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Federalism and Democratization: The United States and European Union in Comparative Perspective

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10.1 Introduction

There is an inherent tension between federalism and democracy. From the perspective of the constituent states that make up a federation, federalism constrains democracy because requirements of federal law may limit a state's ability to adopt policies consistent with its citizens' preferences. From the perspective of the federation as a whole, federalism constrains democracy because state governments may be in the position to block policies favored by majorities at the federal level. Federalism constrains majorities, and in this respect, it is clearly undemocratic. However, as theorists of federalism from Madison to Riker (1964) have argued, such constraints may be vital in protecting individual rights against the 'tyranny of the majority' and thus to safeguarding a central element of liberal democracy.

This chapter examines the impact of federalism on the process of democratization in the United States and the EU. Much of the literature on democratization treats nondemocracy (e.g. authoritarianism) and democracy as dichotomous categories and examines the transition from the former to the latter. This chapter, by contrast, treats democracy as a category with continuous gradations (Elkins 2000) and defines democratization as a 'continuous process of reforms and modifications of the institutions and practices in a given political regime, from fewer to more degrees of free and fair contestation and participation' (King and

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Lieberman 2004: 9). This focus allows us to examine how federal institutions have influenced ongoing efforts to extend the degree of democracy in two polities, the United States and the EU, that have long been democratic. The scope of the inquiry is limited to examining one vital dimension of democracy: the participation dimension (Dahl 1971: 4), which encompasses issues surrounding the protection of individual rights and the extent and the openness, transparency, and accountability of policy processes. The federal structures of the United States and EU also have significant impacts on the electoral contestation dimension of democracy. However, these impacts have been subject to a number of incisive analyses,¹ and fall beyond the scope of this study.

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The central argument of the chapter is twofold. First, similarities in the fragmented institutional structure of EU and US federalism have encouraged both polities to adopt a particular approach to democratization, one that emphasizes the empowerment of private actors to assert federal rights through the courts. Second, the institutional structures of US and EU federalism have also encouraged the federal governments in both polities to emphasize openness, transparency, and accountability in policymaking and implementation. This claim is sure to be greeted with skepticism by critics of the EU's purported democratic deficit. However, as we see below, while the growth of federal power in both polities has shifted the locus of decision-making in many areas further from the citizen, this has been compensated for in important respects by the enhancement of opportunities for democratic participation.

Comparing the contemporary experience of the democratization in the EU with the historical experience of democratization in the United States sheds light on each. The processes of democratization of the US and EU polities commenced from vastly different starting points in different eras and involved very distinctive socioeconomic conditions. While the two polities differ greatly on many of the variables relevant to analyses of democratization, they share a number of the same basic constitutional structures. Therefore, following a 'most different systems' research design, comparing the two polities enables one to investigate whether similarities in their institutional structures have led to similar patterns of democratization.

The chapter proceeds as follows. Section 10.2 highlights the crucial similarities in the institutional structures of US and EU federalism. Section 10.3 examines the role of individual rights and rights litigation in the process of democratization in the United States and EU. Section 10.4 assesses the impact of federalism on the quality of democratic participation in the two polities. Section 10.5 concludes.

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10.2 The structures of US and EU federalism

Most scholars of US and EU politics have at least one thing in common—they view their subject of study as truly unique, falling outside traditional categories of comparative analysis and requiring categories and explanations all its own. Among students of the United States, the American exceptionalism hypothesis has a long and distinguished heritage, dating back at least to Tocqueville, who wrote of the structure of US government, ‘Hence a form of government has been found which is neither precisely national nor federal; but things have halted there, and the new word to express this new thing does not yet exist’ (1969: 157). Similarly, most scholars of the EU maintain that the EU is a *sui generis* polity that does not fit existing categories and requires a new vocabulary, including terms such as multilevel governance, variable geometry, *condominio*, *consortio*, or, in Jacques Delors’ words an ‘unidentified political object’ (Schmitter 1996). This emphasis on exceptionalism has led to a common weakness in the literatures on both polities—a failure to adequately engage in and profit from comparative analysis. AQ2

