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David MOULL

B.A. (Honors) Political Science, University of Western Ontario, London, Canada

LL.B., Osgoode Hall Law School, Toronto, Canada

dave_moull@yahoo.com

**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**

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Abstract. There is an important comparison to be made between the formative years of the European Union and the United States. In both cases, there were challenges to the consolidation and expansion of power by a central authority, especially in the area of interpretive competence. Questions were also raised about the legitimacy of the federal or supranational organization. These assertions of the German Federal Constitutional Court call into question how the EU should be conceptualized now and in the future. An alternative vision of federalism from the formative years of the US shows that there is more than one path the EU can follow. This alternative path puts the ideas of democratic legitimacy and the true consent of the people ahead of notions of supremacy and uniformity, which have been made popular by the ECJ

I. Context of the comparison between the US and the EU

With its recent expansion into the states of Eastern Europe, the European Union (EU) is at a critical juncture in its history. Since its inception, it has grown steadily more prominent and influential in the legal and political life of Europe. The numerous volumes of literature to be found on related topics are evidence of this phenomenon. One of the EU's stated goals is the "ever closer union among the peoples of Europe."¹ This essay will set out how the process of integration within the EU has been carried out, specifically in the First Pillar of the European Community (EC). It will focus mainly on the judgments of the European Court of Justice (ECJ), especially those regarding the principles of EU law, such as Direct Effect, Supremacy and the Doctrine of Implied Powers. These judgments will be examined to see what logic the Court used to expand the power and competences of the EU over time.

The importance of these judgments is not only in what they meant to the EU in terms of its growing sphere of influence, but also on a more conceptual and theoretical level of what they meant to Europe as a whole and to the political organization of that part of the world. In this regard, the essay will address the issue of the EU's constitutional nature and how this concept is uniquely played out. As well, the character of the EU as an organization will be examined in terms of what labels are appropriately applied. The answers to these questions are not simple and definite.

An analysis of these issues is not best accomplished in a vacuum. This is not the first time in history a group of states with some common goals and interests has attempted to come together and form a larger entity. A prime and comparable example to the EU is the United States of America (US). There are many differences between the EU and the US as it is conceptualized today. However, helpful comparisons can be made between the formative years of the EU, which are still ongoing, and the formative years of the US, namely the period of time until the end of the Civil War in 1865. As in the EU, the Supreme Court in the US gave a series of judgments in its formative years that presented a certain vision of the country. The main issue of interest to the comparative analysis in these cases is whether the federal court or the state courts have the ultimate authority to decide questions of which court has interpretive competence (*Kompetenz-Kompetenz*). This is essentially the power to decide whether the matter is to be decided by the state or federal court in the US, the MS court or the ECJ in the EU. In the US during this time of consolidation of federal power there were strong challenges from some states and their courts to the notion that the Supreme Court is the final authority on this matter.

Parallels have been drawn between this debate and the one currently taking place in Europe, which was made prominent by the German Federal Constitutional Court in its *Maastricht* decision², as well as in several of its decisions over the previous years. These challenges to the EU have raised similarities to the thinking of US states rights' advocates in the pre-Civil War period, most notably John C. Calhoun.

¹ European Community Treaty, Preamble

² Brunner v. The European Union Treaty 1 *Common Market Law Reports* 57 [hereinafter *Maastricht*]

The US Civil War effectively ended the debate between those advocating a vision of the US as a contract between state governments and those who favored a stronger national government. This argument was decided by force. However, the vision of those who preferred a states' rights approach, and those who formed the Confederate States of America provides a useful basis for conceptualizing the EU today. The EU needs to find a balance between increased integration and uniformity on the one hand and true consent of the people and democratic legitimacy on the other in order to avoid future conflicts between the EU and Member States (MS's). A type of federal union based on the principles of democratic legitimacy through concurrent majority and continued sovereignty of the MS's provides a model for the future. The EU does not necessarily need to become a federal state with a strong central government, modeled on the current vision of the US that developed in the post Civil War era, in order to provide for further integration of Europe. An "ever closer union" can be achieved gradually, with the true consent of the MS's and their people, under this different model, by providing appropriate checks on the future expansion of the powers and competences of the EU.

II. The development and expansion of EU powers and competences

The first step in this analysis is to look at the decisions of the ECJ, which developed a number of significant doctrines. These doctrines have led many commentators to the opinion that the EU, while not having a single document as its constitution, has developed over time a constitutional character, through the Treaties and the decisions of the ECJ. Zuleeg points out that there are examples in history of different forms of constitutions. Further, while the EU is not yet a traditional full-fledged federal state, it has many characteristics of one. Some of these characteristics are found in the Treaties, but others have been developed by the actions of the institutions of the EU over the past fifty years.³

It is this evolution of EU powers over time that has led to it being conceptualized as more than a traditional intergovernmental organization. Weiler and others say the EU has taken on a supranational character, where a new level of authority is created and there are powers of coercion available to that authority independent of the MS's.⁴ A supranational structure brings in to play questions of sovereignty. These questions have been addressed by MacCormick, who believes that absolute sovereignty, and the accompanying ability to be the ultimate authority on Kompetenz-Kompetenz, has not remained with the MS's, but has also not been passed on completely to the EU as the supranational organization.⁵

³ M. Zuleeg, "The European Constitution under Constitutional Constraints: The German Scenario" (1997) 22 *European Law Review* 19 at 21 [hereinafter Zuleeg]

⁴ J. Weiler, "The Community System: the Dual Character of Supranationalism" (1981) 1 *Yearbook of European Law* 267 at 268 [hereinafter Weiler 1]

