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Boundaries and Identity:
The Legal Geography of the European Union and the United States of America

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ABSTRACT
This essay addresses the types of federalism found in the European Union (EU) and the United States of America from different perspectives. The first perspective is the traditional one, according to which federal designs are the outcome of processes of evolution and adaptation. Both types of federalism have their roots in the process of the formation of their respective systems, and such processes have subsequently shaped their institutional designs. The second perspective is intimately related to the traditional one. It assumes a functional approach, and highlights the constitutional character developed by American scholars, who have been applying their vocabulary and concepts to EU federalism. It reveals an intimate relationship with constitutional identity, which a community incorporates into constitutional provisions. The essay focuses on the role of one of its constitutive features of constitutional identity, i.e., the legal geography of the EU and the United States.

KEYWORDS: European Union, United States of America, Federalism, Constitutional Identity, Legal Geography
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1. Comparing and Contrasting the EU and the United States: 
The ‘Traditional’ Perspective

When addressing the so-called “federalizing processes,”¹ scholars usually refer to the EU and to the United States and elucidate similarities and differences between the two prototypes of “federated” systems.²

This is not another essay dedicated to the constitutional evolution of the United States and the EU. Several contributions have been dedicated thereto, and in-depth analyses have pinpointed analogies and discrepancies between them.³ Nor will the article consist of a juxtaposition of the two federal designs. Comparative legal studies have speculative aims: comparing and contrasting the EU and U.S. forms of federalism give rise to noteworthy issues. This means that there is room left for comparative surveys, the significance of which depends on the perspectives we choose when addressing the topic.

First, there is the traditional perspective, according to which both the EU and the United States are the outcome of processes of evolution and adaptation. Their narratives are traced back to the historical formation of their federal systems, which has subsequently shaped their institutional designs: “The manner and context in which a federal system comes into being has a distinct and

pervasive influence on the kinds of governing institutions and decision-making processes [...] adopted.”

This perspective reveals analogies between the EU and the U.S. forms of federalism. Both systems are formed through the aggregation/integration of political communities, and this aggregative nature sheds light on their institutional structures: the formative basis is reflected in “representative institutions”, i.e., the U.S. Senate and the EU Council of Ministers representing constituent units. Such an influence may also be detected in member states’ participation in decision-making processes allocated at the federal level. Furthermore, the U.S. Constitution and the European Treaties distribute legislative powers between tiers of government, and the principle of subsidiarity governs EU non-exclusive powers.

Finally, both systems establish a final adjudicator in constitutional issues: the Supreme Court and the European Court of Justice (ECJ), respectively. Nobody can deny their role as the main actors supporting the evolution of their respective constitutional frameworks. While performing the function of “resolution,” the ECJ contributed to the “evolution” of the EU toward a “constitutional framework for a federal-type structure.” This is apparent in the foundational period, where the constitutionalization of the European system rested on the judicial doctrines of direct effect, supremacy, and implied powers: the EU system of judicial review does highlight the changes in the original, confederative structure, and accentuates analogies between the same EU and federal states.

However, this perspective mainly emphasizes analogies, which can also be noticeable, e.g., the “federal” narrative or the presence of constitutional adjudicators; differences, however, are even

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more remarkable. Whereas the United States is a federal state, the EU lacks statehood, although it has “federalizing features”. The “federal-like” character of the integration process makes federalism applicable to the EU: it is the process, not the legal system, that has traits in common with the U.S. form of federalism. The legal system established by the Treaties simply reflects these traits, because it has been evolving toward “an entity whose closest structural model is […] principally the federal state”.

