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Matteo Nicolini

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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* of the EU's "treaty-based federalism". Such a perspective has been 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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SUMMARY: 1. Comparing and Contrasting the EU and the United States: The 'Traditional' Perspective. – 2. Approaching the EU From a U.S.-Oriented Perspective: The Federal-Experience Perspective. – 3. An Alternative Narrative: Constitutional Identity and Territory Between Law, Geography, and Linguistics. – 4. From Territory to Constitutional Identities, via Legal Geography. – 5. Towards a Thick Constitutional Identity and a Concrete Legal Geography for the EU.

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

[1] See Friedrich, C.J., "New Dimensions of Federalism," 57 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* (April 25-27, 1963), pp. 238-240; Friedrich, C.J., *Trends of Federalism in Theory and Practice* (New York: Praeger 1968), p. 24; Burgess, M., *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford, Oxford University Press 2012).

[2] See Bermann, G.A., "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 *Columbia Law Review* (no. 2, March 1994), pp. 331-456; Stein, E., *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism* (Ann Arbor, MI, Michigan Publishing 2000).

[3] Friedrich, C.J., *Trends of Federalism*, p. 160; Sandalow, T. and Stein, E. (Eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford, Oxford University Press 1982); Fahey, E., "On the Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US," 20 *European Law Journal* (no. 3, May 2014), pp. 368-384.

pervasive influence on the kinds of governing institutions and decision-making processes […] adopted."[4]

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",[5] i.e., the U.S. Senate and the EU Council of Ministers representing constituent units.[6] Such an influence may also be detected in member states' participation in decision-making processes allocated at the federal level.[7] Furthermore, the U.S. Constitution and the European Treaties[8] distribute legislative powers between tiers of government, and the principle of subsidiarity governs EU non-exclusive powers.[9]

Finally, both systems establish a final adjudicator in constitutional issues: the Supreme Court and the European Court of Justice (ECJ), respectively.[10] 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".[11] 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.[12]

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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[4] Aroney, N., *The Constitution of a Federal Commonwealth. The Making and Meaning of the Australian Constitution* (Cambridge, Cambridge University Press 2009), p. 39.

[5] Watts, R.L., *Comparing Federal Systems* (Montreal et al., McGill-Queen's University Press 2008, 3rd edition), p. 135.

[6] On the U.S. Senate, see Wechsler, H., "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* (no. 4, April 1954), pp. 543-560.

[7] See Aroney, N., "Representation and Amendment in Federal Constitutions," 54 *The American Journal of Comparative Law* (no. 2, Spring 2006), p. 282.

[8] EU Treaties are "the basic constitutional charter" of the integration process: see ECJ, C-294/83, *Parti Ecologiste, "Les Verts"* v. *European Parliament* [1986] ECR 1,339, 1,365; ECJ, C-402/05, *P – Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6,351.

[9] See Bast J. and von Bogdandy, A., "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform," 39 *Common Market Law Review* (no. 2, 2002), pp. 227-268.

[10] See Roth, G.H., "Increased Competences through Development of the Law: The European Court of Justice and the U.S. Supreme Court," in Grabher, G.M. and Gamper, A. (Eds.), *Legal Narratives. European Perspectives on U.S. Law in Cultural Context* (Wien, Springer 2009), pp. 195-211.

[11] Stein, E., "Toward a European Foreign Policy? European Foreign Affairs System from the Perspective of the United States Constitution," in M. Cappelletti, M. Seccombe and J.H.H. Weiler (Eds.), *Integration through Law: Europe and the American Federal Experience*, vol. 1 (Berlin, Walter de Gruyter 1986), pp. 3-63.