⁵ MacCormick, N., "The Maastricht-Urteil: Sovereignty Now" (1995) 1 *European Law Journal* 259 at 259 [hereinafter MacCormick]

The first time the ECJ significantly expanded the authority of the EU was in the *Van Gend* case.⁶ This decision contains the now famous assertion by the ECJ that: “The European Economic Community constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States, but also their nationals.”⁷ The Doctrine of Direct Effect was thus created. Not only would the provisions of the Treaties be binding on the MS’s, but also the nationals of the MS’s would enjoy those rights as well and could seek to enforce them in their own national courts against their own MS’s. This development was so significant as traditional Public International law was seen as weak and easily broken since there was little an ordinary person could do to enforce it. In the years since *Van Gend*, Direct Effect has been expanded further, far beyond the provisions of the Treaties, and has been referred to as a “general rule of construction applicable to much of Community law.”⁸ The effect for the conceptual debate is that with its judicial activism and expansion of the role of the EU, the EU started the path towards becoming more independent of the MS’s, by reserving more power and competences for itself.

Shortly thereafter, the ECJ introduced the principle of Supremacy of EU law in *Costa*.⁹ It is this notion of Supremacy that indicates some type of federal structure for the EU. The EC Treaty did not have a so-called “supremacy clause” as found in some other federal constitutions.¹⁰ However, the ECJ determined that there should be a hierarchical relationship between EU law and national law. The ECJ held that “The executive force of Community law cannot vary 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).”¹¹ These articles provided that MS’s must take action to fulfill their obligations under the Treaty and that they must not do anything which endangers the achievement of the goals of the Treaty, of those goals being the creation of a common market.¹² EU law is supreme over the law of a MS if the EU law is within the competences of the EU. This doctrine applies even if the MS law is made after the EU law and is intended to override the EU law and even if the MS law is of a constitutional character.¹³

⁶ Case 26/62 *Van Gend en Loos Nederlandse Administratie der Balastigen* [1963] *European Community Reports* 1 [hereinafter *Van Gend*]

⁷ *Ibid.* at para. 3

⁸ Weiler 1, *supra* note 4 at 274

⁹ Case 6/64 *Costa v ENEL* [1964] *European Community Reports* 585 [hereinafter *Costa*]

¹⁰ J. Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403 at 2414 [hereinafter Weiler 2]

¹¹ *Costa*, *supra* note 9 at 589

¹² European Community Treaty, Articles 10 and 14

¹³ Weiler 1, *supra* note 4 at 274

Weiler points out that it is the combination of the Doctrines of Direct Effect and Supremacy that makes them so significant. Under ordinary International Law, even in Monist states where the laws are automatically accepted in the nation, a later law can be made that overrides the previous law. However, Direct Effect means that the EU law has to be taken to be the law of the MS. As a result of Supremacy, the MS does not have the ability to simply make a later law to get out of having to apply the EU law. This type of hierarchy is usually found only in the constitutions of federal states.¹⁴ Thus, the EU took on a constitutional character, which forms the basis for analysis of this system today. It is apparent that with Supremacy, further sovereignty passed from the MS's to the EU.

The ECJ subsequently expounded the Doctrine of Implied Powers in the *ERTA* case in 1971.¹⁵ This case involved the ability of the EC to make external treaties, an area in which under the ECT gave the EC very little power. The ECJ found, however, that when the EC has an area of internal competence, this translates into an implied grant of external competence, so that the EC could accomplish its goals in the area of internal competence. This interpretation by the ECJ meant that whenever there was an area of competence granted to the EU, there was an implied grant of additional powers that the EU could use if it deemed them necessary to achieve its objectives. *ERTA* is also significant for the fact that the ECJ used a purposive style of Treaty interpretation that is most commonly found in the analysis of constitutions, not treaties. Traditional treaty interpretation had involved the principle that the encroachment by the treaty on the sovereignty of the nation-state should be as little as possible. The ECJ went in the opposite direction and the result was more sovereignty appearing to flow to the EU at the expense of the MS's.¹⁶

The judgments of the ECJ touched on areas where the EU had competence from the Treaties. It expanded the scope of this competence more than expanding the areas of competence themselves. But, eventually the areas of competence were expanded further by other actions of the EU. This phenomenon occurred gradually and was not widely noticed at the time it happened. The actions of the EU have been broken down into the categories of extension, absorption, incorporation and expansion, with the latter being the most drastic form.¹⁷ Over time, the ECJ has changed its attitude towards implying powers. At first it was cautious, but later became much more strident in interpreting the Treaties in a more “flexible” and “functional” manner.¹⁸

Article 308 ECT, formerly Article 235 of the Treaty of Rome, provided the basis for the expansion of EU competences. It is essentially an “elastic clause” which allows the EU to take measures that the ECT has not provided for if they are necessary to attain a common market, which is one of the main objectives of the ECT¹⁹ All of the

¹⁴ Weiler 2, *supra* note 10 at 1415

¹⁵ Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] *European Community Reports* 263 [hereinafter *ERTA*]

¹⁶ Weiler 2, *supra* note 10 at 2416

¹⁷ *Ibid.* at 2436

¹⁸ *Ibid.* at 2443

¹⁹ *Ibid.* at 2443

institutions of the EU came to read this provision widely. The ECJ did not object to the broad interpretation of Article 308. It was used as the basis of EU action in numerous circumstances. One case of note is *Massey Ferguson*²⁰ where the ECJ allowed Article 308 to be used as the basis of an action even when it was not really “necessary”, as there were other legal bases for the action, in the interests of legal certainty.²¹ As a result, institutions acting on later issues did not think it was so important to find a basis other than Article 308 for acting, and therefore made very broad use of the provision.²²

