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THE EXTRA-NATIONAL STATE: AMERICAN CONFEDERATE FEDERALISM AND THE EUROPEAN UNION

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> "I'll be damned. So, if Gouverneur Morris were drafting today, he would have had to write 'We, the Peoples of the United States.' How different that sounds."
>
> St. John pursued her advantage. "Good stylist that he was, that's what Governeur Morris would have to write. But more correctly, 'We, the Peoples of the signatory States.' If he had had then to compose the phrase in the French he spoke so well, it would have been crystal-clear; he would not have been able to hide the plural for 'people' and for 'United States': *Nous, les peuples des États-Unis*."
>
> "That would have put the people back in the States."
>
> "Where they belonged," added St. John smugly. She paused and then made a pronouncement.
>
> "Calhoun's *s*, this is the fatal flaw."[1]

> The argument based on national identity is further supported by the objective of the European Union ... of "an ever closer union among the *peoples* of Europe" which confirms that these peoples are separate.[2]

This article examines the ways in which John C. Calhoun's theories of federalism, suppressed in the United States after the American Civil War, now shape the European debate over the nature of the European Union's political organization. Most of the academic work regarding the "lessons" offered by American federalism for the European Union ("EU") and other supra-national systems has predominantly focused on an understanding of post Civil War American federalism. It remains, on that account, extremely superficial. The more important lessons of American federalism are

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[1] Sebastian de Grazia, A Country With No Name: Tales From the Constitution 245 (1997).

[2] Diarmuid Rossa Phelan, Revolt or Revolution: The Constitutional Boundaries of the European Community 425-26 (1997).

to found in Calhoun's marginalized understanding of federalism. This alternate vision of the possibilities of federal organization may yet provide emerging supra-national unions, the most important of which is the European Union, with a powerful conceptual foundation for the construction of non-national federal systems of government. Indeed, the political future of the European Union and other supra-national systems will likely be based on a different resolution of the great debates about federalism than that which ended in the United States with the Civil War. Understanding the possibilities inherent in this alternative resolution requires reconsideration of previously accepted "truths" about the relation of supra-nationalism to federalism, and a more sophisticated understanding of the possibilities of federalism in domestic and international law. [3] The theories of multi-state association, which were rejected in nineteenth century America, may prove extremely forward-looking in the twenty-first century world of small ethnically homogenous communities and large pluralistic super-unions.

I. INTRODUCTION

Societies, and especially political societies, try to authoritatively fix the meaning of words; these communities endeavor to make eternal a particular ordering of the political universe. Invariably, however, communities de facto subvert the classification systems that politicians, armies, priests, philosophers and academics, each in turn painstakingly constructs.[4] So it is with the form of political organization we try to classify as federal; so is it also with that great division between domestic and international law straddled by political systems which are or ought to be catalogued as "federal".[5]

In the United States, elite communities follow a pattern of pronouncing a definitive consensus of the meaning and character of federal systems, only to have that consensus shattered by the emergence of novel forms of organization which in turn become the normative standard. Thus, over the last two hundred years, the system in place in the United States has emerged as both a new form and eventually the definitive form of

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[3] I propose, as such, to turn the standard approaches on its head. See, e.g., Peter L. Lindseth, Democratic Legitimacy and the Administrative Character of Supra-Nationalism: The Example of the European Union, 99 Colum. L. Rev. 628 (1999). Where the common perception is one of an administrative super structure in search of a state, I see a new form of state invisible to those who study it. The invisibility is due, in large part, to the way that traditional means of understanding political organizations blind people to changing political realities. This blindness is particularly acute when such political organizations, by their very nature, burst the traditional bounds of understanding of how such organizations legitimately work, or ought to work. Blindness is not limited to the emerging realities of the European Union. Political and academic elites in the United States have been wrestling with a similar problem in the United States for over a century. The administrative super-structure of the American federal government, like that of Europe, is in some ways, a new form of governance in search of legitimacy outside the traditional means of legitimization. See, e.g., Peter Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984) (providing an attempt at theoretical justification for the creation of a new headless "fourth" branch of the American federal government consonant with traditional notions of American federalism).

[4] Thomas S. Kuhn, the Copernican Revolution 74 (1957) ("Logically, there are always many alternative conceptual schemes capable of bringing order to any prescribed list of observations; but these alternatives differ in their predictions about phenomena not included on the list.").

[5] For an interesting reading, see S. Rufus Davis, The Federal Principle: A Journey Through Time in Quest of a Meaning (1978).

federal organization.[6] This American union is bound together by what has come to be acknowledged as the highest form of domestic political and legal expression: a *constitution*.[7]

In the twentieth and twenty-first centuries, the European Union[8] is emerging as a

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[6] Alexander Hamilton sought to convince his audience that the proposed constitution, though different from the prior government in significant respect, still fell comfortably within the amorphous definition of a confederation. The Federalist No. 9 (Hamilton) 71-76 (Clinton Rossiter ed., 1961) ("So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact, and in theory, an association of states, or a confederacy." Id. at 76). At the beginning of the Twenty-first century it is virtually impossible to discuss federalism without reference to the American model. See discussion, infra, at Part II, "The American Conversation."

[7] Constitutions, of course, are now seen as the basic expression of the form and limitations of national government. Constitutions also articulate and memorialize the relationship between the government, as agent, and the governed, the sovereign principal on whose behalf the agent acts. Constitutions operate as meta-law, instruments superior to that law which is interposed on the polity by the constitutionally created organs of government. Constitutional norms, indeed, precede government, as the expression of the will of the people of the community to join together in the political form described in this organic document. For a discussion, see, e.g., Keith Banting & Richard Simeon, The Politics of Constitutional Change in Industrial Nations: Redesigning the State 1-29 (1985); Walter F. Murphy, Constitutions, Constitutionalism and Democracy, in Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg et al. eds., 1993) (noting functions of constitutions in different contexts as sham, as charter for government, as guardian of fundamental rights, and as covenant); Michael J. Klarman, What's So Great About Constitutionalism? 93 Nw. U. L. Rev. 145 (1998) (describing what author identifies as the ten leading explanations of constitutionalism, rejecting each and positing that American constitutionalism provides a structure through which judges can impose the values of national cultural elites on the masses). On the origins of the notion of constitutions as a written expression of the political covenant of groups to come together to form a nation, see Johannes Althusius, Politica: Politics Methodically Set Forth and Illustrated With Sacred and Profane Examples IX (Frederick S. Carney trans. & ed., 1964) (1614) and Daniel A. Elazar, Althusius' Grand Design for a Federal Commonwealth, *in* Althusius, supra at xxxvi-xl. On new approaches to constitutions and constitutionalism as process or politics, see, e.g., James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996).

[8] The union of Europe began in the 1950s with the creation, by treaty, of three "communities" within Europe, each designed on functional lines. These were the European Coal and Steel Community ("ECSC"), the European Atomic Energy Community ("Euratom") and the European Economic Community ("EEC"). See Treaty Establishing the European Coal and Steel Community of April 18, 1951, 261 U.N.T.S. 140 (as amended); Treaty Establishing the European Atomic Energy Community of March 25, 1957, 298 U.N.T.S. 167, 5 Eur. Y.B. 454 (as amended); Treaty Establishing the European Economic Community of March 25, 1957, 298 U.N.T.S. 11, 4 Eur.Y.B. 412 (as amended). The European Union, as such, came into force on November 1, 1993, 1993 O.J. (L. 293) 61, upon the ratification by the member states of the Treaty on the European Union of February 7, 1992, 1992 O.J. (C 224) 1 (the "Maastricht Treaty" or the "TEU"). The TEU tied together, within the institutional framework of a supra-national organization the previously existing Communities, which became the first of three "pillars" of the union. This first pillar strengthened the institutional and legal structure of the Communities. The two additional pillars of union, the Common Foreign and Security Policy (TEU art. J) and Co-operation in Justice and Home Affairs (TEU art. K), were excluded from the institutional structure of the Communities pillar, and functioned largely at the level of the member states. With the ratification of the Treaty of Amsterdam of October 2, 1997, 1997 O.J. (C 340) 1, the Justice and Home Affairs Pillar was restructured to link it more closely to the institutional structure of the Communities Pillar. Thus, what is popularly conceived of as the government of the European "Union," over which the institutions of the European Communities have authority - the European Council, the European Commission and the European Court of Justice - is actually limited to those matters within the competence of the old Communities treaties, mostly economic (common market) regulation. The CFSP and, to some lesser extent, the CJHAP, function on a more traditionally intergovernmental basis. As such, it is deceiving, to some extent, to speak of the governance of Europe in the singular. Something far more complicated is being devised. However, "the Amsterdam Treaty, though formally confirming the three pillar structure,

new form of federal union.[9] It is joined together by what has come to be acknowledged as the highest form of international political and legal expression: a *constitution.*[10]

This article challenges the ossified approach to "pure" federalism derived from the historical circumstances of the political development of the United States and suggests that the theories of federalism suppressed in the United States after the American Civil War now shape the debate in the emerging political union of Europe. The article explores the ongoing conversations about federalism within the United States and the European Union and their ramifications. The starting point is the American conversation about federalism.

The American constitution represented the product of significant compromise between groups holding very different ideas about the nature of the system they had just created.[11] From the inception of the United States, Americans hotly debated the nature and structure of the union.[12] This debate centered on the relative powers of state and

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blurred the institutional and constitutional divide between the EC and the intergovernmental strains of the non-EC EU... . At the very least, the label 'European Union law', previously misleading in its intimation of a unified constitutional pattern, has begun to attain credibility, albeit that the evolving creature represents an unsettling combination of mutating legal strains." Stephen Weatherill & Paul Beaumont, EU Law: The Essential Guide to the Legal Workings of the European Union 23 (1999). Unless otherwise noted, this paper concentrates on the developments in the first, Community, pillar.

[9] I will not use the term "nation" to describe the union. First, there is yet no formal consensus on the applicability of that term, as currently understood, to the European Union. Second, labeling the union within Europe as "nation" or something else will have more of an effect on the utility of the term "nation" than it will on the status, powers and construction of the union itself.

[10] This point of course remains highly controversial. See, e.g., The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration (Joseph H.H. Weiler ed., 1999) and discussion infra at Part III, "The European Conversations on Federal Union". On the constitutionalization of the instruments establishing international organizations, see, e.g., Bardo Fassbender, The United Nations as Constitution of the International Community, 36 Colum. J. Transnat'l L. 529, 538-55 (1998).

[11] There is a mountain of writing on the making of the federal constitution. For a taste of the bibliographical materials, see Kermit L. Hall, A Comprehensive Bibliography of American Constitutional and Legal History 1984. For other work on the subject, see, e.g., Raoul Berger, Federalism: The Founders' Design (1987); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552 (1999); Stephen Gardbaum, Rethinking Constitutional Federalism, 74 Tex. L. Rev. 795 (1996); Akil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); Carol M. Rose, The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism, 84 Nw. L. Rev. 74 (1989); Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1 (1996).

[12] Only one side of that debate has survived to become authoritative. See Alexander Hamilton, James Madison & John Jay, The Federalist Papers (Clinton Rossiter ed., 1961) (1788). Even the opponents of nationalist tendencies of that document prior to the Civil War recognized the importance and influence of that work.

> The convention which framed [the federal Constitution], was divided... into two parties - one in favor of a *national*, and the other of a *federal* government. The former, consisting for the most part, of the younger and more talented members of the body - but the less experienced - prevailed in the early stages of its proceeding. ... The party in favor of a *federal* form, subsequently gained the ascendancy - the national party acquiesced. ... They regarded the plan as but an experiment; and determined, as honest men and good patriots, to give it a fair trial. They even assumed the name of federalists; and two of their most talented leaders, Mr. Hamilton and Mr. Madison, after the adjournment of the convention, and while the ratification of the constitution was pending, wrote the major part of that celebrated work, "The Federalist;" the object of which was to secure

general government within the federal scheme. Its resolution in the aftermath of the American Civil War (1861-65) - the constitutional amendments from Reconstruction through the end of the so-called Progressive era - produced a unitary and narrow orthodox vision of federalism.[13] This orthodox vision provided a boundary between the domestic law of nations and the law between nations. In this way the construction of the modern American federal state helped reinforce our understanding of the division between domestic and international law.[14]

The article then considers the emerging European reprise of this American conversation. The European Union has restarted a conversation about the nature and elasticity of federalism which was cut off in the United States in 1865.[15] That European conversation has served to challenge the now old consensus about federalism *previously* based on the post-1865 American model. I begin with a review of the European version of federalism orthodoxy emerging out of the jurisprudence of the European Court of Justice and the elaboration of this orthodoxy in the projects of the Institutions of the European Community, and draw parallels with the development of the American orthodox position. I then examine the way this new orthodoxy is being challenged within the European Union in a way that mirrors the challenge to American orthodoxy before the Civil War. Among the leaders of this challenge are the constitutional courts of the Member States, principally the German, Italian, Spanish and English courts. The parallels between the European and American challenges to emerging federal orthodoxies are no accident. The German Constitutional Court, in particular, is the direct heir to Calhoun's notions of federalism within Europe through the absorption of his ideas by 19th century German theorists.[16] To engage in an exploration of federalism in this context is thus both an act of memory and a look to the future.

I then suggest some lessons that can be drawn from these distinct conversations about federalism.[17] For Americans, the European struggles push against the boundaries

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its adoption. It did much to explain and define and explain it, and to secure the object intended; but it shows, at the same time, that its authors had not abandoned their predilection in favor of the national plan.

John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Union and Liberty: The Poltical Philosophy of John C. Calhoun 78, 239-40 (Ross M. Lence ed., 1992) [hereinafter Union and Liberty]. After the Civil War, The Federalist Papers lost its partisan character and became more the neutral yardstick by which to gauge adherence to the will of the Constitutional Convention. In effect, one side of the great split within the Constitutional Convention on the nature of federalism began to serve as the now postulated single authoritative voice of that Convention. For a discussion of the arguments that failed, see, e.g., Jackson Turner Main, The Anti-Federalists: Critics of the Constitution 1781-1788 (1974) (1961). For a discussion of the ambiguities and questions left open in the Constitution as adopted, see Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996).

[13] See Kenneth Clinton Wheare, Federal Government 8 (4th ed. 1964).

[14] See, e.g., Paul Taylor, The Limits of European Integration (1983); Luzius Wildhaber, Treaty-Making Power and Constitution: An International and Comparative Study (1971).

[15] See, infra, Part III, "The European Conversations on Federal Union".

[16] See August O. Spain, The Political Theory of John C. Calhoun (1968) and discussion, infra at notes 117-126.

[17] I avoid the obvious ones - the first, there is nothing new under the sun, and the second, ideas travel. These, of course, form the core ideals of the comparative law project. See, e.g., Annalise Riles, Wigmore's Treasure Box: Comparative Law in the Era of Information, 40 Harv. Int'l L.J. 221 (1999); Walter J. Kamba, Comparative Law: A Theoretical Framework, 23 Int'l & Comp. L.Q. 485 (1974). On convergence theory in comparative law (that initially different legal systems are converging to match the globalization of economic

that the modern understanding of American federalism creates around the concepts of "federalism" and "nation." Under the old American orthodoxy, only nations can be federations, and only nations are governed by constitutions. Only constitutions can serve as the highest expression of domestic law. But federal systems have emerged which may not be nations, as conventionally understood.[18] These non-nation federal systems are also governed by constitutions. These constitutions are derived from international law, yet they perform the core functions traditionally reserved for the basic internal law of nations. As core principles of transnational and international law become part of the domestic law of nations, and as nations themselves become subordinate parts of larger governmental organizations, the line between domestic and international law blurs. This is the brave new world of federal constitutionalism in the twenty-first century.

For Europeans, on the other hand, the struggle over the nature of their political community is in danger of becoming a reprise of the worst of the American antebellum experience. Like the American intellectual and political warriors of the nineteenth century, Europeans have divided themselves into two significant, and incompatible, camps. The "Hamiltonian" camp assumes the authority of a general government for Europe, of one kind or another, and has largely been concerned with the structures and competence of the institutions of the European Community/Union.[19] Its primary opponent, the "state's rights" camp, assumes the non-existence of a general government for Europe, and concentrates on the technicalities of translating the inter-governmental obligations of supra-national organizations, such as the European Community, into the respective national legal orders of the Member States.[20] Between them there is neither common ground nor common language. Each looks at only one piece of the European puzzle - one from the perspective of the institutions of the Community, the other from the perspective of the Member States. The Hamiltonian nation-builders too easily dismiss the importance, and perhaps the permanence, of the nation-states of Europe. The state's rights camp seeks to hide, by resort to legal formalism and technicalities, from the reality that Europe is drifting towards union. The intellectual community engages in this absurd mimicry even as it falsely assumes the unchanging nature of American federalism or dismisses as substantially irrelevant the historical genesis of American federalism and the consequences of the early American struggles.[21] The blindness of both camps, like those of American antebellum thinkers, seriously impedes

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and political activity, see, e.g., Peter de Cruz, Comparative Law in a Changing World 477-89 (1995); but see Pierre Legrand, European Systems are not Converging, 45 Int'l & Comp. L.Q. 52 (1996).

[18] See Costa v. Ente Nazionale per l'Energia Eletricca (ENEL), Case 6/64, 1964 E.C.R. 585, 1964 C.M.L.R. 425; and discussion, infra, at Part III, "The European Conversations on Federal Union".

[19] The members of this camp tend to be a diverse group. Some argue for the creation of an American style federation. See, e.g., G. Federico Mancini, Europe: The Case for Statehood, 4 Eur. L. Rev. 29 (1998). Others assume that the union is *sui generis*. See, e.g., Joseph H.H. Weiler, The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle, *in* Weiler, supra note 10, at 130.

[20] See, e.g., Phelan, supra note 2, at 160-64 (rejecting the notion of European Community law as a federal legal order).

[21] Europeans dismiss the American experience as irrelevant because of a mistaken belief that the American Constitutional founders, and those who came after, shared a common view of the nature of a federal state and that the nature of federalism in the United States has remained substantially unchanged since 1789. See, e.g., Mackensie Stuart, Problems of the European Community Transatlantic Parallels, 36 Int'l & Comp. L.Q. 183 (1987).

the task of European union making, and ignores the political and economic realities emerging within Europe,[22] with potentially disastrous results.[23]

Regardless of the way the discussion of federalism is resolved - whatever form of system it will produce - Europe is moving towards the construction of a federal system in fact, based on a constitutional structure. This federal system will eventually require Americans to reassess their rather provincial and narrow views of the nature of federalism. It will also and necessarily require reassessment of distinctions between national and international systems of governance. It is time to modify antiquated approaches to fit emerging facts.

II. THE AMERICAN CONVERSATION

In 1865, the United States finally settled the question of federalism.[24] From the inception of the new government, it became clear that a settlement of some sort was necessary.[25] This settlement was accomplished violently and was written into the basic law of the land during Reconstruction and the period of "Progressive" reform leading up to the First World War.[26] This settlement effectively determined the core principles animating the way sovereign power in a federal republic could be diffused, controlled and exercised among the general government, its constituent states, and the people. It thereby effectively narrowed the range of characteristics which could be claimed by

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[22] Popular writers in Europe recite the widespread understanding that the European Communities has created a system which has made war between the European powers impossible and brought great economic advantage to its members. Jonathon Fenby, On the Brink: The Trouble With France 46-49 (1998). He also notes that "views are polarizing - while a majority of the French support a European Central Bank and a common currency and oppose a federal European system, the number of those in favour and those against rose significantly in all three cases between 1994 and 1996." Id. at 47.

[23] Neil MacCormick has discussed some of these issues. For an interesting theoretical discussion, see Neil MacCormick, The Maastrich-Urteil: Sovereignty Now, 1 Eur. L.J. 259 (1995); Neil MacCormick, Beyond the Sovereign State, 56 Modern L. Rev. 1 (1993).

[24] This settlement, of course, was the second constitutional settlement in the United States. The first resulted in the adoption of the Constitution of 1787 superceding the Articles of Confederation. For a comparison of the Articles of Confederation and the Constitution, see, e.g., Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 San Diego L. Rev. 249 (1997).

[25] See, e.g., Rakove, supra note 12, at 161-202. "Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Antifederalists were right in predicting how tempered or potent a government the Convention had proposed. ... Whether the politics of the American republic would prove more 'federal' or 'national' ... was a function neither of the language of the Constitution nor of any grand principles that the framers implanted in their regime but of the various ways in which Americans weighed the advantages and disadvantages of pursuing their interests within the compound federal structure the Constitution both created and acknowledged." Id. at 201.

[26] "A long controversy, which was not finally closed until after the civil war of 1861-65, continued between those who regarded the general government as the agreement of the states and those who maintained that it was or ought to be an independent government. Indeed, it took 'the terrible exercise of prolonged war,' in Woodrow Wilson's phrase, to resolve the conflict between the two principles." Wheare, supra note 13, at 8 (quoting Woodrow Wilson, Epochs of American History: Division and Reunion 1829-1889 254 (1926)). "An amendment of the Constitution in 1913 [17th Amendment] completed the process by formally making the election of senators a matter for the people of the states, not for the legislatures." Id. at 3. Moreover, Wheare, like others, have noted that "in the United States, three amendments - XIV, XVI and XVII - increased the powers of the general government." Id. at 237. Cf. Calvin R. Massey, The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States, 1990 Duke L.J. 1229.

systems purporting to be "federal." Henceforth, the general parameters of the characteristics of post Civil War American federalism would serve as the benchmark for distinguishing between federal systems and all other arrangements among governments.[27] European integrationists especially have proceeded on this basis.[28]

American federalism after the American Civil War was based on the acceptance of several basic parameters.[29] First, sovereign power was to be split between a national government and local political units - the states - each to constitute an autonomous government. Second, within the ambit of its authority, the national government was to be supreme over state governments. Third, the national government, through any of its constituent branches, but especially through its courts, was solely competent to decide the scope of the powers ceded to the national government. Fourth, the ceding of power to the national government created a direct relationship between the national government and the people of the several states with which the states could not interfere. Fifth, states could not secede from the union.[30] Because power was assumed to

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[27] Thus, for example, commentators take it as a given, not worth much exploration, that "*Los Estados Unidos llegaron a ser verdaderamente federates sólo después de la Guerra Civil.*" Joseph H.H. Weiler, Europa 111, at n.193 (1995) ("The United States did not become a true federation until after the Civil War."). For European students of federalism, Germany, and its "progress" or "evolution" from pre-state empire to confederation to "real" federation with the 1871 Reich federal structure, provides a similar model of the historical transformation from disunity to confederation and ultimately to true federation. This paper takes a very different view. I suggest that a shortcoming of the analysis of many students of federalism is the belief that Europe will be a federation only if it "looks" like, or evolves into, the present federal character of the United States or Germany. The parallels between Reich and the union of Europe, as well as between that union and United States are worth serious exploration. They are touched on in this paper, see infra at nn.103-07.

[28] For example, the Florence Integration Through Law Series, a multi-volume comparative investigation of contemporary issues of the European Community originating through the Law Department of the Instituto Universitario Europeo (Fiesole) "set out to examine the role of law in, and the legal impact of, integration in Europe, using the United States federal system as a comparative point of reference." Mauro Cappelletti, Monica Seccombe, Joseph Weiler, General Editor's Foreword, *in* Thierry Bourgoignie & David Trubek, Consumer Law, Common Markets and Federalism in Europe and the United States v (1987).

[29] Wheare defines the essence of federalism, the federalism principle, as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent." Wheare, supra note 13, at 10. See also Mark C. Gordon, Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court, 14 Yale J. on Reg. 187, 210 (1996). This definition, though broad enough to encompass virtually any configuration of governance in a multi-governmental structure of a union, does little to capture the flavor of the form of the method of dividing powers established in late 19th and twentieth century America. It is the American construction which has become archetypical in the study of federalism. Other forms, equally valid and interesting, and among those principally those developed for the unification of the German states, have, for historical reasons not shared the same prestige. German federalism, in particular, has suffered marginalization as a result of the sad history of Germany in the twentieth century. Like Calhoun's theories marginalized when tied to a losing cause deemed horribly morally wrong, the federalism emerging from out of the German Reich was victim to German imperialism culminating in the defeat of 1918, and the moral horrors of the National Socialist period.

[30] While this aspect of American federalism was not resolved until after the Civil War, it is interesting to consider that the notion of indissolubility as the basis for the union of American states predates the federal constitution itself. Thus, George Washington identified, as one of the "four things, which I humbly conceive, are essential to the well being, I may even venture to say, to the existence of the United States as an independent power: First. An indissoluble Union of the States under one federal head." George Washington, Advice to the United States, June 8, 1783, *reprinted in* George Washington in His Own Words 65, 68 (Maureen Harrison & Steve Gilbert eds. 1997). Conventional American scholars today suggest that the question of secession is beyond the scope of any discussion of the American vision of federalism, at least by

reside in the people of the various states united through the general government, dissolution was theoretically possible though secession was not. Dissolution, however, could only occur as the act of the people of the entire federation.

For many commentators in the United States, federalism has been transformed into a disposable concept almost entirely in the hands of the federal supreme court.[31] Federalism is no longer deemed a fundamental *political* conception of the governmental organization of a society with common bonds. American orthodox federalism now appears essentially discretionary.[32] The discretionary power is vested in the federal government, rather than in that of the constituent states. Federalism, in this sense, is merely code for the quantum of power the federal government will devolve to the states.[33] For many Americans, then, states have become the appendage of the general government; federalism merely provides the means of resisting the reduction of states to mere administrative units.[34] The decision to grant greater or less deference to the subsidiary units of governments rests largely in the hands of the general government. That was the essence of the "new federalism" under President's Nixon and Reagan;[35] it is the essence of federalism in other federal states as well.[36] Within this framework, enumerated powers are largely illusory.[37]

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legitimate scholars. Some wrongly, I think, even invoke Madison to anachronistically solidify the notion of indissolubility as inherent in the original version of the federal Constitution. See, e.g., Cass R. Sunstein, Constitutionalism and Secession, 58 U. Chi. L. Rev. 633 (1991).

[31] See, e.g., William W. Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985). For a very conservative critique, see Lino Graglia, From Federal Union to National Monolith: Mileposts in the Demise of American Federalism, 16 Harv. J. L. & Pub. Pol'y 129 (1993). Even where state courts seek to assert their independence within their own sphere of control, "skepticism about the state law revolution is in order, a skepticism rooted in not only the checkered history of state-based liberty in the nineteenth century but also the realities of modern federalism." Kermit L. Hall, Of Floors and Ceilings: The New Federalism and State Bills of Rights, 44 Fla. L. Rev. 637, 655 (1992).

[32] There is a good sense of this in articles dealing with the devolution of responsibility for social welfare programs after 1996. See Cashin, supra note 11.

