

Relearning Federalism: The Lisbon Treaty Reminds America of Its Roots

David Keith Shimp (University of Sofia)

Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes.¹

Thomas Jefferson

The American experiment in constitutionalism is under-appreciated as a source of insight into federative implications of the Lisbon Treaty. The result of the world's first attempt to create a republican federation on a large scale, America's experience yields over two centuries of evidence upon which to assess the philosophic foundations of popular sovereignty, multi-level governance, and the rule of law. Uncodified assumptions of the framers of the United States Constitution regarding their hybrid notion of federalism (compounded by our imperfect knowledge of their intentions) precipitated considerable interpretation, redefinition, and acute political divergence among their successors. Consequently, the young federation's fundamental law was susceptible to transformation that abetted a centralist arrangement for society and a policy-setting role for the judiciary. There are parallels between some phenomena of American federalism and the potential for similar manifestations in Europe exist, should comparable provisions of the Lisbon Treaty be manipulated to advance particular agendas.

The peculiar dynamics of 21st century governance in the United States provide evidence of a unique circumstance in political evolution. A society that once embraced the core republican doctrine of popular sovereignty within the rule of law lost sight of its roots, forcibly compelled unity from a

¹ Harvey C. Mansfield, Jr., ed. *Thomas Jefferson: Selected Writings*. Wheeling, IL: Harlan Davidson, 1979. p.31.

voluntary union, and became captivated by nationalistic policies veiled by creative jurisprudence. Now institutionalized, this arrangement is held in place by the sheer scale of its federation and its growth is abetted by an entrepreneurial judiciary. Although circumstances in Europe today are vastly different from 18th century America, as the European Union more closely integrates its political, economic, and social functions pursuant to the Lisbon Treaty, some important comparisons with the perturbations of federalist theory in the United States warrant consideration.

A study of early American federalism and its weakening as a result of untoward events during the mid 19th century could become entangled in the personalities of the prominent actors on the political stage of that era. Without assessing the moral ethos of any particular person or situation, or rushing to indict any action or catalyst, the bold experiment with certain concepts of governance on one side of the Atlantic can be compared to similar but time-distant implementation on the other. Political radicalism in America during the 1800s and the ensuing catharsis of the remnants of federalism in the United States drove deliberate as well as inadvertent enablers of the centralist agenda to shift the fundamental character of popular sovereignty away from that intended by the founders of the republic for the united American states. Today, the people of these now homogenized American political subdivisions stumble over the lessons of their history and then, without introspection, pick themselves up and continue on as if nothing happened. Responsible citizenship, however, asks more of them. While Woodrow Wilson made clear his opinion that the nation was not really born until after the Civil War, he acknowledged that the South was right in law but wrong in history. In contrast, he stipulated that the North was wrong in law but right in history.² Europe can be right in both.

Without postulating solutions to the complex challenges that confront the peoples of Europe as they pursue a federal structure for their multi-lateral union, it is useful to consider the array of weighty lessons embedded in the experiences of their American cousins with the world's first large

² William Edward Dodd. *Wilson and His Work*. NY: Doubleday, Page & Company, 1920. p.28.

scale republican federation. An often unseen or concealed threat to the citizenry of such a system of governance is the inevitable temptation for centralists to curtail the authority of member states and blend regional traditions. Thus, as those in power further their agenda, be it benevolent or not, the unwitting citizen is alienated from the principles of states' rights. Consequently, the capacity of a system based on multi-level governance to avoid nationalistic dominance is weakened. The American experiment in republican federalism, just as the Russian experiment in communism, was an untested and relatively new-found political theory instituted on a grand scale. A death knell resonated through both some seventy years after their births when eleven states seceded from the former and fifteen from the latter. Secession from the USSR, explicitly authorized by the Soviet Constitution, was relatively peaceful; secession from the United States, an implicit right taken for granted by the founders,³ was prevented by the bloodiest war of the 19th century.

While such a dark political horizon is unforeseen under the Lisbon Treaty, consideration of Eurocentralist processes as they gain traction within Eurofederalism is an anxiety-laden pursuit, a multifaceted project, and a worthy endeavor if for no other reason that to invite attention to potential concern for multi-level governance in Europe. When pressed toward integration on a broader plane, toleration of diversity and distributed authority will become a necessity in a federated Europe. The present accumulation of international agreements and other supranational governance structures in Europe are fundamentally a confederative arrangement. It remains to be seen if that decentralized character can remain under the Lisbon Treaty.

Nations tend to federate for protection, to synchronize their economies, and to promote fundamental human rights within a wider social context. From the theories of Aristotle, Plato, and Althusius to the philosophies of Hobbes, Locke, Hume, Rousseau, and Montesquieu, the

³ The constitutions of Massachusetts, North Carolina, South Carolina, and Vermont, and the ordinances of New York, Virginia, and Rhode Island ratifying the U.S. Constitution affirm state sovereignty or unilateral authority to resume powers delegated to the federal government.

core reasons why societies organize and federate are to guarantee peace and security; assure social justice; protect the rights of the individual, and to provide economic regulation and development as well as public services beyond the competences of the individual and community. These philosophic influences with others offered the founders broad perspectives. However, unlike those great thinkers who never actually had to experience the social structures they theorized and advocated, the men who framed the American experiment in federalism provided the world with a rare example of philosophic accountability. America's first home-grown philosophers ingeniously fused ancient with, for them, recently developed social theories to form the world's first concept of large scale, representative, multi-level governance under the rule of law. *The hybrid arrangement of society created by the American founders must be recognized as significant world philosophy.* Not before or since have such important theories of social arrangements been developed by a handful of men in such a compressed timeframe. Without the luxury of being insulated from reality and urgency or the comfort of being absolved of accountability for their ideas as many philosophers enjoy, they constructed a model for a unique society then labored to implement it. They not only devised and instituted a totally new social system but they had to live under it, too. Prominently, the ideas of Rousseau's popular sovereignty and Montesquieu's separation of powers were embedded in the synergistic vision of the founders and resonated in their pursuit of a new style of mixed government.

