

ARTICLE

JUDICIAL FEDERALISM IN THE EUROPEAN UNION

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ABSTRACT

This Article compares European Union judicial federalism with the American version. Its thesis is that the European Union's long-term goal of political integration probably cannot be achieved without strengthening its rudimentary judicial institutions. On the one hand, the EU is a federal system in which judicial power is divided between EU courts, of which there are only three, and the well-entrenched and longstanding member state court systems. On the other hand, both the preamble and Article 1 of the Treaty of Europe state that an aim of the European Union is "creating an ever closer union among the peoples of Europe." The Article argues that central government courts and member state courts are not fungible. In close cases, the latter are more likely than the former to favor the member state's interests. The EU's approach to judicial federalism, with its heavy reliance on member state courts, will retard the political integration envisioned by the Treaty. The Article develops this thesis by comparing EU judicial federalism with the American variant, which differs from the EU system in two key respects: First, most issues of EU law are adjudicated in the member state courts. In the United States, a network of lower federal courts adjudicates many federal law issues. Second,

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the U.S. Supreme Court reviews state court judgments that turn on issues of federal law. The Court of Justice of the European Union does not review member state judgments, even on issues of EU law. The Article argues that these aspects of the federal system in the United States were indispensable to achieving and maintaining national unity. If the EU aspires to a similar level of political integration, their absence may prove to be a significant obstacle.

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I. INTRODUCTION

This Article compares European Union (EU) judicial federalism with the American version. Its thesis is that the European Union’s long-term goal of political integration probably cannot be achieved without strengthening its rudimentary judicial institutions. On the one hand, the EU is a federal system in which judicial power is divided between EU courts, of which there are only three, and the well-entrenched and longstanding member state court systems. On the other hand, both the preamble and Article 1 of the Treaty on European Union state that an aim of the European Union is “creating an ever closer union among the peoples of Europe.”¹ The Article argues that central government courts and member state courts are not fungible. In close cases, the latter are more likely than the former to favor the member state’s interests. The EU’s approach to judicial federalism, with its heavy reliance on member state courts, will retard the political integration envisioned by the Treaty. The Article develops this thesis by comparing EU judicial

1. Consolidated Version of the Treaty on European Union pmb., art. 1, Oct. 26, 2012, 2012 O.J. (C 326) 15–16 [hereinafter TEU]. The current versions of the TEU and the accessory Treaty on the Functioning of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU], were adopted by the member states in 2009. ROGER J. GOEBEL ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 28 (4th ed. 2015) (hereinafter GOEBEL). The historical evolution of the EU, beginning with the European Coal and Steel Community in 1951, is described in GOEBEL, *supra*, at 3–26; *see also* KOEN LENAERTS & PIET VAN NUFFEL, *EUROPEAN UNION LAW* 3–73 (Robert Bray & Nathan Cambien eds., 3d ed. 2011) (summarizing the historical development of the EU and various treaties); NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 54–75 (7th ed. 2010) (describing the expansion of member states and the early treaties). The Union used to be called the European Economic Community, and then the European Community. MARTIN J. DEDMAN, *THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION 1945–2008: A HISTORY OF EUROPEAN INTEGRATION* 1 (2d ed. 2009). In this Article, I refer to it by its current name, the European Union, and abbreviate this as EU, as is the custom in Europe, without periods. I abbreviate United States as U.S., with periods, as is the custom in the United States.

federalism with the American variant, which differs from the EU system in two key respects. First, most issues of EU law are adjudicated in the member state courts. In the United States, a network of lower federal courts adjudicates many federal law issues. Second, the U.S. Supreme Court reviews state court judgments that turn on issues of federal law. The Court of Justice of the European Union does not review member state judgments, even on issues of EU law. The Article argues that these aspects of the federal system in the United States were indispensable to achieving and maintaining national unity. If the EU aspires to a similar level of political integration, their absence may prove to be a significant obstacle.

Part II elaborates on this thesis by providing background information on federalism, the comparative method, and the European Union. Part III distinguishes the judicial federalism mechanism from other strategies designed to advance the values of federalism. These mechanisms include creating substantive constraints on the central authority and political arrangements that give local interests a voice in central government decision making. I suggest that the judicial federalism spectrum reaches from “weak” to “strong,” and that the EU approach is especially strong, in the sense that it favors the member states more than others, at the expense of the central authority. Part IV compares EU judicial federalism with the federal system of its nearest neighbor on the spectrum, the United States. Part V suggests ways in which a comparative approach can shed light on the cost-benefit issues raised by EU judicial federalism.

II. FEDERALISM, THE EUROPEAN UNION AND THE COMPARATIVE METHOD

In a “unitary” polity, such as the French Republic, all governmental authority comes from a single source, even if the French state chooses to delegate some functions to regional officials.² By contrast, “[a] federal system is one in which political power is divided between central and subordinate authorities” and “leaders in its subordinate units don’t depend on the central government for their political authority.”³ We are accustomed to

2. *France: Division of Powers*, EUROPEAN COMMITTEE OF THE REGIONS, <https://portal.cor.europa.eu/divisionpowers/countries/MembersNLP/France/Pages/default.aspx> [https://perma.cc/9RYM-UAA9] (last visited Feb. 1, 2017).

3. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1488 n.5 (1994); see also Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 142, 142 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (stating that

associating federalism with nation states, such as Germany, Switzerland, and the United States. Even though the EU is not a nation state—for example, it does not have armed forces at its disposal and it does not have a single executive in charge of its government—it may still be fairly characterized as a federal system.⁴ The European Union has a federal structure, in that it divides executive, legislative, and judicial power between centralized and decentralized levels.⁵ In addition, the EU aims to achieve far greater political integration than typical international organizations, as indicated by the Treaty’s goal of “ever closer union among the peoples of Europe.”⁶ Thus, the problems that the EU faces in constraining member states by law are similar to the problems encountered by national authorities in those of more conventional federal systems.⁷ As Judge Koen Lenaerts of the Court of Justice of the European Union (CJEU)⁸ has pointed out, “[f]ederalism, as a means of structuring the relationship between interlinked authorities, can be used either within or without the framework of a nation-state.”⁹ Comparing the EU’s and our own systems of judicial federalism thus holds the promise of better illuminating how each system works, and how each might work better.

Decision-makers can structure federal systems in a variety of ways so as to disperse power between the different levels of government. A constitution may curb central government authority by enumerating its powers or by establishing political

federalism involves “multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority”).

4. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991) (arguing that “the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state”); see also Robert Schütze, *On “Federal” Ground: The European Union as an (Inter)national Phenomenon*, 46 COMMON MKT. L. REV. 1069, 1069, 1099, 1105 (2009) (examining the question of “[w]hat kind of union is the European Union?” and concluding that “the European union is a federation of States”). The debate over whether the EU is properly characterized as a federal system is summarized in Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1641 (2002). It appears that resistance to the term “federal” reflects reluctance to conceive of the EU as anything other than a relationship governed by international treaties. *Id.*

5. See Young, *supra* note 4, at 1633–36.

6. TEU art. 1.

7. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1797–98, 1864–65 (2009) (suggesting that the EU’s internal governance issues resemble the issues typically raised by efforts to apply legal constraints to state behavior within a constitutional system).

8. This Court is sometimes called the European Court of Justice, abbreviated as ECJ.

9. Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT’L L.J. 746, 748 (1998).

arrangements that engage member states in the selection of national lawmakers, thus bringing local voice in central government decision-making.¹⁰ This Article focuses on judicial federalism, that is, the allocation of judicial power between the central government and the member states of a federal system. Federal systems typically divide up judicial jurisdiction in some way, but the nature of this division can and does vary greatly. A key question is “Why?” This Article reflects on that question, by comparing EU judicial federalism with other versions, and with the U.S. version in particular. Comparative analysis suggests that the answer has much to do with how much the decision-makers in a given polity value the coherent and effective articulation and execution of policy we associate with centralization versus the competing values of federalism, which are associated with a more skeptical appraisal of government power.

In the United States there is a network of lower federal courts, and the Supreme Court may review both federal and state decisions that turn on federal law. By contrast, there is no network of lower EU courts. Private litigants are ordinarily obliged to sue in member state courts, even to enforce EU rights.¹¹ Nor does the CJEU exercise appellate review of member state rulings on EU law. Instead, it resolves these issues by a procedure called “preliminary reference,” in which member state courts seek answers to EU issues raised by cases before them as to the bearing of EU law.¹² Unlike the United States, private litigants ordinarily have no direct access to the CJEU to appeal unfavorable member state rulings.

There are significant tensions between the EU’s strong form of judicial federalism and its commitment to “ever closer union among the peoples of Europe.”¹³ The Treaty’s aspiration to greater unity may be thwarted by EU judicial federalism, because the allocation of judicial power within a polity influences the degree of political integration. The U.S. experience shows that there is a link between jurisdiction and the outcomes of close substantive disputes. State courts will tend to favor state interests while national courts give priority to national goals.

10. See Young, *supra* note 4, at 1617, 1645 (discussing substantive and political safeguards of federalism).

11. *Court of Justice of the European Union (CJEU)*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en [https://perma.cc/6X2H-SKWL] (last visited Feb. 1, 2016).

12. See MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE § 1.1 (2010) (defining the preliminary reference system).

13. TEU art. 1.

One of the reasons the United States achieved a high level of political integration is that, in Article III of the Constitution, the United States adopted a comparatively weak form of judicial federalism.¹⁴ Early Supreme Court decisions by the Marshall Court also favored a weaker version, although stronger judicial federalism was not vanquished until the Union victory in the Civil War and actions taken by Congress after the War.

In this Article, I do not take sides on the question of whether stronger or weaker judicial federalism is appropriate in the EU context. The aims of the Article are to show that the choice between strong and weak judicial federalism involves tradeoffs among competing values, to show why those tradeoffs probably cannot be avoided in the long term, and to evaluate EU judicial federalism in the light of those two propositions. A premise underlying the analysis is that polities are not all alike. A virtue of the comparative method is that it enables us to recognize that they have different origins and serve different purposes. Although the Article focuses on the dissonance between strong judicial federalism and a political integration, it should be noted that a high degree of political integration is not obviously or necessarily desirable, and particularly not in the EU context. The EU is composed of longstanding nation states, most of which have resisted and will continue to resist greater integration. The EU's agenda, at least until recently, has consisted mainly of removing barriers to the free movement of goods and people across borders within Europe.¹⁵ Strong judicial federalism may be fully compatible with those limited aims.

Besides these distinctive features of the EU, there are sound policy arguments in favor of strong federalism. The cost of a more centralized system is that the values of federalism are sacrificed for the sake of political integration. For example, "state and local government does provide many more avenues for citizen participation than does the national government."¹⁶ Federalism helps to keep officials accountable, because "[o]fficials at the local level are likelier to be available, and thus are likelier to be held accountable."¹⁷ Divided government encourages experimentation,¹⁸

14. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 32–33 (5th ed. 2015) (detailing the debate between framers over whether to include lower federal courts in the Constitution or trust state courts to uphold federal law).

15. See GOEBEL, *supra* note 1, at 349.

16. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 390 (1997).

17. *Id.* at 395.

18. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Although Brandeis made this point in a dissent, it has become a part of the federalism canon. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); see also

facilitates “cultural and local diversity,”¹⁹ and protects liberty by diffusing government power.²⁰ Henry M. Hart, Jr. maintained that if government is viewed “as more significantly a facility than a control,” federalism encourages the private ordering and private solutions.²¹ According to Erwin Chemerinsky, “[a] key advantage of having multiple levels of government is the availability of alternative actors to solve important problems.”²²

Before proceeding with the argument, a brief (and unavoidably superficial) introduction to the principal institutions of the European Union may be helpful. First, there is no single executive like the President of the United States. Most executive power is in the hands of the European Commission, composed of one commissioner from each of the 28 Member States, which initiates and drafts legislation (on its own or at the behest of other institutions) and enforces EU law against private actors and Member States.²³ The Commission’s President is probably the closest analogue to the U.S. President. Second, the member states significantly influence EU policy through two institutions. One of these is the Council of Ministers, which is composed of a minister from each member state.²⁴ The Council meets periodically to approve legislation and also exercises some executive power.²⁵ The other member state-oriented institution is the European Council, composed of heads of government of the member states.²⁶ This group makes major policy decisions, such as approving the EU budget, and intervenes from time to time to deal with vexing problems, such as the immigration crisis of 2015.²⁷ Third, legislative power belongs not just to the

Friedman, *supra* note 16, at 397 n.339 (relying on Brandeis’s dissent to support the contention that government innovation will benefit, not harm, the nation as a whole).

19. Friedman, *supra* note 16, at 401–02.

20. *See id.* at 402–04 (arguing that dispersion of political power renders the states as a more accurate representation of the voice of the people).

21. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 490 (1954) (arguing that federalism has value because “the existence of varied facilities, providing alternative means of working out by common action, through various groupings of interest, solutions of problems which cannot be settled unilaterally, appears as an enrichment of equipment for successful social life”).

22. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995).

23. LENAERTS & VAN NUFFEL, *supra* note 1, at 505, 507–08, 511.

24. *Id.* at 486.

25. *See id.* at 484.

26. *Id.* at 480.

27. *Id.* at 475–76; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, at 3, COM (2015) 240 final (May 13, 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240&from=EN> [<https://perma.cc/5KRU-BAFZ>].

Commission and the Council but also to the European Parliament, which is composed of legislators elected by popular vote from the member states.²⁸ Parliament cannot initiate lawmaking but must approve most legislation.²⁹ Fourth, the CJEU adjudicates issues of EU law in cases brought directly to it by member states and EU institutions, in cases brought to it on appeal from two lower EU courts, and in ruling on issues brought to it by “preliminary reference,” from member state courts, a process described below.³⁰

In addition, some potentially confusing bits of vocabulary should be clarified at the outset. Americans use “federal” to mean “national,” while Europeans use the adjective “national” to mean “pertaining to a member state.” For the sake of avoiding confusion, some collective terms are needed to signify the two governments headquartered in Washington and Brussels. I will sometimes use “central government” or “central authority” when it is convenient to refer collectively to the government of the United States or of the European Union, and “member state” to refer to each of the fifty American states and to each of the members of the EU. Thus, “central government law” and “central government courts” denote what Americans call “federal law” and “federal courts.”

III. THREE APPROACHES TO FEDERALISM

In order to explain the role of judicial federalism in dividing the powers of government between the central authority and the member states, it is helpful to distinguish judicial federalism from two other means of limiting central government power—substantive constraints on the central state and political safeguards of federalism. The starting point for discussing these three tools is that, in the modern world, most federal systems follow the “centralized federalism” model invented by the framers of the U.S. Constitution in 1787.³¹ This model involves channeling power to both a central authority and member states, thus creating “a government of the federation and a set of

28. LENAERTS & VAN NUFFEL, *supra* note 1, at 452–53, 462.

29. *Id.* at 453–55.

30. These institutions, and other institutions, and their functions and interactions, are described in GOEBEL, *supra* note 1, at 27–66; LENAERTS & VAN NUFFEL, *supra* note 1, at 451–608; NUGENT, *supra* note 1, at 103–243.

31. See WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 5 (1964) (distinguishing this “centralized federalism” from the “peripheralized federalism characteristic of earlier eras”) (emphasis omitted).

governments of the member units.”³² Like all bureaucracies, central governments tend to pursue greater power, and often succeed.³³ In centralized federalism, the rulers of the federation usually have more influence over society than anyone else. “[H]aving this influence, they tend to acquire more,” so much so that “an identifying feature of centralized federalism is the tendency, as time passes, for the rulers of the federation to overawe the rulers of the constituent governments.”³⁴ Over time, as the federation confronts one issue after another pitting local against central interests, the member states will have disparate interests, while the central government will consistently favor a central government solution. This persistent pressure to tilt the division of authority in favor of the center means that maintaining the independence of the member states is a challenge for any federal system.³⁵

If the values of federalism are to be realized, means must be found to combat the tendency toward centralization. In order to clarify the issues raised by judicial federalism, we need to examine two other ways of constraining the center and strengthening the periphery: (1) substantive constraints on central authority; and (2) political arrangements that enable local authorities to limit the scope of central government action.

A. *Substantive Constraints*

One strategy for defending localism is to impose limits on centralization in the fundamental law governing the polity.³⁶ Both the U.S. Constitution and the TFEU contain such limits. Article I of the Constitution specifies that Congress’s legislative power extends only to certain subjects.³⁷ The TFEU also grants

32. *Id.*

33. See Ronald Wintrobe, *Modern Bureaucratic Theory*, in PERSPECTIVES ON PUBLIC CHOICE 429, 433–34 (Dennis C. Mueller ed., 1997).

34. RIKER, *supra* note 31, at 7.

35. See Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE, *supra* note 33, at 73, 103 (describing “overawing” of the states); see also Young, *supra* note 4, at 1690 (“Substantive policy commitments on particular issues often will overwhelm concerns about the *institutional* interests of the state or Member State governments that representatives are supposed to represent.”).

36. In Ernest Young’s terminology, this is “power” federalism. Thus, “[p]ower” federalism doctrines hold that the central government simply lacks power to act in certain situations.” Young, *supra* note 4, at 1645.

37. See U.S. CONST. art. I, § 8; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–87 (2012) (discussing the limits on Congress’s enumerated powers and holding that the power to regulate interstate commerce does not include the power to require someone to engage in commerce); see also DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION 193–94* (2d ed. 2005) (describing the choice made in favor of enumeration rather than general principles).

limited powers to the central authority, and “the ‘original’ understanding was that the principle of enumeration would be strict and that jurisdictional enlargement . . . could not be lightly undertaken.”³⁸ With or without such an enumeration, courts could guard against undue centralization by “allocating power . . . to different levels of government as a matter of law” based on their assessment of the different “competences” of each level.³⁹ No significant judicial constraint, however, has taken hold in either the United States or the EU. Nor is this surprising, because “the central government’s role in creating the central judiciary, supplying financial resources, and controlling appointments renders the central judiciary a natural ally of the central government in the control of the states.”⁴⁰

1. *Substantive Constraints in U.S. History.* Beginning early in U.S. history, the Supreme Court under the leadership of Chief Justice John Marshall read the Article I list broadly.⁴¹ Notably, Article I authorizes Congress to regulate “Commerce . . . among the several States.”⁴² In *Gibbons v. Ogden*, the Court suggested that the power to regulate commerce includes a power to regulate activity that occurs within a single state, if it affects commerce among states.⁴³ For more than a century after *Gibbons*, the Court attempted to identify limits on the commerce power.⁴⁴ But in response to the economic crisis of the 1930s, it largely abandoned the effort, going so far as to hold that Congress may limit the amount of wheat a farmer may grow for his own purposes, because the more he grows the less he will buy on the market, thereby lowering the price of wheat.⁴⁵ More recently, the Court has occasionally curbed Congress’s power

38. Weiler, *supra* note 4, at 2433–34.

39. Kramer, *supra* note 3, at 1491.

40. Halberstam, *supra* note 3, at 147.

41. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 110 (18th ed. 2013) (introducing the Commerce Clause decisions of the Marshall Court).

42. U.S. CONST. art. I, § 8, cl. 3.

43. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195–96 (1824).

44. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 273–74, 276 (1918) (invalidating a federal statute regulating child labor in factories, by distinguishing between commerce, which Congress may regulate, and production, which it may not).

45. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942); see also *United States v. Darby*, 312 U.S. 100, 115, 119–20 (1941) (holding that the regulation of interstate commerce based on fair labor standards is for the Legislature since it does not implicate the Constitution and that Congress has the power to regulate interstate commerce when intrastate activities have “a substantial effect on the commerce”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40 (1937) (holding that production is not determinative but rather the effects on interstate commerce).

under the Commerce Clause,⁴⁶ but without casting doubt on the general breadth of that power.

2. *Substantive Constraints in the EU.* The European Court of Justice has a shorter history than that of the Supreme Court. But its rulings over the past fifty years have generally tracked those of the Supreme Court, by turning away challenges to exercises of power by EU institutions.⁴⁷ The Treaty contains a “principle of conferral,” which in principle limits EU activity to powers the Treaty assigns to it.⁴⁸ The power-conferring provisions most closely analogous to the Commerce Clause are those that authorize what is often called “harmonization,” or, in the language of the Treaty, “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”⁴⁹ The ECJ has read this and other conferrals broadly, leading George Bermann to draw a parallel between the ECJ and the Supreme Court. According to Professor Bermann,

[N]either the US Supreme Court nor the European Court of Justice has traditionally shown a great deal of interest in closely examining the question whether a given exercise of legislative authority is or is not constitutionally justified by reference to the commerce clause or the EC Treaty’s harmonization provisions, respectively.⁵⁰

The ECJ “has never taken the opportunity to define restrictively the Treaty’s competence-conferring provisions, nor has it seriously questioned whether a Community law measure bears a sufficient connection to the internal market to justify its adoption pursuant to the Treaty’s internal market harmonization provisions.”⁵¹

46. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–87 (2012) (commerce power does not empower Congress to require a person to engage in commerce); *United States v. Lopez*, 514 U.S. 549, 551, 561, 567–68 (1995) (commerce power does not empower Congress to prohibit persons from possessing firearms near schools).

47. See Young, *supra* note 4, at 1663–82 (discussing the failure of “power” federalism in both polities).

48. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 3b, para. 2, Dec. 13, 2007, 2007 O.J. (C 306) 12 [hereinafter Treaty of Lisbon] (“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”).

49. TFEU art. 114, para. 1.

50. George A. Bermann, *The Role of Law in the Functioning of Federal Systems, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 191, 199 (Kalypso Nicolaidis & Robert Howse eds., 2001).

51. *Id.* at 199–200.

