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FEDERAL AUTONOMY AND LEGAL THEORY IN US ANTEBELLUM CONSTITUTIONALISM: A VIEW FROM EUROPE

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ABSTRACT: This *Article* analyses debates in US antebellum constitutionalism on the "autonomy" of the US federal order in light of similar debates in contemporary EU constitutionalism. In the early American republic, two interrelated questions permeated constitutional theory: what was the nature of the federal order that had been created by the ratification of the US Constitution, and who was the final arbiter in constitutional questions. Today, EU constitutional lawyers would have no trouble recognising these debates, which are essentially re-enacted both in scholarly discussions and in collisions between the Court of Justice and national constitutional courts. This *Article* starts with a brief historical overview of some of the main constitutional debates in US antebellum constitutionalism, showing that these debates were remarkably similar to issues recently presented by the *PSPP* judgment of the German Federal Constitutional Court and the K 3/21 decision of the Polish Constitutional Tribunal. Secondly, this *Article* shows that both debates are characterised by a similar asymmetry: proponents of an autonomous federal legal order mainly use functionalist arguments, while proponents of the sovereignty of the states mainly use arguments about the "nature" or "origin" of the federal order. Thirdly, the *Article* contrasts the framing of the debate about the autonomy of the US federal order with the monism–

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dualism dichotomy that is central to our thinking about the relationship between national and international law. It shows how this distinction was not relevant to constitutional debates in the early American republic, and how that could cast a different light on the EU legal order today.

KEYWORDS: US antebellum constitutionalism – federal autonomy – nullification – primacy – monism – dualism.

I. INTRODUCTION

In the early American republic, two interrelated questions permeated constitutional debates: who was the final arbiter in constitutional questions surrounding the vertical division of powers between the Union and the States, and at a more abstract level, what was the nature of the federal order that had been created by the ratification of the US Constitution. Today, roughly 200 years later, EU constitutional lawyers would have no trouble recognising these debates, which are essentially re-enacted both in scholarly discussions about the autonomy of the EU legal order and the jurisdiction of the European Court of Justice (Court of Justice or ECJ), and in collisions between the Court of Justice and national constitutional courts.

Constitutional questions and conflicts in the early American republic were indeed remarkably similar to the issues presented recently by, for example, the *PSPP* judgment of the German Federal Constitutional Court[1] and the K 3/21 decision of the Polish Constitutional Tribunal.[2] Both the normative independence of the American federal legal order and the position of the US Supreme Court were heavily debated, both in judicial dialogues, politics and the popular media. In the wake of the emergence of judicial review of statutory legislation, the US Supreme Court steadily assumed the role of the final constitutional arbiter, even though this position remained fragile until well into the 20th century.[3] Along the way, the Supreme Court also sanctioned the deeply controversial view that the US Constitution did not derive its legality and legitimacy from the States or their State constitutions, but directly from "the people of the United States".

[1] German Constitutional Court judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*).

[2] Polish Constitutional Tribunal judgment of 7 October 2021, Ref. no. K 3/21.

[3] Examples include the backlash after the US Supreme Court mandated school racial desegregation in *Brown v Board of Education*, 347 U.S. 483 (1954) and after it declared the death penalty – as applied in specific cases – unconstitutional under the Eighth Amendment in *Furman v Georgia*, 408 U.S. 238 (1972). For roughly a decade after *Brown*, southern schools overwhelmingly remained segregated, and the Court's judgment induced massive political resistance in the southern states. For analysis, see *e.g.* MJ Klarman, 'How *Brown* Changed Race Relations: The Backlash Thesis' (1994) Journal of American History 81. The allusion in *Furman* to the unconstitutionality of the death penalty *in general* created a political backlash that culminated in the US Supreme Court's judgment in *Gregg v Georgia* 428 U.S. 153 (1976), in which it backtracked and held that the death penalty as such was not unconstitutional.