[33] Here is a stark manifestation of the principle of supremacy. Hierarchy, in this sense, amounts to hegemony. Indeed, one of the greatest fruits of the American Civil War was the establishment of a hegemonic notion of supremacy in the general government. American commentary on the issue of federal power essentially has taken this approach throughout the twentieth century. It is within the institutions of federal government that the scope of devolution to the states, or comity, is most effectively debated and decided. For an interesting discussion see, Harry N. Scheiber, Redesigning the Architecture of Federalism - An American Tradition: Modern Devolution Policies in Perspective, 14 Yale L. & Pol'y Rev. 227 (1996).

[34] "[I]n light of the broad sweep given to the Commerce Clause and other federal powers by the modern Court, it seems more worthwhile to identify those areas that the framers believed would remain in the control of the states, despite the Constitution's grant of new powers to the national government." John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 Ind. L. Rev. 27, 29 (1998). See, Thomas S. Ulen, Economic and Public-Choice Forces in Federalism, 6 Geo. Mason U. L. Rev. 921 (1998) (Since the 1930s the federal government has been the senior partner and the states the junior partners in the American republic).

[35] Gordon, supra note 29; Ulen, supra note 34, at 921 n.44 (description of franchise theory of federalism; analogy between Congress' delegation to the states to regulate and a business's decision to franchise its operation).

[36] See, e.g., Shivadev Shatri, Lessons for the European Community from the Indian Experience With Federalism, 17 Hastings Int'l & Comp. L. Rev. 633 (1994) (Indian model based on a strong central government with state governments that are not sovereign but which retain certain enumerated powers; the general government of India, thus has great latitude to devolve power).

[37] "If the states refuse to enforce federal laws, then the federal government simply can threaten the states with the ultimate weapon - the weapon of bypass." Roderick M. Hills, The Political Economy of

Whatever their view of the importance of states in a federal system, many accept without much thought the idea that it is for the federal Supreme Court to craft, and recraft, "a meaningful balance between federal and state power."[38] What American students of federalism worry about now is merely "to identify a law of federalism that can deal satisfactorily both with the 'oldest question of constitutional law' and the modern reality of national power";[39] a task which has been assigned largely to the federal courts.[40] For this task, traditionalists would have the federal courts limit their search to the original intent of the constitutional founders.[41] Yet, whatever the intent of the Framers in creating the constitutional system of 1787, that system was substantially altered, perhaps beyond recognition between the Civil War and the First World War.[42]

The Civil War reconstruction of federalism silenced a vibrant debate between the proponents of the ultimately adopted conception and other theories of American federalism. These alternate visions were based on very different conceptions of the locus of sovereignty within a federation and the basis on which the attributes of sovereignty could be diffused within a federal system. The best known and most developed of these opposing visions was most famously expounded by John C. Calhoun, a slaveholder and political patrician from the uplands of South Carolina.[43]

Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 838 (1998) (describing mechanisms available to Congress by which the national government, at little cost to itself, can impose requirements with large costs on the states).

[38] Yoo, supra note 34 (seeking to sketch out a theory justifying federalism); Charles L. Black, Jr., On Worrying About the Constitution, 55 U. Colo. L. Rev. 469 (1984). For a more critical exploration of this notion, see, e.g., Klarman, supra note 7.

[39] H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 638-39 (1993) (reviewing the developing construction of federalism in the writings of Justice O'Connor). Many commentators appear to have it backwards today, offering as explanation for federalism the need to provide some space for local governance. See, e.g., Sunstein, supra note 30, at 664 (federalism in the American experience reduced to a means of providing local self-determination while providing the benefits of a territorially large national area).

[40] See, e.g., H. Geoffry Moulton, The Quixotic Search for a Judicially Enforceable Federalism, 83 Minn. L. Rev. 849 (1999). For a comparative perspective, see, e.g., Massey, supra note 26.

[41] See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law 133-85 (1990).

[42] For an interesting discussion of the notion of historical intent in a changing world, see, Hans W. Baade, "Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1001 (1991). For a taste of traditional liberal arguments against the constraints of original intent jurisprudence, see, e.g., Leonard Levy, Original Intent and the Framers' Constitution (1988); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (180).

[43] The bulk of Calhoun's thoughts were set down by him in his Disquisition on Government, *in* Union and Liberty, supra note 12, at 3, and his Discourse on the Constitution and Government of the United States, id. at 79. The scholarship on Calhoun reflects the ambivalence which the builders of the victorious ideology emerging after the American Civil War felt for Calhoun and for the time and place, so alien to us today, which he so passionately and unsuccessfully defended in his time. John Niven, a contemporary biographer has exposed this problem nicely: "Although I have always sought to avoid the historical sin of present-mindedness, I could never bring myself to consider objectively Calhoun's position on slavery and the nature of the Union. ... After renewing my acquaintance with the literature on Calhoun ... I must confess ... that my negative opinions on Calhoun's defense of slavery and his ideas on the nature of the Union were reinforced... ." John Niven, John C. Calhoun and the Price of Union, a Biography xv (1988) (contains a useful bibliography of primary and secondary sources on Calhoun and his work). For a useful analysis of the scholarship on Calhoun through the 1960s, see, John L. Thomas, Introduction, *in* John C. Calhoun: A Profile vii-xxi (John L. Thomas ed., 1968). For older biographies and studies, see, e.g., Richard N. Current, John C. Calhoun (1963) (contains an interesting critique of earlier biographies; id., at 157-158); Gerald M. Capers,

Calhoun, of course, was not a solitary voice of this different vision of the nature of the American federal union prior to the Civil War.[44] Nor were all the voices from the South.[45] Yet, Calhoun remains the most influential - the great synthesizer of that vision.

Calhoun, along with Henry Clay and Daniel Webster, was considered to be among the most influential statesmen of his time.[46] Calhoun championed a vision of federalism based on the great animating principles of the concurrent majority and nullification. These, in turn, were based on Calhoun's basic assumptions about humanity and government, and each, in turn, provided a justification for secession and slavery.

Calhoun begins with the notion that humans are social animals, yet social animals with an overwhelming need to maximize the personal over the social. The basic instinct for personal advancement over others, including over other members of a person's community leads to conflict, anarchy, and ultimately reduces the possibilities for personal advancement. Government, then, represents a political compact between members of a community to control individual competition within a community and direct its worst effects outwards to other communities.[47]

John C. Calhoun - Opportunist a Reappraisal (1960); Arthur Styron, The Cast-Iron Man: John C. Calhoun and American Democracy (1935); Margaret Coit, John C. Calhoun: American Portrait (1950); Charles M. Wiltse, John C. Calhoun: Nationalist 1782-1828 (1944); John C. Calhoun: Nullifier 1829-1839 (1949); John C. Calhoun: Sectionalist, 1839-1850 (1951).

[44] See, e.g., Abel P. Upshur, A Brief Enquiry into the True Nature and Character of Our Federal Government: Being a Review of Judge Story's Commentaries on the Constitution of the United States (1863) (attacking, among other things, Story's assumption that union for some purposes was tantamount to union for all purposes).

[45] During the War of 1812, the statesmen of Massachusetts, in particular, and of New England, in general, contemplated a federal union based on a stronger state, and weaker general governmental, powers. Radical New England Federalists led an attempt to secure the secession of New England from the Union. Towards the end of 1814, on the call of Federalist leaders from Massachusetts, a number of New England statesmen met in convention at Hartford, Connecticut. "As the time came for the Hartford Convention in the middle of December many in the country feared that the New England states were moving towards secession from the union." Reginald Horsman, The War of 1812, 211-12 (1969). The Convention, instead, proposed a number of constitutional amendments designed to devolve greater power to the states. But the British invasion of the South and the conclusion of the War of 1812 resulted in the abandonment of the Hartford Convention proposals. For a history of the Hartford Convention written by its secretary, see, Theodore Dwight, History of the Hartford Convention With a Review of the Policy of the United States Government Which Led to the War of 1812 (1833).

[46] "Webster, Clay and Calhoun ... their arrival on the political stage announced a new era of American statesmanship, and their departure forty years later brought it emphatically to a close. They were representatives, spokesmen, and ultimately personifications, of their respective sections: East, West and South." Merrill D. Peterson, The Great Triumvirate: Webster, Clay and Calhoun 5 (1987). For a view of Calhoun as a transitional figure in Southern thinking, see, e.g., William E. Dodd, Statesmen of the Old South or From Radicalism to Conservative Revolt (1929).

[47] Here Calhoun parts company with notions of social compact current during the 18th and 19th century in American political discourse. Social compacts are possible only among social, economic and political equals. Calhoun rejects the possibility of this state of affairs. Anticipating post-modernist and critical theory of over a century later, Calhoun suggested that political and social theory is inescapably contextualized:

> These great errors have their origin in the prevalent opinion that all men are born free and equal. ... I refer to the assertion that, that all men are equal in the state of nature; meaning by a state of nature, a state of individuality, supposed to have existed prior to the social and political state. ... But such a state is purely hypothetical. It never did nor can exist. ... [I]t follows, that men, instead of being born in it, are born in the social and political state; and of course, instead of being born free and equal are born subject, not only to parental authority, but to the laws and institutions of

Government, whatever its political manifestation, is imposed as a coercive means of preserving some sort of social order;

> There is no difficulty in forming a government. It is not even a matter of choice, whether there shall be one or not. Like breathing, it is not permitted to depend on our volition. Necessity will force it on all communities in some one form or another.[48]

Government is thus a means of creating social order within a community. Social order ensures that a community can fashion some sort of an optimum mix between liberty and security.[49] Thus, "to preserve society, it is necessary to guard the community against injustice, violence and anarchy within, and against attacks from without."[50] Yet, government and society (or group culture) are not the same thing.

> [A]lthough society and government are thus intimately connected with and dependent on each other - of the two society is the greater. It is the first in the order of things, and in the dignity of its object; that of society being

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the country where born....

John C. Calhoun, A Disquisition on Government, *in* Calhoun, supra note 43 at 44-45. This contextualization provides a basis for the notion of concurrent majority and interposition in Calhoun's political theory, see infra at notes 59-79, as well as the theory of the German Federal Constitutional Court in resisting what it perceived as the nationalizing thrust of the institutions of the European Union, see infra notes 124-138.

[48] John C. Calhoun, A Disquisition on Government, in Calhoun, supra note 43, at 9-10. The basis of this universal tendency is a communal aversion to anarchy that would result from any communal system of unregulated individual avarice.

> And hence the tendency to a universal state of conflict between individual and individual, accompanied by the connected passions of suspicion, jealousy, anger, and revenge - followed by insolence, fraud, and cruelty - and, if not prevented by some controlling power, ending in a state of universal discord and confusion, destructive of the social state and the ends for which it is ordained. This controlling power, wherever vested or by whomever exercised, is government.

Id. at 7.

[49] Id. at 40-41. "Liberty leaves each free to pursue the course he may deem best to promote his interest and happiness ... while security gives assurance that to each, that he shall not be deprived of the fruits of his exertions." Id. at 40. The optimum mix of liberty and security varies from society to society depending on social, political, economic and cultural factors specific to each community organizing a government. See id. at 40-41. Thus, for Calhoun, "it is a great and dangerous error to suppose that all people are equally entitled to liberty." Id. at 42. Moreover, liberty necessarily produces inequality and hierarchy with respect to individual socio-economic and political position in society. As such, it could not, for Calhoun, be confused with equality. Equality, though intimately connected with liberty, is not synonymous with liberty. "That they are united to a certain extent - and that equality of citizens, in the eyes of the law, is essential to liberty in a popular government, is conceded. But to go further, and make equality a condition essential to liberty, would be to destroy both liberty and progress." Id. at 43. This notion comes close to that of our own era's "equality of opportunity" doctrine which has been espoused by many commentators. See, e.g., Richard Delgado, Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law, 45 Stan. L. Rev. 1133 (1993); see generally Richard Delgado, The Rodrigo Chronicles: Conversations About America and Race (1995). These differences are necessarily reflected in successfully implemented constitutions. "A constitution, to succeed, must spring from the bosom of the community, and be adapted to the intelligence and character of the people, and all the multifarious relations, internal and external, which distinguishes one people from another." Id. at 58.

[50] Id. at 40.

> primary - to preserve and protect our race; and that of government secondary and subordinate, to preserve and protect society.[51]

The ideal government, then, is one which more perfectly combines power and liberty.[52]

But this ideal produces a difficulty. Governments operate like individuals. Individuals constituting the government will act in a way that promotes personal wealth maximization and thus succumb to the temptation to abuse the power of government for their own personal ends or for the advantage of the group to which they belong.[53] Constitutions are the means by which society, in forming governments, attempts to institutionalize a system for counteracting the tendency towards abuse of power.[54] For Calhoun, then, "*constitution* stands to *government*, as *government* stands to *society*; and as the end for which society is ordained, would be defeated without government, so that for which government is ordained would ... be defeated without a constitution."[55] A good constitution "will furnish the ruled with the means of resisting successfully this tendency on the part of the rulers to oppression and abuse."[56]

Democratic institutions are essential for the resistance of abuse. Suffrage is basic to the preservation of democratic institutions.[57] Individual suffrage and majority-rule

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[51] Id. at 8. As such, for Calhoun, liberty always gives way to security when the two come into conflict. Liberty is a second order value because it goes merely to the progress and improvement of the community. Security goes to the protection of the existence of the community itself. "And hence, when the two come into conflict, liberty must, and ever ought, to yield to protection: as the Existence of the race is of greater moment than its improvement." Id. at 42.

[52] Id. at 45.

[53] Id. at 9-13. "The powers which it is necessary for a government to possess ... must be administered by men in whom, like others, the individual are stronger than the social feelings. And hence, the powers vested in them to prevent injustice and oppression on the part of others, will, if left unguarded, be by them converted into instruments to oppress the rest of the community." Id. at 9. As Erwin Levine noted, in this respect at least, "Calhoun is in the same pluralist tradition of James Madison and is indeed a precursor of 20th century group theory of politics." Erwin L. Levine, The Ghost of John C. Calhoun and American Politics 6 (1972).

[54] Id. at 9. Calhoun, however, remained pessimistic about the possibility of crafting "a constitution worthy of its name; while, to form a perfect one - one that would completely counteract the tendency of government to oppression and abuse ... has thus far exceeded human wisdom, and possibly ever will." Id. at 10.

[55] Id. at 9.

[56] Id. at 12. In an almost post-modern race critical discourse sort of way, Calhoun insisted that: "Power can only be resisted by power - and tendency by tendency. ... The same constitution of our nature which leads rulers to oppress the ruled ... will, with equal strength, lead the ruled to resist, when possessed of the means of making peaceable and effective resistance." Id. at 13. Compare bell hooks, Killing Rage Ending Racism 251-62, 257 (1995) (overcoming the subordination of racism by moving from pain to power through a process of self determination resulting from an active resistance to "white supremacist attitudes and values"); Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 12 (1992) ("African-Americans must confront and conquer the otherwise deadening reality of our permanent subordinate status. Only in this way can we prevent ourselves from being dragged down by society's racial hostility. Beyond survival lies the potential to perceive more clearly both a reason and the means for further struggle"). There is also a strain of an ancient cynicism to these notions, stretching back to the ancient Greeks. Consider the position of the Athenians who seeking the submission of the Melians, dismissed their arguments about equity and right: "For ourselves, we shall not trouble you with specious pretenses ... since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." Thucydides, The Peloponnesian War 331 (Crawley trans., 1951) (412 B.C.) (On the fate of Melos).

[57] Calhoun's notions of suffrage, like those of his contemporaries, of course, are exceedingly limited

became the firmly established benchmark ideals which after 1865 became the singular vision of the *only* effective means for the construction of such democratic institutions. Calhoun rejected these ideals. Calhoun based his sense of the best form of democratic institution not merely on suffrage,[58] but on a special sort of suffrage he called the concurrent or constitutional majority.[59] The concurrent majority idea was grounded in the assumptions that though suffrage is based on individual voting, society in fact was composed of any number of groups of like-minded individuals, and that these like-minded individuals would tend to vote in furtherance of their collective group interests over the interests of society as a whole.[60] To avoid the tyranny of a majority, society

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by the standards of today. Yet most Americans of the time were blind to the limitations. Thus, Calhoun, speaking of the situation in South Carolina, stated that "[t]he right of suffrage, with few and inconsiderable exceptions, is universal." John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 281. Madison and Adams originally sought to limit suffrage to properties males. See Rakove, supra note 12, at 214-15, 225.

[58] Calhoun argued that suffrage - which he defined as "the right on the part of the ruled to choose their rulers at proper intervals, and to hold them thereby responsible for their conduct" was, indeed, the foundation of any constitutional system in which the power to abuse might be minimized. Id. at 13. But though foundational, suffrage was not sufficient to preserve the democratic principle of government in any constitution. Suffrage merely empowers the majority of any community to impose its collective will against those whose interests are in opposition to the majority. To that extent, suffrage, without more, invites abuse of power in the form of a tyranny of a majority. Id. at 13-16.

[59] Id. at 21-31. "I call it the constitutional majority, because it is an essential element in every constitutional government, - be its form what it may." Id. at 24. For a discussion of the principle of concurrent majority, see, e.g., Current, supra note 43, at 49-60; see also Spain, supra note 16, at 129-63. Concurrent majorities theory continues to have a residual effect in the United States even after the Civil War. For a discussion, see, e.g., Levine, supra note 53. Professor Levine argued that the principle of concurrent majority continues to be manifested in American federal governance. He pointed to the constitutional amendment process, the veto and override process, the federal principle itself, the electoral college, Senate treaty ratification requirements, and even the committee system of Congress all manifest application of the concurrent majority principle. Id. at 13-19. Professor Peter Drucker argued, starting in the 1940s, that the value and persistence of interest group and identity politics was almost an organic implementation within the American system of the notions of concurrent majority. As he puts it, "for the constitutional veto power of the states over national legislation, by means of which Calhoun proposed to formalize the principle of sectional and interest compromise, was substituted in actual practice the much more powerful and more elastic but extra-constitutional and extralegal veto power of sections, interests and pressure groups in Congress and within the parties." Peter F. Drucker, A Key to American Politics: Calhoun's Pluralism, *in* Thomas, supra note 43, at 133-34. However, the twentieth century penchant for "majority rule" has resulted in much criticism of this concept. For an example, see Niven, supra note 43, at 329-30 ("Even his notion of concurrent majorities simply split popular majorities into many parts, each of which would be subject to the same majority-rule, minority right problems he had faced in the first place." Id. at 329). Professor Niven, of course, is right. There need be no end to the division of groups into separable interests. This echoes Madison's point in The Federalist No. 51 (Madison) 319 (Isaac Kramnick ed. 1987). Calhoun never addressed the limits of the concept. Perhaps he assumed that common sense and political reality would act, in the usual case, to make that determination. Ironically enough, in the late twentieth century, it has been the emerging schools of legal thought, principally critical race theory, which has again revived notions of electoral justice based on "concurrence" and the need for group as well as individual participation in electoral politics. See, e.g., Lani Guinier, The Tyranny of the Majority 14-15 (1995).

[60] Again, this follows from the core assumptions of Calhoun's theory, especially the idea that people tend to sacrifice group interests in the furtherance of their individual interests. "Be it greater or smaller, a majority or minority, it must equally partake of an attribute inherent in each individual composing it; and, as in each the individual is stronger than the social feelings, the one would have the same tendency as the other to oppression and abuse of power. The reason applies to government in all its forms - whether it be of the one, the few or the many." Id. at 20. There is much of Adam Smith in this core assessment of human nature, the construction of human institutions, and the nature of human "sociability." Political maximization is

must recognize this pattern of behavior in the way it manages its suffrage.

The concept of concurrent majority embraces the notion that every society, every nation, is divided into communities with different interests. It bases suffrage on the idea that government may function only on the basis of unanimous consent,[61] or consensus[62] - not of individuals, but of each of the groups or communities constituting the society which together have united for particular ends on the basis of a particular constitution. In order to limit the ability of any majority from abusing its power through the control of the government,

> [t]here is, again, but one mode in which this can be effected; and that is by taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to require the consent of each interest, either to put or to keep the government in action.[63]

This notion of concurrence, of a constitutional majority, is not limited to concurrence in the actions taken by the general government. If it were, it would provide far too little protection from abuse far too late in the process of governance. Rather the principle must inform law-making within the coordinate governments as well as informing the relationship between governments and the people. As such, the concurrent majority principle has broad application to the institution of a general government at the federal level itself. The concurrent or constitutional majority principle must be used:

> To put or to keep the government in action. This, too, can be accomplished only in one way - and that is, by such an organism of the government - and, if necessary for the purpose, of the community also - as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and

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merely an element of wealth maximization which sits at the core of capitalist theory. See Adam Smith, The Wealth of Nations 423 (Edwin Cannan ed., 1937) (1776) (invisible hand and individual wealth maximization). To some extent, the disciples of modern law and economics are heirs to this vision. For discussion and critique, see, e.g., Robin Paul Malloy, Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics, 36 U. Kan. L. Rev.209 (1988); Ronald Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191 (1980). Madison appears to concur in this sense of the nature of suffrage, though his solution is different.

"It is of great importance in a Republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil; the one by creating a will in the community itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not *impracticable*." The Federalist No. 51, supra note 59, at 319 (emphasis added).

[61] See George Kateb, The Majority Principle: Calhoun and his Antecedent, 84 (4) Pol. Sci. Q. 596, 597 (1969).

[62] See Levine, supra note 53, at 12 (1972) ("Consensus can lead to unanimity in that consensus means agreement, brought about by compromise, bargaining - politicking if you will"). Accord, Current, supra note 43, at 53.

[63] Calhoun, supra note 47, at 21.

executing the laws, or a veto on their execution.[64]

As such, a constitutional government, that is, a government which minimizes the possibility of abuse, must contain real structures for obtaining the approval not only of the people as a whole, but of every significant group which could be disadvantaged by actions of the government. Such institutions must be built into the structure of government as well as into the fabric of the fundamental relationships between the people, the member states and the general government. It follows that a federal system with an autonomous general government could remain stable, and democratic, only if it had built into it mechanisms for the dispersion and diffusion of power between the general government and its constituent parts. The same principles of checks and balances are necessary to disperse power among the institutions of any government and in this way avoid a tyranny by the executive, judicial or legislative branches of any government. The object of these dispersals of power was to severely limit the ability of bare majorities of the representatives of constituent parts of the federation to hijack the apparatus of the general government to the detriment of the minorities.[65]

The concurrent majority principle, for Calhoun, was thus firmly ensconced in the internal working of the federal government as well as forming the fundamental basis on which the relationship between the general government and the states must be ordered. It was implicit within the federal constitution in the structure of the relationship between states and the general government. All he had to do was to point out the principle and the procedure for putting it into action. That procedure was nullification."[66] Nullification was based not only on notions of concurrent majorities, but also on Calhoun's notion of sovereignty.[67] For him, the locus of the sovereign

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[64] Id. at 21 (by *organism*, Calhoun meant the interior structure of government).

[65] Calhoun's speech on the veto power, delivered in 1842 in opposition to a constitutional amendment to reduce to a simple majority the vote necessary to override a presidential veto and to eliminate the "pocket veto", sets forth the most cogent defense of the separation of powers as well as of the value of the checks and balances built into the federal legislative process. These checks and balances essentially prevented majority rule, permitting passage of legislation only upon the concurrence of majorities of the significant interests represented in the legislature and by the president. John C. Calhoun, Speech on the Veto Power, *in* Calhoun, supra note 43, at 487.

[66] Current, supra note 43, at 60. Calhoun explained the connection: "The necessary consequence of giving the sense of the community by the concurrent majority is, as has been explained, to give each interest or portion of the community a negative on the others.... Without this there can be no systematic, peaceful, or effective resistance to the natural tendency of each to come into conflict with the others: and with this there can be no constitution. It is this negative power - the power of preventing or arresting the action of the government - be it called by what term it may - veto, interposition, nullification, check, or balance of power which, in fact, forms the constitution. They are all but different names for the negative power." Calhoun, A Disquisition on Government, *in* Calhoun, supra note 43, at 28.

[67] The idea of interposition and its relationship to notions of state sovereignty was not new in American Constitutional thinking. Indeed, one of the great founders of the Republic, James Madison, had aired similar notions in 1800 during the great controversy over the passage by the Federalist Congress of the Alien and Sedition Acts.

> The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The states then being parties to the constitutional compact, and in their sovereign capacity, it follows, of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by

authority of the United States was in the people of the several states, which then created both state and general governments as their agents.[68] Both governments were in that sense co-equal; one was the exclusive province of the people of a constituent state, the other was to be shared with the people of the other constituent states of the union.[69] This sharing arrangement was memorialized in the federal constitution which delegated power to the federal government, but not sovereignty. The federal constitution, as a compact between sovereign states, created a relationship of principal and agent between the states and the federal government.[70] Indeed, the federal government was not a party to the agreement - the federal constitution - which created it,

> The States, as has been shown, formed the compact, acting as sovereign and independent communities. The General Government is but its creature; and though in reality a government, with all the rights and authority which belong to any other government, within the orbit of its power, it is nevertheless a government animating from a compact between sovereigns, and partaking, in its nature and object, of the character of a joint commission, appointed to superintend and administer the interests in which all are jointly concerned; but having, beyond its proper sphere, no more power than if it did not exist.[71]

As agent, the federal government had a good faith duty to seek an amendment of the constitution whenever it sought to assert a power not clearly delegated to it by the constitution.[72] Failing that, the people of the several states, as principal, retained the right to determine whether the agent, the federal government, acted in accordance with and within the bounds laid down by, the federal compact.[73] As such, the people of the

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> them be violated; and consequently that as the parties to it, they must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition.

James Madison, Report on the Alien and Sedition Acts, *in* James Madison: Writings 608, 611 (Jack N. Rakove ed., 1999). Calhoun was well aware of this Report. See, John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43 at 251-52. For a sympathetic discussion of Calhoun's notions of sovereignty, see Spain, supra note 16, at 164-83; but see Richard Current, John C. Calhoun, 114-20 (1963); Niven, supra note 43, at 328-38.

[68] He rejected the notion, which became dogma in the United States, that "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to the other." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.). By ratifying the constitution, the states ceded some of their sovereignty, retaining only a general and residual sovereignty. For the modern American Supreme Court this "conclusion is unaffected by the Tenth Amendment. ... The Amendment states but a truism that all is retained which has not been surrendered." U.S. v. Darby, 312 U.S. 100 (1941).

[69] Calhoun explained that "The idea of co-ordinates, excludes that of superior and subordinate, and, necessarily, implies that of equality." Calhoun, A Discourse on the Constitution and Government of the United States 78, 171, *in* Calhoun, supra note 43, at 3.

[70] Id. at 194-196.

[71] John C. Calhoun, The Fort Hill Address: On the Relations of the States and Federal Government, in Calhoun, supra note 43, at 369, 382.

[72] Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 200-213.

[73] "As parties to the constitutional compact, they retain the right, unrestricted, ... to judge as to the extent of the obligation imposed by the agreement or compact - in the first instance, where there is a higher authority; and in the last resort, where there is none." Id. at 196.

several states have the authority, in whatever lawful manner exercised,[74] to nullify a federal law which they deemed violated the federal constitution. Such a law would then remain null and void within that state (and that state only) until the question of the constitutionality of the measure was addressed politically, through an amendment of the federal constitution.

