Chapter 5 Solidarity and the rise of conditionality in EU law

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1. Introduction

Liberal democracies seem increasingly fragile and precarious. The European Union, the most advanced system of supranational integration, is grappling with challenges that will define its very development as a multilevel constitutional system. In such a context, it has never been more urgent to develop governance tools to deal with the inherent and opposing tensions between different demands and identities in composite systems.[1]

Indeed, federal, and quasi-federal arrangements are characterized by the ongoing tension between conflicting but complementary principles: the autonomy of the States (and in the case of the EU, even their sovereignty), on the one hand, and a certain degree of shared rules, common values and solidarity, on the other.

Such a balance may not be clearly defined by constitutional norms, being the constitutional provisions often open to different interpretations in light of economic, societal, and power-related circumstances.

If we look at the federal arrangements through these lenses, we see that such tension has been recurrently addressed not only through the classical legal tools (such as the legislative division of competencies, supremacy clauses, etc) but also through the use of instruments derived from the state control of resources. This is what legal philosophers, starting from Spinoza, Michael Mann,[2] and Galbraith,[3] called *potentia* (or infrastructural power), which sits in opposition to *potestas*, the exercise of power through authority and the ability to produce regulatory acts.

Conditionality has become the most emblematic expression of this, where the 'central' level – in areas where it does not have legislative power

1 Ran Hirschl, 'Opting Out of Global Constitutionalism' (2018) 12 LEHR 1; Joseph Halevi Horowitz Weiler, 'Epilogue: Living in a Glass House. Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

2 Michael Mann, *The Sources of Social Power: Globalizations, 1945-2011* (CUP 2012).

3 John Kenneth Galbraith, *The anatomy of power* (Houghton Mifflin Harcour 1983)

– uses financial leverage to condition the rule-making choices of decentralized governance levels. Conditionality provides a new use of public power not involving the traditional issuing of laws or the exercise of pure coercion but obedience through the 'power of the purse'. In the same vein as other similar tools that have emerged in recent decades, such as nudging and soft law, conditionality takes a step away from the classic 'command and control' paradigm, and the growing recourse to such tools foregrounds the importance of finding governance alternatives for a world in which state sovereignty has metamorphosed and international and supranational actors have growing influence in the constitutional spheres of States.

The use of this mechanism is undoubtedly not new in the regulatory panorama, especially as a contractual mechanism for relationships between a central power and federated entities, but it does raise a series of constitutional issues – both about the very nature of the tool and the impact it has on the exercise of power - that have as yet not been thoroughly theorized.

This topic has been endlessly debated in American doctrine and case law because of the federal government's use of conditionality through spending clauses. Yet, experts remain divided as to the legitimacy and limits that should be placed on the executive's power to impose conditions on federal funding for States. Such problems are mirrored in Europe. Here, the European Union's attempts to achieve a broad array of goals have seen multiple manifestations of conditionality, from the political conditionality adopted during the process to join the European Union[4] to macroeconomic conditionality[5] and the forms adopted in multiple European funding programs,[6] to the use of conditionality in the especially delicate rule of law crisis.[7]

It is impossible here to delve into descriptions of all the conditionality regimes adopted in the European Union. The key point is that over time conditionality has seen both a quantitative and qualitative increase.

4 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008); Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005).

5 Ioannis A. Tassopoulos, 'EU strict conditionality from the perspective of the separation of powers' in Antonia Baraggia, Cristina Fasone and Luca P. Vanoni (eds), *New Challenges to the Separation of Powers* (Elgar Publishing 2020).

6 Viorica Viță, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' (2017) EUI Working Papers LAW 16/2017.

7 Justyna Lacny, 'Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

This pervasive spread and transformation of conditionality in the EU's legal framework has not been matched by equally robust and shared theoretical exploration as to the nature of this tool and its impact on relations between the Union and Member States.

Usually, conditionality has been negatively assessed as an instrument through which the central power impinges on the prerogative of the States. No one can deny that the use of conditionality impacts on the vertical dimension of the separation of power, and therefore on the principle of sovereignty, the distribution of competencies and, more generally, on the relations between the different levels of government.

However, at a deeper look, conditionality, far from being the pernicious tool that limits the State margin of maneuver, can be an instrument needed to strike a fair balance between the two competing strains of federalism: autonomy of the States and solidarity.

The goal of this chapter is to compare the use of conditionality in the United States and Europe to highlight the constitutional impact of conditionality and to show the relation between conditionality and solidarity, which is often overlooked and even not yet conceptualized by the legal literature. Of course, the EU cannot be considered a classical federal state, and we cannot enter into the long-standing debate about the nature of the EU here. However, the EU does face issues with a "federal-like" dimension for which traditional law enforcement mechanisms are not always adequate and sometimes not even available. In this sense, the use of conditionality in the EU can be compared to the experience of the prototypical federal state: the United States.

2. The federal solidarity

Reading the history of American federalism, one can identify different 'stages' of realization of the federal idea and the delicate balance between states and federation, between the principle of state autonomy and solidarity.

One of the most common classifications, which looks at intergovernmental relations and the mutual interactions between different levels of government, has distinguished two phases of American federalism: dual federalism and cooperative federalism. These are historical phases determined by contingent economic, social, political and institutional factors that are,

however, capable of affecting and changing the power relations between the center and the periphery.[8]

The determinants that signal the emergence of one model over another are many and range from the political context, polarized or consensual, to the economic context where, for example, crises or shocks occur, to the social context and the more general datum inherent in the nature of intergovernmental relations. However, the diachronic analysis of American federalism also allows us to identify 'invariants' in these transitional processes.

One of these invariant factors concerns the interpretation and implementation of the federal spending power clause. Indeed, as has been stated, "the pervasive influence of the federal government in modern American life is attributable in significant part to Congress's manipulation of federal funds"[9].

