CRITICAL TURNINGS IN FEDERALISM

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No matter how hard we try to fix authoritatively the meaning of words, no matter how hard we try to make eternal our ordering of the political universe, communities seem to be able to subvert the classification systems politicians and armies, priests, academics and philosophers, painstakingly construct. So it is with the form of political organization we try to understand as federal; so also is it with the great division between domestic and international law. To engage in an exploration of federalism in the context of great division we have made between the realms of domestic and international law is thus both an act of memory and a look to the future. Today I will speak very briefly about the ongoing conversations about federalism within the United States and the European Union in the context of the distinctions we make between national and international systems of governance.

I start with the American conversation about federalism, 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, and the resulting unitary and narrow orthodox vision of federalism. This orthodox vision provided a boundary between the domestic law of nations and the law between nations, and in this way helped reinforce our understanding of the division between domestic and international law. I then explore the emerging European reprise of this American conversation. I begin with a review of the European version of federalism orthodoxy emerging from 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, drawing parallels with the development of the American orthodox position. I then read the vision of federalism being developed by the constitutional courts of the Member States against this emerging federalism orthodoxy of the Institutions of the Community. I concentrate on the jurisprudence of the German courts, with some attention to the pronouncements of the courts of Italy. Here again, the "new" jurisprudence is articulated in parallel to its American progenitor. The similarities are significant. I then suggest some morals other than the obvious ones -- there is nothing new under the sun and ideas travel. The old divisions between domestic and international law are breaking down even as the line is blurred between orthodox government and organizations of states.

In 1865, the United States at last settled the question of federalism. This

settlement was accomplished violently and was written into the basic law of the land during Reconstruction and period of "Progressive" reform leading up to the First World War.[1] This settlement effectively determined the core principles animating the way sovereign power could be diffused, controlled and exercised in a federal republic among the general government, its constituent states, and the people. It thus effectively narrowed the range of the characteristics which could be claimed by systems purporting to be "federal." Henceforth, the general parameters of the characteristics of post Civil War American federalism became the benchmark for distinguishing between federal systems and all others. 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."[2]

Americans, more perhaps than other people, have since that time confined the

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[1] "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." K. C. WHEARE, FEDERAL GOVERNMENT 8(4th ed. 1964) *quoting* WOODROW WILSON, EPOCHS OF AMERICAN HISTORY: DIVISION AND REUNION, 1829-1889 254 (19–). "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, he, 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.

[2] K. C. WHEARE, FEDERAL GOVERNMENT 1(4th ed. 1964). 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." *Id.*, at 10.

discussion of federalism to systems falling within the limits they themselves have constructed.[3] Alternative political arrangements, to the extent considered at all, are characterized as non-federal unitary systems, or conversely are treated as some sort of non-federal, and therefore non-statal international organization, usually labeled confederation. The borders of this system, as memorialized in our federal Constitution, generally define the limits of both federalism and the applicability to a polity of principles of domestic or national law. For federal and unitary systems, the borders of the state or federation also marked the limits of the applicability of domestic or national law.[4] The relationship between the general government of a

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[3] 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."

Id., at 11.

[4] 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 bet 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

federation, so defined, as its constituent parts, was defined by the highest form of domestic law – a constitution. In contrast, two systems, or regimes, of law applied to other political arrangements. International law, the law between sovereign states, provided the only available basis for ordering the relationships between a general government of these associations and their constituent states.[5] National or domestic law regimes stopped at the borders of the constituent states of these supra-national systems. Thus, notions of federalism and the regimes of law applicable within any association of states, are intimately intertwined.

American federalism after the American Civil War was based on the acceptance of several basic parameters. 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

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inviolability of those boundaries against all other states. ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 16 (1987).

[5] "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 A.J.I.L. 705, 706 (1988).

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. Because power was assumed to reside in the people of the various states united through the general government, dissolution was theoretically possible though secession was not, but only as the act of the people of the entire federation.

