

# Michigan Law Review

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Volume 81 | Issue 4

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1983

## Trade Restrictions, Federalism, and the Judiciary: Comparative Perspectives

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### Recommended Citation

Mackenzie Stuart, *Trade Restrictions, Federalism, and the Judiciary: Comparative Perspectives*, 81 MICH. L. REV. 1122 (1983).

Available at: <https://repository.law.umich.edu/mlr/vol81/iss4/55>

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# TRADE RESTRICTIONS, FEDERALISM, AND THE JUDICIARY: COMPARATIVE PERSPECTIVES

*Lord Mackenzie Stuart\**

COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE. Edited by *Terrance Sandalow and Eric Stein*. New York: Clarendon Press, Oxford University Press. 1982. Two volumes. Pp. xxxix, 600. \$39.50 per volume.

Times, happily, have changed since Alexander Hamilton could write of Europe extending her dominion "by her arms and by her negotiations, by force and by fraud" and say that "[i]t belongs to us to vindicate the honour of the human race, and to teach that assuming brother moderation."<sup>1</sup> Europe has long since acknowledged that in the field of constitutional studies it has much to learn from the United States and that the learning process is best conducted in an atmosphere of joint endeavor.

If proof were required it is to be found in these two handsome volumes produced with the restrained elegance one associates with the Clarendon Press. Their object, as the preface by the editors states, is to describe "the roles played by the Supreme Court of the United States and the novel Court of Justice of the European Communities in the creation and day-to-day life of the continent-wide markets on both sides of the Atlantic" (p. xi).

This intention has been most admirably carried out in practice. The individual studies in the work are based on papers prepared for discussion at a meeting of European and American judges, scholars, officials, and legal practitioners held at Bellagio in July 1979. In general, conference papers published "in the raw" are not very appetizing fare. There is often a lack of coordination among contributors, unnecessary duplication and distortion of emphasis. What is remarkable about *Courts and Free Markets* is that the editors and contributors — the editors themselves being important contributors — have given to this work its own coherence and unity and have thereby significantly advanced our understanding of the problems discussed.

## I

From its inception, the European Community has not lacked its informed observers in the United States. They have drawn on their knowledge of American constitutional law and history to make valuable comparisons with their own system. As Professor Stein himself, Professor Hay of Illinois, and Professor Waelbroeck of Brussels, have said in their

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1. THE FEDERALIST No. 11, at 66-67 (A. Hamilton) (H.C. Lodge ed. 1892).

magisterial work on the European Communities: "The American Experience — its achievements as well as its failures — in building a federal type legal framework for a single market of continental proportions is obviously relevant to the European effort, and the differences and similarities in techniques are instructive for European as well as American lawyers."<sup>2</sup> Or to quote Professor Feld and Mr. Slotnick of the University of New Orleans, "[t]he similarities are especially striking when one considers the decisions rendered by the United States Supreme Court during its formative years, which correspond to the first twenty or so years of the fledgling Community Court. The work of John Marshall was and is well-known to Community Court Justices and consciously or subconsciously may have served as an inspiration and perhaps sometimes as a warning."<sup>3</sup>

On the other hand, despite the reference just made to the work of John Marshall, it has seemed to me that the general practitioner in Europe, be he judge or counsel, is largely unaware of the rich seam of American material available to him in his own libraries. Such awareness as there has been has existed in the university and in a handful of specialists although, among a younger generation, there are signs of increasing knowledge and interest which the publication of *Courts and Free Markets* can only assist.

After an introductory chapter by the editors titled "An Overview" — a chapter which merits particular attention — follows a chapter on "The Growth of Central Power, its Incentives and Limitations," viewed from the respective standpoints of the United States and the European Communities. Similarly structured studies deal with the free movement of goods (chapter III) and the free movement of persons and corporations (chapter IV). "Central power control over discriminatory state taxation" is treated as a separate topic and the work ends with a chapter entitled "Central Pre-emption of State Authority and Related Problems." Inevitably this has led to some duplication of material (there are for example no less than seventeen separate references to *Gibbons v. Ogden*<sup>4</sup>) but this is, if anything, an advantage since the several contributors have been left free to develop their material as best suits their own requirements. Indeed, it is fascinating to see the variety of stones hewed from one and the same quarry.

## II

The theme of the volumes, of course, presupposes an affirmative answer to the broad proposition that a useful comparison can be drawn between the problems facing the European Court and the Courts of the United States respectively and the solutions which they have found. Obviously one cannot push the analogy too far.