The transition from the dual to the cooperative model was marked, as is well known, by the profound transformations during the early twentieth century and sealed by the New Deal, which represented the beginning of a new constitutional cycle for the American legal system and state-federal relations. Cooperative federalism represented the dominant framework for intergovernmental relations, responding to the increasingly strong interrelationship between different levels of government in complex systems and balancing the competing principles of any federal arrangement: autonomy and solidarity. Despite solidarity is not commonly referred to in the US constitutional language, the US federalism "encompasses solidarity values",[10] and it plays a constitutive role in the federal structure. This also means that "when conflicts arise, autonomy values do not necessary trump solidarity values, and prioritizing solidarity values is not anathema" to the US constitutional system.

The study of federal conditionality offers a perfect perspective to assess the relationship between autonomy and solidarity over the evolution of the US federal system.

8 Daniel Elazar, 'Cooperative Federalism' in Daphne A. Kenyon and John Kincaid (eds), *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (The Urban Institute Press 1992), 73.

9 David E. Engdahl, 'The Spending Power' (1994) 44 Duke LJ 1, 2.

10 Erin F: Delaney, Ruth Mason, 'Solidarity Federalism', (2022) Notre Dame Law Review, issue 2, 98, 623.

2.1. Cooperative federalism and federal conditionality

The constitutional revolution brought about by the New Deal marked the transition from the liberal state form to the social democratic one that would dominate the American order throughout the 20th century.[11]

This transformation takes place largely through a reinterpretation of both the Interstate Commerce Clause and federal spending power: a reinterpretation, endorsed by the Supreme Court, that will lead to the expansion of central state intervention into so many areas of economic and social significance and thus penetrate the sphere of regulation once left to the states. In the seminal article 'The Passing of Dual Federalism', Corwin identifies the matrix of this evolution, with the formal constitution unchanged, precisely in the interpretive activity of the Supreme Court, which "changed attitude [...] toward certain postulates or axioms of constitutional interpretation closely touching the federal system, and which in their totality comprised what (the Author means) by Dual Federalism".[12]

In this context, as has been observed, 'federal law and states' rights have composed, intertwining, a dynamic body, the parts of which have operated globally in 'cooperation': "a cooperation [...] that has been such mainly because the essential choices of the 'interventionist' model have been made at the center and the member states have then adopted their regulatory systems and administrative practices accordingly".[13]

This model of federalism is well described in a relevant May 24, 1937 ruling concerning the constitutionality of the *Social Security Act*: "The United States and the state of Alabama are not alien governments. They co-exist within the same territory. Un-employment is their common concern. Together the two statutes before us [the Act of Congress and the Alabama Act] embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could

11 Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (Columbia University Press 1938), 7.

12 Edward Corwin, 'The Passing of Dual Federalism' (1950) 36 Va LR 1, 4. The characteristics of *dual federalism* identified ibid by Corwin are: '1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration'.

13 Giovanni Bognetti, *Lo spirito del costituzionalismo americano* (Giappichelli 1998), 206.

fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation".[14]

This phase of American federalism is marked by several defining constitutional aspects, including, for example, the use of *preemption*, i.e., the occupation by federal regulation of a certain matter previously left to the states and the subsequent recession of state regulation by the Supremacy Clause.[15]

Also institutionally significant is the creation of the U.S. Advisory Commission on Intergovernmental Relations [16] in 1959 and the passage of a series of legislative acts aimed at creating mechanisms and forms of cooperation such as the *Intergovernmental Cooperation Act* (1968), the *Intergovernmental Personnel Act* (1970), the *General Revenue Sharing* (1972).[17]

But the defining feature of the transformation can be identified in the expansion of precisely the Spending Power Clause and the increasing use of grants-in-aid. As Kincaid notes, 'among other things, that extraordinary period was marked by (1) dramatic expansions of federal government power legitimized by the U.S. Supreme Court, (2) major increases in federal aid to states and localities made possible by economic growth and federal receipts that delivered abundant resources to Democratic majorities in the Congress, and (3) a proliferation of federal grants-in-aid responsive to various alliances of elected officials, policy professionals, interest groups, and civic activists'.[18]

The use of grants-in-aid represents the tool that most characterizes the shift from the dual to the cooperative model: such a mechanism, in fact, almost naturally implies co-participation between the two levels of government in the implementation of certain policies. This co-partnership

14 *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 526 (1937). See, in particular, Eduard A. Lopez, 'Constitutional Background to the Social Security Act of 1935' (1987) 50 EPS 5.

15 On preemption 'as a unifying function', as a method 'by which prior federal intervention precludes state legislation instituting or increasing taxes, especially those most likely to affect the movement of persons or goods, through the so-called Commerce Clause', see Giuseppe Franco Ferrari, 'Il federalismo fiscale nella prospettiva comparatistica', in *Il federalismo fiscale alla prova dei decreti delegati* (Giuffrè 2012), 136.

16 See Timothy Conlan, 'From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations' (2006) 66 PAR 663.

17 See John Kincaid, 'From Cooperative to Coercive Federalism' (1990) 509 Annals AAPSS 139, 140.

18 ibid

scheme is based on the central state providing the states with substantial funding to pursue certain purposes of general interest, and the states, in turn, agree to use these allocations to pursue the purposes underlying the federal 'gift'. Rather, it seems clear how the grants-in-aid mechanism urges, by creating an intertwining of federal influence and state policy choices, the establishment of cooperative intergovernmental relationships between the two levels of government.

The extent of cooperation is, however, variable depending on the presence of more or less stringent conditions for the use of funds and depending on the amount of funding itself.

Given that, in fact, the federal offer has proven difficult to refuse, theoretically, as the Supreme Court has also stated, it is constitutionally legitimate only to the extent that it leaves a margin of choice to the states regarding its acceptance. That is, the offer must not be of such magnitude that it is not practically refusable: this would result in an exercise of coercive power that would go beyond the framework of the constitutionally legitimate.

