Basic Principles of Federal Allocation of Competence

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'Who does what', 'who decides', and 'on what grounds' are surely fundamental questions for all political systems of a federal nature.[1] Under what kind of safeguards did American States choose to part with some of their competences? Is the allocation of competence that we witness today in the US consistent with the principles adopted two centuries ago? To what extent are the same basic principles at play in the European construct? And what kind of explicit choices would a 'charter of competences' for the EU actually entail? Although the answers to these questions will inevitably reflect variation across time and space, a few basic principles of federal allocation of competence can offer a point of departure.

While subsequent chapters in this volume will inevitably draw attention to broader issues of legitimacy and levels of governance, this chapter is meant to provide a rough overview of the legal basis for allocating competences between the States and the Union in the two systems. This exercise should better enable us to appreciate the nature of the choices that have been made, and are being made, in Europe and the United States—or indeed in any other regional grouping in which federalism or aspects of federalism are present.

In our discussion we adopt two assumptions. First, we assume that, to qualify as legal principles, the lines of federalism *should be* drawn in some more or less regular fashion, rather than haphazardly or through the sheer exercise of power. This is an assumption that, in legal traditions based on the rule of law, we should be prepared to make. Second, we assume that, whatever the lines of federalism may be—for example, whether power is allocated by subject matter or function—certain legal mechanisms *will in fact* be put into place in order to ensure that these lines are respected. In reality, there is a much broader range of legal instruments and controls available for these purposes than is commonly supposed, and both the European Union and the United States have made, and are still in the process of making, their selections. Thus, deciding that the lines of federalism *should* be drawn in a regular fashion and that legal mechanisms *will in fact* be put in place in order to secure them is only the beginning, not the end, of the enquiry.

In a nutshell, federalism principles can be organized around three broad sets of legal criteria, namely, allocative, structural, and procedural. First, the *substantive allocation* of subject matters or functions to different levels of government would seem to be the most basic approach to the relationship and balance of power between the States and the Union—at least for the general public. Second, the *structures* or *institutions* at the federal level may be designed to promote indirectly the interests of the constituent States and their separate populations. Third, those institutions can be required to employ certain *decision-making procedures or decisional processes* aimed at promoting the values of federalism and the respective interests of the various levels of government.[2] We focus in the first section mainly on the *allocative* principles of federalism and, in the second section, merely signal other considerations that may be relevant to the distribution of competences. While this is by no means an exhaustive account, we review a number of simple questions, each constituting one part of the puzzle and ultimatelyone element of the legal framework of federalism.

1. Allocative Principles of Federalism

Locus of Sovereignty

The first question that arises is : *what, and how many, are the levels of government within a federal system that possess lawmaking authority?*

Crudely, the answer could be 'one or more'. In reality, even this very foundational question is a contested

and complex one in the European Union much more than in the United States.

Some scholars, like Daniel Elazar in this volume, would argue that the most fundamental difference between the US and the EU is that in the former sovereignty is seen to lie with the people, while in the latter it is still largely attributed to the state, at one level or the other. While this is certainly a fundamental consideration in political philosophy, formal legal understandings relate to the secondary question of levels of governance. On this count, the prevailing view in the United States is that both the States and the federal government have an original sovereignty. The people of the United States have directly constituted themselves both in States and in the United States.[3] This initial choice is reflected in the direct bounds between the people and each level of governance. Consequently, government at both levels—each in its own sphere, of course—is assumed to exercise that sovereignty *vis-à-vis* the people directly. This is what is known as 'dual sovereignty'.[4]

In the European Union , however, the very relationship of the individual States to the Union is much less clearly defined. On the one hand, the EU could have been described at its inception as a system of 'single sovereignty.'. The European Union itself , not to mention its institutions, is essentially the product of international treaties entered into by the individual Member States acting in a sovereign capacity. On the other hand, the constitutive treaties are traditionally distinguished from other international agreements, by virtue of the fact that they are deemed to have made limited 'transfers of sovereignty' to the European Union, acting through its institutions. The result is that, while the European Union is undoubtedly 'constituted' by and of its Member States, and while those States are in that sense its 'constituent' parts, the Member States are not necessarily *federated*. Their sovereignty has not been absorbed and subsumed in the sovereignty of the European Union.[5] Another way to put the matter is to note that the EU Treaty, however 'constitutive' a document ("a constitution in the making"), is still as much an international treaty as it is a constitution as such,[6] and the fact that it is amended only through intergovernmental conferences and unanimity vote is a forceful reminder of that fact.[7]

Accordingly while the European Union, like the United States, contemplates government at *both* the State *and* the Union (or federal) level, the relationship between the peoples of Europe and the European Union is still not the direct and immediate one that characterizes the relationship between Americans and the United States. The European Union institutions, particularly the European Court of Justice, have undoubtedly done a great deal to close this 'gap', but a fundamental difference remains.

Finally, we need to remember that some of the EU Member States are themselves organized along federal lines, in some cases as strictly federal entities, in others in terms of regionalism and local autonomy. This is true both of some original Member States, such as Germany, Belgium and Italy, and for later entrants like Spain or the United Kingdom The existence of federal structures, and the recognition of federal principles, within the Member States themselves have obvious implications for federalism at the European Union level, and vice versa.[8] The participation of these Member States in the European Union makes it difficult for them to preserve fully intact the institutions of their own 'internal' federalism and the specific internal balance of power that those institutions are supposed to secure. Conversely, the integrity of European Community law may itself suffer to the extent that authority for implementing that law rests, not in the hands of *national* officials, but in the hands of state, regional or local officials whose governments are not themselves parties to the constitutive treaties or to the transfers of sovereignty that those treaties embody. However, the latest amendments to the Treaties whereby Member States can be represented by their constitutive units in some Councils of Minister represent an important step in the formalization of this relationship.