In the first place there are the constitutional differences. No court operates in a vacuum. Its duties and its powers can only be considered against the relevant constitution of which the judiciary is only one element. At the

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2. E. STEIN, P. HAY & M. WAELBROEK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* vii (1976).

3. Feld & Slotnick, "Marshalling" the European Community Court: A Comparative Study in Judicial Integration, 25 *EMORY L.J.* 317, 354 (1976).

4. 22 U.S. (9 Wheat.) 1 (1824).

root, then, of any valid comparison between the European Court of Justice and the United States Supreme Court there must be the underlying premise that the constitutions under which they operate can, at least to some degree, be equiparated. To describe the European Community as "quasi-federal" both poses and begs the question; yet some such statement is necessary if a valid approximation is to be established, since the constitution of the United States is not only the oldest but the most classic federal constitution in being.

Part of the difficulty lies in defining the word federal. It means many things to many people and in certain political quarters the word arouses quite remarkable passion and heat.

The Community is certainly not a federal state in the American sense. As yet the European Parliament has no power of initiating legislation; legislative power is in the hands of institutions not directly answerable to an electorate, and there is little or no parallel to the executive power of the President.

But as was said only a few years ago,

'Federalism' is a much misused word, feared by some as being no more than a concentration of power at the centre of a system, an attempt to impose autocratic decision-making over a wide area in opposition to local rights and by others as meaning the dissolution of all government. More accurately it means the distribution of powers and responsibilities to appropriate political levels and types of institutions, both up and down the scale, so as to combine representation and authority, union and diversity, organization and freedom.

. . . If it is accepted that different levels of government are appropriate to deal with different aspects of policy making the essence of federalism is already there.<sup>5</sup>

Nonetheless, in view of the emotion associated with the word federalism in certain quarters in Europe, it is perhaps better to avoid it altogether and say no more than this: If one is faced with two systems of government — in the widest sense of the word — whose operation rests on the assumption that to be effective different problems must be treated at different levels, there is a basis for comparison irrespective of the label which you attach to each system.

On that limited basis does this assumption apply to both the United States and to the European Communities? The answer can only be yes. One recalls the well-known statement by the European Court of Justice in the leading case of *Costa v. E.N.E.L.*<sup>6</sup> that "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields,

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5. FEDERAL SOLUTIONS TO EUROPEAN ISSUES 1, 13 (B. Burrows, G. Denton & G. Edwards eds. 1978).

6. 1964 E. Comm. Ct. J. Rep. 585, [1961-66 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8023.

and have thus created a body of law which binds both their nationals and themselves.”<sup>7</sup>

There remain nonetheless a number of barriers in the way of making too close a comparison. First, there are the structural or institutional differences. For example, the traditional division of powers into legislative, executive, and judicial which exists in one form or another in the United States and in each of the Member States of the European Community cannot easily be applied to the fourfold institutional structure of the Community — the Council, the Commission, the Court, and Parliament. Perhaps one of the most striking illustrations is this: Although one speaks in a general way of “Community legislation” the EEC Treaty speaks only of “Acts of the Council or Acts of the Commission” — thus making no real distinction between normative legislation and purely executive decision.

In the second place, the content of the exclusive power of legislation conferred upon Congress — its pre-emptive power as the volumes under review would describe it — is very much wider than that conferred upon the institutions of the Community. When one takes into consideration also the nature and extent of presidential and executive power, may one not ask whether this difference is not merely a question of degree but rather one of kind?

In the third place, from a European standpoint, there are the differing dimensions of time and territory, factors which, for the reviewer at least, must always be kept in mind when making any comparison between the work of the federal courts in the United States and the work of the Court of Justice of the European Communities.

Take first, time. The United States has been in business for much longer than the Community. More than two centuries have elapsed since the Declaration of Independence and only thirty years since the signing of the Treaty of Paris founding the original Community, the Community of Coal and Steel, and only twenty-five years since the signing of the European Economic Treaty. The other factor is territorial. Although the population of the enlarged Community is not so different from that of the United States, some 260,000,000 as against 214,000,000, in size they are vastly different. Europe of the nine is 1,600,000 square kilometres against the 9,000,000 of the United States. The United States’ Constitution was conceived in terms of thirteen East Coast States, sea-girt for the most part and rural in their economy. In the interval the territorial changes were immense. In little more than half a century the thirteen colonies with their window on Europe became the immense country we know today stretching from the Arctic to the Gulf of Mexico and from the Atlantic to the Pacific.

