit to the judicial enforcement of individual rights.

States' consent is a relevant factor in determining the scope of the sovereign immunity of states. The more states' consent is deemed given, the less immune from suits states will be. Besides, since this principle is "a personal privilege [of states] which may be waived at pleasure,"<sup>16</sup> the number of cases in which it is applicable varies from one state to the

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taken opposite paths and relying on a cluster of differences, including the factual circumstances of the respective seminal cases, contrasting historical settings, diverging common-law and civil law traditions, stronger political checks in the EU to control unwelcomed EU legislation, alternative mechanisms for the enforcement of federal law in the United States, and a more intensive political scrutiny in appointing federal judges in the United States); Aman Pradhan, *Rethinking the Eleventh Amendment: Sovereign Immunity in the United States and the European Union*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 215 (2008) (arguing that, because the principle of sovereign immunity is not consistent with popular sovereignty, cooperative governance and state autonomy, the U.S. Supreme Court should abandon this principle and embrace a *Francovich*-like approach).

14. *Hans v. La.*, 134 U.S. 1, 13 (1890).

15. This principle originates from the old English maxim according to which "the King can do no wrong." See *id.* at 12-13 (quoting Alexander Hamilton in THE FEDERALIST No. 18, which reads as follows: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.")

16. *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883).

other. However, the U.S. Supreme Court has introduced some uniformity in its application. First, regarding suits brought by the United States or one of its individual states, the U.S. Supreme Court has understood that such consent was given when each state joined the Union. Hence, federal courts have jurisdiction to rule in these cases.<sup>17</sup> Second, the U.S. Supreme Court has rejected the doctrine of “constructive waiver” whereby a state engaged in a federally regulated commercial activity authorising private suits has implicitly waived its immunity.<sup>18</sup> Instead, an unequivocal statement is now required.<sup>19</sup> As a result, notwithstanding the cases in which the United States or other states are the plaintiffs, states’ waivers cannot be presumed. Even if a state interacts in the market with private undertakings, state immunity is preserved. Therefore, the U.S. Supreme Court has interpreted the principle of sovereign immunity in very broad terms.<sup>20</sup> Not only are states immune while carrying out acts of government (*jus imperii*), but they also carry immunity when operating in the market (*jus gestionis*).<sup>21</sup>

### B. *Legal Basis of State Sovereign Immunity*

The principle of sovereign immunity of states and the enactment of the Eleventh Amendment have been closely related. The Eleventh amendment is the result of a political dissent against the U.S. Supreme Court ruling in *Chisholm v. Georgia*.<sup>22</sup> There, a South Carolina citizen sought to recover from Georgia the payments overdue for the goods supplied during the American Revolution. Nevertheless, Georgia argued that it was sovereign, and thus, not liable to such action. The U.S.

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17. *U.S. v. Tex.*, 143 U.S. 621 (1982).

18. *See* *Pardey v. Terminal R.R. Co.*, 377 U.S. 184 (1964).

19. *Coll. Sav. Banks v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).

20. For a view against this proposition, see Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793, 832 (1998). The author holds that the U.S. Supreme Court has hopelessly confused the doctrine of implied waiver and the doctrine of abrogation. *See id.* at 795. Accordingly, by rescuing this distinction, she supports the constitutionality of federal statutes passed under the spending clause that condition obtaining federal funds to states’ waiver of their immunity, as well as federal regulated activities passed under Article I in which states voluntarily engage. *See id.* at 795-96.

21. The scope of states’ immunity under American constitutional law is even wider than the one normally accepted under public international law pursuant to which, whilst a foreign state is pursuing a commercial activity, the latter cannot invoke its immunity. *See, e.g.*, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004); *see also* Laura Gardner, *State Employers Are Not Sovereign: Transfer the Market Participant Exception to the Dormant Commerce Clause to States as Employers*, 79 CHI.-KENT L. REV. 725 (2004) (arguing that the market-participant exception to dormant commerce clause challenges should be extrapolated to cases under the Eleventh Amendment where states act as employers).

22. *Chisholm v. Ga.*, 2 U.S. 419 (1793).

Supreme Court rejected Georgia's arguments and held that Article III of the U.S. Constitution<sup>23</sup> empowered the federal judiciary to rule on proceedings brought by individuals against states.

States were heavily indebted in the aftermath of the Revolution, which meant that the *Chisholm* ruling filled States with consternation.<sup>24</sup> The fear of insolvency prompted the states to seek for constitutional reform, which led to the adoption of the Eleventh Amendment. The Eleventh Amendment reads as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."<sup>25</sup> If one relies on the literal reading of the Eleventh Amendment, it could be argued that the latter only bars diversity jurisdiction, that is, suits brought by out-of-state citizens. Accordingly, citizens could still be entitled to sue their own state.<sup>26</sup> Nevertheless, following *Hans v. Louisiana*,<sup>27</sup> the current opinion of the U.S. Supreme Court is precisely the opposite. Proceedings brought by a citizen against its own state are also barred by the Eleventh Amendment. Although the *Hans* decision does not modify the original understanding of the U.S. Constitution, it overrules the U.S. Supreme Court's decision in *Chisholm*. Moreover, in *Alden v. Maine*,<sup>28</sup> Justice Kennedy, writing for the U.S. Supreme Court, held that the doctrine that a sovereign state could not be sued without its consent was universal in the states when the Constitution was drafted and ratified.<sup>29</sup> He reasoned that this principle has been embraced by the U.S. Constitution since its creation.<sup>30</sup> Justice Kennedy also stressed that had the U.S. Constitution provided that states could be sued in their own courts and by their own citizens, it would not have been ratified.<sup>31</sup> Thus, the Eleventh Amendment does not define by itself the principle of

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23. See U.S. CONST. art. III, § 2 ("The judicial power shall extend . . . to controversies . . . between a state and citizens of another state. . .").

24. *Alden*, 527 U.S. at 720.

25. U.S. CONST. amend. XI.

26. See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1429 (1987). The author argues that the principle of sovereign immunity should be limited to diversity cases. See *id.* at 1427. Thus, when exercising federal question jurisdiction, states may not rely on their immunity. *Id.* In the same vein, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1003 (1983). However, the problem with this theory is that the Eleventh Amendment refers to "any suit." See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

27. *Hans v. La.*, 134 U.S. 1, 13 (1890).

28. *Alden*, 527 U.S. at 706.

29. *Id.* at 715-16.

30. *Id.* at 720.

31. *Id.* at 727.



sovereign immunity of states. On the contrary, it simply emphasizes the importance of such principle in the American constitutional design. In other words, as the U.S. Supreme Court held in *Seminole Tribe v. Florida*, “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.”<sup>32</sup> Therefore, the principle of sovereign immunity of states as a constitutional principle is not framed by the wording of the Eleventh Amendment. As a result, one may infer four direct implications.

First, the principle can be extended beyond the wording of the Eleventh Amendment. In fact, the U.S. Supreme Court has done so. In particular, in *Hans v. Louisiana*,<sup>33</sup> *Smith v. Reeves*,<sup>34</sup> *Principality of Monaco*<sup>35</sup> and *Blatchford v. Native Village of Noatak*<sup>36</sup> the U.S. Supreme Court respectively held that states’ immunity was applicable to proceedings brought by citizens against their own states, federal corporations, foreign nations, and Indian tribes. However, the principle of sovereign immunity is not applicable to political subdivisions of the state, such as cities, counties, and towns, which can be sued in a federal court.<sup>37</sup> The reason is that unless they are the “arm or alter ego of the State,” local corporations are considered “citizens” of the state where they are formed.<sup>38</sup>

The second implication is that the principle of sovereign immunity stands on an equal footing with other constitutional principles, such as the supremacy of federal law. In order to determine the current position occupied by the principle of immunity in the American constitutional landscape, two cases must be examined: *Pennsylvania v. Union Gas*<sup>39</sup> and its subsequent overruling in *Seminole Tribe v. Florida*.<sup>40</sup> In *Union Gas*, the federal government, which had partially covered the expenses for the clean-up at Brodhead Creek, sued Union Gas claiming that it was responsible for the environmental disaster.<sup>41</sup> Union Gas filed a third party claim against Pennsylvania, arguing that in accordance with federal

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32. See *Seminole Tribe v. Fla.*, 517 U.S. 44, 54 (1996).

33. *Hans v. La.*, 134 U.S. 1 (1890).

34. See *Smith v. Reeves*, 178 U.S. 436 (1900).

35. See *Principality of Monaco v. Miss.*, 292 U.S. 313 (1934).

36. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

37. See *Cowles v. Mercer County*, 74 U.S. 118 (1869); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). This an important limit of sovereign immunity, given that local governments are in charge of providing a broad array of public services, such as primary and secondary education, housing or law enforcement. See Meltzer, *supra* note 13, at 45.

38. See *Cowles*, 74 U.S. at 120.

39. *Pa. v. Union Gas Co.*, 491 U.S. 1 (1989).

40. *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

41. *Union Gas Co.*, 491 U.S. at 13.

law, Pennsylvania should share responsibility.<sup>42</sup> Relying on the Eleventh Amendment, Pennsylvania replied that Congress did not have power under Article I to abrogate states' immunity.<sup>43</sup> However, the U.S. Supreme Court disagreed. While acting within the scope of its plenary powers under Article I (in the case at issue, it was the Commerce Clause), Congress could fashion statutes enabling individuals to claim damages against states for breach of federal law.<sup>44</sup> In accordance with the Court's opinion, "the states surrendered a portion of their sovereignty when they granted the Congress the power to regulate commerce, and that by empowering Congress to regulate commerce, the states surrendered any portion of their sovereignty that would stand in the way of such regulation."<sup>45</sup> Consequently, "the power to regulate interstate commerce would be incomplete without the authority to render states liable in damages."<sup>46</sup>

However, in *Seminole Tribe v. Florida*,<sup>47</sup> the U.S. Supreme Court felt "bound to conclude that *Union Gas* was wrongly decided, and that it should be, and now is, overruled."<sup>48</sup> In *Seminole Tribe*, Congress had passed the Indian Gaming Regulatory Act (IGRA) by which states were required to negotiate with Indian tribes a compact.<sup>49</sup> The IGRA also granted Indian tribes the right to start proceedings against states which failed to perform this duty.<sup>50</sup> The same conflicting arguments as the ones exposed in *Union Gas* were repeated by the parties. The Seminole Tribe recalled *Union Gas*, arguing that under Article I of the Constitution (the Indian Commerce Clause), Congress is empowered to abrogate state immunity from suits by individuals.<sup>51</sup> Florida, on the other hand, argued that Congress lacked such power.<sup>52</sup> The U.S. Supreme Court sided with Florida, holding that "Article I cannot be used to circumvent constitutional limitations placed upon federal jurisdiction."<sup>53</sup> When states have surrendered their competences in a particular subject matter to the federal legislature, this does not imply *per se* that the federal judiciary has jurisdiction over claims brought by individuals against states. Thus, the U.S. Supreme Court draws a distinction between

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42. *Id.*

43. *Id.*

44. *Id.* at 13-14.

45. *Id.* at 14.

46. *Union Gas Co.*, 491 U.S. at 19-20.

47. *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

48. *Id.* at 66.

49. *Id.* at 47.

50. *Id.*

51. *Id.*

52. *Seminole Tribe*, 517 U.S. at 47.

53. *Id.* at 72-73.

transfers of competence to the federal legislature and transfers of jurisdiction to federal judiciary. The former does not imply *inter alia* the latter. In fact, it is only the U.S. Constitution, and not Congress by enacting federal statutes, that is capable of empowering the federal judiciary with jurisdiction over claims brought by individuals against the state. It clearly appears from the rationale of the case that the principle of states' immunity has a constitutional character. Likewise, in *Alden v. Maine*,<sup>54</sup> state employees sought compensation from Maine before its own state court, alleging that it had breached the Fair Labor Standard Act (adopted under the Commerce Clause).<sup>55</sup> While the petitioners argued that the principle of supremacy of federal law, embodied in Article VI of the Constitution, by necessity overrides the sovereign immunity of the states, Maine invoked its immunity as a sovereign State.<sup>56</sup> The U.S. Supreme Court agreed with Maine and held that "when a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the sovereign immunity of the States."<sup>57</sup> It seems, therefore, that in accordance with the U.S. Supreme Court's opinion, state liability is outside the scope of supremacy of federal law. In other words, in order to preserve federal law as the "supreme law of the land," it is not necessary to render infringing states liable for damages caused to individuals.

The third implication is that since the principle of sovereign immunity of states has a constitutional ranking, exemptions from this principle are only possible if the U.S. Constitution allows for it. So far, the U.S. Supreme Court understands that Section 5 of the Fourteenth Amendment<sup>58</sup> and the Bankruptcy Clause<sup>59</sup> under Article I are the only constitutional provisions empowering Congress to fashion statutes capable of removing immunity from states.<sup>60</sup>

In *City of Boerne v. Flores*,<sup>61</sup> the U.S. Supreme Court ruled that Section 5 does not extend to general powers to legislate, but only covers corrective legislation.<sup>62</sup> First, it may be invoked to provide remedies against state laws or actions which (or are likely to) infringe the Due

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54. *Alden v. Me.*, 527 U.S. 706 (1999).

55. *Id.* at 711-12.

56. *Id.* at 731.

57. *Id.* at 732.

58. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that, because the Fourteenth Amendment shifted the federal-state balance to the benefit of the Union, Section 5 empowers Congress to adopt "by appropriate legislation" measures that ensure state compliance with the due process and equal protection of the laws, even if this entails a restriction upon state sovereignty).

59. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

60. *Alden*, 527 at 731-33.

61. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

62. *Id.* at 519.

Process and Equal Protection Clause.<sup>63</sup> Second, in order to discern between substantive measures and enforcing measures, only the latter being allowed under Section 5, the U.S. Supreme Court will apply a proportionality and congruence test by which a connection “between the injury to be prevented or remedied and the means adopted to that end” is necessary.<sup>64</sup> In this sense, the U.S. Supreme Court pointed out that sunset clauses, geographic restrictions or egregious predicates are not required, but these or similar limitations would tend to ensure that congressional legislation is proportionate.<sup>65</sup> Finally, the U.S. Supreme Court held that the proportionality and congruence tests are not applicable *in abstracto*.<sup>66</sup> On the contrary, “the appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>67</sup> For instance, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>68</sup> a private company, College Savings Bank, brought a patent infringement claim against Florida Prepaid, a company belonging to Florida.<sup>69</sup> The plaintiff based its claim on the Patent Remedy Act (PRA), which had been passed by Congress to put an end to constant infringements committed by state related companies.<sup>70</sup> Florida argued that the PRA was unconstitutional because it infringed the principle of sovereign immunity of states.<sup>71</sup> College Savings Bank countered Florida’s argument by alleging that under Section 5 of the Fourteenth Amendment, the PRA complied with the Constitution and thus, could abrogate states’ immunity.<sup>72</sup> The U.S. Supreme Court upheld Florida’s arguments.<sup>73</sup> It stated that the Due Process Clause does not protect the deprivation of property alone, but the deprivation of property without due process of law.<sup>74</sup> Since Congress had failed both to prove that state remedies for patent infringement were questionable and to limit federal claims to such cases, its reliance on Section 5 did not comply with the Constitution.<sup>75</sup> From these and similar cases, it seems that the proportionality test under

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63. *Id.* at 517.

64. *Id.* at 519-520.

65. *Id.* at 533.

66. *City of Boerne*, 521 U.S. at 529-30.

67. *Id.* at 530 (citations omitted).

68. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

69. *Id.* at 630.

70. *Id.* at 631.

71. *Id.* at 633.

72. *Id.*

73. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 634.

74. *Id.* at 643.

75. *Id.* at 639-48.

Section 5 is a very strict one.<sup>76</sup> Indeed, reliance on Section 5 is limited, on the one hand, to remedying or preventing unconstitutional behaviour and, on the other hand, to the absence of state remedies. Hence, the U.S. Supreme Court has added a subsidiarity test to the proportionality and congruence ones.<sup>77</sup>

In *Central Virginia Community College v. Katz*,<sup>78</sup> the U.S. Supreme Court held that under the Bankruptcy Clause, states could not rely on their immunity to avoid complying with transfer recovery proceedings.<sup>79</sup> The U.S. Supreme Court based the “Bankruptcy Clause” exception on two grounds. First, historical evidence shows that the Framers wanted to put an end to the problems caused by disparities of state legislation, which prevented debtors from being finally discharged.<sup>80</sup> Thus, the U.S. Supreme Court considered that during the constitutional ratification process, states were aware of the importance of harmonizing bankruptcy law, even if it entailed subordinating their immunity to this “pressing goal.”<sup>81</sup> Second, since bankruptcy jurisdiction is *in rem*,<sup>82</sup> the impact on states’ immunity is only ancillary.<sup>83</sup> The U.S. Supreme Court took the view that under the Bankruptcy Clause, Congress was granted the power to regulate the entire “subject of Bankruptcies.”<sup>84</sup> Bankruptcy courts are therefore entitled to issue ancillary orders necessary to enforce their *in rem* adjudication. This means that they have the power to avoid preferential transfers and to recover the transferred property, regardless of the third-party withholding it. Thus, if the *res* is being held by a state, the latter must return it to the bankruptcy trustee.

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76. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Yet, it does not follow that it is an insurmountable obstacle when fundamental rights are involved. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); see also *Tenn. v. Lane*, 541 U.S. 509 (2004).

77. For a U.S.-EU comparative study on the application of the principle of proportionality to legislative measures, see George Bermann, *Proportionality and Subsidiarity*, in 75 THE LAW OF THE SINGLE EUROPEAN MARKET (Catherine Barnard & Joanne Scott eds., 2002) (holding that the proportionality test applied by the U.S. Supreme Court in examining legislation adopted under the Fourteenth Amendment is stricter than the one applied by the ECJ in evaluating the validity of EU measures).

78. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

79. *Id.* at 362-63.