For Calhoun, then, the heart of the check on the general government's power to encroach on state sovereignty was the amendment power of the Federal Constitution.[75] This provision requires large concurrent majorities within the general government (2/3 of both houses of Congress) and the states (3/4 of the states) to approve any constitutional amendment. However, Calhoun argued that in the United States two significant deviations from the original intent of the Founders substantially eroded the federal nature of the Republic, which would ultimately transform the American federal Republic into a unitary state with all sovereign power vested in the now national government.[76] The first was the expansion of implied powers granted to Congress (especially through the broad use of the "necessary and proper" clause).[77] The second was the appropriation by the general government (and especially the judicial department of that government) of the authority to interpret the extent of its own powers under the Federal Constitution.[78] The judicial power had been deeply troubling from the time of

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[74] Calhoun and his followers argued that such action would be accomplished through a constitutional convention of some type. See Jesse T. Carpenter, The South as a Conscious Minority, 1789-1861: A Study in Political Thought 137-138 (1930) (quoting the 1830 speech of Felix Grundy of Tennessee). The prototype was that held in South Carolina to nullify the tariff acts of 1828 and 1832. The "South Carolina Convention met and declared the tariff acts of 1828 and 1832 null and void, and prohibited payment of duties under those laws after February 1, 1833, unless the federal government gave some relief; declaring that if no relief were accorded and the national authority should be enforced within the boundaries of the State, war would immediately ensue." Styron, supra note 43, at 189.

[75] Thus, in his Fort Hill Address, Calhoun states: "It is thus that our Constitution, by authorizing amendments, and by prescribing the authority and mode of making them, has, by a simple contrivance, with its characteristic wisdom, provided a power which, in the last resort, supersedes effectively the necessity, and even the pretext for force: a power to which no one can fairly object; with which the interests of all are safe; which can definitely close all arguments in the only effectual mode, by freeing the compact of every defect and uncertainty, by an amendment of the instrument itself." Calhoun, The Fort Hill Address: On the Relations of the States and Federal Government, *in* Calhoun, supra note 43, at 383.

[76] For a discussion of the general acceptance of this argument in the ante-bellum South, see Carpenter, supra note 74, at 130-41.

[77] The American Supreme Court has, of course, been fierce in its defense and expansion of the utility of this provision, especially in the twentieth century. On the consternation this broad interpretation of the federal "necessary and proper" clause, see, e.g., id. at 134.

[78] Calhoun argued that such a usurpation was unjustified, especially by the courts. See Calhoun, A Discourse on the Constitution and Government of the United States 78, 171, 186-87, 224-28 *in* Calhoun, supra note 43, at 3 ("I have now shown that the 25th section of the judiciary act is unauthorized by the constitution; and that it rests on an assumption which would give to Congress the right to enforce, through the judiciary department, whatever measures it might think proper to adopt; and to put down all resistance by force." Id. at 238). See also John C. Calhoun, Speech on the Revue Collection [Force] Bill, 403, 406-09, *in* Calhoun, supra note 43, at 3. Southerners generally were aware of Thomas Jefferson's view on this perceived federal usurpation of interpretive power.

> I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that, too, by constructions which, if legitimate, leave no limits to power. Take together the decisions of the federal court, the doctrines of the President, and the misconstructions of the constitutional compact acted on by the

the ratification of the Constitution.[79]

If all else failed, and the amendment itself was deemed unconstitutional by any state, or at least beyond the intent of the parties to the compact at the time of the entry of the state into the union, then a state could secede from the union.[80] States are bound to acquiesce to an act of the federal government within the limits of the federal constitution or made so through the amendment power. But if the federal action "transcends the limits of the amending power - be inconsistent with the character of the Constitution and with the ends for which it was established, or with the nature of the system - the result is different. In such a case, the State ... may choose whether it will or whether it will not secede from the Union."[81] To preserve the union after the bonds of consent are broken, after an action is taken which deprives a state of the benefit of its bargain in joining the union in the first place, is tyranny.[82] Such notions, of course, were inimical to modern understandings of orthodox post Civil War American federalism.[83]

The primary task of the agreements creating this general government, was,

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> legislature of the federal branch, and it is but too evident, that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic.

Thomas Jefferson, Letter to William Giles, December 26, 1825, *quoted in* Carpenter, supra note 74, at 75-76. Jefferson, in later life, was not above chiding one of his appointees to the Supreme Court, for his failure to more actively and publicly restrain the consolidationist endeavors of the Marshall Court. See G. Edward White, The Working Life of the Marshall Court, 1815-1835, 30 Va. L. Rev. 1, 40-41 (1984).

[79] Jack Rakove notes the strength of the arguments by the anti-federalists about the consequences of the proposed Article III of the federal constitution. See Rakove, supra note 12, at 186-88.

[80] See, e.g., Calhoun, Speech on the Revenue Collection [Force] Bill, *in* Calhoun, supra note 43, at 403, 436-37. Calhoun noted that the threats of interposition and secession were a necessary inducement to prevent federal aggrandizement. Without either threat, the federal government would have no incentive to resort to the amendment power, and engage in the necessary political discussion with the states attendant on the resort to the amendment power.

> The federal government never will make an appeal to the amending power, in case of conflict, unless compelled - nor, indeed, willingly in any case, except with a view to enlarge the powers it has usurped by construction. The only means, by which it can be compelled to make an appeal, are the negative powers of the constitution - and especially, so far the reserved powers are concerned - by that of its coordinates - and State interposition.

John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 210.

[81] Id. at 212.

[82] "No, no. You cannot keep the States united in their constitutional and federal bonds by force. Force may, indeed, hold the parts together, but such union would be the bond between master and slave - a union of exaction on one side and of unqualified *obedience* on the other." Calhoun, Speech on the Revenue Collection [Force] Bill, *in* Calhoun, supra note 43, at 436 (emphasis added).

Calhoun was not the first to suggest this basis of secession. The same point was made in 1811 by Josiah Quincy, a Massachusetts citizen elected to the House of Representatives as a Federalist, and President of Harvard College, in opposing a bill permitting Louisiana to form a state government. He suggested that the Constitution did not give the general government the right to admit states outside the original boundaries of the union without a constitutional amendment. "If this Bill passes, it is my deliberate opinion that it is virtually a dissolution of this Union; that it will free the states from their moral obligation, and, as it will be the right of all, so it will be the duty of some, definitely to prepare for separation, amicably if they can, violently if they must." Josiah Quincy, Against the Admission of New States, Debates, 11 Cong., 3 Sess., pp 524-42 (January 14, 1811), *reprinted in* 4 The Annals of America 283 (1968).

[83] For a modern view of American secession, see Sunstein, supra note 30.

therefore, to preserve the division of authority created by the act of union, and to prevent the encroachment by the general government of authority held by the constituent states, at least without the explicit consent of those states by whatever means provided. Calhoun's sensitivity to the tendency of independent supra-national entities to appropriate for themselves powers which might not have been expressly delegated to them without the consent of their constituent parts drove his construction of what has become the alternate vision of a federal union.[84] This alternate vision provided the basis of the rewriting of the federal constitution by the seceding states of the American union in 1861. As Jefferson Davis noted in his inaugural address: "The Constitution formed by our fathers is that of these Confederate States, in their exposition of it, and in the judicial construction it has received, we have a light which reveals its true meaning."[85]

After 1865, Calhoun's vision was substantially discredited and demonized as a mere apology for slavery.[86] Proposals made during the American Civil War for the reordering of the American federation along the lines suggested by Calhoun were dismissed as unworkable.[87] The only nation which implemented this vision, the Confederate States of America, was marginalized as both short-lived and morally evil; it remains essentially forgotten as a model of governance.[88] The developing American

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[84] "[T]he conclusion is inevitable, that the reserved powers were reserved equally against every department of the Government, and as strongly against the judicial as against the other departments; and, of course, were left under the exclusive will of the States." Calhoun, Speech on the Revenue Collection [Force] Bill, *in* Calhoun, supra note 43, at 409.

[85] Jefferson Davis, Inaugural Address, Montgomery, Alabama, 1861, *quoted in* Charles Robert Lee, Jr., The Confederate Constitutions 80 (1963).

[86] There have been periodic little revivals. The neo-Calhounians of the 1940s and 1950s provided one of the few examples which was not tied to reactionary politics emanating from the states of the former Confederacy. For a discussion of this movement, see, e.g., Current, supra note 43, at 136-47.

[87] The most interesting was that of Clement L. Vallandigham, an Ohio Democrat. See Frank L. Klement, The Limits of Dissent: Clement L. Vallandigham and the Civil War (1970). He proposed a federal union in which the concurrent majority principle, applied to the regions of the United States, would play a prominent part. He advocated that the union be divided into four regions. "On demand of one-third of the senators from any one section a concurrent majority from each of the four sections would be required to pass legislation. Similarly, the president and vice-president must obtain majority support from electors within each section." Donald W. Meinig, 2 The Shaping of America: A Geographical Perspective on 500 Years of History 490 (1993).

Of course, Clement Vallandigham is most famous for his arrest by a Union general in 1863 after a speech in which he excoriated the president and his policies. After a military trial he was sentenced to imprisonment, but President Lincoln commuted the sentence to banishment. The Supreme Court thereafter refused review on a writ of habeas corpus. He traveled to Bermuda and then Canada before returning to the United States. For a discussion of this episode see William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 65-67 (1998). See, generally, Michael Kent Curtis, Lincoln, Vallandigham and Anti-War Speech in the Civil War, 7 Wm. & Mary Bill of Rights J. 105 (1998).

[88] The Constitution of the Confederate States of America, and constitutional government during the course of that short lived Republic, remains the domain of specialists, many preferring the stories of battles or of individuals to that of governance. For some relevant studies, see, e.g., Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism (1991); Thomas B. Alexander & Richard E. Beringer, The Anatomy of the Confederate Congress: A Study of Influences of Member Characteristics on Legislative Voting Behavior, 1861-1865 (1972); Richard E. Beringer, Political Factionalism in the Confederate Congress (1966); Charles Robert Lee, Jr., The Confederate Constitutions (1963); Wilfred Buck Yearns, The Confederate Congress (1960). Of these, Marshall DeRosa has argued that "the Confederacy was closer to the Revolutionary ideal of premising the government upon the consent of the governed. This ideal was in contradistinction to the emerging nationalistic political order that was embodied in the U.S. Constitution, cultivated by Publius, and harvested by the Lincoln Republicans." DeRosa, supra,

national consciousness of the 19th century excised from the domestic political lexicon Calhoun's vision of federal organization much like Russian Stalinists of the 20th century rewrote history to remove mention of now dangerous people, events, or dogma that had once been acceptable.[89] What remained of Calhoun's vision was relegated to the theory of international law. What he was said to describe could amount to little more than a confederation, and confederations, thereafter viewed as mere assemblages of states subject to the regime of international law, were never to be confused with the domestic arrangements of federal states as memorialized in a constitution.[90]

III. THE EUROPEAN CONVERSATIONS ON FEDERAL UNION

Ironically, the nineteenth century American debates about the acceptable configurations of federalism within America have re-emerged in modern Europe. Since the 1960's two distinct visions of the federal relationship between the institutions of the European Community[91] and the Member States have been advanced.[92] The more

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at 56.

[89] Calhoun well understood this possibility. In discussing the outcome of disagreement over construction of the constitution when a majority party or faction wrests unchecked control of all of the mechanisms of government. In a way that prophesied the fate of his own ideas, Calhoun argued:

> But of what possible avail could the strict construction of the minor party be, against the liberal interpretation of the major, when the one would have all the powers of the government to carry its construction into effect - and the other be deprived of all means of enforcing its construction? In a contest so unequal, the result would not be doubtful. The party in favor of the restrictions would be overpowered. At first, they might command some respect, and do something to stay the march of encroachment; but they would, in the progress of the contest, be regarded as mere abstractionists; and indeed, deservedly, if they should indulge in the folly of supposing that the party in possession of the ballot box and the physical force of the country, could be successfully resisted by an appeal to reason, truth, justice, or the obligations imposed by the constitution.

John C. Calhoun, A Disquisition on Government, *in* Calhoun, supra note 43, at 27. In this light the fate of Calhoun's ideas should come as no surprise. "[F]or it is practically an axiom of American history that Calhoun's political theories, subtle, even profound though they may have been, were reduced to absurdity and irrelevance by the Civil War." Drucker, supra note 59, *in* Thomas, supra note 43, at 133-34. The contest for dominance of a federal "vision" was replaced with the now well accepted, perhaps mindlessly well accepted, notion of the inevitability of the "progress" of American federalism in the way it has currently emerged. Post 1865 national federalism was as much a creature of manifest destiny, inevitable, perhaps even divinely inspired, as was the American push to the Pacific Ocean. Consider this offering to students of American history: "The Civil War proved that the United States would stand, not as a loose confederation of sovereign states but as one nation, indivisible." Bernard Bailyn et al., 1 The Great Republic: A History of the American People 657 (1992).

[90] One gets a good whiff of this attitude in Wheare, supra note 13, at 2, 11. Consider also Wildhaber's distinction of a federation from a confederation: "A federal state can be distinguished from a confederation, (1) if the federal government has the power to operate directly on individuals, (2) if its competences are relatively large and not limited to a narrowly defined, functional goal, and (3) if the mutual relations between the member units are governed by municipal, federal law (or 'international law by analogy'), not by international law." Wildhaber, supra note 14, at 256. This definition almost appears to have the European Communities in mind as the standard for confederation, the antipode to the real federations in the United States, Canada, Germany and other traditional federal states. For a classic statement of this position, see Taylor, supra note 14. This idea is contested in Weiler, supra note 10, at 184-87 and discussion infra.

[91] The formal structure of the governance of the European Union is complex. There is no singular vision of the relationship between member state and general government. Rather, the structuring law of the TEU has created different governance forms on a functional basis. It is thus important to emphasize the

expansive, and from an American perspective, orthodox view, has been the product of thirty or so years of theorizing by the organs of the Community and its friends within the European academic and political community. At the forefront of this effort has been the European Court of Justice ("ECJ").[93] The other view has been most visibly championed by the constitutional courts of certain member states of the Community and their friends, principally but by no means exclusively by Germany, Spain, and Italy. British courts have contributed a common law twist on the conversation.

The institutions of the European Union have declared three fundamental general principles of law which give legitimacy to the organization created.[94] These are the autonomy of the European Community, the supremacy of the Community within the ambit of its authority, the direct relationship between the Community and the citizens of the Member States, and the sole competence of the European Court of Justice to determine the nature and scope of the powers ceded to the Community by the Member States.[95] The Community, in its own eyes, has been transformed from a self-styled

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distinction between the European Communities and the European Union. By European Communities, I mean the first pillar of the TEU. Here, the 'supranational' or 'federal' character of the institutions and powers of the general government are at their most traditional. But the competence of the European Union also includes the functional areas of governance contained in the second and third pillars (co-operation in justice and home affairs and common foreign and security) of the TEU. These have a much more of an intergovernmental flavor. The relationship of the EU to the European Communities and the institutional relationships among the three pillars is not settled. See, e.g., Deirdre Curtin, The Constitutional Structure of the European Union: A Europe of 'Bits and Pieces', 30 Common Mkt. L. Rev. 17 (1993)

[92] Europeans will be horrified to have the distinctions drawn in this ghastly American manner. For Europeans, these distinct visions have traditionally been labeled differently. Eurocentrists have embraced the federalism model of the United States in the twentieth century. Those who oppose that Eurocentrist federal vision tend to be labeled "functionalists." My sense is that both are federalist in substance. Indeed, by my point in this section is to demonstrate the ways in which European "anti-federalists" have revived the language and concepts of the American state centered and pragmatic federalism of Calhoun.

[93] For a discussion of the influence of the ECJ on policy within the European Community, see, e.g., Rachel D. Brewster, Calling the Tune or Following the Lead: The European Court of Justice in European Policy Making, 13 Tul. Eur. & Civ. L.F. 1 (1998). For a taste of the volumes of writing on the ECJ as a source of European law or general principles and as a critical actor in the integration of the Community, see, e.g., Weiler, supra note 10, at 188-218; Haltje Rasmussen, On Law and Policy in the European Court of Justice (1986); Martin Shapiro, The European Court of Justice, *in* The Evolution of EU Law (Paul Craig & Gráinne de Búrca eds. 1999).

[94] "General principles of law are the values which underlie enacted law." John Bell et al., Principles of French Law 14 (1998).

[95] "The key doctrinal dimensions of the so called constitutionalization of the Community legal order are so well known as to require only the briefest of allusions: Direct Effect, Supremacy, Pre-emption, Implied Powers, and all of the rest." Joseph H.H. Weiler, Anne-Marie Slaughter, Alec Stone Sweet, Prologue - The European Courts of Justice, *in* The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context v, vi (Anne-Marie Slaughter et al. eds., 1998) [hereinafter The European Court and National Courts]. Daniel Wincott criticizes much of the academic analysis of European integration because it has tended to fracture the locus of integration within the institutions of the E.U.

"For example legal analysts typically concentrate on the internal dynamics of the development of the jurisprudence of the Court of Justice; 'neo-functionalist' political scientists ... direct their attention towards the development of a pattern of interest group activity around the supranational Commission, a pattern which can be conceived of as internal to the Community; and 'realist' or 'intergovernmentalist' ... political scientists downgrade the distinctiveness of the Community, comprehending it using almost unmodified international relations models. This latter approach implies that change in the European Community is caused by factors which are more or less external to it, either by treating the Community as merely a creature of the member states (and conceiving of the member states as external to the Community) or by treating it as a product of the international system of states." Daniel Wincott, Political Theory, Law and European Union,

regional organization of sovereign states to - something else.

> [T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Communities Treaties established a new legal order for the benefit of which the States have limited sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.[96]

There is a strong whiff of the federal and the national to this "something else."[97] Yet neither the institutions of the EU nor the great body of European legal commentators dare speak its name.

The doctrines of autonomy and supremacy, when applied to the institutions of the EU[98] outline a form of federal union - though by no means an American federal union - which is unmistakable, whatever the skittishness of the Europeans themselves to name it as such. The doctrines of the autonomy and supremacy of Community law effectively shift legislative power to the federal level. The doctrine of autonomy essentially posits the existence and independence of the Communities as a political unit of government. In its absence, what passes for the Community would amount to little more than collective obligations of the constituent states. Autonomy is the name the ECJ has given to the very notion of federalism so taken for granted in other federal states. Autonomy contains within it the idea that the Community is set apart from its constituent states. The Community, taken as a whole (under the doctrine of unity), constitutes an independent government with concurrent competence over the territories of the constituent states.[99] Autonomy serves as a shield against Member State encroachment of the governmental prerogatives of the Community.[100] Autonomy is protected by the power of the ECJ to "ensure that in the interpretation and application of the Treaty the law is observed,"[101] as well as by the authority given the ECJ to interpret the "federal" basic law of the EU and the validity of the acts of the EU institutions when raised in the

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in New Legal Dynamics of European Union 293, 300-01 (Jo Shaw & Gillian More eds., 1995).

[96] European Economic Area, Opinion 1/91, 1991 E.C.R. I–6079, at ¶ 21.

[97] For a discussion of the forces shaping the emerging federalism of the European Union, see Larry Catá Backer, Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union, 12 Emory Int'l L. Rev. 1331 (1998). For an argument that the European Union ought to make the leap to orthodox federation of the American type, see, e.g., Mancini, supra note 19. Judge Mancini, I believe, makes the fundamental error of assuming that the current organization is not a state. Professor Weiler's reply is instructive. See, Joseph H. H. Weiler, Europe: The Case Against the Case for Statehood, 4 Eur. L. Rev. 43 (1998). In his defense of the uniqueness of the construction of the EU, I believe Professor Weiler underestimates the extent to which the EU has already begun to exhibit the characteristics of a federal state on the American model. Judge Mancini is not a solitary voice within Europe. Groups have emerged which seek a more traditional federal union within Europe. An organization which calls itself Young Federalist Europeans (Jeunes Européens Fédéralistes) their website can be found at http://www.jef-europe.org) have called for the creation of a European constitution. See also http://www.euraction.org.

[98] Of course, supremacy and autonomy do not exist as uniform matters within the E.U. Their application varies as between when the institutions function as the Communities under the First Pillar or when they function more inter-governmentally as under the Second and Third Pillars of the Treaties).

[99] See, e.g., San Michele v. High Authority, Case 9/65, 1967 E.C.R. 1.

[100] See, e.g., Variola SpA v. Amministrazione Italiana delle Finanze, Case 34/73, 1973 E.C.R. 981.

[101] Treaty Establishing the European Community [TEC], art. 164.

courts of a member state.[102]

Having defined the complex of obligations and undertakings in the Community Treaties as creating an autonomous government does not resolve the question of the status of that government relative to the states which constitute this new government. The doctrine of supremacy provides such a definition of position. In this respect, the ECJ has attempted to impose on the constituent states of the Community review mechanisms which appear to mimic the American model.[103] Under this conception of federalism, the constituent states of the federative enterprise cede sovereignty upwards to the (now autonomous and independent) general government.[104] As such, according to the ECJ:

> every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[105]

This notion of supremacy is based, in part, on the belief in the ideal of the universality of norms shared among communities, at least within Europe. "Harmonization within the European Union's 'new legal order' is coercive. It suggests the limits of lawmaking to which the constituent states of the Community must adhere; it supplies boundaries to delineate the conduct norms of the supranational *polis*. Harmonization regularizes and levels national differences."[106]

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[102] TEC art. 177.

[103] Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, 1963 E.C.R. 1, [1963] C.M.L.R. 105. In now often quoted language, the ECJ stated that:

> [T]he Community constitutes a new legal order of international law for the benefit of which that states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Van Gend en Loos, [1963] C.M.L.R. at 129.

[104] Costa v. ENEL, Case 6/64, 1964 E.C.R. 585, [1964] C.M.L.R. 425 ("In fact, by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real power stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves"). *Costa*, [1964] C.M.L.R. at 455. See also Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel, Case 11/70, 1970 E.C.R. 1127, [1972] C.M.L.R. 255; Commission v. Italy (Second Art Treasures), Case 48/71, 1972 E.C.R. 527.

[105] Amministrazione delle Finanze dello Stato v. Simmenthal Spa, Case 106/77, 1978 E.C.R. 629 (Simmenthal II).

[106] Backer, supra note 97, at 1347. Jurgen Habermas suggests the nature of this community limited universalistic leveling within European communities:

> The universalistic content of basic rights is not restricted by the ethical permeation of the legal

Yet, it is also true that autonomy and supremacy do not provide vehicles for the assertion of limitless power. The federation can exercise power only within its competence. The essence of federalism, after all, is a formal contractually based limitation of power among the institutional participants of the federation. Thus, while the basic level of a federal system, usually the constituent state, might claim residuary power, the higher levels of such a system usually may assert only such power as may be conceded to it by its constituent parts, that is, the parts which hold the residuary power. In both the EU and U.S. the residuary power resides in the constituent state. The general or supra-constituent layer of government operates within the constraints of the concession made to it by these residuaries. In the European Union, Commission, Council and Court share significant responsibility for harmonization among the constituent parts of the Union within the confines of the power conceded *to* them by the Community Treaties.[107]

But even though neither the United States nor the EU can assert authority beyond that provided in their respective governance documents, the Community Institutions, and the ECJ, in particular, have never hesitated to find such competence to be breathtakingly broad.[108] As Jean-Victor Louis has suggested, relying on the work of Pierre Pescatore:

> Faced with the task of interpreting a constitutional framework that gives Community Institutions wide powers to implement its goals, the Court has gone beyond the technical rules laid down in the Treaties themselves to establish the fundamental principles on which the creation of the Community is based. ... The principles in question are equality, freedom, solidarity and unity.[109]

The ECJ has taken for itself, the sole right of interpretation of the acts of the Institutions of the Community, arguing that "where the validity of a Community Act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice."[110] Moreover, the ECJ's extraordinarily broad (and some might argue

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> order; rather, it thoroughly penetrates nationally specific contexts. It is for this reason that the legal neutralization of value conflicts, which would otherwise fragment the political community, requires that the justice aspect *have a privileged position*. ... In Germany, for example, the rights of young Turkish women must, if necessary, be enforced against the will of fathers who appeal to the prerogatives of their culture of origin.

Jurgen Habermas, Reply to Symposium Participants, Benjamin N. Cardozo School of Law, 17 Cardozo L. Rev. 1477, 1498 (1996).

[107] On the institutional framework of the Community, see, e.g., David Freestone & Scott Davidson, The Institutional Framework of the European Communities (1988). The TEU's emphasis on harmonization is discussed at note 2, supra.

[108] Asscher v. Staatssecretaris van Financian, Case C-107/94, 1996 E.C.R. I-3089, [1996] 3 C.M.L.R. 61 (direct taxation fell within the competence of the Member States, they nonetheless had to exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality).

[109] Jean-Victor Louis, The Community Legal Order 50-51 (2d ed. 1990).

[110] Firma Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, 1987 E.C.R. 4199, para 17. The ECJ relied on TEC art. 173 and 177 to support its view. From both, the ECJ drew the principle that both the Treaty and the acts of the Community Institutions were to be uniformly interpreted, and that responsibility for such a project had been vested in the Court of Justice. Id. at para 15, 17.

EU Treaty expanding) interpretation of, for instance, Articles 23, 28, and 39 (ex articles 9, 30 and 48), coupled with the "discovery" of consumer protection and consumer fraud, are well known and will not be discussed here.[111]

While there may be substantial agreement within the constituent states respecting the validity of the principle of autonomy,[112] there is significantly less unanimity with respect to the validity of the notion of Community supremacy.[113] Member States continue to resist this vision of the federal union between the Community and its constituent parts. Among the most notorious at the intellectual forefront of this effort has been the German Constitutional Court. Its jurisprudence on the relationship between Germany and the Community has resurrected the federalism principles articulated in the anti-bellum American South.[114] The German jurists are by no means the only people or institutions contesting the legitimacy of the federal vision presented by the institutions of the EU and the "Europeanist" commentators.[115] The question of federalism is as much political in Europe as it is juridical. I concentrate here on the vision of the German Constitutional Court as a notorious and widely known representative of a vision of federal organization contesting the orthodox vision being created by the emerging general government of Europe.

That the Germans have taken up the banner of Calhoun in resisting the transfer of what they conceive of as sovereign power up to a general European government should come as no surprise. The intellectual cross-pollination between the American South and the German nation is long standing. Calhoun's views of the nature of confederations, and the possibilities of union in multi-governmental systems, draws some inspiration from the writings of Pufendorf.[116] Many Southern lawyers journeyed to Germany to

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[111] See, e.g., Finanzamt Köln-Altstadt v. Schumacher, Case C-279/93, 1995 E.C.R. I-225; [1996] 2 C.M.L.R. 450; Wielockx v Inspecteur der Directe Belastingen, Case C-80/94, 1995 E.C.R. I-2493. For a discussion of the European Court of Justice's Article 28 (ex Article 30) jurisprudence, see Miguel Poiares Maduro, We the Court: The European Court of Justice and the European Economic Constitution (1998).