[12] Weiler, J.H.H., *The Constitution of Europe*. *"Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Oxford, Oxford University Press 1998), p. 19.

more remarkable. Whereas the United States is a federal state, the EU lacks statehood, although it has "federalizing features".[13] The "federal-like" character of the integration process makes federalism applicable to the EU[14]: 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".[15]

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.[16] 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".[17] 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".[18]
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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[13] Hay, P., *Federalism and Supranational Organizations. Patterns for New Legal Structures* (Urbana, University of Illinois Press 1966), p. 90.
[14] McWhinney, E., "'Classical' Federalism and Supra-National Integration or Treaty-Based Association: the European Community Movement as a Case-Study," 57 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* (April 25-27, 1963), pp. 241-249; Taylor, P. "The Politics of the European Communities: the Confederal Phase," 27 *World Politics* (no. 3, 1975), pp. 346-3477; Wallace W., "Europe as a Confederation: the Community and the Nation-State," 21 *Journal of Common Market Studies* (no. 1-2, 1982), pp. 57-68.
[15] Weiler, J.H.H., *The Constitution of Europe*, 12.
[16] Hay, P., *Federalism and Supranational Organizations*, p. 90. On functional federalism, see Ortino, S., *The Nomos of the Earth. A short history on the connections between technological innovation, anthropological space and legal order* (Baden-Baden, Nomos 2002), pp. 107-110.
[17] See Oliver, C.T., "The Enforcement of Treaties by a Federal State," in 41 *Recueil des Cours/Collected Courses of The Hague Academy of International Law* (Leyde, A.W. Sijthoff 1974), pp. 331-412; Stein, E., "Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy," 127 *University of Pennsylvania Law Review* (no. 4, April 1979), pp. 897-908, 900.
[18] Weiler, J.H.H., "Eric Stein: A Tribute," 82 *Michigan Law Review. Festschrift in Honor of Eric Stein* (no. 5/6, April-May 1984), pp. 1160-1162, 1161.

constitutional "vocabulary" to the EU.[19]

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.[20]

Hence, the federal-experience approach reveals difficulties that arise because this perspective merely looks at the EU integration process through U.S. scholars' eyes,[21] i.e., it adopts the U.S. form of federalism as the *archetype* of comparative federal studies.[22]

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."[23] 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 *constitutional identity*.[24] 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

[19] See Hartley, C.T., "Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community," 34 *The American Journal of Comparative Law* (no. 2, Spring 1986), pp. 229-247; Börzel, T.A., and Risse, T., "Who Is Afraid of A European Federation? How to Constitutionalize A Multi-Level Governance System," *Jean Monnet Working Papers*, 2000; Weiler, J.H.H., "Federalism and Constitutionalism: Europe's *Sonderweg*," *Jean Monnet Working Papers*, 2000.

[20] Particularly between the 1950s and the 1980s: see supra notes 16 and 17. See, also, Kunz, J.L., "Treaty Establishing the European Defence Community," 47 *The American Journal of International Law* (no. 2, April 1953), pp. 275-281; Hay, P., "Supremacy of Community Law in National Courts: A Progress Report on Referrals under the EEC Treaty," 16 *The American Journal of Comparative Law* (no. 4, Autumn 1968), pp. 524-551; Stein, E., "Lawyers, Judges, and the Making of a Transnational Constitution," 75 *The American Journal of International Law* (no. 1, January 1981), pp. 1-27; Boerger, A. and Rasmussen, M., "Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993," 10 *European Constitutional Law Review* (no. 2, September 2014) pp. 199-225.

[21] See Martinico, G., "Reading the Others: American Legal Scholars and the Unfolding European Integration," XI *European Journal of Law Reform* (no. 1, 2009), pp. 35-49.

[22] See Riker, W., *Federalism: Origin, Operation, Significance* (Boston, Little, Brown & Co. 1964), 2 and 11; Burgess, M., *Comparative Federalism. Theory and Practice* (Abingdon, Routledge 2006).

[23] Avbelj, M., "The Pitfalls of (Comparative) Constitutionalism for European Integration," *Eric Stein Working Paper* (no. 1, 2008) pp. 1-28, 17.