This *Article* analyses debates in US antebellum constitutionalism on the "autonomy" of the US federal order and the question of what institution was the final constitutional arbiter in light of similar debates in contemporary EU law. The aim of this *Article* is to determine what the history of the early American republic can teach us about the autonomy of the EU legal order, the final arbiter in conflicts between national law and EU law, and the nature of constitutional debates about such questions more generally.

In describing their federal political and legal order, early-Republic Americans did not employ the term "autonomy". Indeed, in several ways the federal order was *not* autonomous. For example, US Senators were initially elected by the State legislatures.[4] The President is (still) elected by the Electoral College, the electors of which are selected according to a method specified by the State legislatures.[5]

In a similar sense, the political and legal order of the EU is not "autonomous" either. The Council, for instance, comprises of representatives of the Member States at ministerial level,[6] and the President of the European Commission is nominated by the European Council,[7] itself consisting of the heads of State and government of the Member States.[8] The enforcement of EU law takes place overwhelmingly by national administrative and judicial institutions.[9] Therefore, the "autonomy" of the EU legal order may be understood in a more limited sense as the normative self-referentiality of the EU legal order. This normative self-referentiality means that the validity and interpretation of EU law does not depend on national (or international) law.[10]

This understanding of "autonomy" as normative self-referentiality provides a helpful framework to understand US antebellum constitutionalism as well. In other words, even though the contemporary actors of the early American republic did not use the term "autonomy", their constitutional debates centred on the same questions that are central to debates about the autonomy of EU law: whether the common political and legal order that had been created by the States was normatively independent from the political and legal

[4] US Constitution, art. I, section 3, clauses 1 and 2. Since 1912, the 17th Amendment has provided for the direct election of US Senators by the people of each State.

[5] US Constitution, art. II, section 2, clause 2.

[6] Treaty on European Union (TEU), art. 16(2).

[7] *Ibid*. art. 17(7).

[8] *Ibid*. art. 15(2).

[9] See N MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth* (Oxford University Press 1999) 117; P Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020) 90–91, 136–137.

[10] See to this effect *e.g*. C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1; J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271; K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 47. For an analysis of this normative self-referentiality from a substantive point of view, see D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403.

orders of the States,[11] and which institution was the final arbiter in questions of constitutional interpretation.[12] Thus, approaching US antebellum constitutionalism from the perspective of the question whether the US Constitution had created an autonomous federal order is a fruitful start for a comparative analysis with contemporary EU constitutionalism.[13]

This Article quotes rather extensively from primary sources. Though these quotations add considerably to the *Article's* length, using the contemporary actors' actual words, rather than relying on paraphrasing or explanation, helps to better identify the similarities and differences between US antebellum constitutional debates and debates in contemporary EU constitutionalism.

The remainder of this *Article* is structured as follows. Section II provides an overview of the main constitutional debates, roughly from the late 1790s until the early 1830s on the "autonomy" of the US federal order and the question of what institution should be the final arbiter in constitutional questions within that order. Sections III and IV provide a preliminary comparative analysis of US antebellum constitutionalism and contemporary EU constitutionalism. Section III compares the rhetorical structure of debates in US antebellum constitutionalism and current debates on the autonomy of the EU legal order. In both cases, proponents of an autonomous federal legal order mainly use functionalist arguments, while

[11] See section II.2. of this *Article*. In the context of EU constitutionalism, see *e.g.* N MacCormick, *Questioning Sovereignty* cit. 117; K Lenaerts and D Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed' (2004) ELR 289, 293–297; P Eleftheriadis, *A Union of Peoples* cit. 3–7.

[12] See section II.3 of this *Article*. The literature on the final say in regard to constitutional questions in EU law is vast. See *e.g.* JHH Weiler and UR Haltern, 'Autonomy of the Community Legal Order – Through the Looking Glass' (1996) HarvIntLJ 411; G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) ELJ 358.

