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JUDICIAL INSTITUTIONS IN EMERGING FEDERAL SYSTEMS:[1] THE MARSHALL COURT AND THE EUROPEAN COURT OF JUSTICE

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INTRODUCTION

In the second act of *Twelfth Night,* Shakespeare suggests that fame, or greatness, derives from three sources, "some are born great, some achieve greatness, and some have greatness thrust upon [them]."[2] Without in any way detracting from John Marshall's natural abilities or his achievements as a lawyer, diplomat, politician, and judge, there is much to be gained by

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1. The term "federal system" is technically not applicable to the European Union, which by law exists as a group of independent states united in economic and political interests by a series of multilateral treaties. However, the term is used in recognition of the *de facto* situation that the supranational operation of those treaties, and the submission of the Member States to the terms of the treaties, results in a relationship which is similar to that existing in *de jure* federal nations, such as the United States of America.

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2. WILLIAM SHAKESPEARE, TWELFTH NIGHT, act 2, sc. 5.

considering the unique opportunities that facilitated his rise to fame as "The Great Chief Justice." Charles Hobson points out that Marshall's place in the Revolutionary generation made it possible for him to play a role in establishing the Federal Constitution in 1787 and 1788, and yet live long enough to lead the next generation in giving shape and substance to its terms. Quoting Gordon Wood, Hobson notes that Marshall benefited from the early Republic's development of the "independent judiciary" as a means toward checking the excesses of popular government.[3] Indeed, John Marshall's appointment to be Chief Justice of the United States Supreme Court was itself partially due to his being President Adams' Secretary of State, and thus readily available when the President was under extreme pressure to make an appointment before a rapidly approaching deadline for a Congressionally-mandated reduction in the Court's size.[4]

Americans tend to forget the unique experiment in government that was launched first by the Declaration of Independence in 1776, followed shortly by a proposed Articles of Confederation left unratified until 1781. As a European commentator has observed concerning this period of American history; this was a time of Constitution making, not a time of constitutional interpretation. Referring to the shaping of the European Union, he continued:

> We have . . . inherited a tradition of constitutional theory from revolutionary France and America that testifies to the belief that Constitution-making can be based on intelligent decisions, on careful argument and sensitive historical understanding.[5]

Thus, we are reminded that the American venture into republican and federal forms of government were major events, not only in our national development, but also in world history. Despite the Founding Fathers' investigation for antecedents throughout history as it was then known,[6] the combination of

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3. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW ix-xi (1996).

4. *See* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, at 9-10 (1997) (citing Kathryn Turner [Preyer], *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. (3rd Ser.) 143, 143-63 (1960)).

5. Pavlos Eleftheriadis, *Aspects of European Constitutionalism*, 21 EUR. L. REV. 32, 39-40 (1996).

6. The Federalist Papers provide a good example of this type of study. *See* THE FEDERALIST NO. 9 (Alexander Hamilton) (discussing the Lycian league in Greece); THE FEDERALIST NO. 14 (James Madison) (discussing "turbulent democracies in ancient Greece and modern Italy"); THE FEDERALIST NO. 16 (Alexander Hamilton) (discussing Lycian and Achaean leagues); THE FEDERALIST NO. 18 (James Madison & Alexander Hamilton) (discussing Achaean league); THE FEDERALIST NO. 19 (James Madison & Alexander Hamilton) (discussing Frankish and Holy Roman empires, and Swiss

classical republicanism and federalism raised special problems when approached from the perspectives prevalent in the last quarter of the eighteenth century. One of the least explored areas was the constitutional function of the federal judiciary established in part by the Federal Constitution. The Articles of Confederation assigned a minor role to national judicial courts, and limited their jurisdiction to appeals from state admiralty courts in cases of prize and capture. However, the Supreme Court, as mandated by the Federal Constitution, was to have both original and appellate jurisdiction, and would function as the primary American court of international law. The Constitution also provided for such lower federal courts as Congress might decide to create, permitting a much broader scope for judicial activity than otherwise might have been the case. It was the lower federal courts, primarily those designated circuit courts in the Judiciary Act of 1789, that would carry federal authority and judicial power to the grass roots of early America.[7]

When John Marshall was confirmed as Chief Justice of the United States Supreme Court on January 31, 1801, the Court had evidenced little of the stature and influence it would achieve during his tenure on its bench. This was not because it lacked competent leadership or accomplished legal professionals. Chief Justices John Jay and Oliver Ellsworth provided the Court with a well-defined sense of its place in a government where powers were separated. They and their colleagues strained their physical strength, and some had died of illness aggravated by the strenuous duties of riding the circuit. The Jay Court undertook the unpopular task of making American debtors pay their pre-Revolutionary obligations to British merchants. It also found itself repudiated by the ratification of the Eleventh Amendment after it had asserted jurisdiction over a defendant state. The Ellsworth Court developed prize law for the new nation during the

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confederation); THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton) (discussing Dutch confederation); ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST, OR, THE [N]EW CONSTITUTION: [P]APERS 63, 83, 98, 110-14, 116-21, 123-27 (Heritage Press 1945) (1787-88).

7. *See* STEPHEN B. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT 19-57 (1982) (discussing the Pennsylvania Federal Circuit Court); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 316-32 (1985) (discussing Justice Joseph Story's work in the New England circuit courts); 1 JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 552-661 (Paul A. Freund ed. 1971) (discussing the U.S. circuit courts in general); 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 630-51 (Paul A. Freund ed. 1981) (discussing the U.S. circuit courts in general); JOHNSON, *supra* note 4, at 112-37 (discussing the U.S. circuit courts and the projection of federal power).

Quasi-War with France, and dealt with complex issues of international and domestic law presented by the French Revolution and the continuance of British power in North America. Yet despite these achievements, the Jay-Ellsworth Court, operating with a limited caseload, had little opportunity to rough out the framework of federalism in the new American union.[8]

Undeniably Chief Justice Marshall brought special skills in leadership, as well as a gift for the exposition of public law, to his duties at the Supreme Court. He was an innovator in Supreme Court procedure. This can be seen in the Marshall Court's pattern of opinion delivery, and the institution of seniority in opinion delivery, which enhanced the Chief Justice's authority and the introduction of ostensible unanimity in Supreme Court opinions. Prior to Joseph Story joining the Court in 1812, the Chief Justice, or the senior associate Justice on the bench, delivered virtually all of the opinions of the Court. Thereafter, seniority seems to have declined in importance, and almost disappeared after 1819.[9] We do not know how Court opinions were prepared, but there is evidence that each Justice might have come to the conference with a draft, and that the draft may have been circulated in advance of the meeting.[10] While John Marshall did not introduce the practice of unitary opinions, he was responsible for expanding an earlier practice into a general procedure, and, under his leadership, "Opinions of the Court" were firmly established as the standard format for future generations.[11] He was also capable of

8. *See generally* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995) (surveying the work of the Jay-Ellsworth Courts); RICHARD B. MORRIS, JOHN JAY, THE NATION AND THE COURT (1967) (assessing the work of John Jay); Sandra Frances VanBurkleo, *Honour, Justice, and Interest: John Jay's Republican Politics and Statesmanship on the Federal Bench*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 26-69 (Scott D. Gerber ed. 1998) (discussing John Jay); William R. Castro, *Oliver Ellsworth: "I [H]ave [S]ought the [F]elicity and [G]lory of [Y]our Administration,"* *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL, *supra*, 292-321 (discussing Oliver Ellsworth).

9. *See* JOHNSON, *supra* note 4, at 100-02; HASKINS & JOHNSON, *supra* note 7, at 382-89.

10. *See* JOHNSON, *supra* note 4, at 102.

11. *Id.* at 102-06. Paul Kahn notes that the unitary opinion frees the Court members from personal responsibility to the text; thus, they can depart from it with greater ease in subsequent cases, and even the author's personal reputation does not color the opinion with an individualistic stamp. Seriatim opinions, on the other hand, invite future contest and disagreement. The traditional British seriatim approach was particularly well suited to the elaboration of ancient common law principles. It was inappropriate in establishing a new system of federal constitutional law. *See* PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 105-15 (1997).

discouraging dissenting and concurring opinions, based in large degree upon his personality and charm, but also because of the Justices' unique living conditions.[12] During most of the Marshall era, they lodged together in the same Washington boarding house.[13] As a consequence, they shared meals and recreational time, which minimized the likelihood of corrosive argument at the Court's conferences.[14]

Modern theories of small group dynamics highlight the personal qualities of Marshall and may explain some of his success in achieving unity and mutual support among members of the Court. Group cohesion may develop from a variety of relationships, including sharing tasks and exchanging specialized knowledge. There is documentary evidence that the Justices helped each other with advice and assistance in the conduct of circuit duties.[15] When a small group is opposed by a larger out-group, or perhaps the whole society, it tends to become more introspective and there is an increase in internal bonding. During the presidency of Thomas Jefferson, the Court first operated under the threat of impeachment, and subsequently it was ostracized from Washington society. That remained the case until bachelor Justice Thomas Todd courted and married Dolly Madison's niece, at which point the Marshall Court seems to have married vicariously into an expanded social life. Small group leadership requires the leader to captain the defense against external enemies, a task that naturally fell to Marshall in his first decade as Chief Justice. Skilled in political maneuvering and widely respected by friend and foe alike, Marshall was the ideal protector of the Court and its elderly Justices.[16]

Without doubt, Chief Justice John Marshall brought to his Court duties a series of gifts —greatness with which he was born and greatness which he had acquired through his prior experience as lawyer, legislator, and diplomat. Yet we have suggested that the implacable opposition of President Thomas Jefferson may have made his task easier, at least as far as Court cohesion was concerned. No leadership can be exercised in a vacuum, and institutional growth is difficult if the surrounding circumstances inhibit change. A full understanding of the judicial career of John Marshall may be more readily achieved by a close comparative

12. *See* JOHNSON, *supra* note 4, at 96-99. *See also* G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 1-52 (1984) (referring to decision-making and collegiality).

13. *See* JOHNSON, *supra* note 4, at 97-99.

14. *Id.*

15. *Id.* at 135.

16. *Id.* at 135-37. Small group dynamics are more fully examined in Herbert A. Johnson, *Chief Justice John Marshall, 1801-1835*, 1998 J. SUP. CT. HIST. SOC'Y 1, 3-20 (1998).

look at the characteristics of one or more federal systems and the way in which their growth mirrors that of American federalism under the guidance of Marshall. More specifically, it is necessary to consider how central courts within federal systems simultaneously expand federal authority and enhance their own power and authority.

At first glance, it might appear obvious that American federalism should be compared to the federal systems of the Dominion of Canada and the Commonwealth of Australia. However, each of those nations began their federal existence with two central appellate courts rather than one. One of those courts, the British Privy Council, entertained quite different views of federalism from those held by the Canadian Supreme Court and the High Court of Australia, both before and after Privy Council review ended in 1986. In addition, both Canada and Australia adopted the British principle of legislative supremacy, contrary to American preferences for limited legislative authority restrained by judicial review. Finally, neither Australia nor Canada, before the Quebec independence movement, exhibited the local and state particularism characteristic of the United States. American uniqueness in this regard is due in part to the irregular extension of English law to the American colonies, but it also derives from the divergent development of law and governmental forms in the various states of the American union.[17] American state particularism makes the evolution of the European Union, and the work of its European Court of Justice, more easily comparable to the early American republic and the work of the Marshall Court.

I. COMMONALITIES AND DIFFERENCES

Looking at the Marshall Court and the European Court of Justice, we shall need to examine the visible tip of a much larger iceberg that drifts in the cold, uncharted and turbulent sea of federalism, nationalism, and states-rights. Are there special characteristics shared by central courts in federal unions which facilitate transfers of power from the constituent states to the central government? More specifically, do central courts,

17. *See* Herbert A. Johnson, *Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction*, 19 MELB. U. L. REV. 45, 49-51 (1993) (discussing the contrasts between the extension of English law to North America and Australia); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA §§ 17.3(a) & 17.4(a) (1992) (discussing the role of the Judicial Committee of the Privy Council in restricting Canadian federal power). In the case of Australia's Commonwealth Constitution, appeals which involve the question of power distribution between the Commonwealth and the States (inter se cases) were not appealable to the Privy Council except by permission of the High Court of Australia. Only one such certificate has ever been given by the High Court. *See* TONY BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW AND THEORY 832-33 (1996).

operating at the initial phases of federalizing —or "integration" as the Europeans would have it— enjoy unique advantages in shaping the constitutional and legal foundations of those emerging central governments? These are the basic questions that we may begin to answer by looking at the United States Supreme Court under John Marshall, and comparing it to the European Court of Justice as it has evolved into a system of Community constitutional law between 1957 and 1993.