The American hybrid experiment in federalism was marked by time-urgent implementation of an extraordinary new theory of governance that thrust the theoretical concepts of a variety of political philosophies into the real world. Building upon this fresh idea and analyzing its subsequent struggles with large scale republican federalism, similarities and potential lessons can be applied to the European Union's recent commitment to pursue a closer federative arrangement. America's volatile history is a clear looking glass through which Europe's new initiatives in federalism can be viewed. At 162,000 words - more than thirty times longer than the United States Constitution - the Lisbon Treaty projects clarity of intent but also presents the European Union with similar contentious potentialities. At the same time, it incorporates substantial remedies. The phenomena that reveal

the fundamental nature of governance in the United States is also evidence of a unique set of causes and effects that can be directly contrasted with constitution-like initiatives in Europe today. Although supranational law in Europe is vastly different, America's experiences nonetheless provide important insights into possible consequences when member-state sovereignty is abrogated and with it the ultimate means to trump the actions of a central government that overreach conferred authorities.

The American experiment with republican federalism demonstrates the human tendency to consolidate control and influence by those with the opportunity and means to do so. While American and European constitutional development and implementation are in some ways parallel, in others they are clearly divergent but both of their unique paths to (potential) centralism contain the political disabling of sovereign republican principles and ultimately arrive at judicial review as a de facto policy-setting process. Vigorous judicial engagement in the political process was not intended but nevertheless evolved in America; it is distinctly intentional under the Lisbon Treaty to promote European integration. America's experience highlights many ways by which the centralist agenda has been advanced; it relates to Europe in some direct and some to-be-realized fashions:

Popular Sovereignty

John Locke purported the only legitimate governments are those that rule by consent of the governed⁴ but the will of the "the People" is difficult to distinguish, giving rise to competing voices claiming to be their spokesperson.

Disenfranchisement

(Circumvention of states) By promoting a direct connection with citizens via amendment, statute, and judicial decree, the central government undercuts the power of the states. Unlike the EU, revenue generation/taxation is also direct. (Citizen democratic deficit) At some size,

⁴ John Locke. *Second Treatise of Civil Government* 1690, #222 (Lasslet Edition). NY: Cambridge University Press, 1960. pp. 460-461.

a representative loses touch with those he represents; at some size, an assembly is not able to engage in effective dialogue. The U.S. House of Representatives is artificially but statutorily capped at 435 members causing a constituent ratio roughly 1/700,000 today. In two hundred years, the average constituency increased by 18.8 while the number of members increased by just over 3. The average American now has a representation quotient that is only 5.3% of that experienced in 1803.⁵ Furthermore, based on the 1941 reapportionment act,⁶ inequality of district size is US law. Montana's sole district is over 1.8 times larger than Wyoming's district, which translates to a Montana resident-to-representative ratio of only 55.7% of his fellow citizen in Wyoming.

Size and inertia

At some point, a polity is simply too large to be responsive and becomes disconnected from its citizenry. Now strongly centralized, America is home to almost 310 million people. From a philosophic perspective, Montesquieu recommended city-states of 60,000; Rousseau, about 25,000; da Vinci asserted 30,000; Saint Sir Thomas More's Utopia had cities of 60,000 to 96,000 people; Plato stipulated 35,000 to 40,000 and Aristotle suggested 30,000 to 50,000 people. The sociological verdict is that as cities get bigger, they increase in density, fragmentation, crime, social stress, loneliness, selfishness, and racial and ethnic segregation - problems begin to arise at about the 100,000 level.⁷

Human biology

Three natural considerations challenge the human capacity: the sense of proportion per da Vinci's *golden ratio*,⁸ primal interactivity (for optimal

⁵ Calculations based on data from the US Census Bureau (all residents, not only citizens). Total population numbers were used, including free while males and females of all ages as well as all slaves (counted by a factor of 1).

⁶ Method of Equal Proportions; U.S. Census Bureau.

⁷ Kirkpatrick Sale. *Human Scale*. NY: Coward, McCann & Geoghegan, 1980. pp.192-193,195.

⁸ Ratio of 1 to 1.618... (e.g., aesthetically pleasing proportion, the ratio of the longer side to the shorter).

involvement, groups should contain five to seven members), and span of control. While theory and experience cannot define precise limits, at some level supervision breaks down; four factors can cause it to vary: function, personality, time, and space.⁹ Social theorists posit the maximum number of subordinate relationships to be between 57 and 186.¹⁰ American federalism is non-conformant.

Judicial review

The U.S. Constitution did not provide one branch authority over another, and therefore was silent on which branch would have the last word on constitutionality. Given the Lisbon Treaty mandate that the European Court justices have only European integration in mind,¹¹ the EU is destined to repeat America's failure to hold political action above legalism, but this potential may be attenuated since Member States maintain direct influence on the selection of European Court justices.