This analysis of the broadening of EU power in its formative years is meant to show the main developments of this phenomenon, that in its formative years the EU gained much more power and competence than was originally envisioned. Conceptually speaking, this means that the EU now has a constitutional character to it, and can be categorized as a supranational as opposed to simply intergovernmental organization. Indeed, its organization has taken on somewhat of a federal character, where competences are divided between different levels of governments, but where the federal law is supreme. These are state-like characteristics. The views of the ECJ in the formative cases are indicative of one vision of the future of the EU, that being a “unity” vision along the lines of a “United States of Europe.”²³

III. Explanation of the comparison between the US and EU

It is at this point that a comparison between the EU and the US can begin. However, as Backer points out, it is not all that useful to compare the nature of federalism in the EU and the US in their present forms, as they are at much different stages in their development. The US has already decided what form of federation it is by adopting what Backer calls “pure” federalism.²⁴ There are five principal tenets of this type of federalism that have been identified. These tenets include the division of sovereign power between a national government and local governments, in which the law of the national government is supreme in the areas in which it has been granted authority. Significantly, interpretive competence rests with the national government and its courts to determine what powers have been granted to the national government. Further, the granting of power by the local governments to the national governments created a democratically legitimate relationship between the national government and the people into which the states could not interpose themselves. Finally, secession by a state was not a possibility.²⁵

²⁰ Case 8/73 *Hauptzollamt Bremerhaven v Massey Ferguson* [1973] *European Community Reports* 897 [hereinafter *Massey Ferguson*]

²¹ *Ibid.* at 908

²² Weiler 2, *supra* note 10 at 2446

²³ P. Eleftheriadis, “The European Constitution and Cosmopolitan Ideals” (2001) 7 *Columbia Journal of European Law* 21 at 30 [hereinafter *Eleftheriadis*]

²⁴ Larry Cata Backer, “The Extra-National State: American Confederate Federalism and the European Union” (2001) 7 *Columbia Journal of European Law* 173 at 175 [hereinafter *Backer*]

²⁵ *Ibid.* at 180

There is no debate whether these principles apply now in the US. But, it took a Civil War before the nature of that form of federalism was decided once and for all. The EU is still evolving and changing. Therefore, it is most useful to look at the debate over the nature of federalism in the EU today as compared to the debate that took place in the US in the formative years leading up to the Civil War.²⁶ In doing so, the EU can be examined through the lens of “pure” US federalism to see what shape the EU is taking.

In looking just at the course of the judgments of the ECJ, it is clear that the doctrines of Supremacy and Direct Effect are very similar to the principles that have taken hold in the US. However, the further questions of interpretive competence and democratic legitimacy are still very much up for debate. In both the EU and US, there were challenges to the authority of the supranational and federal governments when they tried to expand their authority. This part of the analysis will begin with the challenges to the authority of the ECJ by the German Federal Constitutional Court (FCC).

IV. Challenges by the FCC to the authority of the EU

The main FCC decision to be studied is the *Maastricht* decision. It is necessary to look briefly at the decisions of the FCC leading up to that judgment. The first case of interest is known as *Solange I*²⁷, where the FCC asserted that the EC’s protection of fundamental rights was not strong enough to meet the guarantees of fundamental rights found in the German constitution. The result was that the German constitutional guarantees would override any EC law to the contrary of these guarantees in Germany.²⁸ This made compliance with the German constitutional guarantees a condition for the Principle of Supremacy of the ECJ to be effective. Such a challenge to the ECJ also brings into question the nature of the EU as a federation. If a MS can assert that Supremacy will not always be effective in its country, the EU looks less like a “pure” federal system of today such as the United States. It is important to note that in its subsequent decisions the FCC did not abandon this notion that it could examine and declare void EU legislation for fundamental rights violations.²⁹

The impact of *Solange I* was subsequently softened somewhat by the *Solange II* decision.³⁰ In this case the FCC stated that the level of fundamental rights protection had risen in the EC so that it met the requirements of the German Constitution. If there was a conflict between a German fundamental rights law and an EC law, the German law would no longer automatically supercede the EC law.³¹ These questions of supremacy are

²⁶ *Ibid.* at 176

²⁷ *Internationale Handelsgesellschaft v EVGF* [1974] 2 *Common Market Law Reports* 540

²⁸ D. Grimm, “The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision” (1997) 3 *Columbia Journal European Law* 229 at 231 [hereinafter Grimm]

²⁹ *Ibid.* at 234

³⁰ *Wunsche Handelsgesellschaft v Germany* [1987] *Common Market Law Reports* 225

³¹ Grimm, *supra* note 28 at 231

important to the conceptualization of the EU and to the comparison to the US. However, the FCC in its *Maastricht* decision introduced the much more contentious and potentially volatile issue of interpretive competence (Kompetenz-Kompetenz). This issue encompasses the question of whether it is the German FCC or the ECJ that gets to decide ultimate questions of the limits of competence of the EU.³² If it is the ECJ, then the potential for the further expansion of EU competences and the conceptualization of the EU as more of a “United States of Europe” is greater. If it is the FCC and other national constitutional courts, then this suggests that the EU is a looser federation, perhaps one which can be compared to one vision of the US that existed in its formative years, as will be further examined.

The *Maastricht* decision came in response to a challenge in the German courts to the Treaty on European Union (TEU). The challenge was unsuccessful, but it is statements made by the FCC that make it so important.³³ Academics have taken various views of these assertions and this analysis will integrate several of those opinions. The main area of interest in the decision is that which relates to competences. However, the FCC made pronouncements on other topics that are also instructive.