Comparisons across national, cultural, and chronological differentials require that there be some relevant similarities among the institutions being studied. At the same time, no comparative study can be valid unless due consideration is given to the differences between the institutions. Fortunately, some very thorough pioneering work has already been done on federalism in the European Union, comparing it to the federal system current in the United States today. Briefly, scholars of the European Union [hereinafter EU] consider it to be much less centralized than the United States in the twentieth century. However, they also look closely at the work of the Marshall Court to explain the evolution of American federalism at its earliest stages.[18] This work is helpful in many ways, but our focus in this paper is not upon the European Court of Justice, but rather upon the Marshall Court, and what the experience of the European Court tells us about the Marshall era.

Historically, there is good reason to compare the European Court of Justice's evolution of EU constitutionalism with the growth of federal power under the guidance of Chief Justice Marshall and his Supreme Court colleagues. European unification began in the wake of World War II, which left most of Europe devastated by war, just as the new American states found themselves in economic depression and exhaustion after the Revolution. Like the American states prior to the Revolution, European nations before the war were dependent upon worldwide commerce for their economic prosperity. Americans emerged from an imperial system and found themselves excluded from trading patterns they had enjoyed in the British Empire. In 1945, European nations were challenged by the collapse of their empires, and by the resulting need to establish new commercial

18. Two useful articles are Francis C. Jacobs & Kenneth L. Karst, *The 'Federal' Legal Order: The U.S.A. and Europe Compared: A Juridical Perspective*, *in* 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, Book 1, 169-242, and Mauro Cappelletti & David Gulay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *in* 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, Book 2, 261-350 (Mauro Cappeletti, et al. eds. 1986). For a brief but careful review of these topics, see generally Sally J. Kenney, *The European Court of Justice: Integrating Europe through Law*, 81 JUDICATURE 250 (1998).

relationships. Each European nation felt vulnerable to the influence of two competing nuclear powers —the United States and the Soviet Union. Similarly, the newly independent American states were threatened by British power in Canada and the Maritimes, and British military garrisons in what would become the Northwest Territory. At the same time, until the completion of the Louisiana Purchase in 1803, the southwestern and southern borders of the United States, including access to the Gulf of Mexico, were alternatively dominated by Spain or France.[19] Europe after World War II, like the United States in the 1780s, saw advantages that would accrue from creating an internal common market for trade. Significantly, it was the small nations of Europe —Belgium, the Netherlands and Luxembourg— who led the way with the Benelux establishment and the European Coal and Steel Community. Prior to the ratification of the Constitution, it was the small American states whose prosperity was most closely tied to commerce, who were the strongest advocates for a federal union and the establishment of a common market that would enhance internal trade.[20]

A variety of economic and geographical factors ensured that the elimination of trade barriers would be both feasible and profitable in post-World War II Europe. Climatic difference between the nation states encouraged the establishment of intergovernmental systems for the free exchange of agricultural products. Varying levels of industrialization promised a flourishing inter-European trade in manufactured goods. Coordinating national initiatives in marketing and finance called for the decline of tariffs and economic subsidies which had flourished under the aegis of balance of payments mercantilism. These incentives also existed in the newly independent American states, although a strong industrial base was not present until well after 1800.

Both the post-Revolutionary American States and the Western European nations after World War II had much to gain by pooling their economic resources into a common market. Given their traditional competitiveness with each other, the Europeans entered union gradually, through a series of treaties which regulated an ever-expanding area of economic activity, and which more recently moved into the fields of diplomacy, human rights, and a common currency. Blessed with more homogeneous legal

19. *See* BRADFORD PERKINS, THE FIRST RAPPROCHEMENT: ENGLAND AND THE UNITED STATES, 1795-1805, at 1-4, 21-22 (1967). For a contemporary expression of the threat of regional divisions, see THE FEDERALIST NO. 4 (John Jay) and THE FEDERALIST NO. 21 (Alexander Hamilton).

20. *See* MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 282-301 (1950); FORREST MCDONALD, WE THE PEOPLE 358-67, 374-76, 378-81 (1958).

institutions and helped by a common language, Americans moved more quickly —but nevertheless with the same caution, first into the Articles of Confederation in 1781, followed by the Federal Constitution in 1789.

The European Union rests upon international treaties, which commentators suggest are "constitutionalized" into the formative documents upon which the EU institutions operate, and upon which Community law depends. These treaties, as well as Community legislation and Court of Justice decisions, are multilingual, generating uncertainty concerning meaning and demanding judicial interpretation. While the treaties generally set forth EU policy in clear terms, they tend to be less complete in setting out what the implementing law should be, and thus leave significant matters to the Court of Justice for interpretation. Some provisions are "open-textured," having much less detail than a British or United States statute, and, frequently, key words are not defined in the treaty, EU regulation, or EU directive. Of necessity, interpretation sometimes verges upon law-making, for which it is criticized.[21]

By way of contrast, the United States Constitution is a single document, written in one official language, and subject to fewer changes over a much longer historical period. However, its purposes and policies also are frequently left vague and unstated. As Chief Justice Marshall reminded us, the Constitution provides an outline rather than a comprehensive plan for union. He correctly observed that our Constitution would become unmanageable and prolix if all the details of its operation were included within the text.[22] Justice Felix Frankfurter, after nearly two decades experience on the Supreme Court bench, expressed frustration at the "vague and admonitory" nature of some constitutional provisions. He pointed out that the United States Constitution, like all legal documents, had to be ambulant and adaptable to the changes of time. Finally, he expressed his concern and discomfort over the "evolution of social policy by way of judicial application of Delphic provisions of the Constitution. . . ."[23]

The Court of Justice enjoys a significant procedural

21. *See* discussion at STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW: THE ESSENTIAL GUIDE TO THE WORKINGS OF THE EUROPEAN COMMUNITY 166-182 (1995) (discussing actions against Member States under Articles 169, 170 and 171). A directive is a notice to one or more Member States issued by the EU. It sets forth a policy which is to be implemented by a method to be chosen by the Member State. The regulation has general applicability (the technical term is "directly applicable") and is binding throughout the EU without any action by the Member States. *Id.* at 136-38.

22. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

23. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 228, 229, 231 (1955).

advantage over Marshall's Court in its ability to provide advisory opinions upon European Community [hereinafter EC] law to courts in the Member States. Article 177 of the EC Treaty (Amsterdam, art. 234) permits, and in some cases requires, a Member State court to "refer" issues of Community law to the Court of Justice. These preliminary rulings constitute about one-half of the European Court's caseload, and they have been responsible for the declaration of several fundamental principles of Community law. There is a fairly broad spectrum of courts, tribunals, and quasi-judicial institutions that are competent to refer questions to the Court of Justice, and the Court tends to allow considerable leeway in permitting reference of issues that may not be directly relevant to the decision of the pending case.[24] By way of contrast, the authority of the United States Supreme Court to review state court decisions is very limited. The court from which the appeal is taken must be the highest state court capable of deciding the case; that was as true in Marshall's day as it is today. In Marshall's day, the federal question involved in the appeal had to have been decided against the constitutionality of the federal statute or treaty provision. Not surprisingly, from 1801 through 1815 only 17 appeals from state courts were heard by the Marshall Court; during the same time period, 361 cases were appealed from the federal circuit courts.[25] Clearly, the European Court of Justice has at its disposal a much more efficient "mouse trap" for conforming Member State law to Community standards through Article 177 (Amsterdam, art. 234) than the Marshall Court possessed under section 25 of the Judiciary Act of 1789.

We should note the existence of a procedure in the Marshall Court for referring issues raised in the lower federal courts for decision by the Supreme Court. Originally called a certificate of division, the procedure continues —albeit rarely used— at the present day. When the judges sitting in the United States Circuit

24. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 279-94. Brown and Kennedy point out that when the Member State court is one from which no appeal lies within the national system, it is mandatory that an Art. 177 (Amsterdam, art. 234) reference be made, but in all other cases, the request for a reference is discretionary with the Member State court or tribunal. *See* L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 196 (1994).

25. *See* HASKINS & JOHNSON, *supra* note 7, at 623-25, 653. However, appeals from state courts tended to be politically controversial. They include: Fairfax v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); and Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). Throughout this paper the term "appeal" is used to cover cases reviewed by the use of one of three procedures: the writ of error (common law), appeal (admiralty and equity matters), and the certificate of division (where the judges divided evenly in the U. S. circuit courts).

Courts disagreed, the issue might be certified to the full bench of the Supreme Court for decision. Since the judges present were usually two in number —the Supreme Court justice riding circuit and the United States District Judge— they might, by agreeing to disagree, bring before the Supreme Court an issue that the parties might be reluctant to raise on appeal.[26] Since the procedure was discretionary, it did not have the broad coverage of Article 177 (Amsterdam, art. 234), and of course, it only applied within the federal court system.

It would be simplistic to assume that the growth of federal power, either in the United States or in the European Union, has been unidirectional. With the implementation of the Maastricht Treaty in 1993, there has been concerted effort to halt, or to decelerate, the further integration of the Community and to minimize inroads on the power and sovereignty of the Member States. Since 1993, the European Court of Justice's doctrines of subsidiarity and proportionality have begun to move power back to the States, and a stricter construction of Article 235 (Amsterdam, art. 308) has limited the discretion hitherto exercised by Community institutions.[27] Under the earlier version of Article 235, a unanimous vote by the EC Council might authorize any measure necessary to advance the objectives of the Community. However, after Maastricht, the Court of Justice has insisted that actions taken under Article 235 be justified by being reconciled to the principle of subsidiarity —that actions are more appropriately left to the component Member States except in cases where the States are unable to deal with the issue at a national or local level.[28] Americans familiar with the contrasting jurisprudence of the Marshall and Taney Courts may well find similarities in the post-

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26. *See* JOHNSON, *supra* note 4, at 116, 120. Mr. John Lupton, an editor of the Legal Papers of Abraham Lincoln, is in the process of examining the certificate of division/certified question procedure from its inception in 1802 to its modification in 1892.

27. *See* Martin Shapiro, *The European Court of Justice*, in THE EVOLUTION OF EU LAW 321-47 (P.P. Craig & G. De Búrca eds. 1999). The principle of subsidiarity requires that matters subject to adequate treatment at the Member State level should not be undertaken by the EU; proportionality requires that Community action be minimized and that interference with Member State activities be in proportion to the importance of the Community objective to be achieved by the interference. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 468-69.

28. *Id.* at 141-43. Like the Marshall Court, the Court of Justice has been criticized for what today is termed "judicial activism," and a series of articles have alternatively attacked the Court or defended its activities in these terms. *See generally* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2403-83 (1991); T.C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Community*, 112 L. Q. REV. 95, 95-109 (1996); and Anthony M. Arnull, *The European Court and Judicial Objectivity: A Reply to Professor Hartley*, 112 L. Q. REV. 411, 411-23 (1996).

1993 redirection of constitutional decisions by the European Court of Justice.[29]

II. JUDICIAL INTERPRETATION AND DECISION-MAKING

One of the most striking similarities between the Marshall Court and the European Court of Justice occurs in the processes of judicial interpretation. This is remarkable considering the differences that exist between judicial interpretation in European civil law and the modes of construction prevalent in the United States and England. In most Western European systems, the existence of comprehensive codes results in judicial reasoning being anchored in precisely drawn code sections, leaving little flexibility for the judge to engage in wide-ranging construction of statutory terms. Simply put, judicial decision-making is essentially finding the facts of the case and applying pertinent code sections to resolve the issues between the parties.[30] However, as Professor John Merryman points out, in the public law area, European nations over time have tended to move in the direction of adopting fairly rigid constitutions which are closer to the American Federal Constitution. With that development has come increased willingness to employ judicial review.[31] By way of contrast, Anglo-American common law judges operate within a much broader context. The legal rules in a common law jurisdiction are contained not only in statutes, but also in precedents established by prior case law. With the burgeoning enactment of statutory law and regulations in modern America, court decisions frequently depend upon legislative or administrative rules; however, these are still construed in light of pre-existing common law rules and may be measured against the "higher law" of state and federal constitutions.[32] The predominant

29. On the other hand, R. Kent Newmyer has warned us that the contrast between Marshall and Taney should not be carried too far. *See* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 89-118, 147-52 (1968). Professor J.H.H. Weiler suggests that there are really three periods in the history of the Court: (1) a period of supra-nationalism from a lawyer's point of view, running from 1958 to about 1975, (2) a time of efforts to expand EC authority, from about 1975 to about 1989, coupled with heavy reliance upon art. 235 to expand Community power, and (3) the years after 1990 when the political agencies of the EU have created constitutional limits upon Community power. *See* Weiler, *supra* note 28, at 2410, 2416-17, 2434.