America's inheritance from Europe is manifested in the resilience of its early pioneers and the passion of immigrants who sacrificed everything to chisel a country from an unknown wilderness. Less recognized is the philosophic bequest of the great European thinkers who inspired colonial leaders to embrace the fundamentals of individual liberty within an idiom of shared political competences under the rule of law. Never before have men progressed from new political theory to placing it in practice in so short a time span, nor have philosophers had to construct and then govern by the social arrangements that they advocated. While the seed of modern federative thought was planted and sprouted in parts of Europe, it blossomed in 18th century America. The framers of the U.S. Constitution envisioned the need for continued cultivation to maintain its relevance and even for pruning it from time to time. However, its federative-republican roots clearly extend to Europe and its evolution offers important insights for those who pursue similar arrangements for European society today. Of concern, American

⁹ Rumki Basu. *Public Administration: Concepts and Theories*. New Delhi: Sterling Publisher Ltd, 1994. p.189.

¹⁰ Ibid.

¹¹ Effectiveness principle; *effet utile*.

federalism is now manifested by serial autocracy in the White House (the epicenter of patronage), an entrepreneurial judiciary whereby policy can be set by five unelected people (majority on the Supreme Court), and a Congress that is virtually unaccountable to the people (94.2% of incumbents who seek reelection are reelected). Clearly, the intended checks and balances are not working. At the federal level, horizontally, the three branches rarely cross swords; vertically, the states as entities are impotent to rein things in.

The American conundrum is that it presents two incompatible republican characters: one Jeffersonian and one Lincolnian. This is a fundamental difference that portends a basic concern for Europe. In the wake of the colonies' secession to abate absorption into the Hobbesian British home-state, the Jeffersonian tradition postulates a society prior to government; man will give up some rights to achieve social order. The task of government is thus to provide and to preserve the general order of pre-existing society. In Lincoln's Americanism, this arrangement is not possible since the states are *not* sovereign and the Union is *indivisible*. The states did not create the Union, the Union created the states. Accordingly, reflective of Thomas Hobbes as well as Jean Bodin,¹² the states are not and never were sovereign political societies. Since the American people in the aggregate are sovereign, it therefore follows that the states are mere administrative units of the central government through which the will of the American people is expressed. Per this rationale, the central government is *not* a service agency of the states but instead the ultimate legitimate voice of the people with the right to define the limits of its own powers. Thus, the task of the federal government is to mold and shape a national society.

The Lisbon Treaty, as seen through the looking-glass of constitutional evolution in the United States, presents several significant provisions of federalist and republican theories for comparison to historic precedents. As the first large scale implementation of uniquely interleaved philosophies, the American experiment in federalism provides an exemplary model for analysis when mirrored in Europe's ongoing efforts to transition from a

¹² Elizabeth Kelley Bauer. *Commentaries on the Constitution, 1790-1860*. NY: Columbia UP, 1952. p.212.

system of treaties to a closer federation. Many contentious issues that have afflicted America seem to have been moderated by the precision of the Lisbon Treaty, enhanced by its clear intent to respect Member State sovereignty by very specifically delineating federal competences. Although potentially mired in detail, the Lisbon Treaty's provisions check naturally evolving and man-devised circumstances that served to foster centralist consolidation and usurpation of authority in 19th and 20th century America. In theory, it effectively shunts such potentialities but the history of its practical implementation has yet to be written. Citizen awareness, aggressive involvement in the affairs of their governments at all levels, vigilant defense of Member State prerogatives, and earnest support of subsidiarity and proportionality will fortify the European Union for the inevitable assault upon (or decay of) the tenets of its new federative social arrangement.

*A careful distinction must be made between the institutions of the United States and democratic institutions in general. ... the laws of America appear to me to be defective in several respects, and as I can readily imagine others, the peculiar advantages of that country do not prove to me that democratic institutions cannot succeed in a nation less favored by circumstances if ruled by better laws.*¹³

Alexis de Tocqueville, 1835

The movement to create a constitution for Europe redirected its momentum to the project of modifying existing EU treaties when the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* was signed on December 13, 2007 in Lisbon, Portugal by the assembled EU heads of state/government. The drive for a single constitutional document to codify fundamental law in the European Union stalled when unanimity among all Member States became unattainable. The Lisbon Treaty, which contains much of the intended

¹³ *Democracy in America* Bk I, Ch 17. 1830-1835 in Henry Reeve, trans. Cambridge, MA: Sever and Francis, 1863.

policy synthesis and procedural synchronization desired in the proposed constitution, became the implementation vehicle that served to amend the European Union's two foundational treaties: the 1992 *Treaty of the European Union* (Maastricht Treaty) and the 1957 *Treaty establishing the European Community* (Treaty of Rome), thereby creating a new political arrangement for Europe. The Lisbon Treaty renames them as the *Treaty on European Union* (TEU) and the *Treaty on the functioning of the European Union* (TFEU), respectively. The characters of the treaties are, however, significantly altered. Upon implementation of the Lisbon Treaty on December 1, 2009, EU functions continue to be directed by an arrangement of lateral treaties instead of one supranational document but it is the virtual collection of all fundamental EU law, *acquis communautaire*. The Lisbon Treaty contains five sections. The first two are the TEU and TFEU. The third section is the incorporation of the European Commission on Human Rights (ECHR) as the Charter of Fundamental Rights (CFR) of the European Union. The fourth and fifth sections contain Protocols that have the force of European law and Declarations that do not. Declarations are tantamount to formal documentation of the intention of the drafters of the Lisbon Treaty, not unlike the oft-sought but illusive founders' intent of the U.S. Constitution.