In both the EU and the United States, the list of enumerated powers is accompanied by a catch-all provision, and in both systems that provision has been used to significantly expand legislative power. Thus, Article I of the U.S. Constitution contains a clause authorizing Congress “[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁵² *McCullough v. Maryland*, one of the Supreme Court’s earliest and most important rulings, read this clause broadly to uphold Congress’s enactment of a statute chartering the Bank of the United States.⁵³ *McCullough* read “necessary and proper” as a broad authorization to Congress to take steps that were “appropriate” to carrying out the enumerated powers.⁵⁴

The EU analogue to the “necessary and proper” clause is “implied powers.”⁵⁵ Early in the EU’s history, the ECJ held that “the grant of internal competence must be read as implying an external treaty-making power.”⁵⁶ That ruling had a broad significance, because it established a general principle that “powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it.”⁵⁷ Notably, the Court’s recognition of implied powers was not based on the Treaty’s own “implied powers” clause,⁵⁸ now Article 352, which “enable[s] the Council to adopt new policies or legislation or take decisions in order to achieve a Treaty objective when no specific Treaty article authorized the action.”⁵⁹ The difficulty was that Article 352 required Council unanimity.⁶⁰ The ECJ thus devised a structure for side-stepping the unanimity requirement, and it has continued to make use of that structure. In particular,

52. U.S. CONST. art. I, § 8.

53. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 423–24 (1819).

54. See SULLIVAN & FELDMAN, *supra* note 41, at 86–87 (describing Marshall’s broad construction of Congress’s implied powers).

55. A discussion of “implied powers” will suffice for present purpose. Note, however, a central theme of Professor Weiler’s article on the “transformation” of the EU: that besides “implied powers,” EU authority gradually expanded under other rubrics, such as (in Weiler’s terminology) “extension” of EU authority, “absorption” of member State functions, “incorporation” of EU norms into Member State law, and “expansion” of EU authority. Weiler, *supra* note 4, at 2437–43.

56. *Id.* at 2416.

57. *Id.*

58. TFEU art. 352.

59. GOEBEL, *supra* note 1, at 170. The Council is composed of ministers from each member state. Treaty of Lisbon art. 9 B, para. 2. In certain situations, it may enact regulations. TFEU arts. 14, 24, 46. Thus, “[c]urrently, the Council alone adopts legislation in the fields of taxation, competition, most monetary measures, and cooperation in police and criminal justice.” GOEBEL, *supra* note 1, at 34.

60. TFEU art. 352.

it has relied on its general power to maintain an “internal market” across the EU by ironing out differences in the rules among member states. *Spain v. Council*⁶¹ illustrates the point. Though the enumerated powers do not include authority to create intellectual property rights, the Council extended the patent protection for pharmaceuticals.⁶² It could not justify the legislation under Article 235 (now Article 352) because it had not acted unanimously.⁶³ Instead, it relied on its power to harmonize the law in areas within its competence, which includes free trade across borders.⁶⁴ Spain and Greece objected that intellectual property rights are distinct from harmonization, so that unanimity was required.⁶⁵ The Court nonetheless approved the Council’s action on the ground that uniform intellectual property controls would avoid “fragmentation of the market.”⁶⁶ The Court thus recognized an “implied power” unencumbered by the need for unanimity.⁶⁷

Besides the principle of conferral, the EU Treaty contains another substantive limit on central authority, the principle of subsidiarity.⁶⁸ That principle provides that, “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.”⁶⁹ But this subsidiarity principle has not produced many invalidations of EU initiatives.⁷⁰ The CJEU seems to take the view that subsidiarity is little more than a factor for the EU legislative actors to consider, not a judicially enforceable norm. For example, in *Germany v. Parliament and Council*, the EU had required member states to regulate banks to ensure that customers’

61. Case C-350/92, *Spain v. Council*, 1995 E.C.R. I-1985, paras. 35–36.

62. *Id.* para. 13.

63. *Id.* para. 25.

64. *Id.* paras. 18–21.

65. *Id.* para. 25.

66. *Id.* para. 36.

67. See LENAERTS & VAN NUFFEL, *supra* note 1, at 293–94 (“As a result of the harmonisation of national legislation, Union law penetrates into areas which do not form a direct part of the Union’s competence.”).

68. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 334 (1994) (discussing the subsidiarity principle).

69. Treaty of Lisbon art. 3b, para. 3; see LENAERTS & VAN NUFFEL, *supra* note 1, at 135 (noting that Union action can be expanded if required or restricted if no longer justified).

70. See LENAERTS & VAN NUFFEL, *supra* note 1, at 139–40 (noting that EU action is often “better” or more efficient than member state action, so subsidiarity is not an actual limitation on action).

deposits would be guaranteed if insolvency occurred.⁷¹ Germany challenged the directive under the principle of subsidiarity, arguing that EU regulators had not shown why this type of regulation needed to be issued at the EU level rather than by the member states.⁷² The CJEU, however, rejected this subsidiarity objection on the ground that “in the Community legislature’s view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level.”⁷³

So long as the application of subsidiarity depends on the legislative and executive branches of the EU, it cannot constrain their power. For this reason, Robert Schütze argues that the CJEU “could—and indeed should—outlaw disproportionate interferences into national legislative autonomy.”⁷⁴ But the U.S. Supreme Court’s track record suggests that formal limits on central power do not effectively foster localism, even if they purport to curb central power, and so far at least the CJEU has followed the same path as the Supreme Court.

B. Political Safeguards

Another strategy for holding off centralization is less direct. It involves the “composition and selection of the central government.”⁷⁵ Professor Herbert Wechsler, writing after the New Deal cases had undermined the “substantive” approach, argued that the main safeguards of federalism are not judicially enforceable limits on congressional power, but the participation of state officers and state electorates in forming the central government.⁷⁶ In the years since Wechsler outlined these “political safeguards of federalism,” scholars have elaborated on his theme and the Supreme Court has paid it heed.⁷⁷

71. Case C-233/94, *Ger. v. Parliament & Council*, 1997 E.C.R. I-2405, para. 5.

72. *Id.* paras. 22–23.

73. *Id.* para. 26; see also Young, *supra* note 4, at 1677–82 (questioning whether subsidiarity will serve as a more significant check than the American Commerce Clause).

74. ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM* 265 (2009).

75. HERBERT WECHSLER, *The Political Safeguards of Federalism*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 49, 50 (1961).

76. Besides Wechsler, *supra* note 75, at 54–55, see, for example, Kramer, *supra* note 3, at 1513–14 (discussing the allocation of power between state and federal systems). See also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 175–90 (1980) (proposing that the judiciary should not decide federalism questions and should be decided by elected representatives since the political system’s very structure protects the states by their participation in it).

77. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). Rejecting a substantive challenge to Congressional regulation of state government employees, the Court said that “[s]tate sovereign interests, then, are more properly

1. *U.S. Political Safeguards.* In the United States, both the national Legislature and the President are chosen by voters within the states. This mechanism for selecting national leaders makes them accountable to local electors, as they will need to pay attention to local concerns in order to obtain and to keep their positions.⁷⁸ The point is not that localism will be shielded from interference in any specific domain or that any specific topics are off limits to the central authority. Rather, over the whole range of topics addressed by government, member states will face fewer national intrusions. Although there is no guarantee that local interests will prevail in any particular face-off between national and state interests, the overall pattern of outcomes will give local interests their due. Incentives related to currying favor at local levels will systematically tip the balance in favor of the member state's interests in a significant set of instances. For example, because presidential candidates gain electoral votes on a state-by-state basis, they may be particularly unwilling to endorse legislation that would deprive Iowa farmers of corn subsidies.

The classic formulation of the "political safeguards" thesis thus stresses that the states have a "crucial role in the selection and the composition of the national authority."⁷⁹ The President is not elected by nationwide popular vote. In each state, voters choose electors to an Electoral College, with each state receiving a number of electors equal to that state's number of Representatives and Senators. The result may be election of a president who would not have won a plebiscite. The upper house of the U.S. Congress is organized in a way that favors state interests, by giving each state "equality of status."⁸⁰ Article I provides for two senators from each state, regardless of population.⁸¹ Members of the House, though chosen from districts drawn on the basis of population, are also elected from the states.⁸² Thus, "the people to be represented with due deference

protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*

78. See THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) (arguing that on account of the means by which national officers are elected, "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them").

79. WECHSLER, *supra* note 75, at 54.

80. *Id.*

81. U.S. CONST. art. I, § 3.

82. U.S. CONST. art. I, § 2.

to their respective numbers were *the people of the states*.⁸³ By means of these provisions, the states would have a strong voice in Congress and their interests would be protected. The states would be “constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.”⁸⁴

The original U.S. Constitution gave even greater weight to state interests, by providing that senators were to be elected by the state legislatures.⁸⁵ Thus, a senator seeking reelection would be accountable to the state legislature and presumably sensitive to its concerns. This “political safeguard” for state interests was undermined in 1913. Influenced by the Progressive movement in U.S. politics, Congress proposed and the states adopted the Seventeenth Amendment, which required that senators be elected by popular vote rather than by state legislatures.⁸⁶ The states’ equal representation in the Senate, and the fact that both senators and representatives are elected from states and localities within states, may continue to provide some influence for the states in Congress, but that influence is certainly weaker than before 1913. Even so, there is reason to believe that the political safeguards of federalism have protected local governments to some degree. After all, state tort, contract, property, family, and criminal law continue to govern most of the encounters and interactions that give rise to legal disputes.⁸⁷

2. *Political Safeguards in the EU.* Turning to the role of political safeguards in the EU, two EU institutions assure that the concerns of the member states will receive attention in EU policy making. One of these is the “Council of Ministers,” composed of the heads of departments from each of the member states, with voting rights at meetings determined by the subject

83. WECHSLER, *supra* note 75, at 55.

84. THE FEDERALIST No. 45, *supra* note 78, at 291 (James Madison).

85. U.S. CONST. art. I, § 3.

86. U.S. CONST. amend. XVII; *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549–54 (1985) (describing the states’ influence on the federal political process and the adoption of the Seventeenth Amendment); *see also* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 581 (2d ed. 2013) (noting that the Seventeenth Amendment seems to have “eliminated the intense incentives of the senators to protect the interests of their state governments, because their reelection was no longer in the hands of the state legislature”).

87. Other factors may carry more weight today in maintaining the role of the states, including the “noncentralized” and “nonprogrammatic” features of political parties, *see* Kramer, *supra* note 3, at 1524, the fact that much federal law is administered at the state level, *id.* at 1543, and “[t]he simple existence of independent states within the larger nation,” *id.* at 1547.

under discussion.⁸⁸ The Council initiates EU legislative projects, which cannot be adopted without its approval, provides a forum for national governments to debate and arrive at agreements on controverted policy issues, and in some areas, such as relations with non-EU nations, takes “direct responsibility . . . for exercising executive power.”⁸⁹ A very rough analogy might be drawn between the Council of Ministers and the pre-1913 U.S. Senate, though the Senate has no executive role.

Another group, confusingly called the “European Council,” is composed of the heads of government of the member states.⁹⁰ This group “is relatively free to decide what it may and may not do.”⁹¹ It is as though the governors of the fifty states met periodically to decide whatever policy questions they chose to address.⁹² The European Council also nominates the President of the European Commission (the chief administrative agency of the EU), and “has provided crucial guidance on the most consequential policy issues confronting the Community or the Union.”⁹³ For example, in 2014, the European Council met several times to establish guidelines for the EU’s budget for the upcoming five years.⁹⁴ In 2015, the EU faced an influx of immigrants from Africa and the Middle East.⁹⁵ In the United States, a problem of this sort would be resolved by national officials, with state officials lacking any significant role except to make their views known to national decision-makers. The EU, however, operates differently. Thus, as the tide of migration rose, EU officials proposed to spread the migrants around the continent. They did not, however, have the last word. Instead, heads of state (i.e., the European Council) met to discuss the issue and “scrapped what had been the heart of a plan to share a burden now borne largely by Greece and Italy.”⁹⁶ Ultimately, this

88. NUGENT, *supra* note 1, at 139.

89. *Id.* The ability of the Council to protect member state interests has, however, weakened over time, as voting rules have moved from a general unanimity requirement to some form of majority voting. See Bermann, *supra* note 50, at 194 (noting that states have made alternative treaty safeguards to shield national interests); NUGENT, *supra* note 1, at 154–55.

90. Treaty of Lisbon art. 8A, para. 2.

91. NUGENT, *supra* note 1, at 171.

92. *Id.*

93. GOEBEL, *supra* note 1, at 38–39.

94. Council of the European Union Press Release ST 14586/1/14, 2015 EU Budget Talks Go to Conciliation 3 (Oct. 22, 2014).

95. *Why is EU Struggling with Migrants and Asylum?*, BBC NEWS (Mar. 3, 2016), <http://www.bbc.com/news/world-europe-24583286> [<https://perma.cc/5K8A-PYUK>].

96. Andrew Higgins, *E.U. Talks on Migrants Come to End with No Deal*, N.Y. TIMES, June 27, 2015, at A4.

group agreed on a sharing arrangement, though at this writing the terms of that arrangement remain under discussion.⁹⁷ Taken together, the structural roles of the Council of Ministers and the European Council have “ensured . . . that national governments have remained centrally placed to shape and influence most aspects of EU business.”⁹⁸

C. *Judicial Federalism*

This Article sets aside substantive and political federalism and instead focuses on the role of judicial federalism in constraining central authority. Judicial federalism differs in important ways from the strategies of imposing substantive limits on centralized powers and of devising political safeguards of constituent-state authority. The domain of judicial federalism is the division of powers of the *courts* between the levels of government. In the United States, state courts and federal courts operate concurrently throughout the nation and their jurisdiction overlaps. The body of law concerned with judicial federalism includes federal question jurisdiction, which consists of rules governing access to lower federal courts for federal law issues,⁹⁹ doctrines that require federal courts to defer to state courts in certain circumstances,¹⁰⁰ and rules governing Supreme Court review of state court judgments.¹⁰¹ Comparative studies of federal systems typically pay little attention to the judicial aspects of federalism, perhaps because judicial federalism seems, at first glance, to address only procedural issues, not substantive divisions of power. In addition, it may be tempting to view the division of judicial powers in the United States as largely a historical relic. In 1787, every state had a judicial system, and

97. *Id.*

98. NUGENT, *supra* note 1, at 139.

99. *E.g.*, *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (holding that there is no federal jurisdiction over a legal malpractice claim that raises an issue of federal patent law); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314–15 (2005) (holding that federal jurisdiction is appropriate over a state law quiet title case raising a federal issue).

100. *E.g.*, *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 591–94 (2013) (discussing abstention in favor of pending state enforcement proceedings); *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006) (noting that there is a probate exception to federal jurisdiction when the property is in the control of the state probate court); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (noting that the domestic relations exception to federal jurisdiction prevents federal courts from divorce, alimony, and child custody cases); *Colorado River Water Conservation Dist. et al. v. United States*, 424 U.S. 800, 817–20 (1976) (describing federal courts' deference to parallel state proceedings).

101. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1039–42 (1983) (discussing the Supreme Court's methods for dealing with ambiguous state court opinions).

none of the framers suggested that those systems be abolished in favor of a unitary national judiciary, though such a system would have been simpler to administer. But “the historical explanation of the origin of the structure of complex concurrency of jurisdiction, even if accurate, does not suffice to explain its persistence.”¹⁰² The very existence of a layer of member-state courts adds complexity and cost to the legal system. Willingness to bear that cost suggests that judicial federalism has value as a means of expressing the member states’ independent stature.¹⁰³

In the United States, the value of judicial federalism is more than symbolic. In an indirect way, substantive interests are at stake in the allocation of jurisdiction between federal and state courts, because the outcome of litigation often depends on whether the court that decides a case is responsible to the national government or the state government. Outcomes may vary because procedural rules differ depending on the jurisdiction, or because the jury pool differs, or because lawyers’ familiarity with the judges and the setting differs. The most important factor, however, is that federal and state judges bring different perspectives to the task of adjudication.¹⁰⁴ Differences arise because federal judges naturally have greater “technical competence” in deciding federal law claims.¹⁰⁵ Even more important are variations in “psychological set” that state and federal judges bring to the decision of cases, with federal judges more attuned to the vindication of federal rights and state judges more concerned with implementing the states’ interests.¹⁰⁶ These different orientations exist in part because many state judges are elected.¹⁰⁷ In addition, whether they are elected or appointed, state judges generally serve for fixed terms of six to eight years.¹⁰⁸ It follows that many of these

102. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642 (1981).

103. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (explaining that the policy of federal court non-interference in state criminal prosecutions is based on “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism.’”).

104. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–30 (1977) (noting that state court judges are not as removed or as insulated from the effects of enforcing the Constitution and may have a more cynical attitude toward constitutional rights).

105. *Id.* at 1121.

106. *Id.* at 1124.

107. *Id.* at 1127–28.

108. See NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org> [<https://perma.cc/>

judges will be sensitive to the interests of the electorate or the political actors who decide on reappointment. In sharp contrast, federal judges are largely insulated from majoritarian pressures by the lifetime tenure and pay maintenance safeguards put in place by Article III.¹⁰⁹ To be sure, these differences between federal and state judges do not signal that state judges are impermissibly biased against federal rights,¹¹⁰ or that federal courts are superior decision-makers. State judges simply bring a different perspective to the adjudication of federal law issues.¹¹¹ The result is what one might call “weak parity,” which means that litigants typically get a fair hearing in state court, but that state and federal judges nonetheless tend to differ in the way they resolve close cases.¹¹²

One not-uncommon view of our judicial system involves “institutional formalism,” which “consists of treating the governmental institution involved as more or less a formal black box” to which powers are allocated.¹¹³ The real-world differences between state and federal courts, however, must be taken into account in order to understand and evaluate any system of judicial federalism. “Institutional realism,” in contrast to institutional formalism, “entail[s] constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time.”¹¹⁴ The built-in differences between

THV6-2WY6] (last visited Feb. 1, 2015) (containing information on judicial selection and terms in all 50 states); *see also* RICHARD H. FALLON ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 301–02 (7th ed. 2015) (discussing methods by which state judges are selected).

109. *See* Neuborne, *supra* note 104, at 1127 (noting that such protection enables them to uphold the Constitution without worrying about retribution). Cover, *supra* note 102, at 660, points out that “[j]udges who are chosen for their strong links to the regime in power may be expected to identify regime interest with their own self-interest.” Professor Cover’s point applies to federal as well as state judges, but there is still a difference. Federal judges need not worry about reappointment and will therefore have a weaker incentive to remain sensitive to the interests of the regime. Neuborne, *supra* note 104, at 1127.

110. *But see* Neuborne, *supra* note 104, at 1119 n.55 (acknowledging that state courts in the South during the 1960s were biased against federal rights, but “similar breakdowns . . . do not exist today”).

111. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 634–35 (1981) (arguing that state court judges cannot be barred from participating in the elaboration of federal constitutional principles).

112. *See* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 614–15 (1991) (discussing the idea that although state court judges are not biased against federal claims, cases will come out differently in state versus federal court).

113. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (2014).

114. *Id.* at 2; *see also id.* at 7–8 (discussing Neuborne’s work as an illustration of institutional realism).

federal and state courts indicate that outcomes may well turn on whether a federal or state court decides key legal issues—as well as whether a federal or state court frames the issues, decides the facts, rules on discovery and other discretionary matters, and generally shapes the litigation. The precise impact of these differences is hard to measure. But there can be no serious doubt that differences exist, as indicated by the fact that attorneys, when they have the choice, prefer federal court over state court for federal constitutional claims.¹¹⁵

The existence of differences between federal and state courts provides a mechanism for promoting (or demoting) the values of federalism. Governing law can accord greater or lesser weight to state interests by allocating state courts more or less jurisdiction. What is at stake in the hard cases is a litigating advantage. In the adjudication of these cases, reasonable arguments can be advanced on both sides and “something in the nature of a choice between open alternatives must be made by whoever is to resolve them.”¹¹⁶ The loser will be disappointed, but he has no ground for complaining of unfairness because either outcome may be justified under the legal materials. U.S. experience provides support for a general principle of institutional design: It suggests that in a federal system the division of judicial power between central government courts and member-state courts can have substantive impact, either furthering state interests or hindering them. A value of the U.S. version of judicial federalism, in which both state and federal judges adjudicate federal constitutional and statutory questions, is that both perspectives can be brought to bear on the resolution of open issues.¹¹⁷ Over time, both the federal and the state judge benefit from the perspective of the other.¹¹⁸

115. See, e.g., Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 655 n.72 (1987); Neuborne, *supra* note 104, at 1115–16; MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 69 (1999) (describing forum shopping and removal to federal court); *cf. id.* at 47–51 (empirical study suggesting that federal courts are somewhat more sympathetic to federal interests in close cases, but that state courts are not inappropriately biased against federal claims).

116. H.L.A. HART, *THE CONCEPT OF LAW* 127 (2d ed. 1994); see also HANS KELSEN, *PURE THEORY OF LAW* 349 (Max Knight trans., U. Cal. Press 1967) (“Even the most detailed command must leave to the individual executing the command some discretion.”); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 34–37 (1991) (discussing the “open texture” of rules).

117. Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 304 (1998).

118. *Id.* at 336.

D. Comparative Judicial Federalism

Federal systems diverge in their approaches to judicial federalism. But why? And how? And do these differences matter? As it turns out, the U.S. system of judicial federalism shares common features with the system at work in the EU, while also differing from it in significant respects. A close look at both shared and differentiating features thus holds the promise of providing insights into important choices about federalism-related institutional design.

