

Constructing Federalism —The EU and US Models in Comparison*

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Abstract

The EU has been taking a steady path toward closer integration, and its member states have delegated some of their sovereignty to the EU institutions. On the other side of the Atlantic Ocean, the US represents a successful model of federalism that recognizes dual sovereignty. What are the relevant legal, political, economic, and cultural foundations for constructing federalism? What are the similarities and differences between the EU and the US in their arrangements of the center-periphery relationship?

To examine this comparative issue, this paper adopts a functional understanding of federalism in analyzing power distribution between a center and periphery. Through this approach, the EU is judged to be in the process of constructing supranational federalism. This article examines the EU and US respectively in their path, organizing

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principle, enforcing mechanism, organizational focus, and process of constructing federalism. It finds that their patterns have been quite different. In spite of the differences, however, both the EU and the US present successful models of federalist construction. This paper concludes that the pattern of constructing federalism is flexible. With treaties or constitutions, with an economic focus or an even broader one, constructing federalism is possible.

Key Words: regulatory federalism, process federalism, supranational federalism, dual sovereignty, principle of subsidiarity

I. Introduction

The European Union (EU) has taken a steady path toward regional integration, as it moves from a common market to a constitutional union. The integration was further driven by the signing of the European Constitutional Treaty in October 2004. The French and Dutch no vote regarding the Constitutional Treaty in June 2005, however, represented a significant setback. Despite the fact that the constitutional ratifying process was severely slowed down, the EU's constitutional future—with fourteen member states that have already ratified the Constitution—is still bright.¹ While the EU is not a State, it is more than simply an international organization.² The member states have delegated some of their sovereignty to EU institutions to serve their common interests. “The pooling of sovereignty,” as it is termed by the EU itself, is the most creative, intellectual invention in the twentieth century's legal and political history.

An equally creative legal and political invention was the formation of the United States of America in the eighteenth century. An economic crisis hit the newly founded colony and triggered the effort to form a more solid union among the thirteen original colonies. In response, a federal Constitution was created to recognize the “dual sovereignty:” one federal, the other state. With the progress of the industrial revolution and the need for government intervention in the marketplace, a new form of regulatory federalism that revised the original framework of dual sovereignty and allowed for more direct national administration emerged in the early twentieth century. The US emerged from the two world wars as a super power and remains as such.

To what extent are the two integrative stories—one in the

¹ Fourteen member states that ratified the Constitution Treaty include Austria, Belgium, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain.

² This “neither-state-nor-international-organization” nature has been repeatedly emphasized in EU's official documents and self-descriptions.

twentieth century; the other in the eighteenth—similar? Was the EU's "pooling of sovereignty" by numerous treaties really different from the US's constitutional recognition of "dual sovereignty"? Whether and to what extent can the EU's arrangement between the Union and member states be referred to as "federalism" as it often applies to a State? Can the American and European integrative stories present one way or the other as a standard pattern for integrative federalism? What are the legal, political, economic, and cultural foundations of integrative federalism?

To answer the aforementioned questions, this article will analyze the ways in which US and EU were formed and the examine two stories in light of their integrative processes. The two stories are distinct in their respective contexts and both stand, in some way, as a sharp contrast to another. In others, however, the two are like twin sisters, looking almost the same. It is precisely due to these similarities and differences that one can make a meaningful comparison. Their path, organizing principle, enforcing mechanism, organizational focus, and constructing process will be analyzed accordingly. Understood in a functional way, federalism could be made into a process for integration, and not surprisingly, both EU and the US are presented as two possible models.

II. Constructing Federalism: Two Stories

A. Functional & Procedural Understandings of Federalism

Federalism has recently been remade into a renewed and vital discourse (Jackson & Tushnet, 1999: 886-888). While no one is entirely sure where the term federalism stands, how it is designed and how it applies, there has been a great deal of discussion about it (Swaine, 2000: 2). In traditional legal discourse, federalism denotes a set of arrangements between a federal (center)

government and its subordinated units in a *State*, be it federal or confederal. What categories of powers, and to what extent, they should be exercised by a federal government or by states is at the core of the “federal questions” (Jackson & Tushnet, 1999: 791-792).

Thus, federalism or federal principles describe the relationship between center and subordinated units, in which neither center nor units hold a predominant status. Likewise, federalist principles rely on a power balance in which there are serious concerns if the center accretes too much power or likewise if subordinated units refuse to enforce common policies (Ackerman, 1997: 776; Swaine, 2000: 2). Understood in such functional terms, federalism can be used to analyze power distribution issues between a center and its peripheries within any polity, whether it is a State or not. Freed from its original conceptual constraint, federalism has become a popular and powerful constitutional subject in recent years, generating a special academic interest in its comparisons between supranational (or transnational) federalism such as EU federalism and traditional federalisms such as American, Canadian, German or Swiss, to name just a few (Jackson & Tushnet, 1999: 888-889). While some may still feel uncomfortable analyzing the relationship between the EU and its member states using federal or confederal terms (Roeben, 2004: 342-343), most scholars—and the number has been increasing in recent years—are content with the new trend (Nicolaidis & Howse, 2001).

The functional understanding of federalism not only enables the analysis of supranational federalism but also—and perhaps more importantly—sheds a different light on a more dynamic examination of federalism as a *process*. Unlike traditional *power federalism* focusing on how much power should be distributed to the center and how much reserved for peripheries, *process federalism* is instead concerned with the process by which the center and peripheries are built and interact with one another (Young, 1999: 21-22). This procedural understanding of federalism was originally developed in *Garcia v. San Antonio*

Metropolitan Transit Authority,³ a US Supreme Court decision and has been further elaborated by scholars. In that case, to uphold the exercise of federal powers, the Court contested that constitutional restraints of federal power rested principally on the way the government was structured and how states participated in it. Additionally, the case also notes that states' interests would be better protected by procedural safeguards inherent in such a structure⁴ (Young, 2002: 1649).

Understood this way, federalism is concerned with *how—through what process*—the center and peripheries come together and interact with one another over time. Thus, the study of federalism extends far beyond a static analysis of center/ periphery power, but also includes the inquiry of a process in which the center is recognized and establishes a particular relationship with the peripheries (Ackerman, 1997). This process itself is dynamic and may change over time. It is in the light of procedural federalism that this article attempts to tell two major stories about the construction of federalism on both sides of the Atlantic Ocean.

B. The European Journey

Europe is calling for further integration, and is poised to transform itself into a more solid union. This transformation has, in effect, been taking place for decades. This transformative journey is divided into four major periods: 1) the earlier period, 2) the EEC era, 3) the Maastricht triumph period, and 4) the march to constitutionalization. Through this process, a European center has emerged and a particular relationship between the center and European member states has been created but remains dynamic.