80. Justice Stevens, who delivered the opinion of the U.S. Supreme Court, referred to two pre-constitutional cases, namely, *James v. Allen*, 1 Dall. 188 (CP Phila. City 1786) and *Millar v. Hall*, 1 Dall. 229 (Pa. 1788). These cases showed that even if a debtor was discharged in one state and had debts in other states, he could be arrested for non-payment in the latter. See also *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

81. *Katz*, 546 U.S. at 362.

82. Jurisdiction “*in rem*” means that bankruptcy trustees are empowered to recover the property of the insolvent debtor resulting from preferential transfers.

83. *Katz*, 546 at 391.

84. *Id.* at 377.

The question that then arises is what differentiates the Bankruptcy Clause from other Article I legislative powers. Unfortunately, the U.S. Supreme Court did not provide a clear answer. Some scholars argue that no persuasive argument can support such distinction.<sup>85</sup> Conversely, it is also noted that congressional powers under the Bankruptcy Clause are greater than under other clauses of Article I.<sup>86</sup> The term “uniform” is only present in the Bankruptcy Clause, suggesting a greater grant of power. Indeed, it is suggested that Congress enjoys exclusive competence in the field of bankruptcies and consequently, sovereign immunity has been surrendered.<sup>87</sup> Likewise, by contrast to *Seminole*,<sup>88</sup> *Alden*<sup>89</sup> and *Florida Prepaid*,<sup>90</sup> in *Katz*<sup>91</sup> Congress did not rely on its legislative powers to create an action *in personae* against the states, but *in rem*.<sup>92</sup> Arguably, the unique nature of the bankruptcy power may be sufficient to merit a different treatment. In any case, the U.S. Supreme Court did not overrule *Seminole Tribe*. Rather, the U.S. Supreme Court seems willing to accept an incidental limitation on states’ immunity.

Finally, the U.S. Supreme Court has applied the principle of sovereign immunity not only in proceedings before federal courts, but also before state courts. In *Alden v. Maine*,<sup>93</sup> after recalling its previous decision in *Seminole Tribe*,<sup>94</sup> the U.S. Supreme Court justified the expansion of this principle to state fora by stressing that “a congressional power to authorize private suits against non-consenting states in their own court would be even more offensive to state sovereignty than a power to the suits in a federal forum.”<sup>95</sup> The principle of sovereign immunity of States is therefore applicable irrespectively of the forum where the suit is filed.<sup>96</sup>

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85. See Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 AM. BANKR. INST. L. REV. 13 (2007) (opining that the historical arguments advanced by the U.S. Supreme Court are not convincing enough to distinguish the bankruptcy clause from the commerce clause).

86. See Randolph J. Haines, *Federalism Principles in Bankruptcy after Katz*, 15 AM. BANKR. INST. L. REV. 135 (2007).

87. See Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L. J. 129 (2003).

88. *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

89. *Alden v. Me.*, 527 U.S. 706 (1999).

90. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

91. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

92. *Id.* at 378.

93. *Alden*, 527 U.S. at 706 (1999).

94. *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

95. *Alden*, 527 U.S. at 749.

96. The U.S. Supreme Court thus rejected that sovereign immunity was a foreign allocation device. See Vicky C. Jackson, *The Supreme Court, the Eleventh Amendment,*

In short, the principle of sovereign immunity of states is a constitutional principle which denies state liability to private claims. States are only liable for infringing federal law when they have unequivocally consented to suit or where federal legislation is passed under Section 5 of the Fourteenth Amendment or the Bankruptcy Clause.

*C. Why Has the U.S. Supreme Court Endorsed States' Immunity?*

The reasons leading the U.S. Supreme Court to consider state immunity as one of the key principles in the American constitutional design are twofold. First, according to the U.S. Supreme Court, an analysis of the framer's intent leads to the endorsement of sovereign immunity of states.<sup>97</sup> Second, in *Alden v. Maine*,<sup>98</sup> the U.S. Supreme Court added four substantive arguments demonstrating that its interpretation is consistent with the essential principles of federalism laid down by the U.S. Constitution.<sup>99</sup> Since historical evidence does not appear to be entirely conclusive,<sup>100</sup> it is best to focus on these substantive arguments.

The first substantive reason announced by the U.S. Supreme Court in *Alden* is that, since the United States enjoys immunity from suit both in federal and state courts, states should be entitled to the same privilege.<sup>101</sup> In terms of sovereign immunity, there is a constitutional parity between the two levels of governance.<sup>102</sup> In this regard, it appears that this legal parallelism is justified, provided that two conditions are met: (1) that federal and state immunity have the same constitutional sources and (2) that they produce the same constitutional effects. Nevertheless, neither of the two conditions is fulfilled.

First of all, the U.S. Supreme Court itself has recognised that the sources of federal and state immunity differ. In *Lapides v. Board of*

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*and State Sovereign Immunity*, 98 YALE L.J. 1, 6-7 (1988) (supporting the above-stated theory). *But see* Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000) (favouring the repudiation of the above-stated theory).

97. The U.S. Supreme Court has based its historical interpretation on four pieces of evidence, namely (1) the principle of sovereign immunity as understood at the time of the American Revolution, (2) Justice Iredell's dissent in *Chisholm v. Georgia*, (3) the opinion of the *Hans v. Louisiana* Court, and (4) States' indebtedness during the constitutional ratification. *See* *Hans v. La.*, 134 U.S. 1, 12-16 (1890); *Alden*, 527 U.S. at 715-16.

98. *Alden*, 527 U.S. at 706.

99. *See generally id.*

100. For a critical view on historical arguments, see John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2000).

101. *Alden*, 527 U.S. at 712-13. In *Cohens v. Va.*, for the first time the U.S. Supreme Court clearly recognized that the states were immune to suit. *See* *Cohens v. Va.*, 19 U.S. 264, 411-12 (1821).

102. *Id.*

*Regents*<sup>103</sup> Georgia, which had waived its immunity before its own courts, decided to remove the case to the U.S. District Court in order to invoke its sovereign immunity.<sup>104</sup> Georgia relied on an analogical application of the U.S. Supreme Court's case law on cross-claims against the United States whereby, even if the United States files a suit against a private party, it does not follow that it is subjected to the full jurisdiction of the federal judiciary.<sup>105</sup> Consequently, a private party can only counter-claim in so far as Congress has agreed.<sup>106</sup> However, by recalling its previous case-law<sup>107</sup> the U.S. Supreme Court held that a voluntary appearance in federal court amounts to a waiver of state immunity.<sup>108</sup> To this effect, the U.S. Supreme Court drew a distinction between state and federal immunity. It held that cases where the United States is a plaintiff "do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government."<sup>109</sup> In light of *Lapides*, it appears that federal immunity and state immunity are not "two sides of the same coin." State immunity arises as a limit to federal power, whereas federal immunity is not explained as a limit to states' powers, but is explained within a wider constitutional context. Furthermore, although it is not expressly mentioned in the wording of the Constitution, Article I Sections 8 and 9, as well as Article III Section 1, not only create a solid basis in favour of federal immunity, but they also enshrine two special characteristics which highlight the differences between federal and state immunity.<sup>110</sup> First, Article I Sections 8 and 9 state that the control of appropriation and the power to pay debts of the United States is allocated to Congress.<sup>111</sup> Therefore, Congress must enact a statute authorising awards of monetary relief against the federal treasury before judicial relief can be granted. Second, according to Articles I and III of the U.S. Constitution, Congress has substantial discretion over the jurisdiction of federal courts and thus, it could simply shape the federal jurisdiction so as to refuse suits against

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103. See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

104. *Id.* at 617.

105. *Id.* at 616-17.

106. See *U.S. v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940); *U.S. v. Shaw*, 309 U.S. 495 (1940); *Okla. Tax Comm'n v. Citizen Band, Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991).

107. *Lapides*, 535 U.S. at 620-22 (quoting *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273 (1906); *Gardner v. N.J.*, 329 U.S. 565 (1947); and *Clark v. Barnard*, 108 U.S. 436 (1883)). These cases held that the invocation of federal jurisdiction by states cannot lead to inconsistency and unfairness. See cases cited *supra*.

108. *Lapides*, 535 U.S. at 624.

109. *Id.* at 623.

110. U.S. CONST. art. I, §§ 8-9, art. III, § 1.

111. *Id.* art. I, §§ 8-9.



the federal government.<sup>112</sup> Hence, it seems that, although the United States can bring proceedings against states in federal courts (because their consent is deemed given in the Constitution<sup>113</sup>), states cannot bring a suit against the United States unless Congress has previously agreed to grant jurisdiction to the federal judiciary and to authorise money relief against the federal treasury.<sup>114</sup>

Finally, vis-à-vis private individuals, state and federal immunity have taken different paths. On the one hand, in the absence of a waiver, the U.S. Supreme Court has relied on suits against states' officials as a way to compensate for state immunity.<sup>115</sup> On the other hand, by enacting the Federal Torts Claims Act<sup>116</sup> (FTCA), Congress has decided that suits against the United States as such are the normal way to claim liability against the federal government and thus, claims against federal officials are almost barred.<sup>117</sup>

Furthermore, the U.S. Supreme Court held that state liability could threaten the financial integrity of the state and adversely affect its proper functioning by weakening states' decision-making power with the possibility of being sued.<sup>118</sup> However, one could counter-argue that States could enact statutes which would lay down a limited liability. A limited liability statute would provide a balance between federal rights of private individuals and state legislative autonomy. In the same way, although the threat to state financial integrity might justify cases where states act while relying on their *imperium* to attain general interests, it is not an acceptable justification when they carry out commercial activities in competitive markets. Indeed, in cases such as *Florida Prepaid*,<sup>119</sup>

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112. *Id.* art. I, §§ 8-9, art. III, § 1; Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 546 (2003).

113. *U.S. v. Tex.*, 143 U.S. 621, 641 (1891); *see also Alden v. Me.*, 527 U.S. 709, 755 (1999) (referring to *Principality of Monaco v. Miss.*, 292 U.S. 313, 328-29 (1934)).

114. *Kan. v. U.S.*, 204 U.S. 331, 342 (1907).

115. Carlos M. Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000).

116. *See* Jackson, *supra* note 112, at 563-67; *see also* Helene M. Goldberg, *Tort Liability for Federal Government Actions in the United States: An Overview*, in 521 TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE (Duncan Fairgrieve et al. eds., 2002).

117. Jackson, *supra* note 112, at 565-67. Although it is true that under *Bivens v. Six Unknown Named Agents of the Federal Narcotic Agency*, 403 U.S. 388 (1971), suits against federal officials for constitutional violations are permitted, the U.S. Supreme Court currently interprets *Bivens* narrowly and is reluctant to expand suits against federal officials to other scenarios. *See* *Schweiker v. Chilicky*, 487 U.S. 412 (1994); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994).

118. *Alden v. Me.*, 527 U.S. 709, 750 (1999).

119. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 627 (1999).

when states are competing on an equal footing with private undertakings it is difficult to see how their financial integrity is affected while pursuing an economic activity intended to increase the state treasuries.

Lastly, the U.S. Supreme Court held that state liability not only would blur federal-state accountability, but it would also be contrary to the principle of separation of powers.<sup>120</sup> The U.S. Supreme Court believes that if, as a result of breaching federal law, Congress could create remedies which allow monetary relief from state treasuries, states would be forced to align their policies with federal mandates and consequently, the states would not be able to comply with their electorate's wishes.<sup>121</sup> It follows that not only would states' political independence be undermined, but it would also be impossible to identify which government is actually responsible for the positive or negative impact of such policies. Accordingly, political accountability would be blurred. In the same way, the U.S. Supreme Court considers that it is for the state legislature and not for the federal or state judiciary to determine how state resources should be spent.<sup>122</sup> In fact, empowering courts with the possibility of awarding damages would transform the judiciary into a decision-making institution on budgetary matters and, thus, would violate the principle of separation of powers.

As a result, the U.S. Supreme Court believes that actions for damages against states have both vertical and horizontal repercussions which are incompatible with the U.S. Constitution.<sup>123</sup> However, even if these substantive reasons are well founded, it seems that they do not safeguard the supremacy of federal law. The U.S. Supreme Court's reply to this objection is that the Constitution provides alternative remedies which render suits for damages against the states unnecessary.

#### *D. Alternative Remedies*

In addition to the aforementioned substantive reasons, the U.S. Supreme Court has held that state liability is not a necessary instrument to secure the supremacy of federal law. In the U.S. Supreme Court's opinion, the Constitution has provided alternative remedies which sufficiently secure states' compliance with federal law, while respecting state immunity. Therefore, it appears that the U.S. Supreme Court is proud of having found a balance between states' sovereignty and the supremacy of federal law. These alternative remedies are, on one hand,

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120. *Alden*, 527 U.S. at 751 (1999).

121. *Id.* at 750-51.

122. *Id.* at 752.

123. *Id.* at 751.

suits brought by the federal government and, on the other, suits for prospective and retrospective relief against state officials.

### 1. United States as a Plaintiff

States may not rely on their immunity against actions for prospective relief to recover a fine or to claim damages brought by the federal government. The federal government does not have to prove any interest in the case. The basis of its claim may be the enforcement of a federal statute.<sup>124</sup> The U.S. Supreme Court only requires that the federal government retains full discretion to start, suspend or put an end to proceedings against infringing states and consequently, private individuals whose rights have been infringed cannot compel the federal government to act in their defence. Nor can the federal government delegate to private individuals its privilege applicant status. The reason is that the U.S. Supreme Court draws a distinction between private suits and suits brought by the United States, which is “entrusted with the constitutional duty to take care that the laws be faithfully executed.”<sup>125</sup> Indeed, in its opinion, unlike suits brought by private individuals, “suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State.”<sup>126</sup>

However, two objections can be raised against the suitability of this remedy. First, while the federal government would most certainly start proceedings against states whose breach of federal law adversely affects the population at large, it is doubtful that it would do the same in cases

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124. This is not the case for the United States. In the light of *New Hampshire v. Louisiana*, a state cannot enforce a private right against another State. 108 U.S. at 91 (1883).

125. U.S. CONST., art. II, § 3.

126. See *Alden*, 527 U.S. at 756. Further, the distinction between private and public enforcement has also been drawn by the ECJ. Suits brought by the United States seem to play a similar constitutional function to enforcement actions brought by the commission against a member state under ex Article 226 EC (now Article 258 TFEU). In this regard, the ECJ has ruled that it is not the exercise of a private interest that underpins actions brought under ex Article 226 EC (now Article 258 TFEU), but the exercise of political responsibility. See Case C-445/06, *Danske Slagterier v. Bundesrepublik Deutschland*, ¶¶ 43-44, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0445:EN:HTML>. The ECJ has not, however, invoked ex Article 226 EC (now Article 258 TFEU) to reject claims in damages brought by private parties. Ever since *Van Gend en Loos* was delivered, the ECJ has embraced the theory of “dual vigilance,” whereby public and private means of judicially enforcing EU law are not seen in competition, but in cooperation. See Case 26/62, *Van Gend en Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 1 (“The vigilance of individuals concerned to protect their rights amount to an effective supervision in addition to the supervision entrusted by articles 168 and 170 [presently, 226 and 227] to the diligence of the Commission and of the Member States.”).

where violations only affect a few private individuals.<sup>127</sup> Second, the federal government might not be interested in filing a suit against an infringing state because it might have adverse repercussions in the political arena.<sup>128</sup> This means that political responsibility is a concept not necessarily related to states' compliance with federal law. Thus, the aim of this remedy is not as much to protect the rights of individuals as to protect the interests of the federal government. As long as there is an overlap between the two interests, judicial protection of private rights is ensured. Nonetheless, if there is a conflict of interests, political responsibility might prevail over effectiveness of federal rights.

From private individuals' standpoint, suits for prospective or retrospective relief against state officials appear to be the only available way to enforce the individuals' federal rights.

## 2. Suits for Prospective Relief: *Ex parte Young*

Federal courts have jurisdiction to adjudicate in cases where private individuals or entities seek injunctions against state officials for breach federal law. In *Ex parte Young*,<sup>129</sup> the attorney general of Minnesota sought to rely on the Eleventh Amendment to avoid complying with a circuit court order, or that declared Minnesota's railroad rates scheme unconstitutional and thus, ordered its elimination. However, the U.S. Supreme Court upheld the circuit court *mandamus*.<sup>130</sup> It ruled that unconstitutional acts cannot be attributed to the states, and consequently, whenever a state official violates federal law, he is "stripped of his official or representative character and is subjected to the consequences of his individuals conduct."<sup>131</sup> Thus, although sovereign immunity prevents individuals from suing states, the so-called *Ex parte Young* doctrine allows them to seek an injunction against their state officials.<sup>132</sup>

However, because states can only act through their officials, a suit for prospective relief against the officials is indeed a suit for prospective relief against the states. As a result, because the distinction between the addressees of the injunction is purely formalistic, the U.S. Supreme

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127. Vázquez, *supra* note 115, at 871.

128. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1022 (noting that "Congress may reasonably doubt that federal governmental resources are wisely used to pursue litigation against state agencies when a private right-holder's interest is great but the public interest may be small.").

129. *Ex parte Young*, 209 U.S. 123 (1908).

130. *Id.* at 148.

131. *Id.* at 160.