Judicial federalism is not a feature of all federal systems. Belgium, for example, is a federal system with a unitary judiciary. In federal systems that do divide judicial power between central and member state judiciaries, judicial federalism is a stronger constraint on central authority in some polities than in others. In order to show how U.S. and EU judicial federalism differ, with the former acting as a comparatively weaker constraint on political integration and the latter a stronger one, it is helpful to locate both systems on a spectrum, in which weaker forms of judicial federalism are at one end and stronger ones at the other. One key distinction is between systems (call them “alpha” systems) in which the high courts of the central governments ultimately rule only on matters of central government law, but not on member state law, and systems in which the high central government courts adjudicate both national and member state issues (“beta” systems). Most federal systems fall into the beta camp; for example, Germany and Australia divide judicial power between national and state courts, but the national courts ultimately resolve issues of state law.¹¹⁹ Both the EU and the United States, however, have opted for alpha systems. These two alpha systems, in turn, differ from one another in two ways: First, the U.S. Supreme Court exercises appellate review over the rulings of state courts on federal law issues, while the CJEU resolves these issues by a procedure called “preliminary ruling,” which involves a member state court seeking an answer to a question of EU law by framing the legal question for the CJEU.¹²⁰

119. The Australian system is described in Michael E.J. Black, *The Federal Court of Australia: The First 30 Years—A Survey on the Occasion of Two Anniversaries*, 31 MELB. U. L. REV. 1017, 1030–33 (2007). For a description of the German system, see David P. Currie, *Separation of Powers in the Federal Republic of Germany*, 41 AM. J. COMP. L. 201, 239–40 (1993).

120. See, e.g., Thomas de la Mare & Catherine Donnelly, *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in THE EVOLUTION OF EU LAW 363 (Paul Craig & Grainne de Burca eds., 2d ed. 2011) (describing the preliminary reference process); NUGENT, *supra* note 1, at 222 (noting that the member state’s court, not the parties, must make the reference).

Second, in the United States, lower federal courts located throughout the nation adjudicate a vast range of federal law issues, and state law issues as well. There is no such network of lower EU courts in the EU.¹²¹

1. *Judicial Federalism in the United States.* In the United States, networks of both state and federal courts of original jurisdiction operate in every state.¹²² Both the state and federal courts have jurisdiction to adjudicate issues of national as well as state law.¹²³ Under the jurisdictional statutes, however, federal jurisdiction is often not available for cases that arise under state law. A complicating factor is that federal law is generally “interstitial,” governing some but not all of the issues in a dispute.¹²⁴ A complex set of rules governs the availability of federal jurisdiction for these hybrid cases. In the United States, the main principles are that: (1) under the “diversity” jurisdiction, federal as well as state courts may adjudicate disputes involving parties from different states that raise only issues of state law;¹²⁵ (2) litigants advancing most federal claims for relief may sue in either federal or state court if the amount in controversy exceeds the minimum requirement;¹²⁶ and (3) litigants raising federal defenses to state law claims are ordinarily required to raise them in state court.¹²⁷ In cases in which there is federal court jurisdiction, another body of law addresses federal court deference to state courts. For example, governing rules require federal courts to abstain from adjudicating cases in which the plaintiff seeks to enjoin state proceedings, and to defer to earlier state court judgments in

121. *Court of Justice of the European Union (CJEU)*, *supra* note 11.

122. The framers of the U.S. Constitution considered and rejected a judicial system that would include no lower federal courts. *See* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 7 (1973) (noting that except for the Supreme Court’s original jurisdiction, all cases would go to the states); CHEMERINSKY, *supra* note 14, at 33.

123. Although Congress may make federal jurisdiction exclusive over a given subject, there is a presumption in favor of concurrent federal and state court jurisdiction. *See* *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (reviewing the judicial history of concurrent jurisdiction); THE FEDERALIST NO. 82, *supra* note 78, at 493 (Alexander Hamilton) (asserting that the state and federal judicial systems are “parts of ONE WHOLE,” such that “the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited”).

124. *See* FALLON ET AL., *supra* note 108, at 488–89.

125. 28 U.S.C. § 1332(a) (2012).

126. *See* *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012) (discussing the presumption in favor of concurrent jurisdiction).

127. *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (illustrating the “well-pleaded complaint” rule, under which the claim may be brought in federal court only if the federal issue necessarily appears on the face of the complaint).

many instances.¹²⁸ The details of these doctrines are not important for my purpose. The key point is that, at the lower court level, both federal and state courts are available to litigants. Congress may grant more or less jurisdiction to the federal courts, and the Supreme Court may construe jurisdictional statutes as broadly or narrowly as it sees fit.

In keeping with the Australian and German provisions for broad federal appellate review, the U.S. Supreme Court hears appeals from the state courts¹²⁹ and definitively answers questions of federal law.¹³⁰ But there also exists a major difference between the Australian/German and American models. This difference arises because the fifty American states have ultimate authority over the development and application of their own law. In contrast to the German and Australian high national courts, the U.S. Supreme Court rules *only* on federal issues. Thus, as the Court held in *Murdock v. Memphis*, state law issues must be left to the highest court of each member state.¹³¹ In *Erie Railroad Co. v. Tompkins*, the Court also ruled that when lower federal courts face issues of state law, as they do in diversity of citizenship cases, they must follow the law of the state, including the decisions of state courts, rather than fashioning and applying a “federal general common law.”¹³² On the spectrum from “weak” to “strong” judicial federalism, the United States is closer than Germany and Australia to the “strong” end with respect to the sovereignty of state courts over state law. But Germany tilts toward a “strong” form of judicial federalism in another way; the absence of a network of lower federal courts in that nation may mean German judicial federalism provides the more effective means of protecting state interests.¹³³

128. See MICHAEL L. WELLS, WILLIAM P. MARSHALL & GENE R. NICHOL, *CASES AND MATERIALS ON FEDERAL COURTS* 473–576 (3d ed. 2015) (explaining federal abstention and other doctrines of federal deference such as the *Younger* and *Rooker-Feldman* doctrines).

129. 28 U.S.C. § 1257 authorizes Supreme Court review of state judgments that turn on federal law. See also 28 U.S.C. § 1254 (authorizing Supreme Court review of lower federal court judgments).

130. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating “the federal judiciary is supreme in the exposition of the law of the Constitution”).

131. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1874).

132. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Nearly every state authorizes federal courts to certify unclear questions of state law to the state Supreme Court, if they wish. See Eric Eisenberg, Note, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 71 (2008) (noting that North Carolina, Guam, Puerto Rico, the District of Columbia, and the Northern Mariana Islands do not). But federal courts may also examine state law and resolve state issues for themselves, if “a reasonably clear and principled course of action exists.” *State Auto. Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015).

133. See Currie, *supra* note 119, at 239–40, 240 n.208. To be more precise, the German system would be especially protective of state interests if outcomes in the state

2. *EU Judicial Federalism.* European Union and American judicial federalism are alike in that the member states remain sovereign over state law. They are also alike in that central government law often takes the form of an overlay on member state law, controlling part of the litigation, but not all of it. The EU system of judicial federalism, however, differs from the U.S. system in two main ways. First, as in the German system, there is no analogue to the nationwide network of federal district courts and federal circuit courts of appeals that operate in the United States. Put another way, the EU system resembles the system that would exist in the United States if Congress had never enacted the Judiciary Act of 1789, thus setting up the nation's web of lower federal courts.¹³⁴ In the EU, there are only two lower central government courts—the General Court and the Civil Service Court. The latter has a very narrow jurisdiction over complaints by EU employees about their treatment by EU supervisors.¹³⁵ The General Court adjudicates complaints from individuals and business enterprises regarding actions taken against them by the executive arm of the EU, the European Commission.¹³⁶ Because there is no network of lower EU courts, much of the work of administering EU law falls to member state tribunals.

Second, in the United States, the loser at the state court level may appeal to the U.S. Supreme Court and may thereby obtain a national court ruling on the national issue. In the EU, adjudication is divided into two tasks: norm articulation and dispute resolution.¹³⁷ The latter is left to the member state courts. The CJEU does not review their rulings. Borrowing from the German model, which directs constitutional questions to the German Constitutional Court, the CJEU hears these issues by “preliminary ruling” from the state courts.¹³⁸ The member state

courts diverged from what they would be in national courts. *But see id.* at 240 n.209 (suggesting that this may not be so).

134. See FALLON ET AL., *supra* note 108, at 20–21 (discussing the establishment of a lower court system and the definition of federal jurisdiction).

135. See LENAERTS & VAN NUFFEL, *supra* note 1, at 534 (detailing the court's jurisdiction); GOEBEL, *supra* note 1, at 63 (discussing the Court's creation, composition, and jurisdiction). The Treaty, in TFEU Article 257, authorizes the Council of Ministers to set up other specialized “judicial panels,” but the Council has not done so.

136. See LENAERTS & VAN NUFFEL, *supra* note 1, at 532–33 (discussing this and other aspects of the General Court's jurisdiction); see also GOEBEL, *supra* note 1, at 60 (discussing the court's jurisdiction over civil service administrative appeals and competition rules). Before the Lisbon Treaty, the General Court used to be called the “Court of First Instance.” *Id.*

137. By contrast, “[a]djudication in the common law mold entails two simultaneously performed functions: dispute resolution and norm articulation.” Cover, *supra* note 102, at 643.

138. TFEU art. 267; see BROBERG & FENGER, *supra* note 12, at 4–8 (describing the historical foundations of the system).

judge, upon determining that an issue of European Union law could determine the outcome of the case, may choose to refer the issue to the CJEU for an answer.¹³⁹ In addition, if the member state court is one from which there is no appeal within the system, the Treaty obligates the court to refer the issue, unless the answer to the EU question is clear.¹⁴⁰ Once the CJEU has ruled on the question, other member state courts are, in principle, obliged to follow its answer.¹⁴¹ There is an important difference between the EU preliminary reference and the German approach from which it borrows. In Germany, the lower court, having obtained an answer from the Constitutional Court, applies it to the case at hand.¹⁴² A higher court, such as the Federal Court of Justice, then reviews the lower court's ruling on appeal.¹⁴³ The availability of appeal imposes a constraint on lower courts. No similar constraint exists in the EU system. Once the CJEU has ruled on the preliminary reference, EU courts are done with the matter.¹⁴⁴ The ensuing adjudication by the member state judiciary can be challenged only by bringing a new lawsuit.

The bottom line is that the central government judicial system of the EU is marked by two constraining characteristics: (1) absence of central government judicial review of member state rulings; and (2) absence of a network of lower central government courts. Judicial federalism in the EU thus seems to provide a stronger counterweight to central government power than is the case in any other federal system. For many of the member states, judicial federalism may offer a more important shield against central government dominance than the political safeguards that analysts far more commonly emphasize as mechanisms of state protection. Indeed, Professors Lynn Baker and Ernest Young distinguish between two distinct classes of threats to state autonomy. One is "vertical" aggrandizement, coming from the central state.¹⁴⁵ The other danger is from other

139. GOEBEL, *supra* note 1, at 67–68.

140. *Id.* at 68, 79.

141. *Id.* at 71–72.

142. MARY ANN GLENDON, PAOLO G. CAROZZA, & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* 129 (4th ed. 2014) (detailing judicial review in Germany).

143. Tatjana Hörnle, *Moderate and Non-Arbitrary Sentencing Without Guidelines: The German Experience*, 76 *LAW & CONTEMP. PROBS.* 189, 193 (2013) (discussing the role of German appellate courts).

144. GOEBEL, *supra* note 1, at 71.

145. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 109 (2001); *see also* Young, *supra* note 4, at 1683 (defining vertical aggrandizement).

member states, or “horizontal,” in their vocabulary.¹⁴⁶ The EU’s political safeguards, notably the role of heads of the member states acting as the European Council to set policy, may prevent vertical aggrandizement. But the prominent role of the member states in governing the EU also presents opportunities for some states—especially the larger and more economically powerful states, such as Germany—to bully others.¹⁴⁷ For example, Germany seems to have controlled decisions on the Greek economic crisis in 2015, even over French objections.¹⁴⁸ It is true that each member state has a vote in the European Council. But in a long-term relationship like the EU, no issue can ever be dealt with in isolation. In every position they take, weaker member states will often need to be concerned about obtaining German or French cooperation on some other matter of great importance to the weaker member. To the extent political safeguards fail to prevent horizontal aggrandizement, the EU’s judicial federalism is all the more crucial to protecting the interests of the smaller member states.

IV. COMPARING EU WITH U.S. JUDICIAL FEDERALISM

From one perspective, EU judicial federalism is preferable to all its weaker cousins, simply because it better shields the member states from centralization, and maintaining member state autonomy is (from this perspective) the paramount goal. In my view, however, it may be better to take a more balanced approach in evaluating systems of judicial federalism, an approach that acknowledges the existence of strong central state values on the other side of the federalism-central state dichotomy. Viewed in this way, the judicial federalism issue involves reaching an appropriate accommodation between the values of federalism and those of central authority.

On this understanding of the role of judicial federalism in a federal system, it would be unwise to celebrate EU judicial

146. Baker & Young, *supra* note 145, at 110. An example of a safeguard against “horizontal” aggrandizement in the United States is the composition of the U.S. Senate, which consists of two senators from each state regardless of population. This composition was a significant victory for the smaller states at the Philadelphia Convention. See Lance G. Banning, *The Constitutional Convention*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 112, 114–22 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (describing the intense debate at the Constitutional Convention over representation in the House and Senate).

147. See Young, *supra* note 4, at 1686–87 (examining American examples of horizontal aggrandizement and postulating that the EU could also use such tactics, such as in economic concerns).

148. Steven Erlanger, *A Price to Pay for Germany*, N.Y. TIMES, July 18, 2015, at A8.

federalism just because it succeeds at fragmenting government authority. Political necessity aside, the rationale for introducing federalism into a legal and political system is not to fragment government, nor is it to guarantee maximum member state autonomy. Judicial federalism is always part of a larger system that consists of a central government and member states, each with an executive, a legislature, and a judiciary. It always competes with other values and cannot be understood or evaluated except in its relation to them. Whether a federal system is worthwhile depends on whether it enhances public welfare, all things considered. Strong judicial federalism in the EU comes at a price. The benefits of strong federalism (judicial or otherwise) come from diminishing the dangers of concentration of power at the center.

These benefits, however, must be weighed against the costs of dividing up judicial authority.

The costs of federalism (judicial or otherwise) are the values of centralization and the political integration it facilitates. These values include the heightened uniformity of legal rules, increases in administrative efficiency, the avoidance of risks that special interests will exert undue influence over smaller governments and use those governments to oppress vulnerable minorities, the creation of opportunities to prevent member states from externalizing costs (such as air or water pollution) to other states, more vigorous protection of individual rights against local governments, and facilitation of such vital goals as defense against foreign invasion and maintenance of a well-functioning internal market, which can only be achieved at the central state level.¹⁴⁹ To the extent judicial federalism means the interests of the member states carry too much weight when they conflict with those of the polity as a whole, the central government may be too weak and the benefits of federalism will not be worth the costs.

The costs and benefits of judicial federalism cannot be quantified or otherwise measured precisely. Unless the system is wholly dysfunctional, it is hard to make a confident judgment about how well the balance is struck so long as one focuses solely on a single system. Put another way, one cannot with any confidence judge the merits of a federal system standing alone, just as one cannot assess the merits of a shortstop, a bicycle or a particular bottle of wine without considering other shortstops, bicycles, or wines. By adopting the comparative method, however, it is possible to better understand and evaluate EU judicial federalism. So long as the functions served by two

149. See ERNEST A. YOUNG, *THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE* 671–72 (2012) (summarizing the benefits of centralization).

systems are similar, one can compare the costs and benefits of alternate approaches, just as one can make useful comparisons between two bottles of wine by tasting them side-by-side.¹⁵⁰ At the least, the comparative method can yield insights into *relative* costs and benefits, if not definitive judgments.

The costs of the EU's strong judicial federalism can be brought into sharper focus by comparing it with the contrasting system of the United States, a system that has a longer history, has faced similar issues, and has addressed those challenges in different ways.¹⁵¹ Both the United States and the EU are composed of formerly sovereign states who gave up some but not all of their sovereignty when they joined the union. In both, debates continue over just how much sovereignty was handed over. A corollary of the division of sovereignty of the member states and central government is that both the United States and the EU recognize member state sovereignty over the member state's own law. Unlike the Australian and German high courts, neither the Supreme Court nor the CJEU is empowered to definitively adjudicate state law issues. There are, in short, strong similarities between the U.S. and EU systems of judicial federalism. But what are the key points of difference? And what is to be learned from them?

In both the United States and the EU, conflicts between member states and the central government have given rise to judicial federalism issues. Yet, in several respects, the two polities have answered those questions in different ways. Viewed from an American perspective, the EU's judicial federalism seems to give too much weight to member state interests, both by relying heavily on member state lower courts and by the preliminary reference procedure in lieu of appellate review by national tribunals. Part IV.A examines the implications of the lack of a network of lower EU courts. From an American perspective, the objection to relying so heavily on member state courts is that a potentially valuable resource is ignored. The history of the lower federal courts in the United States suggests

150. 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 31 (Tony Weir trans., 2d ed. 1987) ("Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function."). For this reason, the United States is a better comparison than Australia or Germany. Both the United States and the EU aim to maintain a division of sovereignty. By contrast, in these other systems, the high court of the central government ultimately controls member state law, such that there is little, if any, member state sovereignty at all.

151. See Young, *supra* note 4, at 1644 (defending U.S./EU comparisons on the ground that "[i]t may be enough for comparisons to have some utility that the two systems face common problems, so that the experience of one may shed light on the questions confronting the other").

that they are essential to achieving significant national goals, most notably the full protection of individual rights. Part IV.B turns to the contrast between the EU's channeling of EU issues to the ECJ by way of preliminary reference and the U.S. Supreme Court's routine exercise of direct appellate review of state court judgments. The EU's preliminary reference procedure gives rise to an especially strong form of judicial federalism by shielding member state courts from direct control by the ECJ. And once again, judicial federalism comes at a price. The preliminary reference approach threatens unity at the central government level, because reliance on member state courts to determine whether preliminary reference is appropriate weakens the CJEU's control over the content of EU law.

A. *Lower Courts*

In the United States, litigants raising claims under federal law almost always may take their cases to federal court. In particular, they may sue state officers and local governments in federal tribunals to obtain remedies for violations of their federal rights.¹⁵² By contrast, plaintiffs in the EU do not have access to EU courts in cases of this kind.¹⁵³ Does this difference in judicial structures matter in a practical way? Precisely because there is no network of lower EU courts, there can be no direct evidence about differing results in EU cases depending on the localized or centralized nature of the trial court. But the history of the dual court system in the United States suggests that shifts in legislative and judicial rules on allocation of jurisdiction between federal and state courts correlate with the substantive goals of the justices and legislators who make the changes. Disparity between federal and state courts, and efforts by litigants to channel their cases to sympathetic courts, is a central theme in American legal history.¹⁵⁴ Throughout our history, Congress has authorized lower federal court jurisdiction for a wide variety of reasons, including to foster uniformity in federal law and to develop expertise in specialized fields, such as intellectual

152. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that 42 U.S.C. § 1983 authorizes suits against local governments in certain circumstances); *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (holding that § 1979 authorizes federal suits against officials who act "under color of" state law).

153. They may, however, sue EU institutions in the two lower EU courts—the General Court and the Civil Service Court. See LENAERTS & VAN NUFFEL, *supra* note 1, at 524–28, 532–34 (describing the limited jurisdictions of the CJEU, General Court, and the Civil Service Court).

154. Neuborne, *supra* note 104, at 1115–30.

property law.¹⁵⁵ But one reason stands out: The federal courts have long emphasized their special role in assuring that litigants—especially litigants who assert violations of federal rights—have access to a fair, impartial, and sympathetic forum.¹⁵⁶ This theme first surfaced in the debates at the Constitutional Convention over whether lower federal courts were necessary.¹⁵⁷ It recurred as Congress considered and enacted the Judiciary Act of 1789, which authorized lower federal court jurisdiction over diversity cases—that is, cases in which one of the litigants was from a different state or a foreign nation.¹⁵⁸ Even though the governing law in these cases is state law, the evident aim of federal diversity jurisdiction was to protect the out-of-state litigant from the risk of state court bias, whether on the part of state judges, legislators, or juries.¹⁵⁹

An episode from early American political history shows that the jurisdiction of the federal courts soon became a political issue, with partisans of central government favoring an expanded role for those courts, while advocates of state autonomy argued for a smaller one. The “Federalist” party controlled the national government in the late 18th century and took the former view.¹⁶⁰ The Federalists lost the congressional and presidential elections of 1800 to the rival “Jeffersonian” or “Democratic-Republican” party, which favored a weaker central government.¹⁶¹ Before leaving office, the Federalists enacted a new jurisdictional statute that gave the federal courts “a jurisdiction almost coextensive with the constitutional authorization.”¹⁶² A year later, the state-oriented Jeffersonians repealed the 1801 statute.¹⁶³

The next big changes in federal jurisdiction came in the Reconstruction Era after the Civil War. The Union victory in that war over the secessionist South considerably strengthened the national government.¹⁶⁴ One result was that new constitutional

155. See, e.g., Trademark Act of 1946, 15 U.S.C. §§ 1051–1127.

156. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–84 (1981) (discussing rationales for exclusive federal jurisdiction).

157. See FALLON ET AL., *supra* note 108, at 6–9 (detailing the Convention’s concerns about increased cost, finality of judgments, and infringement on states’ rights to create a lower federal system).

158. 28 U.S.C. § 1332(a)(1)–(2).

159. FALLON ET AL., *supra* note 108, at 1415–16.

160. *Id.* at 26.

161. *Id.* at 26–27.

162. *Id.* at 26.

163. *Id.*

164. See Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1021 (1977) (“The watershed was the war between the states, the adoption of the three Reconstruction amendments, especially the Fourteenth, and enactment of the various civil rights acts

amendments were adopted—amendments that abolished slavery,¹⁶⁵ guaranteed citizenship to former slaves,¹⁶⁶ and protected their right to vote.¹⁶⁷ Some of the changes were even more far-reaching. For the first time, states were obliged to accord every person equal protection of the law and were forbidden from depriving persons of life, liberty, or property without due process of law.¹⁶⁸ Of particular importance, these rules in practical effect shifted great power to the federal courts, because their vague contours gave those courts new opportunities to police the activities of the states. In addition, “[r]econstruction Congresses complemented the profound changes in constitutional structure wrought by the Civil War amendments with a compendious series of statutes extending the jurisdiction of the federal courts.”¹⁶⁹ An 1867 statute expanded habeas corpus jurisdiction of the federal courts, authorizing them to examine claims by state prisoners that they were illegally confined.¹⁷⁰ Congress also put in place the statute used by most litigants to challenge state government actions on constitutional grounds—42 U.S.C. § 1983—which was originally enacted as part of the Civil Rights Act of 1871 and was aimed at suppressing post-Civil War rebellion in the South.¹⁷¹ In 1875 Congress granted the federal courts general federal question jurisdiction,¹⁷² thus rendering the federal courts “the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.”¹⁷³

Invoking these new rights and grants of jurisdiction, litigants lodged numerous complaints against state officers in federal courts.¹⁷⁴ In the late 19th century, the Supreme Court armed the lower federal courts with new remedies for violations of federal constitutional rights, in a line of cases that culminated

with jurisdiction in the federal courts to enforce them.”).

