**Privacy as Europe’s First Amendment**

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*Abstract:*

The protection of universal principles varies across different jurisdictions: the prominence of dignity in Germany or free speech in the United States is undisputed. My argument is that in America, the First Amendment took off only during the New Deal and later, the Civil Rights revolution as an identity-formation and unifying tool in a deeply divided society. The symbolic significance of free speech in the U.S. remains central to this day. In the midst of its identity crisis with looming Brexit, Europe is now experimenting with privacy-as-constitutional identity in a somewhat similar way. This article seeks to unpack the values encompassed in privacy and freedom of speech, looking into the different functional responses that two different democratic societies place their bets on. As data protection and privacy come to a clash with important trade and security interests in an evermore-globalized world, the power of the outward-oriented European privacy discourse is likely to remain above all rhetorical.

1. Introduction: A Note on Comparative Law Methodology

The question of methodology in comparative constitutional law is a Pandora box[[1]](#footnote-1) but most comparativists would agree that one of the central reasons[[2]](#footnote-2) why we recur to legal comparisons on the fist place is in order to extract principles that can be adapted and applied across different legal systems; in other words, most academic comparisons turn to be functional: we tend to compare in order to learn from one another. In this regard, it makes sense if one looks, for example, into how privacy is protected and balanced with other rights and interests in one legal system and compares this to the way privacy is protected and balanced in another legal system. Similarly, a ‘traditional’ legal comparison would explore the way freedom of expression is protected and balanced in one jurisdiction vis-à-vis the way this is done in another. The *prima facie “*logical” comparison is thus to compare a human right in one legal order to *the same* human right in another legal order: we compare privacy with privacy and freedom of speech with freedom of speech.

On the level of constitutional law between Europe and the United States in the filed of privacy law however, such an approach would render the comparison nearly barren. Privacy is enshrined as a fundamental right in Article 8 of the European Convention on Human Rights (ECHR) and features prominently, on a par with the right to freedom of expression under Article 10 ECHR, in the case law of the European Court of Human Rights (ECtHR). Moreover, the Strasbourg Court ascribes equal value to both privacy and freedom of expression.[[3]](#footnote-3) Especially after the entry into force of a binding EU Charter of Fundamental Rights with the Lisbon Treaty in 2009, the European Court of Justice (CJEU) has also become one of the most prominent institutional actors in promoting the rights to privacy and data protection in the European Union. Landmark judgments like *Digital Rights Ireland,*[[4]](#footnote-4) *Google Spain*[[5]](#footnote-5) *and Schrems*[[6]](#footnote-6) have had a reinforcing effect on one another. Conversely, there is no right to informational privacy under American constitutional law, and seemingly not a chance there would be one in the near future.[[7]](#footnote-7) Circumscribed by both the so-called “first” and the “third-party” doctrines,[[8]](#footnote-8) the US Fourth Amendment offers only very limited privacy protections in the public sector, whereas there is virtually no constitutional protection for the individual that would extend to data exchanges in the private sector. Thus far, also on the level of statutory law EU data privacy (at least on the books)[[9]](#footnote-9) continues to place a strong emphasis on substantive protections based on a comprehensive set of what are known as Fair Information Practice Principles enforced by independent national data protection authorities (DPAs). In contrast, the American experience of state leadership with certain privacy-friendly initiatives, in combination with the Federal Trade Commission (FTC) as a main privacy enforcer, usually remains confined to treating data privacy not as a constitutional but as a consumer protection matter; the US FTC-model consists of legal requirements for disclosure and a narrow, harm-based approach, in line with the American political economy. [[10]](#footnote-10)

In sum, since there is very little weight to put on the side of privacy when the question of balancing freedom of speech against a privacy interest is put on the table before U.S. courts: the privacy interest would not gain much traction. This preliminary finding should not foreclose, however, a meaningful scholarly comparison between the two constitutional systems in this field. I would like to suggest that in order to gain a better understanding of what the judiciary is now trying to achieve in the EU, we must turn the comparison around and see what *systemi*c *meaning and function* is given to free speech in the U.S. constitutional order vis-à-vis the function and meaning that privacy and data protection are acquiring in Europe. Therefore, I argue that the right comparator of the rights to privacy and data protection in the EU is the right to freedom of speech in the U.S.

1. The US First Amendment Clause on Freedom of Speech: from Modest Beginnings to Centrality

1. The Beginnings

The US First Amendment solemnly declares that: “Congress shall make no law… abridging the freedom of speech, or of the press.”[[11]](#footnote-11) Despite this strong wording, from the Sedition Act of 1798, to antislavery influences,[[12]](#footnote-12) suppression of labor agitation[[13]](#footnote-13) and the First Red Scare,[[14]](#footnote-14) the First Amendment provision on freedom of speech had admittedly modest beginnings in the U.S. Ashutosh Bhagwat recounts that: “The English Bill of Rights of 1689 did not provide any protection for free speech (aside from the speech of members of Parliament), nor…did the Virginia Declaration of Rights of 1776. Indeed, of the thirteen original states, only one—Pennsylvania—protected free speech in its state constitution”.[[15]](#footnote-15) In his historical analysis, Geoffrey Stonehas further pointed out that “the Federalists possessed little faith in free and open debate”;[[16]](#footnote-16) the harsh treatment of dissenting speech during the Civil Warwas a clear sign of that trend.

Exploring the origins of the libertarian tradition of free speech in the U.S. in a critical manner, Mark Graber[[17]](#footnote-17) too, has noted that even if during the late nineteenth and early twentieth centuries there existed a radical tradition that sought to offer speech greater protection, this tradition *de facto* offered little help for dissenters like Charles Schenck and Ben Gitlow, the petitioners in the first cases on free speech that came before the Supreme Court at the start of the twentieth century.[[18]](#footnote-18) Consensus on the “dark years” of free speech in America extends to liberitarians like Floyd Abrams who recently wrote that: “Until well into the twentieth century, censorship was rampant. It was as if the First Amendment had yet to be written”.[[19]](#footnote-19) With Helen Knowles and Stephen Lichtam, one can therefore agree it is no exaggeration that the modern law of free expression in the U.S. was “birthed in the opinions written by Holmes and Brandeis in the 1920s and 1930s”.[[20]](#footnote-20) These were separate opinions, however, and could not get close to summoning a majority on the Supreme Court until only decades later. Before World War I, “No court was more unsympathetic to freedom of expression than the Supreme Court…”, wrote David Rabban in a thorough analysis called “The First Amendment in its Forgotten Years”.[[21]](#footnote-21) For Rabban, before World War I, ”the widespread judicial hostility to the value of free speech transcended any individual issue or litigant”.[[22]](#footnote-22)

Outraged at the blatant disregard for free speech of the judiciary during that period, an influential intellectual contemporary, Zechariah Chafee,[[23]](#footnote-23) made it his life-long project to part with, completely ignore and ultimately repudiate disregard for freedom of expression in the U.S. Chafee essentially skimmed through legal history to conjure and convey a heroic story about respect for freedom of speech in early America based on the framers’ purported rejection of common law seditious libel. Even if some of the historical facts in Chafee’s analysis were later categorically refuted,[[24]](#footnote-24) the power of his narrative persisted, and some of Chafee’s doctrinal suggestions were taken up in the dissents of Brandeis and Holmes.[[25]](#footnote-25)