The nature of the conditions in the grant-in-aid offer also affects the cooperative nature of the instrument: the cooperative input of member states will be all the more intense the less stringent the conditions set for the admissibility of grants-in-aid.

Conversely, a highly conditional mechanism would reduce the margins of cooperation and co-participation between the Federation and the states in defining the measures to be implemented to the point of transforming the role of the states into that of mere executors of decisions, heterodirected through the use of leverage, taken by the center.

The contours of this faint distinction have been defined by Supreme Court jurisprudence, which has ruled on several occasions and consistently reaffirmed the legitimacy of such a practice with respect to the sovereignty of states. A look at this jurisprudence allows us to grasp sharply the issues at stake.

2.2. The Supreme Court jurisprudence on grants-in-aid

The transformation noted in the previous section was marked by the work of the Supreme Court, which intervened on several occasions regarding the

legality of grant-in-aid mechanisms, up to the landmark case represented by *South Dakota v. Dole*.[19]

Once the Federation's taxing power was recognized, which was further strengthened in 1913 with the introduction of the Sixteenth Amendment, and in the face of an increasing number of federal funding programs benefiting the states, Congress began to impose precise conditions, on the one hand, to ensure the efficient management of federal resources and, on the other, to ensure that the funds were used to pursue the primary purposes for which the Federation had intended them.

This expansion of the powers of the Federation into areas of policy under state jurisdiction – which was further accentuated during the New Deal [20] – did not, however, leave the states indifferent: in 1923, the Supreme Court was hearing the case *Massachusetts v. Mellon*[21], which concerned the constitutionality of federal funding for states that had agreed to establish programs designed to protect the health and welfare of infants and mothers, provided for in the *Sheppard-Towner Act* of 1921. Although the Supreme Court dismissed the case for lack of jurisdiction, it pointed to an important element in judging the legality of federal funding concerning the coercive or noncoercive nature of the federal program: "the powers of the State are not invaded, since the statute imposes no obligation, but simply extends an option which the State is free to accept or reject".[22]

Another interesting test for the Court is the case of *United States v. Butler* [23], in light of which the Supreme Court was seized by state appeals seeking to ascertain the constitutionality of the *Agricultural Adjustment Act* of 1933, which had introduced a tax on agricultural products, the proceeds of which would be redistributed to farmers who undertook to reduce their acreage under cultivation. The law applied only to certain crops, which the Secretary of Agriculture would identify. The Court, hearing an appeal by some cotton farmers who were particularly affected by the law, ruled by a majority that it was unconstitutional because it regulated a matter – agricultural production – reserved to the states, violating the Tenth Amendment.

This case, in addition to defining the boundaries of federal power over the states, provided an opportunity for the Court to rule on the extent

19 483 U.S. 203 (1987).
20 Douglas M. Spencer, 'Sanctuary Cities and the Power of the Purse: An Executive Dole Test' (2021) 106 Iowa LR 1209.
21 262 U.S. 447, 479 (1923).
22 ibid
23 297 U.S. 1 (1936).

of Congress's spending power under Article 1, §8: it can be legitimately exercised even outside the enumerated powers of Congress itself, as long as there is an objective to promote the 'general welfare of the United States'.

In the case at hand, the Court did not go into determining the link between the purpose of *general welfare* and the measures of the *Agricultural Adjustment Act*, leaving open the interpretive question of Article 1, §8; however, the act was declared unconstitutional because the taxation in question appeared to be a means to an unconstitutional end, in that Congress used the spending power as a mechanism for controlling and imposing activities that were within the jurisdiction of the states. Thus, stated Chief Justice Roberts: 'The act invades the reserved rights of the States. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government'.[24]

Butler casts the coordinates of U.S. jurisprudence on the subject of the Spending Clause and grants-in-aid programs: a jurisprudence that has been enriched and refined over time in search of a doctrine that can clarify the constitutional limits of the federal power to place conditionalities on the states in areas of their competence and determine when, from an attempt to direct states' policies according to a federal purpose in compliance with the federal arrangements, conditionality does not turn into an undue exercise of federal coercion.[25]

A year after *Butler*, the Supreme Court was again called upon to confront the constitutionality of the practice of grants-in-aid in *Steward Machine Company v. Davis*[26], which was decided in May 1937. It does not seem superfluous to point out that this case followed a few months after the *West Coast Hotel v. Parrish* ruling, which had affirmed the constitutionality of the minimum wage introduced by the State of Washington.

In *Steward*, the Court declares the constitutionality of the *Social Security Act,* which had provided for the authorization of administrative subsidies to help states meet the overhead costs of their unemployment benefit programs.

To qualify a state for such aid, its program had to meet federally prescribed criteria designed to ensure that the program would provide sufficient and effective financial relief. The program also provided for the impo-

24 ibid 68.

25 In *South Dakota v. Dole*, cited above, 211, the Court recognized that in some cases 'financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion'.

26 301 U.S. 548 (1937).

sition of a tax on employers with eight or more employees, but allowed employers to claim a 90 percent deduction of their contribution to a state unemployment compensation system if the state program met the eligibility criteria for federal grants.

In the *Steward* case, an Alabama company had paid the tax required under the law before filing a refund claim with the *Commissioner of Internal Revenue*, arguing that it could recover the payment because the law establishing it was unconstitutional. The plaintiff argued that the tax was not an excise tax, was not uniform throughout the United States, and its exceptions were numerous and arbitrary, in violation of the Fifth Amendment. In addition, the company claimed that the purpose of the law was to regulate a specific subject matter, so that it constituted an unlawful invasion of the powers reserved to the states, in part because it was ultimately a scheme of a coercive nature that left the states no choice as to whether or not to adhere to the scheme itself.

In a decision adopted by a five-to-four vote, the Court held that the tax instituted by the *Social Security Act* was a legitimate exercise of a constitutional power vested in Congress.