165. U.S. CONST. amend. XIII.

166. U.S. CONST. amend. XIV, § 1.

167. U.S. CONST. amend. XV.

168. U.S. CONST. amend. XIV, § 1.

169. FALLON ET AL., *supra* note 108, at 28.

170. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385; *see* FALLON ET AL., *supra* note 108, at 1197 (explaining the writ’s expansion covered individuals in state prisons).

171. *See* *Monroe v. Pape*, 365 U.S. 167, 171–83 (1961) (discussing the Civil Rights Act of 1871).

172. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; *see* Fallon et al., *supra* note 108, at 782, 807–08 (noting the historical creation of the Act and the implications of the specific language used).

173. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (quoting FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928) (emphasis added by the Court in *Steffel*)).

174. *See* FALLON ET AL., *supra* note 108, at 781–82.

with *Ex parte Young*.¹⁷⁵ That case and its progeny established that a federal court could enjoin a state officer from violating a federal constitutional right despite the states' sovereign immunity from suit.¹⁷⁶ The practical effect of the ruling was to ensure that, in federal constitutional litigation, the states themselves would not be able to define the scope of the remedies available against them. Rather, a federal law remedy would be broadly available to litigants who succeed in proving violations of their federal constitutional rights.¹⁷⁷ Given the importance of that remedy for the enforcement of constitutional rights, "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law."¹⁷⁸

Under the leadership of Chief Justice Earl Warren in the 1950s and 1960s, the Supreme Court "enter[ed] upon a great and intricate new enterprise,"¹⁷⁹ in which it expanded the reach of the Equal Protection Clause of the Fourteenth Amendment,¹⁸⁰ strengthened the prohibitions on unreasonable search and seizure of the Fourth Amendment,¹⁸¹ broadened the protection afforded by the free speech and press guarantees of the First Amendment,¹⁸² and bolstered other constitutional rights enforceable against the states.¹⁸³ One of the most important aspects of its work was to rule that most of the protections set forth in the Bill of Rights of the federal Constitution applied not only against the national government, as they had under the pre-Fourteenth Amendment regime, but also against the states.¹⁸⁴ In addition, much like the Congress of the post-Civil War period, the Warren Court expanded access to the federal

175. *Ex parte Young*, 209 U.S. 123 (1908).

176. *Id.* at 157.

177. See Hart, *supra* note 21, 523–24, 524 n.124 (1954) (discussing the federal nature of the remedy).

178. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 311 (7th ed. 2011).

179. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 5–6 (2d ed. 1978).

180. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568–69, 577 (1964) (ordering that legislative districts be drawn on a one person-one vote basis); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (forbidding racial segregation in public schools).

181. *E.g.*, *Katz v. United States*, 389 U.S. 347, 353 (1967) (applying the Fourth Amendment to wiretaps).

182. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (imposing free speech restrictions on liability for libel).

183. See BICKEL, *supra* note 179, at 7–8 (discussing the Court's expansion of its own jurisdiction and limitations on government action on individuals).

184. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (listing the rights now applicable to the states).

courts for enforcement of federal rights. In *Monroe v. Pape*, it revived the Civil Rights Act of 1871 to make it available for suits against state officials to recover damages for constitutional violations,¹⁸⁵ including cases in which state remedies were available.¹⁸⁶ *Fay v. Noia* loosened restrictions on federal court habeas corpus suits challenging state convictions on federal constitutional grounds, by allowing prisoners to sue even if they had not properly raised or preserved their claims in state court.¹⁸⁷ *Dombrowski v. Pfister* protected civil rights workers by allowing them access to federal court to challenge state prosecutions on federal constitutional grounds, if the state prosecution was instituted in bad faith for the purpose of harassing them, or if the statute swept too broadly and covered a considerable amount of protected speech.¹⁸⁸ *Dombrowski* “expressed the Warren Court’s activism and its determination to protect the civil rights movement.”¹⁸⁹

The lesson to be drawn from these events is not that federal jurisdiction grows inexorably in the United States. On the contrary, periods of expansion of federal jurisdiction and federal rights often have been followed by periods of retrenchment under more conservative judicial and congressional leadership.¹⁹⁰ The scope of the federal remedy recognized in *Ex parte Young* was limited by statutory restrictions on its use, including a bar on obtaining federal injunctions against state tax collection in favor of state remedies.¹⁹¹ The Supreme Court imposed additional restrictions, such as a principle that federal courts should abstain in favor of initial state court consideration when the

185. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

186. See Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 295 (1965) (noting that a federal remedy was supplemental, not exclusive).

187. *Fay v. Noia*, 372 U.S. 391, 427–29, 434 (1963); see Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1150–58, 1190–1202 (1986) (discussing inadequacy of state grounds and procedural default in habeas cases).

188. *Dombrowski v. Pfister*, 380 U.S. 479, 486–87, 490–91, 494 (1965).

189. Owen M. Fiss, *Dombrowski*, 86 YALE L. J. 1103, 1103 (1977). Professor Fiss goes on to describe the Court’s retreat in the 1970s from the overbreadth aspect of *Dombrowski* and from the general use of federal injunctive intervention to enforce federal rights. *Id.* at 1116–43.

190. The earliest example comes from the 1790s. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court held that the states have no sovereign immunity from suit in the federal courts. Congress soon proposed and the states ratified the Eleventh Amendment, reversing the Court’s decision. See FALLON ET AL., *supra* note 108, at 905–06 (explaining the five opinions of *Chisolm*).

191. 28 U.S.C. § 1341 (2012) (the Tax Injunction Act); see FALLON ET AL., *supra* note 108, at 1068–93 (discussing the Tax Injunction Act of 1937 and other statutory restrictions on federal jurisdiction to grant injunctions against state courts and state officers).

resolution of an unsettled state law issue could obviate the need to address a federal constitutional issue.¹⁹² In the years since the Warren Court's expansion of constitutional rights and remedies, Congress and the Court have limited habeas corpus¹⁹³ and curbed suits against state governments.¹⁹⁴ The Supreme Court has directed federal courts to defer to earlier state judgments,¹⁹⁵ to avoid enjoining state proceedings,¹⁹⁶ and to refrain from interfering in state judicial administration.¹⁹⁷

The U.S. experience, with its recurrent resort to lower federal court jurisdiction and federal remedies, reflects an ongoing struggle between the state-oriented values of judicial federalism and the federal-oriented enforcement of rights held against the states. In periods when those rights are growing, Congress enacts new jurisdictional statutes or the Supreme Court construes old ones in ways that expand the role of the federal courts in adjudicating issues raised by the new rights. Eras of consolidation of earlier advances slow down the process of centralization, but rarely reverse earlier gains. The result is that, over time, the federal courts have proven to be a powerful nationalizing force. Assessing the history of the federal courts at their bicentennial, Daniel Meltzer concluded that "[i]nsofar as modern lawyers have a common intellectual heritage, the federal courts are its primary source."¹⁹⁸ Viewing the EU from a comparative perspective, the salient point is that the lower

192. R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941).

193. See e.g., *Teague v. Lane*, 489 U.S. 288, 298–99 (1989) (excluding access to habeas corpus for claims based on “new law”); *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (barring federal habeas corpus to petitioners who have defaulted in state court unless they show “cause” for the default and “prejudice” if the default is not excused). In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, Congress imposed a number of restrictions on habeas corpus, including a one-year statute of limitations and a bar to successive petitions. See *id.* at 1214, 1220; PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 823, 852, 915, 929–35, 947–54, 961 (7th ed. 2011) (discussing various provisions of AEDPA that limit habeas corpus).

194. E.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress may not, when acting under its Article I powers, abrogate state sovereign immunity from suit in state court); *Seminole Tribe v. Florida*, 517 U.S. 44, 72–74 (1996) (holding that Congress may not, when acting under its Article I powers, abrogate state sovereign immunity against suit in federal court).

195. *Allen v. McCurry*, 449 U.S. 90, 99–101 (1980) (holding that doctrines of res judicata and collateral estoppel apply in § 1983 suits raising issues previously decided in state courts).

196. See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590–91 (2013) (distinguishing between contexts in which abstention is appropriate and those in which it is not).

197. *O'Shea v. Littleton*, 414 U.S. 488, 500–02 (1974).

198. Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 427 (1989).

federal courts in the United States are a valuable resource for implementing nationalist values, and one that is not available in the EU under the current jurisdictional structure. The history of the U.S. federal court system suggests that, if the EU is to achieve the political integration envisioned by the Treaty, a network of lower courts may be a necessary component.

B. Comparing Preliminary Reference with Supreme Court Review

Along with the network of lower federal courts in the United States, the fifty separate state court systems adjudicate countless federal law questions.¹⁹⁹ U.S. Supreme Court review is available for review of those questions unless the state case rests on an “adequate and independent state ground.”²⁰⁰ Indeed, ever since the Supreme Court’s ruling in *Martin v. Hunter’s Lessee* in 1816,²⁰¹ it has been a settled principle of U.S. law that the U.S. Supreme Court may review state court judgments to assure the uniformity and supremacy of national law. *Martin* rejected a contrary position, espoused by the Court of Appeals of the Commonwealth of Virginia (as the highest Virginia court was then called) in earlier proceedings in the same case. The Virginia Court took the view that the U.S. Constitution is a compact among sovereign states, such that “[t]he Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty.”²⁰² The U.S. Supreme Court repudiated that position: In its view, 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.’”²⁰³ Under the Supremacy

199. Federal issues are common in state court litigation because federal law often controls only one of several issues in the case. For a description of the interstitial nature of federal law, see FALLON ET AL., *supra* note 108, at 488–89. The case may be adjudicated in state court because the federal issues are not sufficiently prominent to justify federal jurisdiction, yet the federal issues may nonetheless figure decisively in the outcome. *Id.* The same is often true in the litigation of EU issues in the member state courts.

200. See, e.g., *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). An adequate and independent state ground is one that will support the judgment no matter how any federal issues were or might be resolved, and one that is not itself dependent on federal law. See FALLON ET AL., *supra* note 108, at 491–94.

201. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 381–82 (1816).

202. *Hunter v. Martin*, 18 Va. 1, 12 (1815) (opinion of Cabell, J.). Although the other judges on the Virginia court wrote separately, they all agreed with this part of Cabell’s opinion. See FALLON ET AL., *supra* note 108, at 466 (excerpting passages of the Virginia court’s agreement to Cabell’s opinion on the independence of federal and state judicial systems).

203. *Martin*, 14 U.S. at 324 (quoting the Preamble to the U.S. Constitution).

Clause, state courts “are not independent; they are expressly bound to obedience by the letter of the constitution.”²⁰⁴ A few years later the Court held explicitly what was already implicit in *Martin*: When a state supreme court judgment is appealed to the U.S. Supreme Court, the state court is obliged to obey the U.S. Supreme Court’s directions as to how the case should be decided.²⁰⁵ A different result in these cases would have “struck a body blow at the apparent plan of the Constitution for the enforcement of federal law.”²⁰⁶

To the extent there remained any doubt over the supremacy of national law, or over the Supreme Court’s authority to interpret and enforce the Constitution, or over the states’ obligation to comply, it was removed by the Civil War. The Union not only prevailed on the battlefield against the states that had attempted to secede, but obliged them to return to the Union under terms set by the victors. The Supreme Court ruled that the confederate states had not left the Union at all. In a case involving the question of whether Texas had in fact seceded, the Court said that “[w]hen . . . Texas became one of the United States, she entered into an indissoluble relation.”²⁰⁷ Consequently, “the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null.”²⁰⁸ Later, in the 1950s, sectional tension flared up again, as the Court obliged the states to desegregate their schools. Federal troops were sent into recalcitrant states to compel obedience to federal law, and the Supreme Court rebuked state officers who questioned the authority of federal court directives.²⁰⁹

Certain structural features of the European Union suggest that the EU is organized on a different political theory. For one thing, it is still based on treaties, not a constitution. The project of adopting a constitution was, at least for the time being, abandoned after French and Dutch voters rejected the proposed

204. *Id.* at 344.

205. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 419–23 (1821); see FALLON ET AL., *supra* note 108, at 474 & n.3. For discussion of enforcement of the Supreme Court’s mandate, if necessary by punishment for contempt, see *id.* at 476–77.

206. Hart, *supra* note 21, at 506.

207. *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1868).

208. *Id.*

209. The most prominent case from this period is *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), in which the Court declared that “the federal judiciary is supreme in the exposition of the law of the Constitution.” In an unusual move, all nine Justices signed the Court’s opinion. *Id.* at 4; see also SULLIVAN & FELDMAN, *supra* note 41, at 22 (discussing *Cooper*).

constitution in referenda in 2005. Second, it is not a product of “We, the people,” exercising their sovereignty over the whole territory. The preamble to the Treaty states that it is agreed to by “His Majesty the King of the Belgians,” “Her Majesty the Queen of the Netherlands,” and other heads of state.²¹⁰ The Treaty contains no express supremacy clause²¹¹ and it specifically recognizes the right of the member states to secede.²¹² In a sense, then, the EU seems to more nearly resemble the compact between sovereign states posited by the Virginia Court of Appeals.

This “compact between states” conception of the EU is further supported by the treaty provisions for EU control over the articulation and application of EU law. In the United States, federal and state courts are conceived of as parts of “one whole.”²¹³ One corollary is that the Supreme Court hears direct appeals from state courts on issues of federal law. By contrast, in the EU, the Treaty eschews appellate review in favor of the preliminary reference procedure, which directs member state courts to refer EU issues to the CJEU in the course of the litigation.²¹⁴ Another corollary of the U.S. conception of “one whole” judicial system is that state courts may strike down federal legislation on federal constitutional grounds. By contrast, in the EU, the member state courts may not invalidate EU legislation, even if they find it incompatible with the higher law of the EU Treaty.²¹⁵ Rather, they must make a preliminary reference of the issue.²¹⁶ In this view, striking down EU law is strictly the province of the CJEU.²¹⁷

In these ways, preliminary reference seems to rest on a foundation that bears some resemblance to the “compact of states” thesis of the Virginia Court of Appeals in *Hunter v. Martin*. It should be noted, however, that the analogy is not

210. TFEU pmb1.

211. See GOEBEL, *supra* note 1, at 134 (noting that the CJEU has referred to the “duty of loyalty,” now set out in TEU Article 4(3) in its rulings that assert the primacy of EU law; the duty of loyalty is evidently “the closest resemblance to an express statement of Treaty primacy”). There is however, a “declaration on primacy . . . attached to the Treaty.” NUGENT, *supra* note 1, at 213, 214 tbl. 12.2.

212. TFEU tit. VI, art. 50, para. 16.

213. THE FEDERALIST No. 82, *supra* note 78, at 493 (Alexander Hamilton).

214. TFEU art. 267.

215. Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199, paras. 15, 17, 20.

216. *Id.* paras. 11, 12; see Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMP. L. 295, 318–20 (1993) (analyzing *Firma Foto-Frost*).

217. *Foto-Frost*, 1987 E.C.R. at para. 17.

exact. The preliminary reference procedure does aim to achieve the uniformity and supremacy aims of appellate review, like the U.S. Supreme Court in *Martin*. But preliminary reference strives for those goals in a roundabout way, without suggesting that the CJEU is at the apex of a jurisdictional hierarchy that includes the member state courts. The problem is that the means may not be adequate to the end in view. The idea behind preliminary reference seems to be that member state courts will refer every uncertain issue of EU law and faithfully apply the answers given by the CJEU, not only in the case referred but in similar cases.²¹⁸ That idea may not be fully achieved in practice.

1. *Problems with Preliminary Reference.* If member state courts were to fully embrace the preliminary reference scheme, the ultimate result would be a body of EU precedent made by the CJEU, not unlike the body of precedent generated by the U.S. Supreme Court. In order for the plan to work, however, the member state courts must give priority to EU goals, sacrificing any competing agenda of their own. As Michal Bobek puts it, “[i]n the standard dictum of the Court of Justice as well as in the mainstream EU law scholarship, the preliminary rulings procedure is said to be based on the *spirit of cooperation*, which defines the relationship between the Court and the national courts.”²¹⁹ But there is a difference between theory and practice. Because it depends on cooperation rather than obedience, the preliminary reference procedure is a less effective means than appellate review for assuring the uniformity and supremacy of EU law against member state officials who may balk at enforcing EU norms.²²⁰

a. *Absence of Hierarchy.* Part of the gap between theory and reality relates to the difference between answering a

218. See Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 425–26 (1996). Cohen “inquires into why the Americans and Europeans have responded to a similar challenge in such disparate ways and defends expanded use of certification in the American context.” *Id.* at 421–22.

219. Michael Bobek, *The Court of Justice, the National Courts, and the Spirit of Cooperation: Between Dichtung and Wahrheit*, in RESEARCH HANDBOOK ON EU INSTITUTIONAL LAW 353, 354 (Adam Lazowski & Steven Blockmans eds., 2016). By contrast, in the United States, state officials are expected to obey the mandate, and may be held in contempt for disobedience. See FALLON ET AL., *supra* note 108, at 476–77.

220. See Cohen, *supra* note 218, at 444 (arguing that an appellate system could ensure uniformity). Although Cohen finds much to admire in the preliminary reference procedure, he acknowledges its deficiencies. Thus, “[t]here can be no doubt that the exercise of appellate jurisdiction over Member State courts by the European Court of Justice would have been a more effective way of ensuring uniformity in the interpretation of Community law.” *Id.* But this was not possible, because “[a] system of appellate review was of course unacceptable to the original Member States.” *Id.* at 445.

question and reviewing a record. A court that answers questions in a cooperative arrangement generally has less control over the proceedings than a court at the top of a hierarchy that reviews lower court judgments.²²¹ An appellate court cannot ordinarily overturn findings of fact, but it can determine whether they are supported by evidence.²²² Preliminary reference covers only questions of law or application of EU law to facts found (or to be adjudicated after receiving the CJEU's response) by the member state court.²²³ On appellate review, the appellate court continues its oversight. The lower court's ultimate disposition can be appealed again for not fully complying with the higher court's mandate.²²⁴ On preliminary reference, once the question of EU law is answered, "[t]here are no provisions of Community law governing the subsequent continuation of these proceedings."²²⁵ A member state court disposed to discount the EU norm bearing on the litigation is free to try to find a way to do so without fear of rebuke on appeal to the CJEU, for example, by identifying a state law ground that will arrive at the desired result despite the EU rule.²²⁶ Other member state courts are supposed to treat the preliminary ruling as a precedent.²²⁷ But an absence of appellate review may mean that other member state courts will feel free to ignore the ruling, at least when it is not uncontrovertibly dispositive of the cases they are adjudicating.²²⁸

221. See Jan Komárek, *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order*, 42 COMMON MKT. L. REV. 9, 10 (2005) (discussing the institutional position of the Court and its disadvantages).

222. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–89 (1964) (weighing the evidence to determine if the findings were substantiated). For a discussion of the judicial role in fact determinations that focuses on, but is not limited to, the constitutional context, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232–38 (1985).

223. See BROBERG & FENGER, *supra* note 12, at 355–56, 420, 424 (describing cases in which the CJEU defers to the facts established). For discussion of exceptions to the general rule that member state courts definitively decide the facts, see *id.* at 356–63.

224. See FALLON ET AL., *supra* note 108, at 476–77 (discussing the Supreme Court's "enforcement of the mandate" against uncooperative state courts).

225. BROBERG & FENGER, *supra* note 12, at 431.

226. See Bobek, *supra* note 219, at 361 (noting that the ECJ decision on preliminary reference "may be, however, of limited or even no relevance for the individual applicant in the original case"). By contrast, the U.S. Supreme Court reviews the final judgment to determine whether it rests on an adequate and independent state ground. For a discussion of the historical development of the adequate and independent ground, see FALLON ET AL., *supra* note 108, at 491–94.

227. BROBERG & FENGER, *supra* note 12, at 441–42.

228. Other methods of obtaining compliance may be available, such as a suit against the member state (based on the state court's recalcitrance) for failure to comply with EU law. But this remedy requires a showing of egregious conduct on the part of state officials. See TFEU arts. 258–60.

The lack of hierarchy within the EU system also diminishes the CJEU's grip on the development of EU law in another way. Appellate review is undertaken at the initiative of the losing side below. By contrast, member state courts control the preliminary reference process. Only the member state court, and not any party, decides whether to make a reference.²²⁹ The member state court, perhaps influenced by executive officials of the government,²³⁰ determines how to frame the question of EU law, and may or may not seek advice from the advocates.²³¹ The Treaty provides that lower member state courts, from which there is further recourse in the member state judicial system, have unfettered discretion whether or not to refer an issue of EU law to the CJEU.²³² Member state courts of last resort do have a Treaty obligation to refer EU law issues,²³³ but there is an important exception to that duty. Under the "*acte clair*" doctrine, they may decline to refer questions of EU law as to which the legal materials furnish a clear answer.²³⁴ Thus, in the judgment of the member state tribunal, "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."²³⁵ The policy behind *acte clair* is to conserve the limited resources of the CJEU by filtering out issues that do not warrant its attention. But in practical effect the doctrine channels significant authority to member state courts on important questions of EU law.

b. Managing the Case Load. The difficulty of maintaining the uniformity and supremacy of EU law would exist even in a hierarchical system, given the number of EU issues that need answers and the operating practices of the CJEU. That Court now consists of 28 judges, far more than the 9 Supreme Court Justices.²³⁶ Its size is comparable to the 9th Circuit Court of

229. TFEU art. 267.

230. See Marie-Pierre F. Granger, *When Governments Go to Luxembourg: the Influence of Governments on the Court of Justice*, 29 EUR. L. REV. 3, 28–31 (2004) (noting that governments can use "persuasion through participation" to influence judicial preliminary references).