Legal historians later focused on describing the cases that led the First Amendment to be a mere paper guarantee in the period before World War I but did not explain why this might have been the case and how given the low status enjoyed by free speech, as Anthony Lewis observed, “[t]he Holmes-Brandeis views… persuaded the country and, in time, the Court.”[[26]](#footnote-26) In other words, what used to be marginalized dissents became the canon against which the First Amendment is interpreted to this day. The “glorious years” of the First Amendment with *New York Times Co. v. Sullivan*[[27]](#footnote-27) and *Brandenburg v. Ohio*[[28]](#footnote-28) come only with the Civil Rights Revolution. During the struggle to defeat racial segregation that Chief Justice Earl Warren waged in the 1960s, he found out that “support for civil rights frequently required, as a practical matter, significantly broadening the rights to free expression as the movement’s struggles both dramatized the need for broad libertarian speech doctrine and provided the occasions for its expansion and development.”[[29]](#footnote-29) For Bernard Schwartz, “[m]ore consistently than other Courts before or since, the Warren Court approached free speech questions from the perspective that freedom of expression is a *preferred* constitutional value.”[[30]](#footnote-30)

There is a story to be told about the astonishing rise to centrality of free speech in America in exactly that period of extreme racial tensions and social divisiveness. To borrow from a sociologist, free speech filled with meaning the U.S.’s search for a “civil religion”;[[31]](#footnote-31) it provided a rich and multilayered concept that could serve as a symbol of commonality and an image of internal bond in a very divided society.[[32]](#footnote-32) In constitutional law parlance, the vocabulary of civil religion would translate into an aspect of constitutional identity or constitutional patriotism. Unlike constitutional identity that encompasses the broader structural characteristics of a written or unwritten constitution[[33]](#footnote-33) or constitutional patriotism that at its core propagates the espousal of universal values,[[34]](#footnote-34) freedom of speech as civil religion zooms in on one particular identity-construing feature that provides the necessary social “glue” for a heterogeneous community. There are several elements that make freedom of speech an apt candidate for successfully accomplishing precisely this function in the U.S.: these are its bipartisan nature next to an amalgam of individual and communal values that the right bundles together. I will examine these next.

3. The Bipartisan First Amendment

Jack Balkin has poignantly noted that:

”…for most of America’s history, protecting free speech has helped marginalized or unpopular groups to gain political power and influence. The First Amendment normally has been the friend of left wing values, whether it was French emigres and Republicans in the 1790s, abolitionists in the 1840s, pacifists in the 1910s, organized labor in the 1920s and 1930s, or civil rights protesters in the 1950s and 1960s.”[[35]](#footnote-35)

Even if in the early days of the American Republic, the First Amendment did not offer substantive protections to progressives as discussed before, it still remained primarily their (argumentative) stomping ground. However, for Balkin:

“it is also important to remember that the alliances between particular conceptions of rights and a particular political agenda are always contextual, always situated in history. Everyone is familiar with positions that originally were espoused by radicals and later became mainstream or even conservative positions. The radical ideas of the day often become the orthodoxy of tomorrow, and, in the process, take on a quite different political valance.”

Balkin has referred to this phenomenon as “ideological drift,” the move of liberal principles either from right to left on the political spectrum or from left to right. As a multifaceted concept, freedom of speech in the U.S. has become a legal magnet for different contextual constellations that the courts have subsequently disentangled, ultimately siding with both progressive *and* conservative causes. Most notably, the recent expansive protections given to commercial speech and unbridled campaign finance during elections signpost the ideological migration of the First Amendment free speech clause from the left to the right of the political spectrum.

For present purposes however, it is worth remembering that the “golden age of the “progressive” First Amendment comes with the categorical refute of English libel law in *Sullivan*. Justice Brennan wrote the opinion for the Court, constitutionalizing an entire field of state tort law. In one stroke, the Court declared that:

“We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of official conduct”.[[36]](#footnote-36)

The opinion is historic not only because of its value as a strong precedent, setting up new legal standards such as the reversal of “truth” as absolute defense in defamatory cases and the introduction of “actual malice”[[37]](#footnote-37) as the new test for deciding on the merits of such cases. Rather, the dramatic impact of *Sullivan* stems from its connection with the civil rights struggle in the South and the rise of the First Amendment as the constitutional tool *par excellence* in the U.S. for dealing with grievances in a highly divided society.

When on March 29, 1960 the New York Times run the full-page advertisement titled “Heed their Rising Voices” that was to become the cause of action for libel brought by the Montgomery Public Safety Commissioner Sullivan first to the courts in Alabama and subsequently – to be heard by the US Supreme Court, the civil rights revolution was reaching a high point. The Supreme Court had handed down its landmark decision in *Brown v. Board of Education*[[38]](#footnote-38) as far back as in 1954 but even in the beginning of the 1960s, the enforcement of *Brown* still faced a fierce opposition from the South. As Bruce Ackerman argues, it was not yet clear “[w]hat did Brown really mean? Was it a mandate for sweeping assaults on racial subordination or a more modest ban on differential treatment by the state on racial grounds?”[[39]](#footnote-39) Antony Lewis noted that in but a footnote in *Sullivan*, Brennan “disposed of all the legal issues other than the First Amendment claims.”[[40]](#footnote-40) Other no less important claims included, for example, the contention of ministers that they were denied the equal protection of the laws by racial segregation and racial bias in the courtroom. Therefore, even as in the years to come landmark statutes would pass to combat racial inequality in the employment and housing sectors,[[41]](#footnote-41) with *Sullivan* freedom of speech overshadowed to a certain extent the Fourteenth Amendment, emerging instead as the primary constitutional instrument for tackling the deep disagreements that run through American society.

The unifying pull of *Sullivan* was reinforced by the fact that the main lawyer for the *Times* in the arguments to the US Supreme Court was Herbert Wechsler, a renowned constitutional law professor that elsewhere in his academic writings had expressed unwavering support for strong federal powers.[[42]](#footnote-42) Like Chafee decades ago, Wechsler, too, recurred to history and rhetorically drew on the political ideals of the founding fathers.[[43]](#footnote-43) In turn, Justice Brennan relied in large parts on Wechsler’ brief when writing the opinion for the Court in praise of free speech. That Brennan wrote the judgment with an eye on establishing a strong legal tradition for free speech as an inherently American value, breaking with the colonial past of English seditious law, becomes clear also from his reliance on cases where freedom of speech was previously linked to the high ideal of self-government by other Justices like Chief Justice Hughes, Black, Hand and Brandeis. The opinion culminates with Brennan’s characterization of American freedom as “the commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials…”[[44]](#footnote-44)

Whereas *Sullivan* came down on the side of progressive antisegreganionists, the principles that it established were interpreted to protect the expression of the grievances and protest on major public issues of the opposing camp, too. Years after the celebrated judgment of *Sullivan*, in *R.A.V. v. City of St. Paul*,[[45]](#footnote-45) the Supreme Court decided that even racial hate speech such as the burning of a cross on an African-American family’s lawn is constitutionally protected. Once in the domain of public discourse defined ever more broadly and protected by the First Amendment,[[46]](#footnote-46) other US constitutional guarantees become somewhat dimmed. Akhil Amar has criticized *R.A.V*. by emphasizing that the Justices focused almost exclusively on the First Amendment: “They all seemed to have forgotten that it is a *Constitution* they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well.”[[47]](#footnote-47) However, because of the diversity of the American public and the reliance on strong constitutional protections for unimpeded public discourse that if free speech cannot help dissipate, it can at least help reconcile societal differences, “[t]he First Amendment has been interpreted to protect even highly intemperate and uncivil speech, so long as it falls within the broad definition of public discourse”.[[48]](#footnote-48)