In this respect, too, American federalism presents a somewhat neater picture. First, in the United States, the States are unequivocally part of a federal nation-state. While the United States Constitution, which, again, is presumed to have been entered into by the American people and not by the States, reserves important powers to the States, it is unquestionably the organs of the *federal* government, and most notably the *federal* courts, that ultimately determine where the limits of federal power actually lie. As a corollary, no American State is even conceivably permitted to invoke its internal constitutional allocations of power in order to avoid respecting decisions that have been otherwise properly taken by federal authorities. This does not mean that the States are not themselves subdivided, or that their subdivisions are without power, but any such power is enjoyed by delegation under State law. Although every State has a system of local government and gives local governmental units a measure of political autonomy, commonly known as 'home rule', it has never been suggested that such arrangements can operate as a legal restraint on the ways in which the institutions of the federal government are

organized or on the extent to which they may exercise powers otherwise falling within the federal sphere.

Mode of Allocation of Powers

When regulatory authority is attributed to a level of government, in what terms is it attributed? For example, is it attributed in terms of subject matter or governmental function or still some other characteristic? If it is attributed according to subject matter, is the attribution expressed in terms of substantive rubrics, or rather in terms of more general criteria, or some combination of the two?

Whatever may be the "ultimate" locus of sovereignty in federal system, a question necessarily arises as to modes of attribution of competence to the different levels of governance. In this regard, one tends naturally to think, first and foremost, of allocation by subject matter. To a very large extent, this is the case both for the European Union and the United States. But while this approach may be the clearest one both descriptively and prescriptively, for citizens to grasp when asking 'who does (or should do) what?'both the US and the EU systems have evolved towards a more complex, less transparent approach. This is true for both regulatory and fiscal competences, although we focus here on the former.[9]

In the US, the Constitution confers on Congress—and, through the practice of broad statutory delegation, on federal regulatory agencies—the power to 'regulate' certain fields. These expressly include such specific subjects as currency, maritime law, the law governing intellectual and artistic property, and foreign affairs. At the same time, the Constitution gives Congress the more general power to regulate interstate and international commerce.[10] Not surprisingly, the latter provision, the so-called 'interstate commerce clause', has been the source of some of the most important and far-reaching federal regulation

Similarly, both in the objectives that the original EC Treaty assigns to the Community and in the means that it authorizes for achieving those objectives, the EC Treaty's primary reference is likewise to subject matter. Thus, Article 2, introducing the 'tasks' of the EC refers to 'a common market', 'an economic and monetary union', and 'the raising of the standard of living and quality of life'. While these references sound much more like objectives than policies, particularly in comparison with how national constitutions typically couch their enumeration of competences, they nevertheless correspond to sectors of governmental action,[11] and they are certainly references to specific rather than general objectives, where such 'specificity' coming close to traditional subject matters.[12]

Article 3 of the EC Treaty also designates certain more specific 'policies' as constituting Community spheres of action. These 'policies' include commercial policy, agriculture and fisheries policy, transport policy, competition policy, social policy, environmental policy, industrial policy, research and development policy, health protection policy, education and training policy, overseas development cooperation policy, consumer protection policy, and 'energy, civil protection and tourism'. These sound especially more like subject matters.

However, in the EU context, the meaning of 'allocation to the federal level' requires even further clarification. The Treaty does not stop at designating certain subject matters as 'European'. Rather, they enter into considerable substantive and procedural detail, specifying for each subject matter, or 'chapter', the institutions that are competent, the particular procedures that those institutions must follow, and the substantive conditions that any such action must satisfy. This subject-based differentiation became still more visible with the 'pillar' structure adopted under the 1992 Maastricht Treaty, although the 1997 Amsterdam Treaty went on to blur the distinctions between thepillars, introducing subtle differences among the instruments applicable to different subject areas.[13] The combined EU treaties accordingly constitute a complex blueprint spelling out not only the actions that one or more named 'federal', or EU, institution may take, but also the form in which and the procedure by which it may take them.

How do both systems then move beyond allocation by subject matter? In both settings, regulatory competences are exercised primarily through legislative acts. Yet neither in the EU nor in the US is federal regulatory power exclusively *legislative* by nature. While EU interventions typically take one of the principal legislative forms -- egulations or directives,--they may also take the form of individual decisions by EU institutions. Practically speaking, for example, regulatory policy in the areas of competition law and State aids, for instance, is very largely the product of a long series of individual decisions taken by the Commission. Similarly, the treaties

authorize the institutions to affect public policy by making expenditures from various funds that they themselves establish or authorize the Union institutions to establish. Through the power to issue binding individual decisions and the power to make expenditures of European Union resources, the institutions can enhance their basic powers to prescribe the Union's regulatory policy..

The same is undoubtedly true in the United States. While the Constitution refers chiefly to Congress's 'legislative' power, Congress has used that power very extensively to create federal 'agencies' that enjoy either a delegated power to issue secondary legislation or a power to issue individual 'administrative' decisions, or both. It is well established that, within the limits of the existing statutory framework, individual agency decisions are themselves a source of regulatory policy and regulatory law. The EU itself has most recently moved in the same direction, by creating a series of regulatory agencies, albeit with a lesser degree of autonomous decision-making powers.[14]

As to spending *per se*, the Constitution actually expressly authorizes Congress 'to pay the Debts and provide for the . . . general Welfare of the United States'.[15] According to Supreme Court precedent, Congress is permitted to 'spend' federal money for *any* public purpose, including one that is not in itself among the enumerated federal legislative subjects. This undoubtedly has served to expand the scope of federal regulatory authority beyond those subjects listed as such in the Constitution.