[112] This is not to say that the issue of Community autonomy is unanimously settled. See, e.g., Theodor Schilling, The Autonomy of the Community Legal Order - An Analysis of Possible Foundations, 37 Harv. Int'l L.J. 389 (1996) and Joseph H.H. Weiler's response, Joseph H.H. Weiler, The Autonomy of the Community Legal Order: Through the Looking Glass, *in* Joseph H.H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration 286-323 (1999).

[113] McCarthy's Ltd. v. Smith, [1979] 3 C.M.L.R 44 (English Court of Appeal, Civil Div.)(per Denning MR); Brunner v. European Union Treaty, Cases 2 BvR 2134 and 2159, [1994] 1 C.M.L.R. 57 (Federal Constitutional Court, second chamber, October 12, 1993); Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel (Solange I), Case 2 BVL 52/71, 37 BVERFGE 271, [1974] C.M.L.R. 540 (Federal Constitutional Court (2nd Senate)).

[114] See, e.g., *Brunner*, [1994] 1 C.M.L.R. 57. For earlier versions of this position, see, Internationale Handelsgesellschaft, [1970] E.C.R. 1127, [1972]; Internationale Handelsgesellschaft (Solange I), [1974] C.M.L.R. 540 (Federal Constitutional Court (2nd Senate)). American comparativists have begun to explore the similarities between ante-bellum American jurisprudence and that of the German Constitutional Court. For an astute exploration of such similarities, see, Steve J. Boom, The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?", 43 Am. J. Comp. L. 177 (1995).

[115] See, e.g., Phelan, supra note 2.

[116] See 2 Samuel L. Pufendorf, De Jure Naturae et Gentium Libri Octo (On The Law of Nature and of Nations) 1046 (James Brown Scott ed., C.H. Oldfather trans., 1934) (1688). Pufendorf, of course, was hardly the only inspiration for the theory of federal governance which was very much alive during the time of the early Republic. In addition to Pufendorf, Montesquieu and Vattel proved extremely influential in shaping the understanding of the possibility of organizing several states into a union without destroying the constituent states in the process. See, Charles de Montesquieu, The Spirit of the Laws (Anne M. Cohler et al. eds., 1989) (1777); Emmerich de Vattel, The Law of Nations of the Principles of Natural Law (Charles G. Fenwick

finish their legal education.[117]

The middle and second half of the nineteenth century saw the influence of Calhoun in Germany. Max von Seydel "was certainly indebted to Calhoun for much of his thought on the subject [of sovereignty]; he had read much of Calhoun's work, cited and quoted from him with approval, and set forth the same doctrines, modified only as far as was necessary to meet the different facts of the German situation."[118] Calhoun's notions of the (geographical) homogeneity necessary for nations to form and to distinguish themselves from others finds echoes in modern Germany as well, not only in the work of contemporary academics,[119] but also in the analysis of the German Federal Constitutional Court. Ironically, the homogeneity necessary for the construction of discrete communities has been transformed from one based on geography to one based on culture, language, or even race.[120]

Moreover, the Germans, more than any other group within Europe, have had the greatest and most intimate experience with federal union. German federalism has its roots in the Holy Roman Empire.[121] After a period of confederation and disunion, most

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trans., 1916). For a brief general discussion of the influence of these thinkers, see, e.g., Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 San Diego L. Rev. 249, 258-268 (1997). On the influence of Vattel during the late 18th century, see, Francis S. Ruddy, International Law in the Enlightenment 281 (1975). The influence of Pufendorf and Montesquieu is well known. Pufendorf is particularly interesting because of the intimation in his work that while sovereignty may not be divided, it can be delegated by the sovereign to such institutions as the sovereign creates for that purpose. Implicit, of course, is the idea that indirect delegation is possible as well, that is from the sovereign to the institutions of the state, and then from out of that institution to that of a supervening state. See Pufendorf, supra, bk. VIII, ch. VI.

[117] See, e.g., John T. Krumpelmann, Southern Scholars in Goethe's Germany (1964); M.H. Hoeflich, Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century, 35 Am. J. Comp. L. 599 (1987).

[118] Spain, supra note 16, at 208 ("To both Calhoun and Von Seydel, the central agency was stronger because the member states as sovereigns had transferred to it some of the rights to be exercised in common even upon individuals within the states. The federal union or *staatsrechtliche Bund* came into being only when the sovereign member states made the content of the treaty of union between them at the same time law within the state. ... To Von Seydel, the German Reich was just such a monarchical *staastsrechtliche Bund* and the United States of America was a republican variety of the same federal form." Id. at 211).

[119] For a discussion of some of these commentators, see, e.g., Manfred Zuleeg, What Holds Nations Together? Cohesion and Democracy in the United States of America and in the European Union, 45 Am. J. Comp. L. 505 (1997) (referring, in this case, to the influence on those involved in the crafting of the German *Maastricht* decision of the transmogrified theories of Calhoun through the work of people such as the sometimes discredited Carl Schmitt for the proposition that both nations and democracy require a certain homogeneity in order to form and survive. Id. at 510). But this is not a notion merely of the political right. Jurgen Habermas' process based constitutionalism would be limited to those willing to "play by the rules." Jurgen Habermas, Struggles for Recognition in Constitutional Law, 1 Eur. J. Phil. 128 (1993). Renata Salecl's democratic unions marginalizes the "anti-democratic." Renata Salecl, The Spoils of Freedom: Psychoanalysis and Feminism After the Fall of Socialism 37 (1994).

[120] Nathaniel Berman has noted the persistence of the dual usage of terms such as "nation." In one sense it means citizenship in a duly constituted and recognized state, irrespective of the racial, religious or ethnic ties of the state. In another sense, the term means precisely these communities bonded together by ties of race, ethnicity, language, religion or the like. "This terminological ambivalence highlights the difficulty of working out the relationship between the formal state and the ethnic nation in the new international law." Nathaniel Berman, "But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev. 1792, 1828 (1993).

[121] In a continent in which royal houses were consolidating and centralizing authority first in the person of the monarch and then in the notion of the state, the amorphous multi-sovereign Empire of the Germans appeared, as Pufendorf suggested, as "an odd and monstrous structure." Severini de Mozambano (Samuel

of the German states, excluding the Austrian lands, came together in the other great federal state of the nineteenth century - the German Reich of 1871. The unification of Germany in the form of the Hohenzollern Reich was unusual by the standards of a Europe of centralized states.[122] German unification

> came about essentially through the achievement of hegemony by a single large state, Prussia. This involved ... the bringing together of the German states into a confederation under the leadership of the Prussian monarchy. However, the policy pursued so masterfully by Bismarck after 1862 was intended just as much to preserve Prussia as a dynastic state as to satisfy German national demands by bringing about a measure of political unification. This duality of purpose was clearly expressed in the initial step toward unification, the North German Confederation of 1867 and then, more dramatically, in the Empire formed in 1871. This was a federation of states (25 in all) in which the decisive role of Prussia was recognized through its dominant position in the institution which was formally sovereign, the Bundesrat, or chamber representing the governments of the member states. Yet the Reich as constructed in 1871 also allowed the other states to retain considerable internal autonomy in the administration of domestic policies and services.[123]

German federal principles, submerged throughout the Weimar Period and suppressed during the Third Reich dominated by the National Socialist Party, have re-emerged after 1949. The German experience with federalism, as well as its horrible experience with a centralizing government between 1918 and 1945 have infused German courts viewing the growth of European federalism with a healthy dose of scepticism of the supremacy, hierarchy and hegemony of the general government. Such governments have tended to be anti-democratic and tyrannical. Calhoun's notions of federalism finds a receptive audience in the German courts. Ironically, the court's scepticism must be measured against the political commitment of German elites and non-judicial political institutions to international integration. Within Germany, it has been argued, "the balance of norms has favoured the upward transfer of powers. In the administrative domain that has not been so pronounced, resulting in the role of the Länder conforming to a kind of 'administrative federalism.'"[124] Between Germany and Europe, there has been an

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Pufendorf), De Statu Imperiii Germanici (1667), *quoted in* Hans-Peter Schneider, German Unification and the Federal System: The Challenge of Reform, *in* Recasting German Federalism: The Legacies of Unification 58 (Charlie Jeffrey ed., 1999).

The then emerging form of federalism in Germany was indeed not easily reconcilable with the traditional categories of Aristotelian teaching. And the controversies which rages in the seventeenth century about the form of the state of the Holy Roman Empire continued until its collapse at the beginning of the nineteenth century. Hans-Peter Schneider, German Unification and the Federal System: The Challenge of Reform, *in* Recasting German Federalism: The Legacies of Unification 58 (Charlie Jeffrey ed., 1999).

[122] Nevil Johnson, Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany, *in* Recasting German Federalism: The Legacies of Unification 23, 26 (Charlie Jeffrey ed., 1999).

[123] Id. at 26-27.

[124] Simon Bulmer, Efficiency, Democracy and Post-Unification Federalism in Germany: Critical Analysis, *in* Recasting German Federalism: The Legacies of Unification 312, 323 (Charlie Jeffrey ed., 1999).

institutional commitment to integration by both federal and Länder institutions.[125]

And so, even as the European Court of Justice was constructing its vision of the federal relationship between the EU and the Member States, the German Federal Constitutional Court has been developing its own construction of the common enterprise of Europe.[126] This construction resurrects the Calhounian vision of federal union, for the German Court has taken the position that it, and not the Institutions of the Community, has the authority to determine the validity of actions taken by Community Institutions.[127] It has suggested that were it to disapprove of an action of the Community, such action could not be enforced in Germany, whatever the legal effect of the Community action in the other Member States of the EU.[128] "Accordingly, the Federal Constitutional Court will review legal instruments of the European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them."[129]

Here we are presented with a vision of the meaning of federalism within the European Union quite different from that being constructed by the institutions of the European Union. It is a vision of the EU as an association of Member States which retain their separate national identity *(Staatenverbund),*[130] not a Federal State having its own national identity (*Bundesstaat*).[131] For European minimalists,[132] for those still wed

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[125] Simon Bulmer advances three features to this commitment. First, Germany's export oriented economic policies tend to favor integration. Second, institutional inertia tends to favor integration. German federal institutions have been committed to integration for forty or so years. The German Basic Law commits the national institutions to integrationist policies. This is a hard habit to break. Third, German elites have committed to integration. See Bulmer, supra note 124. "This Europeanization process has reinforced the domestic dynamics of German federalism. The quiescence of public opinion on this upward transfer of power has been important. Furthermore, Länder ministers have generally supported this development on the condition that they retain an influence on policy through the Bundesrat." Id.

[126] Among the major expressions of this vision, see, e.g., Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel, Case 11/70, 1970 E.C.R. 1127, 1970; Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel (Solange I), Case 2 BVL 52/71, 37 BVERFGE 271, [1974] C.M.L.R. 540 (Federal Constitutional Court (2nd Senate); *Brunner*, [1994] 1 C.M.L.R. at 89 para. 49.

[127] "If taken as a basis of a power for the Union to determine its competence, Article F(3) of the [TEU] would override the whole competence system of the Union Treaty." *Brunner*, [1994] 1 C.M.L.R. at 89 (para 49). For a discussion of the case, see, e.g., Mattias Herdegen, Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union", 31 Common Mkt. L. Rev. 235 (1994). This echoes the Calhounian attack on the power of the American federal courts to determine the scope of the federal power.

[128] "Any interpretation of the TEU must not, therefore, amount, in effect, to an extension of it. Such an interpretation of the rules conferring competence would not give rise to any binding effect for Germany." *Brunner*, [1994] 1 C.M.L.R. at 89 para. 49.

[129] *Brunner*, [1994] 1 C.M.L.R. at 89 para. 49.

[130] Staatenverbund is an odd term. Manfred Wiegandt notes that the literal translation of the term staatenverbund - federation of states - ought to be used "to reflect that the FCC [Federal Constitutional Court], by using the term 'Staatenverbund' instead of 'Staatenbund,' apparently infers that it views the EU as less than a federation, but also different than an alliance of states." Manfred H. Wiegandt, Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops, 10 Am. U. J. Int'l L. & Pol'y 889, 916 n.30 (1995) (for a discussion of the origin of the term and its prior use by the author of the FCC's Maastricht opinion, see id.).

[131] "As has been stated, the Union Treaty establishes a union of States designed to create an ever closer union among the peoples of Europe organized as states (Article A of the Treaty on European Union), and not a state based on a European people." Brunner v. The European Union Treaty, Cases 2 BvR 2134/92 and 2

to Jean Bodin's notions of "nation"-state and singular sovereignty,[133] the German Court's decision, might well appear inevitable, even if they might quibble with the fine points of the court's reasoning. But, the German view finds its echo, or perhaps echos, in other strands of European thinking based, for example, on the institutional theory of law which posits neither traditional union nor traditional confederation.[134]

Yet, the German Court's reasoning also appears to resurrect those old notions of *race-ethnic-volkish* notions of the construction of states which might appear to make a "European" state impossible.[135] The court stated that "the [Member] States require sufficient areas of significant responsibility of their own, areas in which the people of the State concerned may develop and express itself within a process of forming political will which it legitimizes and controls, in order to give legal expression to those matters which concern that people on a relatively homogenous basis spiritually, socially, and politically."[136] Manfred Zuleeg notes that "[t]here is no way out of the dilemma caused

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BvR 2159/92 (1993), *reproduced and translated in* The Relationship Between European Community Law and National Law: The Cases 526, 556 (Andrew Oppenheimer ed., 1994). The echos of Calhoun are quite strong here. Contrast this section of the German court opinion with Calhoun's notion that:

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

John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 88-89.

[132] See, e.g., Pavlos Eleftheriadis, Aspects of European Constitutionalism, 1996 Eur. L. Rev. 32 (arguing against a singular and unconditional supremacy of Community law). "The gradual constitutional adjustments that have taken place in the legal systems of the Member States as a result of Community law are the best evidence that a process of decentralised convergence is a possible and effective alternative." Id. at 42.

[133] See, e.g., Ese Paasivirta, The European Union: From an Aggregate of States to a Legal Person, 2 Hofstra L. & Pol'y Symp.37 (1997) ("One basic lesson of the discussion of legal personality of the EU is that it demonstrates the central status that the nation-states still have in international society generally (and in Europe in particular) and that the grant of international legal personality is still essentially controlled by states." Id. at 59).

[134] Deirdre M. Curtin & Ige F. Dekker, The EU as a "Layered" International Organization: Institutional Unity in Disguise, *in* The Evolution of EU Law, supra note 93, at 83.

[135] For a discussion of the case in the context of the search for a basis of European citizenship, see Jo Shaw, Citizenship of the Union: Towards Post-National Membership?, *in* VI(1) Collected Courses of the Academy of European Law 237, 288-97 (1998). For an interesting view of the necessity and the ability to avoid fragmentation into *volk* states, see Michael J. Kelly, Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States, 47 Drake L. Rev. 209 (1999) (USA was able to avoid fragmentation because its political divisions are not also ethnic, linguistic or cultural divisions; id. at 260). What is forgotten with statements like that is that, until 1865, there was a strongly held belief that, indeed, the political division of the U.S also mirrored a significant cultural division. See, e.g., Jesse T. Carpenter, The South as a Conscious Minority, 1789-1861: A Study in Political Thought 134 (1930).

[136] *Brunner*, [1994] 1 C.M.L.R. at 89, *translated in* Zuleeg, supra note 119, at 510.

by these requirements. Either the union is and remains a loose association of states without a people of her own or a homogenous European people arises unconstitutionally superseding the existing nations. An ever closer union is a chimera, at least for the Member State Germany." [137] Deirdre Curtin was no less negative: "It is apparently a prerogative neither of sex, of nationality nor of profession to wish to cling to tired old shibboleths of bygone eras."[138]

However, we must acknowledge the strength of these notions within Western thought. The importance of what Ibn Khaldun identified centuries ago as "group feeling,"[139] and its amorality[140], is by now indisputable. Such ideas, conflated with notions of the transcendent rights of groups to arrange their relationships with other groups unrestrained by the will of others, are embodied in the grand theoretical statements of the American Declaration of Independence, the Irish Easter Proclamation of 1916 and the emerging international laws of self-determination.[141] In their most extreme form, however, they also provide the basis for the construction of racist, exclusionary, xenophobic states.[142]

For the German Court, then, it "naturally" follows that the union between Germany and the Community was not to be constituted on the basis of an all consuming hierarchy which is the trademark of the relationships between different levels of government within a state.[143] Instead, the ties between the German state and the European

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[137] Zuleeg, supra note 119, at 510. For further criticism of this racial theory of nations, see, e.g., Joseph H.H. Weiler, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, 1 Euro. L.J. 219 (1995); Matthias Herdegen, Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union," 31 Common Mkt. L. Rev. 235 (1994).

[138] Deirdre Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy 49 (1997) (criticizing the German court's view that democracy can only be secured through a system of nation states in which nationality is the equivalent of cultural and political identity).

[139] The term in Arabic is "*asabiyah*". 'Abd-ar Rachman ibn Khaldûn, The Muqaddimah: An Introduction to History (Franz Rosenthal, trans., N.J. Dawood, ed., 1967) (1377) (*Muqaddimah* (Introduction) to *Kitâb al-'Ibar* (Book of the History of the World) at 97-119.

[140] The sort of group feeling which gives rise to nations such as the United States also give rise to nations of other sorts, such as the ethnically cleaned new nations carved out of the former Yugoslavia. For an interesting view of the way in which group feeling has reasserted itself in the twentieth century, see, Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience 34-71 (1997) (on the rise of political consequences to the narcissism of minor difference with the erosion of the nation-state). That same drive, based on racist formulations of groups, was as much behind the drive of Sudeten Germans for reunification with greater Germany as it was behind the expulsion of ethnic Germans from the within the new boundaries of the Russian, Czechoslovak, or Polish Republics after 1945. A religious gloss to group membership overlay the expulsions of Jews from Spain and the political and social disabilities of the descendants of Jewish and Muslim converts in Spain after 1492. On the origins and effects of the Hispanic socio-cultural and legal obsession with blood purity, see Antonio Domínguez Ortiz, Los Judioconversos en la España moderna 137-71 (1992). The construction and maintenance of groups continues to present the greatest threat to the imposition of a world moral ordering based on emerging notions of tolerance in international customary law.

[141] See Larry Catá Backer, Some Thoughts on The American Declaration of Independence and the Irish Easter Proclamation, 7 Tulsa J. Comp. & Int'l L. --- (forthcoming).

[142] This is well exemplified in the work of the legal theoretician Carl Schmitt. See, e.g., Carl Schmitt, Staat, Bewegung, Volk: Die Driegliederung der Politischen Einheit 42-43 (1933), *translated and reproduced in* George L. Mosse, Nazi Culture: Intellecual, Cultural and Social Life in the Third Reich 326 (George L. Mosse ed., 1966) (the theory of the state rests on the notion of the supremacy of racially similar community acting through a racially similar leader for the manifestation of its will through the acts of an apparatus we have come to understand as a "state"). Europe has no monopoly on this notion of community and state.

[143] For a related argument, which posits the independence of the legal orders of the Member States and

organizations understood to comprise the various pillars of a "union" were necessarily founded on principles understood to be grounded in international law. Under such principles, sovereignty, and the bulk of federal power, resides in the Member States.[144] Domestic law is reduced to and preserved by the constituent states of this federal order. It follows that the German basic law must be superior to the law of the Community, at least to the extent that the law of the Community applicable in Germany must respect the guarantees of the German basic law. Moreover, because the Community lacks status as a nation, that is, as a locus of state power vis-a-vis other states, Germany is free to secede through appropriate actions at a time of its choosing.[145]

Reading the German court's opinion with Calhounian eyes, the court echoes, and sometimes strongly suggests Calhoun's notions of the nature of federal union, of nullification, of the relation of the general to the state governments, of the nature of the devolution of sovereignty "up" to a general government, and of secession. "Germany is one of the 'masters of the Treaties', who have based their commitment to be bound by the Union Treaty, which is concluded 'for an unlimited period' (Article Q of the TEU), on their intention to remain in long-term membership, but who could equally, in the final analysis, revoke that membership by adopting an act with the opposite effect."[146]

The courts of other Member States have also expressed, to varying degrees, disagreement with a notion of supra-supremacy within the organs of the EU However, the extent to which the Member States or their courts have actively resisted the authority of the general government, or of the mandates of the European Court of Justice, has been far less frequent and pronounced than the resistance of the American states and their courts in the period before 1860.[147]

The nature of that disagreement also draws on American antebellum ideas about the nature of granting rights to the general government and the supremacy, or at least the co-equal status, of state constitutions within the complex arrangement which is federal Europe. The Italian courts have echoed the views of the German Constitutional

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the Community, see C.N. Kakouris, La relacion de l'ordre juridique communautaire avec les ordres juridique des etats membres (quelques reflexions parfois peu conformistes), *in* Du droit international au droit del'integration: liber amicorum Pierre Pescatore (Nomos 1987) 319. But see C.N. Kakouris, Do the Member States Possess Judicial Procedural "Autonomy", 34 Common Mkt. L. Rev. 1389 (1997) (autonomy of national courts is provisional, a function of the willingness of national courts to guarantee the application of the law of the Community; id. at 1405).

[144] This presents in radical form the more benignly expressed notions of many students of "European" law that the basis of any union of the States of Europe must be grounded in principles of international "common law." See, e.g., Onora O'Neill, Transnational Justice, *in* Political Theory Today (David Held ed., 1991).

[145] The German Constitutional Court relied on the Treaties establishing the European Union to support this proposition. In particular, the court identified Articles B (subsidiarity), E (enumeration of powers), and F (respect for the national identities of the Member States) of the Treaty on European Union. The Treaty on European Union, along with the text of the EC Treaty as amendment, can be found at 1992 O.J. (L 224) 1, 1 C.M.L.R. 573 (1992)[hereafter TEU]. The court also identified Articles 3a (enumeration of powers principles) and 3b (subsidiarity and proportionality) of the European Community Treaty.

[146] Brunner v. The European Union Treaty, *reproduced and translated in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 526, 557.

[147] See Leslie Friedman Goldstein, State Reaction in Two Trans-State Courts: The European Court of Justice (1958-1994) and the U.S. Supreme Court (1789-1860), *in* Law Above Nations: Supranational Courts and the Legalization of Politics 20 (Mary L. Volcansek ed., 1997). "Although Europe has seen occasions of governmental resistance to the Central Community authority, the occasional occurrences, ... do not approach the veritable parade ... in ... antebellum America." Id. at 22. See also, Steve J. Boom, supra note 114.

Court in this regard.[148] The Italian courts continue to reserve to themselves the power to protect the rights of its citizens as enshrined in the Italian Constitution. To that end, it has assumed the right to review and void Community law,[149] a power which the European Court of Justice had exclusively sought for itself. This assumption of Italian constitutional supremacy, though, is thought by some scholars to be more theoretical than real.[150]

The Spanish courts may be moving in that direction as well. Since the early 1990s, Spanish courts have begun to question the constitutional supremacy of the treaties undergirding the EU[151] The idea that legal supremacy and constitutional supremacy were distinct, and that the national constitutions might not be constrained even by superior law was articulated in 1991.[152] The Spanish Constitutional Court has recently

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[148] See SpA Fragd v. Amministrazione delle Finanze, no. 232, 34 Giur. Cost. I 1001, 72 Rivista di Diritto Internazionale 103 (1989). For a discussion of this case, see, e.g., G. Gaja, New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law, 27 Common Mkt. L. Rev. 83 (1990); Marta Cartabia, The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community. 12 Mich. J. Int'l L. 173 (1990)

[149] It cannot therefore be stated that the Constitutional Court has no competence to verify whether or not a treaty norm, as interpreted and applied by the institutions and organs of the EEC, is in conflict with the fundamental principles of the Italian Constitution or violates the inalienable rights of man. The Constitutional Court is competent to verify the position in this regard by examining the constitutionality of the laws implementing such norms. Such a conflict, whilst being highly unlikely, could still happen. Fragd v. Amministrazione delle Finanze dello Stato (Case No. 232/1989) (Italy, Constitutional Court, April 21, 1989) at para 3.1, *reproduced and translated* in The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 653, 657.

[150] See Adelina Adinilfi, The Judicial Application of Community Law in Italy (1981-1997), 35 Common Mkt. L. Rev. 1313 (1998) (on the relationship between European Community and Italian constitutional law, see id. at 1322-1325). She suggests that, when read closely, the Italian cases limit the scope of their constitutional supremacy doctrine to extreme cases which, for practical purposes, may not arise "owing to the substantive equivalence of the fundamental principles recognized in the Community legal order and by the Italian Constitution respectively." Id. at 1325. On the other hand, the Italian courts would precipitate a constitutional crisis were they to assert the authority they have reserved to themselves and void a Community norm on the basis of its conflict with a fundamental property of the Italian Constitution. "[T]his would normally imply a violation on the part of Italy of its obligations under EC law." Id. at 1324.

[151] In the Electoral Law Constitutionality Case, Case No. 28/91 Spanish Constitutional Court (February 14, 1991), *reproduced in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 702, the Spanish Constitutional Court explained that:

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

Id. at 703.

[152] This notion was confirmed and expanded in the Asepesco Case, Case No. 64/91, Spanish Constitutional Court (March 22, 1991), *reproduced and translated in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 705. There the Spanish Constitutional Court stated that:

> where a constitutional complaint action is brought against an act of the public authorities, taken for the implementation of a provision of Community law, alleging the violation of a fundamental right, such an action falls within the jurisdiction of the Constitutional Court, quite independently

noted that there is a distinction between the granting of the exercise of sovereign powers to a supra-national or general government, such as the institutions of the EU, and the *ownership* of such, which, the Court suggested, remains with the Member State.[153] Thus, Spanish courts have begun to speak of the political consequences of delegation in ways which echo those expressed by Calhoun - drawing a distinction between delegations, even delegations of superior authority, and the permanent ceding of the power to delegate.[154]

English courts, on the other hand, have rested their resistance to the ultimate or binding supremacy of European law and the general government of Europe, on traditional principles of public international law applied to the notion of parliamentary supremacy. Because Britain has adopted a dualist approach to treaty implementation, the obligations of Britain under the various treaties of the European Union have "no effect, as far as these Courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these Courts must go by the Act of Parliament. Until that day comes, we take no notice of it."[155] As such, Parliament retains

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> of the action of whether or not the act at issue is lawful from the strict perspective of the Community legal order and without prejudice to the interpretive value with which the provision may be endowed by Article 10(2) of the Constitution.

Id. at 706.