3. Unpacking Freedom of Speech: Autonomy and Self-Governance

The two main theories of interpreting the First Amendment in the U.S. are revolving around the libertarian notion of a “marketplace of ideas” and the republican one of “self-government”. Each can be summarized in broad strokes as being built around a focus on speech as an either individual or a collective value. Although these two aspects of the right to freedom of speech are intrinsically interrelated in as much as individual liberty and personal autonomy are necessary preconditions for the exercise of self-government and a meeting point for libertarian and republican thought,[[49]](#footnote-49) each brings along distinct implications. An individualist emphasis on freedom of speech serves the purposes of self-fulfillment and personal self-realizaton. Although theoretically liberty does not need to be given a liberitarian spin, this is the predominant understanding that it receives in the American constitutional context: liberty is thus taken to be the negative liberty from governmental intrusion. For example, Floyd Abrams offers originalist arguments to underpin his assertion that: “…what became the First Amendment was phrased in a manner that was couched not as affirmatively assuring the people of their rights but, in indelibly negative language, as assuring that Congress could not strip the public of those rights.”[[50]](#footnote-50)

At the other end of the theoretical spectrum, Alexander Meiklejohn has famously argued for the collective value of free speech as an essential condition for the maintenance of democratic self-government.[[51]](#footnote-51) In Robert Post’s elaboration on the collective limb of the right, freedom of speech protects first and foremost the right to participate in a public discourse and in the channels of communication constitutionally deemed necessary to form an opinion on politics. It gives “[t]he opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic”.[[52]](#footnote-52)

In the U.S, the combination of the two sides of freedom of speech as a right that promotes individual liberty and collective self-government has produced legal doctrine that applies “the most exacting scrutiny” to “regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”.[[53]](#footnote-53) As noted by Justice Kennedy in *Turner Broadcasting System v. Federal Communications Commission,* “the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals”.[[54]](#footnote-54) Thus, the harsh rule that the US courts apply against the content discrimination of speech expresses the fundamental equality of democratic citizenship by aiming to afford equal protection and value to the expression of all Americans. The ideal of equality that underpins First Amendment doctrine is however qualitatively different from the ideal of substantive equality put forward by the Fourteenth Amendment. Moreover, the linkage of the First Amendment provision on free speech to citizenship has been extensively emphasized in American constitutional law scholarship.[[55]](#footnote-55) When unpacked, this link can offer an explanation about the rise to centrality of freedom of speech as a functional response to dealing with heterogeneity in the American society.

1. The place of privacy and data protection in Europe

1. The EU’s endemic legitimacy deficit and the role of the CJEU

In turn in Europe, the recent case law of the CJEU in the data privacy domain can be seen against the larger backdrop of European integration and the role that the CJEU plays in this process. Short of a fully-fledged federation but having by far exceeded the mandate of a conventional international organization, the European project suffers from an almost endemic legitimacy deficiency. From the “empty chair crisis” of De Gaulle in the 1960s[[56]](#footnote-56) to talks of the EU’s “democratic deficit” culminating in the Maastricht decision of the German Federal Constitutional Court[[57]](#footnote-57) through the austerity turmoil with Greece[[58]](#footnote-58) and now Brexit,[[59]](#footnote-59) the EU is exiting one constitutional crisis only to enter into another. During the debates about the already defunct European Constitution around 2004-2005, Armin von Bogdandy observed that:

“many have asserted that establishing a European identity is essential. They consider citizens' identification with the supranational organization as necessary to its expansion into a viable political community. Official efforts were already directed toward this goal by the early 1970s, finding a first peak in the 1973 declaration of heads of state and government on European identity.”[[60]](#footnote-60)

In line with its parsimonious judicial style, the CJEU has always carefully avoided any strong identitarian language in its decisions. Nonetheless, as argued by Rosenfeld, “ a… process for discovering (at least a partial) constitutional identity emerges from the European Court of Justice’s…endeavor to extract meaning from the ‘common constitutional traditions’ of the…EU member states for purposes of filling a perceived constitutional gap at the supranational level of the EU.”[[61]](#footnote-61)

From the development of direct effect and primacy for EU law through the constitutionalization of the preliminary reference procedure, the role of the CJEU in furthering the integration process, especially in the early days of the EU and during periods of crises, has been well-documented.[[62]](#footnote-62) The CJEU became on the forefront of anti-discrimination and citizenship law developments. Regarding the first area of law, the Court was widely perceived to be in the vanguard in the promotion of equality between men and women, creating important legal doctrines such as the notion of indirect discrimination, the device of shifting the burden of proof (i.e. to the employer), the notion of victimization as discrimination and pregnancy discrimination as sex discrimination. All these doctrines were later incorporated into statutory legislation but as Gráinne de Búrca has stressed, the Court itself first outlined them.[[63]](#footnote-63) In reference to citizenship, the Court solemnly proclaimed that: “Union citizenship is destined to be the fundamental status of nationals of the member states.”[[64]](#footnote-64) In its early citizenship cases, the Court also sought to release the mobility of Europeans from the exercise of an economic activity in another member state connected to the freedom of movement. Later it gave further hopes to Europhile enthusiasts by signaling a possible move toward decoupling citizenship rights from the cross-border movement trigger necessary to activate EU law.[[65]](#footnote-65) Kochenov summarizes this vision as follows: “Being a citizen is much more than taking a bus across a (usually invisible) border or being employment-worthy while away from home and thus qualifying for the protections of EU law.”[[66]](#footnote-66) In both antidiscrimination and citizenship law however, the CJEU has gradually retreated from being in the driving seat of legal integration. For example, although prompted by many scholars to develop on its pioneering case law in the area of citizenship and elaborate on the notion of Union citizenship as a fundamental status, the CJEU’s president in a co-authored piece recently emphasized the need for the EU to function within the scope of its delegated powers, “thus presenting the arguments for change as superfluous, if not *ultra vires*”.[[67]](#footnote-67) Similarly, in the area of anti-discrimination, de Búrca concludes that the Court has thus far adopted a less ambitious and expansive role in relation to the newer grounds of discrimination introduced in statutory law than it did in relation to sex discrimination in earlier decades.[[68]](#footnote-68)