In practical terms, Congress has further enhanced the effectiveness of its spending power by making its grant of funds to the States or private parties 'conditional' on the recipient's fulfilment of certain policy requirements specified in the legislation establishing the programme of grants. If States, local governments, or other recipients of grants need or want the federal funds in question badly enough, they will naturally agree to comply with those requirements. The Supreme Court has ruled that Congress can impose virtually any condition it wishes, provided the condition bears some relationship to the purpose for which the money is being given, and is otherwise constitutional. And eventhough these conditions must relate to the purpose for which the moneys will be used, they do not have to relate to one of the enumerated subject matters over which Congress has the independent constitutional power to legislate; the purpose, as the wording of the spending clause itself suggests, may be anything having to do with the 'general welfare'. The spending power thus represents a vast expansion of *de facto* federal regulatory authority.

A spending power is of course useful to a level of government only in so far as that level has revenue-raising powers or otherwise has access to funds. This is where the difference between the US and the EU is certainly the greatest.[16] Contrary to the US, in the EU the common budget was never seen as having a redistributive function across States.[17] Thus, while the United States federal level has the express power under its Constitution to 'levy taxes', that is, to raise the revenue that will support its 'spending' activities, the European Union's own revenues are meagre in comparison, drawn above all from customs duties. Today, taxes raised by the US federal government constitute 25 per cent of GDP, while the EU budget is capped at 1.24 per cent of GDP, part of which is a transfer by the Member States. There is little doubt that differences in the allocation of power have an enormously important fiscal dimension.

Residual Authority

As between the levels of government exercising authority, which, if any, has residual authority: that is to say, which enjoys regulatory and policy competence in the absence of a specific indication otherwise?

Despite their differences, both American and European federalism subscribe to the theory that central authorities enjoy only those regulatory powers that have been accorded to them by the basic constitutive documents, that is, the United States Constitution and the treaties establishing the European Communities, respectively. Residual authority belongs to the States.

In the United States, the principle of 'reserved powers' was made explicit at an early date by the Tenth Amendment, adopted as the last of the original Bill of Rights in 1791:

> The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.

Although this same notion had been assumed, from the very beginning to apply in the European Communities, it was formally introduced formally only through the 1992 Treaty on European Union, or Maastricht Treaty. Article 5 [ex Article 3b] reads: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.'

Of course, it goes nearly without saying that the real effect of a principle of residual or reserved powers depends upon the breadth of the terms in which powers are conferred on the central authorities, and the breadth with which those powers are construed.[18] Here, the parallels between the United States and European experiences are actually quite striking.

Historically, the interstate commerce clause of the United States Constitution enabled Congress to enact legislation bearing on subject matters that, as such, would ordinarily fall within the States' residual or 'reserved' powers. The same is demonstrably so in the European Union, whose central institutions are authorized to adopt, and have adopted, 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.[19] Moreover, in the absence of legislative action at the federal level both the US Supreme Court and the European Court of Justice have interpreted extensively the obligations of the interstate commerce clause and of the 'common market', embedded in Articles 28 and 49 [ex Articles 30 and 59] of the EU/EC Treaty, so as to constrain the freedom of action of individual states.[20]

Such expansive judicial interpretations of the US interstate commerce clause and the EC's internal market provisions have lessened the need for the legislative institutions on both sides to resort to other general 'federal' legislative basis in the constitutive documents. The EU While it is true that European institutions commonly include Article 308 [ex Article 235] -- a broad-ranging basis for increasing federal competences without resort to Treaty amendment--[22] among the recited 'legal bases' of Community legislation, this is virtually always in conjunction with one or another more specific basisthat might alone justify the measure (e.g. , Article 100a on the internal market). In the United States, where there is not understood to be any formal obligation to recite a 'basis' in the Constitution for a given federal legislative measure, references to what is 'necessary and proper', within the meaning of the United States' implied powers equivalent, are even more scarce.

Thus, both the European Union and the United States subscribe to a constitutional principle of enumerated powers under which, in order for powers to belong properly to the federal level, they need to have been enumerated as such. Moreover, those powers that are not enumerated are 'reserved' to the States. They are reserved to the States within the European Union because it is the States that initially 'transferred' the powers. They are reserved to the States within the United States, not because the States originally transferred them, but because the people of the United States so provided in the Constitution.

Exclusive or Concurrent Authority?

Is regulatory authority distributed in such a way as to give different levels exclusive or merely concurrent authority? And, if concurrent, are there any established criteria for determining how that authority will be shared or what the relationship between exercises of power at different levels of government shall be?

Both in the United States and the European Union relatively few subject matters are denominated as exclusively 'federal'. At the same time, very few subjects have remained under exclusive 'State' competence. This state of affairs is often described as 'cooperative federalism'. The US Constitution entrusts the federal government above all with foreign relations: that is, trade on one hand , foreign affairs on the other. Other exclusively federal matters include maritime law, bankruptcy, and industrial and intellectual property rights. However, most of the subjects that have come to be governed by federal law, be it legislation or regulation, fall within the federal government's concurrent competencesStates are bound to respect all such federal laws, but they are not precluded as such from otherwise continuing to regulate those subjects.

The EU presents a basically similar picture with one major caveat. Exclusive federal competences in the Treaties include external economic relations but not foreign policy,the latter even not becoming a concurrent subject until the 1970s. Other European competences, including agriculture, fisheries, and transport, became exclusively federal only to the extent that they had actually been exercised at the Community legislative level. But most subject matters on which the European institutions regulate or legislate lie within the Community's

concurrent, not its exclusive, competence, including the power to enact and apply rules of competition policy. Even the crucial Community power to harmonize Member State laws in the interest of facilitating or completing the internal market cannot properly be described as exclusive. While the legislative power to harmonize national law as such may, as such, be exclusively Community since no Member State can 'harmonize' the laws of other Member States, the Member States nevertheless retain the power to regulate at least some aspects of the fields that have been the subject of harmonization measures at the Community level, provided, of course, that they do respect the conditions laid down in those measures.

