The Locus of Power in the European Union: Determining Whether Judicial Power Will Remain at the Nation-State Level, or if the European Union Will Merge into a Federal Institution

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: /s/ Tiffani Wesley Date: 5/22/2014

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Minor Dissertation

MPol International Relations

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Abstract

Larry Backer opines that 'Most of the academic work regarding the "lessons" offered by American federalism for the European Union ("EU") and other supra-national systems has predominantly focused on an understanding of post-Civil War American federalism. It remains, on that account, extremely superficial.' Backer notes that there are important lessons to learn from Calhoun's marginalized understanding of federalism that provide emerging supra-national unions like the European Union with a powerful conceptual foundation for the construction of non-national federal systems of government. The research question seeks to test this debate, first by following the theoretical arguments that took place within the United States on the issue surrounding states' rights versus federalism, and second through the various court cases that have occurred within the European national courts and the European Court of Justice. In essence, the research question seeks to determine where the locus of power currently resides, or will tend to reside, between to the European Union and its member nations.

Introduction

Larry Cata Baker opines that 'Most of the academic work regarding the "lessons" offered by American federalism for the European Union ("EU") and other supra-national systems has predominantly focused on an understanding of post-Civil War American federalism. It remains, on that account, extremely superficial.' He argues that there are many lessons to be learned by the arguments set forth by pre-Civil War states-rights advocates, particularly those of John C. Calhoun. Calhoun's marginalized understanding of federalism provides an alternative vision of the possibilities of federal organization for emerging supra-national unions, the most important of which is the European Union. This vision can provide a powerful conceptual foundation for the construction of non-national federal systems of government.

Although the great debate about federalism ended abruptly after the Civil War and the US emerged with a strong, centralized government, this debate is re-emerging throughout Europe and the political future of the European Union and other supra-national systems will likely be based on a different resolution. As such, it is important to understand the possibilities inherent in this alternative resolution and seek to reconsider the previously accepted 'truths' about the relationship of supra-nationalism to federalism, and

a more sophisticated understanding of the possibilities of federalism in domestic and international law. These different theories of multi-state association may prove forward-looking in the twenty-first century world of small, ethnically homogenous communities and large, pluralistic super-unions.

As evidenced by the Maastricht Treaty and Lisbon Treaty preambles, Europe seeks to "create an even closer union among the peoples of Europe," and "to continue the process of creating an even closer union among the peoples of Europe." In other words, these preambles seek to form a federation similar to that of the United States, by attempting to further consolidate and centralize power. In contrast, many of the Member States of the European Union have shown resistance through their national and constitutional courts, 'to this even closer union,' as they wish to remain within a looser system of allied nation states.

The research question seeks to test this debate, first by following the theoretical arguments that occurred within the United States on the issue surrounding states' rights versus federalism, and second, through the various court cases that have occurred within the European national courts and the European Court of Justice. In essence, the research question seeks to determine where the locus of power currently resides, or will tend to reside, between the European Union and its member nations. Accordingly, the research question sets up as the null hypothesis that the European Union will develop into a federal institution united under a strong central government. The alternative hypothesis posits that the locus of power will remain at the nation state level, concluding that national courts will remain the arbiter of European Union interpretation.

At the outset this paper has to link the early debates within the United States on federalism and the current debates within the European Union. Many would argue that this link is spurious, as US federalism is based on a constitution while the European Union has been established through a series of treaties. Thus the paper will open with a set of arguments that clearly link the two. In short, the United States was founded by a group of sovereign and independent states, initially united under the Articles of Confederation. The Articles of Confederation failed, and these states subsequently signed the Constitution, creating the federal government. Similarly, the EU was established by a group of sovereign and independent Member States that signed the Treaties that created the European Union.

In both cases, a group of sovereign and independent states signed documents that led to the creation of a governing body.

After establishing the link between the US Constitution and the treaty-based EU, this paper will discuss the manner in which the US veered from this 'group of independent allied states' through decisions made by the Marshall Court, which delegated the power to itself to interpret the Constitution, and significantly increased the power of the federal government. The court essentially transferred discretionary authority from the states to the federal government, turning the states into an appendage of the federal government. By controlling for this interpretation from the US Courts, the paper will be able to test the arguments through the EU Courts to see where the EU is likely to move: toward a closer, centralized federal union or towards a legal framework that places the locus of power squarely with the Member States.

In light of the Supreme Court decisions, this paper will subsequently delve into the arguments set forth by Confederates like John Calhoun, Robert Hayne, and Thomas Jefferson, compared to Federalists like Alexander Hamilton and John Marshall. Confederates advocated states' rights, nullification, and the belief that the United States was an association of states, each of which could nullify an act set forth by the central government if the state believed that the central government overstepped its boundaries. Federalists advocated for the supremacy of the central government and the United States Supreme Court over the individual state governments and state courts. There was a lively debate in the United States after Chief Justice John Marshall's ruling in *McCulloch v. Maryland* until the US Civil War as to what form of federalism would be used. These arguments provide important lessons of American federalism and an alternative version to the way we currently conceive federalism and federal organizations.

Additionally, this paper will focus on the path taken by the European Court of Justice to centralize and consolidate judicial power in Europe. The European Court of Justice has made attempts to federalize the European Union through a series of cases that have mirrored those that laid the federal foundation for the United States. Some of the national and constitutional courts have continuously held that their national constitutions and courts take precedence over ECJ decisions. In many cases, it is an issue of national identity and democratic legitimacy. The primary issue in the EU is centered on the supremacy of the

ECJ over the courts of the member states. Some of the national and constitutional courts have continuously held that their national constitutions and courts take precedence over ECJ decisions. In many cases, it is an issue of national identity and democratic legitimacy. These arguments reflect many of the arguments made by pre-US Civil War confederates that were rejected after the Civil War. Thus, this paper will analyze the foundational cases of the European Court of Justice and the response by the Member States' national and constitutional courts, especially the cases that ruled on the implementing legislation of the Maastricht and Lisbon treaties to determine where the locus of power currently resides between the European Union and its member nations.

Literature Review

There has been scholarship on some of the individual areas covered in this thesis, but very little encompasses the topic in totality. As such, this literature review will discuss the previously written scholarship in relevant sections: literature on the state's rights arguments; material that covers the foundational cases of the Supreme Court of the United States that expanded the Court's power and influence; material that discusses the comparison between the European Court of Justice and the Supreme Court; material that analyzes the foundational cases for the European Court of Justice, and scholarship on the cases from the member state national courts. This thesis will also use as primary sources the cases from the relevant courts, the arguments made state's rights politicians, relevant portions of the United States Constitution and the treaties of the European Union.

This paper will predominantly use primary source materials to address the question presented. Some of the cases used in this thesis will address the judicially crafted policymaking that led to the form of federalism currently present in the United States. The United States Supreme Court, under Chief Justice Marshall, decided a series of cases that broadly expanded the powers of the Supreme Court of the United States and led to many of the debates between the confederates and the federalists. These cases include Marbury v.

Madison[1], McCulloch v. Maryland[2], Martin v. Hunter's Lessee[3], and Cohens v. Virginia.[4] Similar decisions were later made by the European Court of Justice to consolidate power. This paper will also use the documents and arguments set forth by US political theorists that argued the state's rights position. The pre-Civil War arguments that advocated for a confederate government are in the original documents written by Thomas Jefferson, James Madison, John Calhoun, Robert Hayne, and Spence Roane.

The states-rights materials will help establish the link between the constitution-based United States and the treaty-based EU. These arguments focus on the United States as a group of sovereign states that have delegated only certain powers to the federal government. Many of these theories are based on the fact that the United States was first established through the Articles of Confederation. Some of the early states-rights materials are in the Federalist Papers, a series of seventy-seven articles written by Alexander Hamilton, John Jay, and James Madison. Madison was initially a loyal federalist, but eventually abandoned the Hamiltonian ideologies and became a staunch supporter of Jefferson, the nation's fourth President. The Kentucky and Virginia Resolutions, written by Thomas Jefferson and James Madison in response to the Alien and Sedition Act, also provide some of the early confederate arguments. These resolutions focus on the idea that the United States was to be interpreted as a pact between the states that delegated only certain powers to the general government, but reserved all others for the states.

Subsequently, John Calhoun, who served as a Senator from South Carolina and eventual Vice President under President Andrew Jackson, was one of the leading advocates for states' rights, limited government, nullification, free trade, and slavery. His 'Disquisition on Government'[5], 'Fort Hill Address'[6], 'A Discourse on the Constitution and Government of the United States'[7], and arguments presented before the US Senate provide significant insight into his political theory. The paper's theoretical design will thus focus heavily on Calhoun's arguments that general government acts as an agent of the Member States

[1] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)
[2] 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)
[3] 14 U.S. 304, 4 L. Ed. 97,1816 U.S. 333, 1 Wheat. 304.
[4] 19 U.S. 6 Wheat. 264 264 (1821)
[5] Calhoun, J. C. and Cheek, H. L. 2007. *A disquisition on government*. South Bend, Ind.: St. Augustine's Press.
[6] Calhoun, J. C. 1960. *The Fort Hill Address*. Richmond]: Virginia Commission on Constitutional Government.
[7] Calhoun, J. C. and Crallé, R. K. 1853. *A disquisition on government and a discourse on the constitution and government of the United States*. New-York: D. Appleton and Co.

because the paper will demonstrate that this is the direction in which the European Union is heading. In his Fort Hill address, Calhoun clarifies his position, asking, "[S]tripped of all its covering, the naked question is, whether ours is a federal or a consolidated government; a constitutional or absolute one; a government resting ultimately on the solid basis of the sovereignty of the States, or on the unrestricted will of a majority; a form of government, as in all other unlimited ones, in which injustice violence, and the force must ultimately prevail."[8]

The Webster-Hayne debates, which occurred on January 19-27, 1830 between Massachusetts Senator Daniel Webster and South Carolina Senator Robert Hayne, provide further explanation of the confederate's position. The debates were initially on the subject of protectionist tariffs, but evolved into a battle over where the locus of power existed – in either the states or through individuals –, and South Carolina's nullification crisis. Hayne argued "I see as you do, and with the deepest affliction, the rapid strides with which the federal branch of our Government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic, and that too by constructions which leave no limits to their powers."[9] Senator Hayne proved an inadequate match for Senator Webster, as Webster's second reply to Hayne is often referred to as "the most eloquent speech ever delivered in Congress."[10] Webster was an exceedingly competent jurist and one of the most astute constitutional lawyers of his time. He represented the plaintiffs in front of the Supreme Court in many of the foundational cases.[11] His description of the U.S. government as the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people," was later used by Abraham Lincoln in the Gettysburg Address.

Many scholars have written on the impact of the arguments set forth by states'-rights traditionalists, particularly those of John Calhoun. Backer examines the way in which Calhoun's theories of federalism can provide new insight on the European debate over the nature of the European Union. In exploring Calhoun's arguments, Backer notes that according to Calhoun, government provides a means of social order in a community and the

[8] The Fort hill Address: on the relations of the states and federal government
[9] Hayne, 86.
[10] Allan Nevins, Ordeal of the Union" (1947) 1:288
[11] James McCulloch in McCulloch v Madison, the Cohens in Cohens v. Virginia, and Thomas Gibbons in Gibbons v. Ogden.

ideal government balances between power and liberty.[12] The article thoroughly explains Calhoun's theories of concurrent majority and nullification, as delineated in his Disquisition on Government. He cites numerous examples in Calhoun's speeches and writings that exemplify Calhoun's belief that the US Constitution is a compact between sovereign states that created a relationship of principal and agent between the states and the federal government.[13] The article later attempts to link Calhoun's arguments with decisions made by the German Federal Constitutional Court.

C.E. Merriam examines the political theory upon which Calhoun bases his theories of nullification, secession, and slavery.[14] Merriam describes Calhoun as one of the strongest American political theorists in the first half of the nineteenth century and explains the difference between positive power, which makes the government, and negative power, which makes the constitution.[15] Similarly, Alexander Tabarrok and Tyler Cowen trace Calhoun's theories from a public choice perspective.[16] Their article thoroughly examines Calhoun's Disquisition on Government, and Calhoun's theory that men are driven by self-interest and will always seek to benefit themselves over what is best for their country. Men are, by nature, self-interested creatures, but must also live in a social state. As such, men need a controlling force – a government. However, although government is needed, it too has a strong tendency to abuse its powers because self-interest is ubiquitous. The authors further focus on Calhoun's arguments for a concurrent majority and nullification.[17]

In *Judge Spencer Roane of Virginia: Champion of States' Rights Foe of John Marshall*[18], the author sets forth many of the arguments made by Judge Spence Roane, one of the key political and judicial leaders in the state of Virginia. As the title indicates, Judge Roane was a significant opponent to Chief Justice Marshall and decided the *Martin v. Hunter's Lessee* case in the Virginia State Supreme Court. He defied Chief Justice Marshall by holding that

[12] Backer, 184.
[13] Backer, 189, citing Calhoun, A Discourse on the Constitution and Government of the United States
[14] Merriam, C. 1902. The Political Theory of Calhoun. The American Journal of Sociology, 7 (5), pp. 577--594.
[15] Merriam, 582
[16] Tabarrok, A. and Cowen, T. 1992. The Public Choice Theory of John C. Calhoun. Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift f\"ur die gesamte Staatswissenschaft, pp. 655--674.
[17] Id. 659-660.
[18] Judge Spencer Roane of Virginia: Champion of States' Rights Foe of John Marshall. 1953. Harvard Law Review, 66 (7), pp. 1242-1259. Available at: http://www.jstor.org./stable/1336940 [Accessed: 15/07/2013].

the United States Supreme Court did not have jurisdiction over the Virginia State Supreme Court. The article explains Judge Roane's position and his opposition to the Marshall Court. Kent Newmyer's article, *John Marshall, McCulloch v. Maryland, and the States' Rights Tradition* details Judge Roane's and Judge William Brockenbrough's efforts to disrepute Marshall's ruling in McCulloch v. Maryland, which held that Congress may enact laws that are necessary and proper to carry out their enumerated powers, and that the United States Constitution is the supreme law of the land and state laws cannot interfere with federal laws enacted within the scope of the Constitution.[19] While the previous article focuses on Judge Roane's position, Newmyer focuses on Marshall's arguments. He juxtaposes Marshall against the position of the entire state of Virginia and argues that the decision in *McCulloch* placed the Supreme Court at the center of a political storm.[20]

A number of articles examine how and why we can compare the United States Supreme Court and the European Court of Justice. In using the arguments surrounding the decisions of the United States Supreme Court in its foundational years, it is important to understand why comparing the two courts holds relevance. Pavone argues that a comparative analysis of the ECJ and the US Supreme Court falls squarely within the domain of political science. He explains the policymaking role of both courts by examining the foundational cases and argues that their lawmaking function "is a result of the polycentric diffusion of political power that characterizes both the EU and the US systems of governance." Pavone concludes that while the Supreme Court's authority is most consequential horizontally, meaning between the people and the Court, the ECJ's political power is vertically oriented, affecting the relationship between states and supranational EU institutions. This article highlights the difference in the present form of federalism in the United States and further emphasizes that one must examine the pre-civil war arguments as a backdrop to understanding where the locus of power exists in the European Union.