2. The EU Charter of Fundamental Rights and the Rights to Privacy and Data Protection

2.a. The EU-wide Dimension of Data Privacy

Where do data protection and privacy come into play? Since 2009, the European Charter of Fundamental Rights acquired binding status. The Charter is binding on both the EU institutions and the Member States when they act within the scope of EU law. It provides for privacy and data protection in two separate provisions – in articles 7 and 8 respectively.[[69]](#footnote-69) Simultaneously, since 1995 the General Data Protection Directive has served “two of the oldest ambitions of the European integration project: the achievement of an Internal Market (in this case the free movement of personal information) and the protection of fundamental rights and freedoms of individuals.”[[70]](#footnote-70) Before the entry into force of the Charter, however, the CJEU has largely emhasized only the economic limb of the Directive.[[71]](#footnote-71) Much like in the citizenship cases though, the Court first expanded the applicability of EU law despite indications that certain situations might be treated as “wholly internal” and outside of the scope of EU law.[[72]](#footnote-72) Similarly, the Court interpreted narrowly the derogation provisions of the Directive, with the result of further expanding its scope[[73]](#footnote-73). Initially, the judges were careful to leave it to the Member States to weigh in data privacy rights against other rights and interests such as freedom of expression or copyright.[[74]](#footnote-74) As Lynskey argues, with the adoption of the EU Charter as well as the insertion of a specific legal basis on data protection in the Treaty of Lisbon,[[75]](#footnote-75) the CJEU felt more justified in defending the fundamental rights’ objective of the European data protection regime.[[76]](#footnote-76) In addition, the newly adopted General Data Protection Regulation (GDPR) that entered into force in 2018 further stresses the importance of strengthening fundamental rights standards.[[77]](#footnote-77) Moreover, in the *Schecke and Eifert*[[78]](#footnote-78) case the Court invalidated for the first time provisions of European legislation because it found that they contravened with the rights to data protection and privacy under the EU Charter. It is worthwhile remembering that the CJEU has long been accused of its pro-European bias that prevents it from becoming a true constitutional adjudicator. One of the strongest critiques mounted at the CJEU is for applying a double standard of proportionality when reviewing for human rights violations Union acts and Member Sate acts – the Court is said to have been rigid regarding the Member States, but lenient regarding the Union.[[79]](#footnote-79) With the entry into force of the Charter however, the Court did not shy away from applying strict proportionality also against a Union measure, finding that EU transparency legislation in the field of agricultural funds was suitable but not necessary to achieve its stated objectives. In other words, in *Schecke and Eifert* in the last phase of the proportionality test that implies “a least means analysis”, the Court found that the EU could effectively achieve transparency without unduly breaching the individual rights of privacy and data protection under Article 7 and 8 of the EU Charter.

Further, a few years later the CJEU invalidated the EU Data Retention Directive in its entirety. In *Digital Rights Ireland*, the Court held that in view of the important role played by Articles 7 and 8 of the Charter, and given the particularly serious interference with these rights that data retention for national security purposes entails, “the EU’s discretion is reduced, with the result that review of that discretion should be strict”.[[80]](#footnote-80) Unlike in its generally legalistic opinions, the Court used a rather strong language stating that: “the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private rights are the subject of constant surveillance”[[81]](#footnote-81) Subsequently, in *Tele Sverige* the Court reaffirmed its strong stance against disproportionate national data retention measures reintroduced in the aftermath of the *Digital Rights Ireland* judgment. The Court once again interpreted narrowly the derogations to EU statutory law – in this case the so-called e-Privacy Directive. The e-Privacy Directive imposes requirements for the confidentiality of data in the telecommunications sector but excludes from the scope of EU law national measures necessary for the protection of public security, defence, state security and the enforcement of criminal law. The Court refused to accept a distinction between the retention of data (by communications providers) and access to that data (by police and security services), which would have resulted in disapplication of the Directive.[[82]](#footnote-82) In sum, through gradually broadening the scope of EU statutory data privacy legislation, the Court’s case law in this area has had the clear implication of broadening the scope of application also of the EU Charter to the member states. Short of a fully-fledged incorporation, the EU Charter has generally had a certain centralizing effect through the case law of the CJEU.[[83]](#footnote-83)

The EU data protection regime comes on top and is complemented by the European Convention of Human Rights. On the one hand, the text of the EU Charter gives the possibility to the CJEU to rely on more rights-protective sources.[[84]](#footnote-84) On the other hand, even in cases of national security and defense matters that are excluded from the reach of EU law, Article 8 of the ECHR provides a layer of protection. The Convention does not provide a definition of any of the four interests covered by Article 8(1) – private and family life, home and correspondence. Article 8 ECHR therefore leaves ample space for the Strasbourg Court to interpret the open-ended provisions of the right to privacy. It is no exaggeration to claim that Article 8 has been one of the most jurisgenerative provisions in the case law of the Strasbourg Court, and the Court has found also positive obligations for the state to emanate from Article 8. The right to privacy, often in conjunction with Article 14 of the Convention which prohibits discrimination, has been invoked in cases as wide-ranging as those concerning “various aspects of homosexuality, transsexualism, adoption and artificial procreation; restrictive abortion grounds; prohibition of pre-implantation diagnosis; assisted suicide; demand of terminally ill cancer patients to obtain anticancer products not yet authorized; requirement of physical resistance in cases of rape; storing and destruction of fingerprints and DNA samples; paternity leave of military personnel; refusal of residence permit for HIV-positive applicant; failure to compel service provider to disclose the identity of a person who placed indecent advertisements on an Internet site; and so forth).”[[85]](#footnote-85) From search and seizure powers to data protection and even environmental issues,[[86]](#footnote-86) in many of these cases the ECtHR has either set a precedent or the dissenting opinions indicate that there might be a change in the law in the future. Moreover, throughout its Article 8 case law the Strasbourg Court has overwhelmingly relied on a well-known formula from its case law – that of consensus analysis. Coupled with the interpretation of the Convention as a living instrument, evoking consensus or common ground within the Council of Europe Contracting States on the different questions at stake has allowed the ECtHR to narrow the margin of appreciation that it affords to the national authorities and on the whole, to contribute to the harmonization of legal standards within Europe.

2.b. The External Dimension of Data Privacy

In turn, after the adoption of the EU Charter and using the ECtHR’s jurisprudence as a stepping stone to build its own case law,[[87]](#footnote-87) in *Schrems*[[88]](#footnote-88) the CJEU has gone as far as to proclaim that the essence of the right to private life is affected in the case of mass surveillance that gives the government access to the content of intercepted communications. In the prior case of *Digital Rights Ireland*, although the CJEU acknowledged the blurring of the line between the so-called meta (or traffic) and content data, in view of the possibility that both present for profiling individuals, it eventually invalidated that Directive based on a proportionality balancing assessment. However, when the essence of a fundamental right is affected under EU law, this excludes any further balancing tests with countervailing rights or interests. The standard of review affirmed by the Court from *Digital Rights Ireland* is therefore that of strict scrutiny, to use the US vernacular. The Court also found that the essence of the right to effective judicial protection is affected by the lack of any possibility for the individual to pursue legal remedies (in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data).[[89]](#footnote-89) The case is the first instance where the CJEU has found that the essence of a right is affected.

The *Schrems* case came down after the Snowden revelations exposed the sharing of data by private companies for national security purposes under the PRISM program in the U.S.; the case appeared to be about curtailing indiscriminate mass surveillance but it was actually about boosting the handling of personal information by private companies. In effect, because of the centrality of the purpose limitation principle[[90]](#footnote-90) and the comprehensive constitutional and statutory protections for both public and private uses of data under EU law, it aspired at both. With *Schrems*, the CJEU essentially invalidated the US-EU Safe Harbor agreement on personal data transfers from EU member states to US companies. The 1995 General Data Protection Directive (and now the newly enacted General Data Protection Regulation) contain a provision that requires an “adequate” level of data protection to be ensured in non-EU countries that process the data of EU citizens. In the aftermath of the 1995 Directive, about thirty states, among them Canada, Israel and other members of the Organization for Economic Cooperation and Development, enacted EU-like statutes. It became clear, however that the EU has found a “significant other” in the face of the U.S. On the one hand, the U.S. administration prioritized its e-commerce objectives and its data privacy standards were found wanting from a EU law standpoint. On the other, the U.S. remains one of the most important trade partners of the EU and finding a workable solution was thought indispensable for both sides. Thus, the product of protracted negotiations between EU Commission officials and the US Department of Commerce, the Safe Harbor arrangement came into being as a self-certifying scheme for companies that transferred data between the U.S. and the EU.[[91]](#footnote-91) Once set in motion, the framework was heavily criticized on three separate occasions[[92]](#footnote-92) but it was not before the Court’s judgment that the Commission took decisive action toward amending the agreement. In *Schrems*,the CJEU interpreted the standard of adequacy for data exchanges with third countries required by the Directive to mean “essentially equivalent” to that enshrined under EU law.[[93]](#footnote-93) In view of the high bar set by the Court through essential equivalence, it remains to be seen whether the newly signed replacement of Safe Harbor – the Privacy Shield[[94]](#footnote-94) – will withstand judicial scrutiny in the future. There are already two pending challenges brought before the General Court in this respect. Furthermore, the other mechanisms of data transfers to non-EU states provided in EU law and with particular relevance for US companies such as model contractual clauses and binding corporate rules await resolution in the courts as to their compliance with EU Charter rights.