2. Approaching the EU From a U.S.-Oriented Perspective:
The Federal-Experience Perspective

The second perspective is intimately related to the traditional one, from which it draws several elements. When it comes to EU federalism, the second perspective assumes a *functional approach*, and severs the organizational and institutional traits from the functions exercised by the EU organization: federalism thus denotes “a hierarchical relationship” between the EU and its members. This perspective conceives of the EU integration process as a *dynamic blend* of federal and international elements that merge into a unique polity. What makes the EU and the United States comparable is the *constitutional character* of the EU’s “treaty-based federalism”. There is a shift from “federal features” to “federal methodology”: even though the EU is not destined to become a federal state, “the relevance of the federal experience to Europe” – with the U.S. experience being the most relevant of all – is being “increasingly recognized”. In this regard, the role of U.S. scholarship with a background in constitutional legal studies is undeniable. On the one hand, American scholars have developed the main arguments supporting the federal character of the EU; on the other hand, they have supported the application of U.S.

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Since it focuses on the role played by American scholars in the examination of European integration, the federal-experience perspective results in the application of a sort of federal-analogy test to the EU, as well as peculiar terminology. In this regard, the U.S. legal debate has been fruitful for the development of the European integration process.\footnote{Since it focuses on the role played by American scholars in the examination of European integration, the federal-experience perspective results in the application of a sort of federal-analogy test to the EU, as well as peculiar terminology. In this regard, the U.S. legal debate has been fruitful for the development of the European integration process.} Hence, the federal-experience approach reveals difficulties that arise because this perspective merely looks at the EU integration process through U.S. scholars’ eyes,\footnote{Hence, the federal-experience approach reveals difficulties that arise because this perspective merely looks at the EU integration process through U.S. scholars’ eyes.} i.e., it adopts the U.S. form of federalism as the archetype of comparative federal studies.\footnote{Hence, the federal-experience approach reveals difficulties that arise because this perspective merely looks at the EU integration process through U.S. scholars’ eyes.}

3. An Alternative Narrative: Constitutional Identity and Territory Between Law, Geography, and Linguistics

Thus, “[t]he comparative American constitutional experience was […] taken over as a mindset, as an intellectual pattern underlying the EU constitutional narrative which has won a dominant position in the legal construction of European integration.”\footnote{Thus, “[t]he comparative American constitutional experience was […] taken over as a mindset, as an intellectual pattern underlying the EU constitutional narrative which has won a dominant position in the legal construction of European integration.”} The reason why American scholars apply their vocabulary and concepts to the EU form of federalism may be traced back to the U.S. constitutional legal tradition, and reveals an intimate relationship with identity, and, in constitutional comparative studies, identity counts as \emph{constitutional identity}.\footnote{The reason why American scholars apply their vocabulary and concepts to the EU form of federalism may be traced back to the U.S. constitutional legal tradition, and reveals an intimate relationship with identity, and, in constitutional comparative studies, identity counts as \emph{constitutional identity}.} The details of this assumption will not detain us here: suffice it to say that the U.S. form of federalism possesses a strong constitutional identity that has been shaped during the course of its constitutional history and subsequent evolution. It is the same strong constitutional identity that also characterizes the

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European member states, and that is traditionally likened to the principles of constitutionalism and territorial integrity.\textsuperscript{25} Such a process corresponds to the “manufacturing tradition” typical in constitution-making processes. As Laurence Tribe has highlighted, “the very identity of ‘the Constitution’ – the body of textual and historical materials from which [fundamental constitutional] norms are to be extracted and by which their application is to be guided – is [...] a matter that cannot be objectively deduced or passively discerned in a viewpoint-free way”.\textsuperscript{26} The materials can be literary, historical, pseudo-historical, and antiquarian – they go beyond time and law. When forging its own constitutional identity, a community incorporates such values and traditions into its constitutional provisions, from which interpreters will subsequently carve out constitutional identity and its legal significance.

In this respect, constitution-makers are narrators – the storytellers of a thick constitutional identity.\textsuperscript{27} When creating constitutional identities, they use legal, literary, traditional, and social materials. Like a poet, a constitution-maker “[sings] for his contemporaries [...] he is [...] recalling to his hearers’ minds well-known situations which could be conjured up by merely alluding to well-known events and personages”.\textsuperscript{28} The intent is the creation of a thick constitutional identity: the more the materials go beyond time and law, the thicker the new constitutional identity will be.