Rosenfield compares constitutional review by the European Court of Justice and the U.S Supreme Court and argues that while the U.S. Supreme Court is vulnerable to internal forces, the European Court of Justice is vulnerable to external forces, specifically

[19] Newmyer, K. 2000. John Marshall, McCulloch v. Maryland, and the Southern States Rights Tradition. John Marshall Law Review, 33 pp. 875-934. [Accessed: 26 Oct 2013].
[20] Id, 833

constitutional courts in Member States.[21] He argues that both courts have politicized their governing documents, citing *Bush v. Gore* in the US, which essentially decided the results of a presidential election. The article also traces many of the foundational cases from both courts and argues that the fate of the ECJ is not nearly as secure as that of the Supreme Court. Rosenfeld, however, focuses his arguments on the current status of the Supreme Court and fails to take into consideration the effectiveness of the arguments that occurred during Marshall's time as Chief Justice. According to Rosenfeld, judicial supremacy is constitutionally ground in the United States, but judicially grounded in the ECJ. However, one could also argue that we *perceive* judicial supremacy in the United States as constitutionally grounded due to the Marshall's arguments and the length of time that has passed since his ruling.

Mary Volcansek traces the trajectories of judicial power in the EU and the USA.[22] While the Supreme Court's trajectory has wavered in terms of expanding and limiting its own power, the ECJ has thus far remained on course in expanding its own power. Her work argues that state sovereignty is a political theme in Europe, but that is becoming increasingly less salient as the EU further integrates. She traces the expansion of ECJ control, but does not examine the reaction by member state courts.

The European Court of Justice has played a key role in European integration. Many sources explain the significance of the foundational cases of the European Court of Justice. These cases – *Van Gend en Loos, Costa v ENEL, Frankovich v. Italy* – widened the scope of European integration and parallel the foundational cases from the Supreme Court. Some argue that it has surpassed the original intent for the ECJ set forth in the Treaty of Rome. Henkel argues that the ECJ remains a driving force behind the development of constitutionalism of the European Union and that it has played the most dominant and consistent role in the integration process.[23] He examines how the ECJ used principles of direct applicability, direct effect, and supremacy to usurp power from Member States.

[21] Rosenfeld, M. 2006. Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court. International Journal of Constitutional Law, 4 (4), pp. 618-651. [Accessed: 28 Oct 2013].
[22] Volcansek, M. L., 2005. Judicially Crafted Federalism: EU and USA, *EUSA Review* 21(1): 23-31
[23] Henkel, C. 2000. Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice. Wis. Int'l LJ, 19 p. 153.

Some scholars have written on the manner in which Member States have been convinced to abide by ECJ rulings. Mark Pollack analyzes the differences in arguments between the inter-governmentalist approach, where "the ECJ as the agent of the Member States, on a short leash," and the neofunctionalist view as presenting the Court as "a more independent and sophisticated strategic actor."[24] Pollack conducted a study that aimed to analyze the factors that determine the autonomy of agents. Similarly, Bier provides a constructivist analysis on how the ECJ 'taught' Member States to accept its jurisdiction in areas traditionally reserved to sovereign states.

In examining how the ECJ came to such prominence, Alter argues that judges and politicians have fundamentally different time horizons, which translated into different preferences for judges and politicians regarding the outcomes of individual cases. This approach has been dubbed the 'legal autonomy approach' or neo-functionalist approach. Member States intended to create a court that could not significantly compromise national sovereignty or national interest, but the ECJ changed the EU legal system, fundamentally undermining Member States' control over the court. By playing off the shorter time horizons of politicians, the ECJ developed legal doctrine and thus constructed the institutional building blocks of its own power and authority without provoking political response. Transformation of the European legal system by the ECJ subsequently limited possible responses of national governments to its decision in the domestic political realm.[25] Where Alter and Henkel note the ECJ's influence and power over European Integration, Garrett uses principle-agent analysis to explain how the ECJ is merely an agent of the Member States, otherwise known as the 'political power' or inter-governmentalist approach. He argues that the ECJ serves an important, yet limited role in the EU political process and is politically constrained by Member States. Member States delegated authority to the ECJ for the purpose of monitoring compliance with EU obligations. His model predicts that a member state will disregard adverse rulings depending on the potential harm, and that when such disregard is likely to occur by a powerful member state, the ECJ will avoid ruling against that state in the first place.

[24] Pollack 1997, 57
[25] Alter, K. 1998. Who Are the" Masters of the Treaty"?: European Governments and the European Court of Justice. International Organization, 52 pp. 121--148.

Alter is critical of Garrett's work and argues that it attributes to the ECJ certain roles that rightfully belong to the European Commission, and it misses the main role the Member States wanted the ECJ to play in the EU political system: keeping the Commission from exceeding its authority.[26] Walter Mattli and Anne-Marie Slaughter are also critical of Garrett's theories, claiming that Garrett's theory "distorts the ECJ's decision-making process beyond recognition." Like Alter, they argue that during the formative years, the court was able to override Member States' individual preferences and impose significant constraints on the ability of a state to fight back. Judges have their own idea for Europe and interpreted the Treaty of Rome as requiring deeper integration than specified by Member States preferences. The court's ability to advance its own agenda depended on how convincingly it "speaks as the technical and apparently nonpolitical voice of 'the law'."

Although this paper uses cases decided by Member States' national and constitutional courts as primary sources, previous authors have dedicated themselves towards analyzing many of these cases. There is a significant amount of literature that focuses on Germany, as there has been an array of cases decided by the German Federal Constitutional Court relevant to the relationship between the Member State's courts and the European Court of Justice. E.R. Lanier focuses on the FCC's decisions in the *Solange I* and *Solange II* cases. The author focuses on the differences between these two rulings where in the former, the FCC held that the ECJ's protection of fundamental rights was not strong enough to meet the guarantees of fundamental rights found in the German constitution. German constitutional guarantees would override any EC law to the contrary of these guarantees in Germany. However, in *Solange II,* the FCC slightly changed its course in ruling that the level of fundamental rights protection had risen in the European Community so that it met the requirements of the German Constitution. If there was a conflict between EC law and German law, German law would not automatically supersede the EC law. He argues that the ruling in *Solange II* "effectively knitted the Court of Justice of the European Communities into the judicial fabric of the Federal Republic of Germany…"

[26] Garrett, G., Kelemen, R. and Schulz, H. 1998. The European Court of Justice, national governments, and legal integration in the European Union. International Organization, 52 (1), pp. 149--176.

However, as Lanier's article was written in 1988, it is unable to take into account the later rulings on the Maastricht and Lisbon treaties.

Dieter Grimm examines the Maastricht decision, and its importance for European integration and the applicable constitutional issues and arguments.[27] He conducts an analysis of the relationship between the national legal orders and their European Community counterparts, as well as between constitutional courts and lower national courts by examining the potential implications of the FCC's Maastricht decision. Moull also analyzes the Maastricht decision. He argues that the main area of interest in the judgment deals with the issues of democracy and competences.[28] Moull specifically addresses the democracy principle in the German Constitution.

Steve Boom also analyzes Germany's Maastricht decision, but specifically links the FCCs decision on the Maastricht Treaty with arguments from pre-Civil War Virginia politicians. He argues that the consolidation of federal power underlays both the Maastricht decision and the legal and political battle during the foundational years.[29] The German FCC paralleled many of the arguments made by Virginia legislators in response to the *McCulloch* case, which vastly expanded the ECJ's powers when it invoked the 'necessary and proper' clause of the US constitution. This led to the intense debates over the powers of the federal government. Boom argues that the German FCC took similar issue against the ECJ's permissive stance toward the institutional use of article 235 to expand EU competences.[30]

The most recent work on Germany's response to the ECJ addresses the FCC's ruling on the Treaty of Lisbon. Christian Wohlfahrt provides a descriptive analysis of the Lisbon case. His work emphasizes the boundaries of integration set forth by the FCC under

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[27] Grimm, D. 1996. European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision, The. Colum. J. Eur. L., 3 p. 229.

[28] Moull, D. 2004. Lessons the EU should learn from the formative years of the US: Challenges to EU authority in the areas of legitimacy and interpretive competence and the implications for the conceptualization of the EU. *Jean Monnet Working Papers in Comparative and International Politics*, (51), pp. 1-21. Available at: http://www.fscpo.unict.it/EuroMed/jmwp51.pdf [Accessed: 6 Feb 2014], at 8.

[29] Steve J. Boom, "The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?" The American Journal of Comparative Law Vol. 43, No. 2 (Spring, 1995), pp. 177-226, at 206

[30] Boom, 204. Article 235 states, "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." Treaty of the European Union.

German law.[31] It also provides a comparison with the Maastricht case, where the court concentrated on the different mechanisms that might safeguard the competences of the German courts. Frank Schrokopf argues that the Lisbon case is much more far sighted in its reasoning and legal approach than the Maastricht decision, and that Germany's participation in European integration will be examined through the German constitution's provisions for international law.[32] Schrokopf focuses on the court's analysis of electoral democracy as a form of legitimization and the premise of constitutional identity and highlights the case's differentiation between primary and secondary political areas. Under Schrokopf's analysis, the Basic law views the European Union as an association of sovereign states that can only become a primary political area if the respective will has been developed by the citizens. Armin Steinbach focuses on the scope and content of the core competencies that the FCC reserved for the German government. The FCC held that cultural diversity, multilingualism, and heterogeneity of values are obstacles to deeper European integration. Steinbach refutes this and notes that other Member States do not view them as obstacles towards integration. Elisabetta Lanza also examines the Lisbon decision and focuses on the subject matters reserved to Member State jurisdictions, but targets her paper toward understanding the EU's identity and potential solutions to the democratic deficit in the EU.[33] Her analysis comes to a similar conclusion, that the EU remains a secondary political area under certain principles of democracy.

Many scholars examine other Member States' national courts. Oreste Pollicino focuses on Central and Eastern European Courts, specifically Hungary, Germany, Poland and the Czech Republic.[34] He investigates the trends that focus on the relationship between international judicial legal orders. He uses the European Arrest Warrant as a case study to examine the reactions of some CEE Constitutional Courts to the challenges brought on by European enlargement.. Rafael Lea-Arcas discusses the Spanish Constitutional Court's

[31] Wohlfahrt, C. 2009. The Lisbon Case: A Critical Summary. German Law Journal, 10 (08), pp. 1277-1285. [Accessed: 29 Oct 2013].
[32] Schorkopf, F. 2009. The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon. German Law Journal, 10 (08), pp. 1219-1240, 1220
[33] Lanza, E. 2013. Core of State Sovereignty and Boundaries of European Union's Identity in the Lissabon-Urteil. German Law Journal, 11 (04), pp. 399-418. [Accessed: 29 Oct 2013].
[34] Pollicino, O. 2010. The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?. *Yearbook of European Law*, 29 (1), pp. 65-111. Available from: doi: 10.1093/yel/29.1.65.

relationship with the European Court of Justice, and how a potential conflict would be resolved. He uses a series of cases, which establish that national authorities are not 'Community' organs, even when applying community law. Instead, national courts are permanently tied to the Constitution.[35] His article concludes that the existing conflict between EC law and Spanish legislation does not have constitutional relevance. While EC law is not subject to Constitutional review, the implementing legislation is, and can thus be used to circumvent community law.

This paper will use the states' rights arguments as a theoretical framework to assess the locus of power in the European Union by examining national and constitutional court cases. This paper will test Larry Cata Baker's hypothesis that Calhoun's political theory is an alternative view of federalism, which is more appropriate for supranational institutions like the European Union. Previous scholars have examined certain elements of this argument, but this paper will trace the argument from the foundation of the United States to current arguments on the Lisbon Treaty.

Chapter 1- The American Transformation

Baker proposes that we reexamine our understanding of federalism, especially as it relates to supra-national institutions like the European Union. Since the end of the Civil War, the discussion of federal "states" has been confined to the limits of the American situation. By examining the states' rights arguments posited by theorists like John Calhoun and James Madison, one can create a link and establish the conceptual framework that allows for the comparison between the early stages of the United States and the current position of the European Union. This link is found in both the history of the formation of the United States and through many of the confederate and states' rights arguments that were silenced after the Civil War. Baker notes that the intellectual community has "falsely assumed the unchanging nature of American federalism" and is critical of the dismissal of America's early foundations as "substantially irrelevant." This paper argues that the historical genesis of American federalism is rooted in the notion that the United States was initially envisioned as a group of loosely allied states. These states eventually signed the US

[35]Leal-Arcas, R. 2005. Reception of European Community Law in Spain, The. Hanse L. Rev., 1 p. 18.

Constitution, but many of the founding fathers signed under the guise of independent, sovereign states, creating a governing body to which only limited powers were designated. The United States eventually veered off this path into our current understanding of a federal government.

The United States of America was established as a confederation in 1781 upon the signing of The Articles of Confederation and Perpetual Union.[36] The document outlined the original intent for the United States, most importantly that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United states, in Congress assembled."[37] The thirteen original states entered into "a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other…"[38] These provisions demonstrate that the United States was originally organized as an alliance of friendly, but sovereign states that delegated a limited set of powers to a general government. The union closely resembled an international organization, comprised of unreliable signatory states. The Articles of Confederation, however, proved too weak, due in part to Congress's lack of enforcement power, inability to collect taxes, and lack of ability to regulate foreign trade and interstate commerce.[39]

Alexander Hamilton initially proposed the idea for a stronger centralized government. Hamilton, along with John Jay and James Madison penned The Federalist Papers[40], a series of eighty-five articles and essays, in an attempt to encourage their colleagues to ratify the Constitution. Federalist No. 11, written by Hamilton, encapsulates the way in which we currently understand American federalism. It states, "Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great

[36] The document was signed in 1777 by the 13 founding fathers, but only became effecting in 1781 when Maryland, the final state, ratified the document. Jensen, Merrill (1959). *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774–1781*. University of Wisconsin Press. pp. xi, 184.
[37] Avalon.law.yale.edu. 2013. Avalon Project - Articles of Confederation : March 1, 1781. [online] Available at: http://avalon.law.yale.edu/18th_century/artconf.asp [Accessed: 18 Nov 2013]. (Article 2)
[38] Id., Article 3
[39] www.Learner.org. n.d. The New Nation. [online] Available at: http://www.learner.org/courses/amerhistory/pdf/text/AmHst06_NewNation.pdf [Accessed: 5 Feb 2014].
[40] Hamilton, A., Madison, J., Jay, J. and Goldman, L. 2008. The Federalist papers. Oxford: Oxford University Press.