231. BROBERG & FENGER, *supra* note 12, at 297.

232. TFEU art. 267(b).

233. *Id.* art. 267.

234. Case 283/81, *CILFIT v. Ministry of Health*, 1982 E.C.R. 3415, paras. 13–14, 16; see BROBERG & FENGER, *supra* note 12, at 235 (explaining that the CJEU does not rule in a case where there is no risk of EU law being interpreted incorrectly).

235. *CILFIT*, 1982 E.C.R. at para. 16; see also Morten Broberg, *Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times*, 45 COMMON MKT. L. REV. 1383, 1384 (2008) (arguing for a modification of the doctrine that "would give the national courts of last instance an appreciably wider margin of discretion").

Appeals, with 25 active judges, who are charged with oversight of more than 170 district judges and senior district judges.²³⁷ Like the federal circuit courts of appeals, and unlike the U.S. Supreme Court, the twenty-eight members of the CJEU do not sit en banc except in extraordinary cases.²³⁸ As the number of references has grown, the court has resorted to the use of panels. Most disputes are handled by chambers of fifteen, five, or three Justices, depending on the perceived difficulty of the case.²³⁹ The American experience with large appellate courts that sit in panels, including the 9th circuit, suggests that conflicting outcomes among panels will emerge, despite the judges' best efforts to avoid them.²⁴⁰ The sheer number of references may thwart the effort to achieve uniformity.

c. *Acte Clair in the Member State Courts.* A big problem with the EU's reliance on the "spirit of cooperation" is member state courts' application of the *acte clair* doctrine. In theory, *acte clair* is no more than a tool for culling the issues that do not require CJEU attention. So long as member state judiciaries cooperate with the CJEU in an effort to obtain authoritative readings of difficult issues in EU law, the doctrine promotes efficient use of scarce judicial resources. But there are often grounds for dispute as to what counts as clarity in legal doctrine,²⁴¹ and it is unrealistic to expect member state courts to

236. *Court of Justice: Presentation*, CURIA http://curia.europa.eu/jcms/jcms/Jo2_7024/en/#composition [<https://perma.cc/4T62-WLF2>] (last visited Feb. 1, 2017).

237. As of January 2017, that court consisted of 25 active judges, but senior judges also participate on 9th circuit panels. *Active Judges of the United States Court of Appeals for the Ninth Circuit*, U.S. CTS. NINTH CIR., http://www.ca9.uscourts.gov/content/view_active_senior_judges.php [<https://perma.cc/WR2Z-HAYE>] (last updated Jan. 2017).

238. *Court of Justice: Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/en/#composition [<https://perma.cc/F6H5-DEC8>] (last visited Feb. 1, 2017).

239. See GOEBEL, *supra* note 1, at 56 (noting that the number of judges in a "Grand Chamber" has increased from thirteen to fifteen and that 15–20% of all cases are decided by a Grand Chamber); NUGENT, *supra* note 1, at 215–16 (discussing the Court's expanding caseload).

240. Intracircuit conflicts tend to proliferate as the number of circuit judges grows. See Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863, 864 (1994) (labeling judicial changes to the appellate process as intramural); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1176–77 (1994).

241. See, e.g., *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014) (splitting 6-3 on whether a particular proposition of U.S. constitutional law was so well established that reasonable minds could not disagree); *Hope v. Pelzer*, 536 U.S. 730, 744–45 (2002) (similar). These cases illustrate a general principle: The Supreme Court has used the "uncertainty" of the constitutional norms at issue as a ground for refusing to grant federal remedies—including release from prison and damages—to litigants raising constitutional objections to their treatment by government officers. For the views of a federal judge on the issues like the one in *White*, see generally Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing*

apply the doctrine strictly.²⁴² Morten Broberg and Niels Fenger report that “national courts of last instance regularly refrain from making references for preliminary rulings, on the basis that with the requisite confidence they can resolve the relevant Community law issue themselves.”²⁴³ A striking illustration of this tendency of high courts is that the French Conseil constitutionnel, did not make a single reference until 2013.²⁴⁴

The point is that a member state court bent on declining preliminary reference and keeping the issues of EU law for itself may have plausible reasons for deciding that the *acte clair* doctrine applies, even if other judges would disagree.²⁴⁵ Reluctance to refer is not always limited to the highest member state courts. The courts of recently admitted member states seem to refer less often than do other courts.²⁴⁶ More generally, there are wide discrepancies among member state courts as to the number of preliminary references, which suggests that some member state judiciaries systematically and strategically choose to keep EU issues for themselves. For example, a study by Broberg and Fenger of preliminary references between 1998 and

Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219 (2015).

242. See Komárek, *supra* note 221, at 32.

243. BROBERG & FENGER, *supra* note 12, at 237. The authors go on to note the “widespread opinion that, in applying the *acte clair* doctrine, national courts of last instance regularly fail to follow meticulously the conditions laid down in the *CILFIT* judgment.” *Id.*

244. François-Xavier Millet, *How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195, 195–96 (2014). A noteworthy feature of this Article is that Professor Millet treats the issue of whether to refer as one that is discretionary with the Conseil constitutionnel, rather than one governed by EU norms. *Id.* at 199–200. Thus, “it remains to be seen whether [the Conseil constitutionnel] will repeat the experience,” and “may be reluctant to make use of” the preliminary reference, partly because of time constraints and partly because “constitutional identity may be at stake.” *Id.* at 217.

245. Conversely, member state judges, especially judges on lower courts, may use the preliminary reference procedure as a tool for achieving EU-oriented goals, bypassing the potentially contrary views of higher court judges and political actors within the member state. See generally Karen J. Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458 (1996); George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125 (2004). But this use of preliminary reference does not necessarily counteract the strong-federalism bias of preliminary reference and the discretion it affords the member state judge. When lower courts refer in this type of case, they do so because of disagreements with member state high court judges and other officers over specific policy issues. This set of preliminary references does not act as a *systematic* counter to the tendency of member state judiciaries to favor member state interests, unless lower court judges are somehow more EU-oriented than higher court judges.

246. See Michal Bobek, *Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice*, 45 COMMON MKT. L. REV. 1611, 1611–12, 1641–43 (2008).

2008 found that, per 10 million inhabitants, the number of references per year was 44 from Luxembourg and 31.6 from Austria, at the high end, down to 6.7 from Germany, 3 from the UK, and 2.5 for France.²⁴⁷

Broberg and Fenger offer a number of possible explanations for these discrepancies, including “the amount of cross-border activity,”²⁴⁸ the “level of compliance with Community law,”²⁴⁹ and “differences in litigation patterns.”²⁵⁰ These and other wholly proper considerations²⁵¹ surely account for some failures to refer. But the striking numerical disparities suggest that other considerations are also at work. This is all the more true because the neutral explanatory factors identified by Broberg and Fenger seem in some instances to magnify, rather than to explain away, the numerical discrepancies. For example, larger member states, such as Germany, France, and the UK, would likely have more cross-border activity, and much of the litigation over that commerce would take place in their own courts, yet their courts rank near the bottom in ratio of references to population.²⁵² A more sensible explanation of the variations draws on the “disparity” thesis that drives much judicial federalism doctrine in the United States. The variations suggest that some member state courts, especially in the larger member states, prefer to interpret and apply EU law for themselves, bringing their state-oriented perspectives to the task of adjudication. Broberg and Fenger mention “the national court’s policy preferences” as a possible reason.²⁵³ Echoing some of the American scholarship on parity, they give it short shrift, on the ground that “it is, however, virtually impossible to either prove or disprove this theory.”²⁵⁴ But a connection to “differences in litigation patterns” or the “level of compliance with Community law” is not easily documented either.²⁵⁵

Broberg and Fenger resist the “policy preferences” rationale for variations among member state courts on the ground that

247. BROBERG & FENGER, *supra* note 12, at 39.

248. *Id.* at 43.

249. *Id.* at 44.

250. *Id.* at 47.

251. For other efforts to account for variations in preliminary references from one member state to another, see generally Morten Broberg & Niels Fenger, *Variations in Member States’ Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation?*, 19 EUR. L.J. 488 (2013); Lars Hornuf & Stefan Voigt, *Analyzing Preliminary References as the Powerbase of the European Court of Justice*, 39 EUR. J.L. & ECON. 287 (2015).

252. *Id.* at 492.

253. BROBERG & FENGER, *supra* note 12, at 54.

254. BROBERG & FENGER, *supra* note 12, at 56.

255. *Id.* at 44–48.

“[w]ithout proof to the contrary, one must be allowed to assume that normally a judge’s primary preference is to uphold the rule of law regardless of whether he personally favours another result.”²⁵⁶ That assumption is appropriate, but their conclusion does not follow. Broberg and Fenger fall into the fallacy of the excluded middle. By framing the issue as either upholding the rule of law or following a personal policy preference, Broberg and Fenger ignore a third, and more plausible, explanation for the judges’ actions: that the member state judge in a *close* case will tend to favor his own state’s interests in a way that is wholly respectful of the rule of law.

A reluctance to acknowledge “the national court’s policy preferences” as a reason for failure to refer seems to reflect a theory of adjudication in which judges decide open issues merely by applying principles of logic to the law and facts of the case at hand. This understanding of what judges do is at odds with the basic teaching of Legal Realism. That teaching is that, over the universe of legal issues, some can be resolved by applying logic to legal materials but others cannot. In the latter set of cases, the legal materials will provide ammunition for both sides. In those cases, judges will be influenced by their own policy preferences in choosing or applying a rule.²⁵⁷ Today nearly all legal theorists agree with this understanding of how judges decide close cases.²⁵⁸ Any issue that arises in litigation, including the issue of whether a preliminary reference is called for, can fall within the “open texture”²⁵⁹ of law and thus provide an opportunity for the exercise of judicial discretion. The variations between member state judiciaries in the frequency of preliminary reference suggest that member state judiciaries of larger member states, and some smaller ones, are more willing than others to make their own judgments about EU law and probably more likely to limit the EU’s reach when ambitious readings of EU law would seriously intrude on member state interests.²⁶⁰ The result may be

256. *Id.* at 55.

257. See FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 139 (2009) (discussing how the ideology of the Supreme Court Justices affects decisions more than personal characteristics).

258. See KELSEN, *supra* note 116, at 352–56 (discussing how every decision presents many possibilities of resolution to be decided by the judge).

259. HART, *supra* note 116, at 128.

260. See Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice*, 19 W. EUR. POL. 360, 360–61 (1996) (examining the practices of British courts and arguing that “domestic political factors create disincentives for national judges to make preliminary references”); see also Tridimas & Tridimas, *supra* note 245, at 135–36 (2004) (arguing that judges of lower national courts will make self-interested decisions on whether to refer, rather than

a subtle adaptation of EU norms to the perspective of the member state's judiciary.²⁶¹

2. *Remedies for Failure to Refer or Failure to Implement the CJEU's Ruling.* Suppose a member state high court declines to refer an issue of EU law without a good reason. For example, the member state court may have incorrectly decided that the *acte clair* doctrine applies. Although the CJEU has no jurisdiction to review that decision, a remedy is available to a litigant who is disappointed by the member state court's ultimate disposition of the case. He may bring another lawsuit, naming the member state as defendant. The suit would be brought in the member state's courts, and the theory of recovery would be that the member state court's failure to refer is a violation of EU law. Recovery would not be barred just because the member state is the defendant. A general principle of EU law, established in *Francovich v. Italy*, is that the member states of the EU do not enjoy sovereign immunity from suits for violation of EU law.²⁶² According to the CJEU in *Francovich*, "the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."²⁶³ That principle has two implications for preliminary references. First, failure of a member state court to implement a ruling by the ECJ on preliminary reference can lead to a suit against the member state based upon that failure.²⁶⁴ Second, in keeping with the ruling of *Köbler v. Austria*, a litigant wrongly denied a preliminary reference may recover damages from a member state whose high court has wrongly declined to make such a reference.²⁶⁵

simply taking into account the degree of clarity of the relevant EU norm).

261. This conclusion, however, must be qualified in an important respect. Most references come from lower member state courts. GOEBEL, *supra* note 1, at 68. Thus, the adaptation of EU law to the perspective of a member state high court will not occur in the event lower court judges prefer to obtain CJEU interpretations of EU law, rather than leaving the question of whether to refer to the court of last resort. *See supra* note 245.

262. *Joined Cases C-6/90 & 9/90, Francovich v. Italy*, 1991 E.C.R. I-5357, paras. 31–37; *see also* *Joined Cases C-46/93 & 48/93, Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029, paras. 18–20, 31–32, 35–36 (holding that an individual has a cause of action on Community law against any "organ of the State" that causes a loss, regardless of whether national law provides a right of action). These cases are discussed in James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 253–55 (2003) (presenting a comparative analysis of EU and U.S. sovereign immunity doctrines).

263. *Francovich* 1991 E.C.R. at para. 35.

264. BROBERG & FENGER, *supra* note 12, at 432.

265. Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239, paras. 30–36; *see also*

The availability of this type of suit is noteworthy, because it suggests that in this respect EU judicial federalism offers less protection for the member states than the U.S. system.²⁶⁶ This is so because the fifty states of the United States are protected from damages recoveries by the constitutionally-grounded, federalism-based principle of sovereign immunity.²⁶⁷ There is no U.S. analogue to the *Francovich* principle, which generally authorizes suits against member states for damages due to violations of EU law.²⁶⁸ Taken as a whole, however, EU remedial law may well be less favorable to the plaintiff than *Francovich* suggests, and the U.S. remedial system for violations by states may be more efficacious. One problem with the EU remedy is that private suits seeking damages from states must be brought in the member state's own courts. The CJEU intervenes only if it receives a preliminary reference, as it did in *Francovich* and *Köbler*.²⁶⁹ In addition, EU law does not ordinarily authorize a suit for injunctive relief to compel a member state to comply with EU law in the future.²⁷⁰ One can obtain a statement similar to a declaratory

Komárek, *supra* note 221, at 12–18 (discussing *Köbler*).

266. See Pfander, *supra* note 262, at 237–38.

267. *Alden v. Maine*, 527 U.S. 706, 712–15 (1999) (summarizing the purpose of the sovereign immunity doctrine); *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1890) (“The suability of a State without its consent was a thing unknown to the law.”).

268. *Francovich* 1991 E.C.R. at paras. 31–37. On one important issue, the two systems do follow the same rule: The central government may enforce its law against member states without any immunity bar. Sovereign immunity does not protect states from suits by the United States, see, e.g., *United States v. Virginia*, 518 U.S. 515, 523 (1996), and the European Commission may sue the member states in the CJEU, see GOEBEL, *supra* note 1, at 91. From the perspective of a private entity with a grievance against a member state, this possibility is rarely a satisfactory alternative to a private right to sue. See Weiler, *supra* note 4, at 2420 (discussing the disadvantages to a suit by the Commission against a member state).

269. See de La Mare & Donnelly, *supra* note 120, at 365–66 (summarizing when and how member state courts should refer a question to the CJEU).

270. The member state courts must provide remedies for EU claims that “are not less favourable than those governing similar national actions (principle of equivalence)” and must not “render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).” *Joined Cases C-89/10 & C-96/10, Q-Beef NV v. Belgische Staat*, 2011 E.C.R. I-7843, para. 32. If a member state’s remedial law does not permit injunctive relief against the state or its officers, the principle of equivalence would not require such a remedy for a violation of EU law. To my knowledge, no CJEU case holds that the principle of effectiveness requires such a remedy as a general rule. In one context, member state courts *are* required to grant prospective relief in suits brought by individuals: They must provide *interim* injunctive relief if they determine that the plaintiff, suing on an EU law claim, is likely to win on the merits. *Case C-213/89, The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd. (Factortame I)*, 1990 E.C.R. I-2433, paras. 13, 22–23; see also Pfander, *supra* note 262, at 259 n.112 (summarizing the ruling). But the CJEU does not require that member state courts provide prospective relief, whether declaratory or injunctive, as a remedy accompanying the final judgment. *Case C-432/05, Unibet (London) Ltd. v. Justitiekanslern*, 2007 E.C.R. I-2271, para. 65; see also Koen Lenaerts, *The Rule of Law*

judgment that the challenged action is illegal. Unlike a U.S. declaratory judgment, however, the relief available under EU law is not backed up by the threat of an injunction if it is not honored.²⁷¹ By contrast, in the United States, a private litigant may obtain prospective relief in federal court by suing a state officer under the principle of *Ex parte Young*.²⁷² If the plaintiff succeeds in obtaining an injunction, and the defendant defies it, the court can order that the defendant be held in contempt, fined for each day of noncompliance, or even imprisoned.²⁷³ Even if the plaintiff obtains a declaration of rights, a defendant who does not obey it can then be enjoined, with the same threat of contempt.²⁷⁴

There are also important limits on the availability of the *Francovich* money-damages remedy. To begin with, the abrogation of state sovereign immunity does not extend to every member state violation of EU law.²⁷⁵ In particular, the member state is liable only for “sufficiently serious” breaches of EU law,²⁷⁶ and the “decisive test” of this requirement is “whether the Member State . . . concerned manifestly and gravely disregarded the limits of its discretion.”²⁷⁷ Several factors bear on this inquiry, including:

[T]he clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a

and the Coherence of the Judicial System of the European Union, 44 COMMON MKT. L. REV. 1625, 1646 (2007) (noting that “the principle of effective judicial protection did not require the Swedish court to provide for a free-standing, declaratory-type action that would seek primarily to challenge the compatibility of national provisions with Community law to the extent that there existed certain indirect legal remedies that would still allow an individual to challenge the compatibility of national law with Community law”). The indirect legal remedies that will suffice include “an action for damages,” and “judicial review of the [challenged member state] decision” in the member state courts. *Id.*; see also *id.* at 1649 (discussing interim relief in the context of *Factortame I* and *Unibet*).

271. It does not necessarily follow that the member state can avoid changing its behavior. The aggrieved person may be able to persuade the Commission to sue the member state in the CJEU, charging “infringement.” See *Lenaerts*, *supra* note 270, at 1636–41 (discussing the role of infringement actions in upholding the rule of law).

272. *Ex parte Young*, 209 U.S. 123, 157 (1908).

273. For a discussion of the (often insubstantial) distinctions between injunctive relief and a declaratory judgment, see generally Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1126–28 (2014).

274. *Id.* at 1110.

275. See Arwel Davies, *State Liability for Judicial Decisions in European Union and International Law*, 61 INT’L & COMP. L.Q. 585, 593–94, 600 (2012) (discussing differences between EU law and international law).

276. *Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029, para. 51.

277. *Id.* para. 55.

Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law.²⁷⁸

In addition, the plaintiff must show a causal link between the violation and the harm.²⁷⁹ Furthermore, the plaintiff can, like any litigant in the member state court, be thwarted by the member state's "procedural rules, such as the domestic rules on procedure, evidence, limitation, and the calculation of damages."²⁸⁰

For all of these reasons, plaintiffs seeking damages from member states face a daunting prospect. A litigant suing under the *Köbler* principle for, say, the Austrian high court's failure to make a preliminary reference, would need to persuade an Austrian court not only that the Austrian high court should have referred the issue, but also that failure to refer was a "manifest breach by a supreme court of an obligation to make a reference for a preliminary ruling."²⁸¹ That is not all. He must also show that the outcome of the reference would have helped his case enough for him to prevail.²⁸² Otherwise, the failure to refer does not produce any damages.²⁸³ An empirical study of *Francovich* litigation in England and Germany over a twenty year period found that some plaintiffs are compensated. But "[b]oth the statistical findings and the analysis of national court decisions . . . suggest that Member State liability is not a successful means of enforcing European Union law."²⁸⁴

278. Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123, para. 43; see also LENAERTS & VAN NUFFEL, *supra* note 1, at 768–69 (outlining the decision-making process of a national court when determining whether there has been a sufficiently serious breach of Union law).

279. See Joined Cases C-6/90 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, 1991 E.C.R. I-5357, para. 40 (requiring a grant of rights, that the directive establish the content of those rights, and a causal link between the breach and the harm); see also *Brasserie du Pêcheur*, 1996 E.C.R. at para. 65.

280. Tobias Lock, *Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Francovich*, 49 COMMON MKT. L. REV. 1675, 1699 (2012).

281. Opinion of Advocate General Léger, Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239, para. 148. The Court goes on to suggest that a failure to refer would not be a "manifest" violation unless CJEU precedents are clearly against the position taken by the member state court. See *id.* paras. 120, 122–24. The decision reads as though failure to refer an uncertain issue is not a "sufficiently serious breach" of the EU norm to justify imposing liability on the state, even though *CILFIT* requires a member state high court to refer unclear issues of EU law. Case C-283/81, *Srl CILFIT v. Ministry of Health*, 1982 E.C.R. 3415, paras. 11, 21; see Komárek, *supra* note 221, at 17 (arguing that the Court "disregarded its own standard" in *Köbler*).

282. Opinion of Advocate General Léger, *Köbler*, 2003 E.C.R. at para. 151.

283. *Id.* para. 158.