Recently, a small but growing literature, of which the present volume is a part, is subjecting both the EU and the United States to the lens of comparative federalism (Sbragia 1992; Friedman-Goldstein 2001; McKay 2001; Nicolaidis and Howse 2001; Börzel and Hosli 2003; Ansell and Di Palma 2004; Kelemen 2004). This chapter contributes to this literature by investigating how similarities in the federal institutional structures of the United States and EU have influenced the process of democratization in the two polities. The structures of US and EU federalism share two fundamental similarities that are critical for our purposes. First, the EU and United States both combine federalism with separation of powers and bicameralism at the federal level. This fragmentation of power programmed into the very institutional foundations of the United States and EU has important consequences for the role of legislative, executive, and judicial institutions and for patterns of policymaking more generally (Kelemen 2004). Separation of legislative and executive power creates agency problems, as legislative majorities cannot rely on the executive to faithfully implement their policies. In order to minimize agency losses when delegating tasks to the executive, legislative institutions will have an interest in establishing a variety of *ex ante* and *ex post* controls on executive discretion, many of which rely on setting detailed, judicially enforceable administrative procedures (McNollgast 1987, 1989; Moe 1989; Epstein and O’Halloran 1994, 1999). This has had important implications AQ3

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for openness, transparency, and accountability in government. While these dynamics play out initially in relationships between branches of the federal government, they eventually influence patterns of policymaking and implementation at the state government level.

Second, the United States and EU both have extremely powerful judiciaries. The strength of the courts follows from the fragmentation of political power mentioned above. It is precisely because the fragmentation of power so often renders legislative and executive actors incapable of concerted action that courts in the United States and EU are emboldened to play a powerful role in the political process. Knowing that courts are independent and assertive, federal lawmakers eagerly enlist them as agents of policy implementation and enforcement, relying on them to check the actions of executive agencies and state governments. Federal lawmakers will have particularly strong incentives to encourage private parties to enforce federal law via the courts.

10.3 Federalism and rights

Regulation through rights creation and rights litigation is rooted in the very constitutional foundations of the United States and EU. The structure of US and EU federalism has encouraged the federal governments in both polities to pursue their policy objectives by relying heavily on the empowerment of private actors to enforce federal rights in court. Pursuing policy aims through a rights strategy has several advantages in the context of federalism. Above all, it is inexpensive for the federal government. By establishing federal rights and relying on private parties to enforce them, the federal government can avoid the cost of funding the extensive federal bureaucracy and large-scale programs that would otherwise be necessary to systematically implement and enforce policy. By presenting policy goals as individual rights that private actors and state governments are obliged to respect, the federal government can readily pass the costs of compliance on to the private sector and state governments (Kagan 1997: 178).

In policy areas that fall squarely within the domain of state government authority, the creation of federal rights is often the most effective means by which reform advocates can bring federal pressure to bear on recalcitrant state governments.² By invoking federally protected individual rights in court, reform advocates are able to trump the policy autonomy that state governments would otherwise enjoy. This strategy is particularly

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attractive in the context of federal systems such as the United States and EU with powerful assertive courts that are willing to control the actions of state governments.

Over time, the number and scope of federally protected rights is likely to proliferate. First, the structure of US and EU federalism encourages what Eskridge and Ferejohn (1996) have termed a virtual logrolling in which the legislature and the courts defer to one another's rights-creating preferences. Once created, rights are highly resilient. Rights create what Pierson (1993) has termed 'policy feedbacks', in that new rights create new constituencies of beneficiaries who will then work to defend the new rights from attack. If rights have a constitutional basis, they will be particularly insulated against efforts at repeal. Even statutory rights are more immune to counterattack than other forms of policy in that they often come to be seen as social obligation rather than a policy choice (Burke 2001: 1272).

Generally, the proliferation of rights at the federal level will serve to promote democratization. However, the protection of federal rights arguably inhibits democratization when a 'conflict of rights' occurs in which liberties, or negative rights, enshrined at the federal level clash with positive rights introduced at the state level. In both the United States and the EU, federal courts focused initially on the protection of *laissez-faire* economic rights, often to the detriment of other forms of positive rights. The US Supreme Court's protection of common law economic rights, such as freedom of contract, was often the basis for its striking down state (and federal) level regulations designed to advance new positive rights. In the EU context, the ECJ has struck down member-state social regulations on the grounds that they restricted the free movement of goods and services in the internal market in violation of Community law.

While 'negative rights' enshrined at the federal level in the United States and EU have at times stood in the way of democratically backed programs at the state level, overall, the proliferation of federal rights in both polities has advanced democratization. One important reason that the balance remains positive is that where the enforcement of negative rights at the federal level does quash state initiatives; this creates political pressure for the establishment of new 'positive rights' at the federal level.

10.3.1 Federalism and rights in the US

From the end of the civil war until the battle over the New Deal in 1937, the US Supreme Court placed the protection of *laissez-faire* economic rights such as freedom of contract at the top of its agenda. The Court did

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not attempt to use the Fourteenth Amendment to protect other individual civil and political rights against violation by state action. In short, the Court emphasized the protection of the rights of business to be free of government interference, but not the rights of African Americans, women, and other victims of discrimination to equal treatment.