American system, superior to the control of all trans-Atlantic force or influence and able to dictate the terms of the connection between the old and the new world!"[41] The Articles of Confederation were abandoned, and the United States Constitution was written in 1787 and officially ratified in 1790. Despite its federalist nature, confederate advocates remained strong, particularly in the American south.

Once the Constitution became effective, the argument became whether it was a compact between the people of the United States, or in the alternative, a compact between individually sovereign states. The confederate arguments centered on the notion that the Constitution was a contract to which the states, bound together, are the principals while the general government acts as their agent. The federal government was created by the Constitution, but it was not an actual party to the agreement. Baker clarifies the confederate position, which argued that the federal constitution delegated certain sovereign powers to the federal government, but did not transfer sovereignty itself.[42] In order to assert competencies not expressly delegated to it, the general government would need to seek an amendment to the Constitution, which would be granted by elected representatives from the states.

The Virginia and Kentucky Resolutions, both written in 1798, provide some of the early arguments later used by John Calhoun in his nullification doctrine. Both resolutions were a response to the Alien and Sedition Act passed by Congress.[43] The Kentucky Resolution, written by Thomas Jefferson set forth that:

> "the several States composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes — delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the

[41] Federalist no 11
[42] Baker, 189
[43] The Alien and Sedition Acts were created after an aftermath of the French Revolution. It increased residency requirements for American citizenship from five to fourteen years, subjected aliens deemed dangerous to the peace of the United States to imprisonment or deportation, and restricted speech critical of the Federal government. In reality, it was an attempt to decrease the number of French and Irish voters, which usually favored Jeffersonian democrats.

general government assumes undelegated powers, its acts are unauthoritative, void, and of no force."[44]

It further declared that the Constitution was a compact to which the states acceded. The government was created by this compact and could not serve as the exclusive or final judge to the extent of powers delegated to it. To do so would make the governments discretion, and not the Constitution's, the measure of its powers. Jefferson reasoned that each state has an equal right, as parties to the compact, to judge for itself.[45] The Virginia Resolution, written by James Madison, made nearly identical arguments.[46] The arguments made in the Virginia and Kentucky Resolutions would later be found in arguments made by the German Federal Constitutional Court in its ruling on the relationship between the European Court of Justice and the German government.

The Virginia and Kentucky Resolutions establish the early foundations for many of the states' rights arguments later made by John Calhoun, a slaveholding statesman from Virginia. In his Fort Hill Address, he reasoned that the government was formed by the people of distinct, sovereign political communities:

> "the General Government emanated from the people of the several states, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact to which each State is a party, in the character already described; and that the several States, or parties have a right to judge of its infractions; and in case of a deliberate, palpable and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, 'to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them."[47]

He further noted that:

> "The General Government is but its creature; and though in reality a government, with all the rights and authority which belong to any other government, within the orbit of its power, it is nevertheless a government animating from a compact between sovereigns, and partaking in its nature and object, of the character of a

[44] **:** Constitution.org. 2014. *The Kentucky Resolutions of 1798*. [online] Available at: http://www.constitution.org/cons/kent1798.htm [Accessed: 5 Feb 2014].
[45] Id at note 42
[46] Constitution.org. 2014. *Virginia Resolution of 1798*. [online] Available at: http://www.constitution.org/cons/virg1798.htm [Accessed: 5 Feb 2014].
[47] Calhoun, 1960

> joint commission, appointed to superintend and administer the interests in which all are jointly concerned; but having, beyond its proper sphere, no more power than if it did not exist."[48]

Calhoun maintained that the Constitution was signed by the people of the States, each acting in its own convention and ratifying at different dates.[49] Each signature to the Constitution represented an individual and sovereign act. Had the people of the United States agreed to the compact as one body politic, there would have been no need for each state to sign independently. He described the government as an assembly of diplomatists, convened to deliberate and determine how a league or treaty between their several sovereigns for certain defined purposes, shall be carried into execution, leaving to the parties themselves, to furnish their quota of means, and to cooperate in carrying out what may have been determined on."[50] Further, sovereignty is indivisible. Either the states or the union had to be subordinate. The general government may exercise sovereign powers, but is not actually sovereign.[51]

Foundationally, Calhoun argued that although the government is necessary to protect and preserve society, it is comprised of individuals and thus susceptible to human selfishness and abuses of power.[52] The Constitution serves to strike a balance and keeps the government in check. Calhoun's position theory revolves around the ideas of concurrent majority and the doctrine of nullification. The concurrent majority, as opposed to numerical majority, aimed to protect the minority opinion from the majority, which in this case referred to the southern states' desire to protect slavery. Under a concurrent majority, the minority has the right to veto potentially hostile legislation.[53] He feared that the general government, which represents the interests of the whole, may encroach on the State governments, which represent the local interests.[54]

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[48] Id, note 45
[49] Calhoun and Crallé, 1853
[50] Discourse, p 163
[51] Merriam 589
[52] Disquisition, 3-4
[53] As the northern states became industrialized, its population expanded. The south relied on an agrarian-based economy and its population growth stagnated. As such, the north had greater representation in government and was able to drive national policy. In order to protect the southern states, Calhoun zealously advocated for concurrent majority by geographic region.
[54] Foothill address

Perhaps what is most relevant to the European context however, is Calhoun's theory of nullification. Under this doctrine, a state could nullify an act of the general government it deemed unconstitutional. Echoing the Virginia and Kentucky Resolutions, Calhoun believed that the individual states of the union have the right to reject any measure of the general government it regards as inconsistent with the Constitution.[55] The states also have the right to recall the powers delegated to the central government. Calhoun believed that all governments need some sort of mechanism to reign in the government. While positive power is the power of acting, negative power prevents or arrests action, and that combining the two makes a constitutional government.

Calhoun was not alone is his argument. Robert Young Hayne, a South Carolina statesman who served as both a senator and governor, engaged in a fierce debate with Massachusetts statesman Daniel Webster. Webster was one of the most noted constitutional lawyers, served as a senator, a state representative, and as Secretary of State. The debate occurred in 1830 and was initially over a protectionist tariff on western land. Eventually, the debate turned to the South Carolina nullification crisis.[56] Hayne, citing Madison, argued that the United States was formed by "the sanction of the States, given by each in its sovereign capacity."[57] Since the states were parties to the Constitutional compact, there could be no tribunal above their authority. He cited the Virginia and Kentucky resolutions, arguing that if those who administer the General Government be allowed to contravene the limits set by the Constitution, it would annihilate the rights of the State Governments and would consolidate too much power in a central government. Accordingly, the idea that the General Government is the exclusive judge of the extent of its own powers is nothing short of despotism since the discretion of those who administer the government, and not the Constitution would be the measure of their powers.[58] He further claimed that "the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its construction, and that the

[55] Merriam, 584
[56] South Carolina's 1832 Ordinance of Nullification. This ordinance declared by the power of the State that the federal Tariffs of 1828 and 1832 were unconstitutional and therefore null and void within the sovereign boundaries of South Carolina.
[57] Brooks, S. M. 2009. The Webster-Hayne debate. Lanham, Md.: University Press of America. See also Daniel Webster, *The Webster-Hayne Debate on the Nature of the Constitution: Selected Documents,* ed. Herman Belz (Indianapolis: Liberty Fund, 2000). Accessed from http://oll.libertyfund.org/title/1557 on 2014-02-05
[58] Kentucky Resolution of 1799

nullification by those sovereignties, of all unauthorized acts, done under color of that instrument, is the rightful remedy." Finally, like his confederate colleagues, he argued that the powers of the federal government result from an agreement between the states and that the government must limit its actions to those expressly granted by the Constitution. Should the government exceed its delegated powers, the states maintain the right to intervene accordingly.[59]

Summarizing the states' rights arguments, the states are sovereign, but the government of the United States is not. The US Constitution created the federal government and it was to act as an agent or trustee of the states in specifically designated areas ordered by the Constitution. The United States was originally envisioned as a set of allied states that delegated certain powers, primarily the power to tax and direct foreign policy, while the State governments remained in control of all domestic matters. Thus, as a treaty created the European Union, signed by the member nations, so too was the United States created by an agreement between sovereign states.

The United States' early years, and the debates between the confederates and the federalists provide the context for comparing the US and the EU. The signing of the Constitution correlates with the signing of the treaty that established the European Union. Before examining the EU, however, this paper will examine the way in which the United States deviated from this path. Many of the previously mentioned arguments were in response a series of cases decided by the Supreme Court of the United States (SCOTUS), which consolidated and expanded federal power. These cases, many of which were decided by Chief Justice John Marshall, transformed the United States from allied independent states that delegated certain powers to governing body, to a country with a strong central government where the states were left as dependents. The Supreme Courts' early jurisprudence transferred discretionary power from the states to the federal government.

Marbury v. Madison is perhaps one of the most important cases in US judicial history, as it immensely increased the scope of judicial power by establishing the principle of 'judicial review' and granting the Supreme Court the authority to void an act of Congress

[59] Supra note 56, 160

deemed unconstitutional.[60] It was a battle that displayed the political genius of two bitter rivals, Chief Justice John Marshall and President Thomas Jefferson. The elections of 1800 resulted in the first transfer of power from the Hamiltonian Federalists to the Jeffersonian Republicans. The Jeffersonian Republicans won majorities in both the executive and legislative branches, leaving the judicial branch in the middle of the controversy.[61] Outgoing President John Adams made a series of 'midnight appointments' in an effort to stack the bench with Federalist judges. When President Jefferson took office, he surreptitiously convinced Congress to repeal the act that allowed the midnight appointments, terminating many of the newly created positions.

One of President Adams' 'midnight appointments', William Marbury, had been confirmed by the Senate, but his commission was not delivered before Adams left office. President Jefferson instructed Secretary of State James Madison, a former federalist, not to deliver the commission, therefore denying Marbury his position. Marbury petitioned the Supreme Court to issue a writ of mandamus under Section 13 of the Judiciary Act of 1789[62], compelling Madison to deliver his commission.[63] Justice Marshall held that Marbury had been wronged and deserved a remedy, but Section 13 violated Article III of the US Constitution because it extended to cases of original jurisdiction,[64] which, according to Marshall, exceeded Congress' authority. Marshall voided a congressional act, creating the concept of judicial review. In his decision he stated "…the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void […] So, if a law be in opposition to the Constitution, […] the Court must determine which of these conflicting rules governs in the case. This is of the very essence of judicial duty […] that a

[60] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)
[61] Secretary of State John Marshall was nominated for the position of Chief Justice of the Supreme Court. The Senate quickly passed the Judiciary Act of 1801 which created sixteen new circuit court positions and reduced the number of Supreme Court positions by one.
[62] Loc.gov. 2014. *Judiciary Act of 1789: Primary Documents of American History (Virtual Programs & Services, Library of Congress)*. [online] Available at: http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html [Accessed: 5 Feb 2014]
[63] SEC . 13. And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.…The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.
[64] Original jurisdiction refers to the power to bring cases directly to the Supreme Court and under Article III, applied only to cases "affecting ambassadors, other public ministers and consuls and to cases in which the state shall be a party."

law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument." Although legal scholars have debated Marshall's interpretation of Article III,[65] the importance of this case is undeniable. Marshall declared that it was the Supreme Court's duty to review acts of congress, which infringe on the claim that reviewing acts for constitutionality was within the jurisdiction of state courts. It represents the creation of judicial policy making and the power of a court to strike down legislative acts. It placed the judiciary on par with the legislative and executive branches and provided a model of judicial review for future courts, like the European Court of Justice.

The second of these cases was decided in 1812 and positioned the Virginia State Supreme Court against The United States Supreme Court and Virginia's Judge Spencer Roane against the Chief Justice Marshall. *Martin v. Hunter's Lessee,*[66] which has been called the "Keystone of the whole arch of the federal judicial power"[67] centered on whether the US Supreme Court could review state court decisions on issues of federal power. The case involved Virginia legislation from the American Revolution that allowed the state to confiscate property of American colonists that remained loyal to the British monarchy (Loyalists). The original suit was a 1791 'action of ejectment' against Lord Fairfax, a British Loyalist. During the War, Virginia seized the land from Lord Fairfax and assigned part of it to David Hunter. After the war, the United States and Great Britain entered into a treaty guaranteeing the protection of lands owned by British Loyalists. Lord Fairfax's nephew, Thomas Martin, inherited the land upon Fairfax's death and sued in Virginia state court to recover the parcel assigned to Hunter. The court ruled in favor of Martin. Virginia's highest court, the Court of Appeals, reversed the decision. Martin subsequently appealed to the U. S. Supreme Court, which reversed the decision once again, and held that the parcel in fact belonged to Martin pursuant to the treaty between the United States and Great Britain. In essence, the U.S. Supreme Court commanded a state court to obey an order given by the Supreme Court.

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[65] See, for example Van Alstyne, William W. 1969. "A Critical Guide to Marbury v. Madison." Duke Law Journal. 1969: 1–47; Crosskey, William W. 1980. Politics and the Constitution in the History of the United States. Chicago: University of Chicago Press; Currie, David P. 1985. The Constitution in the Supreme Court. Chicago: University of Chicago Press

[66] 14 U.S. 304, 4 L. Ed. 97,1816 U.S. 333, 1 Wheat. 304

[67] Warren, C. 1926. *The Supreme Court in United States history*. Boston: Little, Brown, and Company, 449

The Virginia Court of Appeals, however, repudiated the Supreme Court's ruling arguing that the U.S. Supreme Court lacked the authority to review and overturn its decisions, that the U.S. Constitution did not provide for such a review, and that states had final say over federal laws in cases brought in state courts because states are independent governments in the federal system. The Virginia Court of Appeals argued that the Supreme Court had exceeded its jurisdiction. The judges unanimously agreed that the United States was comprised of a compact of states; sovereignty was divided and once a case was brought in a state court and not removed to a federal court, the state judiciary had an equal right with the federal judiciary to interpret the Constitution with finality.[68] In his ruling, Judge Cabell argued "the belief, that [to give the federal government or one of its organs jurisdiction to operate directly and in a controlling manner upon the states] would produce evils greater than those of the occasional collisions which it would be designed to remedy."[69] Judge Cabell also reasoned that the principle of appellate review implied that the appellate tribunal was "superior" to the tribunal whose decisions it reviewed. Because the state and federal courts belonged in different and distinct systems, the Supreme Court could not be considered "superior" to a state court, but only to lower federal courts.[70] Judge Cabell argued that the state courts were just as sovereign as the courts of foreign nations.