[13] By conceiving of US antebellum constitutional debates in terms of whether the US Constitution had created an "autonomous federal order", contrary to contemporary parlance, a certain degree of anachronism is inevitable. Anachronism is sometimes regarded as the classic sin of historical analysis. According to the classical view associated with the so-called "historicist" tradition, the aim of the historian should not be to provide a history useful to the present times, but merely to show "what actually happened". This view is attributed to the nineteenth-century historian Leopold von Ranke: "Man hat der Historie das Amt, die Vergangenheit zu richten, die Mitwelt zum Nutzen zukünftiger Jahre zu belehren, beigemessen: so hoher Aemter unterwindet sich gegenwärtiger Versuch nicht: er will blos zeigen, wie es eigentlich gewesen" (L von Ranke, *Geschichten der romanischen und germanischen Völker: von 1494 bis 1535* (Reimer 1824) v-vi). At the same time, *all* historic research is shaped by contemporary concerns and interests. This point was eloquently made by the Italian philosopher and historian Benedetto Croce, who remarked that "all true history is contemporary history" (*ogni vera storia è storia contemporanea*). Croce elaborated this claim as follows: "The practical requirements which underlie every historical judgment give to all history the character of 'contemporary history' ['storia contemporanea'] because, however remote in time the events there recounted may seem to be, the history in reality refers to present needs and present situations wherein those events vibrate" (B Croce, *La storia come pensiero e come azione* (Laterza 1938) 5, quoted and translated in D Armitage, 'In Defense of Presentism' in DM McMahon (ed.), *History and Human Flourishing* (Oxford University Press 2023) 59, 65.

proponents of the sovereignty of the States mainly use arguments about the "nature" of the federal order. This comparative rhetorical analysis aims to unveil an important *similarity* between US antebellum constitutionalism and contemporary EU constitutionalism. By contrast, section IV focuses on a fundamental *difference* between these two streams of constitutional debate. It contrasts the debate about the autonomy of the US federal order with the monism–dualism dichotomy, which is central to our contemporary thinking about the relationship between national and international law. It shows how this distinction was irrelevant to the constitutional debates in the early American republic, and how that could cast a different light on the EU legal order today as well. Section V concludes.

II. The autonomy of the federal legal order in the early American Republic

This section aims to provide the groundwork for an analysis of the autonomy of the EU legal order based on a historical comparison with constitutional debates on the autonomy of the nascent US federal legal order. Legal-historical comparison between the US and the EU is obviously not new. Following the *Integration Through Law* project in the 1980s,[14] major contributions to US–EU comparative constitutional law and history have been made by, among others, Leslie Friedman Goldstein,[15] Robert Schütze,[16] Andrew Glencross,[17] and Signe Larsen.[18] This *Article* aims to complement these contributions by focusing in more detail on the constitutional debates in the very first decades of the American republic from the perspective of the issue of "federal autonomy".

To this end, this section shows how constitutional debate in the first decades of the US Constitution centred on the question of whether the Constitution had created something more than a so-called "compact" between sovereign States. Notwithstanding the Supremacy Clause in the US Constitution,[19] proponents of a "compact theory" insisted that the Constitution had merely maintained a confederation among States which had remained sovereign entities.

Moreover, constitutional debates in the early American republic soon focused on the question of who was the final arbiter regarding vertical division of powers between the

[14] M Cappelletti, M Seccombe and JHH Weiler, *Integration Through Law: Europe and the American Federal Experience* (de Gruyter 1985).

[15] L Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press 2001).

[16] R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

[17] A Glencross, *What Makes the EU Viable? European Integration in the Light of the Antebellum US Experience* (Palgrave Macmillan 2009).

[18] S Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).

[19] US Constitution, art. VI, clause 2.

federal government and the States. The US Constitution did not, and still does not, unambiguously stipulate the final interpretative authority of the US Supreme Court, whose appellate jurisdiction to State court judgments was hotly contested. This led to a series of threats of, and sometimes actual, defiance of US Supreme Court judgments and federal laws by both northern and southern State officials. In US constitutional history, much attention is usually given to the so-called South Carolina nullification crisis in 1832 and 1833, when South Carolina nullified the federal tariff within its territory, and President Andrew Jackson subsequently threatened with federal military action.[20] South Carolina's nullification was however only one of several refusals to apply federal law by State institutions.[21] The intellectual foundation of such defiance throughout the antebellum period was the Virginia and Kentucky Resolutions from 1798 and 1799.