³ 469 US 528 (1985) (In this decision, the US Supreme Court upheld a federal statute that regulated wages and hours of state government employees).

⁴ 469 US 528, 552 (1985).

(A) The Earlier Period

The idea of some sort of European union was hatched in the aftermath of World War II. It was initiated to facilitate cooperation between major European powers and to prevent any postwar confrontations. The first “Intergovernmental Conference,”⁵ which began in May 1950, and brought together the heads of state of Belgium, West Germany, Luxembourg, France, Italy and the Netherlands, realized such an idea. The direct product was the Treaty which established the European Coal and Steel Community (ECSC) which was signed in April 1951 in Paris, and entered into force in July 1952.⁶ Notwithstanding a purely economic coalition, the ECSC nevertheless stood for an initial embodiment of a federal “United States of Europe” in the eyes of some European federalists (Weiler, 1999: 91).

(B) The EEC Era

With the success of the ECSC, both European Atomic Energy Community (EURATOM) and European Economic Community (EEC) were created in 1957 at the Treaty of Rome. These arrangements were aimed at removing trade barriers between member states and ultimately forming a “common market.”

A decade later, the three European communities were combined in the Merger Treaty, signed in Brussels on 8 April 1965 which went into force in 1 July 1967. From this point on, the basic framework of the European Economic Community was set, as it set

⁵ This was the first Intergovernmental Conference (IGC) in the process of European integration. Subsequently, Intergovernmental Conferences were employed as negotiating mechanisms preceding treaties and were convened in 1955-1957, 1985, 1990-1991. Noticeably however, Intergovernmental Conference is outside of the procedures and institutions under the framework of the European Community and the European Union. Yet, as noted later in this paper, this was changed in the Treaty on European Union of 1992, which was the first to schedule a subsequent IGC to review its working.

⁶ The ECSC expired on 23 July 2002.

up the Council of Ministers, the Commission, the European Parliament, and the Court of Justice. Whether termed a commission, parliament or court, these organs functioned not as constitutional institutions in nation states under the classical model of the separation of powers. Rather, their functions were defined specifically in the treaties and the division of labor decided upon by the practical division of multiple representations within the Community (Young, 2002: 1625-1626).

The Council of Ministers was comprised of representatives of individual member states at the ministerial level, which held the primary, law-making power in the Community.⁷ The Commission was charged with the power of legislative initiative as well as the overseeing power of the implementation of Community laws. The Commission issued nonbinding recommendations and opinions regarding the interpretation of Community laws.⁸ The European Parliament, without law-making power, served as a representative body.⁹ Originally, members of the European Parliament were chosen by the national parliaments, but since 1979, the citizens of the member states were allowed to vote, and direct elections have been held every five years. Finally, the Community also had a law-interpreting body, the Court of Justice, whose primary function was to ensure that “in the interpretation and application of this Treaty the law is observed.”¹⁰

With institutions in place, however, the European Community grew in a rather stagnant fashion in the 1970s and 80s (Weiler, 1999: 38-39). Denmark, Ireland and the United Kingdom joined the Community in 1973, followed by Greece, Spain and Portugal in the 1980s. Next, momentum gained for a subsequent integration in 1987. The Single European Act (SEA) was signed in

⁷ Article 203 (ex Article 146) of the Consolidated Version of the Treaty Establishing the European Community (hereinafter “the Community Treaty”).

⁸ Article 213 (ex Article 157) of “the Community Treaty.”

⁹ Article 189 (ex Article 137) of “the Community Treaty.”

¹⁰ Article 220 (ex Article 164) of “the Community Treaty.”

Luxembourg and the Hague, entering into force on 1 July 1987. This Act not only symbolized the Community's determination to extend economic cohesion and monetary integration, but also, perhaps more importantly, laid the foundation for an internal European single market (Young, 2002: 1624).

(C) The Maastricht Triumph

A genuine constitutional moment came in the early 1990s. At first, it was a considerable leap towards a more integrated economic community. In 1992, the economic and monetary union (EMU) came into existence with the introduction of a single European currency, the euro,¹¹ which was to be managed by a European Central Bank. From here it was a bold step towards the coming together of Europe, the formation of the European Union.

The treaty that gave rise to European Union was signed in Maastricht and entered into force in November 1993. "The Maastricht Treaty" changed the name of the European Economic Community to "the European Community (EC)" and introduced new forms of cooperation between member states by extending the Community's capacity into the other two "pillars:" foreign policy and security, on one hand, and justice and home affairs, on the other.¹² From this moment on, Europe presented itself as both an economic cooperative organization, called the European Community, and a broad, political union, called the European Union (EU).

The EU principally maintains the institutions established under the framework of the EEC, now the EC. The European Parliament still represents the direct voice of the people of Europe, with its capacity enhanced so as to ameliorate the "democratic deficit"

¹¹ The single currency, the euro, became a reality in January 2002. It has replaced the national currencies in 12 European Union countries: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain.

¹² Titles V & VI of the Consolidated Version of the Treaty on European Union (hereinafter "the European Union Treaty").

within the Union. The Council, formerly known as the Council of Ministers, enjoys the legislative and decision-making powers and holds the responsibility for all three “pillars” of EU affairs. The Commission, still regarded as the driving force for organizational work, consists of twenty members, whose President is now chosen by the governments of member states and must be approved by the European Parliament. The Court of Justice, which is more heavily loaded than ever, has been assisted since 1989 by a “Court of first instance” whose jurisdiction particularly covers actions brought by private individuals and cases related to unfair competition between businesses.¹³

Noticeably, with the Maastricht treaty, the European Council which consists of heads of states or governments has been given a specific mission to politically steer the Union’s further development and progress.¹⁴

(D) The EU’s March to Constitutionalization

Despite the remarkable progress in Maastricht, however, the further development of a more integrated European political unity lost momentum in the 1990s.¹⁵ To rescue the integrative momentum, Intergovernmental Conferences to examine the functions of the EU were subsequently arranged, which resulted in the release of two documents.

The first was the Amsterdam Treaty in 1997, which affirmed the Union’s expansion to the East, enlarged the Union’s capacity policy areas such as immigration, environment, social policy and foreign affairs, and subsequently amended and renumbered the EU and EC Treaties. The Nice Treaty of 2001 was the second product, which gave birth to a consolidated version of the EU and EC

¹³ Article 225 of “the European Union Treaty.” Under certain kinds of conditions, the Court of Justice may sit as the appellate court of the Court of first instance on points of law only.

¹⁴ Article 4 of “the European Union Treaty.”

¹⁵ After its installment, the Union’s membership did not expand considerably. Only Austria, Finland and Sweden joined in 1995.

treaties. And it was in the Nice Conference where the frustration about the complexities of treaty regimes and the anxiety about the future of Europe were expressed. It was generally felt that the Union needed a simpler treaty, a Constitution perhaps.