Beyond the technicalities of handling data transfers, the CJEU was perceived as putting an emphasis on Europe’s “otherness” in relation to the U.S. also in the *Google Spain* case. In 2014 the CJEU handed down its controversial ruling in what the applicant argued was his ‘right to be forgotten’.[[95]](#footnote-95) On the substance, the question focused on the data protection rights of an individual to prevent Google from displaying links to information that was too outdated to be relevant to that individual’s current circumstances. Twelve years before the court proceedings a Spanish newspaper, La Vanguardia, published an advertisement about a public auction against the real estate of the applicant that aimed at recovery of social security debts incurred sixteen years ago and settled since. The Court interpreted Article 12(b) of the 1995 Data Protection Directive, which provides a right to appeal to the national data protection authority (DPA) to compel the correction, removal or blocking of false and inaccurate information, and Article 14(a), which provides the right to object to the inclusion of false information in a database (and when the objection is justified, requires the controller of the database to remove the objectionable data).[[96]](#footnote-96) Unlike the Advocate General, who did not find the search engine to be the data controller,[[97]](#footnote-97) the CJEU emphasised the need to secure the effectiveness of the EU data protection regime and decided that Google was indeed the controller of the data. The digitalized record of La Vanguardia’s advert could stay online but needed to be delisted by Google.

In a way, with this decision the CJEU anticipated the GDPR, which was at the time still going through the legislative process. In *Google Spain*, the CJEU merely sketched the contours of a balancing exercise in the context of profiling by search engines, leaving it to the national courts to put flesh on the bones of that test. Whereas the Court reasoned that in the particular circumstances of the case at stake, the commercial interest of the search engine in the processing cannot trump the individual rights to privacy and data protection of the individual,44 it recognized that the balance may depend, on a case-by-case analysis, on: “the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, according to the role played by the data subject in public life”.[[98]](#footnote-98)

The CJEU was especially concerned with the adverse effects of detailed profiling on the individual: presumably in the case of assessing the individual’s financial credibility for a number of contractual applications, the applicant in the case at stake could be severely hampered based on the outdated information about his debts. The CJEU emphasised that the search engine is “liable to affect significantly the fundamental rights to privacy and to the protection of personal data”, stressing that:

“the processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of [the data subject]. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information in such a list of results ubiquitous…”.[[99]](#footnote-99) thought I'd circle back with you: I'll arrive at 19.4

Тhe final outcome of the decision is that if a person is searched for by name in Google’s search engine and even if the links lead to lawfully displayed material, Google might need to remove them if they are deemed to contravene the provisions of EU data protection law. By assessing the content of the information displayed in order to determine its utility in the public interest, the CJEU has significantly deviated from the US understanding of content neutrality. Moreover, although access to information was implicitly balanced with data privacy rights, the Court did not explicitly mention the right to freedom of expression under Article 11 of the EU Charter. The decision was met with unequivocal critique on the side of the American academic community. Along with *Google Spain* and *Schrem*s, recent serious antitrust fines against American technological giants like Apple and Google have further provoked the ire of the former U.S. democratic administration. In 2015 then President Obama stated: “…oftentimes what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of [EU’s] commercial interests."

Long before these recent transatlantic data wars, Europe has antagonized the U.S. in areas as diverse as disputes over the International Criminal Court, the Kyoto protocol (and more recently, the Paris agreement), as well as the war in Iraq. In his analysis of the identitarian aspects of the failed Constitutional Treaty, von Bogdandy finds a similar trend by which “[the] treaty affirms the notion that Europe can find its identity only in delimitation from, perhaps even by standing against, the U.S. The delimitation arises… from the European social model…[and the treaty’s mandate for the assertion of EU’s interests and values internationally].”[[100]](#footnote-100)

2.a. Unpacking Data Privacy: Self-determination and Democratic Accountability

Privacy and data protection have been broadly connected to informational self-determination and the development of autonomous personality in a landmark decision of the German Federal Constitutional Court,[[101]](#footnote-101) and have also been linked to dignitary concerns. The ECtHR has yet to ascribe a broader democratic value to privacy, and as pointed out by Kirsty Hughes, the Court associates the right to privacy with individual interests such as “physical and psychological integrity” and the “right to identity and personal development”. However, next to the status of privacy as an individual right, recent accounts have started advancing its significance as a collective good and a *sine qua non* for democracy. Instead of an often mistaken degeneration of privacy as an ultra individualistic value that hampers the common interest in security or the right to freedom of speech, Paul Schwartz has noted that novel methods of civic engagement and democratic participation on the internet can be endangered by the lack of robust privacy regulation. From this point of view privacy is but a Janus-faced freedom of expression: the internet’s potential to promote democratic discourse would be hampered by the loss of privacy, privacy being a precondition for the exercise of free speech. Although perhaps at first sight counterintuitive, the idea that privacy and free speech are complimentary, rather than opposing values, transpires both from case law and comparative legal analysis. Currently, the ECtHR is about to decide on a pending case on an application by the British Bureau for Investigative Journalism under both articles 8 and 10 (rights to privacy and freedom of expression under the Convention). In the aftermath of the Snowden revelations in 2014, the Bureau challenged the UK’s gathering and handling of directly intercepted data and metadata for failure to protect the confidentiality of journalistic sources. Similarly, although the CJEU did not mention freedom of expression in *Google Spain*, it has evoked it on its own motion in the *Tele Sverige* case. As Neil Richards has it, “unconstrained surveillance, especially of our intellectual activities, threatens a cognitive revolution that cuts at the core of the freedom of the mind”.[[102]](#footnote-102) If anything, privacy appears to be co-constitutive of free speech.

The political limb of data privacy rights has a particular historical pedigree in Europe where the development of privacy and data protection rights is connected to the atrocities of World War II, and the heightened sensitivity toward data gathering practices of the secret police in Germany. In addition, the totalitarian past of Eastern Europe, as well as the authoritarian military regimes in Southern European states make the commitment to data privacy for political accountability seem especially important. Privacy has been recognized as a general principle of EU law by the CJEU even before the adoption of the EU Charter, and even though the same cannot be said for data protection, the latter right exists in the national constitutions or through judicial interpretation in several of the EU Member States. Like a commitment to freedom of speech in the interest of governmental accountability, which is ultimately universal, the political part of data privacy rights extends well beyond Europe. Privacy International states that: [w]hen we think of privacy in the political system we tend to recall historic events like Watergate, secret files held by governments in war-time, and blacklists”, and points to the stifling effect on protests in Iran, Iraq or China that governments’ use of modern surveillance technologies can have. Privacy (and data protection) have a direct link to democracy due to the chilling effect of surveillance on many other rights and freedoms like freedom of speech and association.[[103]](#footnote-103) As Helen Nissenbaum16 and Anabelle Lever write, privacy is inherent to the idea of a secret ballot: it is an expression of the democratic commitment to the equality of all citizens to decide who their representatives are without fear of being exposed to public pressure, manipulation or ridicule.