30. A useful general discussion of civil law codification and judicial decision-making is in JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 27-31, 40-49 (1969).

31. *Id.* at 142-45.

32. RUPERT CROSS, PRECEDENT IN ENGLISH LAW 164-66, 201 (2nd ed. 1968). The American preference for common law precedent to legislative statute may well be traced to the views of Sir Edward Coke and Sir Matthew Hale, discussed in JOHN G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE

role of precedent was even more dispositive in John Marshall's day, and was legitimated by the early Republic's acceptance of the seventeenth-century English Whig perspective that the liberties of Englishmen depended upon the ancient common law, and not the sovereignty of Parliament.[33]

With the European Court's membership roughly proportional to the membership of the EU,[34] most judges bring a civil law training to their work on the Court. However, the Court has shown a tendency to use a broad system of judicial interpretation in conducting its decision-making. Recently, most Court of Justice opinions evidence one of two methods of interpretation. One is a contextual approach, which looks to all EU treaties, and all Community legislation, to determine what policies or rules apply to the area of concern and whether they are consistent with each other. The other interpretive method has been what Professor Brown terms teleological —a consideration of the overall purpose and intent of EC treaties and other policy documents as an aid to construing the terms before it. This has also been denominated a "purposive" approach to interpretation. The difference between these two approaches is that the first is tied to textual materials, while the latter permits a non-textual identification of Community policy that will govern interpretation.[35]

At first glance, Marshall Court decision-making appears to be based upon textual analysis —a careful examination of words and phrases in constitutional or statutory language. However, the European Court parallel causes us to redirect our attention to the interpretive methods employed by the Chief Justice and his colleagues. Are Marshall Court decisions contextual? Perhaps the most familiar example is Marshall's construing the "necessary and proper" clause in light of the provision in Article I, Section 10, which stipulates that states might not lay "imposts, or duties on imports or exports, except what may be *absolutely necessary* for executing its inspection laws . . . ."[36] His conclusion was that the Constitution's draftsmen intentionally distinguished between these two phrases, and might have similarly limited the "necessary and proper" clause had they seen fit to do so.[37]

FEUDAL LAW 170-73 (1987).

33. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 265-67, 294-95 (1969); ROBERT K. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 59-61 (1968). Dr. Hobson points out that Marshall made an effort to conform his statutory constructions to the dictates of equity and natural justice. HOBSON, *supra* note 3, at 162-63.

34. *See* BROWN & KENNEDY, *supra* note 24, at 43-47.

35. *Id.* at 299-322. The "purposive" nomenclature is used by WEATHERILL & BEAUMONT, *supra* note 21, at 172-74.

36. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) (emphasis added).

37. *Id.* at 414-15.

As Professor Currie points out, Justice Story rejected a similar contextual argument in *The Steamboat Thomas Jefferson,*[38] a purported admiralty case based upon a seaman's wage claim for work on a ship navigating the Missouri River. Citing the English rule that maritime contracts were cognizable in admiralty only if duties had been performed on the high seas, Story proceeded to reject counsel's argument that the Judiciary Act of 1789, creating admiralty jurisdiction, was adequate to bring the case within the class of "cases arising under federal law."[39] According to Story, nothing less than an express statutory provision evidencing congressional intention to include such contracts would suffice to confer federal court jurisdiction.[40] The statute in question was not sufficiently broad, and was too ambiguous concerning Congress' intent, to encompass this claim to an expanded admiralty jurisdiction.[41]

The European Court of Justice is no stranger to contextual interpretation, and indeed may be said to have outdone the Marshall Court in this aspect of construction. Brown and Kennedy point out that in the *Gingerbread*[42] case, the Court was called upon to construe Article 12 (Amsterdam, art. 25) which prohibits Member States from imposing "new customs duties on imports [or exports,] . . . or [any] charges having similar effect. . . ."[43] The Court considered the prominent position of this provision at the beginning of the treaty, citing this to be evidence of its importance and "essential nature" to the formation of the Community. It then noted that the principle of "free circulation of goods," was treated as a fundamental aspect of the Community in Article 9 (Amsterdam, art. 23). Finally, it stressed the significance of Articles 9 and 12 (Amsterdam, art. 25) in condemning unilateral changes in customs and fiscal practices which inhibited the free trade in goods, and thus violated Community norms. The judgment concluded that "charges having similar effect" had to be construed broadly to include all barriers, pecuniary or otherwise, to trade between Member States. Brown and Kennedy suggest that an English court, faced with the same general words, would have construed them narrowly to conform most closely to the specific term "duties" which preceded it.[44]

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38. The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

39. *Id.* at 429-30.

40. *Id.* at 430.

41. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 116 (1985); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429-30 (1825).

42. Consolidated Cases 2/62 & 3/61, Re Import Duties on Gingerbread: The Commission of E.E.C. v. The Grand Duchy of Luxembourg and the Kingdom of Belgium, [1963] C.M.L.R. 199 (1962).

43. *Id.* at 215.

44. BROWN & KENNEDY, *supra* note 24, at 311-13; *Gingerbread,* [1963]

More recently, the European Court has applied contextual reasoning to both affirm, and to limit, the power of Member States to enter into international treaties unilaterally. Negotiations leading to the European Road Transportation Agreement [hereinafter ERTA] had been on-going for several years under the auspices of the United Nations Economic Commission for Europe, and the six Member States of the Community had been involved directly in those discussions. Although the proposed treaty was concluded in 1962, ratifications had not been exchanged, and the Council of the European Community authorized further coordinated negotiations by the six Member States, based upon Council Regulation 543/69 (adopted on March 27, 1969). The European Commission objected to the Council's permitting the Member States to conclude negotiations, asserting that under the Treaty of Rome (ratified in 1957), the Community's Commission had exclusive authority to negotiate.[45] The litigants agreed, and under the Council's direction, negotiation of ERTA was conducted by the six individual Member States, led by the delegation representing the presidency of the Council of the European Community.

The Court of Justice declined to follow the recommendation of the Advocate General, which urged a narrow construction of the Treaty of Rome that would have permitted the Council to conclude the then well-advanced negotiations of ERTA under its own authority. Viewing the question as being whether at the time of the Council's discussion, on March 20, 1970, the authority to negotiate on road transportation belonged to the Community, the Court looked to several articles in the Treaty of Rome which allocated authority between the Member States and the Community institutions. Noting that Article 75 (Amsterdam, art. 71) conferred wide authority on the Community to implement a common transportation policy, the Court held that the Community's authority clearly encompassed the power to negotiate treaties with non-Member States.[46] Once the Community had established common rules, as it had in 1969 under Regulation 543/69, Member States might not unilaterally contract obligations with non-Member States which affected those common rules. Article 5 of the Treaty of Rome (Amsterdam, art. 10) bound Member States to ensure that the obligations imposed by the EEC treaty were carried out, and to refrain from taking any steps that would jeopardize the attainment of treaty objectives. By enacting Council Regulation 543/69, the EC Council conferred

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C.M.L.R. at 215-17, 218-19.

45. Case 22/70, Re The European Road Transport Agreement: E.C. Commission v. E.C. Council, [1971] C.M.L.R. 335, 336-39 (1971) (Advocate General submissions).

46. *Id.* at 344-48, 354-55.

authority on Community institutions to negotiate internationally with non-Member States concerning road transportation, and that authority was thereafter exclusively within the scope of Community external authority.[47] As the Court observed:

> [t]o determine in a particular case the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions. . . . Such authority may arise not only from an explicit grant by the treaty. . .but may equally flow from other provisions of the Treaty, and from steps taken, within the framework of these provisions, by the Community institutions.[48]

However, although the Court upheld the Commission's contentions in principle, it pointed out that even after the transition period stipulated by Article 116 of the Treaty of Rome (replaced by Amsterdam, art. 135), pending negotiations might be concluded by the common action of the Member States, in accordance with directions received from the Council. Introducing the Community as a new party as late in the proceedings as 1970 might well have jeopardized the successful conclusion of ERTA treaty negotiations. Thus, the Court concluded that in negotiating ERTA, the Member States acted "in the interest of and on account of the Community," and in accordance with Article 5 of the Treaty of Rome (Amsterdam, art. 10).[49] On the other hand, the reasoning on the merits provided a strong legal basis for the Community's authority thereafter to exercise exclusive authority in international diplomacy which involved Community matters. Subsequent cases have demonstrated similar flexibility in allocating treaty-making powers between Member States and Community institutions. However, the clear tendency is to restrict the international authority of Member States to negotiate with non-member nations.[50]

A. Open-Ended Opportunities for Judicial Interpretation

Both the European Court of Justice and the Marshall Court demonstrate skill in deferring judgment on issues that might provide future opportunities for court interpretation and doctrinal evolution. In the case of the Marshall Court, the best-known

47. *Id.* at 348-40, 355-56.

48. *Id.* at 354-55.

49. *Id.* at 359-62.

50. For example, the European Court of Justice held that the European Economic Area agreement concluded between Member and non-Member States clashed with the supremacy of the EC Treaty, and also found unacceptable the provisions which created a separate European Economic Area Court which might render decisions contrary to those of the European Court of Justice. *See* the discussion at WEATHERILL & BEAUMONT, *supra* note 21, at 320-22.

example is Marshall's decision that the Commerce Clause was not exclusive, but rather concurrent with state judicial power —in certain limited cases. What those cases might be, and how they would be treated when presented for decision, was something left to future litigation before the Court. Felix Frankfurter synopsized Marshall's approach and thought-patterns quite well:

> The need of a strong central government . . . was for him the deepest article of his political faith, But while he had rooted principles, he was pragmatic in their application. No less characteristic than the realization of the opportunities presented by the commerce clause. . .was his empiricism in not tying the Court to rigid formulas for accomplishing such restrictions.[51]

As Frankfurter demonstrates, the Chief Justice drew back from at least two doctrinal interpretations that might stultify future development. One was the temptation of using the Supremacy Clause, and declaring that the New York statutes in *Gibbons v. Ogden*[52] were repugnant to the power vested in Congress by the Constitution and exercised by the Federal Coasting Licensing Act. The second was the opportunity to assert exclusive federal control even in the absence of any Congressional legislation —what we have come to call the "dormant commerce power." Instead, Marshall left the interstate commerce clause in a state of ambiguity, preserving a void to be filled by subsequent opinions of his Supreme Court. Leaving options open for future decision by the Court made the area of interstate commerce one of the richest sources of federal power in antebellum America. It also enhanced the central position of the Supreme Court as an expositor of constitutional law.[53]

At least two other Marshall Court ambiguities left room for future judicial interpretation. In *Fletcher v. Peck*,[54] Marshall based his decision not only upon the Contract Clause, but also upon "general principles which are common to our free institutions, or by particular provisions of the constitution of the United States . . . ."[55] The inference that protection of property rights might be involved in a general common law of all the American states, or perhaps even a principle of natural law, left ample room for the future exploration of concepts earlier touched upon by

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51. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 14-15 (Quadrangle Books 1964) (1936).

52. 19 U.S. (6 Wheat.) 448 (1821).

53. *Id.* at 15-34. Professor Currie suggests that Marshall's concept of "exclusivity" ostensibly upheld in *Gibbons v. Ogden*, did not necessarily preclude state actions touching upon interstate commercial activity. CURRIE, *supra* note 41, at 175.

54. 10 U.S. (6 Cranch) 87 (1810).

55. *Id.* at 138.

Justice Samuel Chase in *Calder v. Bull*,[56] and which Marshall reconsidered in his dissent in *Ogden v. Saunders*.[57] At the same time, Marshall's statement left open, until 1833, the possibility that some Federal Bill of Rights provisions might provide protection against state action trespassing upon property rights.[58]

Chief Justice Marshall had the support of his associate Justices in preserving latitude for future Supreme Court decision-making. Professor Currie points out that Justice Joseph Story utilized what I have termed an "open-ended" approach to the question of jury trials in civil cases under the Seventh Amendment. *Parsons v. Bedford*[59] involved a clash between procedural requirements under Louisiana state law, and the rules applicable to trials by jury in federal courts. Under the terms of an 1824 United States statute, the federal district courts sitting in Louisiana were directed to follow the practice of the state courts. Louisiana procedure permitted appellate review of jury verdicts and the grant of new trials by the state Supreme Court. Yet this procedure appeared to contradict the express provision of the Seventh Amendment, which guaranteed that jury verdicts might not be reversed upon appeal. Furthermore, the terms of Article III of the Constitution appeared to exclude U.S. Supreme Court appellate review of facts in common law cases.