Continuing its line of reasoning from the *Solange* cases, the FCC addressed the topic of fundamental rights and by extension the principle of Supremacy. It reinforced its ruling in *Solange II*, but added the statement that unlike previously, the FCC’s jurisdiction for reviewing cases on the basis of fundamental rights was not just present in cases where Germany was applying in EC law but also where the EC law stood alone without any involvement of German law. The significance of this assertion of jurisdiction is limited currently, as the FCC did not overturn its ruling that EC law had adequate fundamental rights protection. However, there is the possibility that the FCC could assert this jurisdiction in the future and come into conflict with the ECJ’s Principle of Supremacy.³⁴ Such a conflict could occur if the FCC challenged individual decisions of the ECJ.³⁵

The main area of interest in the judgment deals with issues of democracy and competences. The starting point of understanding this area of the decision is Article 38 of the German Constitution (Basic Law), which is the so-called “Democracy Principle” saying essentially that the authority of the state must rest in the will of the people.³⁶ This principle is unalterable and cannot be changed by amendment, according to Article 79 of the German Constitution, making the pronouncements of the FCC all the more important.³⁷ The FCC looked at whether or not the EU lived up to the democracy

³² Ibid. at 232

³³ U. Everling, “The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union” (1994) Yearbook of European Law 1at 5 [hereinafter Everling]

³⁴ Grimm *supra* note 28 at 234

³⁵ S. J. Boom, “The European Union after the Maastricht Decision: Will Germany be the Virginia of Europe?” (1995) 43 *American Journal of Comparative Law* 177 at 181 [hereinafter Boom]

³⁶ *Ibid.* at 182

³⁷ Everling, *supra* note 33 at 5

requirements of the Basic Law and concluded that some vital indicators of democracy were absent from the EU. This has been critically referred to as the “No Demos” thesis of the FCC.³⁸ Among the factors absent that a democracy should have in the opinion of the FCC are a lack of constant discussion among the people leading to a “common public opinion” and transparency of the objectives of the public authority that are able to be comprehended by “the ordinary citizen.”³⁹ Also missing, according to the FCC, is a homogenous group of people making up the citizenry of the EU, as would be found in a nation-state, also referred to as the “people of a polity” or “the Volk.”⁴⁰ Whether or not these are valid assertions, they are significant for the conceptualization of the future of the EU.

The FCC explained that any sort of democratic legitimacy in the EU therefore comes from the elected bodies of the MS’s, which participated in creating the EU in the first place. This line of reasoning picks up on an earlier FCC decision, the *Kloppenburg* case, where it was declared “the MS’s are now, and have always been, the masters of the Union treaties.”⁴¹ Since this type of legitimacy is indirect, there is a limit on the amount of powers and competences that can be transferred to the EU, although the FCC did not identify exactly what was this limit. As the EU enjoys only indirect legitimacy, its legal acts with Direct Effect in Germany must have as their basis a high degree of certainty as pertains to the identification of the basis for EU action in the EU law itself. If they do not, the action will lack democratic legitimacy.⁴²

Thus, the FCC made a distinction between the concepts of treaty interpretation and treaty amendment and in the development versus the amendment of EU law. The ECJ did not have the power to undertake treaty interpretation in a manner that leads to what in effect is treaty amendment. The function of treaty amendment is reserved for the MS’s acting unanimously. So, the FCC asserted that it had the competence to determine the applicability of EU law if it was made by actions of EU institutions, including the ECJ, that amounted to treaty amendment.⁴³ It had the power to declare that these acts would not be valid and binding in Germany. A situation where this had occurred according to the FCC was in the use of Article 308 ECT, as discussed above, through the use of the doctrine of Implied Powers. The FCC made the controversial statement that “the FCC [and not the ECJ] will examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them.”⁴⁴ This is the vital assertion of Kompetenz-Kompetenz over EU law by the FCC.

³⁸ J. Weiler, “Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision” (1995) 1 *European Law Journal* 220 at 224 [hereinafter Weiler 3]

³⁹ Boom, *supra* note 35 at 183

⁴⁰ Weiler 3, *supra* note 38 at 225

⁴¹ Boom, *supra* note 35 at 185

⁴² *Ibid.* at 184

⁴³ Grimm, *supra* note 28 at 236

⁴⁴ Boom, *supra* note 35 at 184

It must be noted that the FCC has not as of yet exercised this power it claims for itself, though it may have had the opportunity to do in the “Banana” litigation and the Television Without Frontiers Case.⁴⁵ As for the ECJ, it has previously ruled in the *Foto-Frost* case that the responsibility for the interpretation of EU acts lies with the ECJ, stating “where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.”⁴⁶ The need for uniformity of the application of EU is cited by the ECJ as a basis for claiming this competence. The contradictory positions of the FCC and the ECJ provide for the possibility of a conflict where the ECJ rules a EU law valid and the FCC rules it is invalid in Germany. This has not yet occurred, and if it did, it would make for not just a legal nightmare, but could cause severe political problems. Since such a potential for conflict exists, this phenomenon plays an important role in the conceptualization of the EU.

V. The situation in the formative years of the US

In looking at the European situation, it is seen that the EU has expanded its powers beyond what was envisioned in the treaties that founded it. A similar situation occurred in the formative years of the US. An analysis of this case law and conflicting political theories of the time will help show the similarities, and lead to a discussion of how the EU of today can learn from the experience of the US.