With the adoption of the Fourteenth Amendment in 1868, federal courts gained the authority to protect individual rights against violations by state governments.³ However, the Supreme Court adopted a very narrow reading of the Fourteenth Amendment that effectively eviscerated it for decades to come. In *Minor v. Happersett* (1876), the Court found that a state law prohibiting women from voting did not violate the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Supreme Court struck down the Civil Rights Act of 1875 arguing that its prohibition on private discrimination in public accommodations was beyond the authority of the federal government. The Court argued that under the Fourteenth Amendment the federal government could only regulate 'state action' and not private action. In *US v. Harris* (1882), the Court struck down the antilynching provisions of the 1871 Civil Rights Act on the grounds that, because lynchings were carried out by private citizens, they were not a state action that could be banned under the Fourteenth Amendment. Most infamously, in *Plessy v. Ferguson* (1896), the Court held 'separate but equal' accommodations to be acceptable under the Fourteenth Amendment.

Throughout the Gilded Age and Progressive Era, the Supreme Court stood firm as a defender of common law property rights and freedom of contract. The leading case of this era was *Lochner v. New York* (1905), in which the Supreme Court struck down a state law that set maximum working hours for bakers. Many reform advocates responded to these judicial restrictions on state regulation by demanding federal regulation to establish nationwide standards. However, in addition to invalidating many state laws that attempted to regulate business and establish rights for workers, the Court also stood in the way of efforts at reregulation at the federal level. For instance, in *Hammer v. Dagenhart* (1918), the Court struck down a federal law restricting child labor. Later, the Court blocked key elements of Roosevelt's New Deal. In *A.L.A. Schechter Poultry Corp. v. U.S.* (1935), the Court ruled the National Industrial Recovery Act unconstitutional, and in *Carter v. Carter Coal Co.* (1936) it invalidated federal regulation of working hours and wages in the coal mining industry.

The year 1937 marked a turning point, both in the Court's jurisprudence on economic regulation and in its stance on civil rights. The story of

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Roosevelt's clash with the Court over the New Deal in 1937 is well-known. As Roosevelt found his New Deal initiatives blocked by the Court, he threatened to 'pack the court' with additional appointees. Faced with the threat posed by Roosevelt's plan, the Court backed down and began to allow New Deal programs to withstand judicial scrutiny (Gely and Spiller 1992).

The less-appreciated aspect of the 'Constitutional Revolution' of 1937 is that the Court accompanied its turnaround on economic regulation with intensified attention to defense of civil rights (McCloskey 1960: 174). The very year that the Court clashed with Roosevelt, it asserted federal control over state criminal procedures in a more forceful way than ever before in *Palko v. Connecticut*. In 1938, the Court enforced the Fourteenth Amendment's equal protection clause in defense of African American's rights in the field of education (*Missouri v. Canada*), foreshadowing *Brown v. Board* and the momentous judicial interventions to come. In part, this new interest in civil rights marked a break from the past. However, in important respects, the Court's new individual rights jurisprudence paralleled and grew out of its long battle to protect individual economic rights against state governments. As McCloskey (1960: 171) observed, 'In a way the development of the due process clause to protect economic rights made the ultimate protection of other rights logically inescapable'.

During the 1960s, the United States experienced a dramatic increase in the number and scope of federally protected rights for individuals. This 'Rights Revolution'⁴ involved an explosion of both constitutional and statutory rights. The Warren Court extended the scope of constitutionally protected individual rights in areas involving freedom of speech and the press, rights against racial, sexual, religious, or age discrimination, the right to due process in both criminal and administrative procedures and created a new constitutional right to privacy. Congress responded to the civil rights movement with groundbreaking statutes such as the 1964 Civil Rights Act and the 1965 Voting Rights Act. Meanwhile, modeling themselves on the civil rights movement, other progressive movements of this period increasingly adopted a rights rhetoric and demanded the establishment of statutory rights in fields ranging from environmental protection, to workplace health and safety, to consumer protection to social welfare and rights for the disabled. Congress obliged and created a series of landmark statutes in various areas of social regulation, many of which empowered private parties to bring enforcement litigation by loosening standing requirements, permitting fee shifting, and allowing for various forms of class action suits.