In his opinion for the Supreme Court, Story pointed out that the 1824 federal statute did not impose an absolute requirement that state procedures be followed. Rather, it allowed the district judge to make by rule such exceptions as might be required to conform federal practice to state procedural standards. However, Louisiana practice allowed the reduction of testimony to writing prior to submission of the case to the jury, and it was a mistake on the part of the district judge to deny a request that such a transcript be prepared. Was it reversible error in the Supreme Court of the United States, when the case was before the Supreme Court on a writ of error? Story established that the only purpose to be served by allowing the transcription of evidence in this case would have been to permit the U.S. Supreme Court to reverse the verdict of the jury and to award a new trial. On a writ of error from any other state than Louisiana, that would have been beyond the jurisdiction of the Court.[60] Was that also the case in regard to

56. *See* CURRIE, *supra* note 41, at 131; HASKINS & JOHNSON, *supra* note 7, at 406, 579-80, 594-97. *Compare Fletcher*, 10 U.S. (6 Cranch) at 133-35, *with* Calder v. Bull, 3 U.S. (3 Dallas) 386, 388 (1798).

57. 25 U.S. (12 Wheat.) 213, 342-47, 351-54 (1827).

58. *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833) held that Bill of Rights guarantees were not applicable to the states.

59. Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Peters) 433, 441-49 (1830).

60. *See* CURRIE, *supra* note 41, at 111-12; *Parsons*, 28 U.S. (3 Peters) at 445-46.

Louisiana cases coming up under a writ of error? The case turned upon that procedural question, which Story decided against protests of the defendant, thereby sustaining the general rule that the facts of a jury verdict were not reviewable on a writ of error.

In arriving at his decision, Story felt called upon to define the term "common law" as used in the Seventh Amendment, which was ratified before Louisiana's annexation to the United States. Avoiding a narrow definition of the term, he pointed out that cases in equity and admiralty were traditionally exempt from jury trial, but other cases utilized jury trial. How did the Framers understand the matters to which jury trials were to extend? They meant:

> [n]ot merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered; or where, as in admiralty, a mixture of public law, and of maritime law and equity was [sic] often found in the same suit.[61]

He noted that new remedies and new forms of action were not uncommon throughout the various American states, and to the extent that these were neither equitable nor maritime in nature, they also should fall within the protective provisions of the Constitution and Seventh Amendment. In adopting such a sweeping approach, Story nevertheless left open to the decision of future Supreme Courts the classification of those new remedies and procedures, and thus whether jury trial would attach by virtue of the Federal Constitution's mandate.[62]

Similarly, the European Court of Justice has shown skill in using the "open ended" technique to provide flexibility for the evolution of new doctrine. One example is the manner in which the Court dealt with an employee's claim that the Italian government's failure to establish a wage guarantee fund damaged him when his employer filed for bankruptcy.[63] Council Directive 80/987 required Member States to establish guarantee funds from which employee wage claims might be paid in situations of employer bankruptcy. The directive permitted Member States to establish the period during which employee reimbursement might

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61. *Parsons*, 28 U.S. at 447.

62. It may also have been true, as Justice John McLean's dissent infers, that Story's broadening the basis for "common law" jury trial protection may have been a way to limit the authority of Congress to circumvent the constitutional requirements of Article III and the Seventh Amendment. Such a step was possible through the authority of Congress to establish and make procedural rules for the lower federal courts. *Id.* at 456.

63. Cases C-6/90 & 9/90, Francovich v. Republic of Italy, [1993] 2 C.M.L.R. 66, 66-116 (1991).

be implemented, and it also allowed discretion in the Member States to place a ceiling on fund liabilities. Under existing Community law, the petitioning employee was precluded from "direct effect" relief since the scope of his entitlement was conditioned on Member State action, namely establishing a liability ceiling and a time-table for employer implementation, which in turn determined the period for which compensation was payable.

As Advocate General Jean Mischo phrased the issue, it was "whether, generally speaking, a national court may be required by virtue of Community law to hold the State liable where failure to implement a directive which does not give rise to direct effect has caused harm to an individual."[64] He argued that damages could be awarded to a citizen who had been injured by State defiance of directly effective Community law. Since this was a case based upon the "Community legal order," no distinction should be made when the formal requirements of direct effect were not present. The courts of the Member States should uphold Community law rights, and provide effective remedies to those individuals who were damaged by State neglect of Community obligations.[65]

The Court of Justice agreed, imposing liability upon the Italian government for the losses suffered by Francovich, despite the fact that it was the non-feasance, rather than the misfeasance of the government that caused the damage. In such cases, there would be no basis to claim a "direct effect." Nevertheless, the Member State was held liable to pay compensation for damages which resulted from its failure to implement the Community directive. The full effectiveness of Community law would be impaired if individuals were denied reparation in this sort of case.[66] Thus, the Court of Justice expanded the right of private individuals to bring action against a Member State court when Community rights were impaired by failure to implement a Community directive. It laid down three requirements governing the availability of such relief: (1) The directive must be such that it entailed a grant of rights to individuals, (2) The directive should adequately identify the content of those rights and (3) There must be a causal link between the harm suffered by the individual and the Member State's breach of its Community obligation. In effect, *Francovich* established a broad possibility of expanded individual litigation against Member States, subject to three conditions to be construed and further refined by the judgments of the Court of Justice.

The Court of Justice did not long delay the opportunity to add

64. *Id.* at 84.
65. *Id.* at 86.
66. *Id.* at 111-16.

glosses to the *Francovich* decision. In *Dillenkofer v. Germany*,[67] it held that failure to implement an EU directive within the stipulated time would subject a Member State to liability when one of its citizens suffered a financial loss after purchasing a package tour. The directive required that some form of insurance or governmental guarantee protect purchasers of package tours from insolvency of the tour organizer. Although the Court conceded that German legislative procedures made it impossible to provide consumer protection within the period stipulated by the directive, it nevertheless held Germany liable even though no fault was involved. *Francovich* required that the Member State's breach of Community law be sufficiently serious before direct liability to a citizen could arise. The Court held that a failure to implement a directive was per se sufficiently serious to give rise to liability under the *Francovich* doctrine. In addition, it rejected the argument that until Germany acted, the extent of Member State liability was uncertain, hence the citizen's claim was too unclear for recovery to be granted. To the contrary, the Court reasoned that, regardless of the Member State's action or inaction, the citizen had the right to expect that on the effective date of the directive, there would be recovery of monies lost through insolvency, and that the cost of return transportation would be provided. This was sufficiently certain to comply with the *Francovich* requirement. Finally, the Court noted that no Member State might rely upon its own internal laws or procedures to justify delay in transposing a directive into national law. The only relief available to a State unable to comply within the prescribed period, was for the State to apply to the Community authorities for an authorization to delay implementation.[68]

Along with *Dillenkofer*, the Court replied to two referred cases concerning the extent and criteria for damages that might be available to individuals affected by a Member State's action contrary to Community law. In *Factortame III*,[69] the complainant Spanish fishermen were excluded from British waters by a Parliamentary statute, and among other claims for relief, they sought compensation for their lost profits. In *Brasserie du Percheur SA*,[70] a French brewery was precluded from exporting to Germany by administrative enforcement of a German statute regulating the purity of beer. In his lengthy submissions to the Court, Advocate General Giuseppe Tesauro pointed out that

67. Joined Cases C-178, 179, 188, 189 & 190/94, Dillenkofer v. Germany, [1996] 3 C.M.L.R. 469 (1996).

68. *Id.* at para. 19-26, 29, 42, 46, 53-54.

69. Joined Cases C 46 & 48/93, Brasserie du Percheur SA v. Germany; Regina v. Secretary of State for Transport, *ex parte* Factortame, Ltd., [1996] 1 C.M.L.R. 889 (1996).

70. *Id.*

Francovich was a confirmation of a long-standing value —that there must be effective implementation of Community provisions. Affording complete judicial protection to those injured by breaches of Community law was a fundamental characteristic inherent in the Community legal order. The Community must be the origin of the liability rules applicable to Member States.[71] In its judgment, the Court further explained the *Francovich* tri-partite test, noting that the second branch —involving the serious nature of the breach— would occur when a Member State "manifestly and gravely disregarded the limits of its discretion." As to the causal link between the Member State's breach and the claimant's injury, it was for national courts to decide that issue. Reparations were to be awarded in accordance with national standards, but in no case were they to be less than what would have been awarded in a purely domestic case. Those damages might include reparations for loss of profits attributable to the Member State's action.[72] Finally, the Member States' liability could not be conditioned upon there having been a prior adjudication concerning the legality of the questioned action.[73]

Frequently, European Community legislation may itself provide an opportunity for Court of Justice findings that are "open-ended" in format. The Sex Discrimination Directive, Council Directive 76/207, was brought before the Court by means of an Article 177 (Amsterdam, art. 234) reference from a West German court. Three women had been denied positions despite the fact that they were better qualified than the male applicants who received the appointments. However, the German Civil Code provisions purportedly implementing the directive, provided that employers who violated the Community directive, would be liable for sums expended by the candidate who relied upon there not being discriminatory behavior in making the appointment. In the case of the one applicant who could prove damages through such reliance, the total damages amounted to 7.20 Deutsche Marks, or roughly $3.60 (U.S.). In its judgment, the Court of Justice pointed out that Member States were free to exercise discretion in selecting means to enforce the Community Directive. On the other hand, that discretion was to be exercised within limits. There was no requirement that the disappointed employee be offered employment, and the award of damages might be an appropriate sanction. Pointing out that the nominal damages provided by German law were not an effective sanction to insure compliance, the Court required that the Member State provide real and effective judicial protection against sex discrimination.[74] Since the

71. *Id.* at para. 32, 41, 52, 71 (1996) (Advocate General submissions).
72. *Id.* at para. 51, 65, 83, 86.
73. *Id.* at para. 95.
74. Case 79/83, Von Colson & Kamann v. Land Nordrhein-Westfalen,

German statute failed to provide adequate sanctions to render the Community Directive effective, the referring German court was advised to utilize whatever remedies that might be both (1) available under German law, and (2) appropriate means of implementing the Community Directive.[75]

Presumably the German court giving judgment in *Von Colson and Kamann* would be required to fashion a remedy independent from the provisions of the Civil Code section implementing the Sex Discrimination Directive. While those remedies would be limited by the jurisdiction of the court involved, they would have to be designed to effectively achieve the purposes of the Directive. Should they not be appropriate, they would be subject to mandatory reference from the highest court having cognizance of the case in Germany, and thus come within additional review by the European Court of Justice under Article 177 (Amsterdam art. 234). In addition, a recalcitrant Member State may be subject to direct actions filed against it in the Court of Justice by the European Commission. Pursuant to the 1991 Maastricht Treaty, such actions may result in monetary damages being assessed against a Member State.[76]

Given the European Community's reliance upon Member State courts to provide judicial enforcement of Community Law, it follows that many decisions are, like *Von Colson and Kamann,* either advisory or open-ended. As such, they reserve some degree of discretion to the Member State courts involved, but at the same time, because of the supremacy of Community law over national law, Member State courts are under compulsion to respond positively to the need for effective implementation of Community law by their judgments.

B. Teleological or "Purposive" Interpretation

The Court of Justice has come under sharp criticism for its use of a teleological or "purposive" interpretation of Community law. These terms refer to a method of construction whereby the Court takes its guidance from the underlying intention of the constitutive treaties of the EU, seeking to apply its decision-making process in accordance with the implied foundational principles of the Community. In effect, the Court attempts to fill in some area of Community law that is left unstated in the treaties, but is raised either as a reference from a Member State court, or arising directly before the European Court of Justice in the course of litigation between Member States, between Member

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[1986] 2 C.M.L.R. 430, 450-52 (1984).

75. *Id.* at 453-54.

76. *See* BROWN & KENNEDY, *supra* note 24, at 105-13; WEATHERILL & BEAUMONT, *supra* note 21, at 192-207.

States and Community institutions, or even among two or more Community institutions. Teleological or "purposive" interpretation is, therefore, not unlike what modern American constitutional theorists call "non-interpretive" construction of the United States Constitution.