1. Freedom of Speech and Privacy as bedrocks of different democratic societies?

Freedom of speech and data privacy can be regarded as functional responses to different anxieties in two differently structured heterogeneous democratic societies.[[104]](#footnote-104) Europe accepts the elite-driven, bureaucratic state but fears its Kafka-like outreach: this is one way of interpreting what Article 8 of the EU Charter is about. The prominence that privacy and data protection have acquired in the recent case law of the CJEU can also be connected to the distinct but somewhat vague ideal of a social European model or a capitalist society that aspires to present an alternative to the American one. In the most compelling and perhaps most ambitious version of a theoretical justification for privacy so far – that of “privacy as non-domination” put forward by Andrew Roberts – autonomy itself can only be achieved after one has assured the non-domination of others.[[105]](#footnote-105) On this account, domination translates in the power misbalance produced by the massive amount of information the government or indeed, private companies store and use to exercise different forms of control. However, beyond a general critique of relying on identitarian politics that can backfire as nationalistic or yield to parochialism at best, the search for legitimation for the European project through opposition might be ultimately unsatisfactory. The CJEU is yet to distinguish the rights to privacy and data protection; much like with the enigmatic formula of European citizenship as “a fundamental status”, little do we know about what is the essence of data protection or why do we need to care as much about our privacy. We know what Europe is not, but what is it that it is about?

In contrast, mistrust for the state in America has led to the rise of freedom of speech as a centerpiece of American constitutionalism. Based on Herbert’ Croly’s distinction between the electorate and the people, Robert Post explains the importance of free speech for the development of public opinion and the public sphere in the U.S.:

“Although elections matter in a democracy, the decisions of an electorate are frankly tentative and revocable…The really effective sovereign power is to be found in public opinion, and public opinion is always in the making. Advances in communication have enabled people to keep in constant touch with one another by means of publicity…afforded by magazines, the press and the like. The active citizenship of the country meets every morning and evening and discusses the affairs of the nation with the newspaper [and one can add – social media] as an impersonal interlocutor.”[[106]](#footnote-106)

Americans as citizens need to gain a direct relationship of ownership with the state, one in which they imagine themselves as equals; their diverse viewpoints and grievances are equally given platform for expression, even if not equally attended to, i.e. through the equal protection clause of the Fourteenth Amendment. Similarly, the CJEU experiments with giving a unifying and perhaps identarian force to the combination of data protection and privacy in the EU, a strong stance that might be coming at the expense of other means of legal integration such as non-discrimination and citizenship.

1. \*Assistant Professor, Maastricht; Visiting Fellow, Yale Information Society Project. I am indebted to Robert Post, Jack Balkin, Bruno De Witte and Adrienne Stone for comments on earlier iterations of the article at the Yale Freedom of Expression Scholars Conference, the Maastricht Research Seminar Series and at Melbourne Law School. All errors remain mine.