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Enlisting private litigants to serve as its foot soldiers was, and remains, a central element in the federal government's enforcement strategy (Dobbin and Sutton 1998; Kagan 2001; Burke 2002). The federal bureaucracy did expand dramatically as new agencies were established to help enforce the new catalogue of rights established in the 1960s and 1970s (Sunstein 1990: 27–8). However, lawmakers recognized that the federal bureaucracy would remain relatively weak and would be unable to control the actions of state governments, local governments, or private sector actors from Washington. Given the limited capacities of the federal bureaucracy and the strength of the judiciary, a heavy reliance on decentralized rights litigation became a crucial tool in the federal government's efforts to democratize the American polity. AQ4

10.3.2 Federalism and rights in the EU

Like the US Supreme Court, the ECJ's initial attention to individual rights focused on protecting the rights of economic operators against state governments (Shapiro 2005, forthcoming). The ECJ played a crucial role in the creation of the EU's single market through a process of 'negative integration' (Scharpf 1999, 2003), striking down member-state regulations that constituted nontariff barriers to trade in violation of Community law. Litigation brought by private parties via the Article 234 (ex-Article 171) preliminary ruling procedure was crucial to this market-making project (Stone Sweet and Brunnell 1998; Alter 2001; Fligstein and Stone Sweet 2001). Given the limits on the Commission's enforcement capacity, the EP and the Commission had a particular interest in enlisting private litigants to enforce EU law against recalcitrant member-states. Even member-states that are less enthusiastic about private enforcement support it as a means through which to promote the uniform application of the law without building up a massive Eurocracy in Brussels. The fragmentation of political power at the EU level provided the ECJ with considerable insulation against political backlash, and thus emboldened it to interpret EU Treaty provisions and secondary legislation so as to expand rights and create additional bases for litigation (Weiler 1991; Alter 1998; Tallberg 2000; Tsebelis and Garrett 2001). AQ5

The EU has not limited its rights agenda to striking down national laws that infringed on economic rights. Rather, the EU has pursued an expansive positive rights agenda providing individuals with a range of economic, social, and political rights (de Búrca 1995; Flynn 1999; Engel 2001; Bignami 2005; Shapiro 2005). The EU's positive rights agenda had AQ6

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meager beginnings. The Treaty of Rome established a very limited number of rights guarantees, such as the right to equal treatment in employment regardless of sex, and contained no general catalog of fundamental rights. Indeed, in 1959, the ECJ ruled that it had no power to review Community acts with regard to fundamental rights (Case 1/58, ECR 1959, p. 43). However, the ECJ soon came under pressure from the German and Italian constitutional courts. After the supremacy and direct effect of EU law were established in the early 1960s, these constitutional courts became concerned that the EU could adopt laws that would violate fundamental rights protected in their national constitutions. In a series of decisions beginning in 1969, the ECJ assured national courts that the full spectrum of fundamental rights distilled from the 'common constitutional traditions' of the member-states were implicit in the EU treaties and that the ECJ would review EU legislation for conformity with fundamental rights (Craig and de Búrca 1995; Stone Sweet 2000: 170–8; Shapiro 2005 forthcoming). While supranational judicial protection of fundamental rights added little for countries, such as Germany, where national constitutional courts already provided this, such judicial review enhanced rights protection in countries, such as the UK, which lacked formal, constitutionally enshrined rights protection against acts of parliament.

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EU secondary legislation continues to expand the catalogue of 'statutory' rights for private parties in areas ranging from equal treatment of the sexes, to consumer protection, to free movement, to disability rights (Kelemen 2006). A few recent developments illustrate the trend. In the field of equal treatment of the sexes, ECJ interpretations of Article 141 (ex-Article 119) and a series of equal treatment directives have extended equal treatment protections from questions of pay to include issues such as pensions, part-time work, and pregnancy and maternity rights (Cichowski 2004). Article 13 of the Amsterdam Treaty empowered the EU to 'combat discrimination based on [...] racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Directives adopted pursuant to this Treaty provision, such as the Racial Equality Directive (2000/43/EC) and the Equal Treatment Framework Directive (2000/78/EC) establish antidiscrimination rights in the workplace and are likely to also create bases for antidiscrimination litigation in areas such as social security, health care, education, and public housing. The latter directive is modeled on the US Americans with Disabilities Act and empowers disabled persons to sue employers who fail to make 'reasonable accommodations' to accommodate their disability. In the area of consumer protection, a 2004 Regulation (261/2004) extends rights (including rights to compensation)

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for air passengers who face cancellations, long delays, or are denied boarding on overbooked flights, and a 2005 directive on Unfair Commercial Practices (2005/29/EC) empowers individuals and consumer organizations or competitors to take legal action against firms that engage in unfair commercial practices. In the field of corporate governance, EU directives on prospectuses (2003/71/EC), trans/109/EC and market abuse (2004/72/EC) have created new causes of action and rights for investors, and the Commission has called for strengthening of shareholders rights as part of its Action Plan on Modernising Company Law (COM (2003) 284 final) law. Finally, ECJ case law has significantly expanded the scope of EU social rights protections for migrants; in particular, they have extended migrants' rights of access to social security, unemployment benefits, education, and medical care (Conant 2006, forthcoming).