The major case involving a direct conflict between the Supreme Court of the US and a state court is *Martin v Hunter’s Lessee*.⁴⁷ The case was decided at a time when the limits of federal power were still being drawn. The Supreme Court overturned a decision of the Virginia Court of Appeal and directed it to enter the Supreme Court judgment. The Virginia Court refused to do so, on the grounds that the Supreme Court was acting outside of its jurisdiction under the Constitution in telling a state court what decision to make. It was argued that the Constitution made no attempt to say how conflicts over who got to decide the limits of federal and state power, essentially the question of interpretive competence, would be resolved.⁴⁸

It also made an important remark, which indicates a certain point of view towards the principle of Supremacy, and its accompanying rationale that complete uniformity is necessary in the EU areas of competence. Judge Cabell of the Virginia Court wrote “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.”⁴⁹ Such a statement goes against the idea of complete uniformity in suggesting that there may be other

⁴⁵ Grimm, *supra* note 28 at 236

⁴⁶ Backer, *supra* note 24 at 197

⁴⁷ *Martin v Hunter’s Lessee* 14 U.S. 304 (1816) [hereinafter *Martin*]

⁴⁸ Boom, *supra* note 35 at 187

⁴⁹ *Ibid.* at 187

considerations that should be taken into account. One consideration may be that of democratic legitimacy, in that Cabell reasoned that the federal and state courts belonged to separate sovereign systems, and for one to infringe upon the other would not be a legitimate act.⁵⁰

In the subsequent appeal over the Virginia Court's refusal to implement the prior decision, the Supreme Court made arguments that appear to be similar to those made by the ECJ in the EU cases of the formative period as analyzed above. Justice Story of the Supreme Court made statements in his judgment indicating that the federal government did have the power to interpret the limits of competence, and this power rested on the democratic legitimacy of the federal government and the importance of uniformity. Story's vision was based on the sentiment that "the constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble to the constitution declares, by 'the People of the United States.'"⁵¹ According to this vision, the creation of the US was not merely a compact between existing states, but a new contract between the citizens of those states to form a new state, which gives that new state direct democratic legitimacy.

If, as Story said, there was one American people, there should be a uniform code of law applying to them, no matter which state they are from. He also invoked the Supremacy clause of the US Constitution, which states that the federal law is the supreme law and the states, including their courts, are bound by it. On the issue of uniformity, Story spoke of the need for a "revising authority" to ensure that the "public mischiefs" which would occur as a result of laws having different meanings and effects in different states, were avoided.⁵² Critics point out that though Story claimed the power of interpretive competence for the Supreme Court, his arguments did not directly address the question of whether the Supreme Court had the jurisdiction to decide whether a matter was appropriate for federal appeal or not. Instead his arguments focused on why the Supreme Court should have jurisdiction to hear appeals.⁵³

In subsequent cases the Supreme Court continued its arguments that federal powers were more important than states' rights, which was an area of huge tension both legally and politically. In *McCulloch*, Chief Justice Marshall wrote the famous lines that "the government of the Union, then, is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."⁵⁴ Marshall clearly thought the federal government had democratic legitimacy, and therefore that strengthened his position that federal law was supreme to state law. Supremacy is key to having uniformity. Uniformity, in turn, suggests a "pure" federal state, which the US is today. These similarities between the reasoning of the Supreme Court and the ECJ are striking.

⁵⁰ *Ibid* at 187

⁵¹ *Martin*, *supra* note 47 at 325

⁵² *Boom*, *supra* note 35 at 190

⁵³ *Ibid.* at 189

⁵⁴ *McCulloch v Maryland* 17 U.S. 316 (1819)

McCulloch also addressed the “necessary and proper” clause of the US constitution, which is similar to Article 308 of the ECT. The ECJ’s treatment of Article 308 is comparable to the Supreme Court’s treatment of the “necessary and proper” clause. Marshall identified an Implied Powers doctrine in the US constitution, writing that “If this be not so, and if congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation.”⁵⁵ As was the case with Article 308, this clause has been used numerous times since to justify expansion of federal competences. The purposive approach to interpretation is also noteworthy. The ECJ, by applying this approach to the treaties, gave further credence to a notion of the EU as a “United States of Europe” with a “pure” federal character.

There was continued opposition by states’ rights advocates to the decisions of the Supreme Court. Their arguments are reflected in the *Maastricht* decision. In terms of conceptualizing the EU along the lines of those opposed to the uniformity vision of the ECJ, it is useful to investigate the theoretical underpinnings of the opposition to the Supreme Court in the US. These theories of states’ rights advocates provide an alternative vision to the one presented by the ECJ and the “pure” federal approach that eventually won out in the US. Perhaps the most vigorous promoter of states’ rights was John C. Calhoun, a South Carolina politician, whose theory of federalism were largely ignored in the US after the Civil War⁵⁶.

VI. Calhoun’s alternative theory of federalism

The alternative vision of Calhoun begins with the characterization of the contract that created the United States. The Supreme Court definitively viewed the Constitution as creating a direct relationship between the government of the US and the people. Calhoun viewed the founding of the US as only a compact between several independent and sovereign states.⁵⁷ The people of the states possessed what was referred to as the “locus” of sovereignty. This essentially means that the centre of sovereignty is concentrated in the people. The people then created the state government as their agent, entering into a relationship of principal and agent. The state government, on behalf of the people, entered into a relationship with other similarly sovereign states. In so doing, they created a federal government and thus a relationship of principal and agent between the state and federal governments. The federal government was granted certain powers by the state governments, but this did not involve an actual transfer of sovereignty. The federal government had absolutely no authority to act outside of the powers specifically granted to it by the states. The federal government was not a party to this contract, but merely a creation of it.⁵⁸

⁵⁵ *Ibid.* at 325

⁵⁶ Backer, *supra* note 24 at 174

⁵⁷ *Ibid.* at 189

⁵⁸ *Ibid.* at 190

Two key questions arise from this analysis. The first question involves why such a limited form of federal power may be more desirable than the expansive federal power preferred by the Supreme Court. The second question investigates how the states can act to make sure the federal government acts only within its powers and what remedies the states have if they feel the federal government has crossed the line and infringed upon the sovereign powers of the states.