132. *Id.*

Court has finally recognised that *Ex parte Young* doctrine is in fact a derogation from the Eleventh Amendment.<sup>133</sup>

In order to rely on this remedy, the application must fulfil two conditions: first, there must be an alleged violation of federal law; second, the application must address an ongoing violation, that is, applicants cannot seek compensation or retrospective relief for past violations. The prospective-retrospective distinction was drawn by the U.S. Supreme Court in *Edelman v. Jordan*.<sup>134</sup> In that case, the applicant brought a class action against a state official seeking to recover the money that Illinois had withheld in breach of a federal statute.<sup>135</sup> The U.S. Supreme Court dismissed the application, holding that the Eleventh Amendment bars suits seeking retrospective monetary relief to be paid from the state treasury.<sup>136</sup>

Following the same trend as it did in relation to congressional powers under Article I and under the Fourteenth Amendment, the U.S. Supreme Court has also narrowed down the *Ex parte Young* doctrine in favour of states' sovereign interests.<sup>137</sup> In this sense, in *Seminole Tribe* the applicant based its application on two claims.<sup>138</sup> The first was against the state of Florida, claiming that it had breached the IRGA.<sup>139</sup> In the second claim, the applicant sought prospective relief against Florida's governor, who, in spite of being obliged by this federal statute to enter into a compact with the Seminole Tribe, did not do so.<sup>140</sup> As mentioned above, the U.S. Supreme Court declared the IRGA unconstitutional on the ground that Congress lacked power under Article I of the U.S. Constitution to abrogate states' immunity.<sup>141</sup> As for the second plea, the U.S. Supreme Court refused to apply the *Ex parte Young* doctrine, holding that, since the IRGA provided for suits against the states, it also implicitly pre-empted suits against state officials. As a result, the application was dismissed in its entirety.

In the same way, in *Idaho v. Coeur d'Alene*,<sup>142</sup> the U.S. Supreme Court dealt with an entitlement dispute between Idaho officials and the Coeur d'Alene Tribe over the submerged lands and bed of Lake Coeur

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133. *Pennhurst State Sch. & Hosp. v. Haldermann*, 465 U.S. 89, 105 (1984).

134. *Edelman v. Jordan*, 415 U.S. 651 (1974).

135. *Id.* at 653.

136. For the difficulties in applying the prospective-retrospective distinction, see *infra* pt. III(B).

137. See *Seminole Tribe*, 517 U.S. 44 (1996).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 47.

142. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1996).

d'Alene.<sup>143</sup> The Tribe filed an *Ex parte Young* injunction aiming at prohibiting state officials from taking any further regulatory action in violation of its federal rights to the lands.<sup>144</sup> However, the U.S. Supreme Court refused to grant an injunction.<sup>145</sup> Writing for the Court, Justice Kennedy stated that where special sovereignty interests of states are at stake or where prospective relief becomes as intrusive as an award of damages against the state, *Ex parte Young* is not applicable.<sup>146</sup> Otherwise, the principle of state sovereign immunity would be reduced to "an empty formalism."<sup>147</sup>

In *Seminole Tribe*, the limitation imposed on the *Ex parte Young* doctrine was not so significant in so far as it only shifted the burden of proof to Congress, which is now required to expressly mention that federal action against a state does not prevent private individuals from relying on prospective relief against state officials.<sup>148</sup> By contrast, *Coeur d'Alene* is an important curtail to prospective relief. There, the U.S. Supreme Court held that the exercise of federal jurisdiction is not conditioned upon protecting federal law alone, but it must also take into account state sovereign interests.<sup>149</sup> In other words, this remedy which, in the U.S. Supreme Court's opinion, would secure the supremacy of federal law is also submitted to the Eleventh Amendment. In so far as suits for prospective relief do not adversely affect the states' most valuable interests, this remedy would be available to private individuals and entities. Nevertheless, even if federal law has been manifestly breached by a state official, the latter would be protected by the Eleventh Amendment if *Ex parte Young* would turn out to be too intrusive.

However, as the dissenting Justices pointed out in *Coeur d'Alene*, it is difficult to distinguish this case from others where federal rights have been granted to private individuals.<sup>150</sup> It seems that an injunction against an economic regulatory activity (as was the case in *Ex parte Young*) is as intrusive as an injunction against the regulation of the use of land. Besides, *Ex parte Young* is per se "intrusive" since state officials are almost always doing what their state's legislative and administrative authorities intend for them to do.<sup>151</sup> Thus, this evisceration of *Ex parte Young* deprives individuals from effective prospective relief, not only because the U.S. Supreme Court did not specify what "special sovereign

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143. *Id.* at 264.

144. *Id.*

145. *Id.* at 287.

146. *Id.* at 270.

147. *Coeur d'Alene Tribe*, 521 U.S. at 270.

148. *Seminole Tribe v. Fla.*, 517 U.S. 44, 77 (1996).

149. *Coeur d'Alene Tribe*, 521 U.S. at 267-68.

150. *Id.* at 311.

151. *Id.* at 312.

interests” means, but also because the Court seems to justify state officials’ impunity for unlawful breaches of valid federal law, leading to a clear infringement of the principle of supremacy of federal law, and most importantly, of the rule of law. However, in defence of the U.S. Supreme Court’s reasoning, one could object that, since Idaho had waived its sovereign immunity in its own courts, the Coeur d’Alene Tribe’s federal rights could still be protected. The Coeur d’Alene Tribe could consequently rely on state courts to apply federal law.<sup>152</sup> Therefore, the U.S. Supreme Court is eager to reinforce the principle of subsidiary as it did in *Florida Prepaid* before granting federal courts with jurisdiction. Granting such jurisdiction would undermine states’ immunity, and accordingly, the remedies available in state court need to be considered.<sup>153</sup>

### 3. Suits for Retrospective Relief: State Official’s Liability

Furthermore, prospective relief in and of itself is not sufficient to ensure that state officials will comply with federal law. As a matter of fact, this remedy is only suitable to put an end to current or prospective violations of federal law. It is not, however, an appropriate means to render states liable for prior infringements. If the Constitution only allowed individuals to seek prospective relief, there would be many, albeit temporary, violations of federal law. Thus, in order to secure the supremacy of federal law, its violations not only have to be stopped, but also deterred. In the U.S. Supreme Court’s opinion, suits claiming damages against state officials acting in their individual capacity are the deterrent element by which violations of federal law would be prevented.<sup>154</sup>

A state official’s liability for breach of constitutional and federal rights is laid down in the Civil Rights Act of 1871<sup>155</sup> and in the U.S.

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152. *Id.* at 274-276.

153. See Carlos M. Vázquez, *Night and Day: Coeur d’Alene, Breard, and the Unravelling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L. J. 1, 42-51 (1999) (noting that this part of the Opinion did not enjoy the support of the majority).

154. *Alden v. Me.*, 527 U.S. 709, 756 (1999).

155. 42 U.S.C. § 1983 (1996) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a

Supreme Court case-law. Private individuals can start proceedings either before federal or state courts. In the latter case, since the claim for damages is based on federal law, state statutes limiting the liability of state officials are inapplicable.<sup>156</sup>

Moreover, pursuant to the U.S. Supreme Court, this remedy is subject to two limitations. First, state officials enjoy “qualified immunity,”<sup>157</sup> which “reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizen, [but also] the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”<sup>158</sup> Thus, the U.S. Supreme Court has set up a threshold of liability, which deters state officials from breaching federal law, while ensuring that they will carry out their tasks with normality. This means that ensuring the supremacy of federal law must not simultaneously entail that valid state law is not applied by fearful state officials.

In this sense, the U.S. Supreme Court has held that state officials are liable for breach of federal law in so far as the law violated was “clearly established.”<sup>159</sup> The U.S. Supreme Court applies a test “that focuses on the objective legal reasonableness of an official’s acts,”<sup>160</sup> and thus, the official’s subjective good faith is irrelevant.<sup>161</sup> Where the state official is expected to know that his conduct was in breach of statutory or constitutional rights, then injured parties can bring an action for damages against the state official. As a result, a mere breach of federal law is not sufficient to render the state official liable, it is just necessary that “a

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declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

156. See *Howlett v. Rose*, 496 U.S. 356 (1990); see also Fred L. Morrison, *The Liability of Governments for Legislative Acts in the United States of America*, 46 AM. J. COMP. L. 531 (1998).

157. Nevertheless, judges, prosecutors, and legislators are entitled to “absolute immunity.” See *Stump v. Sparkman*, 435 U.S. 232 (1978) (judges); *Butz v. Economou*, 438 U.S. 478 (1978) (prosecutors); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975) (legislators). Compare with *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. F.R.G., The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029; and *Case C-224/01, Köbler v. Republik Österreich*, 2003 E.C.R. I-10239.

158. *Butz*, 438 U.S. at 504-06.

159. *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

160. *Id.* at 818.

161. See John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) (In accordance with Jeffries, some constitutional violations require more than “negligence,” they require a particular intention or purpose, e.g., racial discrimination.).



reasonable official would understand that what he is doing violates that right.”<sup>162</sup>

Second, state officials can only be sued in their individual capacity, that is, applications must seek compensation from the state official's personal resources, not from the state treasury. The case of *Edelman v. Jordan*<sup>163</sup> illustrates this point. In this case, respondent John Jordan filed a complaint seeking relief against two former directors of the Illinois Department of Public Aid, alleging that these officials were administering federal aid in a manner inconsistent with federal regulations and the Fourteenth Amendment of the Constitution.<sup>164</sup> However, his application was limited to recovering the money that was wrongfully withheld.<sup>165</sup> Had Jordan's application been upheld, the money would not have come from the state official's pocket, but from Illinois' treasury.<sup>166</sup> Said differently, Edelman's claim was not an action in tort against the state official but in restitution against the state of Illinois. Likewise, as the principle of agency states, “a servant is liable for torts committed in the master's business, [but] the servant is not responsible for master's contract.”<sup>167</sup> Hence, it seems that the U.S. Supreme Court distinguishes between actions in torts and actions in contract. Tort claims are admissible under 42 U.S.C. § 1983, whereas the contract claims are barred by the Eleventh Amendment.<sup>168</sup>

However, the difference between obtaining compensation from the state official's own resources and from the state treasury is blurred by a widespread system of indemnification, pursuant to which damage judgments rendered against state officials are usually, directly or indirectly, paid by the state.<sup>169</sup> As Professor Vázquez points out,

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162. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

163. *Edelman v. Jordan*, 415 U.S. 651 (1974).

164. *Id.* at 653.

165. *Id.*

166. *Id.* at 663.

167. *Jeffries Jr.*, *supra* note 161, at 66.

168. *Id.* at 67-68.

169. The attempt to equate official liability accompanied by compensation with state liability has been criticised by some scholars. For instance, Meltzer put forwards four arguments against this straightforward assumption: First, Congress would have to modify a range of status in order for injured parties to direct action in damages against state officials; Second, it is often difficult to determine which official is to be held responsible; Third, indemnification is neither universal, nor may it cover all type of wrongdoing; Finally, states might limit their coverage to the loss actually suffered by the state official as a result of an adverse judgment. *See Meltzer, supra* note 128, at 1018-21. *But see*, Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (positing that state and personal liability are economically undistinguishable in so far as two conditions are fulfilled, namely “(1) the employee has sufficient assets to pay any conceivable judgment in full (perhaps with the aid of an insurance or contractual indemnification from the employer) (2) the transaction

prospective state officials will consider the risk of being sued for violation of federal law before accepting to work for the state.<sup>170</sup> Thus, the state will have to either pay the judgment directly, indemnify the official or get a less competent employee.<sup>171</sup> Accordingly, the economic risk for an eventual breach of federal law is not supported, at least in its entirety, by the state official, but is a burden on the state treasury. It follows that, because since state officials do not suffer the economic consequences of their wrongdoing, through the system of indemnification states are “dampening the incentive to comply with federal law.”<sup>172</sup>

Nevertheless, one could raise four arguments in favour of the deterring effect of this remedy.<sup>173</sup> First, one could argue that states are not legally obliged to indemnify their officials. Second, states have the option of setting a maximum for indemnification. Third, states could refuse to indemnify in cases where the official engaged in gross negligence or wilful misconduct. Finally, if an official is called to court, he or she would suffer the embarrassment of having been found responsible for violating federal law. However, these arguments do not appear to be entirely convincing. Although states are not legally compelled to indemnify state officials, states are economically compelled to do so. As previously mentioned, actions for damages against state officials transfer the economic risk for violations of federal law to states, and consequently, states will directly or indirectly have to suffer that burden.<sup>174</sup>

Moreover, denying indemnification in cases of gross negligence or wilful misconduct would push the threshold of deterrence to a higher level than the one applied by the U.S. Supreme Court in the “clearly established” test. In the same way, the level of deterrence will not be established in accordance with the case-law of the U.S. Supreme Court, but by states’ discretion. As for capping indemnification, the deterrent effect would depend on the amount that the state has agreed to cover. The lower it is, the more deterring it will be. However, by fixing a maximum indemnification, states take into account not only the level of deterrence to ensure an appropriate compliance with federal law, but also other policy considerations, such as the necessary amount to attract

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costs of employment contracts that include terms to allocate liability between the employer and the employee are small.”)

170. Vázquez, *supra* note 115, at 880-88.

171. *Id.* at 880.

172. *Id.* at 883.

173. See Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 261 (2006).

174. Jeffries Jr., *supra* note 161, at 62; Fallon & Meltzer, *supra* note 8, at 1823.

competent employees or how much resources the states want to spend to cover officials' liability in detriment to other expenses. In other words, by fixing a maximum indemnification, the degree of compliance with federal law would depend on a series of economic factors, all of which would depend on each state's budgetary policy. Finally, although it is true that a state official who is found responsible for violations of federal or constitutional law will have to suffer the embarrassment of his behaviour, it does not appear sufficient to produce a deterrent effect and consequently, to reinforce the supremacy of federal law, in the hands of the moral values of the state officials.

Consequently, as it currently stands, since states assume the economic risks for violations of federal law committed by state officials, suits for damages against the latter do not provide a sufficient degree of deterrence to ensure the supremacy of federal law.

## II. THE PRINCIPLE OF STATE LIABILITY UNDER EU LAW

### A. *Concept*

The principle of state liability under EU law implies that where a member state<sup>175</sup> has seriously breached community rights, individuals are entitled to reparation for the damages suffered as a result of the state's breach. It is thus a retrospective remedy, which has a financial nature. State liability can also be seen as an economic sanction against infringing member states; it is for these states to assume the economic repercussions of their wrongdoing, and not for the injured parties. It follows that like most judicial remedies in a federal system, state liability has a double dimension: it renders effective individual federal rights, while it keeps national governments under the rule of federal law.<sup>176</sup>

The European Court of Justice has consistently ruled that in spite of being enforced by national courts, the principle of state liability must be determined by referring to the conditions laid down by the ECJ in *Francovich*<sup>177</sup> and *Brasserie*.<sup>178</sup> State liability is therefore an independent concept, which does not have to take into account additional requirements of tort law.

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175. "State" in this section refers to member states within in the EU.

176. See generally, Fallon & Meltzer, *supra* note 8.

177. See Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

178. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. F.R.G., The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 34.

Moreover, the ECJ does not distinguish among the branches of the state liable for having violated community law.<sup>179</sup> On the contrary, it considers that it is the member state as a whole that has committed the infringement.<sup>180</sup> Accordingly, the same conditions of liability apply irrespective of whether the violation has been committed by the regional or central government,<sup>181</sup> the legislature,<sup>182</sup> the judiciary<sup>183</sup> or public authorities.<sup>184</sup>

Furthermore, the principle of state liability has been influenced by and, subsequently, has influenced the principle of non-contractual liability of the community institutions. At first, the ECJ inferred from ex Article 288 EC (now Article 340 TFEU),<sup>185</sup> which embodies the principle of non-contractual liability of the European Union, that there is a general principle of liability of public authorities, familiar to the legal systems of the member states and recognised by the EU legal order.<sup>186</sup> Thus, not only EU institutions, but also member states are liable for breaches of EU law. Later, in *Bergadem*,<sup>187</sup> in order to determine whether the European Commission was liable for breach of EU law, the ECJ applied the conditions laid down by its case-law on state liability.<sup>188</sup> Thus, there has been a mutual influence or crossed-fertilization<sup>189</sup> between the two principles, which submits member states and the European Union to the same standard of liability.

In addition, the principle of state liability has also influenced national administrative law.<sup>190</sup> Indeed, nowadays the conditions of

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179. See Roy W. Davis, *Liability in Damages for a Breach of Community Law: Some Reflections on Who to Sue and the Concept of State*, 31 EUR. L. REV. 69 (2006); Georgios Anagnostaras, *The Allocation of Responsibility in State Liability Actions for Breach of Community Law: A Modern Gordian Knot?*, 26 EUR. L. REV. 139, 152-53 (2001).

180. *Brasserie*, 1996 E.C.R. ¶ 34.

181. Case C-302/97, *Konle v. Republik Österreich*, 1999 E.C.R. I-3099, ¶ 62.

182. *Brasserie*, 1996 E.C.R. ¶ 35.

183. See Case C-224/01, *Köbler v. Republik Österreich*, 2003 E.C.R. I-10239.

184. Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123; See also Case C-118/00, *Larsy v. INASTI*, 2001 E.C.R. I-5063.

185. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 340, 2008 O.J. (C 115) 193, reads as follows:

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

186. *Brasserie*, 1996 E.C.R. ¶ 29.

187. Case C-352/98 P, *Laboratoires Pharmaceutiques Bergadem SA v. Comm'n of the Eur. Cmty.*, 2000 E.C.R. I-5291.

188. *Id.* ¶¶ 34-35.

189. PANAGIOTIS TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 475 (Oxford, 2006).

190. Marie-Pierre F. Granger, *National Applications of Francovich and the Construction of a European Administrative ius commune*, 32 EUR. L. REV. 157 (2007).

liability of public authorities for breach of national law are often influenced by the ones laid down by the ECJ for breach of EU law.<sup>191</sup> Hence, there has been a spill-over effect which is leading, in the words of Van Gerven, to the creation of a *jus commune europeus* in terms of the liability of public authorities.<sup>192</sup>

As a result, the characteristics of the principle of state liability under EU law are threefold: (1) independence in its definition, (2) uniformity and universality in its application, and (3) a harmonizing aptitude.<sup>193</sup>

### B. *The Breakthrough: Francovich*

Until 1991 when *Francovich* was decided, the ECJ had held that it was for the national law to decide whether individuals could claim damages arising from violations of EU law. In *Russo v. AIMA*,<sup>194</sup> the Court's reply to this question was that the state was "liable to the injured party of the consequences in the context of the provisions of national law on the liability of the State."<sup>195</sup> The ECJ's self-restraint can be explained by its ruling in *Rewe v. Hauptzollamt Kiel*,<sup>196</sup> where it held that "[the treaty] was not intended to create new remedies."<sup>197</sup> In other words, the ECJ believed that the principle of procedural autonomy<sup>198</sup> counterbalanced by the principles of equivalence<sup>199</sup> and effectiveness,<sup>200</sup>

191. *Id.* at 188-89.