A constitutional document or fundamental law by its very nature is a creation and instrument of man - and subject to imperfection. In the worst of cases, it becomes not the rule *of* law but the rule *by* law¹⁴ when men figure out how to circumvent its controls to manipulate original intent and unanticipated ambiguities via redefinitions or reinterpretations that support their own agendas. The U.S. Constitution yields pertinent lessons. In tying this to the present European situation, it is more important to offer America's experiences - good and bad - as a backdrop for the several crucial questions that arise from the Lisbon Treaty as it attempts to bring new structure to the three pillars that constitute the European Union: the idea of one European community, a common foreign and security policy, and police and judicial cooperation.

It is important to understand that federalism in America was born within a republican idiom out of an emergent need to create a government

¹⁴ Otto von Habsburg. Interview. Pöcking, Germany, September 23, 2007.

from scratch. The drafters of the constitution for the united American states had no empirical model, only theory upon which to sculpt their new hybrid and innovative form of governance. They did not have a long tradition of self rule as independent sovereign states or as a federated union. In contrast, the Member States of the European Union have experienced centuries of national autonomy and several decades of economic and societal integration coordinated by a supranational body. This is a significant distinction.

Subsequent to secession from England, the loosely aligned American states did not have to contend with an entrenched central bureaucracy with its own agenda and inertia as do those who advocate structural change to the European Union. Unlike Europe, however, young America was rushed to decide on its style of confederation. It availed itself of some untested and then-radical philosophic and political theories to set forth a federal arrangement for the newly sovereign and independent former colonies. Providing foundational principles, the constitution for this unique polity was to be sustained via a robust modification process to accommodate unforeseen and evolving circumstances as the experiment progressed. In contrast, the Member States of Europe were under no particular pressure to quickly seek a closer union and they are able to fully analyze the concepts of further integration through the lens of their own experience. Years of dealing with EU institutions and a lack of urgency to re-empower them afford the citizenry of Europe crucial insights into the functioning of the European bureaucracy and the luxury of unhurried debate over modifications to their current web of treaties. Upon signing the Lisbon Treaty on December 13, 2007, Member State governments set about convincing their citizens to ratify this international treaty and confer further competences upon federal European authorities but success was to be elusive since ratification had to be unanimous. After substantial debate, it was ultimately ratified and became effective December 1, 2009. Set upon the backdrop of America's experience, the following considerations relate to the implementation of a strengthened federative arrangement for Europe:

- EU Member States have strong traditions of separate national sovereignty.
- Europe has traditions of modern federalism (established top-down) that have linkage to innovative developments in early 19th century

America.

- The Lisbon Treaty is precise, complex, and largely unambiguous but is inequitable by Protocol. Its drafters' intent is contained in 52 Declarations.
- The Lisbon Treaty implements some instances of inconsistent law among Member States to allow social harmony and political unanimity.
- The EU government is empowered but adequately constrained, in theory.
- There are economies of scale in the areas of the conferred competences.
- The EU embraces the principles of subsidiarity and proportionality.
- The Lisbon Treaty requires the judicial process to favor actions that promote European integration.
- Member States are empowered; sovereignty is preserved via specific conferral of competences.
- Member States retain substantial control of European Union mechanisms.
 - Heads of Member States set policy and elect the “President of Europe”.
 - Members of the Council of Ministers are representatives of and directly accountable to Member State governments, similar to Austria, Germany, Belgium, and Switzerland; unlike the U.S. Senate after Amendment XVII.
 - Member States appoint judges to the European Court of Justice.
 - Unanimity is necessary for fundamental changes to the Lisbon Treaty.
 - Member States can withdraw (secede).
- The Lisbon Treaty largely avoids the inherent vulnerabilities of the U.S. Constitution in establishing its pragmatic version of America's model of federalism.
- Special interests are thwarted by codified procedures that cause legislation to be drafted by the European Commission for one subject only and prevent bobtailing (unrelated amendments).
- Intended to level the specialized lobbying impact, policy inputs are sought from private/non-governmental sectors.

- The European Union is vulnerable to expansion of the impact of human rights via judicial activism.
- The revision process to implement substantial changes to the Lisbon Treaty requires simple majority of the European Council to consider amendments but unanimity via the same procedure as original ratification (TEU Article 48.4).

While not all issues and concerns rooted in the evolutionary political landscape of the U.S. are relevant to the development of a constitution-like arrangement for Europe, there are basic considerations that transcend America's experience and offer a launch point to compare explicit and implicit similarities. Some activities are perceived as enablers as well as checks, suggesting the duality of certain policies that may contain unobvious consequences if implemented without sustained oversight. Among the many fundamental provisions of the Lisbon Treaty, five key areas of this new European social arrangement generally relate to issues that arose within just a few decades after ratification of the U.S. Constitution; they continue to have tremendous impact on the functioning of government in America. As Europe's unique style of federalism settles into operation, its politicians, Eurocrats, and the peoples of its Member States will be gripped by the evolving issues of national sovereignty, asymmetric distribution of power, assurance of core personal liberties, expanding authority of those who interpret its laws, and the resilience of organizational mechanisms that serve to check the unintended influence of any particular sector. Of these Eurofederal processes, some appear to have been structured in a manner that avoids problems experienced by America's experiment in multi-level governance while others flirt with situations that portend potentially similar pitfalls under European circumstances. Skeptics of the Lisbon Treaty brought a great deal of scrutiny to bear on the initiatives to broadly amend the existing treaties governing the EU. This bodes well for a continued watch on the new processes of European governance:

- *Member State Prerogative.* The European Union principles of subsidiarity,¹⁵ proportionality,¹⁶ conferral,¹⁷ Qualified Majority

¹⁵ Principle of resolution/action at lowest competent level.