Concurrent powers can be allocated in countless different proportions among those government units that share them. Accordingly, to the extent that federal authority is concurrent rather than exclusive, general principles are needed for determining the relationship between federal and State bodies of law. We highlight two: one fundamentally political, the other legal.

A first principle addresses the mainly political question of whether the federal government should exercise its concurrent authority at all, in view of the fact that the States are also in a position to act. More generally, when is each level of governance to know, before acting, when and to what extent it is best to act, and when and to what extent it is best to leave it to the other holder of concurrent powers to do so? This is the core 'subsidiarity question', analyzed in great detail in other contributions to this volume, including that by David Lazer and Viktor Mayer-Shoenberger .

A second set of principles reflects the more traditional way of analyzing the relationship between federal and State law in areas of concurrent competence: namely, by asking what the priority is between federal and State laws *once* those laws have been adopted. It is useful in this connection to distinguish between the notions of the 'supremacy' of federal over State law, on the one hand, and 'pre-emption' of State law by federal law, on the other.

Supremacy is the easier of the two terms to grasp, and it is recognized in both the United States and the European Union, albeit with nuances of difference. The supremacy of federal over State law as such is expressly inscribed in Article VIII of the US Constitution, and there is no significant dissent from this principle in any State quarters. It is precisely because the *legal* principle of supremacy is so fully accepted in the United States that advocates of greater State autonomy direct their efforts primarily to the *political* process—linked to the first principle discussed above—urging that overly expansive or intrusive federal legislation and regulations not be adopted in the first place.

While the EC Treaty is not explicit on the subject of supremacy, the Court of Justice, and indeed all the Union institutions, act on the conviction that, *to the extent of any conflict or inconsistency between them*, Community law takes precedence over Member State law.[23] In such situations, according to the Court's case law, Member State authorities are duty-bound *not* to apply Member State law.

The notion of unqualified supremacy of Community law over national law has not been accepted in every Member State. The most notable example is, of course, Germany, whose Constitutional Court ruled in its 1993 Maastricht Treaty decision that national authorities are not bound to respect and apply Community law to the extent that it exceeds the outer boundaries of Germany's transfer of sovereignty to the European institutions.[24] In a similar vein, the German Constitutional Court has ruled that no transfer of sovereignty is valid to the extent that it results in the violation of the fundamental individual rights guaranteed in the German Constitution.[25] Like views have been expressed, albeit in less clear terms, by courts in certain other Member States, including Ireland and Italy.

The term 'pre-emption' is commonly used, both in the United States and the European Union, to s that federal law both displaces any inconsistent State law and precludes the adoption of any State law on that subject, whether consistent or inconsistent, from then on.[26] Under this notion of pre-emption, federal law bars the adoption or application of *any* State law on a subject, it 'occupies the entire field', no matter how consonant with federal policy such State law may appear to—or even actually—be.

Pre-emption may be 'constitutional' in the sense that the Constitution, or constitutive treaties, themselves provide that federal law in a given area shall be exclusive of all State law. This, in a sense, is the import of *exclusive* federal legislative competences, as discussed above. More interesting and problematic is the question of 'legislative' or 'regulatory' pre-emption, under which a matter does not fall under exclusive federal competence until it is actually addressed federally. Thus the exercize of federal legislative authority turns concurrent

competences into exclusive ones. 'Legislative' pre-emption arises when the legislature declares that federal policy on a given subject shall be exclusive of all State law, whether consistent with it or not; State authorities may not even supplement it. In principle, whether federal legislation is pre-emptive in this sense is purely a matter of legislative intention.[27]

Unfortunately, Congress does not always clearly indicate whether or not it has the intention to pre-empt. Recognizing this fact, courts are willing to accept the possibility of *implied*, as well as express, federal pre-emption. Implied pre-emption arises when, despite the legislature's failure to make its intention to pre-empt State law explicit, the circumstances of the legislation, including its legislative history, make this intention sufficiently clear. Systems which more or less readily accept the notion of implied federal legislative pre-emption (treating such pre-emption as basically a question of statutory interpretation) almost invariably vest *federal* courts with the power to determine whether there is federal legislative pre-emption or not.
The situation in the EU appears to be evolving in much the same general direction. Thus, even if the Community's Treaty-based legislative authority on a certain subject is concurrent only, this will not in itself prevent the EU legislature from legislating pre-emptively on that subject, and whether it has done so is basically a matter of legislative intent and statutory interpretation. The Community's internal market harmonization is widely considered to be pre-emptive, in that, once a relevant measure is enacted, the Member States are deemed to lose the right to legislate any further on that subject,re-emption being in effect the default mode. The Council and Parliament may have to state expressly, as by seting *minimum* standards, that the measure does not prevent the introduction by Member States of more stringent protective standards, if that possibility is to be left open . Conversely, they may decide that Community-wide standards should be fully uniform and thus legislate comprehensively by indicating that the standards adopted are both minimum *and maximum* standards.In some subject matter areas, the intent to pre-empt may be very strongly presumed. Such is the case, for example, with EU legislation in the areas of agriculture and fisheries. It is simply assumed that, once the Community institutions establish a "common" organization of a particular agricultural market, that regime becomes a fully exclusive one. As a consequence, the Member States' competence is limited to implementing that policy; they may not add to it. Since the correct interpretation of EU legislation is ultimately a matter of EU law itself, preemption is an appropriate and indeed a common subject of preliminary references from national courts to the Court of Justice under Article 234 [ex 177] of the EC Treaty. The question may be posed whether, even if the Constitution —or a constitutive treaty—treats federal legislative authority over a certain subject matter as concurrent, the federal legislature may in its discretion choose to adopt a pre-emptive federal policy over that subject matter. This means that we can ordinarily anticipate controversy in both the political and the judicial arenas: controversy within the legislature over whether to adopt pre-emptive federal legislation in the first place, and controversy before the courts over whether the federal legislature did in fact do so.