The Civil War reconstruction of federalism silenced a vibrant debate between the adherents of the ultimately adopted conception and other theories of American federalism. These alternative 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 strongest of these opposing visions was brilliantly expounded by John C. Calhoun.[6] Calhoun, a political patrician from the uplands of South Carolina, championed a vision of federalism based on the locus of the sovereign authority of the United States in the people of the several states, which then created both state and general governments as their

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[6] The bulk of Calhoun's thoughts were set down by him in his *A Disquisition on Government, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 3 (Ross M. Lence, ed., 1992). and *A Discourse on the Constitution and Government of the United States, id.,* at 79.

agents. 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. The primary task of the agreements creating this general government, was, 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 itself powers which might not have been expressly delegated to it without the consent of its constituent parts drove his construction of what has become alternative vision of a federal union. As such, a federal system with an autonomous general government could remain stable only if it had built into it mechanisms the for dispersion and diffusion of power between the general government and its constituent parts, as well as within governments of a federal union. 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.[7] This

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[7] 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

notion of concurrent majorities still survives within the American federal government.[8] Additional protection from encroachment followed from the original division of authority between general and specific government. These included the liberty of states to define and interpret for themselves the authority of the general government to act, the indirect relationship between the people of the several states and the general government, and of the power of the constituent members of a federal union to withdraw from the union.

For Calhoun, the heart of the check on the power of the general government to encroach on the sovereignty of the states was the amendment power of the Federal Constitution.[9] This provision requires large concurrent majorities within the general

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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* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 487 (Ross M. Lence, ed., 1992) (January 28, 1842).

[8] Concurrent majorities theory continues to have a residual effect in the United States even after the Civil War. For a discussion, see, e.g., EDWIN L. LEVINE, THE GHOST OF JOHN C. CALHOUN AND AMERICAN POLITICS (1972).

[9] 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

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 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.[10] The first was the expansion of implied powers granted to Congress (especially through the broad use of the "necessary and proper" clause).[11] 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.

After 1865, Calhoun's vision was substantially discredited and demonized as a mere apology for slavery. What remained of Calhoun's federalism vision was

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amendment of the instrument itself.

John C. Calhoun, *The Fort Hill Address: On the Relations of the States and Federal Government, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 369, 383 (Ross M. Lence, ed., 1992) (July 26, 1831).

[10] For a discussion of the general acceptance of this argument in the ante-bellum South, see JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT 130-141 (1930).

[11] 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., JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT 134 (1930).

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.[12]

Ironically, the great debates about the acceptable configurations of federalism of early nineteenth century 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 and the Member States have been advanced. The more expansive, and from an American perspective orthodox, 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. The other view has been championed primarily by the constitutional courts of certain member states of the Community and its friends, principally but by no means exclusively in Germany and Italy.

The institutions of the European Union have declared the autonomy of the European Community, the supremacy of the Community within the ambit of its

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[12] One gets a good whiff of this attitude in the classic K. C. WHEARE, FEDERAL GOVERNMENT 2, 11 (4th ed. 1964).

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. The Community, in its own eyes, has been transformed from a self-styled regional organization of sovereign states to – something else. Yet there is a strong whiff of the federal and the national to this "something else."[13]

The doctrines of Community law autonomy and supremacy 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

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[13] For an argument that the European Union ought to make the leap to orthodox federation of the American type, see, e.g., G. Federico Mancini, *Europe: The Case for Statehood*, 4 EUR. L. REV. 29 (1998). Judge Mancini, I believe, makes the fundamental error of assuming that the current organization is not a state. Professor Weiler's reply is instructive. J.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.

territories of the constituent states.[14] Autonomy serves as a shield against Member State encroachment of the governmental prerogatives of the Community.[15] Autonomy is protected by the power of the ECJ to "ensure that in the interpretation and application of the Treaty the law is observed,[16] 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 courts of a members state.[17]

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 constituted this new government. The doctrine of supremacy provides such a definition of position. In this respect, the ECJ has attempted to impose the American model on the constituent states of the Community.[18] Under this conception of federalism, the constituent

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[14] *See, e.g.*, San Michele v. High Authority, Case 9/65, [1967] ECR 1.

[15] *See, e.g.*, Variola SpA v. Amministrazione italiana delle Finanze, Case 34/73, [1973] ECR 981).

[16] EC TREATY, art. 164.

[17] EC Treaty, art. 177.

[18] Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, [1963] ECR 1, [1963] CMLR 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

states of the federative enterprise cede sovereignty upwards to the (now autonomous and independent) general government.[19] 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 later 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.[20]

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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."