Writing for the majority, Justice Benjamin Cardozo first noted that the tax was not an exercise of coercive power against the states in violation of the Tenth Amendment. The Supreme Court rejected the argument that the *Social Security Act* provision involved, in effect, an unconstitutional attempt to compel states to adopt unemployment compensation legislation passed by the federal government. However, the Court did not simply declare the constitutionality of the provision in question; it elaborated a true *coercion test* that would be specified by case law to come.

Indeed, the Court holds that Congress is generally required to avoid using the *spending power* to "destroy[] or impair[] the autonomy of the states".[27] However, it recognizes that, in the present case, the state had the opportunity to refrain from joining the federal reimbursement program and, therefore, it was not a coercive program.

From the perspective of the limits of federal *spending power*, the Court then pointed out that, given the high unemployment rate and difficult economic times, the tax under appeal pursued the goal of '*general welfare*' at both the state and federal levels.[28]

27 *Steward Machine Co. v. Davis,* cited above, 586.

28 ibid 586–587: 'The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was

2.3. The Unconstitutional Conditions Doctrine: the Dole Test

South Dakota v. Dole is the leading case for conditional spending power and the limitations thereon; it has even been called 'the foundation of the modern conditional spending doctrine'.[29]

In 1984, Congress approved a law[30] that delegated the Secretary of Transportation to cut 5 per cent of federal Highway funds – to improve the safety of the interstate road system – for States that kept their drinking age under 21. South Dakota appealed this provision to the Supreme Court, arguing that cutting funds because of the condition imposed (legal drinking age) was an *ultra vires* exercise of federal spending power. Moreover, the provision violated the Twenty-First Amendment, which prevents Congress from directly regulating the legal drinking age.

The Court's assessment of the State's grievances resulted in the creation of what became known as the Dole test, setting out four fundamental elements to determine the unconstitutionality of conditions placed on federal funding. First, the Court drew on existing case law and confirmed the need for federal funding to be connected to the 'general welfare' goal. In its ruling, the Court also noted the 'courts should defer substantially to the judgment of Congress'.[31]

Secondly, the Court identified the nature of the conditions, stating they had to be clear and unambiguous so that States can make conscious choices, with full awareness of the consequences of their participation or non-participation in the federal aid program.

The third element is already evident in earlier case law, but it had never been fully fleshed out:[32] the correlation between the conditions imposed and the federal interest in specific national projects or programs. Should such a correlation not be discernible, the conditions imposed are deemed illegitimate.

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need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that, in a crisis so extreme, the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare'.

29 Daniel S. Cohen, 'A Gun to Whose Head? Federalism, Localism, and the Spending Clause' (2019) 123 Dick. LR 421, 436.

30 23 U.S.C. §158.

31 *South Dakota v. Dole*.

32 *Ivanhoe Irrigation Dist. v. McCracken* 357 U.S. 275, 295 (1958): 'The Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof'.

Finally, the conditions cannot breach the articles of the Constitutions, especially the federal principles of the Tenth Amendment. In such cases, the financial incentive offered by Congress could not be so demanding that it passes the point where pressure becomes coercion. Such programs go too far and become unconstitutional.

The Court assessed the constitutionality of the provision of law in the light of these four conditions and ultimately rejected South Dakota's grievances as the Highway funds were expressly to pursue a general interest: reduce the number of cases of driving under the influence, which was a goal that was hindered by the various drinking age limits in States. The conditions were clear and not ambiguous. The possibility of a breach of other constitutional provisions was also not proven in the Court's view as there was no violation of the Twenty-First Amendment or the Tenth Amendment because, in the pursuit of 'general welfare', Congress can use its financial leverage to regulate areas that go beyond those listed in Article 1 of the Constitution.

Finally, in this specific case, the imposition did not amount to coercion. "Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory, but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power".[33]

If South Dakota refused to change its legal drinking age, it would only lose 5 per cent of the allocated funds. This is a fairly modest percentage that, in the Court's view, cannot be said to be proper coercion. "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now, the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems".[34]

The Court did provide a scheme for dealing with unconstitutional conditions and federal spending power, partly through its summary of earlier

33 *South Dakota v. Dole.*
34 *Steward Machine Co. v. Davis.*

case law, but some points do remain unclear such that scholars have even described the Dole rule as 'vacuous and illogical'.

2.4. Conditionality in the Affordable Care Act

The question of unconstitutional conditions has become entwined with one of the prickliest issues in American constitutional law from the last decade: the healthcare reform sought by President Obama (*Affordable Care Act* – ACA –, often called *Obamacare*). One of the provisions was that all State Medicaid programs should be extended to the entire population under 65 whose household income was below 133 per cent of the federal poverty level.

Created in 1965, Medicaid is a joint federal and State aid program designed to help cover healthcare costs for millions of poor Americans, especially minors from poor families, low-income pregnant women and people with disabilities. It is not a general program, but a program that focuses on specific categories of people meeting set requirements. Right from its earliest days, federal law set the minimum level of coverage and allowed the States a degree of flexibility in deciding whether to extend the healthcare aid to other categories of people on the poverty line. By 1982, all States had chosen to be part of Medicaid. Federal funding received from Medicaid thus became a significant part of State budgets, now accounting for over 10 per cent of income in most States.

The Affordable Care Act sought to disrupt this balance by asking all States to extend Medicaid to all citizens under a specific age limit and below a poverty threshold.

Owing to the ACA, the federal government agreed to cover 100 per cent of the costs of extending Medicaid in the initial years (up to 2016) and then 90 per cent thereafter.

Despite the benefits of the offer, once the ACA entered into effect, 26 States appealed to the Supreme Court, claiming the expansion of the Medicaid program was an illegitimate form of coercion and not an invitation or legitimate form of pressure as it did not allow the States to reject it. Indeed, should the States refuse to extend the Medicaid program, they would be punished by having all federal funding linked to the program withdrawn.