Doubts over the legitimacy of pre-emption become heightened when pre-emption is neither 'constitutional' nor 'legislative' but simply 'regulatory' or 'administrative'. In a system like the United States, in which federal legislative power is broadly delegated to federal administrative agencies, it may become necessary to decide whether the regulatory or administrative agency to which the federal legislature has delegated legislative authority may itself adopt pre-emptive federal rules. Basically, the question whether an agency is empowered to adopt pre-emptive federal rules depends upon the intention of the legislature in creating and empowering that agency, that is to say, on the scope of the delegation. On this question, we are likely to be even less well guided by statutory language. Indeed, we may not even be certain that the agency *intended* to adopt pre-emptive rules in the first place. If the federal legislature does not always express itself clearly on the question whether its policies are pre-emptive of State law, it should not be surprising that it also does not always express itself clearly on whether it, in turn, has authorized a federal agency to adopt policies that are pre-emptive of State law. The determination of that question can be made only on the basis of a close examination, not only of the statutory language, but also of the precise policy purposes for which the statute was adopted. Legislative history will play a large role in this determinations.[28] Given the widespread practice of delegating legislative powers to federal administrative agencies, the question of regulatory or administrative pre-emption arises with great frequency in the United States, and ultimately ends up in the federal courts.

As Giandomenico Majone discusses in this volume, the European Union is at a different stage of evolution in this regard. Community regulatory authority still remains largely concentrated in the hands of the

Community legislature—the Council and European Parliament—and of the European Commission, even in areas where regulatory agencies have been created, as with food standards or pharmaceuticals. Even so, the pre-emptive or non-pre-emptive effect of legislation adopted by the Council and Parliament depends largely on their implicit or explicit intention in adopting that legislation. Thus, the only remaining issues are (1) whether the Commission had legislative authority under the delegation from the Council and Parliament to adopt a pre-emptive Community policy and (2) whether the Commission actually exercised that authority by in fact adopting a pre-emptive Community policy.

Fortunately, legislative drafting and legislative history in EU practice up to now have been such as normally to enable us to know fairly clearly what the intentions of both the Council and the Parliament were, and, where relevant, also the Commission's intentions, as to the pre-emption question. But there is always a danger that the Community institutions will become less attentive, or in any event less legislatively explicit, in this regard.[29]

The likelihood of this happening may well increase with enlargement of the Community, and with the resulting political necessity of leaving matters such as pre-emption unresolved, or unclearly resolved, in the legislative process. To the extent that this occurs, the solution to pre-emption questions may become every bit as obscure in the European Union as it has come to be in the United States, with difficult pre-emption cases increasingly surfacing before the courts. And the diffuse fear of 'creeping competences' as both an invisible and an irreversible process is likely to increase as a result. It may be advisable for the EU to draw lessons from this aspect of the US experience.

Overriding Principles of Division Of Labor under Concurrent Competences

Are there any general principles of allocation of competences which might serve as overriding constitutional limitations on federal powers—operating either in conjunction with or in the absence of more specific criteria? Do these general principles take priority over specific allocations that may have been made, or do they merely bear upon our understanding and interpretation of those allocations?

This question naturally arises only in connection with the exercise of concurrent competences. Where federal powers are exclusive, the limits, if any, on their exercise will by definition have nothing to do with the reservation of powers to the States, for none have been reserved. On the other hand, the exercise of exclusive federal legislative competences may of course be limited by other constitutional considerations, such as fundamental individual rights or general principles of law including, for example, principles of proportionality, equal treatment, and protection of legitimate expectations.

To some extent, this may be only a matter of *defining* the competences attributed to federal authorities or qualifying existing definitions. Thus, in its *Lopez* decision[30], the US Supreme Court explained that Congress could not constitutionally exercise legislative power predicated on the interstate commerce clause unless it could –and did- rationally consider the legislation to be a response to a problem of interstate commerce and rationally demonstrate that this is the case. Similarly, in its path-breaking decision in *New York v. United States*,[31] the Supreme Court declared that Congress may not use its power to legislate over interstate commerce, or any other subject within its constitutional scope of authority, in such a way as to coerce or compel the States to use their own legislative powers in implementation of policies made at the federal level. The Court determined that such federal 'commandeering' of the States' apparatus to carry out federally imposed policies constitutes a violation of the Tenth Amendment; if Congress empowers federal agencies to 'commandeer' State resources, it goes *too far* in the exercise of its subject matter competences. [32]

Within the European Union, the principle of subsidiarity is unquestionably the pre-eminent general principle of this sort, as incorporated in Article 5 [ex Article 3b] of the Maastricht Treaty as follows:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

> *In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community* (emphasis added)
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

The principle of subsidiarity thus requires that the Community institutions refrain from taking action, even when admittedly acting within the scope of their competences , where the objectives to be met by such action could be effectively achieved by action taken at the Member State level or below, and where action at the Community level would not be markedly more efficient;and the complementary principle of proportionality as stated in the last paragraph of theArticle calls for acting with restraint even when it does take action.