Judge Roane argued for the sovereignty of each individual state. As evidence, he cited the fact that each state called a special convention to ratify the Constitution by individuals elected from the population of these states. The Constitution was a contract between sovereign people in sovereign states. The purpose of the Constitution, therefore, was to limit the national government, not to strengthen and empower it, as he believed Marshall did in numerous rulings. Because states are sovereign, the cases of interpretation should go to the states and not the national government. The Constitution, therefore, gave the Court the power to decide cases between states, but not jurisdiction over its own controversies because doing so would make the national government the final judge in its own case.[71]

[68] Roane, 1250
[69] Boom, citing Hunter at 9
[70] Id
[71] Newmeyer, 905

The case was once again appealed to the U.S. Supreme Court, which held that the Constitution did allow the Supreme Court to review state court decisions concerning federal laws. Justice Story[72] represented Marshall's philosophy in the Court and rejected the Virginia court's argument, ruling that the Constitution did confer jurisdiction over decisions from state courts, that the Constitution was derived from the people and not from the states, and that the absolute right of decisions must rest with the Supreme Court. He contested the Virginia court's statement that the United States was a compact of states, arguing that "the constitution of the United states was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the People of the United States." Story further reasoned that the Constitution does not guarantee complete independence from the federal government. Not only did the Supreme Court have the authority to review acts of Congress, it now had the authority to review state court decisions on federal power.[73] This case represents yet another example of the Supreme Court deciding its own jurisdiction.

A following case further polarized the nation and further divided the federalists and states' rights advocates. *McCulloch v. Maryland* was the watershed case that established the principle of supremacy. At issue in this case was the constitutionality of an act of Congress that established the Second Bank of the United States.[74] When state banks began to fail in 1818 much of the blame was directed towards the Second Bank as an unfair competitor. Maryland enacted antagonistic legislation directly at the Bank of the United States that created a substantial tax on "any bank not chartered within the state."[75] The Bank of the United States was the only bank in Maryland not chartered within the state. When the Second Bank's Baltimore branch refused to pay the tax, Maryland sued a cashier at the bank, James McCulloch, for collection of the debt. McCulloch argued that the tax was unconstitutional. Maryland won in both state court and at the court of appeals. McCulloch appealed to the U.S. Supreme Court in 1819 and was represented by Daniel Webster, from the previously mentioned Webster-Hayne debate.

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[72] Justice Marshall recused himself from the case due to a personal interest in the property in controversy
[73] Boom, 186
[74] Under the act, the bank was the depository of federal funds and had the authority to issue notes that circulated as legal tender similar to the notes of states' banks. In lieu of paying taxes, the Bank agreed to lend the federal government money.
[75] 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)

The doctrine of implied powers, under the necessary and proper clause of the US Constitution was one of the major points of contention.[76] Alexander Hamilton had previously argued that in order to accomplish the duties of a government, there must be an implied right to use means sufficient to its ends. The implied powers doctrine, where powers authorized by the Constitution are not explicitly stated, but are implied by those that are, and the growth of the northern majority posed a significant danger to the agrarian slave-owning south.[77] If Congress could use implied powers that exceeded the enumerated powers via the "necessary and proper clause" and the northern interests continued to prevail, slavery could be abolished.

Chief Justice Marshall penned the opinion for the unanimous Supreme Court. He invoked the implied powers doctrine and held that the Bank of the United States was constitutional and the tax on the bank was unconstitutional. Marshall made three pivotal arguments that shaped federalism in the United States. First, under the Necessary and Proper Clause of Article 1, Section 8, Congress is expressly granted the power to pass laws "necessary and proper" for the performance of its "enumerated powers." These enumerated powers include power to regulate interstate commerce, borrow money, and collect taxes. Accordingly, the creation of the Bank of the United States was related to Congress' enumerated powers and was therefore constitutional. Marshall also ruled that Maryland could not tax the bank because it lacked the power pursuant to the Supremacy Clause of Article VI of the Constitution. Under the Supremacy Cause, the laws of the United States are superior to conflicting state laws. By attempting to tax the Bank of the United States, Maryland was undermining superior institutions and laws of the United States. Finally, Marshall held that political authority of the Union lies with the people of the States, not the individual states that comprise it. He rejected the view that the United States was an alliance of states and that the authority rests with the people. Specifically, the Court ruled that "the government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit." Maryland's attempts to tax the Bank of the United States equates to waging a

[76] Alexander Hamilton initially used the implied powers doctrine to defend the constitutionality of the First Bank of the United States against protesters like Thomas Jefferson and James Madison
[77] Newmyer 881

levy against all American citizens by a state only accountable to the people within its borders.

Reactions to Marshall's rulings in *Hunters, Marbury, and McCulloch* were varied. Some states acquiesced and incorporated the rulings in future legislation. Other states, particularly Virginia, opposed and rejected the Supreme Court's authority on three grounds. First, it was argued that states did not cede sovereignty to the federal government. As previously stated, they believed that states, as parties to the treaty, possessed the power to "decide for themselves, and each State for itself, whether, in a given case, the act of the general government transcends its power."[78] Second, they rejected the Supreme Court's argument of the Supremacy Clause. The argument follows that although the Supreme Court has the authority to interpret the Constitution between the branches of the federal government, this authority does not extend "to questions which would amount to a subversion of the Constitution itself, by the usurpation of one contracting party or another."[79] Finally, in opposition to Marshall's argument for the need of uniformity among the states, anti-nationalists believed that non-uniformity was inevitable because the US was comprised of a group of free and independent governments.

In a series of scathing articles critical of Justice Marshall, Judge Roane proclaimed that the problem was "a renegade [sic] congress," of "turn-coats and apostates." He accused Justice Marshall of inciting "a judicial coup de main," in *McCulloch* and gave future legislators "a general letter of attorney."[80] Roane felt that Marshall extolled Hamilton and supported his consolidationalist philosophy, believing him to be "the Alpha and Omega, the beginning and the end, the first and the last-of federal usurpations." Roane felt that he was speaking for the people of Virginia and for the American forefathers.

Re-examining Calhoun's position on nullification against the backdrop of these cases, one can clearly see his opposition to the consolidation of power at the federal level. Calhoun argued that states were the primary units while the general government was

[78] Boom 195
[79] Id
[80] Brooks, C. 2004. R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court, Baton Rouge: Louisiana State University Press, 2001. Pp. 540. *Law and History Review*, 22 (03), pp. 658--660.

merely an agent. States should have independent judgment as to what is and is not constitutional and should be the final arbiters for constitutionality. However, after these foundational cases, power was transferred from the states to the general government, making state governments subordinate to the federal government. Marshall's response to the states' rights advocates simplifies the way in which we currently view American federalism. In responding to Judge Roane, he wrote; "In fact, the government of the union, as well as those of the states, is created by the people,… who administer it for their own good….The constitution has defined the powers of the government, and has established that division of power which its framers, and the American people, believed to be most conducive to the public happiness and the public liberty…." Marshall desired a system of duel federalism, which balanced the rights of the states with the rights of the national government. He summarized his constitutional philosophy:

> "[The Constitution] is not a contract between enemies seeking each other's destruction, and anxious to insert every particular, lest a watchful adversary should take advantage of the omission. Nor is it a case where implications in favor of one man impair the vested rights of another. Nor is it a contract for a single object, everything relating to which, might be recollected and inserted. It is the act of a people, creating a government, without which they cannot exist as a people. The powers of this government are conferred for their own benefit, are essential to their own prosperity, and are to be exercised for their good, by persons chosen for that purpose by themselves…. It is intended to be a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view. From its nature, such an instrument can describe only the great objects it is intended to accomplish and state in general terms, the specific powers which are deemed necessary to those objects."[81]

The purpose of examining these foundational cases has been to come to an understanding of the path the United States took as it evolved from a confederation to its current federal union. In the early years, "states enjoyed more legitimacy than the general government, which was distant."[82] The general government gained legitimacy under leadership from Chief Justice John Marshall. The principles established by the Supreme Court transferred the locus of power from the states to the federal government. Studying these cases and the arguments that ensued sheds new light on the current debate in the

[81] Newmayer 894
[82] Polack and Donahue, 94

European Union. As Baker notes, "Calhoun's sensitivity to the tendency of independent supra-national entities to appropriate for themselves powers, which might not have been expressly delegated to them without the consent of their constituent parts, drove his construction of what has been the alternative vision of a federal union." The treaty that created the European Union, like the original foundation of the United States, was signed by a group of sovereign states, but through the decisions and actions by the governing bodies, most notably the European Court of Justice, has similarly transformed the European Union from a group of allied sovereign states into an entity more deeply integrated than originally intended.

Chapter 2

The American debate over federalism ended with the conclusion of the Civil War, but has re-emerged in the European Union. Comparing the two courts is appropriate due to the amount of influence the Supreme Court had on the development of the foundational European Court of Justice jurisprudence. For example, Judge Pescatore, a distinguished member of the ECJ urged Europeans "to recognize that on many issue arising in a federal context the United States have the advantage of some 150 years of a highly diversified judicial development from which many useful lessons may be learned."[83] Baker contends that the governing organs of the European Community have taken up the American-orthodox stance with the ECJ leading the way. The constitutional courts and national courts of certain Member States – most notably Germany and Italy – have championed Calhoun's states' rights arguments.[84] The ECJ decided a series of cases that closely parallel the foundational cases decided by Justice Marshall and the US Supreme Court. These cases have transformed the Community from what Baker calls "a self-styled regional organization of sovereign states – to something else." Indeed, these cases transformed the European Court of Justice from a weak institution with little enforcement capabilities, to one of the

[83] Majone, G. 2001. Regulatory Legitimacy in the United States and the European Union. In: Nicolaidis, K. and Howse, R. eds. 2001. *The Federal Vision: legitimacy and Levels of Governance in the United States and the European Union*. Oxford: Oxford University Press, pp. 252-274.
[84] Baker, 194

strongest political actors in Europe, and the leading proponent of European integration. Like the Supreme Court, the ECJ conferred rights that were not granted in its governing document. The ECJ has, in a sense, attempted to federalize the European Union by asserting supremacy of Community law and granting individual citizens and lower courts the right to bypass their respective higher national and constitutional courts. This chapter will examine the cases that transformed the European Union, drawing comparisons to similar cases in the United States.

In 1952, the Treaty of Paris established the ECJ as part of the European Coal and Steel Community. Modeled after the French Conseil d'Etat, the ECJ was created to fulfill three limited roles: ensuring that the Commission and the Council of Ministers did not exceed their authority, filling in ambiguous aspects of EC laws through dispute resolution, and determining charges of noncompliance raised by the Commission or by Member States.[85] In the European Coal and Steel Community, it was the Commission, not the ECJ that monitored contraventions of Community law. The ECJ originally served as an appellate body that heard challenges of Commission decisions. Under the Treaty of Rome, the Commission still monitored Treaty compliance, but lost the authority to unilaterally declare breaches of Treaty provisions and to levy fines.[86] The Commission served as the primary monitor, but "the ECJ mediated Commission charges and Member States' defense regarding alleged treaty breaches…only if the diplomatic efforts to secure compliance failed."[87] Despite its initial limited function, the ECJ has significantly expanded its judicial function. The ECJ's history can be categorized into three periods. The first period encompasses its formation through the landmark cases of the 1960s, including the *Van Gend en Loos*[88] and *Costa* cases and lasted until the early 1970s. Although many of the foundational cases were decided in this period, the ECJ remained a weak institution as few took notice of the potential ramifications of these decisions. The second period commenced at the end of the first and continued until the 1980s. During this period, the ECJ continued

[85] Alter, K. J. 1998. Who Are the" Masters of the Treaty"?: European Governments and the European Court of Justice. *International Organization*, 52 pp. 121—148, at 124

[86] Id.
[87] Id at 125
[88] Case 26/62 [1963] ECR 1

to expand on its foundational cases. Combined, the first and second periods represent the ECJ's transformation into a political actor. Alter explains the technique used as a well-known judicial practice of expanding its jurisdictional authority by establishing legal principles, but not applying the principles to the cases under consideration.[89] The third and final period started in the 1980s and continues to the present day. During this time, the ECJ's area of control gradually expanded through treaty amendments including the Single European Act of 1986, the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, the 2001 Treaty of Nice, and the 2007 Treaty of Lisbon.[90]

The 1963 *Van Gend en Loos*[91] case established the doctrine of direct effect and is one of the most important judgments decided by the ECJ. If direct effect is applicable to a provision of Community law, national courts must apply that provision as part of the law of the land.[92] The Van Gend en Loos company imported urea-formaldehyde from West Germany to the Netherlands. It objected to the tariff imposed by Dutch Customs authorities on products imported from Germany and filed a complaint with the national court seeking a refund. Van Gend en Loos sought to apply Article 12 of the Treaty of Rome,[93] which requires Member States to refrain from introducing between themselves any new customs duties on imports or exports against the Dutch customs authorities in proceedings in a Dutch tribunal. The case was referred to the ECJ for a preliminary ruling for a decision on whether Article 12 was directly effective.

The respondent argued that the obligations set forth in Article 12 were addressed to govern rights and obligations between States and did not confer rights to individuals. The Court ruled for the Van Gend en Loos company, citing "the objective of the EEC treaty" and held that Article 12 contains an unconditional negative obligation and that the nature of the prohibition makes it "ideally adapted to produce direct effects in the legal relationship between Member States and their subjects."[94] The most quoted passage of the

[89] Alter 1996
[90] History of the European Court of Justice
[91] Van Gend en Loos v Nederlandse Administratie der Belastingen
[92] TC Hartley, 192
[93] "Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any changes having equivalent effect, and from increasing those which they already apply in their trade with each other.
[94] At 13

case, however, tackles the notion that Member States have limited their sovereign rights. The ECJ stated:

> [T]he Community constitutes a new legal order of international law for the benefit of which that states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights, which become part of their legal heritage..