II.1. The Virginia and Kentucky Resolutions

In the Virginia and Kentucky Resolutions of 1798, the Virginia State legislature and the Kentucky State legislature protested against the supposed unconstitutionality of the so-called Alien and Sedition Acts of 1798. In the late 1790s, as the United States was on the brink of an undeclared naval war with France,[22] the Federalists believed that the large number of immigrants, as well as the increasing amount of government-critical, Jeffersonian press, posed a major threat to the US government and the American society.[23] Thus, the Alien and Sedition Acts restricted the immigration and rights of non-citizens, and freedom of speech.[24] The Alien Friends Act[25] and the Sedition Act in particular were widely

[20] See generally W Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (Oxford University Press 1992).

[21] Other than in the South Carolina nullification crisis, these refusals to apply federal law typically did not formally "nullify" federal law, but involved the refusal of State political and judicial institutions to follow the case law of the federal courts. Most instances of defiance of federal (case) law by State courts could therefore be compared to the German Federal Constitutional Court's refusal to follow the ECJ's judgment in case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000 German Constitutional Court judgment of 5 May 2020 cit. or the Danish Supreme Court's refusal to follow the ECJ's judgment in case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278 in case C-15/2014 *Dansk Industri (DI) acting for Ajos A/S vs The estate left by A*. For some examples of such defiance, see section II.3 below. While the distinction between "nullification" and "disapplication" is an important one, both theoretically and practically, this *Article* does not provide an elaborate analysis of this distinction for reasons of space.

[22] This so-called "Quasi-War" between the United States and France was fought between 1798 and 1800.

[23] GS Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press 2009) 246–250.

[24] The Alien and Sedition Acts comprised four acts: the Naturalization Act, which increased the residency requirement for aliens to be eligible for US citizenship from five to fourteen years; the Alien Enemies Act, which gave the president the power to arrest, relocate or expel non-citizens in times of war; the Alien Friends Act, which gave the president the power to expel non-citizens he considered "dangerous to the peace and safety of the United States", and the Sedition Act, which criminalised the expression of "any false, scandalous, and malicious writing or writings against [the federal government]".

[25] *Ibid*.

condemned by Jeffersonians because it allegedly went beyond the enumerated powers of Congress, and because the Sedition Act encroached upon freedom of speech.[26]

Both the 1798 Virginia Resolutions, authored by James Madison, and the 1798 Kentucky Resolutions, written by Thomas Jefferson, asserted that the States had retained the sovereign right to decide on the extent of the powers conferred to the federal government.[27] Since the federal government had been created by a "compact" among sovereign States, the Virginia and Kentucky Resolutions insisted that only the States themselves could be the final arbiter on the delineation of powers of the federal government. As the Virginia Resolutions specified, the States had maintained the right to condemn "*deliberate, palpable and dangerous*" exercises of federal power:

> "That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them".[28]

Both State legislatures emphasised that the Alien and Sedition Acts were unconstitutional.[29] But neither the Virginia Resolutions nor the Kentucky Resolutions from 1798

[26] See S Elkins and E McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (Oxford University Press 1993) 700–701.

[27] Madison's authorship of the Virginia Resolutions 1798 is somewhat remarkable, as one decade before he had espoused the supremacy of the federal government: "[I]n controversies relating to the boundary between the [federal and State] jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government" (J Madison, 'Federalist No 39' in A Hamilton, J Madison and J Jay, *The Federalist, with Letters of "Brutus"* (T Ball ed, Cambridge University Press 2003) 186. Madison's radical change of mind was probably caused by his severe dissatisfaction with the expansive interpretation of federal powers by the Federalist governments of the 1790s. See *e.g.* N Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (Farrar, Straus and Giroux 2017) 372–440.