[24] See Jacobson, G.J., "Constitutional Identity," 68 *The Review of Politics* (2006): 361-397; Jacobson, G.J., Constitutional Identity (Cambridge, MA, Harvard University Press 2010); Mahlmann, M., "Constitutional Identity and the Politics of Homogeneity," 6 *German Law Journal* (no. 2, 2005), pp. 307-317.

European member states, and that is traditionally likened to the principles of constitutionalism and territorial integrity.[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".[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.[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".[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",[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.[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

[25] See Griffin, S.M., *American Constitutionalism. From Theory to Politics* (Princeton, NJ, Princeton University Press 1996).

[26] Tribe, L.H., "A Constitution We Are Amending: A Self-Defense of a Restrained Judicial Role," 97 *Harvard Law Review* (no. 2, December 1983), pp. 433-445, 440.

[27] See Kumm, M., "The Idea of Thick Constitutional Patriotism and its Implications for the Role and Structure of European Legal History," in H. Porsdam and T. Elholm (Eds.), *Dialogues on Justice. European Perspectives on Law and Literature* (Berlin, Walter de Gruyter 2012), pp. 108-137, 109.

[28] Williams, R.A., *The Finn Episode in Beowulf. An Essay in Interpretation* (Cambridge, Cambridge University Press 1926), p. 4.

[29] Grossfeld, B., "Geography and Law," 82 *Michigan Law Review. Festschrift in Honor of Eric Stein* (no. 5/6, April-May 1984), pp. 1510-1519.

[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.[31] 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.[32] 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".[33] 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".[34]

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[31] See Coates R., "Names," in R. Hogg and D. Deniso, *A History of English Language* (Cambridge, Cambridge University Press 2006), 335 et seq.

[32] Maitland, F.W., *Township and Borough: The Ford Lectures 1897* (Cambridge, Cambridge University Press 1964), 6-7. The lineage of legal geography stretches back through the centuries up to the Domesday Book, the first socio-economic geographical "map" of England. See Maitland, F.W., *Domesday Book and beyond. Three essays in the Early History of England* (Cambridge, Cambridge University Press 1987); Darby, H.C. et al., *The Domesday Geography of England*, 5 vols. (Cambridge, Cambridge University Press 1954-67). See also Fleming, R., *Domesday Book and the Law* (Cambridge et al., Cambridge University Press 2003).

[33] Maitland, F.W., *Township and Borough*, 11, 29.

[34] Braverman, I., Blomley, N., Delaney D., and Kedar, A., "Expanding the Spaces of Law" in I. Braverman, N., Blomley, D. Delaney, and A. Kedar, Alexandre (eds.), *The Expanding Spaces of Law. A Timely Legal Geography* (Stanford: Stanford University Press 2014), pp. 1-29. 1.

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".[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*).[36]

Furthermore, legal geography considers place names, boundaries and "territorial segmental autonomy", which "means, in practically all cases, a federal arrangement".[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.[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.[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.[40] Further-

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[35] Blomley, N., Delaney, D., and Ford, R. T., "Preface: Where is law," in N. Blomley, D., Delaney, D., and T. R. Ford, *The Legal Geographies Reader. Law, Powers, and Space* (Oxford: Blackwell Publishers 2001), pp. xiii-xxii, xv.

[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).

[37] Lijphart, A., "Consociation and Federation: Conceptual and Empirical Links," 12 *Canadian Journal of Political Science* (no. 3, September 1979), pp. 499-515, 505.

[38] See Duchacek, I.D., *Comparative Federalism: The Territorial Dimension of Politics* (New York, Holt, Rinehart and Winston, Inc. 1971); Agranoff, R. (Ed.), *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden, Nomos 1999); Burgess, M. and Pinder, J. (Eds.), *Multinational Federations* (Abingdon, Routledge 2007).

[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.