This case reversed an internationally recognized public international law principal which presumes that international legal obligations apply only to states. According to Weiler, "Public international law typically allows the internal constitutional order of a state to determine the method and extent to which international obligations may, if at all, produce effects for individuals within the legal order of the state."[95] Typically, even when international law or human rights obligations create state obligations or bestow rights on an individual, it does not create an actionable right in the national courts. Meaning, individuals cannot invoke international obligations in a national court. Under direct effect, Member States are subjected to individuals invoking Community obligations in their national courts.[96] It created a direct relationship between the Community and the Member States' citizens. Furthermore, EU law must be "fully and uniformly applied in all the Member States from the date of their entry into force for as long as they continue in force,"[97] regardless of whether state law requires implementing legislation. The ECJ gradually expanded the rights of individuals under the principle of direct effect in subsequent cases. Initially, for a provision to be directly effective, it had to be clear and unambiguous, unconditional, and not dependent on further action being taken by EU or national authorities.[98] However, in the 1974 case *Van Duyn v Home Office,*[99] the ECJ held that direct effect also applied to directives. The Court later ruled that even when a directive

[95] Weiler, J. 1991. The Transformation of Europe. *Yale Law Journal*, 100 pp. 2403-2483, at 2413, 2414, 2415
[96] Alter, 126
[97] Henkel 157
[98] Garrett, 169
[99] Case 41/74, [1974] ECR 1337. The case concerned a Dutch woman who wanted to enter the UK to take up a post with the Church of Scientology, which the UK had concluded was harmful to the mental health of those involved and adopted the official position of discouraging immigration permission to known scientologists. Van Duyn was denied permission to enter the UK on public policy grounds . She brought legal proceedings in the English court. The question centered on whether Article 39(3)[48 (3)] was directly effective.

has not yet been incorporated into national law, domestic courts must interpret national law in light of the directive in question.[100]

What is equally noteworthy about this case is that the ECJ made its decision outside of the parameters of the Treaty of Rome. Like the Supreme Court did in *Marbury v. Madson,* the ECJ engaged in judicial policymaking in determining a foundational principle of Community law. Both courts argued that there are implied rights that are not necessarily specifically granted by treaty or constitution. In *Marbury,* Justice Marshall argued, "affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[101] In *Van Gend en Loos,* the court rejected the argument that express remedies exclude the use of any other remedies. Both courts also base their ruling on the notion that a contradictory ruling would lead to an absurd result.[102]

With the passage of the Single European Act and a series of directives issued to finalize the internal market, the European Commission acted to address Member States' improper or non-implementation of community directives. Many Member States refused to incorporate ECJ judgments and the ECJ used the *Frankovich*[103] case to establish the doctrine of state liability. It concerned a claim that the Italian government's failure to implement Community directive – the establishment of a wage guarantee fund – caused him damages when his employer filed for bankruptcy.[104] Under Council Directive 80/987, Member States were required to establish guarantee funds from which employee wage claims might be paid in situations of employer bankruptcy. The complainants requested sums payable or damages for non-implementation of a directive. Under the then-existing understanding of direct effect, the employee was precluded from relief. The issue before the court hinged on whether a national court may be required under Community law to hold the State liable

[100] Case C-106/89, Marleasing [1990] ECR I-4135
[101] Marbury v Madison 5 U.S. 137 (1803)
[102] Engle, 44
[103] Andrea Francovich and Danila Bonifaci and others v Italian Republic. (1990) C-6/90
[104] Johnson, citing Cases C-6/90, Frankovich v. Republic of Italy, [1993] 2 C.ML.R 66, 66-116 (1991).

where the failure to implement a directive which does not give rise to direct effect has harmed an individual.[105] The Court ruled in favor of the claimant's second request, holding that there is a general principle inherent in the Treaty that a Member State must compensate individuals for losses caused by a violation of Community law for which the Member State is responsible. Like its ruling in *Van Gend en Loos,* the Court based its reasoning on the idea that the principle exists because it is in the interests of the Community that it should exist.[106]

One year after *Van Gend en Loos*, the ECJ established the doctrine of supremacy of Community law over national law. In *Flamino Costa v. ENEL*,[107] an Italian citizen owned shares in an electricity company. He opposed the nationalization of the electricity sector in Italy and refused to pay his electricity bill in protest. The nationalized electricity company, ENEL, sued Costa for nonpayment. Costa argued that nationalizing the electricity sector violated both the Italian Constitution and the Treaty of Rome. The case was first referred to the Italian Constitutional Court and then to the European Court of Justice. The Italian Constitution Court ruled that although the Italian Constitution provided for the limitation of sovereignty, the latter of two conflicting statutes prevails. Because the nationalization law was signed in 1962 while the Treaty of Rome was incorporated into Italian law in 1958, the nationalization law must prevail over the Treaty. Further, the Italian government submitted to the ECJ that a preliminary rule would not serve any purpose because the ECJ did not have the power to set aside Italian law.[108]

The ECJ disagreed with the Italian government, holding that "the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which subsequent unilateral acts incompatible with the concept of the Community cannot prevail."[109] In a move similar to that of the United States Supreme Court in its *Marbury* ruling, the ECJ declared that although Community law remains supreme, the Italian law did not actually violate Community law.

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[105] Id at 84
[106] Hartley, 230
[107] [1964] ECR 585 (6/64)
[108] Supra note 105
[109] Costa

It is this notion of the supremacy of EU law over national law that indicates a type of federal structure.[110] Although the treaty that established the European Community did not have a specific supremacy clause similar to the Supremacy Clause of the US Constitution, the ECJ determined that there is a hierarchical relationship in which EU law ranks higher than national law. The ECJ held that "integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. […] The executive force of Community law cannot carry from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) (now Article 10) and giving rise to the discrimination prohibited by Article 7 (now Article 14). The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[111] As such, EU law remains supreme over national law so long as the EU law falls within the competences of the EU and Member States are incapable of making laws with the intention of overriding EU law.

The Court of Justice later asserted the principle of primacy in *Amminstrazione delle Finanze dello Stato v. Simmenthal*. In *Simmenthal,* the complainant challenged the inspection fee imposed by the Italian revenue authorities. Simmenthal argued that the fee violated the previously mentioned Article 12. During the preliminary hearing, the Italian government argued that issues of constitutionality were reserved for the Italian Constitutional Court. The ECJ disagreed, arguing that Community regulations are subject to direct effect and that "deferring taxpayer's recovery until the Italian Constitutional Court acted would upset the uniform application of the regulation throughout the community."[112] The Court held that "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals

[110] Moull, 4
[111] Costa note 9 at 589. See also, Moull
[112] Johnson, 1096

and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."[113] Accordingly, national courts must give full effect to relevant provisions without prior constitutional review. The constitutional procedures of Italy were not permitted to delay the consideration of the complainant's case. This case will be re-analyzed from the Italian perspective in the following chapter to understand Italy's opposition towards Community primacy.

The *McCulloch, Costa,* and *Simmenthal* cases all concern the supremacy of federal law over state or Member State law. Backer argues that supremacy provides the definitive answer to the question of the status of the Community government relative to the states, which constitute the new government. Through these decisions, the ECJ attempted to impose on the constituent states of the Community review mechanisms which appear to mimic the American model. Supremacy is critical in establishing the ideal of the universality of norms shared among communities. Harmonization within the European Union's 'new legal order' is coercive. It suggests the limits of lawmaking to which the constituent states of the Community must adhere; it supplies the boundaries to delineate the conduct norms of the supranational polis. Harmonization regularizes and levels national differences.[114]

Each of these cases also highlights the transfer of sovereignty to a somewhat centralized government. In both the United States and the EU, states are prevented from creating or enacting legislation that is incompatible with the federal structure. State courts in the United States and national courts in the European Union must also comply with rulings from the Supreme Court or the European Court of Justice. Weiler argues that it is the combination of direct effect and supremacy that truly highlights the federal nature of the EU. Under the two doctrines, Community norms that produce direct effect are "not merely the Law of the Land, but the "Higher Law" of the land. This architecture, with very few expectations, is only found in the internal constitutional order of a federal state.[115]

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[113] Simmenthal 106/77
[114] Backer.
[115] Bverfg.de. 2009. Das Bundesverfassungsgericht. [online] Available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [Accessed: 6 Feb 2014].

The doctrines established by the European Court of Justice: supremacy, direct applicability, direct effect, implied powers, and primacy, clearly indicate the Court's intention towards deeper European integration and centralized governance. These principles were not part of the Treaty of Rome. Rather, they were judicially created by the ECJ, which transformed the original preliminary ruling system from a system that allowed individuals to question Community law into a system that allows individuals to question national law.[116] The ECJ's ruling on the supremacy of Community law challenged the notion that international law must be narrowly interpreted and closely follow the clear intent of the negotiating parties. These doctrines, however removed the ECJ from the realm of traditional principles of international law.

Alter discusses the groundbreaking judicial advocacy practiced by the ECJ, noting that "nowhere did the Treaty of Rome say that European citizens had a legal right to have the Treaty implemented; nowhere was it written that EC law was supreme to national law; and nowhere in the Treaty were national courts empowered to enforce EC law against their governments. There was also no national legal basis for courts to apply the supremacy of EC law."[117] The ECJ summarily changed the role of the Court by declaring the doctrines of supremacy and direct effect. Given the responses from the national courts that will be explored in the following chapter, one must examine the way in which the ECJ was able to establish legal precedent, consolidate, and aggregate power with little political response.

Re-tracing the foundations of the European Court of Justice allows us to examine the manner in which the ECJ veered from one of the weakest Community institutions to a driving integrating force. In the United States, criticism of Marshall's interpretation of federalism was anything but subtle. In the European Union, the ECJ was able to quietly commandeer authority with little fanfare until recent decades. The ECJ undermined the national law by invoking Community law in national courts. Alter argues that the ECJ was able to expand its judicial authority and establish legal precedent without creating controversy by introducing new doctrines gradually. In many of these cases, the ECJ established the principle, but did not apply it to the case being decided.

[116] Alter 1998
[117] Alter 1996

Although this paper will examine at length the legal response from member state courts in the following chapter, it is important to first examine the political atmosphere that allowed for the expanded ability for the European Court of Justice to further integrate the European Community. The ECJ has largely been able to escape Member State control. As noted by the 1974 *Financial Times* article, "although the Court likes to pose modestly as 'the guardian of the Treaties' it is in fact an uncontrolled authority generating law directly applicable in Common Market Member States and applying not only to EEC enterprises but also to those established outside the Community, as long as they have business interests within it."[118] Allowing individuals to bring cases directly to the ECJ removed the power from the national courts to determine which cases the ECJ would hear. Individuals "raised cases involving issues that member states considered to be the exclusive domain of national policy, such as the availability of educational grants to non-nationals, the publication by Irish student groups of a how-to guide to get an abortion in Britain, and the dismissal of employees by recently privatized forms."[119] Individuals received rights even when the national legislation wasn't in compliance with Community law and states were incapable of ignoring ECJ decisions.

The ECJ expanded its power while minimizing the financial and political response. Until the 1980s ECJ decisions were mere 'principles without reality and had little political effect.'[120] For example, in the previously mentioned *Costa* case, the Court ruled that the Italian law was not in violation of Community law. As such, there was nothing the Italian politicians could protest, not comply with, or argue to overturn. There was nothing for the Italian courts to enforce. The ECJ was careful not to solicit a great deal of political action from national actors. Some argue that European politicians were simply not paying attention to ECJ decisions. In considering the tactics used by the ECJ to allay political response, Trevor Hartley commented on the common tactic used by the ECJ, explaining that the ECJ introduces a new doctrine gradually. It will first establish the doctrine, but not apply it. If there are not too many protests, it will be re-affirmed in later cases.[121]

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[118] From "More Powerful than Intended,"*Financial Times,* 22 August 1974.
[119] Alter, 127
[120] Alter 135
[121] Hartley, Trevor 1988 *The Foundations of European Community Law.* Oxford: clarenden Press 78-79

Although political objections were minimal, they were still present. Legal integration proceeded in spite of the objections raised by national politicians. In the late 1970s and early 1980s, French, German, and British politicians began decrying ECJ decisions. Specifically, French Prime Minister Michel Debre, declared that "once again…the attitude of the Court [has led to an] usurpation of the sovereignty of the Member States. Some scholars argue that if national politicians were truly outraged with the ECJ, they would have taken action against the Court to counter its jurisprudence. However, Joseph Weiler argues that the largest advances in EC legal doctrine at both Community and national levels occurred while Member States were simultaneously minimizing supranational tendencies from the Treaty of Rome. Member States were re-asserting their sovereign rights. For example, shortly after supremacy of Community law was declared in 1964, France commenced its 'empty chair' policy to block Community policy-making and the expansion of Commission authority. Further, the "Luxembourg Compromise" protected national sovereignty by national politicians agreeing to stop the advancement to qualified-majority voting.[122] While the ECJ was advancing principles of supremacy and direct effect in the 1970s, national politicians were blocking attempts to create a common market. National representatives also argued against interpreting community law in a way that would allow national courts to evaluate the compatibility of Community law and national law.

This chapter focused on the path taken by the European Court of Justice to turn the EU into a "United States of Europe." The ECJ attempted to 'federalize' EU law, by creating a hierarchical nature where EU law is supreme over national law, by making Member States liable for not conforming to EU norms, and by creating a direct relationship between individuals in the Member States and the European Union. The ECJ engaged in judicial policy making, relying on implied powers, to enhance the importance of the Court, as the Supreme Court did in the United States. Like the Hamiltonian federalists, the ECJ has attempted to position the locus of power at the supranational level. However, as evidenced by the case law examined in the following chapter, the National Courts in the Member States continue to resist.

[122] Alter 1996

Chapter 3 The Member States Respond

National courts throughout the Member States have had varied responses to the ECJ's efforts. For example, Belgium and Latvia have complied with little resistance.[123] At the other end of the spectrum are Germany and Italy, which have consistently questioned the democratic legitimacy of the Union, making the issue both legal and political. As the European Court of Justice has been a powerful force for integration, it follows that the courts in the Member States have professed the most opposition. Examining the cases from Member States' national and constitutional courts provides an understanding of some of the states' responses to the ECJ, and helps to determine where the locus of power exists in the European Union. Subsequently, this examination provides an understanding of the nature of federalism in the European Union and its prospects for a federal union from both the Community and national perspectives. Some of the national court responses mirror the same arguments made by Calhoun and his confederate colleagues – that the EU remains a group of aligned, but ultimately sovereign Member States. The lessons learned from the US Supreme Court becomes increasingly relevant, because many of the national courts mimic the arguments made by Calhoun and his confederate colleagues; that the Union is a group of allied, but ultimately sovereign states to which certain competencies cannot be transferred.