In the ACA ruling, the Supreme Court decided, for the first time in its history, that a federal program was illegitimately coercive and unconstitutional.[35] The majority opinion, supported by seven Court judges (in addition to Roberts and the conservative judges, also Breyer and Kagan supported the ruling), provides an interesting depiction of the status quo of the theoretical debate on the nature of federal conditionality and the still unresolved problems this poses.[36]

More specifically, the Court stressed the contractual nature of Congress exercising its spending power, the legitimacy of which 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'.[37] Compliance with this limitation is essential in ensuring the use of federal spending power does not undermine the status of the States as independent sovereigns in the federal system, based 'on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one'.[38]

As Justice Roberts continued, this is why "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. [...] Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer".[39]

In the case in hand, the use of federal spending power is not merely a means to encourage States to extend Medicaid in accordance with federal preferences but a 'gun to the head'[40] of the States. Failure by a State to comply with the federal request to expand healthcare coverage would not result in only losing a relatively small portion of current funding but the entire amount. Indeed, Medicaid spending accounts for over 20 per cent of the total average budget of a State, with federal funds covering 50 to 83 per cent of those costs. This is a vastly different situation than when the Court dealt with Dole, where the threat was less than 1 per cent of the budget in the South Dakota case, and so ensured the State was actually in a position to reject the conditions imposed by Congress. This is not comparable with

35 *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. 519 (2012).
36 Laurence H. Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (Henry Holt and Co. 2014), 256.
37 567 U.S. 519 (2012).
38 ibid
39 ibid
40 ibid

the loss of over 10 per cent of a State's total budget, an economic tool that leaves States with no real option other than to agree to such Medicaid.

While the ruling in question undoubtedly makes the boundaries and limits of spending clauses and federal conditionality clearer, it still leaves a few questions open,[41] such as determining in practice what constitutes *ultra vires* action by Congress. The Court failed to set a percentage of a State's budget as a threshold for determining whether a condition is coercive or not. It did not even deal with the possible asymmetries that might arise between a State that would be heavily hit by the federal 'threat' of withdrawing funding and another State that was impacted less by the program.

What appears quite clear in the Obamacare saga is that in the equilibrium between federal solidarity and states' autonomy, the pendulum has shifted in favor of the latter.

3. Conditionality in Europe: Pathways of a Disputed Tool

An examination of conditionality in the history of European integration shows it has been used in multiple ways, with the very nature of conditionality constantly and continually developing.

Europe is often analyzed through a comparative lens, using the United States as a reference point. This work certainly does not shy away from such an approach, but the goal is shifted away from specifically seeking the similarities and differences in how conditionality is adopted in both systems, especially as such information is relatively lacking in utility given the clear distinctions between the two cases. Instead, this investigation focuses on providing – on the basis of a comparative examination – the theoretical elements that can be used to determine the legitimacy and constitutionality of the use of conditionality in Europe.

Despite the inherent differences in usage and even in the reference constitutional frameworks, it is possible to identify certain elements found jointly in Europe and America.

Conditionality seems to sit somewhere between legislation and soft power, occupying a grey area in the exercise of power, in the shadow of that particular use of resources known as *potentia*. To borrow the words of

41 Mitchell N. Berman, 'Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions' (2013) 91 Tex LR 1283.

one of the world's leading scholars of conditionality as a governance tool, Frank Schimmelfennig, conditionality is a mechanism of 'reinforcement by reward'.[42] The debate about the coercive – or not – nature of conditionality is relevant to America and, perhaps to an even more problematic degree, Europe. Is conditionality always a coercive form of power, even when used with other means (i.e., using material incentives instead of mandatory rules)? And when does conditionality become coercive? For example, when a State depends on a specific benefit for its survival, does connecting such a benefit to conditionality become a form of coercion? If the conditioned goods are absolutely necessary, does such conditionality become a form of coercion? Plus, conditionality can be tricky to distinguish from a sanction when the benefit is the absence of that sanction.

Such questions gain significance in the light of the widespread use of conditionality in Europe, especially in times of crisis, as it happened during the economic crisis and as it is happening today in the rule of law crisis.

Yet, in Europe, the constitutional debate on conditionality as a governance tool remains fundamentally in its infancy. Despite the harsh criticism on how conditionality was employed during the Euro crisis – particularly the substance of the conditions imposed and the opaque manner in which they were managed[43] –, European institutions seem to have continued almost blindly to trust in conditionality, especially in times of crisis, because of the ineffectiveness of other traditional tools, and paid little attention to its constitutional impacts, limits and active effectiveness.

The following pages will concentrate on the relations between conditionality and solidarity in light of the cohesion policy and of the two most recent uses of conditionality, namely the rule of law conditionality and the new EU programs to combat the effects of the pandemic.

3.1. Solidarity and Conditionality in the EU

Solidarity is a fundamental value of Article 2 TEU, which is also reflected in the financial commitment of the Union and whose implementation is based on mutual trust between the Member States, which in turn is nourished by common respect for fundamental values, including the rule of law.

42 Frank Schimmelfennig and Ulrich Sedelmeier, *Introduction: Conceptualizing the Europeanization of Central and Eastern Europe* (Cornell University Press 2005).

43 Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 325.