In December 2001, the European Council which was meeting in Laeken decided to call for a Convention, thus paving the way for the drafting of a constitution. To draft the Constitution, a Convention chaired by the former French President Giscard was set up in 2002. This Convention, unprecedented in European history, brought together representatives of all member states and candidate countries, European parliament, national parliaments and Commissions and publicly debated between February 2002 and July 2003.¹⁶ The draft Constitution was then submitted to the European Council.

In September 2003, the Council gave its support to the convening of an Intergovernmental Conference, which was opened in October 2003 in Rome. The Intergovernmental Conference took place between October 2003 and June 2004 and finally reached a consensus on the Treaty establishing a Constitution for Europe. This Constitutional Treaty, once effective, would replace all the previous treaties¹⁷ and become the fundamental legal framework of Europe.

The ratification process began and so far, fourteen member states have already ratified the document. In June 2005, however, rather surprisingly, the French and Dutch people voted against the Constitution, creating uncertainty for the future of constitutionalization. Despite the process being slowed down, with the already enlarged EU and the accelerated integration under the three pillars agreed upon in the Maastricht treaty ten years ago, the EU's march toward integration—armed with a Constitution or

¹⁶ The enlargement of the EU was dealt with in the Treaty on the Accession of 10 new Member States, which was signed on 16 April 2003 to enter into force on 1 May 2004.

¹⁷ It is with the exception of the Euratom Treaty.

not—is not likely to be suspended.

Process federalism understands this scenario perfectly well. Once the attempt at building a center and establishing some *juridical* form for the relationship between the coordinated units, federalism as *process* would take on its own path. This is not to say that process federalism leads only to further and closer integration, rather, it means that *the process for building a relationship* between the center and periphery, once started, *is likely to continue*. While this process may lead to further integration or disintegration—this discourse on the arrangements or rearrangements of such a changing relationship is likely to be embedded in juridical—and more specifically legal and institutional—forums.

This is what has happened in Europe. Notwithstanding its original coal and steel network, the EU has over time constructed a particular web of relationships between a commonly recognized center and subordinated units. The relationships are neither fixed nor determined, but the process of constructing such changing relationships remains persistent. In the ongoing juridical construction process, some legal and institutional arrangements are needed, which will be explored further in the following section. For now, it suffices to say that with or without the Constitutional Treaty which is expected in 2006,¹⁸ the process of constructing federalism in the EU is likely to continue. Actually, this was already reflective of what has been written in the Constitution Treaty. The Constitution Treaty neither adds nor removes any existing power arrangements between the EU and its member states, rather it has merely acknowledged existing relationships or clarified them as they have been developed from numerous treaties or judicial decisions.¹⁹

¹⁸ As originally planned, the Constitutional Treaty, after ratifications by all member states, is expected to enter into force on November 1, 2006. The French and Dutch vetoes certainly put this date into uncertainty.

¹⁹ This has been the official attitude of the EU towards the draft of the Constitution Treaty, merely codifying what's been there.

C. The American Story

In order to understand more thoroughly the modern federalism construction in Europe, it is helpful to reflect upon a much earlier—but on a similarly large scale—effort on the other side of the Atlantic Ocean.

(A) The Earlier Period

In response to tyrannical British rule, the American colonies decided to take action. The worsening economy and deepening financial crises left them nearly no choice but to fight for survival. The first Continental Congress met in September 1774, with representatives from every colony except Georgia (O'Connor, 2004: 48-49).

The legal and political status of the Continental Congress was, however, not at all clear. Whether it was a governmental or intergovernmental body and what relationship it had with the colonies remained unanswered (Wood, 1969: 354). Yet, during such grave exigencies, there was a great deal of confidence that this Congress could deliver the much-needed solidarity and enhance the coordination between the colonies. Thus, despite legal and institutional uncertainty, the Continental Congress continued to serve as the decision-making body for the colonies. It was under the mandate of this Continental Congress that Thomas Jefferson drafted the Declaration of Independence, and with a few changes by the Continental Congress, the colony's secession from the British Empire was announced.

The Declaration inevitably brought about war and it became obvious for these newly independent states that a more solid framework governing their relationships and interactions must be created. Without a fully conceived nationalist sentiment, the Articles of Confederation, drafted by a committee appointed by the Continental Congress, strongly preserved the sovereignty of individual states. The prevailing notion was that the declaration of independence in 1776 was actually a declaration by “thirteen

united States of America” (Wood, 1969: 356).

State sovereignty thus respected, the Articles of Confederation demonstrated a great deal of institutional weakness in its confederation government. The first problem was the requirement of an affirmative vote of nine out of thirteen states in passing any important legislation as well as that of a unanimous vote in amending the Articles. The second weakness was the lack of an elective executive, which is essential to any meaningful, solid, political community. Finally, no judiciary system was provided at the level of confederate government (Klose & Jones, 1994: 90).

It is worthwhile to note here that the confederation government was less structured than the early European Community, although both fully preserved the separate sovereignty of states and perhaps more strikingly, the latter was arranged almost exclusively by international treaty. In spite of its limited strength, the Articles of Confederation were submitted to the states for ratification in late 1777, which was successfully completed in 1781.

(B) The Federalist Founding

Only a few years later, facing with economic crises and financial problems created by the war, the Confederation Congress decided to move toward a more effective government. A Convention on 14 May 1787 in Philadelphia was called and all the state legislatures except Rhode Island sent delegates. Under the strong leadership of George Washington and Benjamin Franklin, the outcome of the meeting was much more than an amendment to the Articles of Confederation, but in fact was a completely new framework of union it was a Constitution of the United States (Klose & Jones, 1994: 99-100). More surprising was the framework laid down by the new Constitution, which was indeed strongly federal.

The federalist triumph in 1787 symbolized America’s clear ideological break from that of the motherland (Ackerman, 1998: 87-88; Wood, 1969: 362-363). Indeed, what separated federalists

from anti-federalists was the latter's insistence on a notion of legislative sovereignty which had been borrowed from the European continent, where sovereignty was transferred directly from King to parliament. Since state legislatures were in essence sovereigns, there could be no way of installing another sovereign that ruled on the same level or on one above it. The federalists, however, were successful in reconstructing the idea of sovereignty based upon "the people" rather than "the representatives." They portrayed the English parliamentary sovereign as the source of tyranny and argued that in order to establish a true democracy, the sovereignty must come directly from the people. And since it is the people who are the sovereign, it is not only possible but also logical to construct a "dual sovereignty:" a sovereignty of states with the citizen of the state serving as the base unit and the other of which is the sovereignty of the Nation, namely the people that make up the nation (Wood, 1969: 372-383).