The range of rights protected under EU law is likely to expand substantially. The Charter of Fundamental Rights, which was signed and 'solemnly proclaimed' by the Commission, Parliament, and Council in 2000, establishes a long catalog of new rights, including social rights and antidiscrimination rights. Because the member-states refused to incorporate the Charter into EU law in the Treaty of Nice, it has no formal legal status. The Treaty establishing a Constitution for Europe would have given the Charter a formal legal status. However, in light of the resounding 'No' in the recent French and Dutch referenda, the Constitutional Treaty is unlikely to be adopted for the foreseeable future. While the prospects for ratification of the Constitutional Treaty appear dim and distant, much of the Charter of Fundamental Rights is likely to be incorporated into EU law in any event.

The EU's CFI has already invoked the Charter in a few decisions. To date, the ECJ has refused to follow the CFI and invoke the charter. Ostensibly, this would appear as a sign of reluctance on the ECJ's part to expand the scope of EU rights protection and the opportunities for litigation. However, I would suggest a more strategic interpretation of ECJ behavior. While the outcomes of national referenda were uncertain, the ECJ had powerful incentives to resist the temptation to apply the Charter. Euro-skeptic opponents of the Constitutional Treaty argued that the incorporation of the Charter of Fundamental Rights would lead to a further erosion of national sovereignty. An expansive reading of the Charter would have provided grist for the Euroskeptic mill and imperiled the Constitutional Treaty (also see Eeckhout 2002; de Búrca 2003: 67–73). With the Constitutional Treaty moribund, the ECJ now has little to lose by offering an expansive reading of the Charter of Fundamental Rights. Given its

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long-term interest in expanding the scope and power of European law, and its track record of extending fundamental rights protections, it is likely to do so.

The EU has not only created a wide range of new rights for individuals, it has also enhanced their opportunities to exercise these rights through its promotion of 'access to justice'. The EU has long relied on and celebrated the role of private parties as the enforcers of Community Law (Alter 2001; Schepel and Blankenburg 2001). In 1998, the Commission issued a Communication (COM (1997) 609) final emphasizing that consumers, firms, and citizens faced obstacles to justice and that the EU needed to encourage equal access to rapid, efficient, and inexpensive justice. At the 1999 Tampere Summit, the member-states called on the Commission to launch a series of judicial cooperation initiatives to create a 'European area of justice' based on transparency, democratic control, and access to justice. Subsequently, the EU has undertaken initiatives to expand financial support for private enforcement and to spread awareness of the potential for private parties to enforce EU law (Kelemen 2006). The ECJ too has acted to increase incentives for private enforcement of EU rights. Most famously, the ECJ established and expanded of the doctrines of supremacy⁵ and direct effect⁶. More recently, by establishing the principle of state liability in *Francovich*⁷ and subsequently expanding it (Tallberg 2000; Hunt 2001: 91), the ECJ has given would-be litigants a powerful incentive to pursue legal action against noncompliant states. In addition to the development of the state liability principle, the ECJ has made judgments that pressure member-states to increase damage awards domestically (Kelemen 2003, 2006). ECJ case law is also gradually expanding the ability of individuals to invoke EU directives in disputes with other individuals (through the principle of 'horizontal direct effect') (Kelemen 2003).

The ECJ's effort to complete the single market through the protection of economic rights has proven so successful that some critics argue it imperils democracy across the EU. Most prominently, Scharpf (1999, 2003) has argued that there is an asymmetry between the strength of the ECJ's ability to eliminate national social rights and protections in the name of the market, and the limited ability of EU legislative actors to respond by adopting new social policies and rights at the EU level. In short, according to Scharpf, the same fragmentation of political power that empowers the ECJ to engage in 'negative integration', paralyzes the EU lawmakers and prevents them from engaging in 'positive integration'. As a result, European integration systematically favors the interests of business and undermines the agendas of social democratic governments.

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This democratic deficit critique underestimates the degree to which new positive rights are being created at the EU level. Negative integration has, in some cases, undermined national governments' efforts to protect the 'social rights' of vulnerable groups. However, as in the United States decades earlier, such negative integration has generated political pressure for positive integration, and the EU has responded with an expansive positive rights agenda. A series of recent legal developments have increased the substantive basis for EU rights litigation, opened up new opportunities for private parties to bring litigation, and heightened their incentives to do so (Kelemen 2003; Shapiro 2005).