A myriad of issues have arisen in the national courts of the Member States in response to the ECJ's foundational cases. The doctrines of supremacy and direct effect have caused conflicts between Community and Member State laws, and raised many questions. One is the extent to which national courts will go to accept supremacy when EU law conflicts with constitutional law. Are states willing to amend national and constitutional norms for the sake of conformity to Community law? Another issue is the conceptual basis on which national courts base their decision on cases that involve the supremacy doctrine. Is it based on the acceptance of Community supremacy? A third issue is the question of which court has ultimate interpretive authority of EU law. Do the national courts, as representatives of the Member States, decide when the ECJ has exceeded its jurisdiction? In

[123] Hartley

the United States, the Supreme Court delegated to itself this power. Can a national court declare EU law null and void if it conflicts with constitutional norms? Although the United States has settled many of these questions, these issues are not certain in the EU. One of the central themes present throughout the Member States is that national and constitutional courts maintain the right to review acts EU acts for constitutionality, like judicial review in the United States. Another theme rests on principles of democratic legitimacy and national sovereignty. This chapter provides a synopsis and analysis of the national courts' responses, which will subsequently show where the locus of power exists within the EU.

Italy

The Italian Constitutional Court (ICC) has vacillated between acceptance and non-acceptance of Community norms from the inception of the ECJ to the present day. Italy's initial misgivings are evident as it was the Italian government that prompted many of the ECJ's foundational cases, including *Costa* and *Simmenthal.* At a fundamental level, the ICC uses a dualist approach, where national and international norms are separated. International law does not become part of national law until it has been transformed and implemented into the national legislation.[124] The ECJ takes a monist approach, where Community law and national laws are considered equal.[125] The ICC serves a dual and somewhat competing role in Italy. It is tasked with both acting as the guardian of the Italian constitution while simultaneously fostering European integration. Italian jurisprudence has re-envisioned the notion of Community supremacy and, in a sense, brought it down from the supranational to the national level.

As noted earlier, the ICC has wavered on its acceptance of Community supremacy and ECJ authority. In one set of cases, the ICC has accepted, albeit with some hesitation, the authority of the ECJ. In another set of cases, it has attempted to limit the ECJ's authority. It is in this set of cases that the ICC has "incrementally enlarged its power to exercise judicial review when Community matters are involved."[126] The former focused on sovereignty where the latter set focused on democratic legitimacy. Re-examining some of the

[124] Craig, 38
[125] Cartabia
[126] Cartabia, 176

foundational cases from the Italian perspective highlights initial impediments of Community supremacy under Italian law. Italy's path to acceptance began with the 1964 *Costa* case, in which the ICC asserted, "the relationship between Community and national norms was no different from the relationship between two national sources of law possessing the same binding authority."[127] Accordingly, the ICC ruled that where a national and Community law conflict, the most recent law prevails. This meant that the Italian parliament could pass a law contrary to Community law that would have higher authority in Italy making Italy uncommitted and unbound by any Community law. The ICC slightly adjusted its position ten years later, bringing more conformity with the ECJ, but still subjected Community law to judicial review, triggering the ECJ's *Simmenthal* decision. The ICC declared that when the ICC determines there is a conflict between national law and Community law, the national law would be ruled unconstitutional. In 1984, through its decision in the *Granital*[128] case, the ICC disposed of the Constitutional review requirement for cases dealing with inconsistent national and Community laws, ruling that Community laws in which direct effect applies will prevail over national laws. The Court stressed that "… technically, national norms may not be abrogated by Community norms, nor are they to be considered null and void. They simply cannot be applied by judges – when the same concrete situation is governed by both a national and a Community norms, the former is no longer relevant to the case."[129]

In a parallel set of cases, the ICC has made adverse rulings on European integration, despite accepting aspects of Community supremacy, by focusing on the issue of limited sovereignty. In 1973, the ICC decided the *Frontini*[130] case, holding that the States' powers are limited due to handing over certain powers to the Community. However the ICC also held that Community institutions are incapable of breaking fundamental constitutional principles because this would nullify the sovereignty of Italy and exceeds Constitutional limits. The ICC retained the ability to review Community law when it threatened Italian constitutional principles. More than a decade later, the ICC decided the *FRAGD*[131] case

[127] Costa
[128] Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098
[129] Cartabia 179
[130] Judgment of Dec 27, 1973, Corte cost., Italy 18 Giur. Cost. I 2401
[131] Judgment of Apr. 21, 1989, Corte Cost., Italy, 34 Giur. Cost. I 1001.

ruling on the constitutionality of the parliamentary act that ratified Article 177[132] of the EC Treaty, specifically the section giving the ECJ the right to provide prospective judgments in preliminary proceedings. The ICC held that all Treaty provisions were subject to judicial review to determine their constitutionality, expanding its right to review Treaty provisions and secondary law.[133] The ICC reasoned that a "judgment of unconstitutionality would not necessarily invalidate the entire ratification law but only some of the Treaty's articles, interpretations, or applications. Under this line of reasoning, the Court attempts to eliminate from the Italian legal order those community rules which are inconsistent with the highest constitutional values, while preserving Italian membership in the EC."[134]

The ICC has theoretically accepted supremacy of Community law, but places a limit on further integration when sovereignty is in jeopardy. Reserving the right to review of Community norms is incompatible with the ECJ's declaration of supremacy. The ECJ has sought to acquire and maintain the exclusive right to void and review Community law.[135] The ICC has repudiated the ECJs claim and the idea that Community law remains supreme over national laws by maintaining the right to potentially invalid elements of Treaty provisions should they conflict with constitutional law. By subjecting Community law to constitutional review, the ICC has removed some of the hierarchical nature of a federal institution.

France

Like Italy, French courts also maintain the right to subject EU law to judicial review, albeit through a different process. France's situation is unique, because it consists of high courts that conflict over the position of supranational law in the national courts. France's legal system consists of the Cour de Cassation, the Conseil Constitutional and the Conseil

[132] Article 177 reads: 1.Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries. 2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.
3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations.
[133] Id at 9
[134] Cartabia, 186
[135] Backer, 205

d'Etat. The Cour de Cassation is the highest judicial court and exercises jurisdiction as the court of last resort for civil and criminal matters, and is the most accepting of Community supremacy. The Conseil Constitutionnel acts as the supreme authority on constitutional matters and the Conseil d'Etat is the highest administrative court. Both courts have been far more suspicious of Community law and have historically treated Community law as international law, maintaining that supremacy of the French Constitution over Community norms.

Article 61 of the 1958 French constitution requires institutional acts be referred to Conseil Constituionnel for a rule on their conformity with the constitution.[136] In 2008, this provision was amended,[137] to grant individuals facing a court the right to argue that a legislative provision is in breach of rights afforded by the constitution, a process known as QPC.[138] Procedurally, once invoked, the respective court must pause the proceedings while the question is examined by the Conseil d'état or the Cour de Cassation. These courts then decide whether to refer it to the Conseil Constitutionnel for a final ruling. If the Conseil Constitutionnel finds the provision is in breach of the Constitution, the provision is repealed. A preliminary understanding of the QPC process reveals potential concerns for the ECJ, as subjecting national implementing law to constitutional review once again defies the notion of the supremacy of Community law.

The Cour de Cassation was the first French high court to readily accept Community law. The leading case for the Cour de Cassation is *Administration des Douanes v. Societe 'Cafes Jacques Vabre' et SARL Weigel et Cie*[139], under which the Cour held that when a conflict exists between a national law and an appropriately ratified international act that had entered the internal legal order, the Constitution granted priority to the international act. Vabre imported soluble coffee extract into France from Holland on which he was required to pay duties under a 1996 French law. Because coffee extract produced in France was subject to a lower tax rate, the complainant argued it that had violated Community law.

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[136] Article 61, 1958 constitution http://www.franceway.com/w3/Facts&Figures/politics/constitution.html
[137] By loi organique
[138] a law adopted to complete a specific provision of the Constitution. QPC stands for 'question prioritaire de constitutionalite;
[139] [1975] 2 CMLR 336

In response, the Director-General of Customs argued that the Cour de Cassation is precluded from determining constitutionality because that right is reserved for the Cour d'Appel. The Cour de Cassation rejected this argument, reasoning that the Community operates on a separate legal order to which national courts are bound.

In the case of *Melki and Abdeli,* two unlawfully present Algerian nationals were detained by French police at a police control zone close to the French-Belgian border. They argued that the law permitting the police controls breached their rights guaranteed by the French constitution. By invoking article 88-1 of the French Constitution, which recognizes France's participation in the EU, they argued that the treaty provision that allows for free movement of persons has constitutional value and that the police controls violated France's constitution.

The Cour de Cassation found that in order to make a decision on constitutionality, the Conseil Constitutionnel would have to subject Community laws to constitutional review in order to decide on the compatibility of the police control provision with EU law. It requested a preliminary ruling from the ECJ for guidance on whether France's law permitting police controls violated France's constitutionally mandated EU participation.[140] The first president of the Cour de Cassation, Vincent Lamanda, referencing *Simmenthal* stated that "every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights, which the latter confers on individuals, and must accordingly set aside any provision of national laws which may conflict with it, whether prior or subsequent to the [EU] law."[141] The ECJ's preliminary ruling suggested that the Cour repeal the national law.

The Conseil Constitutionnel has consistently held that it is of utmost importance that the French Constitution remains supreme to Community law. In 1996, the president of the Conseil Constitutionnel, Pierre Mazeaud, wrote, "It is necessary to amend the Treaty of Rome itself to insert into it an exception to the supremacy of Community law when the latter infringes the constitution of one of the Member States. When the Court of Justice

[140] http://ec.europa.eu/dgs/legal_service/arrets/10c188_en.pdf
[141] Kellerman, A. 2006. Jurisprudence. [online] Available at: http://international.jurisprudence.cz/clanek.html?id=10&seznamtyp=&rocnik=&cislo= [Accessed: 12 Feb 2014]

finds that a Community act is contrary to a constitutional rule or principle in a Member State, it should exempt that state from applying it within its territory."[142] The Conseil Constitutionnel has held that directives must not be contrary to a rule or principle inherent in the French constitutional identity, unless the people of France have consented.[143] The Conseil Constitutionnel disagreed with the Cour de Cassation's decision in the *Melki case.* The Conseil Constitutionnel disagreed that article 88-1 required legislation be examined in light of all EU law. The Conseil proclaimed that the QPC procedure "did not hinder a court from doing whatever was necessary to ensure the full effectiveness of EU law in a case before it when it is alleged that national law is in breach of EU law. The Conseil Constitutionnel confirmed in its Maastricht decision that there are limits to France's acceptance of supremacy. Its decision stated that France could transfer competence to an international organization, provided that it did not thereby violate the essential conditions for the exercise of national sovereignty, and provided that the international agreement did not contain clauses contradictory to the Constitution. A transfer of power that exceeds constitutional norms would require modification of the constitution.[144]

Similarly, the Conseil d'Etat departed from the Cour de Cassation's reasoning. Two days after the Conseil Constitutionnel's ruling, the Couseil d'Etat held in the *Rujovic* case that the *loi organique* did not hinder the administrative courts from ensuring the effectiveness of EU law as they can immediately stop all effects of a law which is contrary to EU law. The Conseil d'Etat also ruled that an administrative court must first examine whether "a rule of general principle exists in [EU] law which, having regard to its nature and scope, as interpreted by the current state of the CJEU (Court of Justice of the European Union)'s case law, guarantees in its application the effective respect of the provision or principle of constitutional value invoked." Following the path of the conseil Constitutionnel, the Conseil d'Etat recognized that there is "a core of constitutional values which would block the transposition by an administrative act, and it will undertake this control on a case-by-case basis.[145]

[142] P Mazeaud Le Monde 20 Jan 1996 p 13, reproduced in (1996) 28 Revue francaise de droit constitutionnel 702—704.
[143]Decision n 2006-540 DC of 27 July 2006
[144] Craig, citing C.C. 2 September 1992,
[145] Richards, 10

The lack of a consensus amongst French courts highlights the disparity amongst and the debate between different national courts within a member state. France has one court that aligns itself with the European Court of Justice and two courts that seek to protect constitutional law over Community law. The Cour de Cassation envisions itself as a European Court, while the Conseil Constitutionnel and the Conseil d'Etat are loyal first and foremost to French constitutional principles. The Cour de Cassation does not draw its authority to apply EU law from the French Constitution, but looks directly to EU law. On the other hand, the Conseil d'Etat, in its *Rujovic* decision, stated that 'the administrative courts were the '*juge de droit commun de l'application du droit de l'Union europeenne,'*[146] and should thus, in all circumstances, ensure the effectiveness of EU law. However, for the Conseil d'Etat, in line with the Conseil Contitutionnel, the Constiuttion remains supreme, and EU law is accommodated within the French legal system because this is provided for by the Constitution itself."[147]

United Kingdom

Like Italy, the United Kingdom has developed a dualist view regarding the relationship between international treaties and national law. International treaties, "though signed and ratified by the United Kingdom, are not part of the domestic law of the United Kingdom."[148] They must be incorporated domestically in an Act of Parliament to be enforceable at the domestic level. This contradicts the doctrines of supremacy and direct effect because an Act of Parliament incorporating Community law at the domestic level is vulnerable to a subsequent contradictory Act of Parliament. Further, Community norms subject to direct effect are supposed to become effective without implementing legislation. On this issue, in the case of *McWhirter v Attorney General,* Lord Denning stated, "Because Britain has adopted a dualist approach to treaty implementation, the obligations of Britain under the various treaties of the European Union have no effect, as far as these Courts are concerned, until it is made an Act of Parliament. Once an Act of Parliament implements it,

[146] Roughly translated: ordinary courts applying the law of the European Union
[147] Richards, 16
[148] Craig, 40

these Courts must abide by the Act of Parliament. Until that day comes, we take no notice of it."[149]

The case of *R. v. Secretary for Transport, ex p. Factortame Ltd.*[150] involved Spanish fishermen who claimed that the criteria for registration of vessels under the Merchant Shipping Act of 1998 were discriminatory and incompatible with the EC treaty. The parties agreed to submit the issue to a preliminary hearing with the ECJ. The question under consideration was the status of the Act while the Act was under consideration by the ECJ. When the House of Lords ruled that "there was no jurisdiction under English law to grant interim injunctions against the Crown,"[151] the applicant claimed that this was a violation of Community law. The ECJ held in favor of the applicants, citing the necessity for full effectiveness of Community law. The case returned to the House of Lords to be considered in light of the ECJ's preliminary ruling. This case took twelve years to come to a conclusion, where many of the issues were settled, but highlighted the UK's issues with Community supremacy. In a later case, Lord Justice Laws ruled that "...there is nothing in the European Communities Act which allows the European Court, or any other institution of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom...That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions."[152]

Spain

Article 93 of the Spanish constitution was created in anticipation of Spain's eventual admission into the European Community. It reads:

'By means of an organic law, authorization may be granted for concluding treaties by which the exercise of powers derived from the Constitution shall be vested in an international organization or institution.'