The territorial dimension does not end there, of course. One has to reckon with the traumatic events of the Civil War and the enormous surge of entrepreneurial activity that followed upon it. It is enough to say that the

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7. 1964 E. Comm. Ct. J. Rep. at 593, [1961-66 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8023, at 7385.

8. *See* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 143.

9. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (Treaty of Rome).

eighteenth-century Constitution has had to be changed and interpreted afresh to take account of changing circumstances of space and economic background. Marshall's observation that the Constitution was "intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs"<sup>10</sup> has been proved right by events. Changes there have been in Europe during the past thirty years certainly, not always for the better, but the scale has been wholly different. Thus the difficulties in the way of making too close a comparison are twofold. If one pursues the analogy of the European endeavor in the past thirty years with the achievements of the Marshall Court more than 150 years ago the vastly different backgrounds must be taken into account. If one seeks to compare present-day solutions to present-day problems on both sides of the Atlantic one does so against, respectively, the short history of the European Communities and the long experience in the United States of adapting the Constitution to changing needs.

It is characteristic of the integrity of *Courts and Free Markets* that these difficulties are faced unflinchingly at the outset. They are stated and explained by the editors in their opening chapter with skill and point. A similar and excellent discussion, but from the European angle, is to be found in Professor Waelbroeck's closing chapter on pre-emption. Indeed, it is by emphasis placed on the differences of institutional structure that *Courts and Free Markets* has frequently something of value to say on both systems.<sup>11</sup>

### III.

It is, however, when one comes to the detailed problems encountered by the courts in the United States and by the courts<sup>12</sup> in Europe that parallels become striking and exciting. One could give many examples, but let three

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

11. To give one example among many, in discussing the differing levels of integration between the two systems, the editors have this to say:

Unlike the Congress, the Council currently acts more as a diplomatic conference, in which states pursue discrete national interests, than as a common institution which decides in the common interest, if necessary by majority vote. Since negotiations continue until unanimity emerges, the decision often reflects the lowest common denominator of national positions at the lowest level of integration policy. The bargaining process is fraught with a distinct risk that states may accept a Treaty violation by one of their own as a *quid pro quo* or in the expectation that their own similar infringement may also receive the blessing of the Council. Such compromises would lead to a gradual disintegration of the Common Market. It is therefore essential for the Court to check any serious deviation from a rigorous and uniform application of the free trade rules throughout the Community. In the United States, the risk of disintegration of the national market, at this stage of the federation at any rate, is minimal.

Pp. 31-32.

12. I say "courts in Europe" in the plural because the extent to which questions of European law, at least in the first instance, come before national courts is not perhaps sufficiently realized in the United States. The opportunity for private individuals to bring a case before the European Court exercising original jurisdiction (a "direct action") is very limited, whereas national courts are always available to hear actions brought to enforce rights under Community law. Such cases reach Luxembourg only through the procedure provided for in Article 177 of the Treaty of Rome, 298 U.N.T.S. at 76, whereby a national judge may obtain a preliminary ruling by the Court of Justice on problems dealing with Community law. In that sense, every judge of every court throughout the ten Member States is a Community judge and may in that capacity have to interpret and apply Community law.

suffice. Mr. Justice Linde, in his section on "Transportation and State laws under the United States' Constitution" — admirable particularly for its broad historical approach which for the interested but perhaps only modestly informed European reader is a most excellent introduction — discusses (at p. 150) the judgment of Chief Justice Taney in the *License Cases*<sup>13</sup> and his well-known if much criticized observation that the States may, "for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce of its own ports and harbours and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."<sup>14</sup>

The parallel is marked between the *License Cases*, which concerned the sale of intoxicating liquor brought from outside the State, and the recent decision of the Court of Justice of the European Communities concerning the Belgian *Loi Vandervelde*.<sup>15</sup> Shortly put, the *Loi Vandervelde*, which was introduced at the end of the First World War to combat the widespread alcoholism of the day, forbade in Belgium the selling of alcoholic spirits (over a certain strength) in any public place for consumption on the premises. Foreign visitors to Belgium may have been surprised to know that such a law continued to exist, but it certainly existed until very recently, and a prosecution was challenged on the ground that it infringed the free-movement-of-goods article of the Treaty of Rome. A question designed to resolve this problem was submitted by the Court of Appeal at Liege to the Court of the Communities. The Court in its judgment preferred not to place its reasoning on the protection of health but on the absence of discrimination between imported and home produced goods. "Such a legislative measure," it said, "has therefore in fact no connexion with the importation of the products and for that reason is not of such a nature as to impede trade between Member States."<sup>16</sup> The end result, however, of the *Blesgen* case was the same as that in the *License Cases*.