Voting, opting-out (non-opting-in), and the withdrawal clause provide checks on the legislative process and place minority protection in practice. They serve to dull apprehension by seemingly bringing safeguards to bear against potential excesses by the central government. They provide checks on the central rule-making process as a deterrent before rising to a governmental crisis. However, the principle of subsidiarity can cut both ways. At the same time it supposedly precludes central government interference with issues that can be resolved by Member States, it suggests circumvention of Member State prerogative by also supporting actions that can be effectively implemented by a sub-sovereign entity. Further, the European Commission has established a close and direct connection to the individual citizen via the Citizens' Initiative¹⁸ which fosters circumvention of national authority.

- *Democratic Deficit*. The Lisbon Treaty advances some approaches to mitigate the so-called democratic deficit in the European Union but codifies others that institutionalize it. Article 233 TFEU sets a goal – but without deadline -- for the European Parliament to draw up a proposal to lay down the provisions necessary for the election of its members by direct universal suffrage. This is to be a uniform procedure in all Member States and in accordance with principles common to all Member States. An elementary observation suggests that this will be a significant undertaking since Member States (e.g., Germany, Hungary, et al) have an entrenched method of proportional representation whereby, with limited exceptions, a citizen casts his vote for a party, not for an individual. On the other hand, the Lisbon Treaty has generally expanded the use of qualified majorities, which has the effect of dampening direct democracy. Augmenting its guarantees of minority and citizen rights, QMV

¹⁶ Principle of optimal/measured response.

¹⁷ Principle that all EU competences are voluntarily conferred by Member States; it has no competences by right, thus areas of policy not explicitly agreed by all Member States remain the domain of Member States.

¹⁸ One million citizens from Member States have the right to call on the Commission to create new policy.

assures that important policies are enacted by substantial double majorities regardless of simple majority approval. The Lisbon Treaty has retained the practice of degressive representation for the composition of the 751 member European Parliament. While continuing to theoretically allay concerns of small countries of domination by larger Member States, asymmetric citizen influence has been intentionally institutionalized in the European Union. Reflective of the inequitable influence factors caused by unbalanced district apportionment in the U.S. House of Representatives, the number of MEPs apportioned to each Member State (6 to 96) produces a broad range of MEP-to-constituent ratios -- the average Maltese citizen has over 12.5 times greater representation than his German counterpart (68,000 to 856,000 per MEP).

- *Citizen Rights*. Assessing human freedoms requires consideration of a variety of complex, multifaceted issues surrounding citizen entitlements and related assurances that governments struggle to provide. Moreover, as societies evolve, the meanings they attach to such rights may call upon definitional and interpretive assistance from their legislatures and judiciaries. However, whether strengthened or (re)engineered, the resulting liberties are hardly more than abstract notions if they are not ultimately put into practice. The Capabilities Approach is a method to tangibly gauge the ability of the individual, singularly not collectively, to participate in the fullness of his community. Guaranteeing freedom of the press means little in an illiterate society. The investigation by Amartya Sen into human capabilities and subsequent identification of basic enablers by Martha Nussbaum have provided a framework to assess whether acknowledged rights are actually realized by those who theoretically possess them. Their efforts have provided an apolitical means to look beyond mere possession of the effective tools of citizenship to the robust ability to use them effectively. Significantly, the essence of the Capabilities Approach has been embraced by French President Nicholas Sarkozy, which portends its increasing visibility as a method to assess the meaningful reach of

citizen rights in European society. In 2009, among other conclusions, the study he commissioned recognized the important role for governments in today's economies and in providing a range of collective services such as security and trade facilitation, and those of an individual nature like housing, health, and education. The United States has endured volatile social anxiety for over two centuries and now has calcified many tensions provoked by insufficiently detailed legal rights and poorly codified civil liberties. The Lisbon Treaty, which incorporates the Charter of Fundamental Right (CFR) into European law,¹⁹ has subjected the European Union to similarly general social standards. Therefore, the Capabilities Approach may offer important - and tangible - perspectives to the possible implications of simplistically written statements of human rights as now lay upon Europe.

- *Judicial Review.* Critical comparisons between U.S. and European judicial functioning distill to two fundamental and intertwined concerns. They deal with the primacy of federal policy and formalized deference to its expansion, and containing intermediaries/hindrances to a direct relationship with the general population when expedient for the central regime to have unfettered access to the individual citizen. In both unions, legalism has emerged as a self-conferred form of legislative action and policy implementation; in many cases, it has proven to favor centralization and deliberately mitigate the sovereignty of the component members of the federation. As in the U.S., ultimate adjudication is embodied centrally in the EU, meaning that the ECJ is empowered to definitively decide an issue. However, unlike the U.S. Supreme Court, its justices are appointed by Member States so they retain theoretical linkage and empathy with their national roots although they are sworn to act independently. While the Member States control the composition of the ECJ, it is nevertheless formally