284. Lock, *supra* note 280, at 1700; see also Björn Beutler, *State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest*

V. THE STRENGTH AND WEAKNESS OF EU JUDICIAL FEDERALISM

Judicial federalism produces costs and benefits.²⁸⁵ The cost of the two distinctive features of EU judicial federalism—heavy reliance on member state courts and the deployment of the preliminary reference procedure—is that they erect obstacles to achieving the aims of centralizing government authority. The benefit is that they strengthen the member state courts and thus serve the purposes of decentralized policy making. By contrast, state courts in the United States must compete with the federal courts and are always in danger of losing some of their jurisdiction to the federal courts, either by congressional actions and Supreme Court rulings or by lawyers voting with their feet to go to the federal forum. When member state courts in the EU decide EU issues, rather than referring them, they face no danger of direct rebuke by the CJEU.²⁸⁶ In contrast, when American state courts decide federal issues, they risk repudiation of their decisions by the U.S. Supreme Court on appellate review.²⁸⁷ The bottom line is that the EU's pursuit of federalism-based benefits has come at a price. The EU has spurned the opportunity to make use of a network of lower federal courts, a resource that has enriched the development and enforcement of U.S. law throughout our history. Preliminary reference is a more tenuous form of control of member state

Infringement of the Applicable Law an Insurmountable Obstacle?, 46 COMMON MKT. L. REV. 773, 804 (2009) (arguing that “the requirement of a manifest infringement must neither in theory nor in practice be understood as an insurmountable obstacle”).

285. See, e.g., FALLON ET AL., *supra* note 108, at 421 (“In considering the appropriate forum for cases involving a mixture of state and federal issues, questions arise about how to weigh the competing state and federal interests in adjudicating the entire case . . . and about the benefits and drawbacks of carving a case into parts so that the state elements can be adjudicated in state court and federal issues resolved in federal court.”); Hart, *supra* note 21, at 539–40 (discussing the costs and benefits of a unitary system compared with a federal legal system); Bator, *supra* note 111, at 610 (issues of “comparative competence” of state and federal courts “must at least in part be addressed in the institutional context” in which they arise); cf. Paul Craig, *Competence and Member State Autonomy: Causality, Consequence and Legitimacy*, in THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 11, 26 (Hans-Wolfgang Micklitz & Bruno De Witte eds., 2012) (arguing that “[c]ollective action will be the preferred option when the benefits outweigh the costs, which is increasingly the case in modern society”); Ernest A. Young, *Institutionalizing Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1161 (2005) (decisions about the allocation of decision-making among institutions “are made according to assessments of comparative institutional strengths and weaknesses in dealing with particular sorts of problems”).

286. Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 492, 499 (2000).

287. *Supreme Court Procedures*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/3U4Q-CQXD>] (last visited Feb. 1, 2017).

courts than the sort of appellate review exercised by the U.S. Supreme Court. In short, the EU system, when compared to its American counterpart, probably generates less uniformity in the operation of the central government's law and less effective enforcement of the central government's norms.

Are the benefits of EU judicial federalism great enough to justify its costs? If local autonomy has no value, as some argue,²⁸⁸ then the cost/benefit calculus is likely to come out against strong judicial federalism in general, and the EU model in particular. A more nuanced approach to costs and benefits would focus on judicial federalism in the context of the legal and political system in which it operates. And one significant component of context concerns the *maturity* of the federal system. In particular, for more than 200 years, the United States has steadily moved toward stronger central government, at the expense of the values of federalism.²⁸⁹ The EU is at a comparatively early stage in its history. It has aimed to achieve a more limited set of goals than the modern United States, and it has given more weight to the value of localism as it has transitioned into a radically altered system of government that involves the collaboration of twenty eight independent nations, many of which operated autonomously for centuries.

It should not be surprising that the very different timelines of the federal systems of the United States and the EU have produced different institutions and practices, including with respect to judicial federalism. The EU is a dynamic polity. Its champions hold that it must and will move toward "ever closer union," including "political" union of the member states.²⁹⁰ In fact, as recent events have suggested, such centralizing features as the Schengen zone, within which persons move freely across the national borders of most EU member states, and the common currency may not be viable unless the central government is empowered to police national frontiers and to control national budgets and transfer resources from one member state to another to meet economic downturns.²⁹¹ These aspects of EU politics may

288. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 915–20 (1994) (questioning the value of federalism).

289. Friedman, *supra* note 16, at 320–24.

290. TFEU pmbl.; Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 162 (Kalypso Nicolaidis & Robert Howse eds., 2001).

291. See, e.g., PETER B. KENEN, EMU AFTER MAASTRICHT 10–14 (1992) (describing the different stages of creating a common EU currency and the necessity of a common monetary policy promulgated by a new institution); Editorial, *Toward a Stronger European Border*, N.Y. TIMES, Dec. 17, 2015, at A38 (recommending that Frontex, the EU

seem remote from judicial federalism. But there is inevitable tension between the drive for political union and the EU's strong version of judicial federalism. The U.S. experience with jurisdictional law suggests that the EU's version of judicial federalism could hinder the EU's move to political union. It also suggests that, as political structures are transformed in the direction of greater centralization, pressures will mount to reform judicial structures in the same direction. And if that is the case, the EU's existing strong-federalism system of courts may soon find itself in the grip of weak federalism reform.

A. *Differences Between the United States and the EU*

Comparisons between U.S. and EU judicial federalism are incomplete and misleading if they fail to account for differences between the two systems. Every polity serves a purpose, and they do not all serve the same purpose. The costs and benefits of federalism depend on those purposes and are not the same everywhere. Differences in judicial federalism may be explained by differences in the functions served by allocating jurisdiction in one way rather than another. Features of EU judicial federalism that seem awkward, inefficient, or otherwise subject to criticism can be understood as sensible means of addressing the allocation issues raised by the distinctive governance issues of the EU.

1. *Different Aspirations.* In 1787, “[w]e, the people of the United States” drafted and then ratified a constitution for a variety of purposes identified in the preamble: “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”²⁹² The broader purposes of the American polity can be traced back even further. In 1776 “the inhabitants of the United States constituted themselves as a people” by the Declaration of Independence.²⁹³ The Declaration, with its assertions that “all men” are “endowed . . . with certain unalienable rights,” that “to secure these rights, governments are instituted among men,” and that the people have a right to overthrow an unsatisfactory government and form another,²⁹⁴ “is the definitive statement for

agency that polices the external border of the Schengen zone, be given greater power at the expense of member state sovereignty).

292. U.S. CONST. pmbl.

293. Dennis J. Mahoney, *The Declaration of Independence as a Constitutional Document, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 54 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

294. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

the American polity of the ends of government, of the necessary conditions for the legitimate exercise of political power, and of the sovereignty of the people who establish the government.”²⁹⁵

At least for most of its history, the European Union has been a different kind of polity with a different set of goals. One of its initial aims was to prevent another European war by integrating the national economies of Western Europe.²⁹⁶ Another goal was to promote economic welfare, chiefly by eliminating barriers to trade across national borders, including tariffs and quotas. To that end, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands agreed in the 1957 Rome Treaty to create a common market.²⁹⁷ Besides these economic and security aims, the signatories had a political purpose, namely, to provide some measure of common government throughout the Union.²⁹⁸ While these aims are significant, “[c]ompared with existing domestic federations, the [role of the] EU is substantively narrow.”²⁹⁹ The EU’s budget is “about one-sixteenth the size of the US federal budget,”³⁰⁰ although its population is greater.³⁰¹ The EU’s focus is on “the regulation of policy externalities resulting from the direct regulation of economic production.”³⁰² It is “almost entirely

295. Mahoney, *supra* note 293, at 54.

296. Robert Schuman, *The Schuman Declaration—9 May 1950*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm [<https://perma.cc/TU3H-ZK2P>] (last visited Feb. 1, 2017). The EU grew out of the European Coal and Steel Community, which imposed supranational regulation of basic war materials. *See id.* (noting that the European Coal and Steel Community aims to “make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible”); *see also* TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 158 (2005) (noting that the creation of the ECSC was more psychological in order to heal the rift between France and Germany); Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 395, 400 (2011) (describing the history of European integration after World War II); David A.O. Edward, Address, *What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration*, 5 COLUM. J. EUR. L. 1, 7 (1999) (explaining that the European integration was intended to make another European war impossible). A Belgian law student once told the Author, on an exam answer, that the United States was formed in order to protect the member states from foreign threats, while the EU was formed to protect Europeans from each other.

297. GOEBEL, *supra* note 1, at 5.

298. *See* Edward, *supra* note 296, at 7 (defining constitutional law in European integration as law that sets up governments and gives them powers).

299. *See* Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 165 (Kalypso Nicolaidis & Robert Howse eds., 2001).

300. DICK LEONARD, *GUIDE TO THE EUROPEAN UNION* 103 (10th ed. 2010).

301. Kalin Anev Janse, *Is Europe Outperforming the US?*, WORLD ECON. F. (Oct. 30, 2015), <https://www.weforum.org/agenda/2015/10/is-europe-outperforming-the-us/> [<https://perma.cc/QZ9D-CQCM>].

302. Moravcsik, *supra* note 299, at 165.

uninvolved in . . . the provision of social welfare,”³⁰³ and it “lacks significant defense, military, and police policies.”³⁰⁴ At least until recently, it has had “only a peripheral impact on national legal systems.”³⁰⁵ In language that has endured through several new versions of the treaty, the preamble promises “ever closer union among the peoples of Europe.”³⁰⁶ But it is noteworthy that even this aspirational language, part of the treaties since 1957, continues to use the plural, “peoples,” in contrast to the preamble to the U.S. Constitution, which takes it as given that the Americans are one “people.”³⁰⁷

Judged by the economic and security goals its members have pursued, the EU has achieved impressive success. It has maintained peace in Western Europe. It has spurred economic growth by breaking down barriers to a single market.³⁰⁸ But political integration is a more elusive goal. Some member states have opted out of certain aspects of EU policy, including the common currency, social policy, and the “Schengen zone” in which there is free movement across intra-EU borders.³⁰⁹ Given a chance in 2005 to vote on a document called a “constitution” for the EU, French and Dutch voters rejected it, and the whole project was then abandoned in favor of embodying its reforms into the 2009 Lisbon Treaty.³¹⁰

2. *The Democracy Deficit in the EU.* Rather than holding referenda, France and the Netherlands opted for legislative ratification of the Lisbon Treaty.³¹¹ That choice, one adopted by

303. *Id.* at 166.

304. *Id.*

305. *Id.* at 167.

306. TEU pmb.

307. *Id.*; U.S. CONST. pmb.

308. Besides free markets, the EU pursues other, more parochial, goals. The Common Agriculture Policy (CAP), which subsidizes European farmers, may be the most prominent, and costly, illustration of an EU policy that does not promote free markets. See NUGENT, *supra* note 1, at 323, 350 (noting that the CAP “consumes around two-fifths of EU budgetary expenditure”); SCHUTZE, *supra* note 74, at 215 (discussing the origins and rationale of the CAP).

309. See NUGENT, *supra* note 1, at 336 (explaining how Ireland and the UK were given opt-outs for the “Schengen zone”); *The Euro*, EUR. COMMISSION ECON. & FIN. AFF., http://ec.europa.eu/economy_finance/euro/index_en.htm [<https://perma.cc/GE8K-2WT6>] (last updated May 10, 2016); EurWork, *Agreement on Social Policy*, EUROFOUND (Nov. 29, 2013), <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/agreement-on-social-policy> [<https://perma.cc/ERT9-EBMP>].

310. See NUGENT, *supra* note 1, at 69–85; see also *Editorial Comments: From the Constitution to a New Round of Treaty Amendments: Step-by-Step*, 44 COMMON MKT. L. REV. 1229, 1232–33 (2007) (describing the specific reservations of the French and the Dutch).

311. NUGENT, *supra* note 1, at 73–74.

nearly all other member states, illustrates another feature of EU governance, the “democracy deficit.”³¹² This label is meant to capture the lack of political accountability of EU leaders to the general population of the member states. In the early years, voters did not participate in choosing EU leaders.³¹³ To be sure, they had an indirect role in choosing members of the “Assembly,” as it was initially called,³¹⁴ because the Assembly’s members were drawn from state legislative bodies. The Assembly was soon later renamed a Parliament, but it had only an advisory role.³¹⁵ Later still, it evolved into something resembling a legislature, in that voters in the member states now choose its members, and most legislation must be approved by this body.³¹⁶ Even so, the Parliament still cannot initiate legislation, a role that is assigned primarily to the unelected European Commission.³¹⁷

Another aspect of the democracy deficit is that there is no EU executive comparable to the U.S. President. The framers of the U.S. Constitution provided for a single elected executive, in part because they believed effective governance required one.³¹⁸ They worried that, “[w]henver two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion.”³¹⁹ But they were also concerned with political accountability. Alexander Hamilton championed the single executive on the ground that “the plurality of the executive” deprives critics of a clear target.³²⁰ By contrast, in the

312. See, e.g., Paul Craig, *Integration, Democracy, and Legitimacy*, in *THE EVOLUTION OF EU LAW* 13, 28–31 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011) (arguing that “a number of these alleged deficiencies are overstated”); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 636–37 (1999) (arguing that the EU “draws its authority not from a constitutional enactment of some definable European ‘demos,’ or people—the prerequisite of democratic legitimacy—but generally from lawful transfers of normative power from national parliaments”); Young, *supra* note 4, at 1705 (suggesting that the democracy deficit may strengthen federalism in Europe by diminishing the legitimacy of central authority).

313. GOEBEL, *supra* note 1, at 47.

314. *Id.*

315. *Id.*

316. *Id.* at 48–49.

317. *Id.* at 49.

318. U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President”).

319. THE FEDERALIST No. 70, *supra* note 78, at 425–26 (Alexander Hamilton).

320. *Id.* at 428–29. Hamilton wrote:

[T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, *second*, the opportunity of discovering with facility and clearness the misconduct of the persons they

EU there is no single individual, much less an elected one, who can be held accountable for anything. Many important decisions, including selection of the president of the European Commission, are made by the heads of the member states.³²¹ And wealthier and larger member states, especially Germany, exert more influence than smaller and poorer ones.³²²

The Commission is the poster child for the democracy deficit.³²³ It is the “central administrative body” of the Union.³²⁴ Its members are appointed by the European Council (the heads of state), but the European Parliament also plays a role.³²⁵ The Commissioners are chosen one from each member state, but they are not accountable to their states. On the contrary, under the Treaty, the Commissioners are not supposed to represent the member states from which they come, but “shall promote the general interest of the Union . . . [and] shall neither seek nor take instructions from any Government or other institution, body, office or entity.”³²⁶ The Commission’s executive activities resemble those of the U.S. Department of Justice or a federal agency, except that its portfolio is broader than that of any U.S. agency. It investigates and fines private actors who violate EU competition law, and defends its sanctions in the General Court and the CJEU.³²⁷ It sues disobedient member states in the CJEU, especially for imposing barriers to cross-border movement and trade.³²⁸ It may also bring suit against the Council of Ministers for exceeding the powers given to it by the Treaty.³²⁹

3. *Implications for Judicial Federalism.* These differences between the structure and the aims of the EU and the United

trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

321. See GOEBEL, *supra* note 1, at 43. Note, however, that “Parliament must approve the nominee, by an absolute majority vote.” *Id.* at 50.

322. *Id.* at 43 (noting that in the past, larger states have vetoed candidates for the presidency).

323. See Young, *supra* note 4, at 1694–97 (discussing ways to legitimize the Commission’s responsibilities to the public). For a systematic description of the Commission and its activities, see NUGENT, *supra* note 1, at 105–37.

324. GOEBEL, *supra* note 1, at 39.

325. Under the Lisbon Treaty, Parliament votes on the entire slate of Commissioners and on the President. GOEBEL, *supra* note 1, at 50. Parliament also has a role in overseeing the Commission’s activities. It may, by a two-thirds vote, censure the entire Commission, “which is then compelled to resign.” *Id.* at 43.

326. TEU art. 9D, paras. 1, 3.

327. GOEBEL, *supra* note 1, at 779.

328. *Id.* at 41.

329. See *id.* at 163 (describing the interplay between the Council and the Commission).

States are relevant to understanding and evaluating EU judicial federalism. The strength of the EU is that, in the constant battle between the centrifugal and centripetal forces of power, the member states' interests are valued more highly than in the United States. The cost of respecting their autonomy is that the EU, as a political system pursuing goals independent of those of the member states, is necessarily weaker than the United States. But the cost-benefit calculation is not the same in the two polities. The United States pursues the whole range of policy goals of a nation state. It is composed of inhabitants who share largely common interests and who have been knit more or less closely together by 228 years of history. Voters can fully participate in choosing leaders, and the President they elect is accountable for decisions made by executive departments. By contrast, the EU is, or has been, a relatively loosely organized collection of member states who join together mainly for economic purposes. In the former system, the costs of a weak center are intrinsically great. In the latter, they are comparatively small.

One weakness of the EU's system of judicial federalism is that it may not be well-suited to tighter political integration and to the growth in the EU's sphere of policymaking responsibility that would accompany closer union. That project necessarily requires a sacrifice of many of the values of federalism, because it necessarily involves displacing local control with centralized authority. The history of American judicial federalism suggests that the federal courts are a critical—and underappreciated—resource for achieving the goals of centralization, a resource that is largely unrealized so long as adjudication of EU issues remains the province of member state courts. If EU policy is limited to economic and social goals related to the single market, preliminary reference may suffice as a means for enforcing EU law. Any realistic effort to achieve a more far-reaching union, however, will require closer CJEU supervision of member state courts, or perhaps even the creation of a network of lower EU courts.³³⁰

Some EU champions seem to think that political union can be achieved without fundamental change in EU judicial federalism. Michal Bobek suggests that “the spirit of cooperation” between member state courts and the CJEU is likely to ensure

330. Cf. Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, 36 TEX. INT'L L.J. 555, 580–81 (2001) (discussing proposals, so far rejected, to create “decentralised judicial bodies,” which could be a step toward a full-fledged system of lower courts); see also BROBERG & FENGER, *supra* note 12, at 34–35 (describing the advantages of such a network, then adding, as a downside, that “[s]uch a structure would, however, bear a clear resemblance to a federal structure”).

the implementation of EU norms through the preliminary reference procedure.³³¹ But it is not so clear that cooperation can be counted on. Disobedience is always a threat when judges attempt to impose legal constraints on states.³³² Even today, the spirit of cooperation is not always sufficient to the task of enforcing EU law, and the problem is exacerbated by the unavailability of other, less subtle means of obtaining compliance. For example, unlike the United States, the EU lacks a military force capable of enforcing judicial orders.³³³ Nor is the need to rely on such forces outlandish or far-fetched. In 1957, when Arkansas officials balked at implementing school desegregation decrees, President Eisenhower dispatched U.S. armed forces to Arkansas to carry out the judicial orders.³³⁴ By contrast, the EU has neither a chief executive who can act quickly nor an army that can enforce EU policy. It must rely on the judicial processes and local executive officials of member states. *Commission v. France* illustrates the problems posed by such a system.³³⁵ French farmers blocked Spanish produce trucks near the border and repeatedly dumped their cargo, while French police looked on.³³⁶ The EU had no means at its disposal to stop the disorder.³³⁷ To be sure, the European Commission successfully sued France in the CJEU, but months passed before the problem was addressed.³³⁸ And similar episodes occur from time to time.³³⁹ A “spirit of cooperation” is hardly an effective substitute for a strong executive in command of an army.³⁴⁰

331. See Bobek, *supra* note 219.

332. See Goldsmith & Levinson, *supra* note 7, at 1822–23 (noting that international law lacks enforcement mechanisms that sovereign states employ).

333. See European Defence Agency, *Inception*, EUR. DEF. AGENCY, <http://www.eda.europa.eu/Aboutus/our-history/inception> [<https://perma.cc/M673-AZRQ>] (last visited Feb. 1, 2016) (describing Europe’s tradition of security through cooperation of member-state forces and treaties rather than a single military force); W. Craig Bledsoe, Christopher J. Bosso, & Mark J. Rozzell, *The Chief Executive*, in *GUIDE TO THE PRESIDENCY* 535 (Michael Nelson ed., 2d ed. 2015).

334. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 753–54 (1976) (discussing the failed negotiations and eventual dispatch of paratroopers to enforce the desegregation order).

335. Case C-265/95, *Comm’n v. France*, 1997 E.C.R. I-6959.

336. *Id.* para. 2, 4, 5, 9, 12–13.

337. See *id.* para. 34 (noting France’s noncompliance despite the existence of treaty obligations and a judgment, and thus suggesting that the Commission had no other remedy).

338. *Id.* para. 52, 65–66.

339. See, e.g., Rory Mulholland, *French Farmers Block Lorries from Germany and Spain*, *THE TELEGRAPH*, July 27, 2015 (noting that “[t]he latest protests came after a week that saw farmers block tourist sites, seal off the ferry port of Caen in Normandy . . . dump manure outside public buildings and prevent deliveries to supermarkets”).

340. Sometimes states resist for decades. Compare Case 167/73, *Comm’n v. France*,

B. EU Law in the Member State Courts

Is the goal of greater EU integration unduly hindered by the absence of a network of lower EU courts? While a comparative analysis cannot definitively answer this question, it may provide some guidance. In particular, the degree of systemic integration or disintegration produced by reliance on member state courts would seem to depend on whether the member state courts reach different outcomes from those a hypothetical network of lower EU courts would reach. If they do not, the absence of lower EU courts is of no moment. This issue can be illuminated by a comparison with the United States, because we do have both federal and state courts and there do seem to be systematic differences in the outcomes they reach.

How much disparity is there between federal and state courts in the United States? This is an empirical question that cannot be definitively answered. Moreover, the level of disparity may vary from issue to issue and from time to time. It may also loom larger in some polities than in others. Professor David Currie, a distinguished American scholar and specialist on federal jurisdiction, was surprised by the lack of lower federal courts in Germany.³⁴¹ He noted that German scholars did not see this as a problem.³⁴² By contrast, “[i]n the United States, such an arrangement would raise fears . . . of inadequate enforcement of federal rights.”³⁴³ As between the United States and Germany, which is a better analogue to the EU?

The EU and the United States are alike (and unlike Germany) in that both are composed of member states that retain full sovereignty over their own internal law and that are dispersed over a wide area.³⁴⁴ In both, there are sharp cultural and political differences from one state to another. Arguably, both are more diverse than the German *Lander*.³⁴⁵ For these

1974 E.C.R. 359, 361, 372–73 (holding that France must amend the French Maritime Code to remove a provision providing that the crew of certain French vessels be composed of French nationals), *with* Case C-334/94, *Comm’n v. France*, 1996 E.C.R. I-1307, I-1333 (condemning France for still having failed to obey the earlier judgment). France had evidently complied with EU law forbidding discrimination against persons from other member states, but it had not changed its maritime law to reflect the EU norm. *Comm’n v. France*, 1996 E.C.R. at I-1342–43.