The subsidiarity principle has many presumed origins and as many presumed sins. It is said to have been inspired by the Catholic Church, the German *Länder*, and the Founding Fathers themselves. It has been accused of being too vague and of generating undue expectations. It is in any case a contested principle, whether it is examined primarily as an analytic matter, as a political issue, or as a matter of practical implementation. While more detailed operational criteria were included in a "Subsidiarity protocol" to the Amsterdam Treaty, these criteria remained to be tested in Court or even through a high profile case at the political level.[33]

While the anti-commandeering principle of *New York v. United States* in the US and the principle of subsidiarity in the EU are quite different in the precise kind of limitations that they place on the exercise of concurrent competences, they are alike in that they both operate as an additional constitutional constraint.[34] It is not enough for federal or Community institutions to remain within their proper subject matter fields; it is also necessary that, in exercising their powers within those fields, they do so in a fashion that is compatible with the Tenth Amendment and the principle of subsidiarity, respectively.

2. Supplementary Mechanisms to Safeguard Basic Allocation of Competences

The set of basic principles outlined above is meant to provide agreed upon limitations on the exercise of central powers in a federal system. Assuming that the rules of the game are set in this way, how sustainable are they? Are they the sole guarantee of appropriate division of labour between levels of governance? And if not, what other safeguards are there of federalism principles? We will quickly review two sets of additional considerations below.

Alternatives to Legal Allocative Principles: Structures and Processes

To what extent is federalism organized through the structures of the federal institutions or through any particular decisional processes that those institutions are required to employ, instead of, or in addition to, particular allocations of competences ?

It is important to recognize that constitutional protections of federalism do not necessarily take the form of legal principles. They may also take the form of legal structures and processes. For example, a constitution may structure 'federal' institutions or their workings so as indirectly to promote respect for the interests of the constituent States and their separate populations. This point is explored more systematically in the contributions to this volume by George Bermann, Daniel Halberstam, and Cary Coglianese and Kalypso Nicolaidis.

The view that the structure of federal institutions can itself operate as the core 'guarantee' of the values of federalism has long been associated in the United States with the writings of Herbert Wechsler.[35] According to Wechsler, the architects of the US Constitution anticipated the needs and interests of the States by providing that the Congress and the President would be selected in ways that cause them to give due regard to those needs and interests. Therefore, rather than review directly whether a given federal measure respects the Constitution's limitations on the exercise of federal powers *vis-à-vis* the States, the courts should simply enforce the rules that govern the structure and procedures of the federal institutions themselves.

The Wechslerian theory was attractive in large part, not simply because it affirmed the importance of respecting the institutional ground rules of federalism—which in itself is presumably a good thing—but also because it called for avoiding 'judicial second-guessing' of fundamentally *political* judgements about the appropriateness of federal legislative interventions. In other words, the theory operates openly in support of the principle of the separation of powers, notably, the separation of judicial power from legislative and executive powers.

Critics of the theory have disputed the empirical basis for the claim that the way the federal government is structured or functions offers any serious guarantee that the prerogatives and interests of the States will be safeguarded, and that the balance of power between the federal and State governments will thereby be maintained.[36] The theory is widely considered today as being unduly optimistic about the capacity of the prevailing structural and functional rules at the federal level, and therefore of the federal political process, to guarantee respect for federalism.

The Wechslerian theory has had a particularly uneven fortune in the US Supreme Court over recent decades. At the present time, the Court remains quite divided over the notion that maintaining the balance between federal and State regulatory power is primarily a political and not a judicial function. In fact, Supreme Court developments in this respect are more in flux than ever. Ironically, one could argue that the Wechslerian theory applies much more straightforwardly to the European Union than to the United States. The institutional structure of the EU rests on the representation of the Member States at the centre, in the European Council and Councils of Ministers, the bodies that to this day ultimately control the legislative process and provide political oversight of the Commission's exercize of executive functions. Albeit less overtly, Member States are also represented in the appointment of the Commission itself. The Treaty of Nice signed in December 2000 constituted a forceful reminder of the import of structural safeguards of federalism in the EU as Member States finally agreed to a new bargain over new voting weights, the scope of national veto powers, and the numbers of Commissioners to be nominated by each Member State—a bargain that had been in the making for at least five years.[37]

At the same time, however, the asymmetric character of the EU calls for a more differentiated understanding of State representation at the centre than that prevailing in the early history of the United States. In a Union where differences in size and power of the constitutive units are extremely wide, we need to ask further how such differences are reflected in relative influence at the Union level. This question becomes all the more delicate with the increased resort to variable geometry configurations in the Union, now institutionalized under the procedures of 'enhanced cooperation'. Increasingly, it seems, with the enlargement of the Union, the dilution of individual State influence will be compensated by greater allowance for institutional configurations giving bigger States a leadership role in specific areas of integration.

Principles of Federalism and Constitutive Texts

Through what kinds of instruments are all of these ground rules of federalism laid down? And what difference does that make?

Due to their perceived fundamental importance in federal and federal-type systems, rules on the allocation of power between States and federal or Union institutions are typically expected to figure directly in the federal constitutive documents. In a 'true' federal system like the United States, this document can only be the federal Constitution. In the European Union, absent a true constitution, such principles are expected to be laid down in the constitutive treaties, namely, the Treaty of Rome, as revised by successive intergovernmental conferences. To a considerable extent they are.

But it is one thing for constitutional documents to purport to articulate basic federalism principles; it is another thing for them to express those principles faithfully and accurately in accordance with prevailing political understandings. As Jack Donahue and Mark Pollack demonstrate vividly in this volume, the real balance of federalism within any vertically divided power system is subject to change over time, with or without formal constitutional amendments. Thus, whether a written constitution or constitutive document fairly reflects prevailing legal and political principles of federalism may depend on the frequency with which such foundational texts are amended in the light of considerations such as these.