[153] Re Treaty on European Union, Case No. 1236/92, Spanish Constitutional Court (Plenary Session) (July 1, 1992) *reproduced in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 712 (holding that there was a conflict between the then proposed Treaty on European Union (the Maastricht Treaty) and the Spanish Constitution, which did not permit non-citizens to stand for municipal elections and requiring a conforming amendment of the Spanish Constitution as permitted under another provision of the Spanish Constitution before the Maastricht Treaty could be ratified by Spain). The Court explained that:

> Article 93 [of the Spanish Constitution] permits the granting of the right to "exercise powers derived from the Constitution" which will involve (and has already involved) the specific limitation or restriction for certain purposes, of the powers and competences of the Spanish public authorities (limitations of "sovereign rights" in the expression of the [ECJ] in *Costa v. ENEL* ...). In order for this limitation to operate, however, it is indispensable for there to be a grant of the exercise of powers (not the ownership thereof) to international organizations or institutions.

Id. at 726.

[154] Thus, Calhoun begins his *Discourse* with a reminder to his readers of "the great Cardinal maxim, that the people are the source of all power, that the government of the several States and of the United States are created by them, and for them; that the powers conferred on them are not surrendered but delegated." John C. Calhoun, Discourse on the Government and Constitution of the United States, *in* Calhoun, supra note 43, at 82. Richard Currant's summary of Calhoun's views in this regard bring this point out nicely.

> *Sovereignty*, the ultimate and supreme power within a body politic, is not to be confused with governmental powers. The one is the source for the others. Governmental powers, which are derived from sovereignty, may be delegated and divided; sovereignty itself cannot be. In the United States, sovereignty resides in the people of each of the separate states.

Richard N. Current, John C. Calhoun 104 (1963).

[155] McWhirter v. Attorney General, [1972] C.M.L.R. 882, 886 (C.A.) (Per Lord Denning). The limitations of European law within Britain, based on the dualist approach to international agreements was restated in R. v. Sec. State for Foreign and Commonwealth Affairs (ex parte Lord Rees-Mogg), [1994] L.R. 552 (Q.B. July 30, 1993) ("In the last resort, as was pointed out in argument, though not pursued, it would

the power to legislate contrary to its obligations under the Treaties.[156] The English courts, like their German counterparts, have spoken approvingly of a Member State's at least theoretical power to withdraw by a simple act repealing its accession to the Treaties.[157]

The nature of the implementation power, the "necessary and proper" clause of the Community Treaty,[158] has also proven to be as troublesome for Europeans, especially for the Danes, as it has been for Americans of an earlier century. The resistance to the use of Article 235 contains strong echoes of the warnings about the American "necessary and proper" clause by both Calhoun, and, interestingly enough, by Madison as well. Madison's Report to the Virginia General Assembly on the Alien and Sedition Acts of 1800, contains a much noticed interpretation of the potential for the expansion of the power of a government granted implementation power through a "necessary and proper" clause: "it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers."[159] The Danish resistance demonstrates both the instability of divisions of power within federal systems, and the tendency of greater governments to assert increasing levels of independence and

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presumably be open to the government to denounce the Union Treaty, or at least to fail to comply with its international obligations ... .") (Per Lloyd, L.J.) *reproduced and translated in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 911, 923.

[156] "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our Parliament." MacCarthys Ltd v. Smith, 1979 3 All E.R. 325, 329. [1979] 3 C.M.L.R. 44 (C.A.) (Per Lord Denning) (on the interpretation of the Equal Treatment provisions of EU law as applied in England). See also Paul Craig, Parliamentary Sovereignty in the United Kingdom After Factortame, 11 Yearbook Eur. L. 221, 251, 253 (1991).

[157] The same suggestion was made by Lord Denning in an early English case testing the authority of government to join the European Community. Blackburn v. Attorney-General [1971] 1 W.L.R 1037; 1971 2 All ER 1380 ("So, whilst in theory Mr. Blackburn is quite right in saying that no Parliament can bind another, and that any Parliament can reverse what a previous Parliament has done, nevertheless so far as this court is concerned, I think we will wait until that day comes. We will not pronounce upon it today." Id., 2 All ER at 1383, (per Lord Denning, M.R.); "As to Parliament, in the present state of the law, it can enact, amend, and repeal any legislation it pleases." Id., 2 All ER at 1383 (per Salmon L.J.).

Compare the language of the German and English Courts with that of Calhoun:

> That a State, as a party to the constitutional compact, has the right to secede - acting in the same capacity in which it ratified the Constitution - cannot with any show of reason be denied by any one who regards the Constitution as a compact - if a power should be inserted by the amending power which would radically change the character of the Constitution or the nature of the system, or if the former should fail to fulfill the ends for which it was established.

John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 212.

[158] See TEC art. 305 (ex art. 235).

[159] James Madison, Report on the Alien and Sedition Acts, January 7, 1800, *in* James Madison: Writings 608, 643 (Jack N. Rakove ed., 1999). There is irony in Madison's position. Here is Madison, held up as one of the great authoritative sources of interpretation of the Constitution, rejecting an early and fundamental interpretation of the Constitution. Madison, indeed, underwent a significant change in his views of fidelity of constitutional interpretation to text and the American Constitutional system he helped create. For a discussion of the ways in which Madison's views of the nature of federalism were written into the Constitution, see, George W. Carey, In Defense of the Constitution 80-94 (1995).

supremacy from its constituent parts. The American example of federal drift serves as a warning for states seeking to construct federal systems who wish to avoid the American forms of federal mutation.

Europeans have thus taken up once again the conversation so abruptly cut off in the United States. This conversation is held against the backdrop of the construction of a federal union very different from what has evolved in the United States. Whether that conversation will lead to the development of another peculiar sort of federal *union*, or whether the conversation will also be stopped short, only time will tell. This conversation evidences a banal reality which we in the United States tend to forget at our peril: things change. Governments and governance mutate, and the relationships between associated governments change. No constitution, no theory, no definition will contain or suppress this mutation. Eventually, constitution, theory, and definition must change to recognize evolving reality. The evolution of federalism within Europe provides a case in point.

IV. FEDERALISM BETWEEN THE NATIONAL AND THE INTERNATIONAL

The renewed debate about federalism is taking place within a politically and economically significant entity which is now attempting to put into practice the theories being debated. European practice has at last brought to the forefront the complex possibilities for structuring federal unions which remain federal but which may neither duplicate each other precisely nor fall within a recognized category of governmental organization. It suggests that federalism can contain within its meaning forms of union, and dispersals or diffusions of sovereignty, far beyond what the American states supporting the Union could tolerate as federalism. It also suggests that federalism, that is, the domestic organization of intra-governmental arrangements and the construction of direct relationships between multiple "states" and an individual, has already jumped the barriers traditionally separating "domestic" from "international" law.

A. Uniqueness and Hierarchy Within Federalism

Both the United States and the European Union embarked, early in their histories on what they each self-consciously proclaimed to be a unique experience in governance. Calhoun, himself, emphasized this older understanding of the broadness of the definition of federalism and the special place of the new form of governance within that definition. "Our system is the first that ever substituted a *government* in lieu of [councils of diplomats representing constituent states]. This, in fact, constitutes its peculiar characteristic. It is new, peculiar, and unprecedented."[160] Yet this uniqueness

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[160] John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 117.

> To be more full and explicit - a federal government, though based on a confederacy, is, to the full extent of the powers delegated, as much a government as a national government itself. ... The case is different with a confederacy; for, although it is sometimes called a *government* - its Congress, or Council, or the body representing it, by whatever name it may be called, is much more nearly allied to an assembly of diplomatists, convened to deliberate and determine how a league or treaty between their several sovereigns, for certain defined purposes, shall be carried

was not meant to be revolutionary. The Founding Fathers understood this quite well. "Indeed, what the authors of *The Federalist* claimed for the Constitution of 1787 was not that it substituted a federation for a league but that it substituted an efficient federation for an inefficient federation."[161] As Jack Rakove has correctly noted -

> the Constitution [of 1787] would only modify, not transform, the essential division of the sovereign powers of government that was inherent in American federalism from its outset. ... The national government would henceforth look like a real government, and enjoy the same powers of enacting, executing, and adjudicating law that were the principal badges of state sovereignty. But sovereignty itself would remain diffused - which is to say, it would exist everywhere and no where.[162]

Two hundred years later, as we have seen, the peculiar and unprecedented has wholly displaced the norm. "For the federal principle has come to mean what it does because the United States has come to be what it is."[163]

Likewise, the makers of the European Union have posited the uniqueness of its experiment in governance. The ECJ has for a long time now championed its vision that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals."[164] The "EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law."[165] A school of commentators has indeed arisen to champion this notion of *sui generis* form of EU organization. For these academics, "[t]he European Community itself has no direct parallels in the international legal order. It is an entity which comes between, and

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> into execution; leaving to the parties themselves, to furnish the quota of means, and to cooperate in carrying out what may have been determined on.

Id. at 116-17. For a discussion of Calhoun's conception of the difference between confederation, federation and nation, see Spain, supra note 16, at 186-87. Calhoun's error, I believe, is not necessarily his conflation of confederation and federation, but rather, his relegation of federations, along with confederations, to the regime of law regulating the relations between unrelated sovereigns - international law.

[161] See Wheare, supra note 13, at 11.

[162] Jack N. Rakove, Making a Hash of Sovereignty, Part I, 2 Green Bag 2d 35, 41 (1998).

> For as historians know better than ratifiers could have guessed, these two architects of the new federalism [Hamilton and Madison] privately numbered among its great doubters. And that in turn gives their exposition a further ironic authority. For in dispelling the specter of consolidation, Madison and Hamilton could be entirely sincere because they still doubted that the Convention had in fact solved the dilemma of divided sovereignty in a way that would give the Union the decided advantage over the states.

Rakove, supra note 12, at 189.

More ironically still, perhaps, Calhoun and his anti-nationalist contemporaries were unconvinced that Hamilton and Madison were unconvinced that they had created the germ of a consolidated national government. See John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 239-48.

[163] See Wheare, supra note 13, at 11.

[164] *Van Gend en Loos*, [1963] E.C.R. 1.

[165] European Economic Area, Opinion 1/91, 1991 E.C.R. I-6079, at para 21.

in some respects straddles, the classical intergovernmental organization and federation."[166] Even notions of citizenship requires reconceptualization at the level of the European Union.[167] Some have painted the EU as a system in which state power is not surrendered, but rather one in which power is created at the transnational level which transcends that which could be exercised by individual states and in which the states party to this transnational power creation then share.[168] Others, echoing Calhounian sensitivity for the interests of the constituent parts of a federation, have celebrated the peculiar features of the EU itself, for example the practice of "the Community and its Member States to jointly conclude international treaties with third states and international organizations ... as a near unique contribution to true federalism."[169]

These significantly divergent characterizations of the nature of European federalism may be irritating to Americans who have grown accustomed to the enforced sameness of the American vision of federalism. Yet, this discordance has produced a transformation and expansion of federalism theory at the most fundamental levels. The Europeans have discredited the notion, unassailable in the United States since 1865, that supremacy of the general government must be a fundamental and unalterable component of any system purporting to be federal. It seems, the notion of federalism ought not invariably lead to the certain conclusion that the actions of the government of the most general jurisdiction ought to be supreme within its areas of competence.

There is nothing within a general theory of federalism, other than the historical practices of generally recognized federations to date, which decrees that the actions of the general government ought invariably to be supreme.[170] As victims, perhaps, of at least a century of belief that federalism means post Civil War American federal governance, and that the American federal paradigm represents the inevitable end of any multi-state amalgamation, western scholars of federalism constantly attempt to fit

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[166] Weiler, supra note 19; Alec Stone Sweet & Wayne Sandholtz, European Integration and Supranational Governance, 4 J. Eur. Pub. Pol'y 297 (1997) (different areas of Community power are located within a spectrum between pure intergovernmentalism, where policy is lodged in the members states on a classical confederation, and supranationalism, where the locus of policy shifts upwards).

[167] "In this regard, it should be noted that the European Union is a distinct Community which may require a different form of citizenship from that developed at the national level. In other words, the traditional model of the use of the notions of status and sovereignty to secure allegiance to a national society may not be transferable to the European context." Michelle Everson, The Legacy of the Market Citizen, *in* New Legal Dynamics of European Union, supra note 95, at 71, 90.

[168] See Stephen Weatherill, Law and Integration in the European Union 3, 92 (1995). "The cross border structure is developed precisely because of a perception that national power is illusory in a number of sectors." Id. at 3.

[169] Weiler, supra note 19. "Mixity offers ... a different way in the search for unity and the respect for state interests and autonomy. It is a way which is particularly sensitive to one interest which is difficult to square with the alternative federal-*state* approach: the preservation, so far as possible, of the international personality and capacity of the Member States." Id. at 185.

[170] In a classic essay, Bohdan Halajczuk, responding to the use of a doctrine of international practice articulated by an authority in 1929, to the effect that the constituent states of a federation have no international legal personality, reminds us that "*En réalité ce maitre de l'Ecole de Vienne, loin de prétendre au rôle d'un législateur du droit international, se borne à l'analyse et à la systématisation du droit positif de son époch. ... Fidèle à sa tâche analytique (qu'il distingue bien de la critique et de la politique du droit), Kunz constate seulement que - à son avis - jusqu'en 1929 les membres des Etats fédéraux ne jouissaient pas de la personnalité internationale, et non pas qu'ils ne peuvent pas en jouir.*" Bohdan T. Halajczuk, Les Etats facxe au droit internationale, 13 Osterreichische Zeitschrift für öffentliches Recht 307, 309 (1964).

new forms in old vessels.[171] Thus, for example, a federal system could be constructed in which all of the acts of the general government must meet the basic constitutional requirements of each of the member states thereof.[172] Indeed, there is no reason to presume that a centralizing authority for the pronouncement of norms within a federation is more efficient or fair.[173] It is not inevitable that satisfactory federations must be unified, national and upwardly hierarchical to achieve legitimacy or practical success. There is no necessarily inevitable evolutionary process for successful federations from confederation to tightly bound unified federal state.[174] In this respect,

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[171] Though I disagree with the substance of his thesis, Judge Edward makes this point most trenchantly:

> The sad truth is that, except perhaps in modern Germany, the average European remains largely uninterested in the process of government and even more uninterested in the theory of government. Consequently, the institutional debate tends to be dominated by those who continue to believe that the institutions of the United States are a sort of paradigm towards which ... the rest of civilized mankind are forced to march with unresting feet.

David A.O. Edward, What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration, 5 Colum. J. Eur. L. 1, 2 (1998).

[172] Of course, systems designed in this way are invariably subject to attack on grounds of inefficiency. And the charge is well made, but only if the efficiency of the actions of the general government are what is prized. In systems which value more the individual constitutional traditions of its member states, efficiency notions could have quite different results.

Moreover, the German Constitutional Court has intimated that systems requiring unanimity violate the basic principles of democratic governance which forms a fundamental part of European governance. "Having unanimity as a constant requirement would automatically set the individual will above that of the community of States itself and would thereby call the very foundations of such a community into question." Brunner v. The European Union Treaty, *reproduced and translated in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 526, 552.

[173] For an interesting discussion, see, Gráinne de Búrca, The Language of Rights and European Integration, *in* New Legal Dynamics of European Union, supra note 95, at 29 ("The rhetorical appeal to common constitutional traditions may lose its force, if the state in question does not share the particular conception of the right in issue." Id. at 46). For the American version, see, e.g., G. Edward White, Recovering Coterminous Power Theory, 14 Nova L. Rev. 155 (1989).

[174] Professor Weiler, for example, has suggested that:

> *No es una casualidad que algunas de las más satisfactorias federaciones que han surgido de organizaciones políticas separadas - los Estados Unidos, Suiza, Alemania - disfrutaran de un período de confederación previo a la unificación. Esto no significa que la confederación sea un requisite previo para la federación. Simplemente indica que en una federación creada por integración, más que por devolución, debe haber un período de juste para que las frontera políticas de la nueva organización política lleguen a ser aceptadas socialmente como apropiadas para las reglas de una democracia más amplia en virtud de las cuales la minora aceptará una nueva mayoría.*

Joseph H.H. Weiler, Europa, Fin de Silo 111 (1995) ("It is not a coincidence that some of the most successful federations which have developed from separate political organizations - the U.S., Switzerland, Germany - benefitted from a period of confederation prior to unification. This does not suggest that confederation is a prerequisite to the formation of a federal union. It simply indicates that in a federation created by integration, more than in one created by devolution, there should be a period of adjustment to permit the social acceptance of the new political boundaries as the appropriate basis for the norms of a larger democracy by virtue of which the minority will accept a new political majority."). I suggest that this quasi-biological analogy, this analogy to progress and "fruition," is misapplied in the context of federal structuring. It reflects both conventional and historical understandings of how events have transpired rather than how systems may be successfully ordered under different circumstances. American, German and Swiss federal history do not suggest an inevitability of conditions necessary for success of federal systems.

at least, notions of legitimacy and evolution are needlessly tied.

Moreover, federal systems have been constructed in which the member states are bound ultimately by moral ties.[175] This, certainly, comports with the German Constitutional Court's suggestion of the nature of union within Europe.[176] Indeed, in light of emerging principles of self-determination, it will be increasingly difficult to define the attempt by separable regions as civil wars. The recent experiences in East Timor and the former Yugoslavia, attest to this.[177]

Certainly, in the area of the foreign affairs powers of the Community, the ECJ has

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[175] The Confederate constitution was designed in this way.

> The C.S.A. Constitution, with its covenantal qualities, associated the distinct sovereign states into a community of states. This community of states was to be held together by a moral force complied to, with secession serving as the constitutional exit for a member state in which this moral force was lacking.

Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism 56 (1991).

[176] See quoted material, supra note 131.

[177] For discussion of the conception of self-determination, see, Rigo Sureda, The Evolution of the Right of Self-Determination: A Study of United Nations Practice (1973); Aureliu Cristescu, The Right to Self-Determination (1981) (New York, UN Doc. E/CN.4/Sub.2/404/Rev.1)); Michla Pomerance, Self-Determination in Law and Practice (1982); Thomas M. Franck, Fairness in International Law and Institutions 140-169 (1995). For an episodic and journalistic sense of the realities of self-determination movements of the end of the twentieth century, see Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience (1997). Obviously, the European Union is neither Indonesia nor is it the former Yugoslavia. In both cases, factors unique to each gave rise to communities which sought separation from the general government of the nation. Indeed, in East Timor, the residents sought to revert to something like the status quo ante Indonesian hegemony but without the overlordship of Portugal. On the other hand, in the 1850s, the several states which were to form the Confederacy increasingly saw themselves as distinct in culture and mores from the rest of the federation, and on that basis, entitled to secede.

> Those who fought on opposite sides of the American Civil War also invoked the great principles of the Declaration of Independence. The seceding states of the Confederacy invoked the great principles of disunion. They presented a case against their Northern brethren which paralleled the indictment of the abuses of Britain toward the American colonies less than a century earlier. The Union states invoked the Declaration of Independence as a basis for breaching an important initial covenant on which the American union was formed - the protection of the right to hold slaves. Each side in the conflict thus embraced one set of the fundamental principles of the Declaration of Independence to justify both the alteration of the original covenant creating one nation and the disbanding the union itself.

Larry Catá Backer, supra note 141. The same might be said for the component parts of a more federated Europe. For the moment that prospect seems far more academic than likely, but it continuously shapes the jurisprudence of the courts of the member states *sub silentio*. But see Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience (1997):

> One effect of the explosion of ethnic war in the 1990s is to awaken liberal societies to the full magnitude of the task they have set themselves, to awaken them to the realization that for the first time in four centuries, they will actually have to live up to their starting premises or sunder into civil war. Whereas civic order traditionally depended on a variety of exclusions, now everybody is included, and the question of whether a genuinely 'civic' order of individuals can flourish without depending on majority domination - in culture, language, religion and morals - has acquired new urgency.

Id. at 69.

begun constructing a very fluid and co-determinative sort of union. The Union treaties provide for large areas of Member State competence in the foreign policy sphere where the Community and the Member States must act jointly on the basis of divided competence.[178] The Treaty of Amsterdam, in particular, more readily permits deviation from standardization.[179] In some of these areas, the European Court of Justice has been specifically denied competence.[180]

In the same vein, it is now also clear that federal systems are not required to adhere to the principle that the courts of the general government should be vested with the sole or supreme authority to interpret the basic laws giving rise to the federal system.[181] Indeed, what may well be emerging is that the courts, whether those of the general government or those of the constituent states, may have only a very limited place in the process of interpreting the contours of federalism within any multi-governmental system. The interpretation of federalism, then, becomes a *political*, rather than a *judicial* project. The Europeans have begun experimenting with this idea, though only to a limited extent. First, between 1965 and 1994, each Member State enjoyed an effective veto of legislation in the European Council. As such, it was difficult to pass legislation which would adversely affect the member states.[182] The Luxembourg Accord effectively

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[178] Opinion 1/94, 1994 E.C.R. I-5267 (Nov. 15, 1994) (World Trade Organization - WTO) at paras. 106-109. For an interesting analysis, see Mattias Kumm, Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice, 36 Common Mkt. L. Rev. 351 (1999). Kumm proposes a middle position which he terms a "Common European Constitutionalist" approach. Id. at 374-84. He suggests a number of principles of interpretation which are meant to draw analysis away from authority towards an equitable application of the rule of law within Europe by all courts.

[179] The Treaty of Amsterdam appears to confirm the power of Member States to vary the rate and intensity of integration within the Community. For example, under new Article 11(1), the institutions of the Community may permit "Member States which intend to establish closer cooperation between themselves ... to make use of the institutions, procedures and mechanisms laid down by the Treaty" subject to certain limitations. Commentators have sought to describe the Treaty of Amsterdam as including "the first institutionalization of the concept of flexibility as a basic principle in the Treaties." Alexander C-G. Stubb, The Amsterdam Treaty and Flexible Integration, 11 Eur. Cmty. Stud. Ass'n Rev. 1-5 (1998). Flexibility issues have varied in intensity during the 1990s, leading some commentators to draw the conclusion that especially with the coming to power of the Labour government in Britain, "flexibility aroused more academic interest than political passion." Desmond Dinan, Ever Closer Union: An Introduction to European Integration 178 (2nd ed., 1999). Dinan notes that "[a]lthough some member states remained wary, a consensus began to emerge that the principle of flexibility should be included in the treaty as long as the practice of flexibility was limited to precisely defined conditions that would not endanger the *acquis communautaire*." Id.

[180] See TEU art. 46 (ex art. L). For a criticism, see Andrew Duff, Reforming the European Union 153 (1997) (jurisdiction of ECJ should be expanded to cover Third Pillar topics such as asylum, immigration and police action).

[181] For Calhoun's attack on the American legal principle of federal court review of constitutional disputes, see John C. Calhoun, A Discourse on the Constitution and Government of the United States, in Calhoun, supra note 43, at 81, 223-44.

[182] In 1965 President de Gaulle of France provoked a crisis within the European Economic Community when, in an attempt to block Community proposals for independent sources of finance, he withdrew French participation in Community affairs for six months. In response, the Governments of the Member States adopted a statement of intent, commonly known as the Luxembourg Accord, which effectively suggested that unanimity was required for actions on issues deemed very important by any Member State. This agreement was entered into "unofficially" and was never made part of the amendment process of the Community Treaties, though it effectively amended these Treaties in substantial respect. See The Luxembourg Accords of 28 and 29 January 1966, Bulletin of the EEC, March, 1966, *reprinted in* James D.

introduced Calhoun's notion of interposition to the governance of Europe.[183] A version of the Luxembourg accord has now been included in the Treaty itself.[184] Second, Europe has been far more willing to use the amendment process to solve problems among its major constituencies than has the United States. "The intergovernmental conference system, which resulted most recently in the Maastricht Treaty and in the proposed Amsterdam Treaty, is effective because it incorporates the possibility for change into the core of the federation's normative structure. Thus, the EU system permits the Member States to attempt to renegotiate the power at different levels of governance within the federation, as well as the nature of the normative 'first principles' which should guide all Community action."[185] These conferences, regularly held, function much like periodic constitutional conventions among the Member States.[186] This pattern of European constitutionalism, built in part on regularly held constitutional conventions within Europe, was suggested and rejected early in the history of the American Republic as unworkable. Yet, it does indeed appear to work when the Member States are willing to engage in the common enterprise.[187]

Indeed, the emerging acceptance of the construction of unions in which the constituent parts delve up administrative functions but retain for themselves a collective power to control the institutions of the union, is increasingly important in a world of

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Dinnage and John F. Murphy, The Constitutional Law of the European Union 215-16 (1996); Sir William Nicoll, The Luxembourg Compromise, 23 J. Common Mkt. Stud. 354 (1984) (reprinting the French text of the Luxembourg Compromise). The Luxembourg Accord was substantially eroded in the 1980s, especially after the Single European Act broadened the areas in which decisions were to be taken by qualified majority voting. An echo of the Luxembourg spirit can be found in the Joanina Compromise, Council Decision of January 1, 1995, 1995 O.J. (C 1) 1 (amending Council Decision 94/C 105/01 (March 29, 1994) which attempted to ease the problem of close votes in matters subject to qualified voting). Like its predecessor, the Joanina Compromise has resulted in some controversy within Europe. For a discussion, see Anthony L. Teasdale, The Life and Death of the Luxembourg Compromise. 31 J. Common Mkt. Stud. 567 (1993).

[183] Leslie Friedman Goldstein has astutely noted that "Surely if America had structured its federal system along the state-veto-power lines long advocated by John C. Calhoun, there would have been far fewer national laws passed (if any) and therefore less occasion for discontented states to rebel against them." Goldstein, supra note 147, at 28. Of course, the preceding observation comes with a barb - it is easy to avoid rebellion when the supra-national entity does not act. That is true enough, yet interposition need not invariably result in paralysis. Interposition, however, underscores the moral ties of union. In unions of parties better off disunited, paralysis, and disunion, may be the result. On the other hand, in unions imbued with a sense of common destiny, and for such time as that common vision is shared, interposition and political accommodation can produce significant advance. Europe since 1992 is, I would suggest, a good example of this power of movement, even in a regime of interposition and accommodation.

[184] Article 11(2) of the Community Treaty, as modified by the Treaty of Amsterdam, provides for Member State veto of closer cooperation arrangements if it views the action as inconsistent with important national policy.

[185] Backer, supra note 97, at 1388.

[186] Indeed, consider that a major task of the intergovernmental conference 2000 is to substantially reformulate the basic makeup of the administrative institutions of the Community in preparation for substantial enlargement, including reducing the size and composition of the Commission and fixing the size of the Parliament. See The Intergovernmental Conference 2000, Eur-Op News: Information From the European Communities' Publication Office, January, 2000 at 1. This can also be found at http://www.eur-op.eu.int/opnews/100/en/leader.htm#OPO.