The first and least objectionable teleological interpretation is when the Court of Justice is required to apply an express provision in the treaty texts which gives wide discretion to the Court. This occurred in regard to the provisions concerning export and import duties, which also includes "charges which have an equivalent effect." Clearly, enforcement of the express provisions requires the Court to determine what charges do have "equivalent effect."[77] The Marshall Court, in *Ex Parte Bollman and Swartwout*[78] and the Chief Justice subsequently on circuit in *U.S. v. Burr*,[79] elaborated upon the Constitution's incomplete definition of the substantive law of treason, rejecting the English concept of constructive treason, and setting forth detailed requirements for proof of treasonable conduct.[80] Another Marshall Court example is the clarification offered in *McCulloch v. Maryland*[81] concerning what should be considered "necessary" —that is, how essential the selected means might be to the effective implementation of an enumerated power of Congress. Both the Marshall Court and the Court of Justice were simply providing clarification concerning terms included in the constitutional documents, and responding to the need that such an interpretation be made before the case before them could be decided. This is little more than going through the logical steps necessary to administer justice in a specific case, and as such, it is the least objectionable aspect of a court "making law."

Teleological interpretation also arises for the Court of Justice when the treaty is silent on an important point of law controlling the case. One such pregnant silence regards the supremacy of Community law over the legislation and all other Member State actions that impact upon the Community or its legal system. While the EC treaty permitted unilateral Member State action in carefully defined areas, it never specifically provided that Community law was to take precedence, or be "supreme," over Member State law in all other matters. On the other hand, the

77. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 174-75; BROWN & KENNEDY, *supra* note 24, at 316-21. As Brown and Kennedy point out, this "filling in of gaps" is a familiar process in civil law legal systems, and is expressly authorized by the Swiss Civil Code of 1922. *Id.* at 318.

78. Ex Parte Bollman & Ex Parte Swartwout, 8 U.S. (4 Cranch) 75 (1807).

79. United States v. Burr, 25 F. Cas. 30, (C.C.D. Va. 1807) (No. 14,692d).

80. *See* HASKINS & JOHNSON, *supra* note 7, at 258-62, 279-85; *Ex Parte* Bollman, 8 U.S. (4 Cranch) at 125-37; *Burr*, 25 F. Cas. at 33-34.

81. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-21 (1819).

treaty text did provide that Member States, by negotiating and ratifying the treaty, were limiting their sovereign rights by creating the EC and conferring law-making authority upon Community institutions. In the *Costa*[82] case, the Court of Justice established the principle that Community law is supreme, and that the Community itself would lose its purpose if Member States could annul EC measures by unilateral establishment of contrary national law.[83]

Costa is quite similar in its teleological foundation to the Marshall Court's decision in *Marbury v. Madison*,[84] establishing judicial review. Although Article VI of the Federal Constitution stipulates that the Constitution, laws, and treaties of the United States shall be the supreme law of the land, it fails to provide an enforcement mechanism, nor does it expressly state that the Constitution is superior in authority to a statute or treaty. Considering the actions of an executive department head, Chief Justice Marshall was requested to issue a mandamus writ that had been authorized by the Judiciary Act of 1789, but appeared to be available under the Constitution only when the Supreme Court was exercising its appellate jurisdiction. Declining to issue the writ, Marshall clearly established the primacy of the Constitution over federal statutes, and also asserted the authority of the Supreme Court to determine the constitutionality and validity of federal statutes. In *Costa* and in *Marbury*, there is language within the constitutional documents that supports the court's decision. However, it merely forms a basis from which a court might draw a reasonable inference concerning supremacy, and the role of the court in effectuating the concept of supremacy.

Another variant of teleological interpretation arises when there are some relevant provisions in the treaty, and judicial elaboration occurs in regard to logical implications from the treaty text.[85] *McCulloch v. Maryland* provides two apt parallels to this use of teleological interpretation by the European Court of Justice.[86] Discussing the power of the United States government to establish a banking corporation, Chief Justice Marshall first pointed out that banks traditionally were used by the British government as an effective means of fiscal management and operations. As a mode of implementing enumerated powers, the creation of a banking corporation was certainly not required to be included within the enumerated powers, since the Constitution did

82. Case 6/64, Costa v. Ente Nazionale per L'Energia Electrica (ENEL), [1964] C.M.L.R. 425 (1964).

83. *Id.* at 455-56. *See also* WEATHERILL & BEAUMONT, *supra* note 21, at 39-40 (discussing the role of the President of the Commission).

84. Marbury v. Madison, 5 U.S. (1 Cranch) 137-80 (1803).

85. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 175.

86. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

not attempt to enumerate methods by which the federal powers were to be exercised. On the other hand, were Congress compelled to rely upon state-chartered banks to achieve its goals, this would render precarious the activities of the central government, subjecting them to the caprice of state institutions or state legislatures.[87] In addition, *McCulloch* points out that concurrent state powers of taxation cannot be exercised in ways that would "defeat the legitimate operations of a supreme government."[88] Marshall observed, "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence."[89] While supremacy is expressly stated in Article VI of the Federal Constitution, the ramifications of federal supremacy for state taxation powers were not mentioned within the document itself, and thus a purposive explanation and justification was required.

A second category of teleological interpretation occurs when EC law, as yet not subjected to review by the European Court of Justice, clashes with a positive rule of law within the Member State. In the *Factortame*[90] case, this situation presented a difficult issue for the European Court of Justice. The litigation involved a new British statutory instrument and related administrative regulations which provided for the registry of fishing vessels, but which allegedly discriminated against ownership by nationals of other Member States. Since Community law was involved, the trial court referred questions to the Court of Justice for a preliminary ruling under Article 177 (Amsterdam, art. 234). However, since the Article 177 reference suspended the action on the merits, the trial court also ordered the Government not to apply the new requirements to the defendant fishing firm. The Court of Appeal, followed by confirmation from the House of Lords, reversed the trial court, and held that since the new requirement was an act of the UK Parliament, it could not be suspended by a British court. Furthermore, no British court might grant an injunction against the Crown —that is, against the Government acting under Crown prerogatives.[91]

Pointing out that the rule of Community law was directly applicable (that is, no Member State action was required to place

87. *Id.* at 421-24.

88. *Id.* at 427.

89. *Id.* at 426-36.

90. Case C-213/89, Regina v. Secretary of State for Transport *ex parte* Factortame Ltd., [1990] 3 C.M.L.R. 867 (1990).

91. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 151-52 (discussing *Factortame* case); *see also* BROWN & KENNEDY, *supra* note 24, at 195, 224-25, 379-80 (discussing *Factortame* case); *Regina*, [1990] 3 C.M.L.R. at 871-73 (providing procedural details in the opinion of Advocate General Giuseppe Tesauro).

it in force), the European Court of Justice held that British courts were required to provide effective protection to those asserting claims under EC law. Citing the *Simmenthal*[92] case, the Court ruled invalid:

> any provision of a national legal system, . . .which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law and power to do everything necessary . . . to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.[93]

The existence of a putative Community law right was sufficient to suspend the operation of a United Kingdom statutory instrument, and it also empowered a British court to enjoin the Government from proceeding until the European Court of Justice had resolved the referenced issues.

Facing similar circumstances, the Marshall Court evolved a doctrine of concurrent federal and state powers, permitting flexibility in the Supreme Court's future decisions concerning federal-state allocations of power. In *Houston v. Moore*,[94] the state of Pennsylvania established court-martials for the trial of state militiamen who failed to appear for duty. The Federal Constitution conferred upon Congress the power to organize, arm and discipline the militia. However, it reserved appointment of officers to the states, and also gave the states the authority to train the militia in accordance with the discipline prescribed by Congress. While Congress had passed a 1795 statute providing procedures for calling militia into federal service, the question of administering discipline when the militia was not in actual federal service was not addressed. Justice Bushrod Washington, in what was designated an "Opinion of the Court", held that federal service of a militiaman did not begin until his unit arrived at the place of rendezvous. While Justice Washington conceded that Congress might have made a militiaman prior to rendezvous subject to federal court-martial jurisdiction, it had not done so. On the other hand, state tribunals were not prohibited from acting in such circumstances. He concluded that the state court-martial had

92. Case 106/77, Administrazione Delle Finanze Dello Stato v. Simmenthal SpA (No. 2), [1978] 3 C.M.L.R. 263 (1978).

93. *Regina*, [1990] 3 C.M.L.R. at 892 (citing *Simmenthal*, [1978] 3 C.M.L.R. at 275-79, 283). The reference would be to the Advocate General's representations and the opinion of the Court stressing the delay which Italian constitutional law procedures would impose upon Community proceedings. *Simmenthal*, [1978] 3 C.M.L.R. at 275-79, 283.

94. 18 U.S. (1 Wheat.) 1 (1820). The case is discussed at length at III-IV G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 535-41 (Paul A. Freund & Stanley N. Katz eds. 1988).

concurrent jurisdiction with federal court-martials empowered by Congressional statute to try those who disobeyed the call of the President into active service.[95]

In *Houston*, Justice Joseph Story dissented on the ground that the enactment of Congressional statutes in 1795 and 1814 conferred exclusive jurisdiction upon the federal tribunal authorized by those acts, and hence the state was (in modern parlance) precluded from establishing its own court-martial.[96] Professor White argues persuasively that the internal disagreements within the Supreme Court over the Houston case reveal a question basic to the issue of concurrent sovereignty: when Congress was given power to regulate, but it failed to do so completely, was there then a residuary sovereignty in the states to regulate? Despite Justice Story's strong argument for an exclusive power in Congress that blocked any state action, the majority view in favor of concurrent jurisdiction (and more broadly, concurrent sovereignty), would prevail —most significantly in regard to the Supreme Court's view of the Commerce Clause.[97] Leaving the matter open for future decisions provided both flexibility for future Supreme Court decisions and for wise forbearance in delimiting state power.[98]

Ogden v. Saunders[99] is another Supreme Court decision dealing with Congressional non-exercise of its powers. Except for a brief time in the early years of the Marshall Court, there was no uniform federal bankruptcy statute as authorized by the Federal Constitution. It thus became a question of whether state insolvency laws, which discharged debtors from prison and protected debtors within the state, violated the Contract Clause of the Federal Constitution. Since the insolvency law pre-dated the defendant's becoming indebted, there was no issue of statutory retroactivity condemned earlier in *Sturges v. Crowninshield.*[100] Each Justice among the majority submitted an individual opinion, but common to all was the view that a state insolvency proceeding was part of the existing municipal law included by implication within the provisions of the contract.[101] For practical and legal

95. *Houston*, 18 U.S. at 12-32 .

96. *Id.* at 47-76.

97. *See* WHITE, *supra* note 94, at 538-41; *see also* JOHNSON, *supra* note 4, at 160-61 (discussing *Houston*).

98. *See* Gibbons v. Ogden, 19 U.S. (6 Wheat.) 448 (1821) (elaborating upon the enunciation of concurrency under the cloak of a supposedly exclusive position).

99. 25 U.S. (12 Wheat.) 213 (1827).

100. 17 U.S. (4 Wheat.) 122 (1819).

101. *See* Ogden, 25 U.S. at 256-62 (providing Justice Washington's opinion); *id.* at 285-86 (providing Justice Johnson's opinion); *id.* at 297-99 (providing Justice Thompson's opinion); *id.* at 324-25 (providing Justice Trimble's opinion).

reasons, they believed that Congress's power in this field could not have been intended to be exclusive.[102] Despite Chief Justice Marshall's dissent, based on the Contract Clause and an extensive discussion of natural rights to contract, the Court thus upheld the existence of concurrent power in the states and the federal government.[103]

A third type of teleological interpretation occurs when the European Court of Justice decides a case contrary to textual indications in the treaty. One instance is the *Les Verts v. European Parliament*[104] case, where the Court entertained an Article 173 (Amsterdam, art. 230) proceeding brought against the Parliament. The relevant portion of Article 173 pre-dated a grant of authority to the European Parliament that included participation in the budget process. An ecological group within the EU wished to field one or more candidates for election to the Parliament, and felt itself aggrieved when what it considered an inadequate fund was allocated to the *Les Verts* group for promulgation of information on their candidates. However, despite the expanded authority of the Parliament, Article 173 (Amsterdam, art. 230) had not been amended to include the Parliament within the EU institutions whose actions were subject to review by the Court of Justice. The Court held that, given the nature of the Community as a body under the rule of law, all EC institutions, regardless of their express mention in Article 173 (Amsterdam, art. 230), should be subject to review by the Court of Justice. This was in accord with the spirit of the EEC treaty, as well as the general scheme to make all Community action subject to direct challenge by those whose interests were affected.[105] While it is arguable that the Court's decision was essential to protect a contesting party's access to EU election funding, the broader expression of that purpose provides justification for what might become wide-ranging law-making authority. On the other hand, the Court was careful to point out that procedurally, it has been the custom to provide liberal access to the Court's jurisdiction through a broad construction of the Treaty articles conferring

102. *See id.* at 280-81, 290-91 (providing Justice Johnson's opinion); *id.* at 305-311 (providing Justice Thompson's opinion).