Id., at –.

[19] Costa v. ENEL, Case 6/64, [1964] ECR 585, [1964] CMLR 425 ("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." *Id.*, at –). *See also* Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel, Case 11/70, [1970] ECR 1127, [1972] CMLR 255; Commission v. Italy (Second Art Treasures), Case 48/71, [1972] ECR 527.

[20] Amministrazione delle Finanze dello Stato v. Simmenthal Spa, Case 106/77, [1978] ECR 629 (Simmenthal II).

Yet, 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. 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.[21]

It is 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 E.U. and U.S. the residuary power resides in the constituent state. The general or supra-constituent layer of government operates

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[21] 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 action sof 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.

within the constraints of the concession made 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 them by the Community Treaties.[22]

Yet, though neither the United States nor the E.U. 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.[23] 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.[24]

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[22] On the institutional framework of the Community, see, e.g., D. FREESTONE & J. DAVIDSON, THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN COMMUNITIES (1988). The EU Treaty's emphasis on harmonization is discussed at note 2, *supra*.

[23] Asscher v Staatssecretaris van Financian, Case C-107/94, [1996] ECR I-3089, [1996] 3 CMLR 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).

[24] JEAN-VICTOR LOUIS, THE COMMUNITY LEGAL ORDER 50-51 (2nd ed. 1990).

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.[25] Moreover, the ECJ's extraordinarily broad (and some might argue EU Treaty expanding) interpretation of, for instance, Arts. 9, 30 and 48, coupled with the "discovery" of consumer protection and consumer fraud, are well known and will not be discussed here.[26]

While there may be substantial unanimity within the constituent states respecting the validity of the principle of autonomy, there is significantly less unanimity with respect to the validity of the notion of Community supremacy.[27] Member States continue to resist this vison of the federal union between the

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[25] Firma Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, [1987] ECR 4199 at ¶ 17. The ECJ relied on EC Treaty 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 ¶¶ 15, 17.

[26] *See, e.g.,* Finanzamt Köln-Altstadt v. Schumacher, Case C-279/93, [1995] ECR I-225; [1996] 2 CMLR 450; Wielockx v Inspecteur der Directe Belastingen, Case C-80/94, [1995] ECR I-2493.

[27] McCarthy's Ltd. V. Smith, [1979] 3 CMLR 44 (English Court of Appeal, Civil Div.) (per Denning MR); Brunner v. European Union Treaty, Cases 2 BvR 2134 and 2159, [1994] 1 CMLR 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] CMLR 540 (Federal Constitutional Court (2nd Senate).

Community and its constituent parts. 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.[28]

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 Lands is of long standing. Calhoun's views of the nature of confederations was in some measure shaped by the writings of Pufendorf.[29] Many Southern lawyers journeyed to Germany to finish their legal education.[30] 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

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[28] *See, e.g.*, Brunner v. The European Union Treaty, Cases 2 BvR 2134/92 and 2 BvR 2159/92 (1993), *reported in English at* [1994] 1 CMLR 57.

For earlier versions of this position, see, Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle Für Getreide und Futtermittel, Case 11/70, [1970] ECR 1127, [1972]; Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle Für Getreide und Futtermittel (Solange I), Case 2 BVL 52/71, 37 BVERFGE 271, [1974] CMLR 540 (Federal Constitutional Court (2nd Senate).

[29] SAMUEL L. PUFENDORF, THE LAW OF NATURE AND OF NATIONS (4th ed. 1729 London).

[30] *See, e.g.*, M.H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 A.J.COMP. L. 599 (1987).

much of his thought on the subject [of sovereignty]; he had read much of Calhoun's work, cited and quoted form hm with approval, and set forth the same doctrines, modified only as far as was necessary to meet the different facts of the German situation."[31] Calhoun's notions of the (geographical) homogeneity necessary for nations form and to distinguish themselves from others finds echoes in modern Germany as well, not only in the work of current academics,[32] but also in the analysis of the German Federal Constitutional Court. Ironically, homogeneity here becomes one of culture, language, or even race.

The German Federal Constitutional Court has taken the position that it, and not the Institutions of the Community had the authority to determine the validity of actions taken by Community Institutions. It suggested that were it to disapprove 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. "Accordingly, the Federal Constitutional Court will review legal instruments of the of European institutions and agencies to see whether they remain within the limits of

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[31] AUGUST O. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN 208 (1968).