Calhoun believed that rulers have a natural disposition to oppress and abuse the ruled. His notion of government and society dictated this view. Human beings had the natural instinct to try to advance themselves, which often because of necessity would be to the detriment of others. The competition for personal advancement, if left unchecked, would cause disorder and even anarchy in the society, and thus opportunities for individual prosperity would ultimately be hindered. To check the excesses of individual ambition, the people in a society must enter into a compact with one another to form a government, which would regulate the actions of the individuals. Calhoun wrote, “to preserve society, it is necessary to guard the community against injustice, violence and anarchy within, and against attacks from without.”⁵⁹

However, having a government was not the answer to all of society’s problems, as governments had a tendency to act in the same power-maximizing fashion as individuals. Therefore, it was important that no one government had too much power, or else it would become oppressive itself. One tool to limit the power of a government was a constitution. To be an effective constitution, it “must furnish the ruled with the means of resisting successfully this tendency on the part of rulers to oppression and abuse.”⁶⁰

Democracy was an indispensable part of Calhoun’s vision. His theory of democracy laid the foundation of how the people could act to control the government. In turn, state governments could use his notion of democracy to control the actions of the federal government, which they created. The basis of Calhoun’s democracy was the idea of a concurrent or constitutional majority, rather than rule by simple majority. Though the voting of individuals carried out democracy, society was made up of a number of different groups, many of which tended to have competing interests among themselves. The majority voice of each of these different groups must be taken into account and unanimous consent must be given. If it is not, rule by simple majority rule has the possibility to result in a “tyranny of the majority” within the society and give rise to abuse of the minority.⁶¹

The notion of concurrent majority applies not only to the relationship between the government and the people but also to that of the state governments to the federal government. Since the US Constitution was a contract between the sovereign states, and not their peoples, the federal government can only act legitimately beyond the boundaries of the powers granted to it if it has procedures in place to obtain a concurrent majority of

⁵⁹ *Ibid.* at 184

⁶⁰ *Ibid.* at 184

⁶¹ *Ibid.* at 187

the states or a means by which a state that is not part of the concurrent majority can protect itself.⁶²

One of the means the States have to check the power of the federal government, if the State believes it has acted outside its constitutional boundaries, is the Doctrine of Nullification. Since the federal government was an agent of the states, it had the duty to seek a constitutional amendment if it wanted to exert a power not expressly given it by the states. The states kept the authority to determine whether the federal government acted within its authority, meaning that the states were the entities with interpretive competence. If a state determined the action was outside the federal authority, it could nullify that law and it would be void within that state. Only a political solution, such as a constitutional amendment could remedy the situation. The amendment formula itself was based on the principle of concurrent majority.⁶³ Clearly such a system emphasizes democratic legitimacy through the consent of the people over the need for absolute uniformity.

Nullification was not only a theory in the formative years of the US. It went together with political and judicial attempts by states to resist the authority and jurisdiction of the Supreme Court. In 1819, as a reaction to cases such as *Martin*, a resolution was passed by the Virginia legislature to support the introduction of a constitutional amendment for a new procedure to settle conflicts involving competences, and to denounce the Supreme Court for taking this power for itself. South Carolina, Kentucky, Ohio and Georgia passed similar measures. In 1859, the Wisconsin legislature declared that the Supreme Court's claim of interpretive competence was "an arbitrary act of power...prostrating the rights and liberties of the people."⁶⁴ South Carolina adopted the Nullification policy in 1828, saying that a state could "interpose" itself between the federal government and the people if federal action was unconstitutional, as decided by the state.⁶⁵ The Virginia Courts continued opposing the Supreme Court all the way up to the Civil War. The Georgia Supreme Court declared in 1854 that the Supreme Court "has no appellate or other jurisdiction over this court."⁶⁶

The pattern of opposition to the Supreme Court and expansion of federal competences was quite extreme in some cases. It should be noted that, as has been the case in the EU, the most prevalent reaction to Supreme Court judgments was that of acceptance.⁶⁷ However, the opposition was significant and the theories behind it suggest a much different form of government than currently exists in the US. The only time Calhoun's principles formed the basis of government was in the Confederate States of America (CSA). According to Jefferson Davis, President of the CSA, "The Constitution formed by our fathers is that of these Confederate States, in their exposition of it, and in

⁶² *Ibid.* at 188

⁶³ *Ibid.* at 190

⁶⁴ Boom, *supra* note 35 at 197

⁶⁵ *Ibid.* at 196

⁶⁶ *Ibid.* at 196

⁶⁷ *Ibid.* at 194

the judicial construction it has received, we have a light which reveals its true meaning.”⁶⁸

VII. Future implications for the EU of challenges to its authority

The comparison between the US and the EU is so relevant because the *Maastricht* judgment contains echoes of the theories of Calhoun. That the FCC would give a judgment along these lines is not surprising, as there was an “intellectual cross-pollination” between the US South and Germany that began in the latter half of the 19th Century.⁶⁹ Answers to the questions raised by the FCC will have an impact on the direction the EU takes in the future. If other MS’s adopt the reasoning of the FCC, it is unlikely that the integration of the EU will progress to the stage where it could be called the “US of Europe” with a “pure” federal system. However, if integration continues as it has with the ECJ leading the way, a “Euro State” is much more likely. At the current time, it is more appropriate to conceptualize the EU as a supranational organization organized along the lines of some sort of “federal” model. The nature of that model and what changes could take place in the future is a topic for discussion in light of *Maastricht* and other recent developments.