In this essay, we will not examine all the facets of constitutional identity. We will rather refer to the relations between “Geography and Law”,\textsuperscript{29} i.e., in the creation of spatial, as well as legal, connections between the territory and the community upon which constitutional identity is erected. When it comes to federal studies, “territorial identity” rests on several features: these may be economic, linguistic, religious, and ethnic.\textsuperscript{30} Whatever the legal significance of these features may be, territorial identity presupposes a close geographical interrelation between community and territory. Hence, boundaries are the visible and concrete expression of such a


\textsuperscript{30} “These factors are of the utmost importance in comparative law [...] as legal scholars, we must give them our intensive attention”: see Grossfeld, B., “Geography and Law,” p. 1511.
territorial divide; territorial units’ denomination and boundaries outline the territorial identity of the community, and this governs the process of formation of the constitutional identity. The creation of a thick constitutional territorial identity rests on several materials – and the politics of both territorial denomination and boundaries outline this identity. At the same time, a thick constitutional “territorial identity” asserts the legitimacy and validity of place names, for they are the linguistic evidence of the spatial relations between territory and community. To put it another way, territory and community are not separable, as the narrative of a constitutional identity resting on a place name upholds. In legal terms, constitutional identity confers legal significance to the physical geography of a state as the central aspect of its identity – and physical geography turns into legal geography.

Indeed, place names and boundaries may be numbered among the constitutive parts of legal geography. F.W. Maitland first used this concept in his book *Township and Borough*, where he defined “legal geography” as the relationship between community and its territory. These communities – families, clans, villages, ethnicities, etc. – are claimants asserting an exclusive and close relation with a specific territory – it is a spatial relation, legally relevant, that Maitland terms as “belongs of public laws”. The drawing of boundaries entails an even closer connection between land, community, and law, and highlights legal, economic, and social interactions between territory and institutionalized communities.

The most recent researches share the rationale of Maitland’s legal geography: the relationship between organized communities and territorial space. In this regard, scholars have also expanded its scope:

“Legal geography is not a subdiscipline of human geography, nor does it name an area of specialized legal scholarship. Rather, it refers to a truly interdisciplinary intellectual project”.

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In this regard, legal geography examines how the “spatiality of law” operates: “if social reality is shaped by and understood (or constituted) in terms of the legal, it is also shaped by and understood in terms of space and place”.\textsuperscript{35}

Moreover, legal geography considers what can be labeled as the “law of spatiality” – i.e., the legal consideration of all geographic features (physical, anthropic, economic, and social). This is apparent in the works both of Manfred Langhans-Ratzeburg – on the legal consideration of the cartographic representation of law—and of Walther Merk, which expressly referred to legal (Rechtsgeographie).\textsuperscript{36}

Furthermore, legal geography considers place names, boundaries and “territorial segmental autonomy”, which “means, in practically all cases, a federal arrangement”.\textsuperscript{37} Among its constitutive features we may also number those mechanisms according to which constituent units’ are created and boundaries are drawn or altered. Legal geography complements the rules of federalism, and it is a principle of organization in multi- or bi-ethnic federal states, allowing power-sharing mechanisms to work.\textsuperscript{38}

To sum up, legal geography encompasses several institutes (regional demarcation, place-name policies, territorial alteration, and power sharing) and represents a legal approach complementing the comparative method.\textsuperscript{39} This methodological approach is not confined to the mere study of black-letter federal constitutions, but it contributes to filling in the gaps between written provisions and the practice of law.

Furthermore, legal geographic studies shares fields of research with linguistics – both diachronic and synchronic. This is manifest in the linguistic studies of place names –intriguing research into both the remnants of former communities and the merging of different identities.\textsuperscript{40}


\textsuperscript{36} See Langhans-Ratzeburg, M., Begriff und Aufgaben der geographischen Rechtswissenschaft (Geojurisprudenz) (Berlin-Grunewald, K. Vowickel 1928); Merk, W., Wege und Ziele der Geschichtlichen Rechtsgeographie (Berlin, G. Stille 1926).