192. Walter Van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution*, in *TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE* 125-47 (Duncan Fairgrieve, Mads Andenas & John Bell eds., BIC 2002).

193. *Id.*

194. Case 60/75, *Russo v. AIMA*, 1976 E.C.R. 45.

195. *Id.* ¶ 9.

196. Case 158/80, *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, 1981 E.C.R. 1805.

197. *Id.* ¶ 6.

198. As opposed to the United States, there is no dual system of state and federal courts in the EU. See KOEN LENAERTS, DIRK ARTS & IGNACE MASELIS, *PROCEDURAL LAW OF THE EUROPEAN UNION* 83 (Maxwell Sweet, 2006). The enforcement of EU rights is decentralised. *Id.* It is entrusted to national courts who act as "juges de l'Union." See TRIDIMAS, *supra* note 189, at 419. This means that it is for EU law to provide the substantive right, and for national law to provide the remedy. *Id.* This division of tasks between rights and remedies is known as the principle of national procedural autonomy. *Id.* Nonetheless, if the judicial protection of EU rights were left at the absolute mercy of the member states, its effectiveness would be seriously undermined. The principles of primacy and direct effect would be reduced to mere postulates. *Id.* at 418. That is why the ECJ has consistently held that the principle of national procedural autonomy is not absolute, but subject to the dual and complementary limitation of the principles of equivalence and effectiveness. *Id.* at 423.

199. The principle of equivalence is nothing more than the application of the principle of equal treatment to the law of remedies. Unless there is an objective and proportionate justification, member states may not deny remedies to rights based on EU law, if the

provided an adequate level of judicial protection to EU rights, and, consequently, additional remedies were not required.<sup>201</sup>

By embracing the principle of state liability for breach of EU law, the ECJ brought the missing piece in its vision of EU remedies. Thus, along with *Simmenthal*,<sup>202</sup> *Johnston*,<sup>203</sup> and *Factortame I*,<sup>204</sup> *Francovich* can be considered as one of the landmark cases of the ECJ in providing national courts with judicial instruments aiming at enforcing the effectiveness of EU Law.<sup>205</sup> Due to its unquestionable importance, this case is discussed in detail in this article.

The facts of *Francovich*<sup>206</sup> can be summarised as follows. Italy had failed to implement Directive 80/987/EEC,<sup>207</sup> which compelled member states to provide specific guarantees of payment of unpaid wage claims. Mr. Francovich and Ms. Bonifaci<sup>208</sup> brought proceedings against their former employers seeking payment of their wages.<sup>209</sup> However, as a result of their employer's insolvency and since under Italian law there were no guarantees to cover their unpaid wages, the applicants brought proceedings against Italy seeking compensation.<sup>210</sup>

In a preliminary reference procedure, two Italian courts asked the ECJ two questions. First, could the plaintiffs rely on the directive to oblige Italy to pay the guarantee laid down therein?<sup>211</sup> Second, if the

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same remedies are available to rights having a similar purpose and cause of action but based on national law. See Case C-326/96 *Levez v. T.H. Jennings Ltd.*, 1998 E.C.R. I-835; Case C-78/98, *Preston v. Wolverhampton Healthcare NHS Trust*, 2000 E.C.R. I-3201. For a more recent example, see Case C-268/06 *Impact v. Minister for Agric. & Food*, 2008 E.C.R. I-2483. In the United States, the U.S. Supreme Court has also ruled that a State may not discriminate against federal cause of actions unless there is a valid excuse. See *Testa v. Katt*, 330 U.S. 386 (1947); *Howlett v. Rose*, 496 U.S. 356 (1990).

200. See *infra* Part II(C)(1).

201. See Case 33/76, *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989; Case 45/76, *Comet BV v. Produktschap voor Siergewassen*, 1976 E.C.R. 2043.

202. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629 (holding that EU rights have to be fully effective).

203. Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651 (ruling that the judicial protection of EU rights is a general principle of EU law).

204. Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433 (requiring national courts to grant interim relief, even if it was impossible under national law).

205. TRIDIMAS, *supra* note 189, ch. 11.

206. Cases C-6/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

207. Council Directive 80/987, 1980 O.J. (L 283) 23-27 (EC).

208. The proceedings were brought by Ms. Bonifaci and 33 other employees. See *Francovich*, 1991 E.C.R. ¶ 5.

209. *Id.*

210. *Id.* ¶ 6.

211. *Id.* ¶ 7.

previous question were answered in the negative, they asked whether the plaintiff could claim damages against the infringing member state.<sup>212</sup>

First, the ECJ found that the provisions of the directive concerning the identity of the beneficiaries and the scope of the rights were unconditional and sufficiently precise to give rise to direct effect.<sup>213</sup> However, this was not the case regarding the person liable.<sup>214</sup> Indeed, in accordance with the directive, the member states had two possibilities when choosing the methods of financing the guarantee institution: it could either be financed by the employers or by public authorities.<sup>215</sup> Hence, since the member states enjoyed some discretion in the implementing process, the provisions of the directive were not sufficiently unconditional and precise to give rise to directly enforceable rights.<sup>216</sup>

Second, as for claiming damages, the ECJ answered in the affirmative.<sup>217</sup> The ECJ held that the EC Treaty (now replaced by the FEU Treaty) has created its own legal system, whose subjects are not only the member states, but also their nationals.<sup>218</sup> It added that EU law can impose obligations and grant rights to individuals, which are to be found not only in the wording of the EC Treaty (now replaced by the FEU Treaty), but also by virtue of the obligations clearly imposed on the member states, EU institutions or other individuals.<sup>219</sup> In this sense, it is for the national courts to give full effect to EU law and to protect these rights. Then, the Court went on to rule that:

The full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of [EU] rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by [EU] law.

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212. *Id.*

213. *Francovich*, 1991 E.C.R. ¶ 14.

214. *Id.* ¶¶ 25-26.

215. *Id.* ¶ 23.

216. *Id.* ¶¶ 17, 25.

217. *Id.* ¶ 35.

218. *Francovich*, 1991 E.C.R. ¶ 31.

219. *Id.*

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of [EU] law for which the State can be held responsible is inherent in the system of the Treaty.<sup>220</sup>

Additionally, the ECJ stressed that ex Article 10 EC (now Article 4(3) TEU)<sup>221</sup> can be considered as a further basis for state liability.<sup>222</sup> It argued that the principle of loyal cooperation, enshrined in ex Article 10 EC (now Article 4(3) TEU), obliges member states not only to take “all appropriate measures . . . to ensure the fulfilment of their obligations under EU law,” but also to “nullify the unlawful consequences of a breach of EU law.”<sup>223</sup>

The ECJ announced the three conditions which must be fulfilled in order to render a member state liable for violating EU law.<sup>224</sup> First, the implementation of the directive should result in granting rights to individuals.<sup>225</sup> Second, the directive itself should suffice to identify the content of those rights.<sup>226</sup> Finally, there must be a casual link between the breach of the infringing member state and loss or damage suffered by the individual.<sup>227</sup>

Even though in a preliminary reference procedure, the ECJ is not supposed to rule on the case at issue. Rather, the ECJ leaves with the national court to decide in the light of its ruling. However, in this case, the ECJ went all the way, and provided the Italian courts with the outcome. It held that, since the aforementioned conditions were fulfilled, the referring courts should uphold the rights of Mr. Francovich and Ms. Bonifaci in obtaining compensation from Italy for the loss or damage suffered as a result of the non-implementation of Directive 80/987.<sup>228</sup>

220. *Id.* ¶ 33.

221. Article 4(3) in the Treaty on European Union, 2010 O.J. (C 83) 18, provides: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

222. *Francovich*, 1991 E.C.R. ¶ 21.

223. *Id.* ¶ 36.

224. *Id.* ¶¶ 38-43.

225. *Id.*

226. *Id.*

227. *Francovich*, 1991 E.C.R. ¶¶ 38-43.

228. *Id.* ¶ 44.



### C. *Legal Basis*

In *Francovich*, the ECJ's rationale was based on two principles, namely, the principle of effectiveness and the principle of cooperation.

#### 1. Principle of Effectiveness

The principle of effectiveness can be defined as the teleological interpretation of the constitutional principles of primacy and direct effect,<sup>229</sup> that is to say, the transformation of "programmatic principles" into "judicial instruments."

Because the enforcement of EU law is decentralised, national courts play a fundamental role in ensuring that EU rights are respected. Indeed, it is difficult to imagine how EU law would prevail over national law and be directly enforceable before national courts, if the latter did not have power to render these postulates real. Consequently, the more empowered national courts are, the more respected primacy and direct effect will be.<sup>230</sup>

Furthermore, in relation to national procedural rules, the principle of effectiveness can be assessed from a dual contrasting perspective. On the one hand, it can be seen as a "negative judicial power," that is, by virtue of the principles of primacy and direct effect, national courts have the authority to set aside any national procedural rule which undermines the effectiveness of EU law.<sup>231</sup> On the other hand, it can also be considered as a "positive judicial power," which enables national courts to create new remedies, where the existing national ones are not adequate to guarantee a sufficient level of protection of EU rights.<sup>232</sup> In addition, whereas the first aspect only implies purifying national rules of procedure in light of EU law, the second involves the creation of new remedies via judicial interpretation. Hence, it is clear that effectiveness seen as a way to cover remedial gaps is more intrusive than setting aside national rules of procedure.

In fact, this distinction can be found in the evolving case law of the ECJ. At first, the ECJ held in *Simmenthal*<sup>233</sup> that national courts had the

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229. TRIDIMAS, *supra* note 189, ch. 9.

230. Matej Accetto & Stefan Zleptnig, *The Principle of Effectiveness: Rethinking its Role in Community Law*, 11 EUR. PUB. L. 375 (2005); see also Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19 (1993).

231. See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1970 E.C.R. I-10239, ¶ 22.

232. See Case C-432/05 *Unibet Ltd. v. Justitiekanslern*, 2007 E.C.R. I-2271, ¶ 41 (for the first time expressly recognising that creating new remedies is possible where necessary to safeguard EU rights).

233. See *Simmenthal*, 1970 E.C.R. ¶ 22.

power to set aside any provision, including of constitutional ranking, which “might impair the effectiveness of EU law.”<sup>234</sup> However, at the same time, the ECJ refused to grant national courts with a “positive judicial power,” that is, creating new remedies was out of the question.<sup>235</sup>

At second stage, the ECJ realised that setting aside national provisions inconsistent with EU law was not sufficient to ensure a suitable level of judicial protection, in particular, where there were remedial lacunas in national law. To this end, in *Johnston*,<sup>236</sup> the ECJ held that a certificate issued by the Secretary of State precluding any judicial review as to its compatibility with Directive 76/207<sup>237</sup> was in breach of EU law.<sup>238</sup> The ECJ stated that “the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment” was a general principle of EU law and thus, it was for the member states to take all appropriate measures capable of securing an effective judicial control.<sup>239</sup> In other words, the ECJ urged the member states to create new remedies where necessary. In the same way, in *Factortame I*,<sup>240</sup> the House of Lords asked the ECJ whether, owing to the fact that under English law the judiciary was unable to grant interim relief against an act of Parliament, such power could be derived from EU law.<sup>241</sup> The ECJ answered in the affirmative and consequently, British courts were bestowed with a new prospective remedy, which ran counter to the ancient principle of parliamentary supremacy.<sup>242</sup> Thus, the ECJ took a step further: not only are member states obliged to create effective remedies, but also EU law in itself can grant national courts with the necessary instrumental power to ensure an effective judicial protection.

Finally, as Professor Tridimas points out, *Francovich* can be seen as the ultimate step toward the full enforcement of the principles of primacy and direct effect.<sup>243</sup> The facts of the case demonstrate that the applicant did not have any remedies other than to claim damages against Italy. Indeed, since the provisions of the non-implemented directive lacked direct effect, the latter could not be enforced before the national courts.

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234. See Case 158/80, *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, 1981 E.C.R. 1805.

235. *Id.*

236. Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, ¶ 19.

237. See Council Directive 76/207, 1976 O.J. (L 39) 40-42 (EC).

238. *Johnston*, 1986 E.C.R. ¶ 19.

239. *Johnston*, 1986 E.C.R. ¶¶ 18-19.

240. Case C-213/89, *The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433.

241. *Id.* ¶¶ 1-2.

242. *Id.* ¶¶ 21-23.

243. TRIDIMAS, *supra* note 189, at 500-01.

As a result, not only would the plaintiffs be deprived from any remedy, but also this remedial gap would put into question the binding capacities of non-implemented directives. Hence, in the light of its previous case-law, *Francovich* represents a consistent development. First, by closing a remedial gap, it enhanced the protection of EU rights. Second, the ECJ completed the range of remedies arising from EU law. National courts can grant prospective and also retrospective relief. Finally, by shifting the economic burden of non-implemented directives, it reinforced their binding character and thus, their effectiveness.

## 2. Principle of Loyal Cooperation: Ex Article 10 EC (Now Article 4(3) TEU)

The principle of loyal cooperation imposes two types of obligations on the member states. On the one hand, they must adopt all the necessary measures to fulfil their obligations under EU Law, as well as to facilitate the task of the EU institutions. On the other, they must refrain from adopting any measure capable of putting at risk the objectives of the European Union.<sup>244</sup>

Therefore, ex Article 10 EC (now Article 4(3) TEU) has been relied upon by the ECJ in order to impose additional obligations on the member states.<sup>245</sup> This treaty provision is a legal basis which favours the teleological interpretation of EU provisions, that is, their *effet utile*.<sup>246</sup> Although ex Article 10 EC (now Article 4(3) TEU) does not have direct effect, in conjunction with other treaty provisions, it is a powerful instrument.<sup>247</sup> In other words, ex Article 10 EC (now Article 4(3) TEU) operates as a “catalyst of European integration.” It does not produce any effects in and of itself, but in reaction with other principles, it causes great change. Indeed, ex Article 10 EC (now Article 4(3) TEU) is not a substantive provision. It requires cooperation from the member states, but it does not specify either in which subject-matters or to what extent member states must cooperate. Consequently, the ECJ has relied on this provision in a large variety of cases,<sup>248</sup> but always with the same goal in mind: fostering the enforcement of European law. It follows that it is not

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244. See Accetto & Zleptnig, *supra* note 230, at 386-38.

245. John Temple Lang, *The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law*, 7 ERA-FORUM 476 (2006).

246. *Id.* at 477.

247. ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 93 (1999).

248. See generally John Temple Lang, *Developments, Issues and New Remedies—The Duties of National Authorities and Courts Under Article 10 of the EC Treaty*, 27 *FORDHAM INT’L L.J.* 1904 (2004) (presents an overview of the cases in which this principle has been applied).

surprising that the ECJ also relied on ex Article 10 EC (now Article 4(3) TEU) to enhance the consistency of its ruling in *Francovich*.

*D. From filling in a lacuna to a General Principle: Joined Cases  
Brasserie du Pêcheur and Factortame III*

In these cases,<sup>249</sup> *Brasserie du Pêcheur*, a French brewery, sought compensation from Germany for the loss of earnings resulting from German legislation on Beer purity which, pursuant to a previous judgment of the ECJ,<sup>250</sup> was in breach of ex Article 28 EC (now Article 34 TFEU), which provides for the free movement of goods.<sup>251</sup> Likewise, *Factortame*, a British company but whose vessels and shareholder were Spanish, claimed damages against the UK arising from the Merchant Shipping Act.<sup>252</sup> In *Factortame II*, the Court found that the Act was incompatible with ex Article 43 EC (now Article 49 TFEU).<sup>253</sup>

The differences between *Brasserie* and *Francovich* are twofold. First, whereas in *Francovich* the EU measure infringed was not directly enforceable, both ex Articles 28 and 43 EC (now Articles 34 and 49 TFEU) have direct effect. Second, whereas the damage in *Francovich* was the result of Italy's inaction (failure to implement a directive), in *Brasserie* the damage was the direct result of legislative activity.

Therefore, as Germany, Ireland, and the Netherlands argued, *Francovich* could have been interpreted restrictively.<sup>254</sup> The principle of state liability should be limited to cases where individuals do not have alternative remedies. Hence, because ex Articles 28 and 43 EC (now Articles 34 and 49 TFEU) are directly effective, state liability should be precluded. Furthermore, applying this principle to cases where the legislature is involved not only would be contrary to the principle of separation of powers (it is for the legislature to create remedies and not for the judiciary), but it would also threaten its independence.<sup>255</sup>

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249. See generally *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. F.R.G., The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029; *Case C-392/93, The Queen v. H.M. Treasury ex parte British Telecomm. Plc.*, 1996 E.C.R. I-1613; *Case C-5/94, The Queen v. Ministry of Agric., Fisheries & Food ex parte Hedley Lomas Ltd.*, 1996 E.C.R. I-2553; *Case C-178/94, Dillenkofer v. Bundesrepublik Deutschland*, 1996 E.C.R. I-4845.