[40] Remnants characterize the Celtic substrate in the geography of Anglo-Saxon England: see Townend, M., "Contacts and Conflicts: Latin, Norse and French," in Mugglestone, L., *The Oxford History of English* (Oxford, Oxford University Press 2012), pp. 75-105, 80. On interactions between Old English and Old Norse in place names, see Baugh, A.C. and Cable, T., *A History of the English Language* (London and New York, Routledge 2013, 6th edition), p. 94. On diatopic variation in English word geography, see McIntosh, A., "Word Geography in the Lexicography of Mediaeval English," 211 *Annals of the New York Academy of* Sciences (no. 1, June 1973), pp. 55-66.

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) from 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 pronounciation of /r/ after a vowel where it is present in the written word); a different pronounciation for "wh-", which is indeed pronounced [hw] such as in when [hwɛn]; 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 completing 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, asserted 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 delimiting the area of the same Danelaw.

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[41] See Burrow, J.A. and Turville-Petre, T., *A Book of Middle English* (Oxford, Blackwell Publishing 2005), p. 6. 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 Regnal Solidarities," 5 *Transactions of the Royal Historical Society* (1995), pp. 1-20, 1-2

[43] Smith, J.J., *Essential of Early English. An Introduction to Old, Middle and Early Modern English* (London and New York, Routledge 2005, 2nd edition), pp. 9-10.

[44] See Beal, J. C., *An Introduction to Regional Englishes: Dialect Variation in England* (Edinburgh: Edinburgh University Press 2011); Upton, C., "Modern Regional English in the British Isles," in L. Mugglestone (ed.), *The Oxford History of English* (Oxford, Oxford University Press 2012), pp. 379-414, 386.

[45] McIntosh, A., Samuels, M.L., and Beskin, M., with Laing, M. and Williamson, K., *A Linguistic Atlas of Late Mediaeval English*, 4 Vols. (Aberdeen, Aberdeen University Press 1986).

[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 Townend, M., "Contacts and Conflicts: Latin, Norse and French," p. 81.

[47] Stenton, F.M., "Presidential Address: The Historical Bearing of Place-Name Studies: The Danish Settlement of Eastern England," 24 *Transactions of the Royal Historical Society*, Fourth Series (1942), pp. 1-24.

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

[48] McArthur, T., "English World-wide in the Twentieth Century," in Mugglestone, L., *The Oxford History of English* (Oxford, Oxford University Press 2012), pp. 446-487, 471.

[49] See Ramutsindela, M.F. and Simon, D., "The Politics of territory and Place in Post-Apartheid South Africa: the Disputed Area of Bushbuckridge," 25 *Journal of Southern Africa Studies* (no. 2, September 1999), pp. 479-481.

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."[50]

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. constituent units were carved out of former federal territories that would be subsequently admitted into the federation.[51]

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 respect to the United States, the label *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 *European*. Despite the indication of a geographically oriented requirement for admission, the "criterion of European-ness […] is best understood as a loose geographical" one:[52] the geolinguistic concept of *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 undermines EU "territorial identity". It could be argued that, when admitting prospective members, the Copenhagen criteria might complement the multifarious features upon which EU constitutional (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, democracy and the rule of law" that is not specifically European.[53] The *abstract* commitment to human rights thus has a direct backlash on the *concrete* demarcation of the EU: new member states will

[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.
[51] See Story, J., *Commentaries on the Constitution of the United States*, II (Boston, Little, Brown and Company 1858), p. 189 et seq.
[52] See Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 112.
[53] See Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 109.

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 *demoi* 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-

[54] Kincaid, J., "Territorial Neutrality and Coercive Federalism in the United States," in S. Mangiameli (Ed.), *Federalism, Regionalism and Territory* (Milan, Giuffrè 2013), pp. 133-147, 133.
[55] Kincaid, J., "Territorial Neutrality and Coercive Federalism in the United States," pp. 133-134.
[56] On state admission, see U.S. Supreme Court, *The American Insurance Company and The Ocean Insurance Company (New York) v. David Canter*, 26 U.S. (1 Pet.) 511 (1828). On the territorial clause, see Leibowitz, A.H., *Defining Status. A Comprehensive Analysis of United States Territorial Relations* (Dordrecht, Martinus Nijhoff Publishers 1989), p. 6 et seq.

ritory […] 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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[57] Kincaid, J., "Territorial Neutrality and Coercive Federalism in the United States," p. 134.