[32] 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 transmorgrified theories of Calhoun through the work of NAZI thinkers such as Carl Schmitt for the proposition that both nations and democracy require a certain homogeneity in order to form and survive. *Id.*, at 510).

the sovereign rights conferred on them or transgress them."[33]

Here we are presented with a different vision of the meaning of federalism within the European Union. It is a vision of the E.U. as an association of States which retain their separate national identity *(Staatenverbund),* not a Federal State having its own national identity (*Bundesstaat*). The court stated that "the [Member] States require sufficient areas of significant responsibility of their own, area 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."[34]

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[33] Brunner v. The European Union Treaty, Cases 2 BvR 2134/92 and 2 BvR 2159/92 (1993), *reported in English at* [1994] 1 CMLR 57, 89 (¶ 49). For a discussion of the case, see, M. Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Even Closer Union,"* 31 COMMON MKT. L. REV. 235 (1994).

[34] Brunner v. The European Union Treaty, Cases 2 BvR 2134/92 and 2 BvR 2159/92 (1993), *reported in English at* [1994] 1 CMLR 57, 89, translated in 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, 510 (1997). Zuleeg notes that "[t]here is no way out of the dilemma caused 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." Zuleeg, *supra*, at 510. For further criticism of this racial theory of nations, see, e.g., J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EURO. L. J. 21958 (1995); Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union,"* 31 COMMON MKT. L. REV. 23549 (1994).

As such, the union between Germany and the Community is one founded on principles we have come to understand as grounded in international law, with sovereignty, and the bulk of federal power, residing in the Member States. 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-avis other states, Germany is free to secede through appropriate actions at a time of its choosing.[35] The Italian courts have followed a similar path.[36]

The nature of the implementation power, the "necessary and proper" clause of

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[35] 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. 224) 1, 1 C.M.L.R. 573 (1992) [hereafter EU Treaty]. The court also identified Articles 3a (enumeration of powers principles) and 3b (subsidiarity and proportionality) of the European Community Treaty.

[36] *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); M. 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)

the Community Treaty,[37] has also proven to be troublesome, especially for the Danes. The resistence 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 Virginia Report 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" clauses: "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."[38] The Danish resistence demonstrates both the instability of divisions of power within federal systems, and the tendency of greater governments to assert increasing levels of independence and 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.

The conversation so abruptly cut off in the United States has been taken up again in the construction of a very different federal union. Whether that conversation will lead to the development of another peculiar sort of federal union,

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[37] *See* EC TREATY, art. 235 (pre-Amsterdam).

[38] GAILLARD HUNT (ED.), IV WRITINGS OF MADISON 284 (1—), *cited in*

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.

The renewed debate has at last brought to the forefront the complex possibilities for structuring federal unions which remain federal but which may neither ape 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. 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."[39] Yet this uniqueness 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."[40] 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

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[39] John C. Calhoun, *A Discourse on the Constitution and Government of the United States, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN81, 117 (Ross M. Lence, ed., 1992) (1850).

> "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 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 116-117. For a discussion of Calhoun's conception of the difference between confederation, federation and nation, see, AUGUST O. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN 186-187 (1968). 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.

[40] K. C. WHEARE, FEDERAL GOVERNMENT 11 (4th ed. 1964).

> remain diffused – which is to say, it would exist everywhere and no where."[41]

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."[42]

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."[43] 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 in some respects straddles, the classical

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[41] Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 GREEN BAG 2D 35, 41 (1998).

[42] K. C. WHEARE, FEDERAL GOVERNMENT 11 (4th ed. 1964).

[43] Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, [1963] ECR 1.

intergovernmental organization and federation."[44] 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.[45] 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."[46]

Yet 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

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[44] J.H.H. Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle, in* J.H.H. WEILER (ED.), THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 130, 131 (1999).

[45] *See* STEPHEN WEATHERHILL, LAW AND INTEGRATION IN THE EUROPEAN UNION (1995) (at 3, 92). "The cross border structure is developed precisely because of a perception that national power is illusory in a number of sectors." *Id.*, at 3.

[46] J.H.H. Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle, in* J.H.H. WEILER (ED.), THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 130 (1999). "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.