The parallels between the rights litigation strategies of the United States and EU are striking. Like their counterparts in the US federal government, EU institutions (the Commission, the EP, and the ECJ alike) have powerful institutional incentives to encourage private enforcement of EU law. Above all, because the Eurocracy is so small, popular myths notwithstanding, and because the EU lacks powerful fiscal tools, the EU's most effective means for influencing policy in the member-states is to enlist European citizens to enforce Community law on its behalf.

10.4 Federalism and participation: transparency, openness, and accountability

Critics of the EU's supposed 'democratic deficit' and states' rights critics of distant, 'inside the Beltway' politics in the United States routinely argue that policymaking at the federal level reduces opportunities for effective public participation in the democratic process. According to this classical republican, 'the grassroots-is-always-greener' vision of democracy, policymaking at the state or local level is inherently more accessible and accountable to citizens than policymaking at the federal level. Of course there is an alternative vision of participatory democracy, which highlights the venality, provincialism, and even incompetence of state and local government and emphasizes the greater efficiency, professionalism, and accountability of the federal government. For Progressive Era reformers or later Civil Rights advocates in the United States, or for western Europeans imposing the *acquis communautaire* on eastern European states aspiring to membership in the EU, enhancing federal power was seen as synonymous with advancing democracy. These contrasting visions force us to ask whether the shift in authority from state to federal governments that is fundamental to the development of any 'coming together federalism'

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(Stepan 2001) will enhance or undermine the quality of democratic participation in the polity.

Certainly, the shift in authority from constituent states to the federal level in the United States and EU has moved the locus of decision-making further from the citizen. *Ceteris paribus*, when decisions are taken at a greater distance from the citizen, opportunities for participation diminish. However, this loss of democracy has been compensated for in significant ways by the great emphasis that the federal governments in both polities have placed on transparency, openness, and accountability in policymaking. Ultimately, in both polities the growth of federal power has actually served to enhance opportunities for democratic participation at the state level.

10.4.1 Federalism and participation in the US

For all of its failings, the US federal government is one of the most transparent, open, and accountable governments in the world. Openness, transparency, and accountability are hallmarks of American law and regulatory practice across a broad range of policy areas. These attributes manifest themselves in the prevalence of highly detailed, transparent legal rules and regulatory procedures, requirements of open consultation entrenched in administrative procedures, extensive disclosure requirements, and the active use by regulators of formal implementation and enforcement proceedings (Kagan 2001; Kelemen and Sibbitt 2004). Openness and transparency enhance the accountability of American government by deterring actions that are unlikely to withstand public scrutiny and by arming a wide array of actors with otherwise unavailable information.

The emphasis on openness, transparency, and accountability so prevalent in American administrative law is rooted in the United States' constitutional structure. The separation of legislative and executive power creates acute agency problems, as legislators may find themselves unable to count on the executive to faithfully implement their policy mandates. Lawmakers can use codified administrative procedures to minimize 'agency losses' (McNollgast 1987, 1989; Moe 1990; Epstein and O'Halloran 1994, 1999; Horn 1995). First, they can stack the deck in administrative procedures by establishing procedures that open the administrative agency to the scrutiny of the political constituencies who backed a statute in the first place. Second, they can enlist the courts and private litigants to control the executive. Legislators recognize that the fragmentation of power insulates the judiciary against political backlash

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and that courts may therefore be willing to play an active role in constraining bureaucratic discretion. Lawmakers therefore draft statutes that specify in great detail the goals that bureaucratic agencies must achieve, the deadlines they must meet, and the administrative procedures they must follow. They provide for private causes of action (including the sorts of individual rights mentioned above) assuring their allies will have access to the courts to hold the executive accountable (Moe 1990; Horn 1995; McNollgast 1999). While these dynamics originate at the federal level, they eventually influence the degree of discretion of state governments. States implement much of federal legislation, and when states implement federal statutes, they too must meet the standards of openness, transparency, and accountability required in the APA and the relevant statute.

Many of today's rights of participation and transparency requirements trace their origin directly to the 1946 APA. The APA establishes formal, judicially enforceable administrative procedures that apply across the federal bureaucracy and establishes the procedural rights of individuals in the regulatory process. As McCubbins, Noll, and Weingast (McNollgast (1999)) have argued, after Roosevelt's death, New Deal Democrats foresaw that they were likely to lose control of the federal administrative apparatus they had recently created. Moreover, as the judiciary was loaded with Roosevelt appointees, New Deal Democrats trusted that they could enlist the courts to enforce procedural due process requirements and defend New Deal programs against attempts by a Republican administration to undermine them. The APA's formalization of administrative procedures substantially enhanced opportunities for interested actors in society to participate in the bureaucratic policymaking process.