The debate over solidarity in the EU can be traced back to the first stages of the EU integration process[44], which was at the core of the development of EU cohesion policy. Solidarity was also at stake during the EU's response to the economic crisis and more recently, during the EU's response to the Covid-19 pandemic. Solidarity is at the core of the EU integration process, but it is still an ambiguous concept whose essence in the EU lacks a theoretical understanding. Solidarity in the EU is still trapped in the tensions mentioned above between the EU and the Member States. There is no doubt that the value of solidarity in the EU has not yet found full implementation, being constrained by the fact that social and fiscal policies are still rooted at the national level. This weak realization of the principle of solidarity has a broader implication for the resilience of the Union. As Maduro has already pointed out, without solidarity, "there can be no true social contract capable of legitimizing the emerging European polity, and the consequences would be either a return to a less advanced form of integration […] or, if the current model continues to be stretched, a crisis of social legitimacy which may manifest itself in increased national challenges to European policies (whose redistributive effects are not understood and accepted)".[45]

In the absence of a fiscal union and an equalization mechanism typical of federal states, one of the tools that permeates the redistribution of funds in the Union is precisely conditionality. The realization of the principle of solidarity is often linked to the use of conditional schemes to distribute funds. One of the most evident examples is the spending conditionality, which connects the disbursement of most EU funding programs to fulfilling a broad set of rules and standards. The first spending conditionality mechanisms were introduced as early as the 1990s, especially for the Common Agricultural Policy, where the EU linked funding to fulfilling specific environmental goals. Since then, the scope of application of spending conditionality mechanisms has grown significantly. They apply to more funding programs and substantive content as more and more conditionalities have been attached to funding disbursement[46].

44 See Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 OJLS 213; Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012.

45 Miguel Poiares Maduro, 'Europe's Social Self: 'The Sickness unto Death' in Jo Shaw (ed), *Social Law and Policy in an Evolving EU* (Bloomsbury Publishing 2000), 347.

46 For a critical assessment see John Bachtler and Carlos Mendez, 'Cohesion and the EU's budget: is conditionality undermining solidarity?' in Ramona Coman, Aman-

3.2 . Conditionality and solidarity: the case of cohesion policy

EU cohesion policy is, indeed, an interesting area in which to observe the use of spending power to achieve certain goals and the evolution of the relationship between the Union and member states from a cooperative federalism perspective: as noted, "it is the most redistributive EU policy area of the EU budget"[47] and, at the same time, "it is the paradigm case of EU multi-level governance".[48]

The first two solidarity-based instruments were introduced by the 1957 Treaty of Rome, which established two Funds: the European Social Fund (ESF) and the European Agricultural Guidance and Guarantee Fund (EAGGF, Guidance Section).

By contrast, the territorial dimension of cohesion policy has evolved only since the 1970s, with the introduction of the European Regional Development Fund (ERDF), with the aim of fostering economic, social and territorial cohesion and reducing regional inequalities, partly in light of Article 2 EEC Treaty, which assigned the EEC the task of promoting "harmonious development of economic activities throughout the Community".[49]

The ERDF was officially established in March 1975 by Regulation No. 274/75, which, in the absence of explicit provisions in the Treaties[50], had its legal basis in Article 235 of the EEC Treaty itself, i.e., the provision recognizing the so-called implicit powers of the Union. [51]

Although the creation of a cohesion policy was under discussion as early as the 1960s, two factors gave the decisive impetus for the creation of the Fund: the prospects of development towards EMU, which would inevitably accentuate regional disparities, and the first enlargement with the entry

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dine Crespy and Vivien A. Schmidt (eds), *Governance and politics in the post-crisis European Union* (CUP 2020), 121–139.

47 John Bachtler and Carlos Mendez, 'Cohesion Policy' in Helen Wallace, Mark A. Pollack, Christilla Roederer-Rynning and Alasdair Young (eds), *Policy-Making in the European Union* (2nd edn, OUP 2020) 233.

48 ibid

49 Art. 2, TCEE.

50 Bruno de Witte, 'The reform of the European Regional Fund' (1986) 23 CMLR 419.

51 Art. 235 TCEE: 'When action by the Community is necessary to achieve, in the operation of the common market, one of the purposes of the Community, without this Treaty having provided the powers of action for that purpose, the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly, shall make appropriate arrangements'.

of Ireland and the United Kingdom into the Community, marked by the former's need, in particular, to support its economic development policies.

The ERDF was a relatively small fund, the size of which amounted to only 5 percent of the Community budget, and for this reason, too, it was not received entirely positively by the legal literature[52]; however, it decisively initiated the development of cohesion policy that would evolve from there to the present through a number of turning points[53]: from the reforms of 1979 [54] and 1984 [55] to the decisive reform of 1988 and on to the challenges of cohesion policy in the contemporary context.

Alongside the ERDF, other cohesion instruments were then introduced: the Integrated Mediterranean Programs[56] which, similarly to the former, were conditional grants-in-aid and responded, once again, to the needs arising from a new phase of enlargement: the entry of Greece, which had requested *ad hoc* support along with the other states of the Mediterranean area. Moreover, significantly, Article 23 of the Single European Act (SEA), in 1986, inserted five new provisions into the TEC: from Article 130(a) to Article 130(e).

This is a decisive step from a legal point of view because, for the first time, regional policy is formalized in the Treaties, thus healing the discord that had arisen between a policy that was, in budgetary terms, the second most important in the Union but which had no legal basis except in the aforementioned implicit powers under Article 235 TEC.[57]

Finally, in 1988, with Regulation 2052/88, a common framework for the management of the three cohesion funds (ERDF, ESF and the EAGGF) was introduced, thus determining the birth of cohesion policy.

52 Among others, Mario R. Martins and John Mawson, 'The Programming of Regional Development in the EC: Supranational or International Decision-making?' (1982) 20 JCMS 229; Yves Meny, 'Should the Community Regional Policy be scrapped?'(1982) 19 CMLR 373.

53 Gian Paolo Manzella and Carlos Mendez, 'The turning points of EU Cohesion policy' (2009) Report Working Paper.

54 Council Regulation (EEC) 214/79 of February 6, 1979, amending Regulation (EEC) No. 724/75 establishing a European Regional Development Fund [1979] OJ L 35/1.

55 Council Regulation (EEC) 1787/84 of 19 June 19 1984 on the European Regional Development Fund [1984] OJ L 169/1.

56 Council Regulation (EEC) 2088/85 of 23 July 23 1985 on Integrated Mediterranean Programs [1985] OJ L 197/1.

57 See Bruno de Witte, 'The Integrated Mediterranean Programmes in the Context of Community Regional Policy' (1990) EUI Working Paper LAW 90/8.