[149] (1972) CMLR 882
[150] [1990] 2 A.C. 85
[151] Craig 41
[152] [2003] QB 151; [2002] 3 WLR 247; [2002] 4 All ER 156; Times, 22 February 2002

Backer notes that in the early 1990s, Spanish courts began questioning the constitutional supremacy of the treaties undergirding the European Union.[153] In the Electoral Law Constitutionality Case,[154] the Constitutional Court ruled that:

> From the date of its accession, the Kingdom of Spain has been bound by both the primary and secondary law of the European Community which, to quote the words of the Court of Justice of the European Communities, constitutes an independent legal order, integrated into the legal systems of the Member States and which their courts are bound to apply. However, this binding nature clearly does not signify that, by means of Article 93 of the Constitution, the norms of European Community law are endowed with constitutional rank and force.

Spanish courts have held that legal supremacy and constitutional supremacy are distinct and that national constitutions may not be constrained by superior law. It distinguishes between the granting of certain sovereign rights to an institution like the EU, and the actual ownership of those powers. This notion was expanded upon in *Asepesco Case*[155] in which the Court stated: where a constitutional complaint action is brought against an act of the public authorities, taken for the implementation of a provision of Community law, alleging the violation of a fundamental right, such an action falls within the jurisdiction of the Constitutional Court, quite independently of the action of whether or not the act at issue is lawful from the strict perspective of the Community legal order and without prejudice to the interpretive value with which the provision may be endowed by Article 10(2) of the Constitution.

Like other Member States, the Spanish Constitutional Court maintains that Community law does not rise to the level of Constitutional law. Judgment 28/1991 held that the conflict between a Community norm and domestic norm lacks constitutional relevance. Community membership "does not mean that because of Article 93 the norms of European Community Law have been given constitutional rank and force, nor does it imply that the occasional infraction of these norms by a Spanish provision necessarily entails at

[153] Backer 205
[154] Case No. 28/91 Spanish Constitutional Court 14, 1991
[155] Case No 64/91, Spanish Constitutional Court (March 22, 1991)

the same time an infringement of the aforementioned Article 93 of the Constitution."[156] The Spanish Constitutional Court will not exercise jurisdiction over Community law, but maintains the right to hear cases on implementing legislation. Further, Spanish national authorities are not 'Community' organs, even when applying Community law. National authorities are permanently tied to the Constitution.[157]

Germany

Compared to other Member States, Germany has been the most consistent in its opposition to the expansion of the European Court of Justice's competencies. The jurisprudence on the relationship between the German Federal Constitutional Court (FCC) and the European Court of Justice parallels many of the arguments made in the anti-bellum south – mainly that the European Union is an association of sovereign states and that Germany must resist the transfer of sovereign power to the European government.[158] Backer notes Germany's skepticism towards a centralized union, arguing that "The German experience with federalism, as well as its horrible experience with a centralizing government between 1918 and 1945 have infused German courts viewing the growth of European federalism with a healthy dose of skepticism of the supremacy, hierarchy and hegemony of the general governments. Such governments have tended to be anti-democratic and tyrannical."[159] One of the FCC's foundational cases dealing with the relationship between the FCC and the ECJ is on the issue of fundamental human rights standards, a topic the Treaty of Rome ignores.[160] Germany expressed concerns that the Community would disregard fundamental rights guaranteed by German Basic Law. In response U. Scheuner wrote:

> "When considerable parts of Community Law came to be regarded as directly applicable, demanding immediate application within the States, and when supremacy of Community Law was proclaimed by the Court, the question became urgent whether the transfer of powers to the Community … include[d] the

[156] The Reeption of European Community Law in Spain- Rafael Eal-Arcas
[157][157] Id, citing *Revista de Instituciones Euopeas, 667-681*
[158] Backer, 198
[159] Backer, 200
[160][160] Lanier, 2

recognition of the primacy of European enactments even over norms of the [German] Federal Constitution."[161]

The 1974 *Solange I* case involved issues with the European Council and Commission Regulation that required payment of a bond in conjunction with export license applications. The applicant protested his forfeiture of a bond paid on a corn flour export transaction. The respondent claimed that the applicant had violated its constitutional rights provided by Germany's Basic Law. The Administrative Court referred the case for a preliminary ruling, arguing that German courts could not enforce Community regulations that conflict with fundamental rights that arise from the German Constitution as the German court maintains the obligation to protect fundamental liberties.

The ECJ ultimately ruled that the forfeiture of the bond was not an unreasonable burden of trade and that no fundamental right had been violated. However, it took serious issue with the Administrative Court's argument, stating that:

> "Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law…Therefore the validity of the Community instrument or its effect within a member-State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure."[162]

In response to the ECJ, the Administrative Court contested the ECJ's description of the relationship between national and Community law:

> "The question is certainly justified as to whether a certain decline in national institutions and constitutionality must be suffered as the price for the construction of a political union of Europe… [I]f Community law…is given precedence over any divergent constitutional provisions, and this European legal system is exempt from

[161] U. Scheuner. Fundamental Rights in European Community Law and in National Constitutional Law. 12 COMMON MKT. L. REV. 171 (1975).
[162] Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle ftir Getreide und Futter mittel, 1970 E. Comm. Ct.]. Rep. 1135, II Common Mkt. L.R. at 283.

> the obligations contained in…the [national] Constitution, it would lead to a constitutional and legal vacuum."[163]

The Administrative Court argued that national law should be the highest national check on European legislation. The FCC was worried about increased expansion without legal safeguards. The FCC subsequently commenced a review of its concerns, commenting on the EU's democracy deficit, stating that:

> In this [connection], the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliable and unambiguously fixed for the future in the same way as the substance of the [national] Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community as adequate in the long term measured by the standard of the Constitution with regard to fundamental rights…[164]

The Court essentially held that the Community, at that time, lacked the ability to guarantee the protection of German constitutional rights. The FCC further reasoned that the German legislature, in assenting to the EEC treaty, could not have intended to transfer powers to the Community that would infringe upon the German Constitution. The FCC maintained that it must continue to exercise its authority to protect Germany's Basic Law. The FCC's insistence on the need to protect Basic Law was met with substantial criticism from EU institutions. The Commission of the European Communities stated that:

> This ruling is contrary to Community law – and in particular to the principle of its autonomy and its primacy over national law, including constitutional law – and to all the relevant case law of the European Court. Accordingly it is a dangerous threat to

[163] Judgment of Nov., 24 1971, 11 Common Mkt. L.R. 177 184-185
[164] Solange I, at 280

> the unity of Community law and creates uncertainty as to the latter's uniform application. By claiming the power to verify the compatibility of Community secondary legislation with the fundamental rights in the Basic Law, the Constitutional Court is impugning the exclusive jurisdiction of the Court of Justice to ensure that in the interpretation and application of the treaties the law is observed…[165]

Solange I remained in place for twelve years, until the FCC's decision in *Solange II.* In 1976, a German processed-food importer was denied a license to import one thousand tons of Taiwanese canned mushrooms into Germany. The license was denied due to EEC Community Regulations that were in effect at that time. The importer filed a complaint with the Administrative Court, alleging that the EEC regulations were invalid because they were premised on poor market conditions that no longer existed. The complainant argued, "As temporary protective measures, the regulation had lost their basis in fact and, therefore, in law."[166] The Administrative Court held that the EEC regulation was consistent with the Treaty of Rome and sought a preliminary ruling from the European Court of Justice. The complainant re-stated its argument on the invalidity of the regulation due to the change in the market. The ECJ decided against the complainant, holding that the information available at the time did not warrant a repeal of protective measures.

When the case returned to the Federal Administrative Court, the complainant alleged a myriad of claims against the ECJ, including that the ECJ had usurped the function of the national court by making factual determinations, and that his constitutional right to practice his trade had been violated. The complainant requested a hearing in front of the FCC or, in the alternative, to renew his appeal to the ECJ. The Administrative Court rejected both requests. In response, the complainant filed a constitutional complaint with the FCC against the Federal Administrative Court. The FCC found that fundamental rights in the Community had now risen to a level of fundamental rights protection that was required by

[165] *Commission of the European Communities, Eighth General Report on the Activities of the European Communities 270 1974*
[166] Lanier,15

the German Constitution. A conflict between Community law and German law would no longer result in German law automatically superseding Community law.[167]

Prior to *Solange II,* the FCC limited its jurisdiction to cases reviewing acts of German state power. However, in this case, the FCC asserted jurisdiction over acts of European organs, reasoning that acts of the Union affect the fundamental rights of German citizens.[168] As such, the FCC challenged the authority of the ECJ by subjecting the acts of European organs to its jurisdiction. The Court reinstated its position that there was a limit to the amount of power that could be transferred from Germany to the European Union. Although the complainant argued that any transfer of power to the European Union violated the Constitution, the Court maintained that the Basic Law provided for Germany's participation in the European Union.

In its *Maastricht* decision, which was a challenge to the Treaty on European Union, the FCC introduced the issue of Kompetenz-Kompetenz, otherwise known as interpretive competence. The case asked whether the ECJ or the FCC holds the ultimate authority on the limits of EU competencies. The FCC confirmed its ruling in *Solange II,* but added that the FCC's jurisdiction applies not only in cases where Germany is applying Community law, but also where Community law stands on its own. The FCC expressed concerns about the ECJ acting beyond its delegated competencies, and differentiated between treaty amendment and treaty interpretation. The Court held that the ECJ may engage in treaty interpretation, but not when it rises to the level of treaty amendment. Only the Member States, acting unanimously could engage in treaty amendment. Accordingly, "the Federal Constitutional Court will review legal instruments of the European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them."[169] Once again, the FCC ruled that Community law is subject to the jurisdiction of the Constitutional Court.

The FCC raised the EU's democracy deficit issue. One of the core principles of Germany's Basic Law is its Democracy Principle and the status of democratic legitimation.

[167] Moull, 4
[168] Boom, 181
[169] Brunner, [1994] 1 C.M.L.R. at 89 para. 49.

The complainant asserted that the Maastricht Treaty violated its constitutional right granted by article 38(1) which provides: "(1)The deputies to the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders and instructions, and shall be subject only to their conscience."[170] Thus, it is the constitutional right of the citizens of Germany to elect members of the Bundestag, which satisfies the democratic legitimation requirement of the Democracy Principle. The FCC examined whether democratic features, which included the constant free exchange of ideas, transparent and understandable objectives of public authority, and the possibility for citizens to communicate in their native tongue with public authorities, were present in the EU.[171] The Court found that the EU lacked a democratic infrastructure. Although the European Parliament played a democratic role in the EU, it was described as peripheral and supportive. Meanwhile, the European Council, which exercises real power throughout the EU, is not a popularly elected body and its decisions are not transparent. Democratic legitimacy, according to the FCC, comes from the elected bodies of the Member States. Transferring too much power to the European Union would result in granting too many competencies to an institution with indirect legitimacy and would violate the Democracy Principle.

The most recent case of significance from the German Federal Constitutional Court is the *Lisbon* case, decided 30 June 2009.[172] The subject matter concerned the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The complaint also challenged the German Act Approving the Treaty of Lisbon. The primary issue in the Treaty of Lisbon was the new procedure for amending European Treaties and the 'bridging clauses' "pursuant to which the Member State governments will be able to give up their veto in the Council and move to qualified majority voting on certain matters without particular treaty amendments requiring ratification by the Member States."[173] The Court found that the legislative bodies (the

[170] Iuscomp.org. 1998. *Basic Law for the Federal Republic of Germany (Grundgesetz, GG)*. [online] Available at: http://www.iuscomp.org/gla/statutes/GG.htm#38 [Accessed: 10 Feb 2014].
[171] Boom 182-183
[172] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html
[173] Lanza, 401

Bundestag and the Bundestrat) had not been afforded sufficient participation in matters leading to the transfer of greater powers to the European Union Institutions.[174] The FCC based its ruling on principles of sovereignty, authority, and democratic theory, emphasizing "that Germany's participation in European integration will be viewed through the lens of the constitution's positions for international law."[175] Using Articles 38 and 23(1) as the legal foundation, the Court invoked models of electoral democracy and constitutional identity.

The FCC spent a considerable amount of time outlining its understanding of the European framework. First, its transformation into a political union as European Union in 1992 with increased openness on issues like home affairs, foreign and security policies, and justice. Next, the expansion to twenty-seven Member States, which the FCC contended was at odds with the original intention of a deepening of a common political identity. Third, the failure of the European constitution. Finally, the continued commitment to Germany's membership in the EU being subjected to the supervision of the German FCC.

One of the key principles the FCC discussed in its decisions is that of an electoral democracy. Based on Article 38(1), the Constitution guarantees the right of German citizens to equally and freely determine public authority. The FCC explained that "The citizens' right to determine in respect of persons and subjects, in freedom and equality by means of elections and other votes, public authority is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is enshrined in human dignity (Article 1.1 of the Basic Law)."[176] Thus the democratic principle is immutable and not only applies to the citizens of Germany, but rather it is a universal principle, applicable in every country. Pursuant to its previous ruling, the European Parliament, though the most democratic European institution, the EP is not a representative body of a sovereign European People.[177] Parliamentary democracy is limited because the prescribed allocation of seats of Member States which, according to the

[174] Lanza, 401
[175][175] Shorkophf, 1220
[176] Lisbon Case, BVerfG, 2 be 2/08 from 30 June 2009 para. 211-12
[177] Lanza 404

Treaty of Lisbon, distribution of seats is "degressively proportional."[178] Rather than being based on a specific formula, the 750 seats are allocated by negotiation, where proportionally, smaller states currently receive more places than more popular seats. Thus the FCC reasoned that it is not the "European people" who are represented, but rather the people of separate Member States, arguing that "The representation of the peoples in their respectively assigned national contingents of Members is not laid out as a body of representation for the citizens of the Union as undistinguished unity according to the principle of electoral equality."[179]

The FCC seamlessly links this principle with the constitutional identity principle, stating that democracy is not susceptible to the weighing of other legal interests. Democracy is paramount, and therefore the government must remain the masters of the treaties. If democracy is guaranteed, than not even parliament can tamper with the constitutional identity. The FCC solidified its position on the issue, stating, "The design of the European Union must comply with the principles of democracy. …Neither can the European integration lead to an erosion of the democratic system of government in Germany (a) nor can the supranational public authority in itself miss basic democratic requirements (b)."

It is evident from the case law that there are unsettled issues in the European Union. In the United States, judicial review, implied powers, and supremacy have been secured at the federal level. Although ECJ case law exemplifies the Court's attempt to federalize and further integrate the European Union, the case law from the Member State courts remains an impediment towards further integration. As the EU continues to amend its governing documents, national courts continue to subject EU law and treaty provisions to national and constitutional review. This suggests there is a struggle between European institutions and the Member States over whether the locus of power remains within the Member States, or whether the Member States have transferred sufficient competencies to create a federal institution parallel to the United States. The ramifications for the Member State courts will be examined in the following chapter.