The structure of the federal government in the 1787 Constitution may be summarized in three aspects. First and foremost, the power of the federal Congress is enumerated.²⁰ In other words, all powers not granted to the federal legislature are reserved for the states and the citizens that execute state policy. Among the powers listed are the powers for declaring war, laying and collecting taxes, borrowing money, regulating interstate commerce, maintaining military forces, establishing postal services, and making laws necessary and proper to carrying out these prescribed powers. The second important design is a strong executive, which was thought to be essential to tackle economic crises at the time (Wood, 1969: 372-383). Last but not the least is the creation of a federal judiciary. The jurisdiction of the Supreme Court and federal courts are defined and perhaps even more importantly, the supremacy of the Constitution as well as federal

²⁰ Section 8, Article 1 of "the Constitution of United States of America" (hereinafter "the US Constitution").

laws is expressed and observed.²¹ By 1788, nine states ratified the Constitution and in 1790 a Bill of Rights was issued, in which the principle of dual sovereignty was repeated.²²

(C) The National Reconstruction

Did the enactment of the Constitution complete the American story of constructing a more solid Union? No, or at least it hasn't yet. More than half a century after the writing of the constitution, the Civil War (1861-1865) compelled American citizens to reconsider the principle of dual sovereignty as well as the ways in which their federal government could be empowered to protect them (Backer, 2001: 180-181). To resolve inhuman living conditions in the African American slave population, it was the National government's responsibility, as Lincoln argues in his 1864 Emancipation Proclamation, to protect all of the nation's citizens (Ackerman, 1998: 123-124). In the 1787 Constitution, however, neither the notion of a national citizens nor a national citizenship was expressly created. Instead, it was merely an anti-discrimination principle agreed upon between the citizens of different states. This principle established that citizens of one state must be allowed to enjoy the same privileges and immunities of citizens in another state.²³

Thirteenth and Fourteenth Amendments, the victorious codification of the post-Civil War Reconstruction period, altered this situation. The Thirteenth Amendment proclaims that neither slavery nor involuntary servitude should exist within the United

²¹ Paragraph 2, Article 6 of the US Constitution prescribed that "This Constitution, and the Laws of the United States, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

²² It is the tenth Amendment, which prescribes that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

²³ Section 2, Article IV of the US Constitution.

States. To ensure the non-slavery national principle was duly observed, the enumerated powers of the National Congress added legislation which enforced this principle. The Fourteenth Amendment, ratified in July 1868, goes even further. A concept of national citizenship was established, ensuring that all person born or naturalized in the United States enjoy both national and state citizenship, and that no State could deprive national citizens of their rights without due process or equal protection.²⁴ Congress was, again, empowered to enforce the protection of the rights of national citizens, which thus resulted in the expansion of its enumerated powers.²⁵

(D) The New Deal and Regulatory Federalism

The construction of American federalism did not end in the nineteenth century. The development of technology characterized the modern era and with it came risks, new social issues, and a deepened interdependence between the people and the governments. All of this has exposed Americans to the question of how to reorganize their relationship with different levels of governance (McGinnis, 2001: 6-7). The Great Depression in the 1930s opened similar new territory. Perhaps not so surprisingly, the solution was “*regulatory federalism*,” which demanded a more active federal government empowered to command national regulatory programs, either correcting markets or providing welfare. The principle of laissez-faire economics and the devolutionary nature of the federal structure that it implies were thus suspended (Ackerman, 1998: 280; Majone, 2001: 256-258).

The constitutional challenges facing regulatory federalism, however, were strong. The enumerated powers constrained Congress’s capacity to propose national legislation. While Congress interpreted some of the clauses as a green light for the initiation of new national regulations, the Court regarded otherwise. The struggle to change

²⁴ Section 1 of the Fourteenth Amendment of the US Constitution.

²⁵ Section 5 of the Fourteenth Amendment of the US Constitution.

federalism became, perhaps inevitably, a fight between the political branch and the judiciary (Ackerman, 1998: 293-301). For instance, the federal government believed that the power to regulate interstate commerce²⁶ enabled it to prohibit the transportation of manufactured goods whose producers had not followed labor-protection standards or working-hour restraints. The Supreme Court disagreed, however. Upholding the dual sovereignty system created in the Founding, the Court argued that the national power to regulate interstate commerce did not give the Congress any “authority to control the states in the exercise of the policy power over local trade and manufacture.”²⁷ In another attempt by the federal government to control the sale and production of coal, the Court stood firm in its interpretation that the Constitution “made no grant of authority to Congress to legislate substantively for the general welfare.”²⁸ The Court, citing a rejected proposal in the Philadelphia Convention which enabled the National Legislature to legislate in all cases in which separate States were deemed incompetent, or in which the harmony of the United States might be interrupted by an individual state’s legislation, resisted any further nationalizing effort by the New Dealers.

Was regulatory federalism which was promoted so strongly in politics eventually blocked by the courts? It was not. With the mounting political pressure and court-packing initiative, the Supreme Court retreated (Ackerman, 1998: 333). Reviewing another national prohibition on the shipment of proscribed goods whose production were in violation of labor-protection standards or working-hour restraints, the Court now admitted that labor standards and wages are related to “methods or kind of competition in interstate commerce,” and that “Congress is free to exclude from the commerce articles it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use.”²⁹ The

²⁶ Paragraph 3, Section 8, Article 1 of the US Constitution.

²⁷ *Hammer v. Dagenhart*, 247 US 251 (1918) [The Child Labor Case].

²⁸ *Carter v. Carter Coal Co.*, 298 US 238 (1936).

²⁹ *United States v. Darby*, 312 US 100 (1941).

Court also overturned the precedents against this new decision. The next year, even a national price regulation instituted by the federal government was sustained,³⁰ thereby assuring the judicial endorsement of regulatory federalism in twentieth-century America.

(E) A Recent Shift to Devolutionist Union?

Thus far, the story of America's federalism construction has been characterized in three waves. The first occurred during the Founding, when dual sovereignty was established. The Reconstruction Era marked the second wave, in which the notion of a national citizenship was created. The last move toward a consolidated Union was the adoption of regulatory federalism in the 1930s and 1940s. The movement, however, has only been in one direction, from a loose union to a solid nation, from devolution to centralization. Could the direction be otherwise? Has there been any counter development?

While its scale and influence are still being debated, the "Velvet Revolution" initiated by the Supreme Court in the late 1990s appears to present a counter wave in the construction of federalism (Chemmerinsky, 2001: 15-16; Fallon, 2002: 446-451; Whittington, 2001: 497). In a rather surprising decision in 1992, the Court re-invoked the principle of dual sovereignty and threw out federal legislation it regarded as "compelling" the states to take action on the disposal of radioactive waste.³¹ In the majority opinion written by Justice O'Connor, it was argued that accountability would be diminished if state officials, commandeered by the federal government, could not regulate according to the views of the local electorate. Despite doubts and criticisms, the Court continued its transformative interpretation. In a 1997 decision, the Court, with a repeated emphasis on dual sovereignty, invalidated a federal act that directed state officers to

³⁰ Wickard v. Filburn, 317 US 111 (1942).