[187] As Donald Meinig has observed in connection with Clement Vallandigham's proposal, "From our late twentieth century perspective, looking back on, say, a Canada, Union of South Africa, Yugoslavia, Belgium, Soviet Union, Republic of India, early Pakistan, Vallandigham's four sectioned United States does not seem quite as bizarre and awkward as it must have appeared in 1861." Donald W. Meinig, 2 The Shaping of America: A Geographical Perspective on 500 Years of History 491 (1993).

emerging multi-ethnic states. Peter Lindseth has aptly demonstrated how the European Union has effectively followed this model to construct a state where sovereign power is denied a central government, which has assumed the role of administrative head of the nation.[188] Concurrent majority principles emphasizing the devolution of the constitutional center of a union from a singular general government to the collective of its constituent *serves to* better reflect the emerging pattern of political and economic union world wide.[189] President Clinton suggested this as well, though he may not have understood the import of his message at a conference on federalism held in Canada in 1999. "Clinton's speech at the conference was laced with a strong defense of federalism. He said it is better for nations to work out problems with unhappy segments of their societies than to allow those factions to break away."[190] Yet this is not the sort of federalism Americans are used to. Rather, this is a form of federalism which recognizes that legitimacy in a union of diverse communities, whether diversity is geographical, ethnic, religious, or racial, may well depend on the ability of like minded communities to guard their interests through formal mechanisms of participation and approval. As the communities which make up a union change, either within a unitary state or federal system, the need to accord such communities voice, even if those communities are not geographically distinct, may be necessary to avoid disintegration.[191] The model of concurrent majority provides a means for the communal assertion of voice within a union in line with the principle of democratic rule we have come to see as essential for the legitimation of a state.

Likewise, the constitutional notions of devolution - subsidiarity and Member State opt-outs of provisions in the federation treaties - also produce a federal system which works.[192] Here, again, we find within the structure of the Community/Union itself

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[188] See Lindseth, supra note 3. Lindseth, of course, offers us this model for the opposite purpose, postulating the nation state of a particular set of characteristics and demonstrating how, where such characteristics are absent, the nation is absent as well. If one suspends belief in the "usual" postulates about the nation-state, it is possible to see in the description the emergence of a state very much in the image of Calhounian limited devolution of power - but a state all the same. See also, Giandomenico Majone, From the Positive to the Regulatory State: Changes and Consequences of Changes in the Mode of Governance, 17 J. Pub. Pol'y 139 (1997).

[189] For an example of the way in which modern commentators see the world as increasingly united in some respects but increasingly separated in other respects, see, e.g., Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1998).

[190] Sonya Ross, Clinton Pushes for a Strong, United Canada, Tulsa World, Oct. 9, 1999, at 18 Classified.

[191] See Albert O. Hirshman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States (1970). This work has proven to be extremely influential in organization theory, not just in public law but in the construction of business enterprises as well.

[192] The echoes of Calhoun's notions of federal state construction are already functioning within the Community. Consider this assessment of a reason for the success of European integration: "federal unions among formerly sovereign states have certain characteristic needs and will function more smoothly when those needs are met. The features detailed here involved giving member states something approximating or *appearing* to approximate a veto power, giving member states an assurance of input into decisions made by the central authority, giving member states some face saving device that preserves an appearance of, if not coequal, at least shared sovereignty, and limited term rather than lifetime tenured for central authorities." Leslie Friedman Goldstein, supra note 147, at 31. The construction of subsidiarity, itself, as a constitutional (if still perhaps underused) block to overweening federal supremacy, also point to a system different from our own yet capable of functioning. For a nuanced discussion of subsidiarity as a constitutional and political construct, see George Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and

Calhounian notions that federal *unions*, which need not be *nations*, can be built on principles of the equality of the coordinate governments of the union. The resulting Europe of 'bits and pieces' is perhaps neither elegant nor traditional. Indeed, it may produce inefficiencies intolerable to those infatuated with the efficiencies possible in modern totalitarian or democratic corporatist regimes. Construction of a union with state opt-outs,[193] and with subsidiarity acting as a constitutional guarantee of some form of devolution,[194] echoes a federalist vision which protects against tyrannies of the majority, even of a democratic majority, within a governance system created by a group of communities willingly bound together for a common purpose.[195] The result is a system which for the communities of Europe may be truer to the principal of democratic rule and respect for the culture of all of its members.[196] It will also produce a system with dynamic institutions and boundaries.

> [T]he emerging federation contains a great potential for overcoming the traditional limitations of European supranational political entities. That potential is best realized if the structure of the Community is treated as a moving target composed of periodic equilibrium between three contradictory impulses - the assimilative impulse of harmonization, the political impulse of the nation-state, and the ethnic impulse of subnational cultural groups. Stability for any European federation must be gauged by its tolerance of movement. Movement is sparked by the recognition that substantial segments of the Community no longer believe the Community is representing their interests. Movement is evidenced by wholesale violation of norms. After all, as we come to understand, "if a Court is forced to condone the wholesale violation of a norm, that norm can no longer be termed law." The subsequent readjustment of norms, through EU Treaty or ECJ interpretation, inevitably results in the perpetuation of a successful

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the United States, 94 Colum. L. Rev. 331 (1994).

[193] See, e.g., Filip Tuytschaever, Differentiation in European Union Law (1999); Deirdre Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 Common Mkt. L. Rev. 17 (1993).

[194] See, e.g., Luisa Antoniolli Deflorian, *La struttura instituzionale del nuovo diritto comune europeo: competizione e circolazione dei modelli giuridici* 63-106 (1996); Bermann, supra note 192.

> [S]ubsidiarity operates merely as a form of exceptionalism. It serves as a political check on the judicially enunciated doctrines of Community autonomy and supremacy. As we have seen, autonomy and supremacy suggest the *effect* of norm making at the federal level on the now subordinate political levels. These doctrines do not, however, suggest the parameters of that norm making power. Neither do they necessarily suggest the standards by which the federal Institutions ought to measure the need to utilize the norm making power with which they have been vested. Subsidiarity is the name given to the means by which Community power is limited.

Backer, supra note 97, at 1347-48.

[195] These notions roughly echo Calhoun's emphasis on concurrent majorities, on interposition, and on the moral (rather than forced) basis of union. See discussion ante at notes 45-56.

[196] The Community's respect for cultural diversity is embedded in the Community Treaties. But that deference to the protection of difference, and therefore, the potential of separation, exists, even in the black letter of the Treaty, in tension with the goal of the Community to homogenize the mass of the people of Europe without respect to borders. Thus Article 151 (ex Article 128) provides that the "Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."

federal system.[197]

Such a system may overturn American notions of a proper federal system. However, that turning should not result in a conclusion that the system so created is not "federal".

Thus, the uniqueness of the governance model of the EU in the realm of "international law" runs parallel to that of the infant United States in the realm of "domestic or national law." The EU is an experiment in more efficient government between states whose interests transcend their respective borders. The experiment continues to transform its institutional form to meet the social, political and economic exigencies with which it is faced.[198] The EU has been successful in part because its proponents, like those of the infant United States, appropriated traditional language to cover the more radical implications of their experiment.[199] Might federal principles also consequently come to have a broader meaning in time? I believe the answer is a most emphatic - yes. The fact that the organization of the EU is *sui generis* - suggests nothing more than a deviance from a historical understanding of appropriate forms of organization as historically understood. Whether this uniqueness can ultimately be accepted as something permanent - as a form of governance that can be imitated - and on that basis, folded into a reordered definition of what is federal, awaits the future.

B. The Federal Principle As Domestic and International Law

"Territorial institutions are normally classified on some continuum from loose confederations to highly centralized unitary structures."[200] But the continuum, it seems, distinguishes sharply between the confederation, the federal state, and the unitary state, whatever the practical reality of systems flowing from one to the other form. Americans, perhaps more than other people, have since 1865 confined the discussion of federal "states" to systems falling within the limits they themselves have constructed.[201]

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[197] Backer, supra note 97, at 1392-93, *quoting, in part,* Cappellitti, Seccombe & Weiler, A General Introduction, *in* I Integration Through Law, Bk. 1, at 38 (1986).

[198] See, e.g., Joseph H.H. Weiler, The Transformation of Europe, *in* The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration 10, 14 (Joseph H.H. Weiler ed., 1999).

[199] Richard Sinpoli notes that an important use of language "could be the legitimization of some new practice by describing it in old commending terms. The authors of *The Federalist* were masters of this tactic as in their appropriation of the term *federalism*, formerly reserved for what we would call confederacies, to describe the more centralized government they proposed." Richard C. Sinpoli, The Foundations of American Citizenship: Liberalism, the Constitution and Civic Virtue 176 (1992).

[200] Stein Rokkan, State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan 209 (Peter Flora ed., 1999).

[201] Wheare provides an honest rationale for this state of affairs:

> And perhaps there is something not unfitting in choosing as the federal principle that principle which the authors of *The Federalist* advocated; and in choosing it principally on the ground that the constitution which embodied that principle and which they supported has by its success spread the fame of that principle in the world. For the federal principle has come to mean what it does because the United States has come to be what it is.

Wheare, supra note 13, at 11. Yet it is not only Americans who base discussion of federalism by the American variety. "American constitutional history offers a conceptual reference for these two basic models of federalism [integrative and devolutionary federalism], however divergent they are in their actual

It has always seemed sensible to twentieth century folk that "in seeking a legitimate and convenient definition of federal government, to begin by examining the Constitution of the United States."[202] Europeans, especially, have sometimes disagreed, at least as to a theory of federalism,[203] though the disagreement is usually with the detail, and the starting point of comparison, at least, is the ***urtext*** of American federalism. Europeans might also include the Swiss Confederation and the German Bund (and perhaps even the Canadian experiment) as other models of federalism.[204] But even here, the quibble is in the detail because these systems each arise from similar acts and each produce a hierarchy similar to that of the United States.

The contours of the definitive American federal system are memorialized in our federal constitution. Alternative political arrangements, to the extent considered at all, are characterized as non-federal unitary systems. Where such political arrangements involve relationships between multiple governments, yet another characterization applies. These political arrangements are treated as some sort of non-federal international organization among states, though not a state itself, which is now usually labeled "confederation."[205]

As such, in multi-level governance systems, the principles of federalism establish the border between the nation, on the one hand, and international forms of political union or association, on the other hand. Federalism principles as well determine whether, within any polity, principles of domestic or national law apply. For federal and

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operation." Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 206 (1990).

[202] Wheare, supra note 13, at 1. See, e.g., Bermann, supra note 192; Thomas C. Fisher, "Federalism" in the European Community and the United States: A Rose by Any Other Name, 17 Fordham Int'l L.J. 389 (1994).

[203] "Strictly normological theories have never been capable of completely gasping the spirit of federalism. For, all in all, there is no single specific yardstick by which a federal state can be distinguished from a unitary state, on the one hand, a confederation on the other." Luzius Wildhaber, Treaty Making Power and Constitution: An International and Comparative Study 255 (1971). The Germans, for example, have been grappling with a dynamic and not-quite-American form of federalism since the last monstrous iteration of the Reich was dismantled in 1949. "Germany is, however, of interest to students of federal forms of government for more than historical reasons. More clearly than any other country, it exemplifies a federal structure based on different principles from that of the United States." Nevil Johnson, Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany, *in* Recasting German Federalism: The Legacies of Unification 23, 24 (Charlie Jeffrey ed., 1999) (American federalism is vertical; German federalism is horizontal and functional, with most of the legislative power in the general government and most of the administrative responsibilities in the Lander).

[204] See, e.g., Luzius Wildhaber, Treaty Making Power and Constitution: An International and Comparative Study 255 (1971), William Riker, Federalism, *in* V The Handbook of Political Science: Government Institutions and Processes 93-172 (Fred I. Greenstein and Nelson W. Polsby eds., 1975).

[205] Confederations have sprung up from time to time in Europe. "The earliest federal structures emerged *within* the Holy Roman Empire and were essentially alliances of peasant communities or, more frequently, of cities against the encroachments of the stronger dynastic units competing for power within that system." Rokkan, supra note 200, at 210. An early nineteenth century example is the Confederation of the Rhine, a product of the Napoleonic wars. Treaty of Confederation of the States of the Rhine (and Upper Danube), July 12, 1806, *in* 58 The Consolidated Treaty Series 459 (Clive Parry ed., 1969). Even at an early date, confederations were not to be confused with federations. What emerged as modern Spain began as a confederation of Christian Kingdoms united in their war against powerful Muslim occupiers. See Rokkan, supra note 200, at 214-15. Contrast the federal system created through the Confederation of the Rhine, with the more unified federal state represented by the Wilhelmine German Reich. See, e.g., Another Germany: A Reconsideration of the Imperial Era (Jack Duke & Joachim Remak eds., 1988).

unitary systems, the borders of the nation or federation mark the limits of the applicability of domestic or national law.[206] The relationship between the general government of a federation, so defined, and its constituent parts, is governed by the highest form of domestic law - a constitution. In contrast, two systems, or regimes, of law apply to other political arrangements. First, international law, the law between sovereign states, provides the only available basis for ordering the relationships between a general government of these associations and their constituent states.[207] As such, mere treaties - documents without the dignity or weight of domestic constitutions, provide the recourse of states attempting "non-conforming" unions. Such instruments are not an expression of the basic will of the people of a community, but rather mere legislative acts. Second, national or domestic law regimes, bordered by the supra-law of a constitution, are confined within the borders of the constituent states of these supra-national systems. The difference in applicable legal regimes between federation and other multi-governmental regimes is critical. Principles of international law derived from a treaty between states provides a much weaker formal basis for the structuring of relationships between government and people than do principles of domestic law derived from a national constitution expressing the will of the people in their sovereign capacity.[208] Thus, the definition of federalism and the applicability of one or more distinct regimes of law to any association of states, are intimately intertwined.

Yet, the uniqueness of the emerging system of governance within the European Community has begun to erode the boundaries between the restrictive law between

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[206] Louis Henkin has provided a powerful explanation of domestic law as the normative expression of the political system of a nation. "Domestic (national) law ... is an expression of a domestic political system in a domestic (national) society. A domestic society consists of people ... . Domestic law is a construct of norms ... that serve the purposes of society. Law serves, notably, to establish and maintain order and enhance the reliability of expectations... ." Louis Henkin, International Law: Politics, Values and Functions, 216 Recueil des Cours (Hague Acad. Int'l L.) 22 (1989-IV). Domestic law is enforced by governments imposed on or by each independent (national) society by the use of such power and in such manner as may be determined by such government and permitted by the people whom such government serves. The first entitlement of a nation is "statehood, which means in the international system, that our new nation is a geographic entity entitled to exert its own legal jurisdiction in the area within its boundaries and to claim the inviolability of those boundaries against all other states." Anthony D'Amato, International Law: Process and Prospect 16 (1987).

[207] "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing the principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims." Case of the S.S. Lotus, 1927 P.C.I.J., ser. A, No. 10, at 18. Other than by a perception of legitimacy, "in the international system, there are no other compliance-inducing mechanisms." Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int'l L. 705, 706 (1988). But see Berman, supra note 120 (on the rise of a more complex interrelationship between domestic law and a revivified international law regime after the First World War in which international law assumed autonomy as well as the power to reach matters previously "invisible behind the veil of sovereignty." Id. at 1873). The systems of international human rights provide an excellent example of this phenomenon. Even private foreign investment has now become part of the complex of international regulation. See, e.g., Elihu Lauterpacht, International Law and Private Foreign Investment, 4 Ind. J. Global Legal Stud. 259 (1997). On the efforts by American commentators to more fully incorporate this internationalization of domestic law, see, for example, Berta Esperanza Hernández-Truyol and Kimberly A. Johns, Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform", 71 S. Cal. L. Rev. 547, 596-607 (1998).

[208] Hamilton shrewdly used this point to drive home his arguments about the nature of the fundamental ills of the Articles of Confederation. See The Federalist No. 15 106-113 (Clinton Rossiter ed., 1961).

states, and the law within nations. This erosion has become quite clear within Europe in the last decade of the twentieth century. As such, the current debate in Europe has significance well beyond the narrow, but important, issue of the malleability and broadness of the concept of federalism.[209] Exploding the boundaries of federalism will threaten the neat boundaries which separate international from domestic law.[210] This explosion of the narrow boundaries of what we tolerate as federal, and therefore "national," countermines the usual accusation that a federal union cannot be so labeled because it appears to contain elements found in systems of inter-state organizations, and thus is more properly understood as an international rather than a (domestic) federal union. The problem is not that the system is federal; the problem is that the old understanding of international and domestic law systems as independent and substantially self-contained is either an impediment to or irrelevant for an understanding of federal systems, or completely distorts the possibilities of federalism being a system for the organization of anything from highly unified states to loose confederations.[211] The consequence is convolution - or de facto merger.

> The fact that the Union is qualified in legal terms as an international organization, as opposed to a would-be-state does not of course deprive its framework rules of a constitutional character, nor does it necessarily reduce the aura of 'supranationalism' of the EC as such which is to be understood as a sub-legal order containing in certain (fairly limited, if one looks at the total picture) respects more far reaching rules.[212]

International law can be used to construct a domestic system, binding on the parties as effectively as constitutions created as the highest expression of domestic law. International law principles can be used as a basis for the construction of an international order with control over its territory as strong as anything permitted of post-Westphalian states.[213]

So at last we come back to the ultimate problem of traditional discourse on federalism - the idea of state sovereignty. Old notions of sovereignty as singular and indivisible, popular since the time of Jean Bodin,[214] have become increasingly

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[209] Ronald Watts recently noted, in connection with the evolution of the relationship between federal states and the supra-federal organizations in which they now effectively form subordinate parts, the merging of "national" and "international" considerations in sub-national politics. "Among these, Germany has been the pioneer in addressing the implications for its own federation of being a member of a supra-federal confederation. Although NAFTA is a much looser organization than the European Union, it is worth noting that all three of its members, Canada, the United States and Mexico are federations for whom similar issues arise." Ronald L. Watts, German Federalism in Comparative Perspective, *in* Recasting German Federalism: The Legacies of Unification 265, 270-71 (1999).

[210] Others have begun to argue that the law of the EU should be treated as an "instrument of reformation of our perceptions of international law." Joseph H.H. Weiler & Joel P. Trachtman, European Constitutionalism and Its Discontents, 17 Nw. J. Int'l L. & Bus. 354 (1996-1997).

[211] Principles of federalism have even been used in the hypothetical construction of a world government. See John P. Humphrey, Peace on Earth and Goodwill to Men, 14 Hum. Rts. Q. 429 (1992).

[212] Curtin & Dekker, supra note 134, at 83, 132.

[213] "This post-medieval epoch was characterized by the co-existence of a multiplicity of states each sovereign within its territory, equal to one another and free from any external authority." Deirdre Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy 11 (1997).

[214] See Jean Bodin, Six Books of the Commonwealth (M.J. Tooley ed., 1955) (1576) (first systematic

troublesome and irrelevant in this age of division and diffusion of the traditional marks of sovereignty.[215] Transnational harmonization coupled with political fragmentation on ethnic and other group dividing lines, have pushed and pulled the nation-state apart and weakened the claim of the nation-state to the position of prime repository of the principles of democracy and self-government.[216] Likewise, increasing recognition of multi-layered loyalties or centers of identity, have reduced the power of unitary loyalty to the nation-state.[217] The European Community has entered into this scene of political and economic change to fill the void created by nation-state fragmentation as well as the increasing desire for meta-norms.[218]

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exposition of what became the modern notion of state sovereignty). More so than Bodin, perhaps, Thomas Hobbes played a critical role in the fixing of the idea of sovereignty in the English speaking world. See Thomas Hobbes, Leviathan 106-244 (Edwin Curley ed., 1994) (1668). Hobbes, of course, reduced government to three forms in any one state - monarchy, democracy and aristocracy. Id. at 118. "Other kind of commonwealth there can be none: for either one or more or all must have the sovereign power (which I have shown to be indivisible) entire." Id. Sovereignty was entirely indivisible for the devolution of even one of the rights appurtenant to sovereignty would render the rest ineffective. See id. at 115. Mixed governments, or governments where the sovereign power was divided, were not governments at all but merely the precursor to civil war with the aim of ultimately reuniting the sovereign power in one government. "For that were to erect two sovereigns, and every man to have his person represented by two actors that by opposing one another must needs divide that power which (if men were to live in peace) is indivisible, and thereby reduce the multitude to the condition of war, contrary to the end for which all sovereignty is instituted." Id. at 119. As Alexandre d'Entrèves has noted, it should come as no surprise that both Bodin and Hobbes concentrated on the unification of governance because each was developing his ideas during periods of civil or religious war in their countries. See, Alexander Passerin d'Entrèves, The Notion of the State: An Introduction to Political Theory 118 (1967).

[215] For a discussion of the abandonment of the hyper-sovereignty developed in the nineteenth century, see David Kennedy, International Law and the Nineteenth Century: History as an Illusion, 17 Quinnipiac L. Rev. 99 (1997). For an interesting discussion of the proliferation of mini-states, made possible under a worldwide regime of international trade and personal liberties guarantees, see, for example, Michael J. Kelly, Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States, 47 Drake L. Rev. 209 (1999). See Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance With International Regulatory Agreements 1 (1995) (stating that "[i]n earlier times, the principal function of treaties was to record bilateral (or sometimes regional) political settlements and arrangements. But in recent decades, the main focus of treaty practice has moved to multilateral regulatory agreements addressing complex economic, political, and social problems that require cooperative action among states over time.").

[216] As Deirdre Curtin has observed:

> This fragmentation process was undertaken both from within the state (the separate parts of the *trias politica* and other non state actors involved in transnational relations), and from the outside (decision making within the governance system of the EU itself). Far from having saved the system of democracy enshrined with such pain and turbulence in national constitutions, the process of closer European integration embodied in the EU has had the effect of fragmenting and dispersing the legislative power of the individual constituent nation-states.

Deirdre Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy 48 (1997).

[217] See Thomas M. Franck, Community Based on Autonomy, 36 Colum. J. Transnat'l L. 41, 64 (1997) ("It is this two hundred year virtual monopoly of state-centered nationalism, the secular religion of the West, which is being challenged in the current 'hetero-nationalist' phase of history, with its new permissiveness toward autochthonous - that is, self-designated - identity.").

[218] This process is especially apparent in the construction of harmonized economic regulation. For an example, see Maduro, supra note 111. But the same trend is apparent in the area of human rights, both in the increasing prestige and importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 5 European Treaty Series (1991), to the incorporation of those

The weakening of the grip of notions of unitary and indivisible sovereignty, along with the real extent of practical state sovereignty in a world closely bound by international norms and regional systems of economic regulation and human rights, also evaporates the distinctions between the realms of international and national law based on notions of sovereignty.[219] For if we are incapable of squeezing new forms of governance into old patterns, the patterns themselves, rather than the new forms of governance are in need of change. "A way around this difficulty [of the indivisibility of sovereignty] is not to try to build an alternative, more Europe-friendly doctrine of sovereignty, but rather to abandon the concept of sovereignty all together in the legal constitutional discourse on integration."[220]

Indeed, a weakness of the German *Maastricht* decision was its blindness to the possibility of federation on the basis of a model other than that of a unified sovereignty residing within the general government, along the lines developed in the United States or the "second" German Reich.[221] Calhoun's similar view made it impossible for him to contemplate a diffusion of sovereignty between a general government and its constituent states. He believed that sovereignty divided would soon unite itself, and the union would most likely take place at the level of greatest generality. Multiple or diffuse sovereignty, therefore, could prove to be a temporary state of affairs as one or more of the constituent parts of the federal structure sought to unify all power within it.[222] Reality has provided some evidence to the truth of this assertion.[223] But even so,

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fundamental human rights within the Community legal order. See TEU art. 6 (ex art. F).

The inconveniences of sovereignty in connection with economic regulation extends to the jurisdiction of courts. International instruments, like the proposed Hague Convention on Jurisdiction and Satisfaction of Judgements, seek to regularize jurisdictional issues between nation states "at a time when the legal demands of the global economy of the global economy have amplified the advantages of developing and maintaining a well coordinated international jurisdictional system." Andrew L. Strauss, Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments, 61 Alb. L. Rev. 1237, 1238 (1998).

[219] Nathaniel Berman's study of the transformation of international law after 1914 illustrates the way in which the emerging theory of international law has resulted in the beginning of a merger between these systems of law. See Berman, supra note 120.

[220] Bruno de Witte, Sovereignty and European Integration: The Weight of Legal Tradition, *in* The European Court and National Courts, supra note 95, at 277, 303.

[221] See Sean Monaghan, Note, European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitutional Court's Maastricht Decision, 12 Emory Int'l L. Rev. 1441, 1488 (1998) (bringing this point out nicely); see also id. at 1468-71 (for a discussion of German academic commentary about the nature of the EU).

[222] "The idea of coordinates, excludes that of superior and subordinate, and necessarily implies that of equality. But to give either the right, not only to judge of the extent of its own powers, but, also, that of its coordinate, and enforce its decision against it, would be, not only to destroy the equality between them, but to deprive one of an attribute - appertaining to all governments - to judge, in the first instance, of the extent of its powers." John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 81, 171-72 (1850). In this, Calhoun, of course, echoed the arguments of the anti-federalists. See also Rakove, supra note 162, at 35, 42 ("Anti-Federalists alleged that the sovereignty of the states would soon evaporate, leaving a federal Leviathon as the unitary sovereign of the American Union.").

[223] See Wheare, supra note 13, at 237-45. "There is a general tendency in all federal governments which is apparent from the exposition of this book. The general governments in all four federations [considered] have grown stronger." Id. at 237.

Calhoun's description of the slide from federation to unitary government is instructive. It also provides, ironically enough, a wonderful counter to those of us who feel bound by originalism in the construction and interpretation of the Constitution. For Calhoun, the process began with the formation of the first government

the drive toward unitary sovereignty has been incomplete, even in the United States[224] and Germany.[225]

Ironically, the answer to this dilemma of upwards "sovereignty creep," draining authority from the constituent states for the government of greatest generality, lies in Calhoun's notions of interposition. The notion of nullification espoused by Calhoun, and with it, the idea that disagreements over assertions of power by the general government ultimately be resolved by the constituent parts and affirmed by adjustments in the compact imposing the general government,[226] suggest that even if one accepts the idea that sovereignty is not divisible, its attributes can be delegated by the ultimate sovereign either up or down a chain of governance. Moreover, even if one conceded the inevitable of the devolution of the indicia of a unitary sovereignty upwards to a general government, the institutions of the European Community for example, it does not invariably have to follow that such a sovereignty must be vested either in the judiciary of that general government, or within the general government at all. This follows from Calhoun's notions that because sovereign power derives ultimately from the people, grouped together in the constituent state which first gave consent to the greater union, such people, so grouped, retain the right, as ultimate sovereigns, to determine the propriety of the assertion of power by the general government by whatever institutional

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under the federal constitution. and was as much the subject of politics as of theory. Thus Calhoun's rendition of the story of the passage of the act giving federal courts the power to interpret the constitution:

> The convention which framed [the Constitution], was divided ... into two parties - one in favor of *national*, and the other of a *federal* government. The former, consisting, for the most part, of the younger and more talented members of the body - but of the less experienced [including Hamilton and Madison] - prevailed in the early stages of the proceedings... . The party in favor of a federal form, subsequently gained the ascendency - the national party acquiesced, but without surrendering their preference for their own favorite plan - ... the necessity of a negative on the actions of the separate governments of the states... . When the government went into operation, [Hamilton and Madison] filled prominent places under it... . No position could be assigned, better calculated to give them control over the action of the government, or to facilitate their efforts to carry out their predilections in favor of a national form of government, as far as, in their opinion, fidelity to the Constitution would permit... . The purity of their motives is admitted to be above suspicion: but it is a great error to suppose that they could better understand the system they had constructed, and the dangers incident to its operation, than those who came after them. It required time and experience to make them fully known - as is admitted by Mr. Madison himself... . The very opinion, so confidently entertained by Mr. Madison, Gen. Hamilton, and the national party generally (and which in all probability led to the insertion of the 25th section of the judiciary bill), that the federal government would prove too weak to resist the state governments... .