   Scholarly agreement on comparative law methodology is scant. For a sample of different approaches, seeMichel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, 2012). [↑](#footnote-ref-1)
2. The other main reason is to gauge whether the system of international law converges or diverges in a certain area. SeeJoanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’, (2014) 62 *American Journal of Comparative Law* 1. See alsoBilyana Petkova, ‘Domesticating the “Foreign” in Making Transatlantic Data Privacy Law’, (2017) 15 *International Journal of Constitutional Law*, 4. [↑](#footnote-ref-2)
3. The ECtHR has held that “as a matter of principle these rights deserve equal respect”,See *Axel Springer AG v Germany,* App no 39954/08 (ECtHR 7 February 2012), para 87. See also *Von Hannover v Germany* App nrs 40660/08 and 60641/08 (ECtHR 7 February 2012), para 100; Węgrzynowski and Smolczewski v Poland App no 33846/07 (ECtHR16 July 2013), para 56. [↑](#footnote-ref-3)
4. Case C-293/12 and Case C-594/12*, Digital Rights Ireland Ltd. v Minister for Communications*, Marine and Natural Resources & Kärntner Landesregierung and Others, ECLI:EU:C:2014:238 (8 April 2014). [↑](#footnote-ref-4)
5. Case C-131/12 *Google Spain v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317 (13 May 2014). [↑](#footnote-ref-5)
6. Case C-362/14 *Maximillian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650 (6 October 2015). [↑](#footnote-ref-6)
7. Paul Schwartz and Karl-Nikolaus Peifer, ‘Transatlantic Data Privacy Law’, (2017) 106 *Georgetown Law Journal* 115. [↑](#footnote-ref-7)
8. As noted by Schwartz and Peifer, the Fourth Amendment “proves a poor fit with the conditions of modern governmental use of personal data in routinized databases that administer public benefits and services. In drawing on information alreadyin its databases, the government’s action is not limited by a constitutional concept that first requires a search or seizure”. *Id.* The authors refer to this as the “first party doctrine” to oppose it to the Supreme Court’s interpretation of the Fourth Amendment in *United States v. Miller*, 425 U.S. 435, 443 (1976) and *Smith v. Maryland*, 442 U.S. 735, 741-42 (1979), where the Justices established what is known as the third party doctrine, holding that the Fourth Amendment places no judicial restriction on information shared with a telephone provider, a bank or any other third party to which information has been made available (e.g. a search engine), even for different purposes. [↑](#footnote-ref-8)
9. Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe,* (MIT Press, 2015), arguing about *de facto* convergence of corporate practices on both sides of the Atlantic. [↑](#footnote-ref-9)
10. See Chris J. Hoofnagle, *Federal Trade Commission Privacy Law and Policy* (Cambridge University Press 2016). [↑](#footnote-ref-10)
11. U.S. Const. amend. I. [↑](#footnote-ref-11)
12. The South had to be protected from “fanatics [who] aimed to ‘excite a servile insurrection’” 250 U.S. at 630 (Holmes, J., joined by Brandeis, J., dissenting). “Instances of the suppression of speech were components of a campaign, by southerners, to construct a legal “Maginot Line” protecting their interests” – Michael Kent Curtis, *Free Speech, The People’s Darling Privilege: Struggles for Freedom of Expression in American History* (Durham, NC Duke University Press, 2000), 125. [↑](#footnote-ref-12)
13. Laura Weinrib, *The Taming of Free Speech* (Harvard University Press, 2016). [↑](#footnote-ref-13)
14. Milton Cantor, *The First Amendment Under Fire. America’s Radicals, Congress and the courts* (Transaction Publishers, 2017). [↑](#footnote-ref-14)
15. Ashutosh Bhagwat, *The Democratic First Amendment*, 10 *Northwestern University Law Review* 5 (2016) 1101. [↑](#footnote-ref-15)
16. Geoffrey Stone, *Perilous Times. Free Speech in Wartime. From the Sedition Act of 1798 to the War on Terrorism* (University of Chicago University Press, 2004) 12. [↑](#footnote-ref-16)
17. Marc Graber, *Transforming Free Speech: The Ambiguous legacy of Civil Libertarianism* (University of California Press, 1991), 8. [↑](#footnote-ref-17)
18. *Schenk v. United States*, 249 U.S. 47 (1919) and *Gitlow v. New York*, 268 U.S. 652, 665 (1925). [↑](#footnote-ref-18)
19. Floyd Abrams, *The Soul of the First Amendment* (Yale University Press, 2017) 29. [↑](#footnote-ref-19)
20. Helen J. Knowles and Steven B. Lichtman*, Judging Free Speech. First Amendment Jurisprudence of US Supreme Court Justices* (Palgrave Macmillan, 2015). [↑](#footnote-ref-20)
21. “[The cases] raised questions that courts today would recognize as free speech issues, although the Supreme Court, and sometimes even the litigants, often did not identify them as such. A few scattered hints of doctrine emerged from this litigation, particularly judicial reliance on the possible "bad tendency" of speech as a justification for penalizing it”. David Rabban, ‘The First Amendment in its Forgotten Years’, (1981) 90 *Yale Law Review* 514, 523. [↑](#footnote-ref-21)
22. *Id.*  [↑](#footnote-ref-22)
23. Zechariah Chafee Jr., ‘Freedom of Speech in War Times’, (1919) 32 *Harvard Law Review* 932. [↑](#footnote-ref-23)
24. Leonard Levy argued that Chafee and others "'anticipated the past' by succumbing to an impulse to recreate it so that its image may be seen in a manner consistent with our rhetorical tradition of freedom, thereby yielding a message which will instruct the present”, Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American history* (Harvard University Press, 1960) 3. [↑](#footnote-ref-24)
25. This was in particular true regarding the “clear and present danger test”, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) [↑](#footnote-ref-25)
26. Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Random House, 1991) 89. [↑](#footnote-ref-26)
27. *New York Times v. Sullivan*, 376 U.S. 254 (1964). [↑](#footnote-ref-27)
28. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). [↑](#footnote-ref-28)
29. Supra n 20, at 38. [↑](#footnote-ref-29)
30. Bernard Schwartz, *The Warren Court: A Retrospective* (Oxford University Press, 1997), emphasis added. [↑](#footnote-ref-30)
31. Robert N. Bellah, *The Broken Covenant. American Civil Religion in Time of Trial* (University of Chicago Press, 1975). [↑](#footnote-ref-31)
32. “The 1787 US Constitution was made in the name of ‘We the People’, yet African American slaves were excluded. Moreover, to the extent the US population is made up principally of the descendants of waves of immigration spreading over two centuries, how can today’s ‘We the People’ identify with its 1787 counterpart and accept the latter’s constitution as its own?”, Michel Rosenfeld, *Constitutional Identity* supra n 1, 761. [↑](#footnote-ref-32)
33. *Id.* See also Gary J. Jacobhson, *Constitutional Identity* (Harvard University Press. 2010). [↑](#footnote-ref-33)
34. For Liav Ograd, “The ‘overlapping consensus,’ in Habermasian terms, centers on the validity of the principles themselves. Accordingly, citizens should accept the validity of universal principles, even though they may disagree over their interpretation and application. Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press, 2015). Similarly, Jan-Werner Müller observes that: “Habermas has stressed time and again that complex modern societies cannot be sustained by a “substantive consensus on values but only by a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power. Yet it is important to bear in mind that even in this picture universal moral norms remain the ultimate source of attachment: it is simply that they have ‘retreated’ into the particular procedures that structure the rules for reworking a constitutional culture.” Jan-Werner Müller, “A General Theory of Constitutional Patriotism”, *International Journal of Constitutional Law* 6 (2008) 1, 82. [↑](#footnote-ref-34)
35. Jack Balkin, ‘Some Realism about Pluralism: Legal Realist Approaches to the First Amendment’, (1990) 3 *Duke Law Journal* 375, 22. [↑](#footnote-ref-35)
36. Supra n 27, 264. [↑](#footnote-ref-36)
37. *Id*, at 119. [↑](#footnote-ref-37)
38. *Brown v. Board of Education*, 347 US 483, 495 (1954). [↑](#footnote-ref-38)
39. Bruce Ackerman, *We the People. The Civil Rights Revolution*, (Harvard University Press, 2014) 6. [↑](#footnote-ref-39)
40. Supra n 26, 142. [↑](#footnote-ref-40)
41. These were the Civil Rights Act and the Fair Housing Act, *see* Pub. L. No. 88-352, 78 Stat. 241 (1964) and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631. [↑](#footnote-ref-41)
42. Herbert Wechsler, ‘The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government’, (1954) 54 *Columbia Law Review* 4. [↑](#footnote-ref-42)
43. For example, Wechsler pointed out that genuine representative government is impossible without very broad constitutional guarantees for freedom of speech and of the press and quoted Madison’s speech before the House of Representatives where Madison had mentioned that in the American system “the censorial power is in the people over the Government and not in the Government over the people.”, supra n 27. [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. *R.A.V. v. City of St. Paul*, III2 S. Ct. 2538 (1992). [↑](#footnote-ref-45)
46. “Displays containing some words - odious racial epithets, for example - would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender - aspersions upon a person's mother, for example - would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents.... St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.”, *Id.* [↑](#footnote-ref-46)
47. Akhil Amar, ‘The Case of the Missing Amendments: R.A.V. v. City of St. Paul’, (1992) *Harvard Law Review* 106 124, 125. [↑](#footnote-ref-47)
48. Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, 1995) 137-40. [↑](#footnote-ref-48)
49. Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (New York: Oxford University Press, 1997). [↑](#footnote-ref-49)
50. In support of his argument, Floyd Abrams quotes the first proposal of the First Amendment that Madison phrased in broader terms but that was later rejected: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable”, supra n 19, 9. [↑](#footnote-ref-50)
51. Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948). [↑](#footnote-ref-51)
52. Robert Post, *Democracy, Expertise and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (Yale University Press, 2012) 5-6. [↑](#footnote-ref-52)
53. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. See supra n 15, and the literature referred to therein. [↑](#footnote-ref-55)
56. Piers Ludlow, The European Community and the Crises of the 1960s: Negotiating the Gaullist Challenge (Routledge, 2007). [↑](#footnote-ref-56)
57. Ulrich Everling, ‘The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union’, (1994) 14 *Yearbook of European Law* 1. [↑](#footnote-ref-57)
58. For a critique on the role of the CJEU in this domain, see Harm Schepel, ‘The Bank, the Bond, and the Bail-Out: On the Legal Construction of Market Discipline in the Eurozone’, 44 (2017) *Journal Of Law & Society: Special Issue: Austerity And Law In Europe* 1. [↑](#footnote-ref-58)
59. For an early assessment, see Brexit Supplement 17 German Law Journal 13 (2016). [↑](#footnote-ref-59)
60. Armin von Bogdanndy, ‘The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe’(2005) 3 *International Journal of Constitutional Law* 2-3, 295. [↑](#footnote-ref-60)
61. Supra n 32, 759. [↑](#footnote-ref-61)
62. Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) *American Journal of Constitutional Law* 75, 1; Joseph W. Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* 8, (1991). [↑](#footnote-ref-62)
63. Gráinne de Búrca, “The Decline of EU Anti-Discrimination Law”*,* paper presented at the NYU Colloquium on Comparative and Global Public Law, October 19, 2016. [↑](#footnote-ref-63)
64. Grzelczyk C-184/99 ECLI:EU:C:2001:458 (20 September 2001), Baumbast and R, ECLI:C-413/99 ECLI:EU:C:2002:493 (17 September 2002), Garcia Avello ECLI:EU:C:2003:311 (2 October, 2003), Zhu and Chen, ECLI:C-200/02, ECLI:EU:C:2004:639 (19 October 2004). [↑](#footnote-ref-64)
65. *Zambrano v. Office national de l’emploi* (ONEm), C-34/09 EU:C:2011:124 (8 March 2011). [↑](#footnote-ref-65)
66. Dimitry Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’, in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, (Cambridge University Press, 2017) 5. [↑](#footnote-ref-66)
67. *Id.* at 7. [↑](#footnote-ref-67)
68. Supra n 63. [↑](#footnote-ref-68)
69. “Article 7 Respect for private and family life

    Everyone has the right to respect for his or her private and family life, home and communications.