³¹ New York v. United States, 505 US 144 (1992).

help enforce federal laws.³² In a similar fashion, Congress's enumerated powers as listed in the Constitution, especially the Commerce Clause, have been so narrowly construed as to restrict its capacity in national policy making.³³

The US Supreme Court's recent embrace of "anti-commandeering" federalism contradicts the trend toward regulatory federalism as established in the New Deal. To what extent, however, this indicates, or even verifies the suspension of regulatory federalism remains to be seen (Banks, 1999: 233; Fallon, 2002: 433-436). One thing is certain, however, that the American process of constructing federalism which has been occurring since the Founding will be multi-directional. Perhaps this principle holds true on both sides of the Atlantic Ocean.

III. Comparing Federalism as Process: Two Models

Having retold the two stories of federalism on both sides of the Atlantic Ocean, this section aims at systematically drawing further comparisons between the two stories and perhaps theorizing them in a more analytical fashion.³⁴

It is clear that the European and American stories are distinct in their respective contexts. Both stand, in some ways, as a sharp contrast to one another. In other ways, however, they look quite

³² *Printz v. United States*, 521 US 898 (1997).

³³ See e.g. *United States v. Lopez*, 514 US 549 (1995) (A federal legislation that prohibited possession of firearms in school zone was held to exceed the Congress's authority to regulate commerce under the Constitution). *United States v. Morrison*, 529 US 598 (2000) (In this decision, Congress was held to have no authority under either the Constitution's commerce clause or Section 5 of the Fourteenth Amendment to provide federal civil remedy for victims of gender-motivated violence).

³⁴ In other words, the analysis (or model) in the following is neither normative nor predictive. It means to be explanatory and analytical, as often employed in social-legal analysis (Macaulay, Friedman & Stookey, 1995).

the same. It is precisely due to these similarities and differences that the two stories can be meaningfully compared. In the following, the path, organizing principle, enforcing mechanism, organizational focus, and construction process of European and American federalism will be examined. Through the comparison, particularly regarding process federalism, it seems that two models of federalist construction are emerging.

Table 1 Two Models of Constructing Federalism

	Treaty Model / EU	Constitution Model / US
Path	Treaties	Constitution/constitutional amendments
Organizing Principle	Subsidiarity/Proportionality	Dual Sovereignty
Enforcing Mechanism	Judicial Interpretation/ Primacy of Union laws	Constitutional Codification/ Supremacy of Federal Constitution and laws
Organizational Focus	Economic Focus	Comprehensive Focus
Constructing Process	From Court to Politics From Elite to Community	From Politics to Court From Community to Elite

A. Path

The construction of European federalism has occurred through treaties. Beginning with the Treaty of Rome, the determination to build a European center among and above the peripheries was expressed (Ackerman, 1997: 793). The Merger Treaty, which came into existence in 1967 established all the major governing institutions, and provided functional as well as representational assistance to the center. It was the Maastricht Treaty of 1992 that profoundly changed not only the center's name but also the cooperative relationship of the peripheral units. The treaty created a Parliament, a Council, a Commission, and even a High Court, along with their respective jurisdictions, and was itself subsequently amended by way of treaties. Despite the decisive

move towards Constitution-Making and a Convention existing outside the treaty realm, the draft Constitution was nevertheless sent to an Intergovernmental Conference in Rome, where another treaty—like the one signed in Maastricht—would ratify “the Constitution for Europe.”³⁵

The American path, however, was different. The United States of America was formed by the 1787 Constitution, and the federal government was established in accordance with the principle of dual sovereignty. Later, a more powerful center was built, and the federal principle pushed it in a nationalist direction, as a result of the Civil War. Although regulatory federalism, which was developed during the 1930s was never codified formally in constitutional provisions or amendments, it nevertheless struggled through a higher-lawmaking track at the level of constitutional politics and was constitutionalized through Supreme Court decisions (Ackerman, 1998: 293-301). The constitutional path determines one thing, among others: if there is any attempt at reversing the direction of federalist development, it must follow a constitutional course of action.

The paths, for the European Union “treaties” and for the United States “constitution” are certainly different. But how different are they? After all, treaties and constitutions are both agreements. Although never referred to as “treaties,” the Article of Confederation or even the 1787 Constitution of the United States, are very similar to the Treaty of Rome, which was negotiated and approved by sovereign states. It was not until the end of the Civil War during which the crisis of succession was resolved, that the United States was transformed from a loose union to a genuine federal state (Ackerman, 1997: 776). Seen from this angle, the “Constitution” of 1787 on this side of the Atlan Ocean was not at all that different from the “Treaty” of Rome in 1957 on the other side. In fact, while not formally recognized as a “constitution,” the

³⁵ The agenda may be seen in the “Citizens’ Guide to Draft Constitution” prepared by the European Commission Secretariat General in June 2003.

European treaties have been converted (largely by judges but also by political institutions they created) into constitutional documents (Ackerman, 1997: 793-794; Maduro, 1998: 12-16).

Regardless of what they are called, “treaties” may begin to take on the status of “constitutions” if “treaties” earn a supreme status and can trump inconsistent laws enacted by individual states. As we shall see, this is precisely the way that the Court of Justice has read and interpreted the European treaties (Bermann, 1994: 331). In the same vein, “constitutions” may turn into “treaties” if they no longer hold supreme status and the decentralized elements become more prominent. The famous “Notwithstanding” Clause of the Canadian Charter of Rights which allows provinces to exempt their legislation from the national protection of rights is such an example. The recent decision by the Canadian Supreme Court which permitted Quebec to mutually negotiate for secession from the union has also, in itself, helped make the Canadian Constitution more “treaty-like” (Ackerman, 1997: 778). It remains to be seen whether the recent “Velvet Revolution” initiated by the American Supreme Court, will release the center’s power to the peripheries, resulting in a more “treaty-like” Constitution.

B. Organizing Principle

The organizing principle of the European community which decides the relationship between the center and periphery has been the theory of “subsidiarity” and “proportionality.” These two terms have long been codified in the Community treaty and have once again been reiterated in the Constitution Treaty.³⁶

The principle of subsidiarity means that the Community should act within the limit of the powers conferred upon it. In areas of concurrent competences where the Community and member states share regulatory capacities, the Community should not act unless member states fail to take action. The principle of proportionality

³⁶ Article I-11, Title III of the “Constitution Treaty.”

commands that any actions taken by the Community should never exceed what is necessary to achieve its objectives³⁷ (Donahue & Pollack, 2001: 73; Lazer & Schoenberger, 2001: 118; Young, 2002: 1636).