\textsuperscript{39} On legal geography as a methodology complementing comparative law, see, also, Grossfeld, B., “Geography and Law,” p. 1511. The author, however, confines legal geography to the presupposition affecting the application of, or imposing modifications on, legal institutes.

more, geographical linguistics draws boundaries in dialectology: these are the so-called iso-
glosses, which “will not commonly coincide or bundle together with one another in such a way
as to define a single firm and satisfactory dialect boundary”.41

This is the case with Scottish identity, whose linguistic features frequently overlap. On the one
hand, the boundary drawn between England and devolved Scotland – and which then “stretched
from the Humber to the Forth, but not further North”42–severs Scots (a variety derived from Old
English).43 On the other hand, there are linguistic markers and types of variation that draw geolinguistic boundaries in the British Isles – among them, the “rhoticity” (i.e., the
pronunciation of /r/ after a vowel where it is present in the written word); a different pron-
unciation for “wh-“, which is indeed pronounced [hw] such as in when [hwen]; the use of [u:] in /au/
words such as “house” – which is the sound before the onset of the Great Vowel Shift, which did not fully take place in Scotland.44

Despite this, scholars with a background in geographical linguistics have succeeded in comple-
ting a number of linguistic atlases such as the *Linguistic Atlas of Late Mediaeval English*.45 In
some cases, legal geography and linguistic geography overlap. In a diachronic perspective, the
878 Treaty of Wedmore between Guthrum, the Danish King, and Alfred, King of Wessex, as-
serted their respective “belongs of public laws” on a specific territory, and established a closer
connection between land, community, and law. It is the so-called Danelaw, i.e., the “territory
[…] subject to Danish law”46 demarcated through a boundary running roughly from Chester to
London. The Danish “belongs of public law” defined the legal relationship between the territory
and the community, and comprised the single constitutive parts of the legal-linguistic geography
of Danish rule: place-names politics,47 linguistic borrowings, a legal system and boundaries de-
limiting the area of the same Danelaw.

The pioneer of linguistic geography was Matteo Bartoli: see Bartoli, M., *Introduzione alla neolinguistica* (Florence,
L.S. Olschki 1925).
42 Davies, R. R., “Presidential Address: The Peoples of Britain and Ireland 1100-1400. II. Names, Boundaries and
43 Smith, J.I., *Essential of Early English. An Introduction to Old, Middle and Early Modern English* (London and
University Press 2011); Upton, C., “Modern Regional English in the British Isles,” in L. Mugglestone (ed.), *The
46 Baugh, A.C. and Cable, T., *A History*, p. 89. The Danelaw as a legal-geographic relation between territory and
community corresponds to the “area to the north and east of the old Roman road known as Watling Street”: see
47 Stenton, F.M., “Presidential Address: The Historical Bearing of Place-Name Studies: The Danish Settlement of
When it comes to the synchronic perspective, there are noticeable overlaps between linguistics and legal geography, including, among others, place-related words defining the types of federalism in the United States and the EU. Both America and Europe refer to a continent, i.e., designate specific “belongs of public law” in linguistic terms; on the other hand, America “serves as [a] potent label for one nation that occupies only the middle reaches of the northern part of the Americas”, while in the late twentieth century, “Europe acquired an additional sense that brought it into line with America: it now meant not only the whole continent, but served as shorthand for the European Union (EU), a politico-economic federation, which occupies only part of that continent”.48 When comparing and contrasting EU and U.S. federalism, linguistics adds relevant arguments to legal geography – place-related words are indeed part of the constitutional identity of the federalism in question. It also sets an additional layer of complexity, since the politics of place names determines to what extent denominational issues match the demarcation of both federations, i.e. their territorial constitutional identity.

4. From Territory to Constitutional Identities, via Legal Geography

Legal geography, in general, and denominational issues, in particular, really affect the way “territorial” constitutional identity is built. In this regard, they offer a narrative that is alternative to the traditional and federal-experience narratives. This is particularly true as far as processes governing the formation of the legal geography of the two types of federalism are concerned.