John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 81, 239-42 (1850).

[224] See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (federal law outlawing possession of guns near schools was beyond the federal commerce power); Printz v. United States, 521 U.S. 98 (1997) (federal law requiring state law enforcement to run background checks on gun purchasers beyond the power of Congress); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act beyond Congress' power under the 14th Amendment to impose on states).

[225] See, e.g., Hans-Peter Schneider, German Unification and the Federal System: The Challenge of Reform, *in* Recasting German Federalism: The Legacies of Unification 58, 74-81 (Charlie Jeffrey ed., 1999).

[226] See, e.g., John C. Calhoun, The Fort Hill Address: On the Relations of the States and Federal Government, *in* Calhoun, supra note 43, at 369 (July 26, 1831). For the nullification debate in context, see, for example, Niven, supra note 43, at 154-200; Frederic Bancroft, Calhoun and the South Carolina Nullification Movement (1928).

means they choose.

Such a retained right in the people need not be constrained by any particular process. Nor need it be left to the judicial rather than the political process. The people, grouped in consenting communities, as ultimate sovereigns, may devolve the power to determine the competence of the "national" sovereign to the representatives of the constituent communities of the union. As a consequence, what might appear as divided sovereignty becomes, as the Spanish Constitutional Court has noted, merely a grant of the exercise of power and not the ceding of ownership of the sovereignty which makes that granting possible, at the instance of the ultimate sovereigns.[227]

In this sense, placing absolute and unitary sovereignty in "the people," effectively results in making sovereignty (and its baggage) substantially irrelevant. As long as "the people", exercising its democratic rights, "lends" one or more of its sovereign attributes, sovereignty is served, and the focus of analysis shifts to a determination of the locus or division of power within a federal (or other political) union.[228] Sovereignty, lodged in the people grouped in the communities which gave rise to the federation, accordingly becomes synonymous with the principle of democratic governance. In this sense, sovereignty reinforces the normative legitimacy of governance.[229] Ironically, this basis of legitimacy, shared by all of the partners in the European Union, provides the basis for the construction of systems of governance which straddle the traditional division between "a domestic sphere of legal authority from an international domain of politics."[230]

It follows that the use of sovereignty, thus understood, as a wall between domestic

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[227] See Re Treaty on European Union, Case No. 1236/92, Spanish Constitutional Court (Plenary Session) (July 1, 1992) *reproduced in* The Relationship Between European Community Law and National Law: The Cases 712 (Andrew Oppenheimer ed., 1994); see also supra notes 118-120.

[228] In a related vein, Alexander Passerin d'Entrèves has argued that mixed forms of government are quite compatible with the notion of sovereignty, because the question of sovereignty and the issue of the form of governance of a state were two very different questions. "[T]he division of power, in its technical details at any rate, is a legal, not a political, theory. It does not provide an answer to the question who should be the holder of sovereignty, but only to the question of how power should be organized in order to achieve certain aims, whoever is the ultimate holder of sovereignty. The theory is consistent with any political form, except, of course, with arbitrary government." Passerin d'Entrèves, supra note 214, at 121. Indeed, d'Entrèves argues that Bodin (though not Hobbes) recognized "the fact that, notwithstanding the unity and indivisibility of sovereignty, power can be distributed in various ways in accordance with particular conditions of time and place, and even in accordance with the ends pursued by the State itself." Id. at 118.

[229] I apply here Alan Watson's cultural notion of legitimacy - the cultural values (independence, democracy, pluralism within limits) of the dominant culture in a society of states which shape "the conscious response of its members, the methods which they used to cope with the network of interests and pressures that held them together ... . The rules and conventions of such unicultural systems were not merely regulatory: they incorporated shared values and aspirations." Alan Watson, The Evolution of International Society 122 (1992). Within the West, the core values, the standard of legitimacy, are the principles of democracy, individual rights and the rule of law. With respect to these core values, "there is some justification for speaking of a 'European-American constitutional statehood' in order to characterize the fundamental political convictions they all share." Carl Otto Lenz, Common Bases and Fundamental Values of European Community Law, *in* European Legal Cultures 78, 81 (Volkmar Gessner et al. eds., 1996).

[230] David Kennedy, International Law and the Nineteenth Century: History of an Illusion, 17 Quinnipiac L. Rev. 99, 130 (1997). The members states of the European Union, "although they form a structure with several legal sphere, they nevertheless can all be traced back to a common cultural sphere. This has facilitated the growing together of the Member States in the fields of the law and the economy." Carl Otto Lenz, Common Bases and Fundamental Values of European Community Law, *in* European Legal Cultures, supra note 229, at 78, 84.

and international law, and the very different characteristics concocted for each, has also become increasingly disconnected from emerging systems of governance, such as that of the European Union, based on diffusion and division of power.[231] Such diffusions are not limited to re-arrangements of political hierarchy. It also significantly intertwined with the centralization of economic power and its separation from increasingly parochial institutions, like nation-states, which are geographically limited.[232] Indeed, regimes of self-consciously international systems have increasingly taken on the core attributes of traditional sovereign rights. Principal among them has been the power of the institution to directly affect an individual irrespective of her citizenship.[233] Regional and international regimes of economic regulation have been analyzed within the framework of federal (or confederal) systems, autonomous and exercising some of the attributes of a state, or better put in the emerging system of world organization, a firm.[234] Even the United Nations, it seems, now has a constitution, and some of the attributes of a sovereign.[235] Sovereignty, like the nation-state, is becoming increasingly irrelevant.[236]

The search for sovereignty, the *Kompetenz-Kompetenz* conundrum of German

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[231] "What is emerging, then, is a global system characterized by overlapping communities and multivariegated personal loyalties yielding more complex personal identities ... . It is [the] two hundred year virtual monopoly of state-centered nationalism, the secular religion of the West, which is being challenged in the current 'hetero-nationalist' phase of history, with its new permissiveness towards autochthonous - that is, self-designated - identity." Franck, supra note 217, at 41, 63.

[232] For an interesting argument of this point, see Kenishi Ohmae, The End of the Naiton State: The Rise of Regional Economies (1996).

[233] See Ronald A. Brand, The Role of International Law in the Twenty-First Century, 18 Fordham Int'l L. J. 1685, 1692 (1995) ("One of the most striking developments of international law in the twentieth century is the extent to which the private party (i.e. non-sovereign) has become the subject of rules of international law."); see also Michael Byers, Custom, Power and the Power of Rules 78 (1999) ("International organizations do play an increasing role in the customary process, as is demonstrated by their contributions in the human rights field. They adopt resolutions and declarations, and in some cases engage in enforcement actions.").

[234] For a very interesting analysis, see Joel P. Trachtman, The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis, 17 Nw. J. Int'l L. & Bus. 470, 535-36, 543-53 (1996-97).

[235] Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 Colum. J. Transnat'l L. 529 (1998).

[236] Such concerns are regularly aired in the popular press in the United States. Georgie Anne Geyer, a syndicated press columnist has been especially vocal. See, e.g., Georgie Anne Geyer, Radical Reforms Cost Britain its National Identity, Tulsa World, November 12, 1999, at A 19. Her analysis is instructive:

> But today, the nation-state, that arbiter of reasons and relations between otherwise inchoate masses of men and women no longer united by blood or religion, is under attack from virtually all sides... . From above ... the nation state is being attacked ... by a supposed information revolution of computers and the Internet, which is in some levels forming "virtual communities" that outreach the nation-state ... . From below, the nation-state is being threatened by the pseudo-Marxist multiculturalists [whose] most fervent desire is to break successful Western nation-states down into individual conflictive groups. ... Then when you throw tendencies toward regionalism, particularly in Europe, into the stew of globalization at the top and disintegration and devolution at the bottom, one can rather clearly see the bind that many citizens find themselves today.

Id. Such commentators are rarely optimistic about the outcome of these trends. "It is far too early to dream of 'one globalized world' or of multi-cultural utopias. These dreams always end in a murder scene where there's no cop on the beat and no nurse at the hospital." Id.

theory,[237] ignores the fundamental basis of structural ordering within Europe. This structuring is grounded on and legitimated by the principle of democratic self-government through the consent of the governed. Yet consent is not necessarily a static principle. [238] Those governed at any one time are not made irrelevant by any initial consent. Rather, consent is increasingly recognized as dynamic.[239] The people of every community retain the power to withhold or modify that consent at their will even after consent is initially given.[240] "[A]ccording to the fundamental principles of our system, sovereignty resides in the people, and not in the government."[241] The people, as variously constituted, can withdraw sovereign public power to itself and redistribute both it, and the power to determine its extent, as it wills.[242] Conventional sovereignty theory, in this respect, has always been upside down. The state, as such, only borrows power from its sovereign. But this borrowing is contingent. Structure follows popular will, not the other way around. But popular will, the will of the community, expressed as the creation of a geographical unit of sovereignty, is not the same thing as the will of God as expressed to Moses on Mount Sinai, or through the grace of Jesus or the like.

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[237] *Kompetenz-Kompetenz* can be viewed as the litmus test of the existence of a nation-state. It refers to the power of a governance unit to exercise all power necessary to deal with issues of concern to it, including the issue of its own competence. See, e.g., Trevor C. Hartley, Constitutional Problems of the European Union 152-53 (1999). It embodies the ultimate power of the governmental institution to describe itself, as well as its limits, and to enforce that description. For some, this translates into the idea that sovereign power, and identification as a state, lies with the level of government the constitution of which is not subject to the unanimous approval of its constituent parts. See Kumm, supra note 178, at 367-68. On a reading of the English response to the *kompetenz-kompetenz* issue, see, P.P. Craig, Report on the United Kingdom, *in* The European Court and National Courts, supra note 95, at 195, 206-09.

[238] Consent as a static principle is responsible for the theory of the genesis of the prohibition of secession in modern American federal theory. Yet this theory, born of the politic reality of war, is not a necessary condition to federal organization. For the standard modern view, see, for example, Cass Sunstein, Constitutionalism and Secession, 58 U. Chi. L. Rev. 633 (1991). Internal territorial self-determination, as such, is categorically precluded within American style federal systems.

[239] Modern political reality has seen the emergence of temporal assent to political condition. Consent is now a function of serial plebiscites in Puerto Rico and Quebec. For a discussion of the politics of temporal assents in those two regions, see Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal 302-04 (1995); Allen Buchanon, Secession: The Morality of Political Divorce From Fort Sumpter to Lithuania and Quebec (1991); Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int'l L. 177 (1991).

[240] The problems of community for the modern age are those of definition and recognition. The rules for determining when a community exists for political purposes, and the recognition of sovereign acts by that community has plagued the modern theory of self-determination. See, e.g., Cassese, supra note 239, at 59-62 (and articles referenced in id. at 59 n.58).

[241] John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 194. For Calhoun, of course, this sovereignty of the people was bounded by those communities that distinguished themselves from other groups of people. This differentiation was inevitable. "The limited reason and faculties of man, the great diversity of language, customs, pursuits, situation and complexion, and the difficulty of intercourse ... have, by their operation, formed a great many separate communities acting independently of each other." John C. Calhoun, A Disquisition on Government, *in* Calhoun, supra note 43, at 11. In the case of the United States, such division was based on geography. Sovereignty "must be in them [the people], as the people of the several States; for, politically speaking, there is no other known system." John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 194.

[242] The Spanish constitutional court echoes this notion in its idea that the indicia of sovereignty can be loaned, but that sovereignty does not travel. See *Re* Treaty on European Union, *reproduced in* The Relationship Between European Community Law and National Law: The Cases, supra note 131, at 712. This flexible notion of sovereignty effectively makes sovereignty irrelevant.

Migration of people, establishment or re-establishment of divisible communities, must inevitably result in a revisiting of the original grant of sovereignty from a community which may no longer exist as constituted at the time of the grant.[243] Borders, nations and states are as malleable as the communities which constitute them. These borders, nations and states exist only at the sufferance of the true sovereigns, as long as such sovereigns exist.[244] The democratic principle, the principle of the rule of law, forbids absolute devolution from populi to institution and protects the reality of multiple sovereigns within unified supra-communal systems.[245]

Sovereignty theory has also always been backwards looking. Such theory merely serves as an apologist, a post hoc rationalization for conditions as they have existed. Sovereignty and the identification of states is a function of the ability of an entity to conform to the practices of the past.[246] New forms, deviant forms, by definition, cannot conform because conformity is based on allegiance to historical practice. Likewise constitutions are supreme because they emanate from the people with the power to order their own governance directly; the involvement of constituent or intermediate governments spoil the broth.[247] Yet this notion denigrates the democratic principle of

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[243] In this point, especially, it is possible to distinguish the notion of sovereignty as vested in the community, from the racist renditions of similar notions. The notions of theorists like Carl Schmitt postulate eternal communities existing in hierarchies. The notion of community described here posits flexible and malleable communities which change as migration, birth patterns and cultural choices change the identity of people living in any particular geographical space. Thus, it is not clear to me that we can continue to say that the great period of *völkerwanderung* is over. Quiet in Europe since the High Middle Ages, I suspect that the great migrations may have begun again destabilizing the ethnic/linguistic/religious infrastructure which has been fairly stable in Europe at least since the Reformation (except, of course, for the People of Israel).

[244] This does not mean that the devolution of sovereignty is an easy thing to undo. Thus, the ease with which we equate the devolution with the granting or transfer of sovereignty from "people" to "state".

> [I]dentity building in the sense of nation building does not merely mean that a new identity comes along to join other age-old or relatively recent identities such as ethnic or class identity. This process is linked rather with the claim to supremacy for this identity (and the loyalties and solidarities that go with it) over other collectivities. In this respect it is comparable to the increasing claim of the territorial state to the monopoly on the legitimate use of force.

Rokkan, supra note 200, at 67.

[245] See Alan Watson, The Evolution of International Society 315 (1992) ("In the contemporary world the rules and institutions ... and the nominal values of our international society give a stamp of legitimacy to a very high degree of multiple independence. Even the strongest powers profess to respect the independence of all members; and this reassurance makes the hegemonial reality more acceptable.") .

[246] These notions, in a sense, underlay the formalist argument of some who resist the integrationist program of the institutions of the European Union. See, e.g., Phelan, supra note 2, at 160 (E.U. cannot be a state because it doesn't have the power to determine its own competence, has no power over defense, must rely on the institutions of the member states to exercise its powers, has no nationality law of its own nor has it the exclusive power to conclude treaties).

[247] The parallel in American constitutional theory is to the idea that the United States was created as the expression of the people of the United States, rather than by action of the people of the states of the United States acting through these states. Calhoun makes much of this in his writing. See, e.g., John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 81, 95-97 (arguing that the notion that the phrase "We the people of the United States" meant the aggregate of the people of the several states was wrong and belied the intent of the framers). This ambiguity was corrected in the Confederate Constitution of 1861, which commenced with the phrase: "We, the people of the Confederate States, Each State acting in its sovereign and independent character." Const. Confederate States of America, Preamble, *in* Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism Appendix at 135 (1991).

retained sovereignty in the people by suggesting that historical practice limits the ability of a people, self consciously acting as such, to establish public power through other instruments of public power. Merely because Europeans have practiced the little nationalisms of the quasi-tribal nation-state for so long does not raise that practice to an inviolable tenet of an absolutist theory of the construction of a state.[248]

C. Between Nationalist and Integrationist: A Common Ground ?

Much of the discussion in this paper has focused on the work of the courts. From an American perspective, this approach has always seemed to make some sense. After all, since the enactment of section 25 of the Judiciary Act of 1789[249] gave the federal Supreme Court the power to hear appeals from state supreme courts on questions of federal law, including federal constitutional law, the courts have always been a focal point for both the political and legal understanding of American federalism. As such, even the politics of federalism is usually strained through the process of judicial resolution - political disputes, structural realignments of federalism have become justiciable.[250]

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[248] Mattias Kumm identifies the problem as conceptualized along traditionalist lines in the form of the search for the "true" *demos*. Here we are confronted with the contradictions of self-determination, federalism, harmonization and supra-national organization.

> Even in a multi-level polity organized along federal lines there is no room for multiple *demoi*: there can be only one demos. This is because the existence of a demos is analytically tied to the constitution of a sovereign State establishing a supreme legal authority, of which there can be only one. The problem, then is how to determine, in the context of a multi-level polity, at which level the demos is located. Do the people of Massachusetts or the United States qualify? The people of Bavaria, the Germans or the peoples of Europe? The question is of great practical significance because it decides three things at once. It decides whether a polity qualifies as a State, whether it is sovereign, and which legal order is, in the case of conflict, supreme.

Kumm, supra note 178, at 367.

But, having said so does not make it so. There is in fact room for multiple *demoi in fact*. In the absence of multiple and simultaneous belongings, pluralism is impossible. It conflates God, *volk*, and territory within the confines of a singular concept never large enough to contain all three. *Demos* is an act of will as well as a course of conduct, an identity as well as an affirmation of borders. But *demos* can no longer exist in the singular. See Larry Catá Backer, Culturally Significant Speech: Law, Courts, Society and Racial Equity, 21 U. Ark. Little Rock L.J. 845, 851-852, 875 (1999) (on the construction of meta-commonality by the collective act of redefining difference to cultural insignificance). Individuals are all, to some extent, strangers or mongrels within any geographic space. Drawing lines between distinctions of no socio-legal significance and those that matter is both arbitrary and suspicious from the perspective of the democratic principle. Neither loyalty nor belonging need not be geographic, nor singular. Certainty before the Westphalian settlement it was not necessarily geographic. The twentieth century has seen the re-emergence of overlapping *demoi* based on belongings to religious, ethnic and other bindings. The nineteenth century in Europe saw the construction of multi-ethnic dynastic states. That they failed does not negate the fact that while they existed, they comprised one *demos* and simultaneously multiple *demoi*.

[249] Act of Sept. 24, 1789, ch. 20, 13, 1 Stat. 73, 80 (codified as amended in scattered sections of 28 U.S.C.). Certainly, this had been the position of Calhoun, who devoted much space to a consideration of the unconstitutionality of that provision, as well as to its deleterious effect on the union. See John C. Calhoun, A Discourse on the Constitution and Government of the United States, *in* Calhoun, supra note 43, at 81, 224-38 (1850). For a short discussion, see, for example, Spain, supra note 16, at 197-201.

[250] See, e.g., James A. Gardner, Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument, 76 Tex. L. Rev. 1219 (1998) (New judicial

But such a concentration on courts and legal analysis in the study of multi-governmental systems ignores the equally important element of political analysis. Neither constitution, nor treaty, nor amendments or accommodations thereof at any level of multi-level systems were forged in the courts. They reflect the expression of a political will of the people either directly or through their representatives. EU federal development, and the interaction of the federal and national governments through the political institutions of both the European Union and of the Member states remains an important source of both the creation and policing of federalism in Europe. Scholars criticize the neglect of political analysis by EU legal scholars in favor of a purely legal analysis. "Indeed, the project of union has found a more constant support in '*l'Europe des juges*' than in the political arena of the EU."[251] Thus, ignoring one in favor of the other leads to distortion.

> Moreover, lawyers and political scientists came to opposite conclusions about the character of the European Community and the prospects for its future development: the former made grand claims about the existing achievements of and future possibilities for the Community, whereas political scientists were modest about both.[252]

The constitution of the European Union, perhaps even more than its American, German, Canadian or other counterparts, is a dynamic document, with changes coming as much from formal political revision at both the "federal" and "state" levels as from the interpretive project of the European Court of Justice. The three pillar structure, the limits on the jurisdiction of the European Court of Justice with respect to large parts of the European Constitution attest to the limits of the utility of a merely legal analysis. But this dynamism also suggests that, like the American federal constitutional character between 1789 and 1860, the fundamental boundaries of European constitutionalism have yet to be determined.

It is in this context that the notion that the emerging European debate on federalism contains echoes of an earlier U.S. debate, best articulated by the work of Calhoun, becomes more than an interesting empirical observation. It highlights the dangers of a fundamental inability to achieve consensus on the basic norms of the multi-governmental system being created. It also provides a basis to avoid the choices made by the Americans in the nineteenth century.

Europeans, like their American counterparts in the nineteenth century,[253] are

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federalism urges state courts to treat the character and values of the people of their states as sources of constitutional meaning).

[251] Peter Fitzpatrick, New Europe and Old Stories: Mythology and Legality in the European Union, *in* Europe's Other: European Law Between Modernity and Postmodernity 27, 41 (Peter Fitzpatrick & James Henry Bergeron eds., 1998).

[252] Wincott, supra note 95, at 293 ("Traditionally, political scientists have ignored the influence of Community law; equally, many lawyers have understood the Community in purely legalistic terms.").

[253] This mirrors the conversations of the early American Republic, where American constitutional minimalists, and Southern states-rights thinkers in particular, on the one hand, and nationalists, usually speaking from Washington through the institutions of the general government, spoke but did not listen to each other. One gets a good flavor of the tenor of the conversation, of the inability to bridge the fundamental conceptual gaps, in the great debate between Daniel Webster of Massachusetts and Robert Hayne of South Carolina, recounted in Merrill D. Peterson, The Great Triumvirate: Webster, Clay, Calhoun 170-83 (1987).

simultaneously engaging in two diverging streams of conversation, two levels of discussion, about the nature of the European Union. One stream is essentially focused on the nation-state and the preservation of traditional liberties in the context of a limited union. The other is essentially integrationist, focusing on the creation of a more or less united Europe. These two vastly different streams of political philosophy, of visions about the center of debate within institutional Europe, have become the fetishes of the European obsession with its own identity.[254] These conversational streams appear to be directed inward, among the participants of each conversation, rather than between them. The current European conversations, at least at the institutional level, are like ships passing in the night. The lights of each are visible, the horns are sounded from afar, but there is little effort to bridge the gap between them or join them in a common endeavor. One European conversation occurs at the supra-national level of the emerging European meta-state. This is the conversation of harmonization, of pan-Europeanism, and of integration through a strong, supreme, democratic and well constituted general government.[255] Here we hear the voice of Hamilton and the work of Justice Marshall. With striking parallels to the work of the American Supreme Court, the European Court of Justice has been at the forefront of the construction of a jurisprudence of integration.[256] The court's construction and application of general principles provides an excellent example of the political economy of this integrationist jurisprudence.[257] But

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[254] See, e.g., Maduro, supra note 111, at 108-49 (positing three models of European constitutionalism and examining each within the lense of legitimacy). Maduro identifies three constitutional streams: one based on positive integration, one based on negative integration (market/private integration), and one based on devolution. See id. at 109. I reduce them to two - nationalist vs. integrationist - corresponding to the division in ante-bellum America between states-rights proponents and nationalists.

[255] As Joseph H.H. Weiler recently put it:

> *¿Cómo emergerá tal legitimidad? Son posibles dos respuestas. La primera es la demostración visible y tangible de que el bienestar total de la ciudadanía se incrementa como resultado de la integración. La segunda respuesta es la seguridad de que la nueva organización política integrada, dentro de sus nuevas frontera, posee estructuras democráticas.*

Joseph H.H. Weiler, Europa, Fin de Siglo 110-11 (1995).

[256] See Hartley, supra note 237, at 12 ("The change in the status of the Court has been enormous, so that today it more closely resembles the equivalent institution of a fully fledged federation (for example the United States Supreme Court or the German *Bundesverfassungsgericht*) than any other institution of the Community."); see also The European Court and National Courts, supra note 95 (passim); Hjalte Rasmussen, The European Court of Justice (1998); Joseph H.H. Weiler, Journey to an Unknown Destination: A Retrospective and Prospective on the European Court of Justice in the Area of Political Integration, 31 J. Common Mkt. Stud. 417 (1993); Francis Jacobs, Is the Court of Justice of the European Communities a Constitutional Court?, *in* Constitutional Adjudication in European Community Law (Deirdre Curtin & David O'Keefe eds., 1992).

[257] A good example of this jurisprudence centers on the rise and independence of the principle of equal treatment. See Gillian More, The Principle of Equal Treatment: From Market Unifier to Fundamental Right, *in* The Evolution of EU Law, supra note 93, at 517. See generally the essays in The European Court and National Courts, supra note 95, at 277, 303. In the area of EU legal personality, see, for example, Commission v. Council, Case 22/70, 1971 E.C.R. 263 (ERTA) (Community has treaty making power with respect to matters within its competence in which it has exercised its authority); Opinion 1/78, 1979 E.C.R. 2871 (International Agreement on Natural Rubber); but see Opinion 1/94, 1994 E.C.R. I-5267 (World Trade Organization) (determining that the Community and the Member States shared treaty making authority with respect to certain portions of the General Agreement on Trade in Services (GATS) and the Trade -Related Aspects of Intellectual Property (TRIPS)). For discussion, see, for example, Koen Lanaerts, The Role of the Court of Justice of the European Community: Some Thoughts About the Interaction Between Judges and

the European Court of Justice is by no means the only site, nor necessarily the most important site, of the integrationist project in Europe.[258]

This conversation assumes the value and reality of a meta-state in Europe - whatever its form or nomenclature.[259] At it greatest level of generality, the nature of this assumption of union is political. Indeed, for this group, the formal expression of union as such is less important than the imposition of the reality of union itself. The object is to create the union in fact, and worry about the nomenclature of its existence later.[260] As a consequence, Europeanists are concerned primarily with the construction of a legitimate state apparatus at the European level. The discussion is dominated by the problems associated with the legalization of issues of treaty (that is constitutional order) competence at the European level, to mirror that of the state level, the importation of fundamental guarantees of democratic institutions and individual rights, the direct relationship between the "people of Europe" rather than the people of the states of Europe.[261] The focus of this conversation is that commonly associated with the legitimacy of any nation-state - transparency, citizenship, equality, fundamental rights and the implementation of the democratic principle to governance at the meta-state level.[262] This conversation ignores issues of the legitimacy of European law within the context of Member State institutions, it being a given that the Member States have abandoned this field. It's project is the construction of a "better" Europe.