¹⁹ See also Article 21 TEU regarding human rights and fundamental freedoms as general provisions for external action (foreign policy); and Article 5.3 TFEU regarding Union initiative to ensure coordination of Member State policies.

charged to adhere to the effectiveness principle that requires the court to rule in the manner that promotes European integration. TEU Declaration 17 clearly requires that the principle of effectiveness, *effet utile* (practical effect), be followed.²⁰ Thus, unless formally addressed to the contrary, EU solidarity has preeminence over Member State law.²¹

- *Checks and Balances.* Maintaining equilibrium and stability of a social system within a federal idiom requires that there be interleaved but fundamentally autonomous components upon which each piece of the whole depends. This arrangement potentially exists in various sectors but in the context of multi-level governance, two dimensions are paramount. The branches of the central government are arrayed horizontally while the association between the federal and distributed governments can be described as vertical relationships. Each entity is established with a defined mission and specific authorities to carry it out, and they are concomitantly empowered to check the other components of government from exceeding their designated limits of action. Tangibly, the American experience has shown this balancing process to be vulnerable to circumvention via political maneuvering and to being overwhelmed by deliberate use of force. The Lisbon Treaty instituted discrete mechanisms and procedures that in ways exceed those that were put in place by the framers of the U.S. Constitution. While Lisbon Treaty language is generally unambiguous in critical policy areas, as an imperfect document, it will likely be subject to challenges and reinterpretation. As America can attest, if there is any vagueness or loopholes in the authorities conferred upon the central government, redefinition of law becomes an implied prerogative of the courts.

In the context of these concerns, the following overview, while not intending to be exhaustive, reflects important representative elements of the

²⁰ See also Article 24.2 TEU regarding “ever-increasing degree of convergence”.

²¹ See *Van Gend en Loos* (1963); *Costa v. ENEL* (1964).

Lisbon Treaty. They provide some surety that Member State sovereignty will not be filleted and that parochial political interests will not be unduly facilitated by the federated European government.

1. Organization

(Executive)

- European Council. The President of the European Council, titular President of the European Union, is elected by simple majority of the members of the European Council, but cannot be a current head of state/government. US: No parallel. Such a position would be a constitutionally empowered Chairman of the National Governors Association, but not a sitting governor.
- European Commission. The European Commission is staffed and overseen by the legislature of the EU. US: No parallel. Tangentially, Congress has a role in approving the senior staff of the Administration; U.S. Cabinet Secretaries, proposed by the President, are confirmed by the Senate.
- The President of the Commission is nominated by the Council of Ministers and approved (elected) by the European Parliament. US: No Parallel. Although essentially the governmental bureaucracy of the EU, the Commission's mission could be compared to the U.S. Administration and Cabinet Secretariats but its functioning and stand-alone authorities are abundantly dissimilar.
- The High Representative of the Union for Foreign Affairs and Security Policy, appointed by the European Council, serves as a Vice President of the Commission. US: No parallel.
- One commissioner is appointed from each Member State. Per Article 245 TFEU, there is to be no influence applied by the Member State on "its" commissioner but he would nonetheless carry the perspective of his Member State. US: No parallel.

(Legislature)

- The Council of Ministers (the "Council") is composed of representatives of each Member State, one per nation at the ministerial level per Article 16.2 TEU. US: Prior to ratification of

Amendment XVII, U.S. Senators represented state governments; after ratification, they are now popularly elected and state government influence is deliberately circumvented.

- The European Parliament (EP) is elected by the citizens by the Member States in accordance with an asymmetric/degressive apportionment plan per Article 14.2 TEU. Theoretically to offset the influence of the significantly larger nations, smaller countries have been given disproportionately enhanced representation, amounting to an explicitly counter-majoritarian system. US: The House of Representatives is the parallel body to the EP. However, whereas EP apportionment is intentionally unequal, reapportionment in the U.S. Congress is by a formula that misaligns district size unintentionally.

(Judiciary)

- Member States appoint the members of the ECJ for staggered six year terms, one per each Member State in accordance with Articles 19.2 TEU and 253 TFEU. While there is to be no influence by the Member State on “its” member of the court as stipulated in Article 254 TFEU, that justice would nonetheless carry the perspective of his Member State. US: The President nominates justices to the U.S. Supreme Court; there is no state input.

2. Procedure

(Executive)

- Per Article 15 TEU, the European Council via consensus (unanimous) decision sets “general political direction” for legislation and other union policy. US: No parallel. In terms of U.S. structure, this would be a formalized association of state governors charged with setting strategic policy and providing guidance and priorities for the federal government.
- Per Articles 11.2 and 11.3 TEU and Article 300 TFEU, the European Commission must include inputs from civil society and representative associations in its research and eventual consideration of legislation and regulations. Of note, one such entity is the Committee of the Regions that assembles 350

representatives of regional or local officials to provide collateral advice to the Commission. US: No parallel. In theory, this practice solicits the expertise of non-governmental and other civilian organizations in formulation of EU policy. Conversely, such input *with substantial affect* upon Congress largely comes from lobbyists who wield (financial) clout and other tangible forms of influence. The Commission is not subjected to such an overtly distorted process of persuasion.