341. Currie, *supra* note 119, at 239–40.

342. *Id.* at 240.

343. *Id.* Professor Currie was also surprised by the German willingness to tolerate the jurisdictional complexity of a system with many specialized courts. *See id.* at 239–40 (discussing the German system of specialized courts).

344. DICK LEONARD, *GUIDE TO THE EUROPEAN UNION* 76–77 (9th ed. 2005).

345. *Compare* Central Intelligence Agency, *North America: United States*, THE WORLD FACTBOOK (Sept. 28, 2016), <https://www.cia.gov/library/publications/the-world->

reasons, the U.S. experience with judicial federalism may offer distinctive insights into the way member state courts in the EU differ from hypothetical EU lower courts. The U.S./EU analogy is by no means exact. As Jeffrey Cohen pointed out some years ago in his article on the preliminary reference, “[e]vidence of systematic non-compliance [with EU law] is entirely lacking.”³⁴⁶ But the American experience suggests that this situation may not last. The EU has adopted a “Charter of Fundamental Rights of the European Union,” and the Treaty of Lisbon gives the Charter legal force.³⁴⁷ It is not yet clear how vigorously the CJEU will enforce these rights against member states. Moreover, the Charter is not the only vehicle by which Europeans may assert violations of individual rights against states.³⁴⁸ It is possible, but not inevitable, that cases involving EU-based “fundamental rights” will come before the courts in increasing numbers. In that event, disparity may be more noticeable than it has been, the cost of strong federalism to EU-oriented goals will grow, and the viability of current jurisdictional arrangements may be threatened. In addition, disparity may be a bigger problem as the EU expands to the east, taking in polities that do not share the cultural commitments of Western Europe.

factbook/geos/us.html [https://perma.cc/3Q4M-ZQ3R] (providing diversity statistics about the United States), with Central Intelligence Agency, *Europe: Germany*, THE WORLD FACTBOOK (Sept. 28, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> [https://perma.cc/D52T-W4EH] (providing diversity statistics about Germany), and Central Intelligence Agency, *Europe: European Union*, THE WORLD FACTBOOK (Dec. 19, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> [https://perma.cc/4LSM-Y5KZ] (providing diversity statistics about the European Union).

346. Cohen, *supra* note 218, at 445.

347. TEU art. 6(1). For a discussion of the Charter, see GOEBEL, *supra* note 1, at 253–55.

348. Of course, individuals can assert individual rights granted them under the law of the member state without ever raising rights under EU law. In addition, and independent of the EU, there is another accord among European nations, called the Convention for the Protection of Human Rights and Freedoms. The Convention sets out important noneconomic human rights principles, including, among others, rights “to liberty and security,” procedural rights in criminal proceedings, freedom of religion . . . freedom of expression, freedom of association and the protection of property rights.” GOEBEL, *supra* note 1, at 249. All of the EU member states, as well as other European nations, are signatories. Persons claiming that their rights have been violated can petition the European Court of Human Rights, located in Strasbourg, though that court “has no power to impose sanctions on a nation that does not comply with its decisions.” GOEBEL, *supra* note 1, at 249. The Treaty of Lisbon calls for the EU to accede to the Convention, TEU Article 6(2), but it has not yet done so. *Id.* at 250. To the extent, fundamental rights litigation is channeled to the ECHR rather than the CJEU, member state ire over interference with internal matters will be directed to the Strasbourg court rather than the CJEU and the concerns discussed in this section will be muted. At present, however, the relation between the two courts, and their respective roles in fundamental rights litigation, remain uncertain.

1. *Distinguishing Common Market Regulation from Assertions of Fundamental Rights.* Suppose hypothetical EU lower courts would decide hard issues of EU law differently from the member state courts, as I have suggested they might do. It does not necessarily follow that the current, member-state-friendly, jurisdictional law presents a serious obstacle to enforcing EU norms. In the U.S. context, disparity between federal and state courts is not a constant across time and across substantive context.³⁴⁹ The 1787 rationale for diversity jurisdiction seems to have been the perceived hostility of state courts or state juries or state legislators to out-of-state or foreign litigants and commercial interests.³⁵⁰ But it is not clear that the problem persists.³⁵¹ Diversity jurisdiction aside, disparity has been perceived as a pressing problem when the national government has sought to enlarge constitutional guarantees involving individual rights and to enforce the new constitutional constraints against state governments.³⁵² Disparity seems to be especially wide in periods like the post-Civil War era and the 1960s, when national authorities seek to protect racial minorities and other unpopular groups, who lack influence in the state political processes. Those are the situations in which it has been thought necessary to transfer more litigation to the federal courts.³⁵³

This history suggests that disparity may be a more serious obstacle to effective enforcement of national norms during periods of abrupt expansion of federal law, when Congress or the Supreme Court has upended settled expectations by recognizing individual rights against the states and protecting unpopular minorities from majoritarian prejudices. In these situations, the national norm overrides the state's internal political process, upsets its citizens' and local judges' understanding of state-federal relations, and restricts the state's power to pursue

349. See Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 249–52 (1999) (discussing the scholarship on parity). *Nollan's* holding dealt with the rules on whether the state had “taken” property by regulating its use. The article found that state and federal courts ruled similarly on this type of claim. *Id.* at 283–86.

350. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 318–19 (7th ed. 2016).

351. See FALLON ET AL., *supra* note 108, at 1415–19 (presenting evidence of scholarly disagreement on whether location bears any influence on the issue); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 79 & n.3 (1993) (summarizing the debate).

352. See Neuborne, *supra* note 104, at 1106–11 (discussing historical periods in which allocation of jurisdiction between federal and state courts was a crucial issue for enforcement of federal rights).

353. See *supra* text accompanying notes 164–89.

its own ends. It is no wonder that politically sensitive state judges, whether they are elected or appointed for fixed terms, would balk at enforcing Congress's or the Supreme Court's decrees in these circumstances. Over time, however, state judges habituate themselves to the federal standards and younger lawyers, who were taught the federal law in school, are appointed to the state bench.

Most EU law has a different tenor. Its core values are the "four freedoms," the free movement of goods, services, people, and capital across member state borders.³⁵⁴ In order to strengthen the four freedoms, much EU law targets member state regulation that would interfere with the common market.³⁵⁵ The CJEU "remains an essentially economic court."³⁵⁶ It deals mainly with "taxation; intellectual property; competition; state aid; internal market (free movement of goods retreating and making way for services and persons); agriculture; public procurement; and customs."³⁵⁷ Besides breaking down barriers to trade and migration, the EU makes and enforces competition law, environmental law, sex discrimination rules, and consumer protection, among other things.³⁵⁸ Extrapolating from U.S. experience, it seems fair to infer that disparity could be a concern whenever member state market regulation or other practices are challenged on EU grounds. The member state has an interest in enforcing its policy, and its judiciary may bend to that interest. Nonetheless, there is a potentially significant difference between the U.S. and EU contexts. Challenges to member state economic regulation differ from U.S. litigation raising federal constitutional rights as grounds for striking down state law. Broadly stated, the underlying EU policy behind most of its legislation is not, as in U.S. constitutional rights litigation, geared toward shielding unpopular beliefs or groups against local

354. See generally CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (4th ed. 2013).

355. See, e.g., GOEBEL, *supra* note 1, at 349 (noting that "[t]he central issue in European Union law is whether a Member State regulation or practice constitutes an impermissible restriction of free movement of goods"); Leonard, *supra* note 300, at 101 (discussing areas in which the EU and states share a competence).

356. Michal Bobek, *The Court of Justice of the European Union*, in *THE OXFORD HANDBOOK OF EUROPEAN UNION LAW* 159 (Anthony Arnall & Damian Chambers eds., 2015).

357. *Id.*

358. Judging by casebook coverage, the single market and competition law are more important than the others. For example, GOEBEL, *supra* note 1, devotes over 200 pages, *id.* at 349–558, to free movement of goods, the common market, and free movement of workers, and nearly 280 pages to competition policy, *see id.* at 773–1049. "Fundamental rights" is covered in a 43 page chapter, *id.* at 235–78; and equal employment rights and antidiscrimination is covered in 62 pages, *id.* at 1305–67.

majorities. The EU focus is utilitarian. In connection with the single market, it is the theory that overall the residents of the member states are better off if commerce is unhindered by member state rules that protect special interests against competition or otherwise obstruct free trade.³⁵⁹ And broad majorities across all the nations of the EU are likely to be at least somewhat supportive of this set of values.

The economic focus of EU regulation of member states is relevant to the disparity question, because it means that the member state's interests are not limited to winning a case that challenges its rule. Even when a member state law is attacked, that member state has interests in addition to its desire to win the case. It may have longer term interests on both sides of many pieces of economic litigation. Any given EU law challenge to a member state rule will threaten a protectionist member state interest, but it will at the same time promote that member state's interest in the benefits to its residents of a free market. The impact of leaving these issues to the member state courts, rather than setting up a network of lower EU courts, may thus be muted, at least as compared with the likely consequences of leaving constitutional litigation over individual rights exclusively to the state courts in the United States.³⁶⁰ If this is so, member state adjudication of EU issues is a strength of EU judicial federalism. The benefits of divided judicial power are purchased at a low cost, as member state judges probably will not be systematically hostile to the EU interests at stake.

2. *Expanding the Scope of EU Law: "Fundamental Rights."*

The EU treaties contained no provisions that explicitly protected fundamental rights. Yet the CJEU introduced the concept of fundamental rights in its case law as an interpretive aid. More recently, the EU recently adopted the Charter of Fundamental

359. See BARNARD, *supra* note 354, at 3–4 (discussing the economic theory of free trade).

360. Another analogy to U.S. jurisdictional rules is relevant to the "degree of disparity" question. The type of U.S. litigation that most closely resembles "single market" cases in the EU is a "dormant commerce clause" challenge to a state rule. The argument advanced in these cases is that state regulation violates the commerce clause by interfering too much with trade across state lines. Typically, though not always, these claims are raised as defenses to state enforcement of the state's rule. Some of them challenge state taxes. Under U.S. jurisdictional law, the case is typically brought in state court, and must remain there, as there is no federal issue on the face of a well-pleaded complaint in some of them. See *supra* note 127. In the tax cases, a federal statute ordinarily precludes access to federal court. See *supra* note 191. State courts are probably sympathetic to the state interests at stake in these cases, yet not so much so as to provoke national authorities to change the jurisdictional doctrine. Neither Congress nor the Supreme Court has ever undertaken to change the rules that put them in state court.

Rights of the European Union. With respect to fundamental rights as an interpretive tool, it has said that “general principles of law” are implicit in EU treaties, and that “fundamental rights form an integral part of the general principles of law.”³⁶¹ Besides the role of fundamental rights as general principles of law, many of these rights have now been codified. In 2000 the EU adopted a Charter of Fundamental Rights, and in 2009 the Lisbon Treaty accorded the Charter “the same legal value as the Treaties.”³⁶² The Charter protects an array of rights. To name just a few, it forbids the death penalty,³⁶³ guarantees “the right to liberty and security of person,”³⁶⁴ declares that “[e]veryone has the right to the protection of personal data concerning him or her,”³⁶⁵ and protects “the right to freedom of expression.”³⁶⁶

Both the Charter and the “general principles” constrain the institutions of the EU, such as the European Commission, the Council, and the Parliament.³⁶⁷ For purposes of evaluating their impact on the values of federalism, however, the important question is how they constrain the member states. In principle, the general principles of fundamental rights do not *broadly* limit the actions of member states in all contexts. They do so only when the member state’s action is connected to EU law.³⁶⁸ An

361. Case 4/73, *Nold v. Comm’n*, 1974 E.C.R. 491, para. 13. For example, in *Joined Cases C-402/05P & C-415/05P, Kadi & Al Barakaat Int’l Found. v. Council and Comm’n*, 2008 E.C.R. I-6351, para. 1, a regulation temporarily froze Kadi’s access to his property because he was suspected of terrorism. He challenged the regulation in the CJEU, charging that it violated his property rights. Kadi won, as the regulation did not give him a chance to “put his case to the competent authorities,” *id.* para. 369, a ground Americans would probably characterize as a denial of procedural due process.

362. TEU Art. 6 (1); see Sara Iglesias Sanchez, *The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights*, 49 COMMON MKT. L. REV. 1565, 1567 (2012) (discussing “some of the emerging trends and underlying tensions that can be drawn from an analysis of the case law of the Court of Justice since the Lisbon Treaty came into force”).

363. Charter of Fundamental Rights of the European Union, art. 2(2), Dec. 7, 2000, 2000/C 364/01.

364. *Id.* art. 6.

365. *Id.* art. 8(1).

366. *Id.* art. 11(1).

367. *Id.* art. 51(1); see Case 4/73, *Nold v. Comm’n*, 1974 E.C.R. 491, para. 13. (stating that Community law frameworks should follow the general principles of law).

368. See Loic Azouli, *The Case of Fundamental Rights: A State of Ambivalence*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 207–10 (Hans-Wolfgang Micklitz & Bruno De Witte, eds., 2012). Azouli notes that “fundamental rights do not apply universally.” *Id.* at 208. Rather:

EU fundamental rights infiltrate via two common types of ‘vehicles’ . . . Firstly, fundamental rights can be applied in every cross-border situation in which the freedoms of movement can be invoked. Therefore, the scope of protection of fundamental rights is largely determined by the scope of application of the economic freedoms. . . . Secondly, fundamental rights can be applied in every

illustrative case is *Kremzow v. Austria*.³⁶⁹ Kremzow, an Austrian citizen, was convicted in an Austrian court of murdering another Austrian citizen and sentenced to twenty years imprisonment.³⁷⁰ On appeal within the Austrian system, he asserted that his confinement was illegal under EU fundamental rights law, and identified the nexus as his right as an EU citizen to move freely throughout the EU.³⁷¹ On preliminary reference to the CJEU, the Court said that Kremzow “is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons.”³⁷² The court declined to examine the substantive fundamental rights grounds Kremzow raised for invalidating the conviction, because “the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of Community law.”³⁷³ Kremzow’s claim that imprisonment affected his EU right to free movement fell on deaf ears.³⁷⁴

Kremzow was a “general principles” case. A similar limit applies to the Charter. Its reach is circumscribed in the same fashion as the unwritten “fundamental rights” principle that was at issue in *Kremzow*. Thus, the Charter applies “to the Member States only when they are implementing Union law.”³⁷⁵ Bear in mind, however, that identifying these limits on the scope of fundamental rights does not really answer the question of how much they will constrain member states. Despite *Kremzow*, and despite the proviso in the Charter, fundamental rights litigation exposes a potential weakness in EU judicial federalism. The expansion of EU law over time guarantees that more and more member state activity will touch on EU law.³⁷⁶ In recent years the CJEU has heard more cases in such areas as “judicial cooperation in civil, administrative and criminal matters,” and “social policy and non-discrimination.”³⁷⁷ The U.S. experience suggests that member state court sympathy for the

situation related to EU norms. Since there has been an increase in volume of EU legislation, which raises sensitive questions of civil liberties and social rights, the scope of the EU fundamental rights protection is potentially expanding.

Id. at 209–10.

369. Case C-299/95, *Kremzow v. Austria*, 1997 E.C.R. I-2629.

370. *Id.* para. 4.

371. *Id.* para. 8.

372. *Id.* para. 16.

373. *Id.* para. 18.

374. *Id.* para. 16.

375. Charter, *supra* note 363, art. 51(1).

376. See Azouli, *supra* note 368, at 208–11.

377. Bobek, *supra* note 356, at 159.

member state's litigation interests is especially likely to tilt outcomes in these areas.³⁷⁸ It is safe to predict that, as the scope of EU activity increases, and more plaintiffs succeed in establishing the necessary nexus, an ever larger number of EU-grounded fundamental rights cases will be brought in member state courts.

In addition, EU legislative institutions—the Commission, the Council, and the Parliament—along with the CJEU, may expand the scope of EU fundamental rights held against member states by borrowing a key doctrine from the U.S. Supreme Court. In *Heart of Atlanta Motel v. United States*, the Court recognized that Congress may justify civil rights legislation under its power to regulate commerce among the states.³⁷⁹ In that case, the Court upheld federal legislation outlawing race discrimination in public accommodations, which Congress had justified under its commerce power.³⁸⁰ The Court reasoned that places of public accommodation serve persons engaged in interstate commerce, and that the commerce is burdened when the motel discriminates on the basis of race.³⁸¹ The lesson of the case is that the *motive* for the regulation need not be commercial, but can include recognition of individual rights.³⁸² A similar ruling by the CJEU would open the door for the EU legislative bodies to enact wide ranging fundamental rights legislation aimed at the member states.³⁸³ U.S. experience with individual rights litigation suggests that member state courts in this type of litigation may tend to favor state interests more than in other contexts. Indeed, *Heart of Atlanta Motel* arose precisely because racial segregation in public accommodations was still widespread in the American South in the 1960s, in keeping with the preferences of most local whites, who controlled political decision making.³⁸⁴ The case also

378. *Id.* (noting that such cases are often thinly-veiled policy-balancing cases); *see, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (providing an example of the U.S. experience with social policy cases wherein the court is heavily influenced by value concerns held by state citizens and courts alike).

379. 379 U.S. 241, 257–59 (1964).

380. *Id.* at 260–61.

381. *Id.* at 255–57, 274–75 (Black, J., concurring).

382. *See id.* at 257.

383. Some of the CJEU case law suggests that it has already moved in toward a general regime of protection of “fundamental rights” against infringements by the member states. *See Azouli, supra* note 368, at 210 (“In [some] cases, instead of subordinating the application of fundamental rights to the existence of a clearly applicable EU rule, the Court creates such a rule. It is as if the desire of the Court to apply fundamental rights required the existence of a connecting factor. Therefore, the protection of fundamental rights becomes a vehicle of its own.”); Sanchez, *supra* note 362, at 1566, 1583–96 (discussing the Court’s application of the Charter of Fundamental Rights).

384. 379 U.S. 241, 252–53; BYRON E. SHAFER & RICHARD JOHNSTON, THE END OF

involved enforcement of the Civil Rights Act of 1964, which was deeply unpopular throughout the South and had been vigorously opposed by southern-state legislators in both the House and the Senate.³⁸⁵ The key point is that current EU jurisdictional arrangements may come under pressure if and as “fundamental rights” litigation expands. Tension may grow between advocates of effective enforcement of fundamental rights and champions of member state court adjudication of complaints about member state violations of those rights. The former camp may demand creation of a network of lower EU courts, and the effectiveness of EU norms may well depend on whether they prevail.

3. *Enlargement.* Disparity is partly a function of cultural difference and psychological set. Other things equal, state judges from a region with a distinctive culture will be more reluctant than others to vigorously implement central government policy, especially if the policy is at odds with its cultural norms. Some evidence of this tendency is that two of the periods in U.S. history in which disparity has been widest involve the federal courts in the Southern states, after the Civil War and in the Civil Rights Era of the 1960s. In both eras, the federal government sought to enforce a strong policy in favor of equal rights for African Americans, and the South, which had systematically denied those rights, resisted the effort.³⁸⁶ Federal intervention was necessary in order to overcome this resistance. The broader point illustrated by these episodes is that cultural differences cannot be ignored in evaluating a system of judicial federalism. If they are sharp, the case for sacrificing the benefits of judicial federalism may be compelling, despite the value of federalism.

The EU has grown from an initial count of six states in Western Europe to the current count of twenty eight.³⁸⁷ And future growth is envisioned. Enlargement will bring with it a new set of member state judges, raised within different cultures and educated in different traditions. Consequently, admitting new member states will have implications for judicial federalism. The lesson of the U.S. experience for the EU is that enlargement may require recalculating the costs and benefits of the current

SOUTHERN EXCEPTIONALISM 52 (2006).

385. 379 U.S. at 242; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1452–53 (2003).

386. See *supra* text accompanying notes 164–78, 352–53.

387. European Neighbourhood Policy and Enlargement Negotiations, *From 6 to 28 Members*, EUR. COMMISSION, http://ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm [https://perma.cc/R43G-W559] (last visited Feb. 1, 2017).

system of judicial federalism. The current approach may work for the more culturally homogenous group of member states in Western Europe, yet it may prove inadequate to the task of imposing EU norms on the newer member states of Central Europe. Courts in Poland, Hungary, and the Czech Republic have challenged the primacy of EU norms³⁸⁸ and tend to make fewer preliminary references than other member state courts.³⁸⁹ These trends may simply reflect a lack of familiarity with EU law, in which case they will dissipate over time. If they continue, the EU may face a choice between achieving uniformity and primacy of EU law, on the one hand, and jettisoning the current strong judicial federalism in favor of an approach that more nearly resembles that of the United States. The need for change would be even more pressing if the EU takes in other member states that do not share Western European values. Turkey, for example, has a culture and history very different from other EU nations; there is a strong movement, however, for admitting Turkey into the EU.³⁹⁰

C. *Preliminary Reference: Threats to the Uniformity and Supremacy of EU Law*

Writing for the Court in *Martin v. Hunter's Lessee*,³⁹¹ Justice Joseph Story gave two reasons why the framers of the Constitution authorized Supreme Court review of state judgments. The framers sought to guard against the risk “that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to

388. See Michal Bobek, Landtova, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure, 10 EUR. CONST. L. REV. 54, 60–66 (2014) (discussing the Czech Court); Marton Varju & Flora Fazekas, *The Reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary*, 48 COMMON MKT. L. REV. 1945, 1945 (2011) (“The experiences of the Hungarian reception process are mixed.”); Laszlo Blutman & Nora Chronowski, *Hungarian Constitutional Court: Keeping Aloof from European Union Law*, 5 VIENNA J. INT'L CONST. L. 329, 333 (2011) (noting that the Hungarian Constitutional Court has placed EU law in its domestic law from a constitutional standpoint while other international law is kept separate; however, the Court has been reluctant to characterize EU law disputes as constitutional). See also Adam Lazowski, *Half Full and Half Empty Glass: the Application of EU Law in Poland (2004-2010)*, 48 COMMON MKT. L. REV. 503, 504 (2011) (responding to the question, “Are the Polish judges up to the job of being European judges?”, and finding that the results are “rather mixed”); *Id.* at 505–06.