In a significant way, the principles of subsidiarity and proportionality were invented as a safeguard for member states against any encroachment from the center. Thus, a devolutionary, decentralized nature of the Community was made explicit (Bermann, 1994). There is another aspect of the theory inherent in subsidiarity and proportionality; that is, democracy. The EU treaty was even more specific in its embrace of the democratic process: "decisions are to be taken as closely as possible to the citizens."³⁸ In other words, the insistence upon subsidiarity and proportionality is intended not to impede the center but rather to ensure the democratic process so that decisions are made from the bottom up. Here, perhaps not so surprisingly, the European emphasis on subsidiarity and proportionality sounds very similar to the American anti-federalist insistence upon dual sovereignty. The federal v. anti-federal debate was, after all, a debate concerning concrete democratic arrangements rather than power struggles between the federal and state governments (Kramer, 2004: 85-92).

If upheld strictly, the principles of subsidiarity and proportionality would considerably restrain the center's capacity to carry out common policies in the EU. There are two ways to achieve such legislative restraint: political means and judicial enforcement. Politically, the Council (of Ministers) is the law-making body, and is represented by government ministers, it is in the best position to uphold the principle of subsidiarity and to guard the interests of member states. In the reality, however, the Council has not ensured the observation of "subsidiarity." On the contrary, the Council has stood firmly as a Community institution in the exercise of its regulatory authority. The fact that a minister

³⁷ Article 5 of "the Community Treaty."

³⁸ Article A of "the European Union Treaty."

represents the interests of a member state does not mean that he or she will vote in a manner consistent with the principle of subsidiarity. Given a privileged role in a supranational organization, it becomes inevitable that the Council will more strongly assert the Community's regulatory authority. The weakness of securing the subsidiarity principle, and the local interests underlying it, applies equally to the European Parliament and to the Commission (Bermann, 1994).

The other means to enforce the Community's respect for subsidiarity is through the judiciary. The Court of Justice, however, has not stood firmly in its enforcement of the principle of subsidiarity and in its constraint on the exercise of the Community's legislative authority. Rather, as we shall see in the following section, the judiciary has been the main force in strengthening the applicability and supremacy of the Community's acts (Weatherill, 1995: 187-189). As the Court of Justice is empowered to ensure the interpretation and application of the Community's treaties and laws³⁹, it is understandable that the Community's institutional interests have prevailed in the judicial process. Moreover, among all the jurisdictions, the Court is empowered to only hear cases brought by the Commission against member states concerning their failure to fulfill obligations.⁴⁰ Yet, the reversed course of action has not yet been created which engenders some institutional bias in the Court's assumption of a neutral role in policing the boundary between the center and the periphery. There have also been proposals concerning the proper mechanism for the due enforcement of "subsidiarity" and some are considering the allowance of member state courts to rule on the validity of the Communities measures—particularly on the principles of subsidiarity and proportionality (Bermann, 1994). This kind of suggestion, however, will involve revising treaties, as judicial review of the Community's acts are now vested exclusively

³⁹ Article 234 of "the Community Treaty."

⁴⁰ Article 226 of "the Community Treaty."

in the Court of Justice.⁴¹

In the American designed federal system, the organizing principle has been the theory of “dual sovereignty” as exemplified by the enumeration of federal powers and the Tenth Amendment. The enumerated powers considerably constrain the regulatory authority of federal government, and the Tenth Amendment, which reserves residual powers to the states, reinforces this direction. At the first glance, the US theory of “dual sovereignty” looks similar to the European principle of “subsidiarity.” But, while they are not unrelated, the two principles are not the same (Bermann, 1994). The theory of dual sovereignty, as it applies to the US constitution, empowers the national center more than it does the peripheries.

First, it was the “Necessary and Proper Clause” of the enumerated powers, which opened the possibility of establishing national institutions like a national bank, or to enact national programs.⁴² Second, as we explained earlier, the vagueness of the language in enumerated powers and the yielded discretionary nature, such as “Interstate Commerce Clause,” has permitted the emergence of “regulatory federalism.” From this perspective, the initial resistance by the Supreme Court was doomed to fail. Finally, and perhaps most importantly, it is “the duality” that not only recognizes states sovereignty but also creates the independent, separate, national sovereignty that empowers the American federal

⁴¹ Issues concerning the interpretation of the Community’s treaties, the validity and interpretation of acts are first raised before courts of member states. If considered as necessary, states courts may request the Court of Justice for a ruling. *See* Section 2, Article 234 of “the Community Treaty.” Furthermore, if such an issue has no judicial remedy under national law in a member states, it becomes compulsory for states courts to bring such matter to the Court of Justice. *See* Section 3, Article 234 of “the Community Treaty.”

⁴² The European Central Bank has a direct enabling clause in the Article 8 of “the Community Treaty”, while there is not direct mandate in the Congressional enumerated powers to establish a national bank in the US Constitution. It was interpreted that way in a 1819 Supreme Court Decision, *McCulloch v. Sate of Maryland*, 17 US 316 (1819).

government and differs from the European principle of subsidiarity. The independent sovereignty of the Union was made explicit in federalist papers, founding documents, and more importantly, the decisions of the Supreme Court. In *McCulloch v. State of Maryland* for example, it was declared that: “The government of the Union, is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.The nation, on those subjects on which it can act, must necessarily bind its component parts.”⁴³ Thus, the concept of dual sovereignty denotes an independent capacity of federal government to act, though this does not exist without limits (Bermann, 1994; Young, 2002: 1646-1647).

To put the comparison in more concrete terms, the principle of subsidiarity creates more space for peripheries, while the theory of dual sovereignty leaves more room for the center. In reality, however, reversals or flows between the two sides are not at all rare. While regulatory federalism developed after the New Deal shows a clear preference toward the national center, the Supreme Court has recently been overseeing its reversal. In the same vein, despite the principle of “subsidiarity,” the European Community has been uncompromising in its attempts to strengthen the center’s regulatory authority through the Court of Justice. To strike a balance, it was little wonder that the respect for local authority and the principle of subsidiarity and proportionality were re-emphasized when the EU was formed and its mission subsequently expanded.⁴⁴

Besides the principles of subsidiarity and proportionality in the EU and dual sovereignty in US, both also observe the supremacy of the Union or federal laws over the laws of member states or states. Yet, because the adoption of supremacy, particularly in the EU, has a great deal to do with judicial decisions, this issue will be dealt

⁴³ 17 US 316, 404-405, 406.

⁴⁴ Section 2, Article 2 of “the European Union Treaty.”

with comprehensively in the next section: the enforcement mechanism. It should be noted here, however, that while the supremacy of Union laws in the EU were established via judicial decisions, in the Constitutional Treaty it has been codified and made explicit.⁴⁵

C. The Enforcement Mechanism

The path of the European construction of federalism has been through treaties and the organizing principle premised upon the theory of “subsidiarity.” The enforcing mechanism has been, perhaps not so surprisingly, the Court of Justice.