(Legislature)

- There is virtual monopoly given to the Commission in proposing Union law. Per Article 17.2 TEU, the European Commission drafts secondary laws to execute its mission and conduct the business of the Union. While initiating legislation is not the exclusive purview of the Commission, it does compose its substance, thereby controlling its structure and assures its intended purpose (Article 102(d) TFEU germane). The Commission is responsive to requests by the Council or EP (Article 241 TFEU), and there are other ways to initiate legislative action per Article 294 TFEU (e.g., Citizens Initiative, group of Member States, ECJ). US: No parallel. Congress drafts its own bills and thus legislation can be as ambiguous or agenda-setting from its creation as its partisan drafters' desire.
- Voting is a convoluted process that can be followed if one digests in depth and interpolates Articles 293 and 294 TFEU, et al. Furthermore, QMV voting thresholds vary based on the gravity of the issue.
- Qualified Majority Voting. The QMV process impedes majoritarianism (simple majority voting) by establishing a higher standard for passage in the Council. Per 238.2 TFEU, legislation that is not prepared by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy requires an enlarged qualified majority vote by the Council, defined as 72% of members (20 of 27) representing 65% of the population of the Union (at least four countries with largest populations: Germany, UK, Spain, and France). US: Although not codified, the member-determined Rules of the Senate have set thresholds for certain

activities, such as 60% for some procedural votes.

(Member State)

- Amendments to the TEU and TFEU regarding changes to Union competences require unanimity of all Members States via their national constitutional requirements, per the ordinary revision procedure (Article 48.2 TEU). US: Ratification of constitutional amendments requires concurrence of only three-quarters of the states.
- Per Article 48.7 TEU, amending the TEU and TFEU in non-competence areas (internal policies and actions of the Union) can be accomplished via the simplified revision procedure (e.g., Part III, TEU). If a national parliament makes known its opposition within six months, its non-concurrence (a virtual veto) puts the proposal back into the ordinary revision process that necessitates unanimity. US: Ratification of constitutional amendments requires concurrence of only three-quarters of the states.
- QMV offers the spirit of a veto or blocking capability, albeit asymmetric. Per Article 16.4 TEU, after 01 November 2014, the Council must act via normal QMV but per Article 31.2 TEU some areas such as military and foreign policy require an enlarged QMV. Normal QMV means that fifteen Members States (the minimum number of smaller Member States needed to meet the dual percentages) can adopt a proposal but the four largest Member States can block (veto) the measure.²² US: No Parallel. In essence, QMV introduces a semblance to the EU legislative process of a double majority as well as nullification, given that members of the Council are the direct representatives of the Member State governments.
- Per Protocol 2, national parliaments can practically nullify Commission legislation -- or at least cause it to be scrutinized and reassessed -- if they claim breach of subsidiarity. Per Article 7.2, if one-third of the parliaments object to draft legislation or, per Article

²² Per Article 16.4 TEU, at least four Member States are needed to block the measure.

7.3, if one half of them objects to proposed legislation, the Commission must reconsider the measure.

- Withdrawal procedures per Article 50 TEU provide a path for a Member State to leave the EU. This provision codifies the unilateral right to withdraw from the Union so the matter is not in question but its execution may be tedious during the potentially two year negotiation process. US: No parallel. Secession was a unilateral authority arguably assumed by the framers of the U.S. Constitution. However, it was rejected by force as the remedy to irreconcilable political divergence among the sovereign principals to the American social contract.
- Revenue generation. Although TFEU (Articles 310/312) is non-specific and defers to Council and EP action, the Members States control the flow of revenue to the EU (portion of national VAT and GNI; EU customs duties). US: taxation is generally direct, circumventing state involvement.

Interest has developed around the themes of the hybrid nature of fundamental law in the United States, the importance of understanding it in the way the founders intended, the likelihood of competing agendas finding paths to achieve their ends, the specificity expressed in the Lisbon Treaty, and -- wittingly or fortuitously -- its avoidance of the failings witnessed by America's lengthy experiment with federalism. Until the finely specified, philosophically rooted, experienced based, and socially conscious arrangement for Europe created by the Lisbon Treaty has endured the challenges of time, its effectiveness can not be adequately assessed but only deduced. This is precisely why America's experience can provide invaluable insights and cautions. Its unique blend of philosophy, though visionary and bold, was loosely codified. The intent and assumptions of the founders and the ratifying states were to be set aside when the Constitution of the United States was transformed by those with the savvy and wherewithal to advance their agendas. Three significant changes occurred.

- *Agent-principal reversal.* Under the constitutional arrangement, the states were the principals and the federal government was its executive agent for some limited functional areas. However, within

seventy years, that was to change by reinterpretation, force, and redefinition. Today in America, the cause of states rights attempts to wrest power back from a gluttonous central government but the movement would be better constituted if it were focused more broadly on restoration of state sovereignty. Addressing states rights only as a mechanism to check federal government actions that stray beyond its conferred competences abandons the original nature of the interstate contract wherein the states as principals were to set policy as well as oversee its accomplishment by their central agent.