250. See *Case 178/84, Comm'n of the Eur. Cmty. v. F.R.G.*, 1978 E.C.R. 1227 (also known as "Beer Purity Case").

251. See *Brasserie*, 1996 E.C.R. ¶ 3.

252. See *id.* ¶ 9.

253. See generally *Case C-221/89, The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1991 E.C.R. I-3905.

254. See *Brasserie*, 1996 E.C.R. ¶ 34.

255. See *id.* ¶ 24.

However, the ECJ rejected both arguments and decided to expand *Francovich*.<sup>256</sup> It held that direct effect was a “minimum guarantee,” adding that it was not an adequate remedy in cases where the damage was already produced.<sup>257</sup> As for the principle of separation of powers, the ECJ pointed out that deciding whether violations of EU law committed by national legislatures give rise to damages was a “question of Treaty interpretation which falls within the competences of the Court.”<sup>258</sup> In relation to the independence of the legislature, owing to the fact that all domestic authorities are bound by EU law, the ECJ deduced that the violation of EU law should be attributed to the member state as a whole.<sup>259</sup> The fact that the infringing authority was the legislature is thus irrelevant. As a result, the ECJ ruled that in so far as the conditions of liability are fulfilled, legislative activity in breach of EU law may give rise to financial reparation.<sup>260</sup>

As for the conditions of liability, the ECJ introduced the new concept of serious breach.<sup>261</sup> The ECJ recognised that in implementing EU policies member states may enjoy some discretion.<sup>262</sup> Therefore, not every violation of EU law gives rise to a right to reparation. In addition, the infringing member state must have “manifestly and gravely disregarded the limits on its discretion.”<sup>263</sup>

Two conclusions can be drawn from *Brasserie*. First, the ECJ opted for a cumulative use of remedies and upgraded state liability from a specific solution to a remedial gap (the lack of horizontal direct effect of directives) to a general principle of EU law.<sup>264</sup> This means that the principle of state liability applies regardless of whether injured parties may seek for prospective relief. Therefore, this case demonstrates that not only is the ECJ determined to create new remedies, but it is also willing to defend their universal application. Second, the concept of serious breach appears to be consistent with the principle of effectiveness of EU law, whilst avoiding over-deterrence on member states by the prospect of actions for damages.

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256. *See id.* ¶ 20.

257. *See id.*

258. *See id.* ¶ 27.

259. *See Brasserie*, 1996 E.C.R. ¶ 36.

260. *See id.*

261. *See id.* ¶ 55.

262. *See id.* ¶ 47.

263. *See id.* ¶ 55.

264. *See Brasserie*, 1996 E.C.R. ¶¶ 23-34.

### E. *Conditions of State Liability*

Although based on the general tort principle of *neminem laedere*, state liability of public authorities has special features, such as the attainment of tasks of general interests, which may limit its scope in various ways. In fact, in order to preserve a fair balance between public interests and private rights, any breach of EU law does not lead *inter alia* to a right to reparation. Therefore, member states' unlawfulness is not always automatically translated into state liability.

It is thus indispensable that additional requirements are met, namely: (1) the law infringed was intended to confer rights to individuals, (2) the existence of a serious breach, and (3) a direct causal link between the violation of EU law and the damage. Whereas the existence of the two first conditions can be determined by the ECJ through a preliminary reference procedure, determining whether there is a direct causal link falls within the competences of the national courts. Moreover, the ECJ has pointed out that the member states are not precluded from lowering down the threshold of liability under national law.<sup>265</sup> It follows that by announcing these three conditions, the ECJ compelled the member states to attain a minimum degree of diligence while acting in the sphere of EU law. It is to the study of these three cumulative conditions that this article now turns.

#### 1. First Condition: The Law Infringed Was Intended to Confer Rights on Individuals

As *Francovich* shows, this first condition cannot be confused with direct effect. Indeed, a EU provision can be "intended to confer rights on individuals" and nevertheless, not be unconditional or lack sufficient precision to be directly effective.<sup>266</sup> Put differently, a non-directly effective provision can give rise to state liability. Indeed, by contrast to direct effect, in order to determine whether an EU provision is intended to confer rights to individuals, it is sufficient that the beneficiary of that right and its content are ascertainable. It is not necessary for the EU provision to determine against whom this right may be enforced. It follows that for the purpose of state liability, conferring EU rights is a less stringent requirement than the "sufficient precision and unconditionality" of direct effect.

Furthermore, EU provisions intending to confer rights on individuals must aim at protecting specific or individual interests, and

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265. See *id.* ¶ 66.

266. Sacha Prechal, *Member State Liability and Direct Effect: What's the Difference After All?*, 17 EUR. BUS. L. REV. 299 (2006).

not only merely public or general interests. The question then then arises is whether the protection of individual interests must be the main objective of the EU provision, or whether it suffices that individual interests are included in its general scope of protection.<sup>267</sup> Until *Peter Paul*,<sup>268</sup> it appeared that the ECJ's answer was that the protection of individual interests as the specific goal of the EU measure was not required.<sup>269</sup> However, in *Peter Paul*, the ECJ took a different approach. The ECJ held that from the fact that banking directives impose obligations on regulatory authorities vis-à-vis credit institutions, or that the protection of depositors is also included among their objectives, it does not follow that these directives intended to confer rights on individuals as a result of defective supervision.<sup>270</sup> By ensuring the mutual recognition of authorizations and of prudential supervision systems, the ECJ stressed that banking directives focussed on harmonizing the banking sector and consequently, liability for defective supervision fell outside their scope.<sup>271</sup> As a result, *Peter Paul* evinces that the protection of individual interests cannot be an incidental objective of the EU law provision. An EU law provision will be deemed to confer rights on individuals where it directly seeks to protect them.

## 2. Second Condition: Serious Breach

In *Brasserie*, the ECJ held that a breach of EU law is sufficiently serious where the member state concerned "has manifestly and gravely disregarded the limits of its discretion."<sup>272</sup> In paragraph 56, the ECJ gave some guidelines to be taken into account by national courts when considering the seriousness of the breach, namely

[T]he clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [EU] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by [an EU] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. . . . On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement

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267. *Id.* at 310-15.

268. *See* Case C-222/02, *Paul v. Bundesrepublik Deutschland*, 2004 E.C.R. I-9425.

269. Case C-178/94, *Dillenkofer v. Bundesrepublik Deutschland*, 1996 E.C.R. I-4845, ¶¶ 36-39.

270. *See Paul*, 2004 E.C.R. 39-47.

271. *See id.* ¶¶ 40-43.

272. *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. F.R.G., and The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 55.

in question to be established or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.<sup>273</sup>

Thus, it seems that the seriousness of the breach is intrinsically linked to the notion of discretion. The more discretion enjoyed by the member state, the less likely it is for the breach to be serious. Conversely, where member states have no discretion, a minor breach of EU law would suffice to meet the “sufficiently serious breach” threshold. In this sense, in *Dillenkofer*<sup>274</sup> the ECJ held that because Germany did not enjoy any discretion to defer the implementation of Directive 90/314/EEC,<sup>275</sup> its late transposition was *per se* a serious breach.<sup>276</sup> Likewise in *Hedley Lomas*<sup>277</sup> the United Kingdom had refused to issue export licences of live sheep to Spain on the sole ground that Spanish slaughter houses did not comply with Directive 74/577/EEC.<sup>278</sup> The English Court referred two questions to the ECJ.<sup>279</sup> First, it asked whether the United Kingdom could rely on ex Article 30 EC (now Article 36 TFEU) to refuse to issue exports licences.<sup>280</sup> Second, if the first question was answered in the negative, did traders, who had suffered loss caused by the United Kingdom’s failure to grant export licences, have a right to reparation?<sup>281</sup> The ECJ answered that the directive

273. *Id.* ¶ 56. In this sense, in relation to the German law on Beer Purity, the ECJ held that German provisions which prohibited the marketing under the designation of “bier” of products manufactured in accordance with rules other than the “Biersteuergesetz,” were clearly a serious breach. *Id.* ¶ 59. The reason being is that under its previous ruling *Cassis de Dijon*, German law would be clearly incompatible and thus, it could not be seen as an excusable error. *Id.* Conversely, since its case law on the use of additives was not clearly defined, the ECJ stated that German provisions banning the use of additives could not be considered as a serious breach. *Id.* In the same way, concerning the Merchant Shipping Act, the ECJ stated that by enacting provisions which required British nationality as a condition for registration of vessels, UK legislation was directly discriminatory and hence, it had committed a serious breach. *Id.* ¶ 61. However, in relation to the requirements of residence and domicile, the ECJ held that, though these conditions breached *prima facie* ex Article 43 EC (now Article 49 TFEU), the UK had sought to justify them under common fisheries policy. *Id.* ¶¶ 62-63.

274. *Dillenkofer*, 1996 E.C.R. ¶¶ 26-27. By contrast, a plaintiff seeking compensation from a member state, which has defectively implemented a directive before the deadline, would need to prove the seriousness of the infringement. See Case C-392/93, *The Queen v. H.M. Treasury ex parte British Telecomm. Plc.*, 1996 E.C.R. I-1631; see also Case C-63/01, *Evans v. Sec’y of State for the Env’t, Transp., the Regions*, 2003 E.C.R. I-14447.

275. Council Directive 90/314, 1990 O.J. (L 158) 59 (EC).

276. *Dillenkofer*, 1996 E.C.R. ¶¶ 26-27.

277. Case C-5/94, *The Queen v. Ministry of Agric., Fisheries & Food ex parte Hedley Lomas*, 1996 E.C.R. I-2553.

278. Council Directive 74/577, 1974 O.J. (L 316) 10-11 (EC).

279. *Hedley Lomas*, 1996 E.C.R. ¶ 13.

280. *Id.*

281. *Id.*



precluded member states from relying on ex Article 30 EC (now Article 36 TFEU), and thus, the United Kingdom could not justify its violation of the freedom to export goods.<sup>282</sup> As for the possibility of claiming damages, the ECJ pointed out that, because the United Kingdom did not enjoy any discretion, its refusal to issue export licenses was considered to be a serious breach.<sup>283</sup>

Furthermore, in *Haim II*,<sup>284</sup> the ECJ held that in order to determine the seriousness of the breach, the degree of discretion enjoyed by domestic authorities under national law is irrelevant. It is only by reference to EU law that discretion must be measured.<sup>285</sup>

Finally, in *Brasserie*, the ECJ indicated that the concept of serious breach cannot be regarded as the possibility of making reparation conditional upon the existence of intentional fault or negligence.<sup>286</sup> It clarified that additional requirements based on this notion, which go beyond the concept of serious breach, are forbidden.<sup>287</sup>

Therefore, despite the fact that the concept of serious breach gives some flexibility to the national judiciary, the ECJ has introduced a measure of uniformity. Indeed, national courts must not pay attention to the intentions of the infringing state, but to the general circumstances in which the breach occurred. As a result, it seems that “serious breach” is based on objective criteria.

### 3. Third Condition: Direct Causal Link

As mentioned above, it is for the national court to decide whether there is a direct causal link between the breach of EU law and the damage suffered. However, this does not mean that causation must be seen as a wholly national concept.<sup>288</sup> It is true that causation must be inferred from the facts of the case and thus, national courts are in a better position to determine its existence. Nonetheless, the ECJ’s guidance remains necessary in order to clarify how the causality factor may affect the vertical and horizontal allocation of damages.<sup>289</sup>

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282. *Id.* ¶ 21.

283. *Id.* ¶ 25.

284. Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123, ¶ 40.

285. *Id.*

286. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. F.R.G., and The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. ¶¶ 79-80.

287. See generally V. King, *The Fault Issue in State Liability: From Francovich to Dillenkofer*, 18 EUR. COMPETITION L. REV. 110 (1997).

288. See Panagiotis Takis Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?*, 38 COMMON MKT. L. REV. 301 (2001).

289. See Goergios Anagnostaras, *Not as Unproblematic as You Might Think: The Establishment of Causation in Government Liability Actions*, 27 EUR. L. REV. 663 (2002).

In this regard, there are four factors which may break the chain of causation, namely interventions by the EU institutions, by a different public authority, by a third party and by the injured party itself.<sup>290</sup> First, when national authorities are required to implement an EU measure leaving no room for discretion and their act is subsequently struck down by the ECJ, the damages resulting from its unlawfulness cannot be attributed to the member states.<sup>291</sup> Indeed, there is no casual link between national implementing measures and the damage occurred, instead the plaintiff should claim damages against the EU institution which adopted the unlawful act. Second, in *Brinkmann*,<sup>292</sup> the ECJ offered the possibility for Danish administrative authorities to correct the failure of the legislature to implement Directive 79/32/EEC<sup>293</sup> on time.<sup>294</sup> Although this legislative failure is a serious breach, the ECJ pointed out that the immediate effect given by the administrative authorities to the directive interrupted the chain of causation.<sup>295</sup> Thus, in accordance with *Brinkmann*, even if the ECJ considers that a violation of EU law is attributable to the state as a whole, this does not prevent different national authorities from cooperating with each other to ensure that EU law is observed. Third, third parties who infringe EU law may also interrupt the chain of causation. A good illustration is provided by cases where third parties deliberately violate EU law and a member state fails to adopt any measure putting an end to such violations.<sup>296</sup> It is true that the ECJ has held that the passive behaviour of member states can constitute a failure to fulfil a member state's obligations under the treaty, however, this does not mean that state liability would arise. In fact, one could argue that the behaviour from which the damage arose was not caused by the State, but by a third party and consequently, a casual link is missing. In addition, if the EU provision breached has horizontal direct effect, pursuant to *Courage*,<sup>297</sup> the injured party could directly seek compensation from the infringing party. As a result, in order for national courts to determine the existence of a casual link, third parties behaviour must be taken into consideration. Finally, in *Brasserie*, the ECJ stated that there is a duty of mitigation on the injured party, whereby the injured party must, as far as possible, do everything to avoid or limit any loss or

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290. *Id.* at 669.

291. *See* Case 106/87, *Asteris AE v. Hellenic Republic*, 1988 E.C.R. 5515.

292. Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, 1998 E.C.R. I-5255.

293. Council Directive 79/32, 1979 O.J. (L 10) 8-10 (EC).

294. *Brinkmann Tabakfabriken GmbH*, 1998 E.C.R. I-5255.

295. *Id.* ¶¶ 28-29.

296. Case C-265/95, *Comm'n of the European Cmty. v. French Republic*, 1997 E.C.R. I-6959.

297. C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297.

damage.<sup>298</sup> In particular, the injured party must “avail himself in time of all the legal remedies available to him.”<sup>299</sup> Thus, if the latter does not fulfil his duty of mitigation, a causal link could be missing. However, it does not follow from the foregoing that all remedies must be used before claiming damages, regardless of their probability of success. Indeed, in *Metallgesellschaft*,<sup>300</sup> the ECJ held that the duty of mitigation is only applicable in relation to remedies which have the prospect of being upheld.<sup>301</sup>

Consequently, the direct causal link requirement cannot be taken as a given and it may be relied upon by the national courts as an escape mechanism to avoid rendering the infringing member state liable for damages. In this sense, after *Brasserie* was delivered and sent back to Germany, the German court held that element of causation was missing because of the fact that the damages were caused by multiple breaches and since the plaintiff did not prove the correlation between the ones deemed serious and the damage suffered.<sup>302</sup>

#### F. *Liability of the National Judiciary*

In *Brasserie*, by indicating that the principle of state liability is applicable to the member states as a whole, regardless of whether the breach of EU Law has been committed by the legislature, the executive or the judiciary, the ECJ supported its universal application.<sup>303</sup> This view was ratified in *Köbler v. Austria*,<sup>304</sup> where the ECJ was called upon to decide for the first time on the liability of national courts of last instance.<sup>305</sup>

The fact of the case can be summarised as follows. Professor Köbler applied for a special length-of-service increment granted to university professors who had completed a 15-year service in Austrian universities.<sup>306</sup> However, his application was dismissed on the grounds that his years of service in other European universities could not be taken into account.<sup>307</sup> He challenged this decision, arguing that Austrian law

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298. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. F.R.G., and The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. ¶¶ 84-85.

299. *Id.* ¶ 84.

300. Joined Cases C-397/98 & C-410/98, *Metallgesellschaft Ltd. v. Comm’rs of Inland Revenue*, 2001 E.C.R. I-1727.

301. *Id.*

302. *Case Summary: Brasserie du Pêcheur SA v. Germany*, 1 C.M.L.R. 971 (1997).

303. *Brasserie*, 1996 E.C.R. ¶ 32.

304. *See* Case C-224/01, *Köbler v. Republik Österreich*, 2003 E.C.R. I-10239.

305. *See* Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, 2006 E.C.R. I-5177.

306. *See Köbler*, 2003 E.C.R. ¶ 6.

307. *See id.* ¶ 6.

was in breach of the free movement of workers.<sup>308</sup> The case reached the Verwaltungsgerichtshof (Austrian Supreme Administrative Court) which requested a preliminary reference to the ECJ.<sup>309</sup> Before the question was answered, the ECJ delivered *Schöning-Kougebetopolou*.<sup>310</sup> There, it ruled that a collective agreement which denies promotion on grounds of seniority to public employees, who have completed comparable employment in the public service of another member state, was in breach of the free movement of workers.<sup>311</sup> Thus, the registrar of the ECJ asked the Verwaltungsgerichtshof whether in the light of this case, it considered necessary to maintain its request for a preliminary reference.<sup>312</sup> It follows that the Verwaltungsgerichtshof had two options, either to uphold Professor Köbler's claim or to maintain its request. Nevertheless, the Verwaltungsgerichtshof took a different approach. It withdrew the preliminary reference, but dismissed his claim, holding that the length-of-service could be qualified as a loyalty bonus and thus, it was a justified derogation from the free movement of workers.<sup>313</sup> As a result, Professor Köbler filed an action in damages against the Austrian State before the Regional Civil Court of Vienna.<sup>314</sup> He alleged that by infringing its obligations under ex Article 234 EC (now Article 267 TFEU) and by misinterpreting the case-law of the ECJ, the Verwaltungsgerichtshof had infringed EU law, and consequently, he was entitled to reparation.<sup>315</sup> The Regional Civil Court of Vienna made a reference to the ECJ.<sup>316</sup> It asked whether the principle of state liability was applicable to national courts of last instance, and if so, what were the conditions for the imposition of judicial liability.<sup>317</sup> It also asked whether compensation could be awarded to Professor Köbler.<sup>318</sup>

First, the ECJ held that the principle of state liability was applicable to violations of EU law committed by the judicial branch of the member state.<sup>319</sup> Because infringing states are seen as a single entity under international law, *a fortiori* states must also be viewed as a whole under

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308. Consolidated Version of the Treaty on the Functioning of the European Union, art. 45, Mar. 25, 1957, 2008 O.J. (C 115) 64; Council Regulation 1612/68, art. 7, 1968 O.J. (L 257) 2-12 (EC).