Another parallel is to be found in the wide use made in the second half of the nineteenth century of the "due process of law" provisions of the fourteenth amendment which, in another case mentioned, was even invoked to guarantee the freedom to operate a slaughter house (p. 156). One may compare this with the contention recently presented before the Court of Justice that a Community regulation imposing a standstill on fresh planting of vineyards — a measure introduced to reduce the total quantity and to improve the quality of Community wine — should be equated with expropriation and was invalid since it conflicted with a general principle of law, unwritten in Community law but found in the law of Member States.<sup>17</sup> In that case, the Court readily recognized that Community law forbade expropriation without compensation and then only in accordance with proper legal safeguards but that it was necessary to distinguish between "a possible

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13. 46 U.S. (5 How.) 504 (1847).

14. 46 U.S. (5 How.) at 579.

15. See *Blesgen v. Belgium*, Case 75/81 (E. Comm. Ct. J. Mar. 31, 1981) (transcript available on LEXIS, Eurcom library, cases file).

16. *Blesgen v. Belgium*, Case 75/81, at 60 (LEXIS transcript).

17. *Hauer v. Land Rheinland-Pfalz*, 1979 E. Comm. Ct. J. Rep. 3727, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8629.

infringement of the right to property and, on the other hand, a possible limitation upon the freedom to pursue a trade or profession."<sup>18</sup> The regulation fell into the latter category and was upheld.<sup>19</sup> The judgment in that case is a good example of the readiness in an appropriate case of the Court of Justice to incorporate as part of Community law principles not expressly to be found in any of the constituent treaties.

In a different field one might cite the evolution in the United States of the case law on free movement of persons so clearly expounded by Professor Rosberg. One is immediately struck by the pertinence to Europe of cases which he cites such as *Edwards v. California*.<sup>20</sup> Take the following quotation from Mr. Justice Byrnes: "It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'"<sup>21</sup>

Was this formulation in the minds of the framer of the Treaty of Rome, Article 48 of which says, "[t]he free movement of workers shall be ensured within the Community" and which continues to the effect that such freedom of movement "shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions"?<sup>22</sup> Probably not, but the concept and spirit informing both statements remains identical.

Nonetheless the Treaty of Rome provides expressly, Article 48, paragraph 4, that the freedom of movement of workers is not to apply to employment in the public service.<sup>23</sup> This in turn invites comparison with the case discussed by Professor Rosberg (p. 329) concerning the existence of State power to exclude aliens from public works employment or the State Civil Service and which has now been denied by the Supreme Court.<sup>24</sup> It is interesting to compare the reasoning of the Supreme Court in that case with that of the Court of Justice in the relatively recent judgment of the Court which declared that Belgium had no right to reserve certain routine and relatively menial jobs for its own nationals.<sup>25</sup>

#### CONCLUSION

Your reviewer is conscious that he has laid too much emphasis on the chapters of *Courts and Free Markets* dealing with the United States. This is perhaps inevitable since he approached the volume from the point of view

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18. Hauer, 1979 E. Comm. Ct. J. Rep. at 3745.

19. Hauer, 1979 E. Comm. Ct. J. Rep. at 3749-50.

20. 314 U.S. 160 (1941).

21. 314 U.S. at 173-74 (quoting *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935)).

22. Treaty of Rome, 298 U.N.T.S. at 36.

23. *Id.*

24. See *Sugarman v. Dougall*, 413 U.S. 634 (1973).

25. *Commission v. Belgium*, 1980 E. Comm. Ct. J. Rep. 3881, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8726.

of one seeking to be further instructed in the relevant sectors of United States constitutional law. On the other hand, this review will be largely read by those in the United States wishing to know more about the law of the Communities. Without attempting to single out any particular contribution it can be said with confidence that the European law material is clearly, succinctly and perceptively deployed. My only suggestion, and it is a minor one, is that while the law of the Communities has but a short history in its present form there are some antecedents and that it might have been helpful to have included a brief *résumé* of earlier attempts to form a free market. Not that there are many close parallels, but a brief description of the operation of the Zollverein, the Prussian-led customs union of the nineteenth century, and some of the earlier attempts in the twentieth century to harmonize tariffs (culminating in GATT) might not have been out of place. But this is indeed a minor criticism, if criticism at all.

In short, *Courts and Free Markets* is an outstanding work to be read with profit by readers on both sides of the Atlantic. More than that, the several contributions add up to a classic of its kind and I am confident that in the years to come it will be a quarry for other writers — with or without due acknowledgement. In the field of academic writing there can be no higher praise.