103. *See id.* at 332-357 (providing Justice Marshall's dissenting opinion). The case is discussed in WHITE, *supra* note 94, at 648-657, and in JOHNSON, *supra* note 4, at 184-187.

104. Case 294/83, Partie Ecologiste "Les Verts" [The Greens] v. European Parliament, [1987] 2 C.M.L.R. 343 (1986).

105. *Les Verts*, [1987] 2 C.M.L.R. at 371-72; *see also* WEATHERILL & BEAUMONT, *supra* note 21, at 179-80 (discussing Article 170 of the Maastricht Treaty). After considering the merits, the Court voided the budget decision, pointing out that inequities in the award of funding to the "Les Verts" association virtually precluded a party not represented in the Parliament from staging an election campaign. *Partie Ecologiste*, [1987] 2 C.M.L.R. at 377-78.

jurisdiction.[106]

Another example of the Court of Justice's purposive approach is the case of *Statens Kontrol v. Larsen*,[107] where the Court commented that Article 95 (Amsterdam, art. 90), which applies to internal taxes that discriminate against imports, would also apply in situations where an internal tax imposes a burden upon exportation that is not equivalent to the impact on domestically marketed goods.[108] In other words, the Court read into Article 95 a broad principle of neutrality applicable alike to imports and exports. Despite the fact that Article 95 of the treaty made no explicit reference to the taxation of exports, the Court reasoned that the broad objectives of the treaty would be jeopardized if a Member State were permitted to discriminate against exportation of a scarce commodity or product. Hence, the general principal of tax neutrality would render the Member State's tax a violation of the treaty.

Although the Marshall Court's purposive interpretation never went as far as the European Court of Justice in *Les Verts*, its decisions do present some evidence that, given a similar constitutional problem, it might have taken equally unorthodox action. For example, in *Peisch v. Ware*, the Court dealt with the exercise of maritime salvage jurisdiction by a Delaware state arbitration tribunal, and affirmed the award of that body despite the seemingly exclusive admiralty power of federal courts.[109] In *New Jersey v. Wilson*, the Court upheld on Contract Clause grounds an exemption from state taxation, despite the fact that neither the contracts made by colonial royal officials nor those of the state of New Jersey were specifically included within the Federal Constitution's Contract Clause.[110]

Perhaps the most extreme Marshall Court trespass upon constitutional provisions occurs in *Osborne v. Bank of the United States*.[111] When the Second Bank of the United States was incorporated in 1816, Congress provided that it might bring actions in the lower federal courts by virtue of its incorporation by Congress.[112] In his opinion for the Court, Chief Justice Marshall asserted that Congress might confer upon the circuit courts original jurisdiction in any type of case to which the Supreme

106. *Id.* at 374, 357-58.

107. Case 142/77, Statens Kontrol Med Aedle Metaller v. Larsen, [1979] 2 C.M.L.R. 680 (1978).

108. *Id.* at 696-97. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 419-20 (discussing function of legislation).

109. 8 U.S. (4 Cranch) 347 (1807).

110. 11 U.S. (7 Cranch) 164 (1812); *see* HASKINS & JOHNSON, *supra* note 7, at 598-600 (discussing *New Jersey v. Wilson*).

111. 22 U.S. (9 Wheat.) 738 (1824); *see* JOHNSON, *supra* note 4, at 157-160 (discussing *Osborne v. Bank of the United States*).

112. Osborne, 22 U.S. at 817.

Court's appellate jurisdiction extended.[113] Shortly after this broad assertion of putative federal court jurisdiction, Marshall proceeded to reason that, since the bank was created by federal legislation, all of its actions depended upon federal law.[114] According to the Chief Justice, the bank's right to sue stood on the same ground as the authority of federal officials to bring actions in federal courts.[115] The standing of the Bank thus rested upon its personal status as a federal instrumentality, coupled with its activities being *per se* grounds upon which to predicate federal questions. Yet the lower federal courts did not possess federal question jurisdiction. On the other hand, if Congress could confer federal court jurisdiction simply by creating "federal corporations" such as the bank, along with a grant of access to federal courts, might not the jurisdiction of lower federal courts be vastly expanded? Justice Johnson's dissent sharply criticized the decision as conferring powers on the lower federal courts that were not authorized by the Constitution.[116] While it is true that the rule of complete diversity, applicable to associations and corporations in Marshall's day, would have barred the bank from federal courts in virtually all cases, there seems to be no constitutional basis for congressional action giving one banking institution access to federal courts when it would be disabled from doing so on diversity grounds.[117] Indeed the basis for the Bank of the United States having this procedural advantage remains obscure in the opinion. Either it should have had the right to sue based upon status as a governmental entity, or as one who possessed complete diversity. In the alternative, the Bank should, like all other "persons," have had the right to take federal question appeals from state court decisions. It was spurious to assert that, since the Bank was created by federal statute, everything that it did raised a federal question. Even more importantly, Congressional authority to establish and make exceptions to lower federal court jurisdiction could not reasonably be stretched to include power to confer a

113. *Id.* at 821. Marshall's position mirrors a general tendency to construe federal court jurisdiction liberally. For example, this was true of diversity of citizenship cases, and the Court leaned heavily toward the view that federal judicial power was coterminous with the powers vested by the Constitution in Congress. *See* WHITE, *supra* note 94, at 510-19, 528-33, 844-46 (discussing jurisdiction).

114. *Osborne*, 22 U.S. at 823-25.

115. *Id.* at 825-26.

116. *Id.* at 871-903.

117. The rule of complete diversity, established in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), required that for a diversity-based case to be within federal court jurisdiction, all of the plaintiffs would have to possess different citizenship than that of the defendants. *Id.* at 267. The rule was extended to corporations and their shareholders in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

private right upon a banking corporation through the means of a public law.

III. SHAPING THE CONSTITUTION OF UNION

In 1991, the European Court of Justice felt obligated to set forth the salient characteristics that distinguished the European Union from the looser form of agreement represented by the treaty erecting the European Economic Area.[118] It pointed out that the European Union was not simply a multilateral international agreement among the Member States:

> [The] EEC Treaty, albeit concluded in the form of an international agreement, none the less [sic] constitutes the constitutional charter of a Community based on the rule of law .... The essential characteristics of the community legal order which has thus been established are in particular its primacy over the law of the member-States and the direct effect of a whole series of provisions which are applicable to their nationals and to the member-States themselves.[119]

Very clearly in the view of the Court, the Community had moved well beyond the status of a group of nations bound by an international treaty to erect a free trade area for their mutual advantage. Through the imposition of a rule of law, the Member States by 1991 were associated in a relationship that to Americans seems very close to our federal system, or at least, to the American Union as it existed in the time of John Marshall.

The two principles identified in the *European Economic Area I*[120] opinion are: (1) the supremacy or primacy of Community law over the law of Member States, and (2) the direct effect of Community law by virtue of its application against both Member State governments and individual citizens or subjects of Member States. Included within the second principle is the implied authority of citizens to demand that their State recognize rights which accrue to them under Community laws.

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118. Re The Draft Treaty on a European Economic Area (Opinion 1/91), [1992] 1 C.M.L.R. 245, 268-69 (1991) [hereinafter European Economic Area I Opinion].

119. *Id.* at 269. The language parallels that of N.V. Algemene Transport-en Expedite Onderneming Van Gend en Loos v. Neder-Landse Tariefcommissie, [1963] C.M.L.R. 105, 129 (1963), which reads as follows:

> Article 177, ... confirms that the States recognised in Community law have an authority capable of being invoked by their nationals before those [Community and national] courts ... [T]he Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law ... not only imposes obligations on individuals but also confers on them legal rights.

120. European Economic Area I Opinion, *supra* note 118, at 269.

A. Supremacy or Primacy

The Court of Justice case which firmly established the primacy of EC Law is *Costa v. Ente Nazionale per l'Energia Ellettrica (ENEL)*, which grew out of the nationalization of the electricity industries by the Republic of Italy.[121] Flaminio Costa, a Milanese lawyer and shareholder of one of the nationalized companies, refused to pay his electric bill. Among other things, he claimed that the nationalization was prohibited by a number of provisions of the EEC Treaty. The local Italian judge, before whom the collection action was pending, referred the EEC Treaty issue to the Court of Justice in accordance with Article 177 (1) (Amsterdam, art. 234[1]). At the outset, the Italian government protested that the Court of Justice lacked jurisdiction under Article 177. It was in rejecting this contention that the Court established the primacy of Community law over Member State legislation:

> [T]he member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. The reception, within the laws of each member-State of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the member-State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. . . . [O]bligations undertaken under the Treaty creating the European Community would not be unconditional, but merely potential if they could be affected by subsequent legislative acts of the signatories of the Treaty.[122]

Hence, rights created by treaty law might not be contradicted by subsequent national legislation or governmental action. It is significant that the EEC Treaty does not provide in express terms that Community law shall be supreme or have primacy over Member State legislation.[123]

The primacy of Community law is also asserted in regard to national procedural rules which would delay an individual's recovery. In the *Simmenthal* case, an inspection fee was imposed by the Italian revenue authorities, and the taxpayer asserted that

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121. Case C-6/64, Costa v. Ente Nazionale per l'Energia Elettrica (ENEL), [1964] C.M.L.R. Part 12, 425, 426, 436 (1964). After amendment of the EEA Treaty provisions, and specific provisions were made for the European Court of Justice to be the sole ruling authority in regard to interpretation of EC law, the Court advised that the second treaty be adopted by the Community. Re The Draft Treaty on a European Economic Area (Opinion 1/92), [1992] 2 C.M.L.R. 217, 217-41 (1992) [hereinafter European Economic Area II Opinion].

122. *Costa*, [1964] C.M.L.R. Part 12 at 455.

123. *See* discussion *supra* note 83 (comparing the *Costa* case to *McCulloch v. Maryland* in terms of their similar reference to an underlying purpose of their respective unions).

the fee violated Article 12 (Amsterdam, art. 25), dealing with tariffs and like charges.[124] The matter was referred by the trial judge for a preliminary hearing under Article 177 (1) (Amsterdam, art. 234 [1]), but the Italian government objected that issues of constitutionality were reserved for its national Constitutional Court. The European Court of Justice disagreed, pointing out that EC Regulations had an immediate (direct) effect, and that deferring the taxpayer's recovery until the Italian Constitutional Court acted would upset the uniform application of the Regulation throughout the Community. It would also deny the taxpayer rights which accrued to him immediately upon the Regulation taking effect. Thus, the constitutional procedures of Italy could not delay the consideration of the taxpayer's case, and the preliminary reference was a valid means of asserting those rights. The trial court was bound to apply EC law rather than its national procedures for determining constitutional issues.[125]

The parallel implications of *Costa* and *Simmenthal* for the European Court of Justice and *McCulloch v. Maryland*[126] for the Marshall Court are obvious. Unlike *Costa, McCulloch* involved a direct confrontation between the tax authorities of Maryland and the Bank of the United States, acting on behalf of the federal government. Arguing for the state of Maryland, Joseph Hopkinson asserted that before a branch Bank of the United States might be established in a given state, the government of that state should assent to the establishment. Furthermore, the branch bank upon establishment should become subject to the general laws regulating or taxing the conduct of a banking business. He observed that in international law, "a sovereign who places his property in the territory of another sovereign, submits it to the demands of the revenue, which are but justly paid, in return for the protection afforded to the property."[127]

The Chief Justice took pains to establish legitimacy for federal supremacy, pointing out that federal power emanated from all of the people of the United States. It would be inequitable to permit a portion of those people residing in one state to limit the actions of the federal government. It resulted from the very nature of the Union that the United States government, "though limited in its powers, is supreme within its sphere of action."[128] Indeed, the Supremacy Clause in Article VI confirmed this very principle.[129] In reason and by constitutional mandate, supremacy

124. Case 106/77, Amminstrazione delle Finanze dello Stato v. Simmenthal SpA (No. 2), [1978] 3 C.M.L.R. 263 (1978).
125. *Id.* at 282-83.
126. 17 U.S. (4 Wheat.) 316 (1819).
127. *Id.* at 341.
128. *Id.* at 405. *See also id.* at 402-05 (discussing federal supremacy).
129. *Id.* at 405-06.