309. See *Köbler* 2003 E.C.R. ¶ 7.

310. Case C-15/96, *Schöning-Kougebetopolou v. Freie und Hansestadt Hamburg*, 1998 E.C.R. I-47.

311. See *Köbler* 2003 E.C.R. ¶ 30.

312. See *id.* ¶ 8.

313. See *id.* ¶¶ 10-11.

314. See *id.* ¶ 12.

315. See *id.*

316. See *Köbler*, 2003 E.C.R. ¶ 14.

317. See *id.*

318. *Id.*

319. See *id.* ¶¶ 32-33.

EU law.<sup>320</sup> The ECJ added that pursuant to the principle of effectiveness, EU rights would be weakened if individuals were precluded from obtaining reparation where national courts of last instance violate EU law.<sup>321</sup> Consequently, the ECJ acknowledged that, because a decision of a court of last instance in breach of EU law cannot be repealed, individuals must be provided with an alternative way to protect their rights.<sup>322</sup> Thus, rendering national courts of last instance liable prevents violations of EU rights from being unsolved.<sup>323</sup> The ECJ also acknowledged that liability of the judiciary had been recognised by the European Court of Human Rights.<sup>324</sup>

In addition, the ECJ dismissed the arguments of the United Kingdom, according to which state liability for judicial acts not only would undermine the independence of the judiciary, but it would also be contrary to the principle of *res judicata*.<sup>325</sup> The ECJ replied that because it is the state which is liable and not the judge in his personal capacity, there is no threat to the independence of the judiciary.<sup>326</sup> Additionally, the ECJ rejected that the principle of state liability would undermine the authority of the national courts of last instance.<sup>327</sup> On the contrary, the ECJ opined that it would “enhance the quality of a legal system” and “in the long run [its] authority. . . .”<sup>328</sup> Likewise, there is no violation of the principle of *res judicata*, since an action in damages has neither the same purpose nor necessarily the same parties as the original underlying suit.<sup>329</sup>

As for the conditions of liability, the ECJ held that they remain the same.<sup>330</sup> However, the ECJ pointed out that, in light of the special role of the judiciary and legal certainty, national courts of last instance should only incur in liability in exceptional circumstances, that is, where there is a manifest infringement of the law applicable.<sup>331</sup> Indeed, by contrast to the executive and the legislature, the degree of discretion is not an

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320. See *id.* ¶ 32.

321. See *Köbler*, 2003 E.C.R. ¶ 33.

322. See *id.* ¶ 36.

323. *Id.* ¶¶ 31-35.

324. See *id.* ¶ 49.

325. *Id.* ¶¶ 25-26.

326. See *Köbler*, 2003 E.C.R. ¶ 42.

327. See *id.* ¶ 43.

328. See *id.*

329. *Id.* ¶¶ 39-43. However, this argument does not appear to be entirely convincing. See Claus D. Classen, *Case Note: Köbler v. Republik Österreich*, 41 COMMON MKT. L. REV. 813 (2004) (holding that it is very difficult to see how the national court in charge of solving the claim for damages will not go into reviewing the lawfulness of the ruling of the national court of last instance).

330. See *Köbler*, 2003 E.C.R. ¶¶ 51-52.

331. *Id.* ¶¶ 52-56.

appropriate parameter to measure the seriousness of the breach committed by national courts of last instance.<sup>332</sup> Instead, liability will be determined by assessing, for instance, the degree of clarity and precision of the rule infringed, whether the breach was intentional, whether it was erroneous, or whether the national court of last instance violated its obligation to refer under ex Article 234, third indent, EC (now Article 267, third indent, TFEU).

Finally, the ECJ held that its findings in *Schoning-Kougetopoulou* were applicable to the case at issue.<sup>333</sup> Consequently, the Austrian length-of-service scheme was contrary to EU law. However, the ECJ considered that the Verwaltungsgerichtshof had not committed a serious breach.<sup>334</sup> First, there was no previous case law of the ECJ on whether loyalty bonus could be a justified derogation from free movement.<sup>335</sup> Second, although by withdrawing its request for a preliminary reference, the Verwaltungsgerichtshof committed a procedural violation of ex Article 234 EC (now Article 267 TFEU), the ECJ considered that its seriousness was extenuated by the fact that the withdrawal was prompted by a misinterpretation of *Schöning-Kougebetopolou*.<sup>336</sup> Hence, the ECJ concluded that the Verwaltungsgerichtshof had not manifestly and seriously breached EU law.<sup>337</sup> Prof. Köbler was not entitled to reparation.<sup>338</sup>

It is noteworthy to point out that, while courts of last instance have an obligation to refer, inferior courts enjoy full discretion. The ECJ indicated in *Brasserie* that the person who has suffered damage for breach of EU law has a duty of mitigation, which may include pursuing “all legal remedies available to him,” such as appealing judicial decisions inconsistent with EU law.<sup>339</sup> This means that, in light of the duty of mitigation imposed on the injured party and the obligation to refer of national courts, under EU law, the principle of state liability for acts of the judiciary is confined to those emanating from national courts of last instance.

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332. TRIDIMAS, *supra* note 189, at 524.

333. *Köbler*, 2003 E.C.R. ¶¶ 81-86.

334. *Id.*

335. *Id.* ¶¶ 80.

336. *Id.* ¶ 123.

337. *Id.* ¶¶ 117-124.

338. However, AG Leger was more demanding with the Austrian Court and understood that Mr Köbler was entitled to reparation. See *Köbler*, 2003 E.C.R. ¶ 170 (opinion of AG Leger)

339. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. F.R.G.*, and *The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029, ¶¶ 84-85.

Furthermore, not only is *Köbler* the logical continuation of the case-law of the ECJ on state liability, but it also introduces significant constitutional changes. On the one hand, *Köbler* highlights that none of the branches of government can escape from faithfully fulfilling its duties under EU law. In the same way, by ratifying the three-pronged test enounced in *Brasserie*, the ECJ resisted the assault of several member states urging for the introduction of more stringent conditions of liability. On the other hand, its innovative feature lies in that it modifies, to a certain extent, the relationships between the ECJ and national courts of last instance. In accordance with ex Article 234, third indent, EC (now Article 267, third indent, TFEU), where in order to solve the case, national courts of last instance are called upon to interpret EU law, the treaty requires the latter to seek guidance from the ECJ by requesting a preliminary reference. The rationale behind this obligation is to create a common understanding of the EU Law by “(nothing) other than the expression of a mechanism of judicial cooperation and mutual trusts between courts.”<sup>340</sup> In *CILFIT*, the ECJ tolerated that the obligation to refer imposed on national courts of last instance did not apply in cases where “the correct application of EU law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved . . .” and “the matter is equally obvious the courts of the other member states and to the Court of Justice.”<sup>341</sup> Thus, by giving up its place as final interpreter of the EU law to the national courts of last instance in cases where the interpretation of EU law is obvious, the ECJ acknowledged the contribution of these national courts in the interpretation and application of EU law. However, the Treaty does not provide any means to prevent or to sanction a misuse of the *CILFIT* doctrine. Because there is no appeal to the ECJ, before *Köbler* there was no remedy against a national court of last instance infringing its obligations under ex Article 234 EC (now Article 267 TFEU). Thus, *Köbler* can be read as a curtailment to this doctrine, which also provides a remedial answer to a structural need. Indeed, as Professor Tridimas points out, national courts of last instance will think twice before applying *CILFIT* and would rather “play safe.”<sup>342</sup> In this regard, by upholding the liability of the national judiciary, the ECJ has introduced a federal element capable of establishing its leadership in the relationship with national courts. As discussed below, liability for judicial acts can be seen as a functional substitute to the absence of an appellate

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340. *Köbler*, 2003 E.C.R. ¶ 111 (opinion of AG Leger).

341. Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415, ¶ 16.

342. For critical view of *Köbler*, see Peter J. Wattel, *Köbler*, CILFIT & Welthgrove: *We Can't Go On Meeting Like This*, 41 COMMON MKT: L. REV. 177 (2004).

jurisdiction over national courts' decisions. Consequently, state liability for judicial acts demonstrates that the ECJ sees itself as "the Supreme Court of the European Union." If "cooperation and mutual trust" define the "ECJ-national courts" relations, liability of the national judiciary allocates the role played by each party in the EU legal order.

### III. STRUCTURAL DIFFERENCES AND STATE FINANCIAL IMPLICATIONS

The historical context in which the principles of sovereign immunity of states and of state liability for damages arose may provide the explanation of a ruling in an individual case. However, history is not sufficient in itself to explain subsequent developments in the case-law. Indeed, history may not in itself justify the constitutional value attributed to these two principles. While the enactment of the Eleventh Amendment provides the constitutional basis for state sovereign immunity, it is not a solid reason in itself to justify its extensive application. In the same way, the fact that state liability first appeared as an adequate solution to the non-transposition of directives does not explain its subsequent application to directly effective provisions.

Accordingly, this section tries to explain why the U.S. Supreme Court and the ECJ have taken different stands towards state liability for damages. It is first argued that structural differences between the federal architectural design of the United States and of the EU provide valuable insights as to why the U.S. Supreme Court persistently refuses to render states liable for breach of federal law, whereas the ECJ considers state liability as remedy vital to the full effectiveness of EU law. In addition, whereas the ECJ does not pay much attention to the adverse economic impacts of its rulings on member states, the U.S. Supreme Court considers the financial integrity of the state treasuries as a key element of its vision of federalism. Thus, the interplay between retrospective and prospective remedies and the state treasuries may shed some light on this issue.

#### A. *Structural differences: EU Directives and the Principle of "Anti-Commandeering"*

##### 1. Some Theoretical Views on Commandeering

There are two ways in which "central"<sup>343</sup> and state authorities may interact, namely either the central government is empowered to employ States as regulatory agencies or not.<sup>344</sup>

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343. In order to avoid confusions, the term "central" instead of "federal" is preferred in this section.



Where the central government is empowered to rely on component states, it may do so in two ways. The central government may lay down a general framework within which states must adopt policy measures.<sup>345</sup> Thus, the central government adopts “*policy-making*” commands which, as a general rule, are addressed to state legislatures.<sup>346</sup> Or, the central government may adopt policy measures in their entirety, leaving their execution to state authorities.<sup>347</sup> Consequently, the central government may issue “*executive-enforcing*” commands, often addressed to the state administrative authorities.<sup>348</sup>

Furthermore, where the central government commands component states, the effectiveness of federal law is intrinsically linked to the effectiveness of central commands. The better component states perform their implementing duties, the more effective “central law” will be.<sup>349</sup> Conversely, where the central government is not empowered to command states, “central law” can only grant rights to or impose obligations on individuals. It follows that, because the central government is not empowered to rely on state legislative and administrative apparatus, a strong federal bureaucracy is of a paramount importance in order to secure proper federal law enforcement.<sup>350</sup>

As a result, where commandeering is possible, the effectiveness of central law depends on the strength of central commands. On the contrary, if the constitutional text precludes the central government from relying on states, then the effectiveness of central law would depend on the enforcement capacities of the central government alone.

## 2. The EU and the United States

In Europe, the EU institutions have both the power to legislate directly upon individuals and to compel Member States to implement EU policies.

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344. Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE U.S. AND THE EU* 213-15 (Kalypso Nicolaidis & Robert Howse eds., 2001).

345. *Id.* at 230-34.

346. *Id.*

347. *Id.*

348. Moreover, from the standpoint of individual rights, this distinction also seems relevant. In relation to “policy making” commands, owing to the fact that states may enjoy some, albeit limited, discretion, state legislative intervention is required in order to fully concretise individual rights. See Halberstam, *supra* note 344, at 230. However, where “executive-enforcement” commands are issued, individual rights have already been defined by the central government. State intervention is not necessary to define their scope. It is only required to enforce them. *Id.*

349. *Id.* at 238-42.

350. *Id.*

By adopting EU regulations,<sup>351</sup> the EU institutions may grant rights to and impose obligations on individuals. EU Regulations can also issue “executive-commands” addressed to the member states.<sup>352</sup> However, since there is no need for further implementing measures, EU Regulations do not lay down “policy-making” commands. Moreover, regulations are directly effective and thus, individuals can rely on them before national courts to enforce EU rights. Thus, state intervention is not necessary in order to give full effect to individual EU rights.

By contrast, EU directives<sup>353</sup> are not addressed to individuals but to the member states. When the EU institutions adopt a directive, member states are obliged to attain a certain result, but they enjoy some discretion as to the means to be deployed in implementation. Therefore, member states are required to enact or adapt national legislation pursuant to the “*policy-making*” commands laid down in the directive. Further, in order for EU rights embodied in a directive to be fully directly effective, member states must enact legislation. In other words, state intervention is required. Thus, when implementing a directive, member states act as EU agents.

On the contrary, in the United States, in accordance with the judicial principle of “anti-commandeering,”<sup>354</sup> Congress lacks powers to use states as implementers of regulation. In the U.S. Supreme Court’s opinion, the framers of the U.S. Constitution thought that the confederate method, according to which congressional powers targeted the states and not the individuals, was inappropriate in order to create a strong central government.<sup>355</sup> The Framers decided that Congress should only be vested with the power to legislate with respect to individuals (e.g. power to tax, to regulate interstate commerce),<sup>356</sup> who, in Hamilton’s words, are “the only proper objects of government.”<sup>357</sup> The U.S. Supreme Court has further found that where the subject matter is not pre-empted by the federal government and the latter commands states to implement its

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351. Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Mar. 25, 1957, 2008 O.J. (C 115) 171 (“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”).

352. *See, e.g.*, Council Regulation 1210/2003, 2003 O.J. (L. 169) 6-23 (EC); Council Regulation 1/2003, 2003 O.J. (L. 1) 1-25 (EC).

353. Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Mar. 25, 1957, 2008 O.J. (C 115) 172 (“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”).

354. *See Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981); *see also FERC v. Miss.*, 456 U.S. 742 (1982).

355. *N.Y. v. U.S.*, 505 U.S. 144 (1992).

356. *See FERC*, 456 U.S. at 762-66.

357. THE FEDERALIST NO. 15, at 76 (Alexander Hamilton) (Goldman ed., 2008).

policies, state officials cannot act in accordance with the views of their electorate.<sup>358</sup> Consequently, accountability between federal and state governments is blurred.<sup>359</sup> In other words, commandeering disturbs the allocation of political responsibilities between these two levels of governance and it makes it impossible for the electorate to determine the institutional origin of any decision.

Moreover, not only is the principle of anti-commandeering applicable to the state legislative branch, but also to the executive one. Therefore, the U.S. Supreme Court understands that the U.S. Constitution prohibits both “policy-making” and “executive-enforcement” commands.<sup>360</sup>

However regarding states courts, the U.S. Supreme Court has held that commandeering is possible.<sup>361</sup> In its view, the reason for this distinction lies in Articles III and VI of the U.S. Constitution.<sup>362</sup> Article III only provides for “a Supreme Court,” leaving the creation of lower federal courts to congressional discretion.<sup>363</sup> This option is known as the “Madisonian Compromise.”<sup>364</sup> Congress could have relied exclusively on state courts to enforce federal law. In the same way, in Article VI there is no constitutional provision directed to state legislatures that is similar to the judge clause.<sup>365</sup> Accordingly, even though the constitutional design precludes commandeering state executive and legislative branches, the supremacy clause and the Madisonian Compromise authorize Congress to command state courts to enforce federal law.

Although Congress cannot oblige states to implement its policies, it is nonetheless entitled to provide some incentives. It follows that this principle does not prevent Congress from encouraging states to regulate in compliance with its policies. In *New York v. United States*,<sup>366</sup> the U.S. Supreme Court indicated that the difference between encouraging and compelling is that, while the former allows state officials to remain accountable to local preferences,<sup>367</sup> the latter does not. It is true that in

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358. *N.Y.*, 505 U.S. at 169.

359. *Id.* at 166-69.

360. *See* *Printz v. U.S.*, 521 U.S. 898 (1997); *see also* Evan H. Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (1997).

361. *See* *Printz*, 521 U.S. at 907.

362. *Id.*

363. *Id.* (holding that “Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States”).

364. *See id.*

365. *See N.Y.*, 505 U.S. 144, 178-79 (1992).

366. *See id.*

367. *Id.*, at 168.

order for states to benefit from federal incentives, they are required to follow Congress' instructions. However, if a state decides to align its legislation to congressional wishes and then, fails to do so, there will be no constitutional violation. It will simply lose its right to federal incentives. Accordingly, even if states consent to follow Congress' instructions, they cannot be considered as federal agents.

As a result, whereas European member states may be required by the EU institutions to act as their agents, this possibility is precluded in the United States.

### 3. State Liability and Commandeering

In relation to state liability, states may commit two types of infringements: omitting to give full effect to federal/EU rights, or actively breaching federal/EU legislation granting rights to individuals. This section will focus on the first type of breach.

In Europe, the first type of violation corresponds to member states' failure to implement a directive. In this sense, if a Member State fails to transpose a directive, it is settled case law that individuals would not be able to enforce EU rights against other individuals (non-horizontal direct effect of directives).<sup>368</sup> Consequently, Member States' inaction hinders the effectiveness of EU law.