After this initial phase of creating and defining the instruments of cohesion policy analyzing its development with respect to the use of conditionality, the doctrine[58] identified three phases, respectively of experimentation (1994 to 2013), expansion (2014 to 2020) and consolidation (post-2020).

It is worth focusing on the third phase of cohesion policy development (2021-2027), which is intertwined with the vicissitudes of the programs adopted to cope with the pandemic shock (NextGenEU) and the new regime on rule of law conditionality.

The phase that opens with the 2021-2027 multi-year budget marks some continuity from the growth of the role of conditionality in the previous phase, although it introduces important novelties.

Chief among them is the Common Provision regulation that transforms the previous *ex-ante* conditionality regime into a system of 'enabling conditions', with four horizontal and sixteen thematic conditions to be monitored throughout the budget period and the possibility of suspending funding at any stage of the process.

In the new cohesion policy, the requirement to respect fundamental rights in the use of EU funds is also strengthened. The recent Communication on the 'EU Strategy for Strengthening the Application of the Charter of Fundamental Rights'[59] has, in fact, linked the implementation of EU-funded programs with compliance with key provisions of the Charter of Fundamental Rights. Although the scope of this conditionality is rather narrow, it is nonetheless an interesting application of conditionality, protecting and promoting the fundamental values of the Union[60], which is part of the Union's new strategy, as evidenced in this regard by the conditionality scheme to protect the rule of law.

58 Viorica Viță, *Research for REGI Committee - Conditionalities in Cohesion Policy* (European Parliament, Policy Department for Structural and Cohesion Policies 2018).

59 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions' COM (2020) 711 final.

60 Renata Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU' (2020) BRIDGE Network - Working Paper 7/2020.

3.3. Conditionality and solidarity in the most recent development of the EU

The link between conditionality and solidarity in the EU has been further elaborated in the so-called "rule of law saga". Indeed, the system of conditionality introduced by Regulation 2020/2092, dealing with the rule of law crisis, not only becomes an instrument capable of linking solidarity and responsibility but also an effective tool for resolving ruptures and managing conflicts in a composite constitutional system, like the European one, within the limits of the powers provided for by the Treaties.[61]

As the CJEU argued in the seminal decision C.156/21 and C-157/21, the regulation at stake aims to "protect the Union budget in the event of violations of the principles of the rule of law in the Member States" in a sufficiently direct manner, and not to sanction such violations as such, whatever their gravity[62] .

Analyzing the regulation, the Court states that "the types of measures that can be taken, the criteria for the choice and scope of such measures, and the conditions for the adoption and revocation of such measures, insofar as they all relate to injury or a serious risk of injury to the sound financial management of the Union budget or the protection of the Union's financial interests, support the finding that the contested regulation is intended to protect the Union budget during its implementation." [63]

Ultimately, the Court recognizes that respect for the rule of law is an essential prerequisite for sound financial management. However, only violations of the rule of law that *sufficiently directly harm* the interests of the Union can be sanctioned.

As mentioned above, however, this inseparable link between violations of the rule of law and damage to the EU budget, on the one hand, weakens and narrows the scope of the conditionality mechanism; on the other hand, it is believed that it is precisely this requirement that legitimizes the mechanism, allowing it to fall within the perimeter of the EU's competences.

Indeed, the EU can act to protect the values of Article 2 TEU, but it can do so only on the basis of those provisions of the Treaties that give it the competence to take such action.

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61 Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2021:975, para 145 and Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2021:974, para 127.

62 *Poland v. Parliament and Council* (C-157/21), para. 124; *Hungary v. Parliament and Council* (C-156/21), para. 110.

63 *Poland v. Parliament and Council* (C-157/21), cited above, para. 128.

What remains to be considered, however, even in light of this assertion, is, as argued by Hungary and Poland in their claims, the legitimacy of a *horizontal conditionality* regime, i.e., conditionality linked to the value of the rule of law in general and not instead closely linked to the objectives of a specific program or the sound financial management of the EU budget.

The link between the nature of the conditions and the purpose of a given program is a requirement for the legality of conditionality schemes, a requirement already widely recognized in federal studies on conditionality, and elaborated in the abovementioned "unconstitutional conditions doctrine"[64] by the U.S. Supreme Court. In light of that doctrine, which appears to date to be the most accomplished formulation of the limits to conditionality schemes, one standard for assessing the legitimacy of a conditionality scheme is precisely the link between the nature of the condition and the specific federal financial program.

The Court of Justice seems to take a different path: in fact, it recognizes the legitimacy of such *horizontal conditionality* when it states that the conditions at stake can be linked to the value of the rule of law in Article 2 TEU, which must be respected in all areas of Union action. As the Court argues, based on the textual interpretation of the regulation, the notion of the rule of law "is to be understood in the light of the other values and principles of the Union enshrined in Article 2 TEU. It follows that respect for these values and principles - as participating in the very definition of the value of the 'rule of law' contained in Article 2 TEU or, as is evident from the second sentence of that article, intimately linked to a society respecting the rule of law - may be required under a horizontal conditionality mechanism such as the one established by the contested regulation"[65].

This broad statement, when viewed beyond the context of this regulation, is of utmost importance for the future development of the EU, as it could pave the way for the adoption of new forms of conditionality-having a legal basis in a primary law rule-to also protect the other Article 2 TEU values, which must be considered as a whole as they form the foundation of the EU legal order and "define the very identity of the Union as a common legal order" [66] .

Finally, it is precisely in the delicate passage aimed at justifying a horizontal conditionality regime that the Court opens a constitutional *paren-*

64 *South Dakota v. Dole*, 483 U.S. 203, cited.
65 *Hungary v. Parliament and Council* (C-156/21), para. 136.
66 *Ibid,* par. 127.

thesis on the nature of the Union, its identity, and its founding values and in particular the principle of solidarity, which deserves to be carefully explored. Solidarity is a fundamental principle that also finds concretization through the Union's financial commitment and whose implementation is based on mutual trust among member states, which in turn is nurtured by common respect for fundamental values, including the rule of law.