[58] Lerche, C..O, Jr., "The Guarantee Clause in Constitutional Law," 2 *The Western Political Quarterly* (no. 3, September 1949), pp. 358-374.

[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 bicommunal 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".[61] 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".[62]

(Thick) constitutional identity is also a key concept as far as the European historical narrative is concerned.[63] First, nobody can arguethat 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.[64] Furthermore, EU treaties entrench a vast array of principles, values, and aims, as well as the Charter of Fundamental Rights of the European Union.[65]

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.[66]

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-

[61] Jacobson, G.J., "Constitutional Identity," p. 384.
[62] Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 110.
[63] See, among others, S. Garcia, *European Identity and the Search for Legitimacy* (London, Pinter Publishers 1993).
[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.
[66] See Article 6(3) of the EU Treaty. On the "common" constitutional traditions, see Jones, J., "'Common Constitutional Traditions': Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?" *Public Law* (no. 1, January 2004), pp. 167-187; Sabel, C.F. and Gerstenberg, O., "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order," 16 *European Law Journal* (no. 5, September 2010), pp. 511-550.

der the *Guarantee clause*,[67] 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."[68]

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.[69]

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.[70] In addition, the constitutional, collective significance of Catholicism in Ireland has been progressively challenged "by a growing emphasis on the rights of the individual".[71] Moreover, EU requirements related to the establishment of a common market founded on the free movement of goods, persons, services

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[67] See Tribe, L.H, *American Constitutional Law* (New York, The Foundation Press 2000, 3rd edition), p. 366 et seq.; Tushnet, M., *The Constitution of the United States of America. A Contextual Analysis* (Oxford and Portland, OR, Hart Publishing 2009), pp. 148-149. For the case law, see *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

[68] Peers, S., "The Stability Treaty: Permanent Austerity or Gesture Politics?" 8 *European Constitutional Law Review* (no. 3, October 2012), pp. 404-441, 404.

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

[70] On January 1, 2007, Irish became an official EU working language. See EEC Regulation no. 1/1958 as amended by Council Regulation (EC) no. 920/2005. See Urrutia, I. and Lasagabaster, I., "Language Rights as a General Principle of Community Law," 8 *German Law Journal* (no. 5, 2007), pp. 479-500.

[71] See Gerard Whyte, "Religion and the Irish Constitution," 30 *John Marshall Law Review* (no. 3, Spring 1997), pp. 725-747, 725.

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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[72] In this regard, a 1983 constitutional amendment acknowledged "the right to life of the unborn, with due regard to the equal right to life of the mother" (Article 40 Const.). See Hanafin, P., "Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy?" 3 *European journal of Health Law* (1996), pp. 179-188. On the relationship between Irish constitutional identity and EU supranational obligations, see Jacobson, G.J., "Constitutional Identity," p. 392 et seq.

[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.

[75] Cheng, T.-C., "Power, Authority and International Investment Law," 20 *American University International Law Review* (no. 3, 2005), pp. 465-520, 469.

[76] Weiler, J.H.H., *The Constitution of Europe,* p. 12.

In this regard, "the plausibility and requisiteness of Europe as a demos",[77] 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".[78]

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".[79]

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".[80]

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.

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[77] Trenz, H.J., "In Search of the Popular Subject: Identity Formation, Constitution-making and the Democratic Consoldiation of the EU," 18 *European Law Review* (no. 1, February 2010), pp. 93-115, 94.

[78] Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 19.

[79] Loubert, A., "Sovereign Debt Threatens the Union: The Genesis of a Federation," 8 *European Constitutional Law Review* (no. 3, October 2012) pp. 442-455, 442. On the notion that the American experience is capable of providing Europe with a strong constitutional patriotism, see Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 111.

[80] Kumm, M., "The Idea of Thick Constitutional Patriotism," p. 110.