Thus, in order to ensure *l'effet utile* of directives, the ECJ was obliged to find ways which would deter member states from disobeying EU commands. At first, by holding that after the implementation deadline, individuals could rely on non-implemented directives against infringing states (vertical direct effect),<sup>369</sup> the ECJ prevented member states from benefiting from their own infringements. In the same way, in *Foster v. British Gas*,<sup>370</sup> by widening the concept of state, the ECJ simultaneously extended the scope of vertical direct effect of directives.<sup>371</sup> Second, the ECJ held in *Marleasing*<sup>372</sup> that national courts are required to interpret national law "in the light of the wording and purpose" of the directive.<sup>373</sup> Accordingly, where national law can be interpreted in different ways, national courts must choose the one which

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368. See Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723; Case C-91/92, *Faccini Dori v. Recreb Srl.*, 1994 E.C.R. I-3325.

369. See Case C-9/70, *Franz Grad v. Finanzamt Traunstein*, 1971 E.C.R. 825; Case C-41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337; Case C-148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629.

370. See Case C-188/89, *Foster v. British Gas plc.*, 1990 E.C.R. I-3313.

371. See *id.*

372. See Case C-106/89, *Marleasing SA v. La Comercial Interacional de Alimentacion SA*, 1990 E.C.R. I-4135.

373. See *id.*

is consistent with the non-implemented directive. Therefore, both vertical direct effect and consistent interpretation can be seen as deterring mechanisms against member states' disobedience of EU commands. However, these mechanisms are limited. In fact, they do not provide an effective remedy in cases where national law does not leave any room for judicial interpretation and where an individual seeks to rely on EU rights contained in a non-implemented directive against another individual. In such cases, the effectiveness of the non-implemented directive is seriously jeopardized.

Finally, the principle of state liability can be seen as the ultimate endorsement to EU directives' commands. The principle of state liability for breach of EU law can be examined under two convergent perspectives. With respect to the protection of individual's rights, the principle of state liability can be seen as an effective remedy. Although individuals cannot rely on EU rights laid down in a directive against another individual, state liability gives rise to compensation against the infringing member state.

The principle of state liability can be seen as an economic sanction, in favour of private individuals from the point of view of the effectiveness of EU directives. Therefore, by shifting the economic cost of the non-transposition of a directive from the private parties to the infringing member state, the latter would be eager to comply with EU commands. As a matter of fact, in light of the ECJ's case law, failure to implement a directive is not only the scenario which opened the door to claims in damages for breach of EU law,<sup>374</sup> but it is also the paradigmatic example of a "serious breach."<sup>375</sup> Thus, the rationale of the ECJ is simple: the combined effect of vertical direct effect, the *Marleasing* doctrine, and the principle of state liability would deter member states from non-implementation of EU directives. The principle of state liability renders more effective EU commands, and thus, EU law.

The United States Congress legislates directly upon individuals, that is, federal rights are directly effective without the need for state intervention. "The failure to implement a directive" scenario simply does not exist under U.S. constitutional law. State inaction has no adverse repercussion on federal rights. The states would only act pursuant to federal policies in so far as they freely consent to do so. However, as previously mentioned, if they agree to follow the commands of the federal government and subsequently fail to do so, no constitutional obligation will be breached, only the right to federal

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374. See Case C-6/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

375. See Case C-178/94, *Dillenkofer v. Bundesrepublik Deutschland*, 1996 E.C.R. I-4845, ¶¶ 36-39.

incentives will be lost.<sup>376</sup> Therefore, because states do not have a constitutional obligation to act in compliance with the congressional mandates, they cannot omit what they are not required to do. With due regard to the exception of state courts, the effectiveness of federal law depends on federal authorities alone.

#### 4. *Köbler*: A Functional Substitute for the Absence of an Appellate Jurisdiction

A structural difference may also explain why the ECJ has decided not to exclude the judiciary from incurring liability for breach of EU law, whereas in the United States, not only do judges enjoy absolute immunity from suit, but the U.S. Supreme Court has also a restricted view on collateral challenges to state court decisions.<sup>377</sup>

The EC Treaty (now replaced by the FEU Treaty) does not provide any appeal over national courts' decisions. The ECJ does not have an appellate jurisdiction to review the compatibility of national courts rulings with EU law. Instead, the treaty provides for a preliminary reference procedure through which the ECJ and national courts cooperate

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376. For instance, Congress may decide to condition the release of federal funds upon states waiving their immunity. Said differently, conditional spending would allow Congress to do indirectly that which it could not do directly. To overcome state immunity, the conditional release of federal funding would have to comply with the three requirements laid down in *South Dakota v. Dole*, namely (1) spending must pursue the general welfare, (2) conditions imposed by Congress must be unambiguous (3) conditions must not be by themselves unconstitutional. See *S.D. v. Dole*, 483 U.S. 203 (1987). In addition, the U.S. Supreme Court noted that conditional spending may not pass the point at which "pressure turns into compulsion." *Id.* at 210. Likewise, *Dole* appears to require some degree of relatedness between the federal spending program and the conditions imposed. The U.S. Supreme Court has not determined the level of scrutiny in applying the coercion test or the relatedness test. When a state refuses to waive its immunity, it remains uncertain whether the loss of all federal funds would amount to coercion. To this effect, in *College Savings Bank*, Justice Scalia pointed out that "where the constitutionally guarantee protection of the States' sovereign immunity is involved, the point of coercion is automatically passed . . . when what is attached to the refusal to waive is the exclusion of the state(s) from otherwise lawful activity." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999). Does this mean that Congress may withhold federal funds to non complying states which may continue to engage in the desired conduct, or is the U.S. Supreme Court endorsing a new definition of "coercion" whereby a waiver of state immunity automatically amounts to compulsion? The former option would grant Congress an important leeway to contain conflicting states. By contrast, the latter option would entail that congressional spending powers have been significantly curtailed. See Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 *STAN. L. REV.* 1331, 1373-80 (2001); Choper & Yoo, *supra* note 173, at 248-53.

377. James E. Pfander, *Köbler v Austria: Expositional Supremacy and Member State Liability*, 17 *EUR. BUS. L. REV.* 275 (2006); see also Meltzer, *supra* note 13, at 75-81.

in interpreting EU law.<sup>378</sup> The main difference between a preliminary reference procedure and an appellate jurisdiction is twofold.<sup>379</sup> First, parties do not have a right to appeal.<sup>380</sup> The decision to refer falls within the exclusive competence of the national court.<sup>381</sup> Second, even though the ECJ has occasionally provided detailed guidance indicating how a case should be solved,<sup>382</sup> it is still for the national court to follow and apply the preliminary ruling.<sup>383</sup> The cooperative nature of the preliminary reference procedure is further demonstrated by the fact that, though ex Article 234 EC (now Article 267 TFEU) imposes on national courts of last instance an obligation to refer where the interpretation of EU law is decisive for the case at issue, the EC Treaty (now replaced by the FEU Treaty) does not provide any sanction or remedy against its violation.

Thus, the absence of a remedy against a breach of ex Article 234, third indent, EC (now Article 267, third indent, TFEU) is an important weakness of the preliminary reference procedure, not only because parties injured by judicial action are not protected, but also because infringing national courts of last instance could threaten the uniform application and primacy of EU law.<sup>384</sup>

It follows that *Köbler* can be read as introducing a functional substitute to the lack of an appellate jurisdiction. In accordance with *Köbler*, where a court of last instance infringes ex Article 234, third

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378. There is no equivalent to the preliminary reference procedure in the United States. For an argument supporting the transplantation of the preliminary reference procedure in the United States, see Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Federalism*, 44 AM. J. COMP. L. 421 (1996).

379. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (giving four characteristics of appellate review: (1) undoing the determinations of law; (2) binding nature of its review; (3) unidirectional effect of the rulings of the appellate court; and (4) it is committed to two functions “error correction” and “enhancing consistency,” and also three characteristics of judicial dialogue: (1) prospective review, (2) bidirectional, (3) dimension of voluntariness).

380. See Case 44/65, *Knappschaft v. Singer*, 1965 E.C.R. 1191, 1198; Case C-412/96, *Kainuun Liikenne Oy & Oy Pohjolan Liikenne*, 1998 E.C.R. I-5141, ¶ 23; Case C-402/98, *ATB v. Ministero per le Politiche Agricole*, 2000 E.C.R. I-5501, ¶ 29.

381. See sources cited *supra* note 380.

382. See Case 20/87, *Ministère Public v. André Gauchard*, 1987 E.C.R. 4879, ¶ 5; Case C-515/99, *Reisch v. Bürgermeister der Landeshauptstadt Salzburg*, 2002 E.C.R. I-2157, ¶ 22.

383. See Case 100/63 *Van der Veen v. Bestuur der Sociale Verzekeringsbank*, 1964 E.C.R. 565, 572 (English Special Edition); Case C-203/99 *Veedefald v. Århus Amtskommune*, 2001 ECR I-3569, ¶ 31.

384. It is true that ex Article 226 EC (now Article 258 TFEU) enforcement actions could be seen as a way of enforcing the obligation to refer. See Case C-129/00, *Comm'n of the Eur. Cmty. v. Italian Republic*, 2003 ECR I-14637. Nonetheless, injured parties will not benefit from this type of remedy, which has rather a prospective character.

indent, EC (now Article 267, third indent, TFEU) and in so far as the three conditions enounced in *Brasserie* are fulfilled, the injured party is entitled to reparation. However, it is very unlikely that the court dealing with the claim for damages will adjudicate in favour of the plaintiff without making a reference to the ECJ. First, the claim for damages will often be heard by a court inferior to the one which committed the breach. Consequently, it would not feel at ease ruling against its hierarchical authority. Second, a lack of referral may lead the infringing court to determine its own infringement and thus, to put into question the impartiality of the judicial system.<sup>385</sup> Hence, it appears that courts in charge of solving the claims for damages will often make a reference to the ECJ. Consequently, the ECJ will often decide whether the national court of last instance should incur liability. Thus, *Köbler* fulfils an analogous function as a direct appeal to the ECJ. It provides a remedial solution to a structural gap. Although, the cooperative and trustful nature of a preliminary reference procedure remains, *Köbler* can be understood as opening the way for a “*de facto*” appellate jurisdiction of the ECJ.<sup>386</sup>

On the contrary, the U.S. Supreme Court has appellate jurisdiction to review the consistency of state courts decisions with the U.S. Constitution and federal law.<sup>387</sup> Article III of the U.S. Constitution states that the U.S. Supreme Court has appellate jurisdiction over all the cases to which the federal judicial power extends.<sup>388</sup> Although it is not expressly stated in the U.S. Constitution, in *Martin v Hunter’s Lessee*,<sup>389</sup> the U.S. Supreme Court strongly asserted its appellate jurisdiction over state court decisions.<sup>390</sup> First, pursuant to Article III of the U.S. Constitution, the appellate jurisdiction of the U.S. Supreme Court is determined by the notion of “case,” regardless of the court it comes from.<sup>391</sup> Second, as mentioned above, in light of the Madisonian Compromise, had Congress decided not to establish federal courts, “the appellate jurisdiction of the [S]upreme [C]ourt would have nothing to act upon unless it could act upon cases pending in the states courts.”<sup>392</sup> Third, the U.S. Supreme Court’s appellate jurisdiction ensures that the U.S. Constitution and federal law are uniformly applied.<sup>393</sup> Furthermore, the appellate jurisdiction of the U.S. Supreme Court has always been

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385. Jan Kómarek, *Federal Elements in the Community Judicial System: Building Coherence in the Community*, 42 COMMON MKT. L. REV. 9 (2005).

386. *Id.* at 13-16.

387. Meltzer, *supra* note 13, at 62-64.

388. U.S. CONST. art. III, § 2.

389. *See Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

390. *See id.* at 351.

391. *See id.* at 327-28.

392. *Id.* at 340.

393. *See Martin*, 14 U.S. at 349-50.



expressly endorsed by Congress in its various judiciary acts.<sup>394</sup> It is also noteworthy that the appellate jurisdiction of the U.S. Supreme Court operates as an *ultima ratio* remedy; in order to file a direct appeal to the U.S. Supreme Court, the plaintiff must first conclude his pilgrimage to state courts.<sup>395</sup>

Furthermore, *Köbler* can also be understood as a collateral attack to a decision of a national court of last instance. Although, the ECJ stated that an action for damages would involve neither the same purpose nor the same parties, the truth is that an inferior court will often be called upon to review the consistency of a higher court's findings with EU law. Conversely, the U.S. Supreme Court has been reluctant to allow inferior federal courts to review the validity of a state court decision with the U.S. Constitution and federal law.<sup>396</sup> In *Rooker v. Fidelity Trust Co.*,<sup>397</sup> after their appeal was dismissed by the Supreme Court of Indiana, plaintiffs brought a new action before a U.S. District Court alleging that the state court judgment was in breach of the U.S. Constitution.<sup>398</sup> Nevertheless, the U.S. Supreme Court ruled that the U.S. District Court lacked original jurisdiction.<sup>399</sup> Instead, plaintiffs should have filed a direct appeal before the U.S. Supreme Court against the decision of the Supreme Court of Indiana.<sup>400</sup> Likewise in *District of Columbia Court of Appeals v. Feldman*,<sup>401</sup> two applicants challenged an admission rule to the bar of the District of Columbia which denied access to students without diplomas from accredited law schools.<sup>402</sup> Their actions before the courts of the District of Columbia were unsuccessful and as a result, they filed a new action before the U.S. District Court.<sup>403</sup> Again, the U.S. Supreme Court held that it was the only court which could review decisions of the highest court of a state.<sup>404</sup> Thus, lower federal courts lack jurisdiction to review state court decisions. Hence, in light of the *Rooker-Feldman* doctrine, a direct appeal to the U.S. Supreme Court is deemed sufficient to secure constitutional and federal rights of private parties, while preserving their uniform application. A collateral challenge will thus become too intrusive into state judicial autonomy.<sup>405</sup>

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394. 28 U.S.C. § 1257 (2000).

395. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 685 (5th Ed. 2007).

396. Pfander, *supra* note 337, at 284-85.

397. *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

398. *Id.* at 414-15.

399. *Id.* at 416.

400. *Id.*

401. *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983).

402. *Id.* at 465-66.

403. *Id.* at 468-69.

404. *Id.* at 482-83.

405. The incompatibility between direct appeal to the U.S. Supreme Court and collateral challenges is also demonstrated by exceptional cases where due to the fact that

As a result, *Köbler* can be considered as an answer to the fact that the ECJ does not have an appellate jurisdiction over national court decisions. Thus, state liability for judicial acts operates as a remedial response to a structural need. By contrast, because the U.S. Supreme Court is vested with appellate jurisdiction over state court decisions, as the *Rooker-Feldman* doctrine shows, it does not need additional means to enhance its authority.

### B. Remedies and the State Treasuries

The principle of commandeering or its prohibition provides an answer to the constitutional consequences resulting from state inaction. Nevertheless, this principle is not sufficient to explain the opposite approach of both Courts regarding violations of federal/EU law due to state action. The answer to this question lies in the interplay between remedies and the state treasuries.

#### 1. America's Antagonism Between Past Remedies and Future Rights

One must recall that the U.S. Supreme Court has held that one of the *raisons d'être* of the Eleventh Amendment is to safeguard states' *financial integrity*<sup>406</sup> The availability of alternative remedies ensuring the supremacy of federal law seems to be conditioned upon economic considerations. *Coeur d'Alene* demonstrates that prospective relief is only available in so far as it is not as intrusive as a retroactive claim for damages.<sup>407</sup> Likewise, actions for damages against state officials allow states to decide whether they indemnify and if so, to calculate, limit and foresee the economic risks generated by federal violations committed by their own officials. Accordingly, liability for breach of federal law is conditioned upon state budgetary policy.

*A priori*, the U.S. Supreme Court's ultimate aim is to protect the state treasuries, even if this implies that private individuals or entities will be deprived from any remedy; that state officials are not deterred from breaching federal law; or that the supremacy of federal law is not secured. Notwithstanding cases where Congress has the power to abrogate state immunity, it appears that private individuals will have access to justice, provided that the state treasuries are not threatened. It can be *prima facie* suggested that economic repercussions on state

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direct appeal to the Supreme Court was precluded, a collateral challenge was allowed. See *Fid. Nat'l Bank & Trust Co. of Kan. City v. Swope*, 274 U.S. 123 (1927).

406. *Alden v. Me.*, 527 U.S. 709, 709 (1999).

407. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1996).

budgets are the decisive factor in determining whether private individuals have an effective remedy to enforce their federal rights against infringing states. However, in light of *Milliken II*,<sup>408</sup> this argument needs to be tweaked.

In *Milliken II*, the U.S. Supreme Court had to decide whether the federal courts had the power to order compensatory and remedial educational programs for school children who had suffered from *de jure* segregation.<sup>409</sup> These programs would require states to spend millions of dollars.<sup>410</sup> Accordingly, the U.S. Supreme Court was asked to determine whether an *Ex parte Young* injunction could have adverse economic repercussions on the state treasuries.<sup>411</sup> The U.S. Supreme Court replied in the affirmative.<sup>412</sup> It held that although desegregation programs were compensatory in nature, it “does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.”<sup>413</sup>

Thus, prospective remedies can have *ancillary*<sup>414</sup> effects on the state treasuries. Hence, the U.S. Supreme Court draws a distinction between the economic impact of prospective remedies and that on retrospective remedies, that is, between new and old property. Whereas retrospective relief cannot adversely affect the state treasury, the effectiveness of prospective relief could be seen as a limitation to its absolute protection.

As Professor Jeffries points out, there is an antagonism between past remedies and future rights, which can be explained as follows.<sup>415</sup> If constitutional innovation is seen as a positive value, then retroactivity must be limited. Indeed, in order for the judges to easily depart from precedent, the impact of their “new law”<sup>416</sup> rulings should be only prospective, that is, break-through judgments are easier to render if judges escape from economic considerations of the past.<sup>417</sup> It follows that awarding damages for past claims may be a hindrance to constitutional innovation and consequently, it should be kept limited as much as possible. On the contrary, prospective remedies operate as a

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408. *Milliken v. Bradley*, 433 U.S. 267, 279 (1977); *see also* *Hutton v. Finney*, 437 U.S. 678, 691 (1978).