The nature of the model has much to do with the future relationship between the ECJ and national courts, especially in the area of interpretive competence. Kumm offers an analysis of the narrower question of the future of the relationship between the ECJ and the FCC following *Maastricht*.⁷⁰ The model is based on a pluralist, rather than monist conception of the EU, which allows national courts to look at their own constitutions as a starting point. Its goals are the expansion of uniformity of laws throughout the EU combined with the institutionalization of fundamental rights protection and democratic legitimacy through an examination of legislative competence. It is only in these areas of fundamental rights and legislative competence that the national courts would retain interpretive competence, but only when there has been truly illegitimate EU action and only when there exist “defensible grounds” in the national constitution for declaring the action invalid.⁷¹

Kumm provides a test for a national court to apply when making the determination, using the example of the FCC. On the issue of fundamental rights, the FCC should use the standard it set for itself in *Solange II*, where review would only take place if the practices of the ECJ and EU in general were disregarding fundamental rights in such a way that rights protections did not at all resemble those called for in the German

⁶⁸ Backer, *supra* note 24 at 192

⁶⁹ *Ibid.* at 198

⁷⁰ M. Kumm, “Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and The European Court of Justice” (1999) 36 *Common Market Law Review* 351 at 351 [hereinafter Kumm]

⁷¹ *Ibid.* at 376

Constitution. The FCC would have jurisdiction to make this determination. On the issue of legislative competence, it is suggested the FCC use the same standard as it does for fundamental rights and only review actions when “there are no sufficient safeguards instituted on the European level to prevent an unjustified usurpation of legislative power.”⁷² The FCC would look at both the general elements of democracy in the EU and the competence provisions of the Treaties and see whether the ECJ was taking them seriously enough in its rulings. If the FCC determined the ECJ was not taking these issues seriously enough, it could assert its jurisdiction.⁷³

However, it would not be sufficient that jurisdiction exists for the FCC to act. There is also a two part test for the standard of review that attempts to ensure that the FCC acts in a way that is compatible with its position as a court that is not just the supreme judicial authority in Germany, but also part of a larger European legal community, consisting of the ECJ and other MS national supreme courts.⁷⁴ An act of the EU can only be declared invalid by the FCC if it has been established that, firstly, there has been a violation of the European legal order, of which the ECJ is the primary authority, that is both “manifest and grave.”⁷⁵ If such a finding were made, this would trigger an analysis to see if there was a violation of other constitutional principles. Here the standard is essentially one of proportionality. The EU action does not have a constitutionally sufficient basis if the loss of democratic legitimacy at the level of the MS is not offset by there being “good reasons” for the EU action.⁷⁶ One criticism could be that the test seems very subjective in nature.

It appears that this conception of the relationship between the courts is one where there would need to be a very serious violation or mistake on the part of the ECJ for the FCC to be able to act. It still leaves open the possibility of a deadlock between the FCC and ECJ, but one where the FCC would prevail, if only in extremely narrow circumstances. The idea of uniformity in this test is seen as more important than the democratic legitimacy as described by the FCC in *Maastricht*. However, since the ECJ is not seen as the “final arbiter” of constitutionality, and practically speaking the MS courts are, this conception suggests that the EU will not progress to become a “pure” federal state, with only the ECJ possessing interpretive competence.

The question arises of what might be the implications both in the short and longer term of the statements of the FCC in *Maastricht*. There is a school of thought that believes the decision is not all that significant, and will merely provide guidance as integration progresses unhindered. However, the language and tone of the decision suggest a willingness to strike down acts of the EU in the future, especially in the area of competences. Past use of Article 308 was pointed out to be an example of a practice the FCC would consider to be a violation if it continued in the future.⁷⁷

⁷² *Ibid.* at 379

⁷³ *Ibid.* at 379

⁷⁴ *Ibid.* at 380

⁷⁵ *Ibid.* at 380

⁷⁶ *Ibid.* at 384

⁷⁷ Boom, *supra* note 35 at 218

The FCC has not as of yet declared invalid an act of the EU invalid. If this were to occur, it would be as a result of a German citizen initiating legal action, either against the German government for refusing to apply an EU act it considered to be outside of its competences, or because the German government did apply an act the citizen thought was invalid. The shape of this challenge would depend on whether the EU act harmed or helped the German citizen. It is sure though that if the FCC declared an EU act invalid, the ECJ would have to respond as it places a high emphasis on the principle of uniformity. Even if the interference of the FCC was very seldom, it could encourage courts in other MS's to resist the ECJ, and this would be very troublesome for the ECJ's vision of the EU.⁷⁸ The ECJ, despite the questionable nature of its judicial activism, has also been an important source of legitimacy for its "United States of Europe" vision. Erosion of its day to day authority could have extremely negative implications for the development of this vision of the EU.⁷⁹

The ECJ might then display a tendency to avoid making a ruling that could result in a confrontation with the FCC or another MS national court. It should be noted that the Supreme Court in the US after *McCulloch* scaled back its rhetoric and give more emphasis to states' rights in its rulings.⁸⁰ In the recent *Tobacco* case⁸¹, the ECJ did take a more restrictive view of the expansion and justification of EU competences. This case was about a Directive adopted under the EC Treaty with its basis being Article 95 ECT, which provides for measures designed to enhance the functioning of the internal market. Its goal was to ban most forms of advertising by Tobacco companies across the EU. However, a large part of the reason for adopting the Directive was to promote health and discourage people from smoking. The ECJ recognized this fact and held that a treaty provision meant to promote internal market harmonization could not be used as a disguise for what was really an effort to regulate and harmonize a public health policy.⁸² The harmonization of public health policy had been deliberately excluded in the Treaty of Maastricht. This case is an example of the ECJ perhaps showing more restraint in the development of EU competences than it had in the past.