The emphasis on transparency and accountability grew with the expansion of the regulatory state during the Rights Revolution (Sunstein 1990). Despite the controls instituted in the APA, by the 1960s, critics such as Lowi (1969) argued that many federal agencies had been captured by the very agencies they were intended to regulate. In the early 1970s, the Democratic Congress that pushed through a raft of statutes establishing new social regulations was confronted by the fact that a Republican administration would control the implementation of these statutes. Moreover, federal legislators recognized that much of the actual implementation of federal statutes would be delegated to state governments. In light of state resistance to enforcing federal civil rights, federal lawmakers had a well-founded distrust of state governments. Distrust of the federal executive and state governments led Congress to enact statutes with rule-making procedures more detailed than those mandated by the APA, such

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as requirements for oral hearings subject to precise timetables, considering petitions regarding rule-making decisions, taking into account the views of a variety of interests and giving detailed reasons for decisions (Melnick 1983, 1996; Moe 1989; Shapiro 1988).

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Ultimately, the codification of transparent, inclusive administrative procedures at the federal level (Stewart 1975; McNollgast 1999) had a dramatic impact on policymaking practices at the state level. State governments that might otherwise have maintained much more closed, opaque practices were pressured to enhance transparency and professionalism in order to meet federal standards (Derthick 1999). As the pressure to fulfil federal administrative and regulatory mandates has grown since the 1970s, state governments professionalized their administrations, rapidly increased their revenues and enhanced opportunities for participation in their policymaking processes in line with federal requirements. As a result, as Kincaid (1994) has pointed out, the seeming paradox of the current era of coercive federalism is that the assertion of federal power has actually worked to strengthen state governments.

10.4.2 Federalism and participation in the EU

Some critics of the EU's 'democratic deficit' mockingly suggest that if the EU were a country that applied for membership, it would likely fail to meet the democracy criteria and be rejected. The EU certainly does lack some fundamental features of a democratic polity; however, many of the criticisms levied by the democratic deficit literature are misguided (Moravcsik 2002). The EU's primary shortcomings as a democracy concern electoral accountability. Voters do select their representatives to the EP and the national governments that represent them in the Council of Ministers. However, neither European nor national elections are contested in a way that gives voters an opportunity to choose between parties or candidates with rival agendas for EU policy (Hix 2003; Follesdal and Hix 2005). Much of the literature on the democratic deficit, however, ignores this very real deficit and focuses instead on the red herring of the EU's purported deficit of openness and transparency (Follesdal 1997; Hix 2003).

Such critiques, however, hold up the EU against a nonexistent ideal-type of democracy and do not withstand comparative scrutiny with real, existing democracies. In his comparative study, Zweifel (2002, 2003) found that the EU's policymaking processes were as open and transparent as those in Switzerland and the United States. More generally, in terms of openness, transparency, and bureaucratic accountability, the EU compares

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favorably with the governments of most EU member-states. To take but one potential measure, if ranked alongside current EU member-states on Transparency International's Corruption Perception Index,⁸ the EU would surely score below paragons of transparent government such as Finland (ranked 1st), but most likely above systems long characterized by opaque policymaking processes and riddled with corruption, such as Greece, Italy, and even France (ranked 50th, 35th, and 23rd, respectively). The EU's relative transparency and accountability is reflected in public opinion. Findings from the 2004 Eurobarometer survey reflected a long-standing pattern whereby on average, more European citizens trust the EU than their national political institutions (with 41% responding that they 'tend to trust' the EU, while only 30% 'tend to trust' national institutions) (European Commission 2004: 5). Thus, while it is tempting to focus on the widespread criticism and distrust of Brussels bureaucrats, we should recall that European citizens reserve even greater distrust for their national politicians.

As in the United States, the combination of horizontal and vertical fragmentation of power rooted in the EU's institutional structure is encouraging the emergence of an approach to administrative procedures that emphasizes transparency, accountability, and strict judicial enforcement. Public distrust of distant, potentially unaccountable Eurocrats in Brussels, coupled with member-states' distrust of each other's opaque regulatory practices, and the EP's distrust of the member-states and the Commission has led to increased demands for transparency and public participation in EU regulatory processes (Dehousse 1992; Harlow 1999; Franchino 2000; Shapiro 2001; Kelemen 2002; Bignami 2004). The EU's legislative actors recognize that, once enacted, policies may be difficult to change and that the EU's bureaucratic agents (e.g. the Commission and the member-state administrations) will have considerable discretion in implementing them (Tsebelis and Garrett 2001). Therefore, when drafting legislation, these legislative principals have incentives to constrain the discretion of their bureaucratic agents by drafting detailed, action-forcing laws and enlisting the ECJ and national courts to enforce them (Franchino 2001).