belonged to the United States government when it acted within its constitutional powers. As far as state-taxing power was concerned, the supremacy of the federal government, coupled with the authority invested in it by all of the people of the United States, made it unreasonable to allow the state government to obstruct or halt the work of the federal government through the state's local taxing power.[130]

In *Costa*, supremacy, or primacy, was inferred from the nature of the Community and from the specific transfers of power inherent in the terms of the Treaty of Rome.[131] More specifically, the express provisions leading to conformity of national law to EC law were evidence of the erection of a Community in which all national law was subordinate. In *van Gend en Loos v. Nederlandse Tariefcommissie*, the issue was complicated by the fact that the Dutch constitution was involved in the question of Community supremacy.[132] Article 66 of the Dutch Constitution provided that provisions of a treaty would prevail over national law when the convention's clauses had a "general compulsory effect" —that is they were self-executing and directly applicable in Dutch law. Pointing out that excepting constitutional provisions from EC law primacy would defeat the uniform development of Community law, the Advocate General successfully urged the Court to both assert the direct impact of the EEC Treaty and to declare that constitutional law of the Member States was also subordinate to Community law.[133]

B. Direct Effect of Community and Federal Law

In both the Community and the United States, there is a close relationship between supremacy or primacy, on one hand, and the direct effect of Community/federal law on the other. In *van Gend en Loos*, the Court of Justice was required to pay particular attention to the direct effect that Community provisions on tariffs would have upon Dutch administrative and judicial proceedings. It rejected the contention that Articles 169 and 170 (Amsterdam, arts. 226 and 227), authorizing Community and Member State action against unilateral change in tariffs, provided an adequate remedy. The argument by the Netherlands government —that Article 177 (1) (Amsterdam art. 234 [1]) authorizing references from a national court to the European Court of Justice was unnecessary— was summarily rejected. The Court of Justice was

130. *Id.* at 427-32. *See* JOHNSON, *supra* note 4, at 142-47 (discussing in detail the arguments of counsel and Marshall's reply).

131. *Costa*, [1964] C.M.L.R. Part 12 at 425.

132. N.V. Algemene Transport van Gend en Loos v. En Expedite Onderneming Nederlandse Tariefcommissie, [1963] C.M.L.R. Part 6, 105 (1963).

133. *Id.* at 113-15, 119, 129.

quite specific that Article 12 (Amsterdam, art. 25) created rights within private individuals, and that those rights were to be protected in the courts of Member States.

Just as Article VI of the United States Constitution included recognition of federal supremacy, it also provided for the application of federal law in the courts of the American states. The third clause of Article VI, Section 2, provides that, "[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Mindful that the Constitution extended federal judicial power to *all* cases which involved the Constitution of the United States, statutes made thereunder, and all treaties made by the authority of the United States, the first Congress provided for appeals to the United States Supreme Court in most situations where "federal questions" were decided by state courts.[134] Consequently, the main work of the Marshall Court involved defining when such "federal question" appeals were authorized by the Constitution and by the Judiciary Act.

Appeals from state courts construing the provisions of treaties entered into by the United States were among the most significant cases decided by the Supreme Court. *Martin v. Hunter's Lessee*[135] squarely presented the validity of such appeals. Justice Story's opinion for the Court struck themes not unlike those considered by the European Court of Justice a century and a half later. The supremacy of United States treaties was included within the constitutional grant of authority to the federal government, and there was a pressing need that there be uniform interpretation of treaty terms throughout the nation. Thus, the Supreme Court performed a critical function in implementing rules of international law through appellate review of state court decisions. Of course, "federal question" appellate review of state court decisions by the U.S. Supreme Court is subject to far greater delays than apply to Article 177 (Amsterdam, art. 234) preliminary references and the *Simmenthal* case.[136]

In implementing its appellate review in this area, the Marshall Court assumed to itself the authority to make unilateral determinations of state law that were the basis for a treaty-right claim. That had been done in *Fairfax's Devisee v. Hunter's Lessee*,[137] where the Marshall Court held that confiscation of the Fairfax estate required a judicial proceeding under Virginia law before the seizure was completed. Since that had not occurred before ratification of the 1783 Peace Treaty or the ratification of the 1794 Jay Treaty with Britain, elimination of the Fairfax title

134. Judiciary Act of Sept. 24, 1789, § 25, 1 Stat. 73.
135. 14 U.S. (1 Wheat.) 304 (1816).
136. *See* discussion *supra* note 93 (discussing the *Simmenthal* case).
137. 11 U.S. (7 Cranch) 603, 622-23 (1813).

was contrary to the 1783 Treaty's non-forfeiture provision. In a similar case, *Smith v. Maryland*,[138] the Supreme Court examined Maryland law and decided that the seizure did not require a judicial finding, and hence was completed prior to the effective date of the treaty. For this reason, the realty in *Smith* was not subject to recovery by its former British owner.

The force of Article VI supremacy was diluted by the ratification of the Eleventh Amendment, which became effective in 1798. When coupled with the vestiges of state sovereign immunity barring citizens from bringing action against their own state, the Eleventh Amendment might well have been broadly construed to preclude a state's involuntary appearance before the U.S. Supreme Court except as defendant in an action brought by a sister state or a foreign nation. The Marshall Court's opinion in *Cohens v. Virginia* narrowly construed the Eleventh Amendment by distinguishing between the state as a defendant, and thus protected by the Amendment, and the state as an appellee in a federal question appeal.[139] *Cohens* also demonstrated the scope of review under the Judiciary Act of 1789, permitting federal question review of any decision that was the conclusion of the highest state court having jurisdiction.[140] As a consequence, no state might so structure its court system to isolate lower court federal question decisions from appellate review by the U.S. Supreme Court.[141]

C. Legal Foundations for the Common Markets

Chief Justice Marshall and his Supreme Court colleagues recognized the need to create a federal state that encouraged internal trade and provided the enforcement mechanisms that would ensure commercial activity among the American states. This involved, first and foremost, forming federal legal doctrine and institutions that would ensure the safety of private capital invested in interstate trade. Guided in part by provisions in the Constitution, and in part by their own acquaintance with the needs of merchants and financiers, the Justices drew upon the commerce clause and the Contract Clause as the preeminent tools for the protection of private property and free trade. Included within that system for security of private property was the establishment of a stable currency and a related, albeit extra-constitutional, system of national banking. To a lesser degree the Marshall Court was drawn into the task of stabilizing or prohibiting state-sponsored extensions of credit through land-bank

138. 10 U.S. (6 Cranch) 286, 305-06 (1810).
139. 19 U.S. (6 Wheat.) 264, 395, 397-98, 405, 414-15 (1821).
140. *Id.* at 410-11.
141. *Id.* at 410-12.

credit schemes and various other state-originated forms of indebtedness. Hampered by the lack of a uniform bankruptcy law, the Supreme Court nevertheless examined state insolvency laws with an eye toward their overall impact on interstate trade and commercial credit. Disturbed by irregularities in negotiable instruments law, the Court spent a great deal of time reshaping the irregular laws of the District of Columbia, and in the circuit courts seems to have attempted the same for the various states.[142]

What about the European Court of Justice? At the outset it is readily apparent that the EC treaties provide a far more extensive mechanism for achieving what the Europeans term "economic integration." However, this has not preempted the Court from utilizing a broad teleological approach to enhance what appear to be rather sweeping measures to restrict Member State protectionism. For example, we have already noted the Court's expansion of Article 95 (Amsterdam, art. 90) to limit Member State taxation on exports, despite the lack of an explicit treaty provision concerning such a trade limitation practice.[143] Traditional taxation policies of Member States have resulted in demands that the Court review the economic impact of such variant policies upon Community integration. One glaring example is the litigation triggered by differing rates of customs duties and excise taxes upon wines, beer, and other alcoholic beverages. Even a cursory glance at the Court's diligence in this area will convince Americans that the Twenty-First Amendment, relegating liquor control and most related law enforcement activity to the states, was a wise, albeit "non-integrating" solution.[144] On the other hand, the wide disparity in taxation systems among the EC Member States makes it necessary to impose rather detailed controls upon the ability of Member States to impose taxation upon alcoholic beverages.

In the European Union even bureaucratic delay can be tantamount to a Member State breaching Article 30 (Amsterdam, art. 28), which ostensibly prohibits the establishment of quotas on the importation of foreign goods. Even when legal provisions provide equal treatment for imported postal meters, a consistent practice of administrative obstruction to such importation will violate Community norms and subject the Member State to Article 169 (Amsterdam, art. 226) proceedings by the European

142. *See generally* JOHNSON, *supra* note 4, at 190-223 (discussing private law in the Supreme Court); HASKINS & JOHNSON, *supra* note 7, at 559-87 (discussing business enterprise and the Supreme Court); WHITE, *supra* note 94, at 595-673, 794-835 (discussing Contract Clause cases).

143. *See supra* text accompanying note 108 (discussing *Statens Kontrol v. Larsen*).

144. *See* WEATHERILL & BEAUMONT, *supra* note 21, at 401-14, 425-26, 438 (discussing Article 36).

Commission.[145] The thread running through the Court of Justice's work in these areas is that it is the economic impact of the Member State action that determines its acceptability, rather than the form of the action.

Although there are parallels between the Marshall Court's enhancement of conditions favoring interstate commerce, and the European Court's more ambitious (and more effective) efforts toward the elimination of all trade barriers and all discriminatory Member State practices, it is quite clear that the complexities of modern commercial regulation render the two situations not readily comparable. On the other hand, the European Court's focus upon the potential economic impact of Member State laws does reflect a similar rationale in the Marshall Court's decisions in *Brown v. Maryland*[146] and *Willson v. Black Bird Creek Marsh Company*.[147] The *Brown* decision enunciated the "original package" doctrine to protect goods in international and interstate trade from taxation other than by the state of ultimate destination. In *Willson*, the economic value of damming a tidal creek was balanced against the waterway's negligible impact on the conduct of interstate or foreign trade. Arguably, both decisions were based upon economic impact rather than recourse to formal legal principles. That emphasis upon the actual effect of state (or Member State) measures seems to be the focal point of the Marshall Court's work as well as the efforts of the European Court of Justice.

D. Protection of Central Court Jurisdiction

Both the Marshall Court and the European Court of Justice have demonstrated diligence in protecting their own authority within their respective federal systems. This is a natural by-product of the doctrine of supremacy expressed in the United States Constitution, and found by the Court of Justice to be inherent in the treaties creating the European Union.[148] The exercise of judicial review over state legislation and court decisions pre-dates the Constitution, and finds its origins in review of colonial laws and judicial decisions by the Judicial Committee of the British Privy Council.[149]

In *Martin v. Hunter's Lessee*,[150] Justice Joseph Story pointed

145. *Id.* at 439-40.

146. 25 U.S. (12 Wheat.) 419 (1827).

147. 27 U.S. (2 Pet.) 245 (1829).

148. *See* discussion *supra* note XYZ (parenthetical).

149. *See generally* JOSEPH H. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (Octagon Books, Inc. 1965) (1950); ELMER B. RUSSELL, THE REVIEW OF COLONIAL LEGISLATION BY THE KING IN COUNCIL (Octagon Books, Inc. 1976) (1915).

150. 14 U.S. (1 Wheat.) 304 (1816). The case is discussed in JOHNSON, *supra*

to the need for Supreme Court resolution of disputes involving "federal questions," that is, cases in which the validity of the Constitution, federal statutes, or treaties of the United States, was denied. Citing the Supremacy Clause, he emphasized the responsibility of state judges as well as federal judges to decide cases not merely according to state law, but also according to the paramount federal law.[151] He asserted that the framers of the Constitution anticipated that state tribunals would have to decide cases involving federal questions, and they also anticipated that federal judicial power would have to extend to those cases. In situations where federal courts did not exercise original jurisdiction, the Founding Fathers must have anticipated that the Supreme Court of the United States would apply federal judicial power by appellate review of state court decisions that trespassed federal concerns.[152] Furthermore, the need for uniformity in interpretation of the Constitution was essential, requiring federal judicial power to resolve conflicts between federal question decisions of the various state courts.[153]

Although theories of the Union played a significant role in *Martin,* and state sovereignty was a matter of debate not only between Story and Johnson, but also in the political arena, the actual status of the states as party litigants before the Supreme Court was not brought into question. *Cohens v. Virginia*,[154] an appeal of a Virginia criminal prosecution, raised the issue directly five years later. The Commonwealth of Virginia contended that, while a sovereign state might be made a party in an original jurisdiction Supreme Court case, the Eleventh Amendment prevented the Court from exercising appellate jurisdiction when the state was a party.[155] At the outset of his opinion for the Court,

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note 4, at 68-72, and in WHITE, *supra* note 94, at 165-73, 495-504.