409. *Milliken*, 433 U.S. at 269.

410. *Id.* at 297 n.3.

411. *Id.* at 288-90.

412. *Id.* at 290.

413. *Id.*

414. *Hutton*, 437 U.S. at 690.

415. John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

416. Fallon & Meltzer, *supra* note 8.

417. Jeffries, Jr., *supra* note 415, at 98-99.

device that favours constitutional renewal. As a matter of fact, not only can injunctive remedies be relied upon in cases of ongoing violations of rights, but they also prevent potential breaches. Hence, they are able to go beyond the underlying rights, ultimately leading to a remedy-right transformation. Moreover, since state resources are limited and both prospective and retrospective remedies are capable of affecting the state treasuries, the judiciary is required to decide between redressing past damages and favouring constitutional innovation.<sup>418</sup> In this sense, the American constitutional structure of remedies is clearly biased in favour of the future. By limiting retrospective relief in favour of injunctive and declaratory remedies, societal resources are shifted from old claimants to new ones, that is, from old to new property.<sup>419</sup>

However, the distinction between the prospective and retrospective effects of monetary relief has long been criticised by U.S. scholars who posit that this distinction gives rise to confusion and that it is very difficult, if not impossible, to apply.<sup>420</sup> As a matter of fact, even in *Edelman*, the seminal case where this distinction was articulated, the U.S. Supreme Court acknowledged that evaluating whether the monetary effects of an *Ex parte Young* injunction are prospective “will not in many instances be that between day and night.”<sup>421</sup> For instance, it has been noted that the ruling in *Milliken II* cannot be reconciled with *Edelman*, given that the desegregation order sought to solve past injustices.<sup>422</sup> As Currie famously noted, “nobody is ever ordered to have paid yesterday.”<sup>423</sup> Conversely, it could be counter-argued that though the damage done to segregated students constituted a violation to their constitutional rights, the remedy was not primarily intended to redress their educational deficiencies. Instead, it attempted to prevent prospective black students from suffering the same evil.<sup>424</sup> Still, this reading is problematic because it would imply that the constitutional violations to the rights of some allow others to benefit from the monetary implications of prospective remedies. Be that as it may, in so far the U.S. Supreme Court continues to endorse this remedial dichotomy,

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418. *Id.* at 105-12.

419. *Id.* at 113-14.

420. See, e.g., David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149 (highlighting the inconsistencies between *Edelman* and *Milliken II*); Amar, *supra* note 26, at 1480 (qualifying this distinction as incoherent); and Jackson, *supra* note 61, at 88 (noting that the distinction has been much criticised).

421. *Edelman v. Jordan*, 415 U.S. 651, 667 (1974).

422. Currie, *supra* note 420, at 162.

423. *Id.*; Vázquez, *supra* note 153, at 34 (reading *Milliken II* as purporting to compensate victims of past wrongs).

424. Jeffries, Jr., *supra* note 415, at 109 (opining that the remedy in *Milliken II* aimed “to spend additional funds to educate future students rather than to distribute cash payments to poorly educated past students).

American courts will continue to struggle in applying this difficult distinction.<sup>425</sup>

In short, the protection of state treasuries is not absolute. The U.S. Supreme Court has agreed that it can be ancillary affected in cases where new property requires protection.<sup>426</sup> Nevertheless, the state treasuries are a limit which forces retrospective and prospective remedies into a dichotomy, which in order to promote constitutional innovation, are settled in favour of the latter.

## 2. The ECJ's Convergent View on Remedies

In his article, Professor Meltzer argues that just as in the United States, the ECJ also privileges state adherence to EU law over judicial protection of individual rights. At the same time, it is easier for applicants to seek injunctive or declaratory relief than to succeed in bringing a claim in damages. Because the existence of a serious breach is a *condicio sine qua non* for state liability, "unless [states] are in rather obvious violation of federal law, only prospective compliance, not compensation for past harm caused, will be required."<sup>427</sup> The remedial preference towards prospective remedies also takes place in the EU. On the other hand, taking the ruling of the ECJ in *Köbler* as an example, Meltzer also reckons that with a view to expanding further the principle of state liability, the ECJ decided not to provide an immediate remedy to the case at bar. Said differently, even though the ECJ expanded this remedial principle to the judicial branch of the member states, it did not rule against the defendant (Austria). As Professor Jeffries noted for *Milliken II*, by withholding remedial relief, the ECJ permitted a more rapid evolution of substantive law in *Köbler*.<sup>428</sup>

One cannot but disagree with the conclusions drawn by Professor Meltzer. To begin with, there is a significant difference between denying state liability in damages in defence of a constitutional principle and not granting relief to the case at bar after introducing a new principle (or expanding an old one). The ECJ might have thought that confirming the application of state liability to the judiciary and simultaneously condemning Austria to pay damages would have caused excessive political alarm in the member states and in their supreme courts.<sup>429</sup>

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425. Vázquez, *supra* note 153, at 52-56 (holding that some inferior federal courts have misread the *Edelman* ruling as barring all relief having a retrospective effect).

426. *Hutton v. Finney*, 437 U.S. 678 (1978).

427. Meltzer, *supra* note 13, at 78, 82-83.

428. Jeffries Jr., *supra* note 415, at 109-10.

429. This type of judicial strategy is not foreign to the U.S. Supreme Court. Suffice it to look at *Marbury v. Madison*, 5 U.S. 137 (1803), where judicial review was introduced

Nevertheless, by contrast to the American remedial dichotomy, nothing prevents future claims in damages against the state judiciary from being successful. Plaintiffs suffering from segregation after *Milliken II* were not entitled to claim damages against the State either. Monetary retrospective relief will always be barred in the United States by the Eleventh Amendment. On the contrary, future plaintiffs may rely on *Köbler* in order to seek damages against national courts of last instance that are in breach of ex Article 234 EC (now Article 267 TFEU). Said differently, denying judicial relief the first time a principle is introduced—or subsequently expanded—does not entail its eternal denial as a matter of principle.

Additionally, while *Köbler* may be read as a response to a structural need rather than as a means of fostering the judicial protection of individual rights, Meltzer's thesis is at odds with *Francovich* and *Brasserie*. From the fact that the existence of a serious breach precludes an individual from automatically having a right to reparation, it does not follow that the requirements for prospective relief are easier to meet than the ones for seeking damages. As *Francovich* clearly shows, the availability of both remedies is submitted to a different and independent set of conditions. The fact that one remedy is unavailable does not condition the availability of the other.

Most importantly, the ECJ has held that there are no antagonistic forces between retrospective and prospective remedies. In *Brasserie du Pêcheur*, the ECJ rejected the argument brought by the German, Irish and Dutch Governments pursuant to which the principle of state liability for breach of EU law should be limited to non-directly effective provisions, that is, to cases where prospective relief was not possible.<sup>430</sup> It held that direct effect was only a "minimum guarantee"<sup>431</sup> and that "the right to reparation is the necessary corollary of the direct effect of the EU provision whose breach caused the damage sustained."<sup>432</sup> Thus, the ECJ has a convergent view on prospective and retrospective remedies; the combined effect of both leads to a complete protection of EU rights.

Moreover, the ECJ's convergent view on remedies may be explained by the fact that in its rationale, the protection of state treasuries has not been an issue. In this regard, *Haim II*<sup>433</sup> clearly demonstrates that

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in order to quash a congressional statute that would have been very difficult to enforce against the federal executive.

430. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. F.R.G.*, and *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 18.

431. *Id.* ¶ 20.

432. *Id.* ¶ 22.

433. See Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123.

budgetary policy considerations do not prevent individuals from receiving full compensation from the member states.<sup>434</sup> Mr. Haim was an Italian national who had studied dentistry in a non-member state (Turkey), but whose title had been recognised by Belgium.<sup>435</sup> In order to join the social security scheme as a dental practitioner, he sought to enroll with the German Association of Dentists (GAD).<sup>436</sup> Nevertheless, the GAD rejected his application on the ground that he was not covered by the Council Directive 78/686/EEC on mutual recognition of diplomas.<sup>437</sup> In *Haim I*,<sup>438</sup> the ECJ ruled that Mr. Haim was entitled to enrol and consequently, the GAD had breached his freedom of establishment.<sup>439</sup> However, instead of adhering to the social security scheme, Mr. Haim brought an action before a German court asking for compensation for the loss of earnings against the GAD.<sup>440</sup> The German court sought a preliminary reference from the ECJ, asking whether the principle of state liability could be extended to public-law bodies such as the GAD.<sup>441</sup> The ECJ answered in the affirmative, stressing that “[m]ember [s]tates cannot, therefore, escape that liability . . . by claiming that the public authority responsible for the breach of EU law did not have the necessary powers, knowledge, means or resources.”<sup>442</sup> Therefore, even in cases where the infringing public authorities cannot financially cover the claims for damages, member states would still remain liable.

In the same way, though it is true that the ECJ can limit the temporal effects of its rulings,<sup>443</sup> it has held that the financial repercussions for the state treasuries are not by themselves sufficient to justify such limitation.<sup>444</sup> In its opinion, since serious infringements of EU law usually produce the most significant financial implications for member states, limiting the effects of its rulings solely on financial grounds would lead to a paradoxical outcome, namely a lenient treatment

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434. For a more recent example, see Case C-470/03, *A.G.M.-COS.MET Srl v. Suomen valtio*, 2007 E.C.R. I-2749 (rejecting that national law could deny the award of loss of profit as a head of damage).

435. See *Haim*, 2000 E.C.R. ¶¶ 7-9.

436. See *id.* ¶ 10.

437. See *id.* ¶ 12.

438. See Case C-319/92, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 1994 E.C.R. I-425.

439. See *id.* ¶¶ 23-29.

440. See *Haim*, 2000 E.C.R. ¶¶ 13-14.

441. See *id.* ¶ 14.

442. *Id.* ¶ 28.

443. Case C-43/75, *Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 1976 E.C.R. 455, ¶¶ 69-75.

444. See Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2119.

of the most serious violations.<sup>445</sup> In effect, the message of the ECJ is quite clear: “to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have under EU fiscal legislation.”<sup>446</sup> As a matter of fact, the ECJ prefers to rely on the principle of legal certainty to limit the retroactive effects of its rulings. Particularly, it requires parties concerned to have acted in good faith and the presence of serious difficulties.<sup>447</sup> Although it is true that in specific circumstances, repercussions for the state treasuries have been considered as “serious difficulties,” the requirement of good faith has been equally taken into account by the ECJ.<sup>448</sup>

Therefore, the financial repercussions for the state treasuries are not a sufficient reason to justify limiting either retrospective relief or the non-retroactivity of the ECJ’s rulings. As a result, the ECJ does not need to decide to which remedy state resources are allocated. Neither does the ECJ need to endorse the effectiveness of one remedy to the detriment of the other.<sup>449</sup> Judicial protection is seen as a whole, with both remedies contributing on an equal footing.

#### IV. CONCLUSIONS

Even though both Courts have given opposite answers to question of state liability arising from breach of federal/EU law, one can draw some parallels between the two. First, both principles have been interpreted extensively. Cases such as *College Savings Bank* (rejection of implied waiver), *Florida Prepaid* (strict interpretation of Section 5 of the Fourteenth Amendment), *Seminole Tribe* (Congressional Plenary Powers under Article I cannot override this principle), and *Alden*

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445. Case C-367/93, *Roders BV v. Inspecteur der Invoerrechten en Accijnzen*, 1995 E.C.R. I-2229, ¶¶ 46-50; see also Case C-137/94, *The Queen v. Sec’y of State for Health ex parte Richardson*, 1995 E.C.R. I-3407; Case C-197/94, *Société Bautiaa v. Directeur des Services Fiscaux des Landes*, 1996 E.C.R. I-505.

446. *Roders*, 1995 E.C.R. ¶ 48.

447. See Case C-437/97, *Evangelischer Krankenhausverein Wien v. Abgabenberufungskommission Wien*, 2000 E.C.R. I-1157.

448. Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2119, ¶¶ 67-69.

449. Besides, in contrast to the U.S. Supreme Court, the absence of a competing view on remedies in the EU has led the ECJ to recently indicate that “in the event of a breach of EU law, EU law does not preclude an official from being held liable in addition to the member state, but does not require this.” Case C-470/03, *A.G.M.-COS.MET Srl v. Suomen valtio*, 2007 E.C.R. I-2749, ¶ 99. There is no point, therefore, in asking whether state or personal liability is the best option to secure the supremacy of federal law. Because state liability is seen as a remedy securing a minimum threshold of judicial protection, additional and supplemental remedies are thus welcomed. Notwithstanding due regard to national procedural autonomy, the more remedies there are, the better.



(extension to this principle to state courts) demonstrate that the principle of state sovereign immunity has gained importance in the American constitutional landscape to the detriment of other constitutional principles, in particular, the supremacy of federal law. In the same way, *Brasserie du Pecheur* (universality of the principle), *Hedley Lomas* (discretion is determined by reference to EU law), *Haim II* (irrelevance of economic considerations) evince that the ruling of the ECJ in *Francoovich* was not a shy statement, but the enunciation of a general principle of EU law.

Second, either where an individual brings an action for damages against a member state under EU law or where an individual decides to sue a state official under Section 1983, the mere breach of EU/federal law does not *per se* give rise to reparation. In fact, both Courts have laid down a similar threshold of liability which requires the element of *fault*, understood not as intentions, but as an expected objective behaviour.

Finally, both federal systems have a centralised model of enforcing federal/EU law. As previously mentioned, the United States can bring proceedings against infringing States on the sole ground of enforcing a private right. Likewise, under ex Article 226 EC (now 258 TFEU), the commission can decide to start proceedings against an infringing member state for failure to fulfil its obligations under the EC Treaty (now replaced by the FEU Treaty).

However, despite these few points in common, the truth is that major differences persist. Indeed, in spite of the similar threshold of liability under EU law and under 42 U.S.C. § 1983, the principles governing the *quantum* could not be further apart. Whereas under the ECJ case law member states would be precluded from arbitrarily capping compensation, not only do American states enjoy discretion as to the amount that they decide to cover, but they may also refuse to insure their officials. Therefore, while Section 1983 allows states to accommodate officials' liability to their budgetary policy and not to an optimal degree of deterrence, the principle of state liability excludes any possibility of limiting compensation. According to the ECJ, compensation must be *full* and *effective*, and thus, member states have little discretion as to the amount that they want to pay.<sup>450</sup>

The Courts' opposite approach is due, on the one hand, to structural differences between the European and American federal design and on the other hand, to the interaction between remedies and the state treasuries. The principle of commandeering entails that the effectiveness

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450. See *A.G.M.*, 2007 E.C.R. ¶¶ 87-98. For an analogical application, see Case C-271/91, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1993 E.C.R. I-4367.

of EU law depends, to a great extent, on the observance of EU commands (directives). Hence, in order to reinforce these commands, the ECJ considered that state liability was a necessary excipient. In other words, state liability could be seen as the appropriate answer to a structural need. Conversely, since the U.S. Constitution precludes the United States from relying on the States as agents, it is for the federal government alone to implement federal law. State intervention is not needed to secure the effectiveness of federal law. Likewise, *Köbler* is a possible answer to the fact that the EC Treaty (now replaced by the FEU Treaty) does not grant the ECJ with an appellate jurisdiction over national courts' decisions. Nor does it provide private parties with remedies for violations of ex Article 234, third indent, EC (now Article 267, third indent, TFEU) committed by national courts of last instance. Thus, state liability for judicial acts appears to be a remedial solution to a structural gap. It creates a *de facto* appeal which is capable of submitting the highest national courts to the mandates of an incipient Supreme Court of the European Union. On the contrary, because the U.S. Supreme Court has appellate jurisdiction to review the consistency of state court decisions with the U.S. Constitution and federal law, additional means are not necessary to secure its authority.

Moreover, because the U.S. Supreme Court is keen on protecting the state treasuries, the judiciary is forced to choose between past remedies and future rights. This antagonism is solved in favour of prospective remedies which are deemed to favour constitutional innovation. On the contrary, since the state treasuries are not taken into consideration by the ECJ's rationale, retrospective and prospective relief are seen as complementary and supplementary remedies.

As a result, state liability in damages is a monetary remedy which illustrates the way in which the principle of primacy/supremacy of EU/federal law operates in a constitutional legal order. In this sense, as the American and European examples demonstrate, primacy or supremacy can be understood in two different ways.

In Europe, the principle of primacy of EU law is intrinsically linked to the dictum *ubi jus ibi remedium*. Thus, primacy is respected in so far as for every violation of EU law, there is a correlative remedy. The strength of primacy amounts to the indissolubility of the binomial "right-remedy." In addition, the fact that there are already in place other remedies is not an obstacle to create new ones more effective. The more suitable the remedies are, the better protected rights are and consequently, the more enhanced the primacy of EU law is. In this regard, the principle of state liability clearly demonstrates the foregoing. At first, it was relied upon by the ECJ in order to cover a remedial gap. Later, taking the view that liability for damages was the most adequate

instrument to solve past violations of EU law, the ECJ upheld its universal application.

On the contrary, in America, the supremacy of federal law is interpreted as the capacity of submitting component States to the rule of law. Hence, the supremacy of federal law is respected where remedies are able to secure state compliance with federal law, regardless of whether past violations of federal rights remain unsolved. It follows that where alternative remedies (such as suits brought by the federal government, suits against state officials or the *Ex-Parte Young* Doctrine) are sufficient to ensure observance of federal law, state liability for damages is not necessary. As *Alden* demonstrates, remedial gaps or remedial inadequacy do not *inter alia* put into question that federal law is the “supreme law of the land.” Thus, whereas in Europe, primacy of EU law and judicial protection walk hand-to-hand, in America, it is not always the case.