The formation of both types of federalism reveals analogies and discrepancies between their respective legal geographies, such as in the case of regional demarcation, which governs the division of the federal territory into territorial constituent units.49

As the EU and the United States may be considered aggregative federalisms, the outcome of demarcation usually coincides with the boundaries of pre-existing units that have come together and created a new federation. As for the EU, these were the six founding member states, whereas in the United States the previously independent political communities that integrated into the confederative system were the former 13 English colonies that had become sovereign states.

This first step was represented by the Resolution passed by the Second Continental Congress on May 15, 1776: “That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affair have been

hitherto established, to adopt such government as shall, in the opinion of the representatives of
the people, best conduce to the happiness of their constituents in particular, and American safety
in general.”

Moreover, both the EU and the U.S. processes of demarcation proved to be effective “works in
progress”. Both federal designs have accrued their territory by virtue of the admission of new
member states, and the sole difference consists in the fact that the EU admits existing sovereign,
independent states [Article 49 of the Treaty on the European Union (TEU)], while U.S. constitu-
ent units were carved out of former federal territories that would be subsequently admitted into
the federation.

Processes governing the gradual formation of the EU and the United States shed noticeable light
on the word geography (and on the constitutional identity) of both types of federalism. With re-
spect to the United States, the label \textit{America} designates the continent, and complements the
United States’ constitutional identity. Legal and linguistic geographies thus perfectly match, and
the progressive admission of new states may now be considered as completed in the continental
United States. U.S. member states occupy the entire middle reaches of the northern part of the
Americas between Mexico and Canada, and there is only room left for the admission of new
states that have an insular, i.e., a physically geographic demarcated, character, such as Puerto Rico.

By contrast, EU Treaties set a precise legal requirement for the admission of new states into the
Union: states must be \textit{European}. Despite the indication of a geographically oriented requirement
for admission, the “criterion of European-ness […] is best understood as a loose geographical”
one:

the geolinguistic concept of \textit{Europe} does not have clear boundaries, and its application
fades into the geographical continuity that characterizes the Euro-Asiatic continent.

It follows that European linguistic geography does not match its legal geography, and this un-
dermines EU “territorial identity”. It could be argued that, when admitting prospective members,
the Copenhagen criteria might complement the multifarious features upon which EU constitu-
tional (and territorial) identity is built. These criteria are incorporated into Article 49 of the
TEU, which, however, merely reflects a “constitutional commitment to human rights, democra-
cy and the rule of law” that is not specifically European.

The \textit{abstract} commitment to human rights thus has a direct backlash on the \textit{concrete} demarcation of the EU: new member states will

\begin{itemize}
  \item \textit{50 “The States and the Congress Move Toward Independence: 1775-1776,” 6 Publius. The States as Keystones: A
  Bicentennial Reassessment} (no. 1, Winter 1976), pp. 135-143, at 141.
  \item \textit{51 See Story, J., Commentaries on the Constitution of the United States}, II (Boston, Little, Brown and Company
  1858), p. 189 et seq.
  \item \textit{52 See Kumm, M., “The Idea of Thick Constitutional Patriotism,”} p. 112.
\end{itemize}
be admitted provided that they respect human rights, democracy and the rule of law. It follows that the European character of prospective members is becoming irrelevant. This seems to contradict traditional legal geographic studies, where boundaries constitute the visible expression of clear territorial “belongs (and divides) of public law. The absence of a clear boundary for a prospective EU territory makes its “belongs of public law” even looser. This is due to the fact that a clear geographical interrelation between community and territory lacks in the EU: indeed, member states’ territory merely define the territorial scope of the Treaties [see Art. 52 of the TEU and Art. 355 of the Treaty on the Function of the European Union (TFEU)]. As a consequence, the process of the formation of EU constitutional identity departs from those typical of state-building processes.