[28] Virginia Resolutions of 1798. The Kentucky Resolutions of 1798 similarly stated "[t]hat the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self–government; [...] that, as in all other cases of compact among powers having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress*" (emphasis added).

[29] "That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts' passed at the last session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to those of executive, subverts the general principles of free government" (Virginia Resolutions of 1798); "That this commonwealth does therefore call on its co-states for an

were clear about the remedy against such "deliberate, palpable and dangerous" exercises of federal power; the word "interpose" in the Virginia Resolutions at most alluded to nullification of the federal law. After the Resolutions sorted little effect and were condemned by most of the other States,[30] Kentucky adopted another set of Resolutions in 1799. In contrast to the 1798 Resolutions, the Kentucky Resolutions of 1799 stated expressly "[t]hat the several states who formed [the US Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and, *[t]hat a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy*".[31]

In private correspondence to Madison, moreover, Jefferson endorsed State secession – perhaps *instead* of nullification of federal law – if the Resolutions were unable to achieve their objectives.[32]

Despite the inherent ambiguity surrounding the 1798 Resolutions, particularly regarding the available remedy against purportedly unconstitutional acts, the Virginia and Kentucky Resolutions of 1798–1799 unequivocally asserted that the ultimate authority to determine whether the federal government had exceeded its specifically enumerated powers rested with the individual States. Over the subsequent six decades, the Virginia and Kentucky Resolutions, partly owing to the esteemed status of their authors, provided an intellectual basis for State defiance of federal laws and the US Supreme Court's case law. Such defiance was in large part triggered by the nationalist jurisprudence that emerged during the Chief Justiceship of John Marshall.

II.2. The Marshall Court's nationalism and compact theory

After the 1800 presidential election, the Federalists lost political power. Thomas Jefferson became the first non-Federalist President after George Washington and John Adams. The Alien and Sedition Acts expired in 1800 and 1801, and the Republicans – the political faction which had grown out of the Jeffersonians – came to dominate national politics for

expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the federal compact" (Kentucky Resolutions of 1798).

[30] See *e.g.* FM Anderson, 'Contemporary Opinion of the Virginia and Kentucky Resolutions' (1899) American Historical Review 45. For a recent re-assessment that offers a somewhat more nuanced view, see W Bird, 'Reassessing Responses to the Virginia and Kentucky Resolutions: New Evidence from the Tennessee and Georgia Resolutions and from Other States' (2015) Journal of the Early Republic 519.

[31] Kentucky Resolutions of 1799 (emphasis added). According to Akhil Amar, Jefferson's reference to "sovereign and independent" states "were 1776 words and 1781 words, not 1788 words", and his endorsement of nullification was "absurd" because "[n]o one had said anything of the sort in the great national conversation of 1788", see A Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (Basic Books 2021) 455. Nonetheless, threats of unilateral nullification and disobedience of federal law continued up until the Civil War.

[32] T Jefferson, 'Letter to James Madison' (23 August 1799).

the decades to come. Towards the conclusion of his presidency, however, John Adams appointed numerous Federalist judges to the federal courts,[33] and nominated Secretary of State John Marshall for Chief Justice of the US Supreme Court.[34]

In the subsequent three decades, Chief Justice Marshall would establish a legal framework emphasising federal autonomy that consolidated national power, at least from a legal perspective. The Marshall Court's jurisprudence revolved around two dimensions of federal autonomy. First, it endorsed a broad interpretation of national powers, justified by the autonomy of the federal government *vis-à-vis* the States. Second, the Marshall Court managed to legitimise, by skillful judicial maneuvering, the role of the US Supreme Court as the final arbiter of an autonomous federal legal order.

Today, the autonomy of the US federal government in relation to the States is undeniable, whether one looks at its pervasive role in the daily lives of Americans or its raw political, judicial and military power. In the late eighteenth and early nineteenth century, however, the power and legitimacy of the federal government was nascent, and still fragile.