    Article 8 Protection of personal data

    Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.

    Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority”, Charter of Fundamental Rights of the European Union, Sep. 26, 2012, O.J. [↑](#footnote-ref-69)
70. European Commission, ‘First Report on the Implementation of the Data Protection Directive (95/46/EC)’ COM (2003) 265 final, 3. [↑](#footnote-ref-70)
71. Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press, 2015). [↑](#footnote-ref-71)
72. The CJEU did not find the existence of an actual link with the free movement between Member States to be required in every situation, see Österreichischer Rundfunk e a. C-465/00 ECLI:EU:C:2003:294 (20 May 2003). The Austrian and Italian governments however, as well as the Advocate General, argued that the auditing activity at stake in the case did not implicate a cross-border element to allow a link to be made with EU law that would trigger the application of the Directive, see also Opinion of Advocate General Tizzano, ECLI:EU:C:2002:66 (14 November 2002). [↑](#footnote-ref-72)
73. *Lindqvist* C-101/01, ECLI:EU:C:2002:513, (6 November 2003). [↑](#footnote-ref-73)
74. *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:266, (16 December 2008); *Promusicae* C-275/06 EU:C:2007:454, (29 January 2008). [↑](#footnote-ref-74)
75. Hielke Hijmans, *The European Union as Guardian of Internet Privacy. The Story of Article 16 TFEU* (Springer, 2016). [↑](#footnote-ref-75)
76. Supra n 72, 58. [↑](#footnote-ref-76)
77. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Dir 95/46/EC (General Data Protection Regulation) 2016, OJ L 119, 4.5.2016, p. 1–88. [↑](#footnote-ref-77)
78. *Schecke and Eifert*,ECLI:EU:C:2010:662, (9 November 2009). [↑](#footnote-ref-78)
79. Jason Coppel and Aiden O’Neill, ‘The European Court of Justice: Taking Rights Seriously’, *29 Common Market Law Review 4* (1992). [↑](#footnote-ref-79)
80. *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others,* ECLI:EU:C:2014:238, (8 April 2014), para. 48. [↑](#footnote-ref-80)
81. *Id.*, 37. [↑](#footnote-ref-81)
82. *Tele2 Sverige AB v Postoch telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others Requests for a preliminary ruling from the Kammarrätten i Stockholm and the Court of Appeal,* ECLI:EU:C:2016:970, (21 December 2016). [↑](#footnote-ref-82)
83. Aida Torres Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights: A Cautionary Tale*, (2017) 15 *International Journal of Constitutional Law*, 4. [↑](#footnote-ref-83)
84. Article 53 reads: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”, Charter of Fundamental Rights of the European Union, Sep. 26, 2012, O.J. [↑](#footnote-ref-84)
85. Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, ‘No Consensus on Consensus? The Practice of the European Court of Human Rights’*,* (2013) 33 *Human Rights Law Journal* 712, at 257. [↑](#footnote-ref-85)
86. *Id.*  [↑](#footnote-ref-86)
87. See referrals to the case law of the Strasbourg Court in *Digital Rights Ireland*, supra n 80, at 47 and 54-55. [↑](#footnote-ref-87)
88. *Maximillian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650, 6 October 2015. [↑](#footnote-ref-88)
89. *Id.*, 94-95. [↑](#footnote-ref-89)
90. The purpose limitation principle essentially limits the reuse or repurposing of data. [↑](#footnote-ref-90)
91. For a detailed discussion on the history of Safe Harbor, see B. Petkova, ‘Domesticating the “Foreign”, supra n 2. [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. Supra n 88, 73. [↑](#footnote-ref-93)
94. The Privacy Shield introduced minor improvements to the pre-existing scheme: these include enhancing the transparency of data withheld by organizations, as well as the possibility for Europeans to obtain response to their complaints within 45 days after lodging the complaint (including with a national DPA), as well as the removal of consumer charges for dispute resolution mechanisms. However, the decision does not impose any obligation on organizations to delete data if they are no longer necessary. The bulk collection of data for national security and law enforcement purposes has not been terminated in the U.S. but under the Privacy Shield the US government has committed to minimize it whenever possible, as well as to introduce the institute of an ombudsman to deal with complaints under this header. Some European institutions have already expressed concerns regarding the independence and insufficient powers vested in the new institute of an ombudsman who is supposed to simultaneously serve as an Under Secretary of State; moreover, since January 2017 the Trump administration has left the post vacant. *See* Mehreen Khan, ‘EU warns over enforcement of Obama-era privacy deal’, *Financial Times* (July 30, 2018). [↑](#footnote-ref-94)
95. C-131/12, *Google Spain*,EU:C:2014:317 (13 May 2014). The label ‘right to be forgotten’ has proven somewhat misleading since in effect, the information, even if delisted by the search engine, might still remain available. [↑](#footnote-ref-95)
96. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L281/31. [↑](#footnote-ref-96)
97. Opinion of AG Jääskinen, EU:C:2013:424, para. 72. [↑](#footnote-ref-97)
98. Supra n 95, 81. [↑](#footnote-ref-98)
99. *Id*., 80. [↑](#footnote-ref-99)
100. Armin von Bogdandy, ‘The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe’ (2005) 3 *International Journal of Constitutional Law* 295, 311. [↑](#footnote-ref-100)
101. Gerrut Hornung & Chrisoph Schanbl, ‘Data Protection in Germany I: The population Census Decision and the right to informational self-determination’ in Joseph Cannataci, *The Library of Essays on Law and Privacy. The Individual and Privacy*, (Routledge, 2016). [↑](#footnote-ref-101)
102. Neil Richards, ‘The Dangers of Surveillance’, *Harvard Law Review* 126 (2013) 7, 1950. [↑](#footnote-ref-102)
103. Privacy International, ‘Privacy as a Political Right’, (March 2012), <https://privacyinternational.org/sites/default/files/2017-12/Privacy%20as%20a%20Political%20Right.pdf>. [↑](#footnote-ref-103)
104. I am grateful to Robert Post for this remark. See also Robert Post, ‘Data Privacy and Dignitary Privacy: *Google Spain*, the Right To Be Forgotten, and the Construction of the Public Sphere’, *Duke Law Journal* (2018) 67, 981. [↑](#footnote-ref-104)
105. Andrew Roberts, ‘Why Privacy and Domination’, *European Data Protection Law Review* (2018) 4, 1. [↑](#footnote-ref-105)
106. Robert Post, *Citizens Divided. Campaign Finance Reform and the Constitution* (Harvard University Press, 2014), 33. [↑](#footnote-ref-106)