When common rules are decided in the Community, it is vital that they are followed in practice and that they are understood the same way everywhere, which is what the existence of the Court of Justice ensures. The Court of Justice was established in 1952 under the Treaty of Paris, which formed the ECSC. The Court consists of one independent judge from each member state and is located in Luxembourg. Up until now, it has been empowered to ensure that Community laws are interpreted and applied consistently and to settle disputes between the Community and its member states. If national courts are in doubt about how to apply Community laws, they are left no room for their own discretion but, instead, must bring the cases to the Court. In addition to the preliminary and referring jurisdictions, individual persons can also bring proceedings against the EU and EC institutions before the Court⁴⁶ (Maduro, 1998: 12-16; Swaine, 2000: 10-15; Weatherill, 1995, 187-189).

To assist the Court of Justice, which is heavily loaded with thousands of cases every year, a “Court of first instance” was

⁴⁵ Article I-6, Title I of “the Constitution Treaty” reads that “The Constitution and law adopted by the institutions of the Union is exercising competences conferred on it shall have primacy over the law of the Member States.”

⁴⁶ Articles 226-244 of the “Community Treaty.”

created in 1989. This Court, attached to the Court of Justice, is responsible for giving rulings on certain kinds of cases, particularly actions brought by private individuals and cases relating to unfair competition between businesses. Both the Court of Justice and the Court of first instance have a President who is chosen by his or her fellow-judges to serve for a term of three years.⁴⁷

In what ways has the Court of Justice become the critical mechanism in constructing European federalism? It has achieved this status primarily through court decisions and notably by establishing doctrines including: supremacy, direct applicability, and the direct effect of Community treaties and laws (Halberstam, 2001: 223; Maduro, 1998: 12-16; Swaine, 2000: 10-15; Weatherill, 1995: 187-189). Despite the lack of a Supreme Clause in the founding treaties, such as exists in the US Constitution,⁴⁸ the Court of Justice nevertheless established its own. In a famous case *van Gend and Loos* in the early 1960s, it was held that “The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.”⁴⁹ It was upon this principle, emphasized by the Court, that the Community treaty provisions “produce direct effect and create individual rights, which national courts must protect.”⁵⁰ In another case, the Court established that the law of member states, despite having been enacted subsequently, could not affect the validity of the pre-existing Community laws.⁵¹ The prevalence of the Community

⁴⁷ Regarding the provisions of the Court of first instance and its jurisdictions, relationship with the Court of Justice, see Articles 220-225a.

⁴⁸ Section 2, Article 6 of the US Constitution. It is expressed clearly that the Constitution, and the laws of the United States shall be the supreme law of the land.

⁴⁹ Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, (1963) European Court Reports [ECR] 1, 12.

⁵⁰ Case 26/62, at 16.

⁵¹ Case 6/64, *Flaminio Costa v. ENEL*, (1964) ECR 585, 509.

legal order was thus reaffirmed.

Through a few other cases handed down in the 1970s, the supreme legal order of the Community was completed and consolidated. In *Simmenthal*,⁵² in which the Court was faced with a conflict between a national law concerning the jurisdiction of its constitutional court and Community law, it was held that the national law would be inapplicable. Similarly, in another case, the Court went even further, indicating that respect for fundamental rights “whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community.”⁵³

By way of judicial interpretations, the Community’s legal order and its entrenchment have been constructed. In a profoundly intelligent and creative way, the Court of Justice has established that member states acting against Community laws violate the laws of their own, rather than those of another supranational legal order (Halberstam, 2001: 224). This judicial construction of federalism has been vital in the process of putting together the European Union. It is evident that the draft Constitution for Europe has adopted these legal doctrines developed by the Court and, equally remarkable in terms of comparative constitutionalism, is the judicial precedence of political solutions for developing federalism.

The American mechanism, however, is quite different. The supremacy of the Constitution and federal laws is embodied clearly in the document itself and, together with the compromising principles such as the enumerated powers of the Congress, or the Tenth Amendment, it gives residual power to the states or the people. Insofar as these principles laid down in the founding document require interpretation or clarification, the judiciary still

⁵² Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629.

⁵³ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel*, (1970) ECR 1125.

has a role to play. Yet, it is a political struggle, rather than judicial intelligence which legitimates federal construction and the entrenchment of the federal legal order.

The vital mechanism of the US construction of federalism has been constitutional codified by constitutional politics. Did the judicial actions during the New Deal indicate a shift in the construction of federalism from the political sphere to the judicial? The answer is no. As I explained earlier, without political leadership and even threats, the Supreme Court would not retreat into an embrace regulatory federalism. The recent “Velvet Revolution” initiated by the Supreme Court, however, shows some of the elitist constructions of federalism (Ackerman, 1997: 793-794).

D. Organizational Focus

In addition to the dissimilar path, organizing principle and enforcing mechanism of the US and EU constructions of federalism, their respective organizational focus is somewhat different.

The European Community has been organized largely in response to economic cooperation and market expansion (Maduro, 1998: 7-8). In the early days, the focus of the ECSC was a common commercial policy for coal and steel and a common agricultural policy. Other policies were added as time passed, and as needs arose. For example, the need for environmental protection is now taken into account across the whole range of EU policies. As the two other pillars were added into the European Union, the center has been concerned with trade negotiations and aid agreements not only within the member states but also beyond their boundaries. And for that purpose, the European Union is also developing common foreign and security policies. Despite the subsequent expansion of its concerns, the European Community (and Union) has placed its organizational focus on economic cooperation.

To a large extent, the efforts to facilitate economic

cooperation and free trade between member states and within the region has assisted the construction of federalism by forming a more solid union. For example, in *Dassonville*,⁵⁴ a case regarding whether measures of member states had an equivalent effect on impermissible quantitative restrictions,⁵⁵ helped enforce the free movement of goods in the Community and, perhaps even more importantly, enforce the primacy of the Community's treaties and laws over member states' national laws (Maduro, 1998: 21). By equalizing economic terms or eliminating unfair trade barriers between member states, the Community institutions, especially the Court of Justice, have unified rules and created an economic framework. Thus, perhaps it should not be so surprising that the cooperation which initially had a limited focus on economic development would result in further integration or even a constitutionalized union.

As opposed to the rather limited focus of the European Community, the Union on the other side of the Atlantic Ocean was formed in more comprehensive terms. While responding to economic crisis was one reason, the forming of the United States and the making of the Constitution were undertaken due to a complex set of reasons: politics, diplomacy, security, colonization, human rights, just to name a few. The comprehensive nature of the 1787 Constitution mirrored precisely the wide-ranging issues that arose during the Founding. For example, the regulatory authority of the federal government, albeit limited, went beyond economic affairs to include common defense, general welfare, and scientific progress.