These developments at the European level are having an impact on national approaches to policymaking. While the traditional policymaking styles of EU member-states of course differ significantly (Richardson 1982), the approaches to policymaking that long predominated across western Europe were more informal, cooperative, and opaque than those in America. In many policy areas, closed networks of bureaucrats and

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regulated interests developed and implemented policies in close concertation—often with little scope for public participation. The systems of regulation prevalent across Europe—ranging from the corporatism found in Austria, Sweden, and Germany (Lehmbruch and Schmitter 1982; Goldthorpe 1984), to the dirigisme of France (Suleiman 1974; Hayward 1982), to the ‘chummy’ cooperative style of British regulation (David Vogel 1986; Steven Vogel 1996)—all relied heavily on closed policymaking networks and empowered bureaucrats to pursue informal means of achieving policy objectives. While these national systems had many virtues, these did not include transparency and openness. As member-state administrations are increasingly occupied with the implementation of EU policies, they are finding themselves pressured to abandon their traditional administrative practices and comply with the EU’s more strictly codified procedures (Schwarze 1996). The ongoing harmonization of administrative procedures on the EU model is enhancing opportunities for democratic participation in administrative processes throughout the EU. The impact will be greatest in member-states with traditions of closed, opaque administrative processes (such as France), where it promises to open up new opportunities for participation for previously excluded groups.

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The growth of federal power in the United States and EU has served to enhance the openness and transparency of administrative procedures throughout both polities. However, federalism has undermined democratic accountability in one important respect. In both the United States and EU, federal and state governments often divide authority in particular policy areas along functional lines, with the federal government playing a lead role in policymaking and the states controlling implementation. This division of authority between state and federal governments leads to a ‘credit assignment problem’ (Bednar 2006, forthcoming). State and federal governments do their best to claim credit for policy successes while shifting blame for failures to one another. This makes it difficult for voters to assign credit and blame and to hold the responsible authorities accountable for their actions. The experience of the United States, EU, and other federal polities suggests that this problem is immutable (Kelemen 2004). One may begin with a model of dual federalism in which the federal and state governments are to act only in separate watertight compartments corresponding to their respective policy competences under the constitution. However, this model is rarely strictly adhered to in practice, as the potential for credit claiming and blame shifting is attractive to both state and federal governments

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and leads them to establish some form of shared competences (Mashaw and Rose-Ackerman 1984; Weaver 1986).

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10.5 Conclusion

The constitutional structures of both the United States and EU combine federalism with the fragmentation of power at the federal level. In both cases, the fragmentation of power among the political branches has encouraged the judiciary to play an active role in the policy process. Working in this institutional terrain, advocates of 'democratization' in both polities have adopted similar strategies, relying on individual rights litigation and codification of transparent administrative procedures to promote the expansion of rights, transparency, and accountability. Both approaches have enabled otherwise weak federal governments to enlist citizens and interest associations as the eyes, the ears and, ultimately, the enforcers of federal law. The role of the US federal government in enhancing democracy at the state level has long been recognized in the scholarly literature. By contrast, research on democracy in the EU has, with the exception of literature on developments in East Central Europe, focused primarily on how the EU undermines national democracy. Despite the EU's shortcomings as an electoral democracy, we should recognize that it is expanding individual rights and opportunities for participation in policymaking in significant ways.

Notes

1. See, for instance, Hix (2003), Moravcsik (2002), and Follesdal and Hix (2005) on the EU and Riker (1964) and Frymer and Yoon (2002) on the US.
2. Reform advocates might also attempt to convince the federal government to preempt state authority in a policy area, or to apply fiscal levers such as conditional grants or cross-cutting sanctions. However, federal governments are often loath to do the former and ineffective at applying the latter. See Kelemen (2004).
3. Originally, the Bill of Rights was designed to limit the actions of the federal government, and did not apply to state governments. This interpretation was supported by the Marshall Court in *Barron v. Baltimore* (1833).
4. Sunstein 1991; Burke 2001, also see Epp (1998: 26–30) who takes a different view on dating the starting point of the rights revolution.
5. Case 6/64 *Costa v. ENEL* [1964] ECR 585.
6. Case 26/62 *Van Gend en Loos* [1963] ECR 10.

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7. Joined Cases C-6 and C-9/90 *Francovich and others* [1991] ECR I-5357.
8. Available at: http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.doc

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