There is another discrepancy between the legal geographies of the EU and the United States. The EU is a mere sum of “belongs of public law”. Each “belong” which corresponds to the geographical interrelation between community and territory of each member, is delineated by visible boundaries, concrete geography, and historical place-name politics, and it is governed by institutions reflecting the same “belong”. Although the EU has traits in common with multinational federations, it only aims to demarcate the territorial scope of the Treaties by holding together the different EU deomoi in a single quasi-federal structure. This assumption leads to another discrepancy regarding EU and U.S. societies. Whereas the EU is a “multinational”, “federal-like” polity, the United States is a homogeneous federation. This means that “[t]erritory in the United States (except for the Indian country) is essentially neutral, that is, a blank slate to be filled in by whomever lives on the territory”.54 Territorial neutrality standardizes member states’ identity: “settlers give life and meaning to a territory”, but “subsequent residents […] [may adapt] the jurisdiction’s institutions to changing times and their preferences”.55

The homogeneous nature of U.S. federalism can be traced back to the fact that constituent units were carved out of the federal territories and then admitted into the federation. The federal government thus shaped member states’ territorial identity, boundaries and denomination prior to their accession to the federation.56

The federal government supervised the processes of territorial delimitation. First, “[t]he Congress [had] Power to dispose of and make all needful Rules and Regulations respecting the Ter-

tority [...] belonging to the United States”, and states were carved out from those territories (*territorial clause*: Article IV, s. 3, cl. 2, of the U.S. Constitution). Second, “[n]ew States [might] be admitted by the Congress into [the] Union” (Article IV, s. 3, cl. 1, of the Constitution). Third, admission implied the application of the criteria set forth in the *Northwestern Ordinance 1787* and the demarcation of states’ borders, which followed “straight lines laid down by surveyors”.57 Fourth, admission led to the conferral of statehood to the new states, and statehood implied the certification of state constitutions under the *Republican Form of Government* clause (or Guarantee clause: Article IV, s. 4, of the U.S. Constitution).58

When admitting new constituent units, the U.S. federal government not only acknowledged their statehood but also their “belongs of public law”, which are, however, feebler and looser than those of the EU member states.59 Hence, units’ territorial identity is the outcome of a restless process through which U.S. territory and community have become inseparable, upholding the narrative of a strong constitutional identity and forging U.S. legal geography.60 Admission to the EU generates the legal geography of the integration process, too: on the one hand, admission does not confer statehood to prospective member states, but bestows European-ness upon them. Thus, the EU generates *Europe* and shapes its own legal geography. Unlike U.S. legal geography, European legal geography will never be considered complete because the progressive admission of new “European” states is a matter of politics, not of physical geography. From this, it does not follow, however, that the European Union has its own “belongs of public law”. First, European-ness is the effect (and not the cause) of admission to the EU. Second, the EU lacks a definite territorial demarcation. Third, EU territory is the mere sum of member states’ territories and “belongs of public law”. Fourth, EU territory coincides with the *territorial scope of the Treaties*. This precludes a concrete and tangible process of self-identification between the EU *demoi* and EU territory, and the EU does not conceive of its institutions as representative of this sum of different territories, peoples, and belongs, but of the individual member states. As far as European-ness is concerned, the EU confers legal and *abstract* significance onto member states’ physical geography, which thus turns into an *abstract EU legal geography*.

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59 With the exception of the South, which “has long been the country’s most distinctive region, so much so that the United States was, in important respects, a bicomunal federation from 1789 to about 1968”: Kincaid, J., “Territorial Neutrality and Coercive Federalism in the United States,” p. 138.
60 See Duffey, D.P., “The Northwest Ordinance as a Constitutional Document,” 95 *Columbia Law Review* (no. 4, May 1995), 929-968, 942: “Through the Ordinance, the states attempted to reproduce – to create entities like themselves [...] the political reproduction [...] was provided to preserve and perpetuated the distinctive political life that the states had won in the War for Independence.”
5. Towards a Thick Constitutional Identity and a Concrete Legal Geography for the EU

It is indisputable that the United States’ concrete, federal-oriented legal geography produces a thick constitutional identity. Not only is this legal geography strictly connected to the formation and elaboration of national identity, but it also exhibits the above-mentioned legal and non-legal presuppositions linking thick constitutional identity to the “social, cultural, as well as economic environment, within which [constitutional identity] effectively came into being”.  