There is no denial, however, that the early constitutional discourse immediately after the establishment of the American union was centered on economic issues and development of an operational economic federalism (Beard, 1913, 1986: 19-51). Much emphasis was placed upon economic terms and conditions,

⁵⁴ Case 8/74, (1974) ECR 731.

⁵⁵ Articles 28-30 of "the Community Treaty."

such as the monetary system, finance, commerce, transportation and infrastructure. The first Supreme Court decision concerning federalism was about the legality of chartering a national bank, which should undoubtedly be considered an economic issue.⁵⁶ It was not until the Civil War that the focus of the federalist construction extended to the sphere of national citizenship, political equality, and human rights, not to mention regulatory federalism, a modern phenomenon.

Thus, initially, the organizational focus of the EU was different from that of the US; the latter was comprehensive while the former more limited. These focuses have been changing as well as expanding, however. Very much like the US now, the European Union, as it grows, has developed and continue to develop common policies in a wide range of fields, from agriculture to culture, from consumer affairs to competition, from the environment and energy to transport and trade.

E. Constructing Process

Detailing the European and American respective developments of federalism, it is difficult not to notice an interesting contrast in their construction process.

On the European side, the process, which began largely with judicial actions, is now proceeding into the political arena thus enabling more political institutions and community citizens to participate. The stage of federalist debates has moved from the Court of Justice to the Convention which was opened to draft the Constitution for Europe. On the American side, however, federalism unfolded in the opposite direction. It has been progressed mainly through constitutional politics and citizen mobilization after the American federalist principle was first codified in the Founding document as well and in the Reconstruction amendments. The platform for discussing federalist

⁵⁶ *McCulloch v. State of Maryland*, 17 US 316 (1819).

arrangements has transferred from conventional meeting places to the courtroom of the Supreme Court.

Since the New Deal, the main actors in debating and deciding the nature of American federalism have been judges. During the 1960s and 70s, it was the Court of Justice that debated and decided similar issues in the European Community. But, that is changing now, and in fact the construction process of federalism never remains the same. Its changes in pattern or direction is reflective of external or internal factors and driving forces such as politics, global process, and democratic concerns.

IV. Conclusion

“Federalism” has become a vital discourse in comparative constitutional law. In recent analysis, federalism is understood in functional terms, denoting any power relationships between a center and its peripheries. The functional understanding of federalism not only enables the analysis of supranational federalism but also—and perhaps more importantly—sheds light on a more dynamic way in which federalism may function as a process. Process federalism gives rise to academic interests in understanding constructive federalism: the process by which the center and peripheries are built and interact with one another.

It is in the light of process federalism that this article recasts the two stories of the construction of federalism. The comparison of constructed federalism in the European Union and the United States shows different patterns. The path of European federalism begins with treaties, while American federalism developed by way of constitutions. The organizing principle of the Europe Community is premised upon the theories of subsidiarity and proportionality, but the Americans have relied on the principle of dual sovereignty. Regarding their respective enforcing mechanism, the European Community relies largely on judges, whereas the US puts more emphasis on constitutional politics and citizen mobilization. In addition, the

organizational focus has been different. The European Community started with economic cooperation, in contrast with a more comprehensive agenda formed during the Founding of the US. Finally, the construction of both paths seems to venture in opposite directions. The European process proceeds from the court to politics, from the elite to the community level, while the American journey began in politics and veers toward the courtroom.

With the comparison of the two stories, it is evident that the patterns in the respective constructions of federalism are different. The differences, however, are not to be overly exaggerated. The success of the Europe's coming together and moving towards a more solid union suggests that federalism does not necessarily require political structures that are territorially defined. The construction of federalism goes beyond the traditional boundaries of a nation-state. It can be exercised in a supranational structure which binds the center with the peripheries (MacCormick, 1993). The comparative findings of this article further suggest that the pattern of constructing federalism remains flexible. The process may begin with a Constitution or with a treaty. The organizing principle may be a devolutionary path toward centrality. Neither the principle of dual sovereignty nor the theory of subsidiarity inhibits a federalist arrangement between center and periphery. The enforcing mechanism need not always be constitutionally codified. Through gradual judicial decisions, a solid and effective power arrangement can be sought. Even mere supranational economic cooperation can possibly be further developed into a consolidated version of an Economic Constitution and expanded into a full-fledge Constitution.

This flexibility of federalism construction is especially encouraging when one takes the future of other regional integrations and even the ongoing global integrative process into consideration. The comparative observations made in this paper suggest that transnational developments are not dependent upon any particular set of legal instruments or political processes. Within national boundaries or not, with treaties or constitutions, with an

economic focus or a broader one, constructing federalism is possible and may be developed. If so, the question to ask next is whether the many other emerging—and perhaps even more loosely organized—regional mechanisms, such as Association of South East Asian Nations (ASEAN) or North America Free Trade Agreement (NAFTA), could possibly be developed into a more solid, integrated framework (Ackerman, 1997; Weiler, 2000). Overly optimistic or not, this question requires further research to render any answer. For now, as far as this paper is concerned, and as suggested by the comparative analysis of the EU and US models in the light of process federalism, the efforts to construct federalism would not be constrained or inhibited by any particular set of juridical form or process. Some other factors, nevertheless, may have influence over it. Like it or not, the possibility of constructing federalism beyond traditional national territories and even in regional arrangements has existed and should be attributed to the further burgeoning of transnational constitutionalism.

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建構聯邦原則——歐盟與美國的比較研究

張文貞

摘 要

歐盟正朝進一步的整合持續穩定發展，歐盟與各會員國的關係也逐漸往所謂的聯邦原則來發展；而美國則是採用聯邦原則的一個成功典範。在聯邦原則的建立上，是否有一定的模式可尋呢？歐盟此一超國家的組織，是否可能在「中心—邊陲」的權力分配與安排上，採行聯邦原則？美國與歐盟在此一經驗上的比較又是如何？爲了解此一問題，並比較美國與聯邦在建構聯邦原則上的異同，本文首先對聯邦原則採取功能性的理解，將歐盟視爲跨國聯邦。此外，本文亦採動態分析，將歐盟與美國的比較，著重於二者在聯邦原則的建構過程與互動方式。

本文發現歐盟與美國在建構聯邦原則的過程中，在途徑、組織原則、執行機制、組織重心及建構過程等面向，都採取了完全不同的方式，但兩者都成功整合中心與邊陲的權力運作。本文因此主張，聯邦原則的建構以及聯邦模式的採行是有彈性的，並不受國界的限制。建立跨國聯邦的可能性已經存在，並可能進一步引發跨國憲政體制的發展。

關鍵詞：聯邦原則、管制性聯邦原則、跨國聯邦、二元主權、輔助原則