If we look at the rule of law conditionality, the rationale that links solidarity with conditionality stems from the need to guarantee that the financial assistance that flows from the EU to the Member States in need – and through this, implementing the value of solidarity – is used by the recipient Member State according to the aim of the funding scheme, of the EU policy goal and in compliance with EU values. Indeed, in the case of the rule of law, the aim is to protect, via the financial competences, the core and founding values of the EU against the challenges posed by Member States, which are themselves implementing divisive and controversial reforms. Therefore, conditionality is enshrined as an instrument of a constitutional nature, called to implement EU fundamental values, that is added – without circumventing them – to other tools available to the European institutions to protect aspects of fundamental importance, including Article 19 TEU, Article 47 of the Charter of Fundamental Rights and, of course, Article 7 TEU.

More recently, in the NextGenEU, conditionality is widely deployed[67] as a tool capable of fostering cohesion and solidarity among the Member states: the Resilience Recovery Facility (RRF) is based on a system of conditional transfers according to a set of objectives and long-term policy priorities in the RRF Regulation.[68] The regime of conditionalities envisaged by the new RRF Regulation aims to foster Member State action in critical sectors—identified by the EU as priorities for the future of the EU itself. This conditionality marks the discontinuity in both substance and procedure between the *NextGenEU* conditionality and that of the economic crisis, evaluating favourably the solidaristic framework of *NextGenEU*.

This is the position advocated by Costamagna, who points out the discontinuity profiles between conditionality under financial assistance programs and that of the *NextGenEU*, when he states that "from the institu-

67 See Takis Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?' (2020) 16 Croatian Y.B. Eur. L. & Pol. VII.

68 Alberto De Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' (2021) 50 EuLawLive Weekend Edition 2.

tional point of view, the mechanism was created and operates within the Union's legal system and, therefore, having to comply with fundamental rights standards, from the substantive point of view [...] the idea that conditionality must necessarily mean austerity has been abandoned.". [69]

However, although in diversity with respect to austerity conditionality, unresolved critical issues remain even in the case of the *NextGenEU.*

As Costamagna further notes, "the strengthening of the European institutions' ability to influence, when not determine, the economic policy choices made at the national level has not been accompanied by any changes in the institutional framework, nor has it been accompanied by a strengthening of the democratic nature of the decisions taken, leaving even more room for executive power" [70] .

Even with these critical issues, the most recent forms of conditionality differ from the mechanisms used during the Eurozone crisis, so that both the *NextGenEU* package and the new rule of law conditionality regulation seem, as noted by careful scholarship, to "*advance conditionality as a constitutional* virtue" [71] .

In particular, forms of 'executive conditionality' seem to be emerging and dominating the scene: that is, mechanisms whose purpose is to enforce other EU primary or secondary law obligations in areas where recourse to other ordinary means of institutional enforcement is not possible or does not produce adequate results, as in the cases of macroeconomic requirements, respect for the rule of law and the common values of Article 2 TEU.

These are often issues with a strong 'federal' dimension, concerning the relationship between different levels of government in the European context, which the Union struggles to address using its traditional *enforcement* mechanisms and not yet having *imperium* tools typical, instead, of state-type organizations.

The use of conditionality in the rule of law crisis and in the new programs to address the crisis caused by Covid-19, ultimately envisions a new, more 'positive' conditionality that is inherently different from that associated with *austerity* programs and that seems to be closer in form and substance to classical federal-style conditionality than to conditionality

69 F. Costamagna, *The Next Generation EU and the Construction of a European Economic Policy: what role for democracy and solidarity?*, in *I Post di AISDUE,* III (2021), Section Proceedings of AISDUE Conferences, 3, December 15, 2021, p. 52.

70 *Ibid*, p. 55.

71 Takis Tridimas, see note 66.

of an internationalist nature. As has been noted "these are developments that could lead to an epoch-making turning point and confirm not only the overcoming of the austerity paradigm that undoubtedly characterized the management of the (previous) economic crisis, but also the Union's commitment to respect for fundamental rights".[72]

We can, therefore, conclude, at least partially, that the most recent applications of conditionality on the one hand confirm the increasing use of the instrument in EU *governance* in sensitive issues; on the other hand, they seem to favor the emergence of conditionality regimes of a 'federal' nature. This application of conditionality is, indeed, closer to the practice of federal states in managing federal grants with strings attached to general policy goals and achieving national standards set by the central government.

4. Conclusions

In the light of the considerations expressed above and given the growing influence of conditionality in the US and Europe, it seems increasingly important to examine the role of conditionality as one of the current 'regulatory' instruments deployed by multilevel systems.

Looking at the EU, conditionality is undoubtedly an attractive option, particularly in those areas where the EU regulatory tools cannot ensure adequate compliance with EU law, objectives and values. Plus, it could help ensure the effective functioning of EU policies and foster solidarity among the Member States.

The use of conditionality in the rule of law crisis and in the new programs to address the COVID-19 crisis provide a new, more 'positive' conditionality that is inherently different, for example, from the 'austerity' conditionality adopted in the past. Such conditionality comes much closer to federal conditionality, which is also considered a 'significant and pervasive feature of modern governance'[73] and even an instrument that plays a 'pivotal role in preserving the integrity of [...] Constitutional rights and structure'[74] or in other words, counterbalancing solidarity and autonomy.

72 Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process*, Routledge, 2023, 139.

73 Tribe and Matz, *Uncertain Justice: The Roberts Court and the Constitution* (n 35).

74 Louis W. Fisher, 'Contracting around the Constitution: an Anticommodificationist Perspective on Unconstitutional Conditions' (2019) 21 JCL 1167.