The United States and the European Union offer a lively contrast from this point of view. As far as express principles of federalism are concerned, the US Constitution has rarely been fundamentally altered. The first time was in 1791with the Tenth Amendment, previously mentioned, which reservedresidual to the States—and the people..American federalism was affected less overtly, but no less fundamentally, by the adoption of the Fourteenth Amendment following the Civil War, which extended to the States the federal constitutional principles of due process and equal protection, thus empowering the federal courts to impose on the States far-reaching substantive and procedural requirements derived from *federal* constitutional law.

The fact remains that, on its face, the United States Constitution does not reflect the strong and sometimes bitter disputes that have been waged over the question of the proper balance between federal and State competences. Nor does it necessarily reflect the principles or practices of federalism that prevail at any given point in time. It is no exaggeration to say that the United States constitutional text, as it reads, is a poor guide to the political, and even the legal, realities of US federalism. This is perhaps truer now than ever. Ground rules for the allocation of power between State and federal authorities in the United States may at present be undergoing as fundamental a change as at any time over the past 60 years. However, virtually all such change is taking place without the benefit of any formal change to the constitutional text.

For obvious reasons, the architects of the European Union have been much less willing to leave the issue of the balance between Member State and Community powers to the 'federal' political process. The States that came together to form the Communities, and that are now acceding to the EU, were and are mature and fully developed nation-states. They are not likely to let the process of European legal and political integration simply take its course.

Not only does the Treaty speak with relative specificity to the scope of federal legislative power, but the terms in which it speaks have been modified at strikingly short intervals, precisely because the Member States as such continue to want to be heard on all the issues. When the time comes to amend the constitutive treaties, the procedure of choice is an intergovernmental conference, in which the Member States negotiate among themselves as independent States and take no action except upon a full consensus. Intergovernmental conferences have been convened for this purpose with increased frequency, becoming almost a constant fixture of EU politics. And t is telling that the constitutive treaties have been amended, following these intergovernmental conferences, not only in their descriptions of particular EU competences, but even in their broad statements about federalism, including of course the variations on subsidiarity. But while the subsidiarity protocol clearly seeks to shift the burden of proof that EU action is necessary on to the Union institutions, it does not constitute a clear-cut principle like the Tenth amendment. As discussed by Lazer and Mayer-Shoenberger its functional equivalent in the US is the executive orders which would be considered far too detailed to qualify for constitutional status.

Thus, the European Union treaties have tended to confront the problems of federalism more regularly, than the United States Constitution. Whether this causes the treaties to give a truer picture of the federalism balance within the Union than would otherwise be the case, or than is characteristic of the United States constitutional text, remains to be seen. Echoing an increasingly widespread call for greater clarity of the EU federal bargain, the British Prime Minister, Tony Blair, in September 2000 called for the adoption of a 'charter of competences' that would presumably spell out the EU's answer to the various questions laid out in this chapter. Could this be done in a clearer and simpler way than the current statement on subsidiarity? The other heads of State responded at the December 2000 Nice Summit by committing to an open debate on the EU's architecture culminating in 2004.

The ultimate question for the EU in the next few years will be whether such constitutive texts ought eventually to be turned into a traditional constitution covering a wider array of topics than subsidiarity. In his contribution to this volume, Joseph Weiler argues that the United States cannot constitute a model for the EU in this regard, as its constitution reflects the existence of a single constitutional *demos*—a 'singleness' that is neither likely nor desirable in the EU context. More prosaically, our discussion suggests that the one of the keys to a sustainable federal contract between States and Union lies in being able to combine clarity of basic principles with flexibility in their application. The United States has succeeded in doing so in spite of its relatively immutable Constitution. The European Union may well continue to chose a more political and flexible approach. In both cases, however, citizens will increasingly hold politicians accountable for their answer to the 'who does

what?' question. Understanding the basic principles for federal allocation of competence ought to be a starting point in addressing this question. But as the chapters in this book demonstrate, we also need to move beyond this basic legal approach if we are to tackle the challenge of legitimacy head on.

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[1] This chapter is heavily drawn from George Bermann, *Regulatory Federalism: European Union and United States* (The Hague: Martinus Nijhoff, 1997).

[2] These various principles are discussed throughout this volume although often under different labels. For a formal discussion, see in particular the chapters by George Bermann and Daniel Halberstam in this volume, as well as, in a more stylized fashion, Cary Coglianese and Kalypso Nicolaidis and John Peterson and Laurence O'Toole. On structural principles, see in particular Vivien Schmidt.

[3]The preamble to the United States Constitution thus reads: 'We the people of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.'

[4]W. G. Vause, 'The Subsidiarity Principle in European Union Law: American Federalism Compared', *Case Western Journal of International Law,* 27 (1995), at 70.

[5]See J.-C. Piris, 'After Maastricht, Are the Community Institutions More Efficacious, More Democratic and More Transparent?', *European Law Review*, 19 (1994), 449; W. Wallace, 'Europe as a Confederation: The Community and the Nation-State', *Journal of Common Market Studies*, 21 (1982), 57.

[6]S. J. Boom, 'The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe"?', *American Journal of Comparative Law*, 43 (1995), 177; D. Grinim, 'Does Europe Need a Constitution?', *European Law Journal*, 1 (1995), 282; T. C. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', *The Law Quarterly Review*, 112 (1996), 95. Alan Dashwood calls the European Community 'a constitutional order of States'. A. Dashwood, 'The Limits of European Community Powers', *European Law Review*, 21 (1996), 113.

[7]See D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review*, 30 (1993), 66.

[8] For a discussion, see Vivien Schmidt in this volume.