[178] Article 14.2 Treaty of Lisbon
[179] Paragraph 280

Chapter 4 Analysis and Conclusion

The hypothesis of this paper is that the European Union will remain a collection of closely aligned but sovereign states, resembling the confederate ideals promulgated by John C. Calhoun and his fellow southern ante-bellum politicians. To test this, the previous chapters examined the American journey from a confederate union to a federalized nation, followed by the similar path taken by the EU through ECJ jurisprudence and the response by national courts in the Member States. This chapter engages in an analysis to determine whether the locus of power will remain with the Member States, or whether continuing integration will result in a 'United States of Europe.' One relevant factor revolves around the reserved powers of the Member States compared to those of the general government within the federal scheme, what are the ramifications of national courts subjecting EU law to judicial review, and whether the national courts can invalidate EU law, denying principles of Community supremacy.[180] Another important factor discerns which court serves as the ultimate interpreter of EU law. If it is the ECJ, then this suggests that the locus of power sits at the supranational level. If it is the courts within the Member States, whether national or constitutional, then it must be that the locus of power remains with the Member States.

The ECJ is positioned in the middle of this argument, as it has been the Court that has transferred to itself an increasingly larger share of EU competencies. The EU is currently debating over many of the same issues debated in the pre-Civil War United States and it has similarly been the courts that have attempted to settle these debates. Understanding the foundations of the judicial policy making conducted by the United States Supreme Court creates the foundation for the examination of the European Court of Justice's transformation into a powerful force for integration. As Henkel notes, "The Court is particularly responsible for the development and elaboration of the relationship between Community law and Member States and has delineated it much like the relationship in a constitutional federal State." Accordingly, Calhoun's political theory provides the foundational context for the Member States', particularly Germany's, response. It also

[180] Backer, 177

provides a re-characterization of federalism, which departs from what has become American orthodoxy. The cases examined in the previous chapter illustrated that the locus of power in the European Union remains with the Member States.

Pierre Pescatore highlights the importance of federalism, observing, "The methods of federalism are not only a means of organizing states. Federalism is a political and legal philosophy, which adapts itself to all political contests on both the municipal and the international level, whenever and wherever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant entities."[181] Backer explains that our current understanding of American federalism is based on the acceptance of several basic parameters. First, sovereign power is split between a national government and local political units, each of which constitutes an autonomous government. Second, within the domain of authority, the national government is supreme over state governments. Third, the power remains with the national government to decide the scope of the powers ceded to the national government meaning that the general government has discretion over which powers it delegates to itself. Fourth, the ceding of power creates a direct relationship between that national government and the people of the several states. Finally, secession from the union is impossible.[182] These principles have been now been solidified throughout the United States and are no longer questioned. However, as evidenced in Chapter 1, these principles were far from settled before the Civil War. Conversely, Daniel Elazar provides two possible ways to view a confederation: as a union of states each of which may be constructed in a statist fashion but which together have pooled certain powers for mutual advantage; or as in a union of unions in which sovereignty is vested in the people of each member unit and through them in the whole.[183]

In 1991, the ECJ asserted its perception of what the EU had become. It argued that the EEC Treaty has transformed the Union into a community based on the rule of law where supremacy and direct effect established the essential characteristics of the

[181]Pierre Pescatore, 'Preface', in T Sandalow and E. Stein, *Courts and Free Markets*, i (Oxford: clarendon Press, 1982), at ix-x

[182] Backer, 180

[183] Elazar in The Federal vision

Community legal order and are applicable to the Member States and their nationals.[184] This certainly resembles the federal system as it was in the United States during John Marshall's time. Although supremacy and direct effect represent the ECJ's attempts to federalize the EU and assert itself as the final arbiter of conflicts between national and Community law, these principles are subject to the most scrutiny in national and constitutional courts, thus making the ECJ vulnerable to the Member States.

One of the major debates between federalists and anti-federalists was whether power derived from the people or from the states. Federalists like Alexander Hamilton, Justice Story and Justice Marshall championed the argument that the authority of the general government stems directly from the American people, citing the preamble of the US constitution, which starts with "we the people." Federal institutions bind the people to their government. The confederates, particularly Judge Roane, argued that the Constitution was an agreement between the sovereign states, and that the general government serves as an agent of the states. In a confederacy, the people are protected by state governments, which in turn contract with other states to create a general government. The general government serves as a link between the states, but not the individuals. As proof, confederates cited the ratification process, which required each state to call its own convention. Judge Roane deduced that because the national government was created by individual contracting powers, the national government constituted "an alliance, or league" of sovereign states.[185] Calhoun explained that the essential feature of the confederacy was "nearly allied to an assembly of diplomats", meeting to determine certain policies, and then leaving their execution largely to the several parties to the agreement. As an agent to the Member States, it serves at their behest.

The European Union's authority is derived from the Member States, not the citizens within each Member State. As Judge Roane cited the preamble to the US Constitution, the preamble of the Treaty of Lisbon opens with His Majesty of the King of the Belgians, the President of the Republic of Bulgaria, the President of the Czech Republic ….Germany

[184] Johnson, citing Re The Draft Treaty on a European Economic Area (opinion 1/91([1992] 1 C.M.L.R. 245, 268-69 (1991)
[185] Newmyer, 897 citing Gunther

reiterated these foundations in *Maastricht,* stating that "The Union Treaty establishes – as mentioned – an association of states for the realization of an ever closer union of the peoples of Europe (organized in the form of states), not a state based on a European people."[186] The FCC went on, stating that "in any case, establishing a United States of Europe with state status comparable to the United States of America is not currently intended." Other national courts cited an ever-present duty to the people of their countries, most notably citing the issues of sovereignty and democracy. Explicit affirmations related to deepening integration of Europe suggest that national courts will continue to oppose any loss of state sovereignty, and that authority emanates from the Member States, not the European people.

One of the key features of a federation under the American understanding, and Backer's second requirement, is the hierarchical nature where lower governments must conform to the general government. In a federation, state law cannot contravene federal law. This was accomplished in the United States by the Supremacy Clause, which ensures that federal law is the supreme law of the land and the Fourteenth Amendment, which prevents any law from abridging the privileges or immunities of citizens of the United States, and the *Martin v Hunters Lessee* and *McCulloch v Madison* cases. In the EU, the *Costa* case established the supremacy of Community law over national law. However, despite its establishment in 1964, the doctrine of supremacy remains one of the most contentious issues in the EU, and one of the major impediments to forming a deeper union. National courts' rulings on the conflicts between Community law and constitutional laws pose a significant threat to the supremacy of Community law. Some national and constitutional courts have placed limits on how far the state can go in accepting Community supremacy, especially if a treaty provision or Community norm conflicts with a state's constitution. While some states have ruled that when a conflict exists, the national law must be amended to bring the state in line with the Community, others have gone so far to say that Community acts that are inconsistent with constitutional norms are void within that state. The German FCC ruled that the German constitution remains supreme in its *Solange I,*

[186] The Maastricht treaty also commences in the same way

Maastricht, and *Lisbon* cases. The Italian constitutional court ruled similarly in its *Frontini* and *Simmenthal* decisions.

Perhaps one of the most poignant indicators of the locus of power, however, is the right to subject 'higher' law to judicial review. Similarly, which court serves as the ultimate interpretive authority? In the United States, state courts are precluded from engaging in judicial review of federal laws and the Supreme Court interprets its own jurisdiction, which suggests that the locus of power is at the federal level. This issue is far less concrete in the European Union. Member states are far from unanimous on these issues. Which court decides when the Community law and the European Institutions have exceeded the powers transferred to them? Which court serves has the ultimate interpreter of EU Acts? Despite the principle of direct effect, national courts have held that Community law remains subject to judicial review by the constitutional or national courts. The ante-bellum confederates' argument becomes especially relevant. Confederates argued that state courts have the right to review federal laws for constitutionality, and a state court can invalidate a federal law if the court holds that the federal law exceeds its jurisdiction. Under Calhoun's nullification theory, a state may reject a measure of the general government regarded as inconsistent with the terms of the constitution, thus nullifying a proposed action of the federal government. The German Federal Constitutional Court, making arguments most reminiscent of Calhoun's, has led the way in arguing for judicial review of Community laws, but the courts in Italy, the UK, Spain, and France have also maintained that Community law must not violate their respective constitution principles. In the *Maastricht* case, the FCC held that it is the Member States that maintain the authority to assess the validity of Community Institutions. For example, in its Maastricht decision, the FCC ruled that:

What is decisive is that Germany's membership and the rights and duties that follow there from (and especially the immediately binding legal effect within the national sphere of the Communities' actions) have been defined in the Treaty so as to be predictable for the legislature and are enacted by it in the Act of Accession with sufficient certainty. That also means that subsequent important alterations to the integration programme set up in the Union Treaty and to the Union's powers of action are no longer covered by the Act of Accession to the present Treaty. Thus, if European institutions or agencies were to treat or

develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the FCC will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them.

This sentiment, that acts exhibited by European institutions that exceed the competencies granted to them by the Treaty are not legally binding in Germany, and that the FCC's insistence on assessing the legal instruments to ensure they remain within the bounds of the conferred rights, defies the traditional understanding of federalism. It also defies the principles of supremacy and direct effect – the founding legal doctrines. Similarly, in Calhoun's *A discourse on the Constitution and Government of the United States*, Calhoun wrote:

> (O)n the contrary, if they have, by ratifying the constitution, divested themselves of their individuality and sovereignty, and merged themselves into one great community or nation, it is equally clear that the sovereignty would reside in the whole – or what is called the American people; and that allegiance and obedience would be due to them. Nor is it less so, that the government of the several states would, in such case, stand to that of the United States, in the relation of inferior and subordinate, to superior and paramount; and that the individuals of the several states, those fused, as it were, into one general mass, would be united *socially*, and not *politically.* So great a change of condition would have involved a thorough and radical revolution, both socially and politically – a revolution much more radical, indeed, than that which followed the Declaration of Independence.

The fact that Member States continue to subject Community law to judicial review suggests that the locus of power remains with the Member States. Despite the ECJ's insistence that Member States must implement Community law without question, the previously examined cases show that national courts, particularly those in Italy, France, and Germany, hold that national courts can review Community law for constitutionality. Requiring Community law to respect national Constitutional principles is the reverse of the example set by the United States, where state laws must conform to federal laws. Even if that authority remains theoretical, the notion that a national court is subjecting what is

supposedly a higher law to review suggests that the ultimate authority remains with the national and constitutional courts.

State sovereignty is another issue that prevents the European Union from becoming a 'United States of Europe'. While in both the US and the EU the shared powers are delegated, the American re-definition of the locus of sovereignty stands in sharp contrast to the statist approach to sovereignty that animates Europe. In the EU, institutions struggle between the limited character of delegated powers and the statist ideals that normally accompany the assignment of competences in statist polities. Calhoun argued that although the general government acts as a sovereign entity, it is not actually sovereign. Acting as their agent, the national government merely exercises particular sovereign powers delegated to it by the sovereign states. The same can be said for the European Union. Member States have delegated to the European institutions the authority to exercise certain sovereign attributes, but ultimate authority remains in the member states. The German FCC, in its *Maastricht* decision, likened the TEU as nothing more than an international agreement among sovereign states. The Member States, the FCC stated, remain the *Herren der Vertrage*, the 'lord of the treaty,' and never surrendered their ability to secede. [187]

Europe's democracy deficit is a major point of contention amongst scholars, and was one of the key arguments in Germany's *Maastricht* and *Lisbon* decisions. Some have characterized it as a debate between direct and indirect legitimation where Union democracy is inaccessible to the ordinary citizen because their method of operating is so complex. Legislative and government powers are dominated by the European Council, the least democratic institution within the Union, thus arguing that the EU lacks democratic legitimacy.[188] Traditional theory derives legitimacy from the notion that the process of European integration is guided and controlled by the sovereign and democratic Member States. National parliaments "ratify the treaties; democratically accountable heads of state or government meeting in the European Council set the strategic priorities; the Council of Ministers, composed of people who are normally elected members of the national

[187] Majone, Regulatory Legitimacy
[188] http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm

executives, must approve the Commission's proposals before they become European law."[189] Some have argued that these are insufficient grounds of legitimation. In its Lisbon decision, the FCC reasoned that even if the European Parliament were to expand its competences, it would not fill the democracy gap between the decision making power of the Union's institutions and the citizens' democratic power of action in the Member States. "Measured against requirements placed on democracy in states, its election does not take due account of equality, and it is not competent to make authoritative decisions on political direction in the context of the supranational balancing of interests between the states…Due to this structural democratic deficit, which cannot be resolved in an association of sovereign national states (*Staatenverbund*), further steps of integration that go beyond the *status quo* may undermine neither the States' political power of action nor the principle of conferral."[190] One of the most difficult challenges in securing legitimation, then, is reconciling the equality of states with the equality of citizens. As the EU is attempting to secure itself as a deeply integrated supranational union, democratic principles require that all citizens have equal rights. Europeans seem to be more worried about the 'democratic deficit' in the EU, an aspect of its statist bureaucratic character, than in improving the partnership, which is what concerns Americans, because the EU is a union founded on principles of economic liberalism and limited partnership.[191]

The principles we have come to understand as paramount to a federal institution – supremacy, interpretive authority, implied powers, and democratic legitimacy have been re-examined in the European context. Backer's sentiment rings true, that federal systems are not required to adhere to the principle that the courts of the general governments should be vested with the sole or supreme authority to interpret basic laws giving rise to the federal system.[192] The asymmetrical nature of the European Union shows sympathy towards a Calhounian concurrent majority, which emphasizes that the devolution of the locus of sovereignty from a centralized general government to the constituent states serves to better reflect the emerging European pattern.[193] In the United States, great emphasis

[189] Majone, note 185
[190] http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html
[191] Elazar, 41
[192] Backer 213
[193] Backer 215

was placed on the symmetrical relationship between the government as a whole and its constituent units, however asymmetry is considered a necessity in the EU. Member states have resisted the supremacy of EU law over national law and have maintained the right to review Community norms. Within the EU, there is more room to renegotiate the allocation of powers through treaty amendment than there is in the United States. European integration has "brought to the forefront the complex possibilities for structuring federal unions which remain federal but which may neither duplicate each other precisely nor fall within a recognized category of governmental organization." Its divergent nature has forced scholars to expand their understanding of federalism, past what we know as post-Civil War American federalism. Taking into consideration all of the relevant elements discussed in this paper, it is fair to assume that the locus of power is currently with the national states, and will remain there for the foreseeable future.

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