The other European conversation occurs at the level of the Member States. This is more traditionalist conversation, one grounded in the distrust of an expansive, bureaucratically driven Europe, a Europe in the form of an administrative, but not democratic state. This is a vision grounded in inter-governmentalism and a voluntary

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Politicians, 1992 U. Chi. Leg. Forum 93 (1992).

[258] For example, the political institutions of the European Community can be said to have asserted as much or more of a unifying influence through the large web of regulations it has parented, along with the policy glosses accompanying this huge project. See, e.g., Wincott, supra note 95, at 293 (role of the Commission); Laura Cram, The EU Institutions and Collective Action: Constructing a European Interest?, *in* Collective Action in the European Union: Interests and the New Politics of Associability 63 (Justin Greenwood & Mark Aspinall eds., 1998).

[259] Thus, for example, underlying Miguel Maduro's description of three constitutional models for the "economic constitution" of Europe is the notion that integration is the inevitable result of even the most decentralized model of regulating the "European market". Maduro, supra note 111, at 110. For other recent visions of the foundations of the integrationist model, see, for example, Lindseth, supra note 3.

[260] Consider the following explanation by a judge of the Court of First Instance of the fundamental principles on which the European Union is based:

> It balances the circumspection as to the federal character of the European integration process with the characterization of the Union as a phenomenon which, while maintaining and developing the *acquis communautaire*, strives to surpass the scheme of Member State sovereignty to reach its citizens directly in order to strengthen protection of their rights and interests.... The balancing point between application of these principles in the Community is left largely indeterminate.

Paolo Mengozzi, European Community Law: From the Treaty of Rome to the Treaty of Amsterdam 10-11 (Patrick del Duca trans., 2d ed. 1999).

[261] See, e.g., Michael Burgess, Federalism and European Union: The Building of Europe 1950-2000 (1999); Michael Burgess, Federalism and European Union (1989) (passim); Koen Lenaerts, Federalism: Essential Concepts in Evolution - The Case of the European Union, 21 Fordham Int'l L.J. 746 (1998).

[262] See, e.g., Weatherill & Beaumont, supra note 8; see also The Constitution of Europe: "Do the New Clothes Have an Emperor?" And Other Essays on European Integration (Joseph H.H. Weiler ed., 1999).

ad-hoc (even if systematized) harmonization centering on the Member State.[263] We have seen a version of this conversation in the opinions of the Member State Constitutional Courts.[264]

This nation-centered is based on the fundamental assumption that there is no union between the nations of Europe. Discussion centers on the means by which a supra-national European association can or ought to be accommodated within existing national institutional orders, that is, with issues of 'legitimacy' of European law in the national legal orders. The idea of a federal structure for Europe, at least one based on the current formal structures of association, is rejected.[265] This is a conversation centered on formalist concerns.[266]

The conversation of this group thus focuses on technicalities, and especially those of international law which limit the authority and powers of supra-national organizations. Thus issues of the power of state legislatures to adopt laws contrary to European Community regulations, and the relative supremacy of national constitutions over those of the constitutionalized treaties of the European Union, are at the forefront of these conversations.[267] This stream is fundamentally suspicious of the establishment of any government superior to that of the nation-state in Europe. They see in such establishment the destruction of the nation-state itself, and they have as the example of this not only the development of federal power in the United States, but also that of Germany, and even non-Western states such as India.

There appears to be no real point of intersection in these debates. Neither engages the other, but each strives indirectly to affect the debate within the opposite camp.[268] Each camp, by effectively positing hierarchy in multi-level governance structures, and choosing a site for supremacy within that hierarchy, have pre-determined the nature of the debate, but in irreconcilable ways.[269] The need to join these two streams in a more

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[263] Mattias Krumm has provided a nice summary of the position from the German perspective. See Mattias Krumm, Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice, 36 Common Mkt. L. Rev. 351 (1999). He notes that the German Court has tied three issues together, statehood, sovereignty and democratic order. Id. at 365-68.

[264] See discussion, supra, at notes 126-57.

[265] See, e.g., Hartley, supra note 237, at 179 ("In the final analysis, Community law is an essentially dependent system of law. It is not valid in its own right, but owes its validity to international law and the legal systems of the Member States."); Schilling, supra note 112, at 390-93 (on dependent and independent constitutions). On the idea that the project of European integration is nothing more than a sophisticated intergovernmental arrangement, see, for example, Stanley Hoffmann, Reflections on the Nation-State in Western Europe Today, 21 J. Common Mkt. Stud. 22, 35 (1982); Stanley Hoffmann, Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe, 95 Daedelus 863 (1966).

[266] See, e.g., Phelan, supra note 2.

[267] See, e.g., Hartley, supra note 237. For a British example drawn from the case law, see R v. Secretary of State for Foreign and Commonwealth Affairs, [1994] L.R. 552, ex parte Lord Rees-Mogg, [1994] 1 All E.R. 457 (Q.B. 30 July 1993) (seeking a declaration that the U.K. could not lawfully ratify the Treaty on European Union (Maastricht Treaty)). The Court, per Lloyd, L.J., noted in passing that "[I]n the last resort, as was pointed out in argument, though not pursued, it would presumably be open to the government to denounce the Treaty, or at least to fail to comply with its international obligations." Id. at 570.

[268] For a wonderfully literary and very personal description of this separation within academia, see Paul Craig, The Nature of the Community: Integration, Democracy, and Legitimacy, *in* The Evolution of EU Law, supra note 93, at 1, 1-2.

[269] Ironically, this pre-determination and irreconcilability of assumptions is dramatically illustrated in ways that mimic the great fundamental rift between antebellum American federalists and states rights

encompassing theoretical debate is great.[270] The magnitude of the need has been highlighted by the rift in jurisprudential philosophy between state and European courts. Both have managed to sidestep confrontation, but the stage is being set. The rift haunts important questions: for example, the power of a Member State to withdraw from the European Union, or the power of a Member State to overturn Community Law based on norms contained in Member State constitutions. Daniel Webster and John C. Calhoun haunt this modern European division, as Europe recreates the frustrations of non-dialogue which effectively characterized discourse in the United States before 1860.

Yet neither side of this European debate is comfortable looking to the practices of established federal systems, and particularly the federal system of the United States. The reasons are usually as short sighted as they are wrong. For example, Lord Mackenzie Stuart, in a grand display of ignorance, declares that in considering the problems of Europe, "One can eliminate any comparison on the constitutional or institutional plane. ... The authors of the [American] constitution shared a common approach to the problems of government deriving not only from the philosophies of the Enlightenment but also from their shared theology."[271] Yet, neither the founders, nor their immediate progeny, shared anything other than the will to craft a document ambiguous enough to permit a union the resolution of the ultimate nature of which was to be left to the future.[272] Whatever unity of design of the federal union existed after 1865 it neither reflects the theory nor actuality of the American federal experience prior to the Civil War.[273] It is that original American disunity, that tentativeness toward the federal experience, which may prove of great use in framing the European debate on the nature and substance of its *sui generis* system. Indeed, as the German Constitutional Court has demonstrated, the ideas of one of the major schools of American union, that of Calhoun, have not only migrated to the German legal academy, but is fast becoming

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federalists. For European theorists, like their American predecessors, a fundamental rift exists with respect to the relationship of individuals to the supra-national European entity.

For European integrationists, like American federalists, the European constitution speaks of a *direct* relationship between all of individuals within the borders of the new entity and the institutions of the Community. "According to Article A, The Union Treaty 'marks a new stage in the process of creating an ever closer union among the peoples of Europe.' This accords with the insistence of the Treaties of the 1950s that people, not simply states, are the explicit focus of the process." Weatherill, supra note 168, at 22.

European states-rights advocates view the this provision with the eyes of Calhoun. "The argument based on national identity is further supported by the objective of the European Union (Preamble (EU), Article A (EU)) and the European Community (Preamble (EC)) of 'an ever closer union among the *peoples* of Europe' which confirms that these peoples are separate." Phelan, supra note 2, at 425-26.

[270] "What is apparent, both from the way the European Regional process has unfolded and from the way academic theorists have tried to conceptualise it over the duration, is that the process is an endemically syncretic one. It harbours mixed motives and conflicting expectations. In these circumstances, any appropriate theoretical explanation of this regional process needs to encompass the two fundamentally different purposes that reside within it. The continuities of nationhood as a source identity, belonging and, thus, of political stability, need to be accommodated to the new demands of global interdependence which challenge and erode the sense of autarchy and insularity of the traditional politics of sovereign states." Michael O'Neill, The Politics of European Integration 144 (1996).

[271] Mackenzie Stuart, Problems of the European Community - Transatlantic Parallels, 36 Int'l & Comp. L.Q. 183 (1987).

[272] For a taste of these problems at the time of the Constitutional Convention, see Rakove, supra note 12.

[273] For a sense of this difference, see Kenneth M. Stampp, America in 1857: A Nation on the Brink (1990).

a general principle of German constitutional jurisprudence.

Perhaps, then, the American federal experience of the 19th century, and in particular Calhoun's framing of the issues of union and liberty in the context of multi-state unions, suggest explicit points of common ground for the modern disjointed European debate. Any such common ground, though must start from a reconceptualization of the conversations about Europe. This reconceptualization must start with the acceptance of the reality of European life.[274] This reality encompasses both the notion that Europe is, indeed, drifting toward integration and that Europe still functions on the basis of territorial and ethnic identity. Each stream, by concentrating solely on one half of the reality of Europe, provides an ultimately flawed and unsatisfactory basis on which to conceptualize the coming Europe. The blindness of the current bifurcated conversations, like those of antebellum America, when combined with the reality of European life, can lead to resolution by the most violent and divisive means. The debate within Europe typifies a decadent formalist academic discourse which seeks to contain within it the multiple and overlapping communities of individuals from which spring the lived reality of that sovereignty, legitimacy, nation-state, and meta-communities which defy the current discourse's ability to contain it.[275] Indeed, "by repeating the rhetoric of dead events which no longer accord with reality,"[276] the proponents of both camps risk irrelevance. The relevant task is "to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion."[277]

Explicitly historicizing federalism, paying more than lip service to the notion that federalism, the relationship between governments in multi-governmental systems, is dynamic and not linear, is a start at freeing Europe from the prison of its old taxonomy of governance.[278] It frees the debate from a blind adherence to the rigidity and formalism of an originalist based theory of governance. More importantly, it refocuses the debate from either within or outside the European "union" and directs it to the general issue of what is possible within Europe, freed of the constraints of an antiquated theory. Europe appears more ready to adopt this view than the United States of the ante-bellum period.[279]

Abandoning adherence to notions of intergovernmental hierarchy and hegemony is

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[274] "Identification and understanding of the possible forms of constitutional noncentralization in terms of what is possible and what actually exists is one of the major concerns of the study of federalism." D.J. Eleizar, International and Comparative Federalism, 26 Pol. Sci. & Pol'y 190, 192 (1993).

[275] This is not a new problem, certainly. But the academic and political debate of the last fifty years, with its emphasis on taxonomy, on division, on the permanence of states as the basis of political community, on the United States of America as the alpha and omega of the federal form, has obscured the problem.

[276] Rosalyn Higgins, Intervention in World Politics 42 (Hedley Bull ed., 1984).

[277] Id.

[278] What Alan Watson described for the ancient world is equally applicable to the coming changes within the European Union:

> Legitimacy in the ancient world was the oil that lubricated the operative machinery of a society. The more its rules and institutions were considered legitimate, the more easily it could change its practices. ... [W]here the pressures for change were great, practice disregarded legitimacy, or found a way round it; and over a period the legitimacy adjusted to take account of the practice.

Alan Watson, The Evolution of International Society 315 (1992).

[279] See, e.g., Neil MacCormick, The Maastricht-Urteil: Sovereignty Now, 1 Eur. L.J. 259 (1995).

another lesson from the American antebellum experience.[280] The nation state no longer sits at the apex of a hierarchy of power.[281] Legitimacy is not a function of categorization in accordance with theories which base their authority on their power to look backwards - rather categorization is authoritative only to the extent it accords with a society's practice and its notion of what is right and good. Here Calhoun's notions, contextualized for the present epoch, are directly helpful. Multi-governmental systems need not be conceived as constructed on the basis of hierarchy. Calhoun has shown that an intergovernmental approach, an approach based on the equality of general and constituent governments is possible in theory.[282] The European Community is demonstrating that, in bits and pieces, such a theory has practical applicability.[283] The consequence is dynamism in institutional form at the level of greatest generality. Constitutional character will assume a permanent countenance. Politics, rather than legalism will more likely shape the character of governance systems of both Member State and general government.

Likewise, multi-governmental systems need not be constructed on the principle of

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[280] For a different, and perhaps opposite, conclusion, yet one also grounded in the language of structural legitimacy at all levels of systems of multiple governments, see Lindseth, supra note 3.

[281] See Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy ix (1996) (territorial boundaries no longer coincide with the limits of political authority or the webs of loyalty of the citizens of a state). Globalization has at once created a rush of standard or norm setting power to a higher level of institutional generality than the state. At the same time, it has fostered the development of communities which are not co-terminus with the borders of a nation state.

[282] John C. Calhoun, Discourse on the Government and Constitution of the United States, *in* Calhoun, supra note 43, at 81.

[283] Indeed, for a demonstration of the flexible and dynamic nature of political evolution within the European Union, one need look no further than the recent suggestions by France and Germany to essentially bifurcate Europe, that is, create different levels of participation within the European Union.

> President Jacques Chirac of France urged Germany today to join France in spearheading a core group of European Union countries that would move faster than others toward political and economic union. "Those countries that want to proceed further with integration, on a voluntary basis and in specific areas, must be allowed to do so without being held back by those who, with every right, do not want to proceed as quickly," Mr. Chirac said in a speech to the German Parliament. ... Mr. Chirac's speech was intended to be the high point of a two-day visit here proving that the French-German "motor" was still vigorous despite what has seemed like a cooling of the relationship in recent years. But his speech was seen here as the beginning of what is likely to be a long and heated debate about the future of the European Union. Last month, Germany's foreign minister, Joschka Fischer, suggested that a European federation with a directly elected president and a parliament sharing real executive and legislative powers was needed for the union to function effectively.

Suzanne Daley, French Leader, in Berlin, Urges A Fast Track to Unity in Europe, The New York Times, June 28, 2000, at A-11. Of course, only those states with the greatest stake in the union would have the greatest say in its organization and policy. That has member states like Britain concerned. "Britain worries that Germany and France are trying to create second-class citizens among that union, a fear that is especially pronounced within the former Eastern bloc. Foreign Secretary Robin Cook says London wants equality among states of the European Union as it reaches out to new members." Julie McCarthy, Future Direction of the European Union, Show: All Things Considered (9:00 PM ET) June 29, 2000, Thursday (transcript available in Lexis, News Lib). See also John Hooper & Ian Black, Showdown Over Europe: Blair Put on the Spot as Germany Increases Pace of Integration: Demands for Inner Core of States, The Guardian (London), June 23, 2000, at Guardian Home Pages 1 (available in Lexis, News Lib) (stating that "[a]ccording to some sources, the new German agenda would include potentially explosive proposals for splitting the Rome treaty. Under this vision, two new treaties would be written.").

supremacy to attain legitimacy. More pointedly, the American notion that governments of greatest generality are invariably the locus of the authority of greatest weight is not inevitable.[284] Issues of hegemony, as they affect legitimacy, can, in this way, join the two spheres of the theoretical debate about 'Europe.' Calhoun's notions of concurrent majorities, of interposition, of weighted suffrage, of multiple checks and balances between and within governments locked together in union, already part of the debate in Europe, serve, as well, as the basis of discussion of the democratic legitimacy, and therefore the binding power, of acts of either general or constituent government.[285]

The concurrent majority principle is already established within the political institutions of the European Communities. It finds expression in the European Council's qualified majority voting rules.[286] This voting scheme suggests, but does not mimic, the division of votes within the American House of Representatives.[287] The emerging Community committee system shows some promise of providing a space for the effective representation of the constituent groups of the Community.[288] But it also suggests that democratic legitimacy is not necessarily a product of "majority rule." To some extent, the United States missed a splendid opportunity to wrestle with and refine its democratic representative principles by embracing the notion of majority rule. Europeans, at least at the level of the Community, have been far more sensitive to Calhoun's misgivings of tyrannies of the majority.[289] Concurrent majority principles can be a greater source of discussion of the incorporation of the democratic governance principle to the governance systems of the European Communities, as well as those of

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[284] The supremacy-of-the-center principle of federalism theory is a function of the current reality of federal systems. But current reality does not make impossible a reconceptualization of the supremacy notion. Calhoun in the United States, and the German Constitutional Court within modern Europe, may be pointing the way to a more nuanced and subtle federal organization of formerly sovereign but culturally related states.

[285] Daniel Bodansky has recently described the central importance of democratic legitimacy in the context of both integrationist and states' rights debates.

> The persisting questions about the legitimacy of the European Union and the Security Council, however, suggest that general consent may not be sufficient, in itself, to legitimate a general system of governance or its resulting rules. General consent involves a much more significant surrender of autonomy than specific consent - and thereby raises more serious concerns about legitimacy - since in giving consent, a state does not know what particular constraints may be imposed on it in the future. For this reason, the notion of "the consent of the governed" has come to mean more in modern political theory than simply initial general consent to governmental authority; it implies ongoing consent through democratic elections.

Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law, 93 Am. J. Int'l L. 596, 609 (1999).

[286] See TEC art. 205(2) (ex art. 148(2)). For a less optimistic view of qualified majority, see Dinan, supra note 179, at 262-64.

[287] "The distribution of votes, however, is not in accord with the population of the states, as proportionately the member states with smaller populations still have more votes than their populations warrant." Weatherill & Beaumont, supra note 8, at 83.

[288] For a discussion of comitology, generally, see Christian Joerges, "Good Governance" Through Comitology, *in* EU Committees: Social Regulation, Law and Politics 311 (1999) (arguing that comitology provides a positive forum for deliberative politics and on that basis contributes to the democratic legitimacy of the Community). Comitology refers to the committee structure of the Community. See, e.g., Council Decision 87/373/EEC, 1987 O.J. (L 197) 33.

[289] See supra notes 45-56.

the member states themselves.[290] The Community, both internally, and in crafting its relationships with the Member States, is in a position to reject the thrall of the notion that democratic constitutionalism is solely concerned with the means of structuring systems of majority rule.[291]

Concerns about structuring of governance norms within the Community and its Pillars - the concern of the integrationists - can be coupled with concern about the authority of the Community and its Pillars over the Member States and its citizens. Ultimately, this becomes not a discussion for judges or theorists, but one for the people, in their communities assembled, speaking through their representatives, in the context of legitimate political institutions.[292] In this context, both streams of the European dialog must confront the secession question. Moral, legal, political and cultural legitimacy within the Community and between the Community and the communities of Europe sharply focus the concerns about the creation of a centralizing meta-state, and the relationship of that state with its constituent parts. Here Calhoun's position,[293] as well as means by which this question was settled in the United States, provides a foundation, as well as a cautionary tale.

The nature of the diffusion of power within multi-level governance systems, rather than the locus of sovereignty, reduces the fundamental differences between Integrationists and Formalists to irrelevance. With authority firmly and unalterably in the hands of the communities making up a union, it is possible to reduce issues of sovereignty to insignificance, and substitute for that a concern with the legitimacy of the power delegated to particular governments within multi-governmental arrangements. That concern is best expressed through the notion of legitimacy, and with it, the concern for democratic principles now very much a bedrock of both international and "domestic" law in the West.[294] Secession and supremacy, democracy and expressions of the popular will, are not problems limited to the institutions of Community or of member states, each in isolation of the others. The great debate within the United States has illustrated the fallacy of that division, and the consequences for those who fail to heed the warning written into the nineteenth and twentieth century history of American federalism.

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[290] Indeed, it seems that the legitimacy concerns of the states' rights proponent are as easily turned inward as they are deployed against the legitimacy of the Community itself. Democratic legitimacy and consent is as important for Catalans in Spain, Bretons in France, and Scots in Britain, as it is for Spain, France and Britain within the European Communities. Devolution coupled with the creation of multi-level meta-states can operate more democratically with systems recognizing within the consent process, the importance of all communities within Europe. For integrationsists, the start of this analysis, perhaps, is not the formalist limits of the Treaty but the spirit of it culture provisions. See, e.g., TEC tit. XII, art. 151 (ex art. 128).

[291] For a statement of this notion, see, Ronald Dworkin, Constitutionalism and Democracy, 3 Eur. J. Phil. 2 (1995).

[292] There is a growing constitutional scholarship on what I call political constitutionalism. Most of the discussion has centered on the political *process* of constitutionalism, with the emphasis on the process. See, e.g., Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996); Dario Castiglione, Contracts and Constitutions, in Democracy and Constitutional Culture in the Union of Europe 59 (Richard Bellamy et al. eds., 1995). I emphasize the importance of the political over that of process in the project of constitutional legitimacy.

[293] See supra notes 66-67.

[294] See, e.g., Giandomenico Majone, Europe's Democracy Deficit: The Question of Standards, 4 Eur. L.J. 5 (1998).

The dynamism of the "federalism" principle, provides another bridge. Federations ought not to frighten states' rights advocates in Europe. The nature of federalism is not set in stone, nor has the world yet witnessed all of the multiple forms of governance which can be constructed within the spirit of this principle. By the same token, federalism does not guarantee the formation of a classical post-Westphalian state from out of the Institutions of the European Union, whatever its form.

> The Community fits easily within European traditions of statecraft. At the same time, this emerging federation contains a great potential for overcoming the traditional limitations of European supra-national political entities. That potential is best realized if the structure of the Community is treated as a moving target composed of periodic equilibrium between three contradictory impulses - the assimilative impulse of harmonization, the political impulse of the nation-state, and the ethnic impulse of sub-national cultural groups. Stability for any European federation must be gauged by its tolerance of movement.[295]

The notion of legitimacy thus provides a basis towards a new model of the federal state, the functioning of which at the levels of the state as well as the union, become more intertwined, and as a result, perhaps more democratic.[296] It permits movement away from the traditionalist conception of union formation - the flow of administrative power down from a unified central authority created by the singular mass of the individuals who are also members of the constituent units of government. In this form, legitimacy (sovereignty) and the democratic principal are concerned with the relationship between a "higher" democratic overseer and the subordinate administrators. The administrative state serves one unified master in which sovereignty resides. The European Community suffers a deficit from this perspective because the administrator and the overseer are the same, and neither may be subject to a sufficient amount of direct democratic oversight.

In place of this traditionalist vision is a conception of federalism in which administrative power can flow up from a collective, but not entirely unified, group of

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[295] Backer, supra note 97, at 1392.

It is in this sense that scholars such as Jo Shaw provide the basis for a reorienting of the dialogue within Europe. Drawing on the work of James Tully, her development of the notion of constitutionalism as a discursive process well suits the needs of a post American federalism discussion. Jo Shaw, Postnational Constitutionalism in the European Union, 6 J. Eur. Pub. Pol'y 579 (1999). Constitutions, like the federal system arising from out of the construction of the Community Institutions, and also like the nature of the relations between the Community and the Member States, is more productively understood as "an inter-cultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity." James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995). Thus, Shaw suggests that "[i]t is wrong to assume that the body politic can necessarily bring different social groups into balance with each other. Rather, it may be necessary to acknowledge that this equilibrium cannot occur or can only occur after very sustained dialogue." Shaw, supra, manuscript at 15. The search for equilibrium, though, is misplaced, at least to the extent that equilibrium is thought to more than a temporary state of affairs.

[296] For an useful illustration of a more nuanced and broader legitimacy analysis, see, Francis Snyder, EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?, *in* The Evolution of EU Law, supra note 93, at 417, 463-67.

constituent states. This turns the idea of the traditional state, and the devolutionary presumption of administrative law, on its head. Here legitimacy and the democratic principal are concerned with the relationship between multiple overseers which occupy a level of governmental generality smaller than that of the government to which the administrative power is placed. Here the constituent states remain the masters of the arrangement. This administrative state serves multiple masters within an institutional context. It is policed from below by the courts of member states on the basis of each state's constitutional norms. Acts of the administrative meta-state found to be ultra vires can be reviewed by political arrangements between the Member States, perhaps through the legislative process currently in place in the Community. The echoes of Calhoun's sense of the federalism principle is strong here indeed.[297]

As Calhoun would have understood, acting collectively, the multiple masters of Europe express the sovereign, though diffuse, will of the collective communities they represent. Collective action is guided by concurrent majorities in a manner which may be more sensitive to multiple identities and loyalties of the individuals within the communities making up the union. "The crucial point, therefore, from both a Treaty and a constitutional point of view, is that development of the democratic foundations of the Union should keep pace with integration and that, as integration progresses, a living democracy should continue to operate in the Member States."[298]

V. CONCLUSION

If the mistakes of the American resolution of its differences about federalism is to be avoided, if secession is ultimately to be averted, if the current theoretical discussion is not to be displaced as irrelevant to the reality of change in Europe, there must be greater attention to the ramifications of the coming together of national and supra-national institutions within Europe. I do not, by this, mean that we must engage in the dialogue of agreement. Rather, the conversations held in private and delivered to different audiences, ideological politics disguised as academic theory, must be unmasked and treated as actors in the process by which a dynamic and contingent new basis for political legitimacy within the context of federation, is reached. The process and rules of speaking together, and reaching political consensus, is the mark of the ultimate success of a constitutional system. The insights of the political theory demonized and suppressed in the United States after 1865, may well provide a basis, a structure, for this accommodation.

Near the end of his long life, Ernst Jünger, one of the bards of the old German *Freikorps* and a fiery *volkish* nationalist in his youth, well understood the increasing irrelevance of the nationalism he had held so dear in his youth. In response to a question about the movement towards a political unification of Europe, he noted "What does a nation mean when you can fly across it in ten minutes?"[299] Indeed, technology has made

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[297] Compare Calhoun's arguments about the power of states to invalidate *ultra vires* federal actions, and the use of the highly political constitutional amendment process to resolve state objections to federal action. See discussion supra notes 60-64.

[298] *Brunner*, [1994] 1 C.M.L.R. at 89 para. 49.

[299] Ernst Jünger is quoted in Nigel H. Jones: Hitler's Heralds: The Story of the Freikorps 1918-1923 246 (1987).

it possible to overcome the nation-state as the best site, or the largest efficient space, for communal norm making.[300] Into the void created by the tugging of the conflict between the local and the general, the notions of concurrent majorities, of nullification, and of a layering of communities with overlapping powers, of *sui generis* constructions of governance which do not play by the rules, so categorically rejected in the age of the great nation state empires, and in the United States after 1865, may well be relevant once again. In the regime of growing world wide migration, emerging ethnic communities, and world wide systems of norm making in which governance systems become malleable, federalism principles rejected in the great age of the nation-state may well serve as more effective mediating axioms than those designed for the seventeenth century European world.

[300] That technology should be a significant force shaping community practice, and therefore, social organization, is not a new thing. See, e.g., Lynn White, Jr., Medieval Technology and Social Change (1962). In the modern west, social mores have also modulated as technologies changed. See, e.g., Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1997).