Maastricht could also have somewhat of a chilling effect on the lawmakers of the EU themselves. If the lawmakers of the Commission, Council and Parliament restrain themselves from acting in a way that could be seen as challenging the boundaries of EU competence, they will avoid putting the ECJ and FCC in a position of potential conflict. It is in this area that there is a major difference between the EU and the US. In the EU, the MS's have a major role in the making of EU laws, especially in the Council. The states have no such role in making the federal law of the US. The FCC suggested that the

⁷⁸ *Ibid.* at 220

⁷⁹ H. Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court" (1998) 13 *European Law Review* 28 at 30

⁸⁰ Boom, *supra* note 35 at 220

⁸¹ Case C-376/98 *Federal Republic of Germany v European Parliament & Council* [2000] *European Community Reports* 8419

⁸² *Ibid.* at para 76

German government should use its influence to push the EU away from further expansion of its competences through illegitimate actions amounting to treaty amendment.⁸³

While the influence of the *Maastricht* decision help persuade the EU from setting the stage for confrontation, there are potential broader solutions to the issue of interpretive competence that must be considered. One solution is found in proposed amendments to the US constitution that ultimately failed. The idea of these proposals was to take interpretive competence away from the Supreme Court. It was thought that the federal government, through the Supreme Court, should not have the power to essentially govern the boundaries of its own power. One way to do this in the EU would be to make a new treaty, declaring that the MS's retained interpretive competence, either on all matters or on just on those of fundamental concern. A more innovative proposal would be a new court to decide questions of interpretive competence. Such a "Court of the Union", made up of representatives from the states, has been proposed several times in the US, both before and after the Civil War.⁸⁴ In the EU, this court could be composed of representatives of the MS's national courts and would need a standard higher than simple majority to act. MS's representatives would act for their MS's, not be unattached from their governments, as are the justices of the ECJ. Since the members of this court would be acting for their MS's, democratic legitimacy would be enhanced.

VIII. Conclusions about the lessons of the US experience for the EU

The ultimate lesson to be learned from this comparison is that there is more than one model of federal union that the EU can follow. This article has attempted to combine the academic literature on the *Maastricht* decision with the vast body of opinions on the conceptualization of the EU. The EU, largely through the encouragement and acceptance of the ECJ, has expanded its power and role beyond the economic co-operation originally envisioned by the MS's. The Doctrines of Direct Effect and Supremacy established that EU law was applicable to the citizens of the MS's and that EU law is supreme to MS law in areas of EU competence. The EU also expanded its competences through the use of Article 308 ECT, the Implied Powers clause.

The German FCC raised opposition to the activities of the EU on a number of occasions, but never more strenuously than in the *Maastricht* case. The FCC declared that the ECJ did not have the power of interpretive competence and that the FCC reserved this power for itself. The reasoning behind this had largely to do with the concept of democratic legitimacy. The EU lacked legitimacy when it acted in manner that amounted to treaty amendment, such it had through the extensive use of Article 308. This opposition raises a comparison to the formative years of the US where some states were vehemently opposed to the interpretation of the Constitution of the Supreme Court. While "pure" federalism eventually won out, the alternative vision presented by States' rights

⁸³ Boom, *supra* note 35 at 222

⁸⁴ *Ibid.* at 199

advocates, such as Calhoun, based on the ideas of concurrent majority and nullification, provides a useful model for the EU to follow. This model emphasizes the importance of democratic legitimacy and consent over a need for absolute uniformity and supremacy of EU law.

Weiler identifies two visions of the future of the EU; Europe as Unity and Europe as Community.⁸⁵ Europe as Unity is the vision, perhaps shared by the ECJ's "certain *idée de L'Europe*", where the EU would progress aggressively towards being a "United States of Europe", where the MS's would eventually cease to exist in their current form.⁸⁶ The Community vision is more limited and sees an important role for the MS's and the EU. The MS's voluntarily limit their own powers and exist alongside the EU, although there is necessarily tension between the entities as they seek to carve out their roles. This limited conception of Community is much more preferable in terms of the democratically legitimate true consent of the people of the MS's, and the desire to prevent a powerful federal government from acting without a concurrent majority.

Backer writes that, "The EU is an experiment in more efficient government between states whose interests transcend their respective borders. The experiment continues to transform its institutional form to meet the social, political and economic exigencies with which it is faced."⁸⁷ The States' rights model of Calhoun is the preferable path for the EU to take. If the ECJ continues to make decisions that are equivalent to treaty amendment and encounters widespread opposition, the legitimacy of the whole community may be put at risk, as "the European Court might well come out ruined in its authority and legitimacy."⁸⁸ For those who believe that uniformity and full integration are the appropriate overriding goals of the EU, this will not be an appealing vision. The EU based on the ideas of Calhoun, a vision of the EU of "bits and pieces" that is not "elegant nor traditional" will be one which "protects against tyrannies, even a democratic majority, within a governance system created by a group of communities willingly bound together for a common purpose."⁸⁹ Such a vision of the EU fulfills the desire to prevent a repeat of the excesses of the state seen in the brutal history of Europe, particularly in the 20th Century, but it does not create an entity that has the potential to cause even more havoc through an illegitimate usurpation of power without the true consent of the MS citizens.

⁸⁵ Weiler 2, *supra* note 10 at 2478

⁸⁶ *Ibid.* at 2479

⁸⁷ Backer, *supra* note 24 at 217

⁸⁸ Rasmussen, *supra* note 79 at 30

⁸⁹ Backer, *supra* note 24 at 216

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