In this respect, the U.S. narrative corresponds to what has been termed an identity shaped “in the present from the connection with the struggles of the past and the ambitions for the future”. (Thick) constitutional identity is also a key concept as far as the European historical narrative is concerned. First, nobody can argue that the framers of the European treaties have been trying to confer an autonomous constitutional identity on the EU since the very inception of the integration process. In this regard, we have already noted that ECJ played a crucial role in supporting the EU’s institutional evolution in the foundational period through the already-mentioned “constitutionalization” of the supranational legal system. Furthermore, EU treaties entrench a vast array of principles, values, and aims, as well as the Charter of Fundamental Rights of the European Union. Second, the EU’s supranational legal order rests on a set of principles shared by member states: the protection of the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms; the constitutional traditions common to the member states, as interpreted by the ECJ. Third, “constitutional traditions” common to member states are closely connected with their “national identities, inherent in their fundamental structures, political and constitutional”, which the Union shall respect under Article 4(2) of the TEU. The question left unanswered by this provision is who should be the final adjudicator in disputes related to member states’ constitutional identity. Whereas the U.S. Supreme Court stated that it would not decide political questions, i.e., “constitutional questions […] involving [the] constitutional structure” of the member states un-

64 See supra para. 1. See, also, Forsyth, M., Unions of States – The Theory and Practice of Confederation (Leicester, Leicester University Press 1981); Weiler, J.H.H., The Constitution of Europe, p. 188 et seq.
65 See Articles 2, 3, 6(1) of the EU Treaty, respectively.
under the Guarantee clause, the interpretation of Article 4(2) is the most contentious issue arising in the EU constitutional environment.

It could be argued that, under Article 4(2), member states’ constitutional identity is eventually incorporated into EU law. The assumption is held by the Treaty on Stability, Coordination and Governance in the economic and monetary union (TSCG) signed in Brussels on February 2, 2010. In effect, constraints imposing that the budgetary position of the member states must be balanced or in surplus progressively deprive member states of their constitutional Kompetenz-Kompetenz: “The stability treaty not only requires [...] constitutional changes in each of the signatory states, but also raises significant questions about its relationship with EU law and the extent of the discretion left to member states to make fundamental decisions about taxation and spending.”

There is, however, a fundamental objection to the assertion that the EU has the power to rule on member states’ constitutional identity, and the ECJ is the final adjudicator of disputes related thereto. Such powers seem to be incompatible with the same concept of constitutional identity, which refers to a specific state, as opposed to constitutional traditions, which are in turn common to both the Union and member states. Furthermore, the powers of final adjudication are challenged by national constitutional courts, which in most cases have ultimately determined the identity of the respective member state.

This is due to the fact that the Union can really affect national constitutional identity. This occurred in the case of Ireland. Although Irish is the official language of Ireland and one of the official languages of the EU (Article 8(1) of the Irish Constitution and Article 55 of the TEU), it was taken into consideration as a working language of the EU until 2006, when the Council included it among the languages to be used in the European Union.

In addition, the constitutional, collective significance of Catholicism in Ireland has been progressively challenged “by a growing emphasis on the rights of the individual”. Moreover, EU requirements related to the establishment of a common market founded on the free movement of goods, persons, services

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69 See, among others, Conseil constitutionnel, judgment 27 July 2006, 2006-504 DC.


and capital had noticeable effects on Ireland’s constitutional identity, which subsequently had to amend its Constitution with respect to abortion.\(^{72}\)