[9] In his classical study, Musgrave offered a three fold categories of policy-making functions, namely, allocation, stabilization, and distribution. Broadly, allocation covers mainly regulatory policies while stabilization and distribution are carried through fiscal instruments. See R. Musgrave & P. Musgrave, *Public Finance, Theory and Practice,* 3rd edn (New York: McGraw-Hill, 1980). Musgrave's functional classification was developed for the US context but is widely used in the EC context. See for instance the Padoa Schopa Report, *Commission of the European Communities* (Luxembourg: EU Publication Office, 1987).

[10]'The Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states.' US Constitution, Art. 1, Sec. 8.

[11]For a discussion of harmonization in the interest of the internal market as a 'subject matter' for Community legislation, see P. J. Slot, 'Harmonisation', *European Law Review*, 21 (1996), 378.

[12] For a discussion, see Daniel Elazar in this volume.

[13] This was done, for instance, by transferring some areas of action—migration and asylum—from the third to the first pillar, thus granting a greater role to supranational institutions while retaining the practice of unanimity voting. This practice of institutional differentiation stems from the fact that the 'federal' level in the EU is a complex mix between intergovernmental and supranational decision making and that the relative weight to be given to each dimension is a function in part of the sensitivity and 'newness' of the policy being centralized. For a discussion of the 'evolutionary pragmatism' characterizing the Treaty of Amsterdam, see Andrew Moravcsik and Kalypso Nicolaidis, 'Federal Ideals vs Constitutional Realities in the Amsterdam Treaty', *Journal of Common Market Studies,* 36, (1998), 13-38 ; see also Andrew Moravcsik and Kalypso Nicolaidis, 'Explaining the Treaty of Amsterdam: Interests, Influence and Institutions' , *Journal of Common Market Studies,* 31 (1999), 59-85.

[14] See Giandomenico Majone in this volume.

[15]US Constitution, Art. 1, Sec. 8, clause 1.

[16]See T. C. Fischer, '"Federalism" in the European Community and the United States: A Rose by Any Other Name', *Fordham International Law Journal*, 17 (1994), 389.

[17]See Loukas Tsoukalis, *The New European Economy Revisited* (Oxford: Oxford University Press, 1997).

[18]G. Falkner and M. Nentwich, *European Union: Democratic Perspectives after 1996* (Vienna: Service Fachverlag, 1995).

[19]EC Treaty, Art. 95 [Ex 100a], para. 1.

[20] There has been ample discussion on the similarities and differences between the jurisprudence of the two Courts. The classical study is still Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience* (Berlin and New York: de Gruyter, 1986).

[22] Article 308 [ex Article 235] of the Treaty of Rome reads: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

[23] *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, [1990] ECR 1-2433, [1990] 3 CMLR 1. The principle of supremacy was originally established by the Court in Van Gend en Loos v. Nederlandse Administratie der Belastingen Case 26/62, [1963] ECR 1, [1963] CMLR 105.

[24]Judgment of 12 October 1993 (*Brunner v. The European Union Treaty*), Cases 2 BvR 2134/92, 2159/92, [1994] 1 CMLR 57 (Ger. Const'l Ct.).

[25] Although the Court's latest ruling on that particular subject indicated that it was willing to rely on the European Court of Justice for the vindication of those fundamental rights. Judgment of 22 October 1986 (*In re Application of Wunsche Handelsgeselischaft (Solange 11)*), Case 2 BvR 197/83, 73 B. Verf. GE 339, [19871 3 CMLR 225 (Ger. Const'l Ct.).

[26] See P. J. Slot, 'Harmonisation', 388–9.

[27] See S. A. Gardbaum, 'The Nature of Preemption', *Cornell Law Review*, 79 (1994), 767.

[28]R. J. Pierce, Jr., 'Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation', *University of Pittsburgh Law Review*, 46 (1985), 636–41.

[29]For a very useful discussion of the different usages of the term 'pre-emption' in the European Union, and a call for greater clarity, see E. D. Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis', *Common Market Law Review*, 29 (1992), 447. Cross distinguishes four attitudes towards pre-emption: (1) express saving; (2) express pre-emption; (3) 'occupation of the field'—as used here; and (4) 'conflict pre-emption', which in turn has two subcategories: direct conflict and 'interference' or 'obstacle' conflict.

[30] 514 U.S. 549 (1995). See, more recently, United States v. Morrison, -U.S.-, 120 S.Ct. 1740 (2000).

[31] 505 U.S. 144 (1992). See, more recently, Printz v. United States, 521 U.S. 98 (1997).

[32] For further discussion of commandeering, see the chapters by George Bermann and Daniel Halberstam in this volume.

[33] For a discussion, see David Lazer and Viktor Mayer-Shoenberger in this volume. . To some extent, the *Tabacco* case where the Court supported Germany's position that the EC acted beyonds its remit in banning all tobacco advertising constitute a first step in this direction.

[34] For a more nuanced assessment see Halberstam in this volume.

[35]Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', *Columbia Law Review*, 54 (1954), 543. For a contemporary endorsement of the theory, see H. Hovenkamp, 'Judicial Restraint and Constitutional Federalism', *Columbia Law Review*, 96 (1996), 2213.

[36]See, for example, L. B. Kaden, 'Politics, Money, and State Sovereignty: The Judicial Role', *Columbia Law Review*, 79 (1979), 847; D. B. La Pierre, 'The ism Redux: Intergovernmental Immunity and the on', *Washington University Law Quarterly*, 60 (1982), 779; D. J. Meritt, 'The Guarantee Clause and State Autonomy: Federalism for a Third Century', *Columbia Law Review*, 88 (1988), 1.

[37] See Moravcsik and Nicolaidis, "Explaining the Treaty of Amsterdam: Interests, Influence, and Institutions," op.cit. note 13