151. *Martin*, 14 U.S. (1 Wheat.) at 338-40.

152. *Id.* at 342.

153. *Id.* at 347-48. In his concurring opinion, Justice William Johnson pointed out that in *Martin* the Supreme Court exercised appellate jurisdiction over the parties, and thus did not subordinate the Virginia Supreme Court of Appeals to its mandate. While he was willing to assert that the need for such review of state court decisions was essential to the continuance of the Union, he denied that the scope of federal judicial power was as extensive as set forth by Story. *Id.* at 364, 372-80.

154. 19 U.S. (6 Wheat.) 264 (1821). The case is discussed in WHITE, *supra* note 94, at 504-20; JOHNSON, *supra* note 4, at 75-77, 152-54; and CURRIE, *supra* note 41, at 96-102. Professor Currie accuses Marshall of emphasizing the intolerable consequences of a contrary decision, and of reaching out for issues not necessarily presented. He asserts that "the strength of *Cohens*, like that of *Marbury,* lies in convincing the reader that the Framers were too wise and too patriotic to have created an imperfect Constitution," *Id.* at 102. Perhaps so, or is this just an example of a "purposive" argument?

155. *See* Cohens, 19 U.S. (6 Wheat.) at 300-01, 304-07 (discussing Philip Barbour's arguments for defendant in error).

Marshall distinguished between federal jurisdiction of cases arising under the Constitution and statutes of the United States, and federal jurisdiction conferred by the status of the parties. He pointed out that the first level of jurisdiction was granted without restriction or qualification in the Constitution, and for that reason, it would not be appropriate to make an exception when a state was a party to the litigation.[156] For the welfare of the Union, and in accordance with the needs expressed by the Supremacy Clause, federal judicial authority was essential to answer definitively those questions that might arise concerning the Constitution and laws of the United States.

> No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own Courts, rather than on others.[157]

Turning to the Eleventh Amendment, Marshall observed that its text limited the authority of federal courts to hear cases "commenced or prosecuted" against a state by a citizen of another state. However, in *Cohens*, the prosecution was commenced by Virginia, and the appeal of the case by writ of error did not alter the relationship of the parties. In federal practice, when the United States was a party in an appealed case, it had never been held that the suit was, by the issuance of a writ of error, changed into an invalid proceeding against the United States.[158] The remainder of the Chief Justice's opinion was devoted to a restatement of the principle in *Martin's Lessee* —that the United States was supreme, and the Supreme Court had jurisdiction to exercise appellate review over cases decided by state courts in which the Constitution, laws, and treaties of the United States were brought into question and their validity was, by the state court, denied.[159]

A third Marshall Court case that deserves attention is *United States v. Hudson and Goodwin*,[160] which finally resolved the long-standing debate over whether there was a federal common law of crimes. In an opinion by Justice William Johnson, the Court decided that all federal criminal sanctions had to be based upon the Constitution and statutes, and not upon common law. This was inherent in the limited nature of the federal government, and

156. *Id.* at 378-79, 382-83, 390-92.

157. *Id.* at 378-79, 382-83, 390-92.

158. *Id.* at 407-12.

159. *Id.* at 407-12.

160. 11 U.S. (7 Cranch) 32 (1812). The case is discussed in JOHNSON, *supra* note 4, at 141-42; HASKINS & JOHNSON, *supra* note 7, at 354-56, 639-46; and WHITE, *supra* note 94, at 137-38, 450, 865-66.

more specifically pertinent to the limitation of federal court jurisdiction. A contrary decision would lead to the speculation that there were implied judicial powers in the federal courts.[161] Although Justice Johnson was willing to admit the existence of some implied judicial powers, he was emphatic that this was not the case when criminal laws were involved. *United States v. Hudson and Goodwin* is an important case for placing federal court jurisdiction within the context of limited federal government. It left open for future consideration the possibility that there might be a federal common law outside the area of crimes, and ultimately led to a sharp restriction upon the development of a federal common law articulated in *Erie Railroad Company v. Tompkins*.[162] As such, the case checked the expansion of federal judicial power in the controversial area of common law crimes, and thus eliminated continuing partisan conflict between the Court, the political branches of the federal government, and the states who held primary responsibility for criminal law enforcement.

Like the Marshall Court, the European Court of Justice has been alert to protecting and expanding its jurisdiction. However, the treaty provisions establishing the Community give much more detailed guidance concerning the jurisdiction of the Court than does the United States Constitution in Article III. The European Court has general authority to judicially review all Community acts under Article 173 (Amsterdam, art. 230); it may also review legislative and administrative inaction by the Council or the Commission under Article 175 (Amsterdam, art. 232).[163] As we noted earlier, the European Court asserted its jurisdiction to review an act of the European Parliament, even though this head of jurisdiction was omitted from Article 173. The Court's justification was that, when Article 173 was ratified, the Parliament did not exist, and that, in any event, the rule of law demanded that all Community institutions be subject to review concerning the congruence of their acts to the treaties establishing the Community.[164] Individual natural and legal persons may also sue under Article 173 when the issue is of "direct and individual

161. *Hudson*, 11 U.S. at 33-34.

162. 304 U.S. 64 (1938).

163. *See* BROWN & KENNEDY, *supra* note 24, at 132.

164. *Id.* at 128-29. In *Case 294/83, Partie Ecologiste "Les Verts" [The Greens] v. European Parliament*, [1987] 2 C.M.L.R. 343, 370 (1986), the court cited its general authority as custodian of Community law, as well as the spirit of Article 173 (Amsterdam, art. 230), to hold that no Community institution, including Parliament, should be exempt from judicial review of its activities. The defect in Article 173 was remedied in the Maastricht Treaty amendments to Community law. Conversely, while Parliament prior to Maastricht did not have an unqualified right to sue in the Court, the Court agreed that Parliament might bring suit to protect its prerogatives. *See* BROWN & KENNEDY, *supra* note 24, at 132-33.

concern" to them. Brown and Kennedy suggest that the Court of Justice is reluctant to permit corporations and other "legal persons" to sue under this provision, but that natural persons affected by a Community institution's decision and who are under compulsion to comply, or who have taken part in the earlier proceedings, will be permitted to ask the Court to annul.[165]

Annulment actions are not only limited to certain parties having standing, but they also are subject to a short statute of limitations. Consequently, the bulk of individual challenges to Community actions are made indirectly in Member State courts through an Article 177 (Amsterdam, art. 234) reference to the Court of Justice. In many ways Article 177 operates as did Section 25 of the Judiciary Act in John Marshall's day. It ensures the uniform application of Community law by referring questions to the European Court of Justice.[166] In accepting cases for review the Court has been generous in exercising jurisdiction, asserting that it is beyond its function to make an initial determination of whether the reference is necessary or whether EC law is really involved. Similarly, the Court has broadly interpreted what bodies are "courts or tribunals" which may refer questions under Article 177 (Amsterdam, art. 234).[167] Finally, the European Court has concluded that when there is no appeal from the decision of a court or tribunal, that body is subject to the mandatory referral requirements of Article 177 (3) (Amsterdam, art. 234).

The European Court of Justice demonstrates both the constitutional authority and the institutional willingness to use to the fullest the judicial review powers granted by the treaty. Its Justices have not been reticent about using teleological interpretive techniques to expand the scope of their authority. Thus their Court, not unlike the Marshall Court, has shown a centralizing, and self-enhancing, tendency in its jurisdictional decisions.

The Court of Justice has also been sensitive to threats to its authority. Its reaction to attempts to establish a European Economic Area (EEA) Court illustrates the way in which the Court of Justice views legislative or diplomatic efforts to introduce new judicial systems that are independent of the EC, but nevertheless interrelated with it. The European Economic Area included both Member States of the EC and non-Member States who were willing to join a common market area, but were reluctant to take upon themselves some of the sovereignty waivers required by the EC. The original EEA treaty created a system of courts for the

165. *See* BROWN & KENNEDY, *supra* note 24, at 133-42; *see also* WEATHERILL & BEAUMONT, *supra* note 21, at 227-46 (discussing judicial review of EC acts).

166. *See* BROWN AND KENNEDY, *supra* note 24, at 198-99.

167. *Id.* at 202-13.

settlement of disputes between Member States, which might include Member States of the EC. It provided that rulings of the new court were to conform to decisions of the Court of Justice made prior to the signature of the agreement creating the European Free Trade Association (EFTA). Furthermore, the new court would consist of eight judges, of whom five would be drawn from the European Court of Justice. In the EEA Court of First Instance, consisting of five judges, two would also be judges of the EC's Court of First Instance. Finally, the Agreement provided a procedure by which the new EFTA Court might ask the European Court of Justice to give advisory opinions concerning the EFTA Agreement.

In rejecting the validity of the original EFTA Agreement, the Court of Justice pointed out that, despite the similarity of structure of powers between it and the EFTA Court, there could easily be a divergence of interpretation of EC law, creating serious questions concerning the authority of the Court of Justice. In addition, the EC treaty provided that the European Court would have exclusive jurisdiction, and this would conflict with a sharing of decision-making with the EFTA Court. The functioning of EC judges in the EFTA Court, far from contributing to coordination, might prejudice their independent judgment should the same matter be brought before the Court of Justice, or the Court of First Instance, for decision.[168] To save the EFTA Agreement, some changes were instituted, including eliminating the provision for EC judges to sit in EFTA courts. New procedures were instituted for settlement of disputes within the EFTA, and the EC Court of Justice might be requested to render rulings on the EFTA Agreement and its construction. A joint committee was established to coordinate EC law with that of the EEA, and in the event of conflict, the EC law (as construed by the Court of Justice) was to prevail. Finally, the provision that the EC Court of Justice was to pay attention to decisions of other courts was deleted from the EEA Agreement. Given these concessions, the European Court of Justice concluded that the EEA Agreement was compatible with the EC treaty.[169]

CONCLUSIONS

Constitutional courts in emerging federal systems play a critical role in shaping the jural relationships between subordinate political units and the union government of which the courts are component parts. They also delineate the degree to which central

168. *Id.* at 232-38; European Economic Area I, *supra* note 118, at 267-73.

169. *Id.* at 238-240. *See* European Economic Area II Opinion, *supra* note 121, at 237-39 (setting forth the second decision).

laws may act upon individual citizens of the component states, utilizing principles of supremacy and "direct effect" to insure that the basic principles of union are enforceable at the level of component states. It is also the responsibility of the central constitutional courts to implement rules that effectively advance the goals for which the union has been established. Both the United States Supreme Court and the European Court of Justice have been extremely effective in laying down legal rules that have led to the development of extremely prosperous common markets. In many ways, the European Union seems to have profited from the American experience, and EC standards eliminating mercantile and protectionist policies within the Union have been more precisely drawn and more vigorously enforced by Community institutions. Specifically, Article 177 (Amsterdam, art. 234) is a widely used and effective tool by which individual citizens can utilize the European Court to protect themselves against their own Member State actions. The Marshall Court, in protecting federal question review, provided a similar, albeit, much more cumbersome and time-consuming, method for citizens to challenge their state governments.

In judicial decision-making, both courts demonstrated flexibility and creativity in implementing teleological, or purposive, decision-making. This is supplemented by use of a contextual method, examining the "four corners" of their constitutional documents to determine the intention of the draftsmen or the underlying principles of the document. Both have recognized that their work is critical to the efficient operation of their federal system. As a consequence, they are alert to the need to maintain judicial independence from the political branches of their central governments, and despite their natural tendency to advance federal interests, have been sensitive to the countervailing demands of component states. In this regard, the European Court has already been influenced by the decentralizing impact of the Maastricht and Amsterdam treaties, and the Marshall Court (perhaps after 1830) was reflecting a decentralizing influence in American political and legal life.

Given the citation practices of European courts, it is not surprising that no reference to Marshall's Court has been located in the judgments of the European Court of Justice. There is also a conspicuous lack of reference to Canadian and Australian judicial work dealing with federal systems and the role of courts in the exposition of the law and principles of federalism. Undoubtedly much of this material is known by the Justices, advocates general and staff of the Court of Justice. The historical challenge of building a new federal state which confronted John Marshall and his colleagues, has become commonplace in today's world of nations, and much that was once new about federalism and the

authority of central courts is now generally accepted knowledge. Yet the nature of federalism and the functions of central courts within federal or quasi-federal systems seem to have remained fairly constant over the past two centuries.