- *Centralized federalism.* With the evisceration of states' rights after the war to prevent Southern independence, the core ideals of Althusius through Montesquieu faded from American governance. As the states' unilateral prerogatives and ability to exercise control over their central government withered, a social arrangement that reflected deliberate tension between the levels of government was effectively flattened. The states became hardly more than dispersed administrative units. As the country grew, its sheer size allowed it to grow farther apart from its component states, precipitating less awareness of governmental activities and thus less accountability of public officials. Combined, the disenfranchisement of the states and their people who are the de jure sovereigns become the de facto subjugates of a polity unimagined in 1789.
- *Judicial review.* Quick to assert its status as arbiter of constitutionality and inject the concept of judicial review into the process of defining law, in 1803 Chief Justice Marshall solidly positioned the Supreme Court as a wholly unelected part of policy making.²³ Progressing from what was once thought to be the least dangerous branch to the one with the strongest per capita potential to adjust the course of the nation, just five justices can not only strike down state and federal law but in essence rewrite the Constitution itself in the fashion that they believe to be appropriate and reflective of their own prejudices. Nevertheless, the self-sanctioned authority of the judiciary to step in during periods of

²³ Marbury v. Madison, 5 U.S. 137 (1803).

social stagnation can keep the machine of government running. When the legislative process becomes dysfunctional as a means to break political gridlock or when visibility would deter elected officials from taking a public stand on sensitive issues, the judiciary has seen fit to craft law in many areas such as reproductive rights and so-called social justice. U.S. Constitution and Lisbon Treaty amendment processes inhibit the ability of American and European fundamental law to function as living documents that evolve with society; this exacerbates the necessary role of judicial review in pragmatic governance.

New American social philosophies became manifest in the Constitution of the United States but this document ultimately failed America. Assumptions in thought, imprecision in text, and misplaced trust in the altruism of those who would eventually achieve control gave birth to a country that would become the most powerful on earth but would, through time, lose its federal soul. As they hurried to cut the umbilical cord with Mother England, the Founding Fathers failed to account for the pervasive agenda of the midwives of human greed, amoralistic capitalism, and political ambition. Now unwittingly complicit in their own subjugation, the citizens of the United States are relegated to a role hardly more than electoral validators whose only choice at the ballot box is between centralism and evisceration of checks upon it. What Thomas Jefferson perceived to be the mortal danger to the republic was that the “Constitution had given all power to the citizens, without giving them the opportunity of being republicans and of acting as citizens. In other words, the danger was that all power had been given to the people in their private capacity, and that there was no space established for them in their capacity of being citizens.”²⁴ A citizen who is informed, involved, and votes has more at stake in the maintenance of the good in society than a one with a dependency attitude does.²⁵

Etienne de la Boetie tells us, “...the power of the political elite can be

²⁴ Lewis White Beck, ed. *On History*. NY: Macmillan, 1963. pp.145-146.

²⁵ Kirkpatrick Sale. *Human Scale*. NY: Coward, McCann & Geoghegan, 1980. p.97.

explained only by the fact that people *accept* to obey the laws.²⁶ However, such acceptance can be due to acquiescence because people have given up hope, concur with present policies, or simply do not care. The American government has provided its society with bureaucratic rigidification, administrative inefficiency, legislative ineptitude, judicial inequity, bribery and corruption, inadequate government regulations and enforcement, the use of repressive machinery, abuses of power, ineradicable national debt, collapse of the two-party system, and defense overspending.²⁷ While some cantilevers of social stress cause social coalitions to rally, citizen apathy is nevertheless a common condition.

This epitaph of America's original conception for its federal union offers practical implications for the continued evolution of federalism in Europe. If the United States is attentive, it can relearn in an unbiased and historically untainted manner from 21st century Europe that its founders had it right. Their original arrangement for America and their unspecified but understood social principles have been resurrected in many of the processes contained in the Lisbon Treaty. Significant among them are:

- Member State control of federal policy and direct influence over executive, commission, and judicial selection and functioning.
- The general notions of nullification and interposition as evident in opting out (not opting in) and virtual vetoes in areas requiring voting unanimity.
- Withdrawal/secession
- Member State government control of the Council of Ministers (U.S. Senate pre-Amendment XVII)
- Measures that thwart funding of parochial projects, political paybacks, and patronage such as term limits and barriers to pork-barrel bobtails to omnibus legislation (as in the Confederate Constitution).

Europe is more soundly positioned than were the fledgling thirteen

²⁶ Etienne de la Boetie. *The Politics of Obedience: The Discourse of Voluntary Servitude*. H. Kurz, trans. NY: Free Life Editions, 1975. p.48.

²⁷ Kirkpatrick Sale. *Human Scale*. NY: Coward, McCann & Geoghegan, 1980. p.21.

states upon the ratification of their constitution in 1788. The American founders plainly received their passion, steerage, and inspiration from a variety of European philosophers as they set about creating their own synthesized social thought. Many of the fundamentals of European law now formalized in the Lisbon Treaty can claim direct lineage to the same philosophy but much of its validation came through painful real world experiences as it detoured from Europe through America and back again. Today, both continents nurture environments of personal motivation within a society that values opportunity and enables its citizens to create the laws they live under. America established a republic with unique federal orchestration that was designed to achieve and maintain social equilibrium. It failed to do so. The European Union has developed a web of treaties that appears to have struck a balance among European integration, Member State integrity, and social justice. Its functioning portends transparency but more importantly, visibility. Its structure promises to mitigate representative inequity, democratic deficits, and disenfranchisement. The specificity of its regulations seems to have set an unambiguous course to achieve meaningful social stability. Eurofederalism has improved upon the cumbersome and self-aggrandized arrangement of governance in America. The Lisbon Treaty may not be a supranational constitution but it has nonetheless established fundamental law for Europe that will likely avoid many of the untoward experiences that continue to haunt the world's first experiment in republican federalism on such a large scale.

From the perspective of a concerned citizen, there is much the American union can relearn about its own constitutional roots from Eurofederalism as manifested 220 years later in the Treaty of Lisbon.