389. See BROBERG & FENGER, *supra* note 12, at 39 tbls.2.2 & 2.3) (indicating low per capita references on the part of Central European member states).

390. See Ian Ward, *The Culture of Enlargement*, 12 COLUM. J. EUR. L. 199, 212–18 (2005) (discussing problems related to Turkey's possible admission to the EU).

391. 14 U.S. (1 Wheat.) 304, 323 (1816).

obstruct or control, the regular administration of justice.”³⁹² They also understood “the importance, and even necessity, of *uniformity* of decisions throughout the whole United States,” on matters of federal law.³⁹³ These two policies—“supremacy of federal law” and “uniformity of federal law”—remain the principal justifications for Supreme Court review of state judgments.³⁹⁴ With these core policies in mind, the EU preliminary reference procedure can be questioned on two distinct grounds, using U.S. Supreme Court review as a benchmark. Even if all the member state courts agreed on the content of EU law, their rulings may not give EU law the weight it deserves when tensions arise between EU norms and member state practices. Even if all the member states seek to give EU law as much weight as it deserves, that body of law might still come to vary from one member state to another, and thereby interfere with effective implementation of EU goals.

1. *Uniformity.* Uniformity is prized because inconsistent interpretations or applications of a legal rule diminish the effectiveness of the norm and produce unfair results.³⁹⁵ The norm will be less effective because compliance will require different actions depending on the place, and some of those steps meant to produce compliance may be at cross purposes with others. Unfairness will result because similarly situated persons will be treated differently. If uniformity were the only goal at stake in choosing a process for enforcing central-government norms, and if preliminary reference produces less uniformity than Supreme Court review, one would be hard pressed to defend the EU approach.

But uniformity is *not* the sole goal in designing a judicial system, and, even if it were, Supreme Court review does *not* necessarily produce more uniformity. On the latter point, the notion that preliminary reference generates less uniformity ignores the contemporary Supreme Court’s actual practice. In

392. *Id.* at 347.

393. *Id.* at 347–48.

394. Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 86–87, 159 n.324 (2002).

395. *See, e.g.*, Case 6/64, *Costa v. Ente Nazionale Energia Elettrica (ENEL)*, 1964 E.C.R. 585, 594 (justifying the principle of primacy of EU law on the ground that “[t]he 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”). *See also* Hart, *supra* note 21, at 489 (uniform rules are needed because “[p]eople repeatedly subjected, like Pavlov’s dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown”).

1816, when *Martin* was decided, the corpus of federal law was small and the Supreme Court could assure the uniformity of federal law. Today it cannot. In the term ending in July 2014, the Court received over 8,580 requests for review from both state and federal courts.³⁹⁶ Almost all of the Supreme Court's jurisdiction is by writ of certiorari, which means that the Court chooses the cases it will review.³⁹⁷ The Court adjudicates fewer than 100 of the petitions for certiorari submitted to it from both state courts and lower federal courts in a given year.³⁹⁸ Since the CJEU decides several hundred preliminary references a year, its efforts may actually produce more uniformity,³⁹⁹ despite the difficulties of coordinating the work of a court that sits in panels.⁴⁰⁰ The Supreme Court does give considerable weight to resolving splits between lower courts in choosing the cases it will review.⁴⁰¹ But the high ratio of petitions to grants suggests that many splits—or at least many serious tensions between lower court rulings—go unaddressed for long periods of time.

Even if Supreme Court review offers a better mechanism than preliminary reference for obtaining uniformity, it is doubtful that uniformity should be the paramount goal in setting up a jurisdictional system. It is costly to devote judicial resources to ironing out every bit of disuniformity in the law, and at some point the benefits are not worth the costs. In addition to the costliness of eliminating disuniformity, the value of uniformity will sometimes be outweighed by other countervailing desiderata. For example, the Supreme Court often allows splits in the lower courts to persist for some time before it addresses them to gain the benefit of encountering different perspectives on contested issues and different means of working through those issues in practice.⁴⁰² In some contexts, long-term disuniformity of federal law is a deliberate choice on the Court's part. For example, federal common law rules have a federal pedigree, but the Court may borrow state law as the federal rule, such that federal law

396. FALLON, ET AL., *supra* note 108, at 47.

397. *Id.* (noting that the Supreme Court took 5 cases in the 2013 term that were original jurisdiction).

398. *See id.* (noting that “[t]he Court rendered opinions in 72 cases in the 2013 Term”).

399. *See de la Mare & Donnelly, supra* note 120, at 395 tbl.13.1, 396 figs.13.1 & 13.1.1, 397–98 tbl.13.2, 398 fig.13.2 (showing the CJEU's large docket for preliminary rulings). On the ECJ's total workload, see NUGENT, *supra* note 1, at 215–16.

400. *See supra* Part IV.B.1.b.

401. SUP. CT. R. 10(a).

402. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 874 & n. 90 (2014) (discussing the Supreme Court's informed decision-making resulting from lower courts acting as “laboratories”).

will vary from state to state.⁴⁰³ In *United States v. Kimbell Foods, Inc.*, the issue was whether state or federal law should control the bankruptcy priority rules governing loans made by a federal agency, the Small Business Administration.⁴⁰⁴ Although the Court ruled that federal law governed the federal government's activities, it went on to borrow state law as the governing federal rule.⁴⁰⁵ This approach, the Court explained, "would in no way hinder administration of the SBA" loan program,⁴⁰⁶ while "businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved."⁴⁰⁷ *Kimbell Foods* shows that uniformity is sometimes sacrificed for the sake of other goals, which would receive no weight in a system committed to relentless efforts to achieve uniformity.

Important features of EU law indicate that uniformity is not considered an especially strong value in the EU. For example, EU rules permit a member state to opt out of various aspects of the EU regime.⁴⁰⁸ Consider the European Monetary Union, formed in the 1990s to provide a common currency—the euro—for member states.⁴⁰⁹ With regard to this program, existing members were left free to use the euro or not as they chose.⁴¹⁰ The UK, Denmark, and Sweden in fact declined to join the monetary union,⁴¹¹ and to this day they retain their own currency and monetary policy.⁴¹² The UK, Ireland, and Denmark have obtained certain exceptions to EU rules that require member states to accept immigrants from out of the EU.⁴¹³ The UK has also refused to join the Schengen Accord, under which people move freely from one member state to another without border controls among those who have joined.⁴¹⁴ In 2015 the UK

403. Pathak, Radha, *Incorporating State Law*, 61 CASE W. RES. L. REV. 823, 844, 847, n.153 (2011).

404. 440 U.S. 715, 718 (1979).

405. *Id.* at 727.

406. *Id.* at 729.

407. *Id.* at 739.

408. See NUGENT, *supra* note 1, at 83, 91 (discussing flexibilities in every treaty since Maastricht).

409. Kathy Jones & Alan N. Rechtschaffen, *The Euro-Ready or Not: Trading Implications of the New Common Currency*, 22 FORDHAM INT'L L.J. 786, 790 (1999).

410. See NUGENT, *supra* note 1, at 331.

411. See *id.* (noting that Denmark and the UK opted out, and Sweden chose not to participate).

412. Central Intelligence Agency, *United Kingdom*, THE WORLD FACTBOOK (Dec. 12, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [<https://perma.cc/B8NL-A8AM>].

413. See NUGENT, *supra* note 1, at 337–38 (describing the concessions afforded to the non-Schengen members who desire to protect national sovereignty).

414. See *id.* at 61 (explaining the provisions of the Schengen system).

undertook to renegotiate its terms of membership, so as to further minimize its involvement in the noneconomic aspects of EU governance.⁴¹⁵ In short, the EU remains to a large extent an international arrangement among states, in which the terms of participation are to some extent negotiated in a quasi-contractual fashion among the parties, rather than a politically integrated polity in which the rules are the same for all participants.

2. *Supremacy.* Although there is no supremacy clause in the Treaty,⁴¹⁶ the CJEU has consistently held for over fifty years that European Union law prevails over contrary member state law.⁴¹⁷ The leading case is *Costa v. Ente Nazionale Energia Elettrica (ENEL)*.⁴¹⁸ The issue in *Costa* was whether EU law precluded Italy from nationalizing the electric power industry.⁴¹⁹ At an earlier stage in the litigation, the Italian Constitutional Court had ruled that, having been ratified as a treaty, the EEC Treaty had the status of a statute in Italian law.⁴²⁰ Consequently, EU law had to give way to Italian constitutional law. A lower court, however, later made a preliminary reference on this issue to the CJEU, which rejected the reasoning of the Italian Constitutional Court.⁴²¹ The CJEU explained that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States.”⁴²² Moreover, EU law trumps local law, for “the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”⁴²³ In later cases, the CJEU made the point in broader terms, declaring that “every national court must . . . apply Community law in its entirety . . . and must accordingly set aside any provision of national law which may conflict with it.”⁴²⁴

415. See, e.g., Robert Winnett, *EU Focus Must Be On Single Market*, DAILY TELEGRAPH, July 29, 2015, at 1 (reporting that George Osborne, the UK Chancellor, has pledged that “Britain’s relationship with the EU should return to the concept of a ‘single market of free trade’ following the renegotiation of the country’s membership”).

416. Instead, a “declaration on primacy” was attached to the Treaty. See NUGENT, *supra* note 1, at 213, 214 tbl.12.2 (describing the declaration on primacy).

417. See *infra* text accompanying notes 423–26.

418. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

419. *Id.* at 588.

420. *Id.*

421. *Id.* at 588–89, 594.

422. *Id.* at 593.

423. *Id.*

424. Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, para. 21.

Some member state courts endorse EU supremacy, or, in the CJEU's terminology, "primacy." For example, the Belgian Conseil d'Etat ruled in *Orfinger v. Belgium* that "[i]n case of conflict between a rule of national law and a rule of international law of direct effect in the national legal order, the rule established by the Treaty must prevail."⁴²⁵ This priority applies "even where the provisions of national law are those of the Constitution."⁴²⁶

Other member state courts, including the German Constitutional Court⁴²⁷ and the UK's Supreme Court,⁴²⁸ take a different position. They assert that in certain circumstances national law overrides contrary EU law.⁴²⁹ This principle took center stage following ratification of the Lisbon Treaty in 2010. That Treaty extended the authority of the EU in several ways, including, for example, new tools for addressing climate change.⁴³⁰ It was ratified by the German parliament and, like Maastricht, was then challenged in the German Constitutional Court on the ground that it compromised national sovereignty in violation of the German Constitution.⁴³¹ The German Court upheld the ratification, but indicated that German constitutional

425. Conseil d'État [CE] [Council of State] Nov. 5, 1996, *Orfinger*, No. 62.922, <http://www.conseildetat.be> (Belg.). For an English translation, see *Orfinger v. Belgium*, [2000] 1 C.M.L.R. 612.

426. *Id.* at 617. Other jurisdictions that "consider EU law to prevail over contrary provisions of national law, arguably even law of a constitutional nature . . . apparently include Luxembourg, the Netherlands, the Slovak Republic, Bulgaria, Romania, Estonia, Latvia, Lithuania, Cyprus and Malta." GOEBEL, *supra* note 1, at 312.

427. See BVerfG 2 BvE 2/08, June 30, 2009, http://www.bverfg.de/ces/20090630_2bve000208en.html [<https://perma.cc/X85D-U25Y>]. The case is also summarized in GOEBEL, *supra* note 1, at 321–23 (identifying certain areas of law that must stay national and holding that EU acts determined to be *ultra vires* will not be enforced at the national level).

428. See *R (Buckinghamshire Cnty. Council) v. Sec'y of State for Transp.* [2014] UKSC 1, [3] (appeal taken from Eng.) (UK Supreme Court challenges the supremacy of EU law when it conflicts with certain UK constitutional principles). See also Christopher Sargeant, *Factortame Revisited and the Constitution Reimagined: The UK Supreme Court Takes Its First Ride on the HS2 Rail-Line*, 5 UK SUPREME COURT ANNUAL REVIEW 157, 163–74 (2015) (discussing the case and its implications).

429. The German and UK cases, and similar cases from other member state courts, have provoked extensive commentary. Besides Sargeant, *supra* note 428, at 164–74, see, e.g., Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1419 (2011) (arguing that the Lisbon Treaty provides grounds for "overcoming the idea of absolute primacy of EU law" in favor of "ensuring both respect for EU law and the constitutional identity of the Member States"); Bobek, *supra* note 388, at 62, 69, 80 (criticizing the Czech court for finding an EU measure to be *ultra vires*); Beke Zwingmann, *The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After Lisbon*, 61 INT'L & COMP. L.Q. 665, 674–75, 694–95 (2012) (minimizing the practical importance of the German Court's skepticism).

430. See NUGENT, *supra* note 1, at 78–85 (comparing the Lisbon Treaty and the Constitutional Treaty).

431. *Id.* at 76–77, 77 tbl.6.4, 268.

law precluded the German parliament from shifting authority over some matters to the EU, including “the civil and military monopoly on the use of force, revenue and expenditure including external financing and all elements . . . that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty” by criminal prosecution or institutionalization.⁴³² Also included are “cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.”⁴³³ The Court rejected the notion that the EU is a constitutional state; rather, the sources of EU authority “are the peoples of Europe with democratic constitutions in their states.”⁴³⁴ Consequently, “the ‘Constitution of Europe’, international treaty law, or primary law, remains a derived fundamental order[, which] is always limited factually.”⁴³⁵

One German scholar concluded that the German Constitutional Court’s decisions in this and other matters give a “negative answer to the question of whether the Basic Law permits the transformation of the EU into a federal state.”⁴³⁶ If a state court in the United States took the position of the German Constitutional Court in *Maastricht* and *Lisbon*, the U.S Supreme Court would respond to the challenge by a mechanism that is unavailable to the CJEU. Citing the Supremacy Clause, it would without delay grant the losing party’s petition for certiorari and reverse the state court judgment. In so doing, it would make a point of rejecting the state court’s reasoning, just as it rejected the reasoning of the Virginia Court of Appeals 200 years ago in *Martin*.⁴³⁷

432. BVerfG 2 BvE 2/08 ¶ 249, June 30, 2009, http://www.bverfg.de/e/es20090630_2bve000208en.html [<https://perma.cc/W2ML-BQWR>]. See Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. REV. 1795, 1821 (2009). According to Thym, “[i]n marked contrast to the European self-perception of ‘ever closer union,’ the Court establishes constitutional limits for further integration, which may only be overcome, once the constituent power decides to abandon national sovereignty and establish federal European statehood.” *Id.*

433. BVerfG 2 BvE 2/08 ¶ 249, June 30, 2009, http://www.bverfg.de/e/es20090630_2bve000208en.html [<https://perma.cc/W2ML-BQWR>].

434. *Id.* ¶ 231.

435. *Id.*

436. Dieter Grimm, *Comments on the German Constitutional Court’s Decision on the Lisbon Treaty: Defending Sovereign Statehood against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 353, 365 (2009).

437. See *supra* text accompanying notes 201–06.

Challenges to EU law primacy impose a high cost on the EU's ability to achieve its aims with confidence. This is a weakness of the EU model of judicial federalism. That cost, however, is mitigated by the infrequency with which member state courts in fact raise constitutional objections to enforcing EU law. That caution may reflect strategic calculation on the part of member state courts. They may not risk outright reversal by the CJEU, but they do incur risks to their own legitimacy, when they reject EU law for incompatibility with their own constitutional norms. One danger is that the member state legislature may take the side of the EU against the member state court.⁴³⁸ Another is that the European Commission may sue the member state in the CJEU, which may impose a fine for noncompliance with EU law. Either of these responses to a member state court's rejection of EU law would undermine public confidence in the member state court.

Furthermore, the costs of the EU system are matched by benefits, at least from the perspective of a strong commitment to the values of federalism. The absence of a hierarchical relationship between the member state courts and the CJEU, and the ever-present threat of defiance by member state courts, encourages EU policy makers to exercise self-restraint in pursuing their most ambitious aims for centralization.⁴³⁹ For example, the German Constitutional Court sent a clear signal in the *Lisbon* case as to lines that should not be crossed. By couching objections as dicta in *Brunner* and *Lisbon*—in keeping with the tradition of the American-law landmark, *Marbury v. Madison*⁴⁴⁰—the German Constitutional Court set boundaries without testing its power to enforce them. In short, the EU's strong judicial federalism furnishes powerful weapons to both the CJEU and the member state courts. Arthur Dyeve likens the conflict to the Mutual Assured Destruction doctrine of the Cold War, in which both sides make credible threats of massive destruction, with the result that both are dissuaded from acting on those threats.⁴⁴¹

438. See Arthur Dyeve, *Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?*, 35 Y.B. EUR. L. 106, 118 (2016) ("Similar to other public decisionmakers, judges are aware that their decisions can trigger adverse reactions. Legislators may respond to their rulings by passing override legislation or by stripping the court of its jurisdiction."). *Id.* at 122 ("[U]nless the government parties wish to leave the EU, a court that blatantly defies it will face a political backlash.").

439. See Millet, *supra* note 244, at 217 ("Bluntly disregarding national constitutional identities would be too risky for the ECJ as it would expose itself to a retaliation of the domestic courts.").

440. 5 U.S. (1 Cranch) 137 (1803).

441. Dyeve applies principles of game theory to the conflict between the German

From a judicial federalism perspective, the point is that the lack of a hierarchical relationship between the CJEU and member state courts produces benefits as well as costs. The cost is a relatively weak and uncertain doctrine of supremacy of EU law, a doctrine so weak and uncertain that the word “primacy” is used in place of “supremacy” to describe it.⁴⁴² The benefit is in providing means by which member state courts can defend their constitutional values. The “lack of appellate review” prong of judicial federalism can be credited for maintaining a more or less stable equilibrium between powerful member state courts and the center, rather than being blamed for producing a destructive tension between the two. So long as tension does not ripen into revolt, the benefits of strong federalism can be obtained at low cost to the EU’s successful pursuit of Union goals. By forcing EU policy makers to consider the possibility of defiance, the continuing uncertainty as to the primacy of EU law may exercise a general constraint on EU policy makers.

Resolving the tension rather than coping with it would have pluses and minuses. A system of appellate review would provide a vehicle for the CJEU to drive home the primacy of EU law over member state law, and the lack of CJEU appellate review of member state courts may therefore count as a demerit for the EU approach to judicial federalism. Definitive resolution of the issue would settle a basic issue and lay a foundation for pursuing “ever closer union.” But the price may be too high, all the more so as the Treaty recognizes the right of the member states to secede.⁴⁴³ Until the BREXIT vote on June 23, 2016, it was easy to discount that risk. But on that day, United Kingdom voters chose to leave the EU.⁴⁴⁴ In the wake of that vote it has become easier to imagine other member states following the UK’s lead. Secession aside, the EU’s lack of brute enforcement machinery—such as a police force or an army—invites foot dragging on the part of reluctant member states. The preliminary reference procedure allows the tension to remain unresolved, arguably to the benefit of both the EU, which can pursue carefully chosen aims for the

Federal Constitutional Court and the ECJ and argues that the Cold War strategy of “Mutual Assured Destruction” is an appropriate analogy. Dyevre, *supra* note 438, at 125–26. He further argues that “a powerful domestic court like the [German Federal Constitutional Court] need not carry its threats to execution in order for them to be consequential.” *Id.* at 111.

442. See NUGENT, *supra* note 1, at 214 tbl.12.2 (setting out the “Declaration concerning primacy”).

443. TEU art. 50 (1).

444. See Steven Erlanger, *Cameron to Quit as E.U. Aims for Rebirth*, N.Y. TIMES, June 25, 2016, at A1.

benefit of the Union as a whole, and the member states, who benefit from the restraint the EU must maintain for fear of one or another form of member state revolt.

VI. CONCLUSION

Comparative analysis of law is often done with the aim of enhancing our understanding of alternative approaches to legal problems and evaluating the strengths and weaknesses of each of them.⁴⁴⁵ Contrasts between federalism in the United States, a 230-year-old polity, and the relatively youthful EU may offer instruction, not so much for the present, but for the future of the EU. The analogue to the current EU may be the United States between 1787 and the Civil War in 1861, an era in which the winds of federalism blew strong.⁴⁴⁶ For example, in the early American republic, there was no general federal question jurisdiction and few individual rights were held against state governments.⁴⁴⁷ One result of the Civil War was a far stronger federal government and a far stronger federal judiciary.⁴⁴⁸ To the extent the EU moves toward “ever closer union,” the array of EU legal issues will probably include more and more matters on which member states and their judiciaries are at odds with EU law and policy. As a result, EU leaders may find that the distinctive features of EU judicial federalism need to be changed, and the U.S. approach may be a useful model. A central government over a large and diverse territory probably cannot be effective in achieving an ambitious agenda unless it has available to it a network of lower federal courts and a means of assuring high court review of decisions of courts that bear allegiance to m decisions of courts that bear allegiance to member states.

445. See, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1227 (1999) (“Some of the best work in the field [of general comparative law] suggests skepticism about any direct ‘borrowing’ of solutions developed in one system to resolve problems in another.”).

446. Until the Civil War, the terms of American federalism remained an open issue. See Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 403 (2015) (contending “that political and legal actors in the early nineteenth century believed themselves to be living in . . . a ‘long Founding moment,’ in which the fundamental terms of the federal-state relationship were still open to debate”); see also Larry Cata Backer, *The Extra-National State: American Confederate Experience and the European Union*, 7 COLUM. J. EUR. L. 173, 229–39 (2001) (comparing the EU to the 19th century debate in America regarding the federal-state relationship).

447. See Friendly, *supra* note 164, at 1021–22.

448. See *id.* at 1021.