The current financial crisis is undermining the same presuppositions of the EU integration process and, to a bigger extent, the same EU identity-building process. In this regard, the crisis gives rise to issues that are related to global economic governance. Hence, international financial actors such as the World Bank and the International Monetary Fund,\(^ {73}\) as well as private-sector investors, endorse the transformation of the economic premises the same EU integration process rests on. In particular, international financial actors suggest the adoption of a common-law-oriented legal tradition that is capable of supporting a capitalist socioeconomic model, but that totally departs from the model of *Soziale Marktwirtschaft* (i.e., social market economy) enshrined in Article 3 TEU.\(^ {74}\) This is caused by international investment law, which “shifts power and authority from states to investors, tribunals and other decision-makers”, and “[t]hese shifts produce outcomes that only partially support global policies”, as well as the transfer of power and authority to decision-makers who are not democratically accountable.\(^ {75}\)

It is obvious that the effects of the economic crisis are even more remarkable when they affect the EU, i.e., “an entity whose closest structural model is no longer an international organization but a denser, yet non-unitary polity” that has traits in common with the federal state, in general, and U.S. federalism, in particular.\(^ {76}\) The EU’s *abstract legal geography* is even more apparent: it highlights the absence of EU “belongs of public law”: there has not been a shift from the aggregate of states’ thick identities to the creation of common institutions capable of representing communities and territory, and this is one of the fallacies of the integration process. Although the EU tends to accommodate different European polities and societies on the basis of common values embedded in the Treaties, a constitutional identity comparable to that of its member states and of the United States is currently lacking.

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\(^{73}\) It is “remarkable” that the institutions of the World Bank Group “have reached their present status as the premier source of both development finance and economic research and information without introducing any major change in their constituent charters”. See Shihata, I.F.I, Tschofen, F. and Parra, A.R. (Eds.), *The World Bank in a Changing World. Selected Essays* (Dordrecht, Martinus Nijhoff Publishers 1991), p. 15.

\(^{74}\) On the negation of the *Soziale Marktwirtschaft* model in Germany, the country where the model was invented, see Ruffert, M., “Public Law and the Economy: A comparative view from the German perspective,” 11 International Journal of Constitutional Law (no. 4, 2013), pp. 925-939.


In this regard, “the plausibility and requisiteness of Europe as a demos”, that is to say, the possibility that the EU rests on a political community, requires more than a general commitment to abstract universal principles, which only serves as the legal requirements for the admission of prospective member states. In this thin commitment, “there is nothing specifically European”.

When addressing a financial crisis, a thick constitutional identity-building process cannot rest on the creation of mere mechanisms for financial governance, such as those established by the TSCG. In this regard, the U.S. constitutional-federal experience and vocabulary might certainly provide Europe with additional solutions to face the current economic crisis. The financial divide between the EU member states reveals the lack of a sole demos, and impedes narratives similar to those that led to the establishment of an ever more perfect union in the United States, i.e., those narratives that persuaded Alexander Hamilton to “successfully [restructure] America’s crippling sovereign debt in the 1790s by ‘federalizing’ the states’ debt”. Hence, a comparative legal examination of the EU and U.S. types of federalism reveals that the U.S. narrative succeeded in establishing its own thick constitutional identity because the United States possessed the legal and non-legal presuppositions allowing the establishment of such a thick constitutional identity. These certainly had a historical lineage that stretches back through the centuries, until the revolutionary “big bang” caused by the Philadelphia Convention – but a national constitutional identity is also “connected to the particular history, ambitions and current political practices of a particular community”. This is due to the fact that the United States elaborated and guided a specific national political action that expressed the United States’ peculiar relationship between its community, its received cultural traditions, and its territory, in relation to which identity is construed, i.e., a concrete legal geography. The same will occur to the quasi-federal EU integration process whenever it defines exactly what European-ness means. When the legal and the linguistic geographies of the EU match perfectly, i.e., when Europe conceives of itself as a territorially, physically and legally geographic demarcated polity, the criterion of European-ness will not be understood as a loose geographical tie anymore. Europe will then be based on a concrete legal geography, and this will mean the time for a thick constitutional identity has come.