"domestic or national law." It, too, has started in an experiment in more efficient government between states whose interests transcend their borders which mutated to meet the social, political and economic exigencies with which it was faced.[47] Might federal principles also come to have a broader meaning in time because the EU has come to be what is will be. I think the answer to this question must be most emphatically – yes. That the organization of the EU is *sui generis* is, I think, increasingly a given. That this uniqueness can ultimately be accepted as something permanent, and on that basis, folded into a reordered definition of what is federal, awaits the future. That this uniqueness has begun to erode the boundaries between the restrictive law between states, and the law within nations, 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. Exploding the boundaries of federalism will threaten the neat boundaries which separate international from domestic law.[48] This explosion of the narrow boundaries

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[47] *See, e.g.,* J.H.H. Weiler, *The Transformation of Europe, in* J.H.H. WEILER (ED.), THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 10, 14 (1999).

[48] Others have begun to argue that the law f the EU should be treated as an "instrument of reformation of our perceptions of international law." J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents,* 17 NW. J. INT'L L. & BUS. 354 (1996-1997).

of what we tolerate as federal, and therefore "national," turns on its head 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 are either an impediment to or irrelevant for the understanding of federal systems or completely distort the possibilities of federalism as a system for the organization of anything from highly unified states to loose confederations.

Old notions of sovereignty as singular and indivisible, popular since the time of Jean Bodin, have become increasingly troublesome and irrelevant in this age of division and diffusion of the traditional marks of sovereignty. The weakening of sovereignty also evaporates the distinctions between the realms of international and national law. 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. 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 presented by the United States.[49] The same view, held by Calhoun, made it

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[49] This is brought out nicely in Sean Monaghan, Note: *European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal*

impossible for him to contemplate a division 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.[50] Reality has provided some evidence to the truth of

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Constitutional Court's Maastricht Decision, 12 EMORY INT'L L. REV. 1441, 1488 (1998) (see also his discussion of German academic commentary about the nature of the EU, *id.,* at 1468-71).

[50] In this, Calhoun, of course, echoed the arguments of the anti-federalists. "Anti-Federalists alleged that the sovereignty of the states would soon evaporate, leaving a federal Leviathon as the unitary sovereign of the American Union." Jack N. Rakove, *Making a Hash of Sovereignty, Part I,* 2 GREEN BAG 2D. 35, 42 (1998). 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 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

this assertion, but even so, the drive toward unitary sovereignty has been incomplete, even in the United States.[51] The kernel of the answer to this dilemma, however, might well have been suggested by the EU's *sui generis* school.

> 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. 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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> 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* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 81, 239-242 (Ross M. Lence, ed., 1992) (1850).

[51] K. C. WHEARE, FEDERAL GOVERNMENT 237-245 (4th ed. 1964) ("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).

federal system.[52]

Yet, oddly enough, this form of stability, of returning the issue of the allocation of power to the political sphere, echoes the notions of nullification espoused by Calhoun, and with it, the idea that disagreements over assertions of power by the general government be resolved ultimately by the constituent parts and affirmed by adjustments in the compact imposing the general government.[53]

The use of sovereignty as a wall between domestic and international law, and the very different characteristics concocted for each, has also become increasingly disconnected to systems of governance based on diffusion and division of power.[54] As Ernst Jünger, one of the bards of the old German *Freikorps* understood so well –

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[52] 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, 1392-93 (1998), *quoting, in part,* Cappellitti, Seccombe & Weiler, *A General Introduction, in* I INTEGRATION THROUGH LAW, Bk. I, at 38 (1986).

[53] *See, e.g.,* John C. Calhoun, *The Fort Hill Address: On the Relations of the States and Federal Government, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 369 (Ross M. Lence, ed., 1992) (July 26, 1831).

[54] "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." Thomas M. Franck, *Community Based Autonomy*, 36 COLUM. J. TRANSNAT'L L. 41, 63 (1997).

"What does a nation mean when you can fly across it in ten minutes?"[55] Into this void, 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 world wide migration, ethnic community and world wide systems of norm making.

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[55] Ernst Jünger is quoted in NIGEL H. JONES: HITLER'S HERALDS: THE STORY OF THE FREIKORPS 1918-1923 246 (1987).