The US Constitution had formally been adopted and ratified by the 13 individual States, each acting in their sovereign capacities.[35] The Marshall Court nonetheless

[33] The Federalists' attempt to cling to power by entrenching themselves in the federal judiciary led to the US Supreme Court's landmark judgment *Marbury v Madison* 5 US 137 (1803), in which the Supreme Court asserted the power to invalidate congressional statutes (for an insightful analysis, see S Levinson and JM Balkin, 'What Are the Facts of *Marbury v. Madison*?' (2003) Constitutional Commentary 255. Even though *Marbury v Madison* became – in retrospect – the most celebrated judgment in US constitutional law, the Federalists' attempt of "court-packing" *avant la lettre* was a failure. As Daryl Levinson aptly summarises, "of course Jefferson and his fellow Republicans had no intention of allowing this strategy to succeed. The Republican Congress promptly repealed the 1801 Judiciary Act [which had expanded the federal judiciary], began impeaching Federalist judges, and successfully intimidated the Federalist-controlled Supreme Court into political docility" in DJ Levinson, 'Parchment and Politics: The Positive Puzzle of Constitutional Commitment' (2011) HarvLRev 657, 683, fn 79.

[34] Initially, Adams nominated John Jay for the position of Chief Justice of the US Supreme Court. Jay declined the honour, observing that the judicial system was so defective that the Court "would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Governmt.; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the Nation, it should possess" in J Jay, 'Letter to John Adams' (2 January 1801).

[35] After the Philadelphia Constitutional Convention had agreed on the text of the US Constitution, it was sent to the Confederation Congress. In the accompanying Resolution, the Constitutional Convention expressed its view as to how the ratification of the Constitution should proceed: "Resolved [...] That the proceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled". The cautious phrasing ("it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates [...]") shows that the sovereignty of States in regard to the ratification procedure was undisputed. A proposal by Gouverneur Morris that the State legislatures ought to call ratifying conventions was rejected because there was no way for the Constitutional Convention to force the States into a particular mode of ratification, see MJ Klarman, *The Framer's Coup* (Oxford University Press 2016) 417–422. Initially, 12 states chose to

managed to develop a jurisprudence predicated on the notion that the US Constitution had created a new political and legal community whose legitimacy and legality did not depend on that of the States. This jurisprudence leaned heavily on the first words of the Constitution – "we the people of the United States" – to show that the federal government derived its legitimacy from the people, rather than from the States.[36] In today's European vocabulary, the key objective of the Marshall Court was to establish and legitimise an "autonomous" federal political and legal order.

First and foremost, such an autonomous federal legal order required a consistent and effective application of the Supremacy Clause. Today, the supremacy of federal law in the US and of EU law in the EU is considered crucially important for their effectiveness. At the Philadelphia Convention, however, the Supremacy Clause had been a major concession for the Federalists, including Madison.[37] Madison's Virginia Plan had proposed a national veto over state legislation,[38] which was rejected by the Convention, and upon leaving Philadelphia, Madison was disheartened by the compromise reached regarding the Supremacy Clause.[39] The efficacy of the Supremacy Clause was far from certain, especially as it was not evident that it could be judicially enforced. In the 1780s and early 1790s, constitutional review of legislation was still in its infancy, and remained controversial.[40]

organize a ratifying convention to vote on the Constitution. Rhode Island organised a popular referendum, in which the Constitution was rejected. One year later, after the Constitution had already been put into effect and Rhode Island had remained out of the Union, Rhode Island finally organised a ratifying convention as well, and joined the Union in 1790, see MJ Klarman, *The Framer's Coup* cit. 516–530).

[36] Both legally and historically, this claim was dubious. At the time of Founding, "we the people of the United States" was understood to mean that "the people" of Massachusetts, of New York, of New Jersey, etc., were to ratify the Constitution, instead of the state legislatures. However, because the Constitution stipulated that it would turn into effect as soon as nine (out of 13) states had ratified it, it was impossible to know in advance how many and which states would become bound by the Constitution. See M Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913) 190–191. See also J Madison, 'Federalist No 39' cit.: "On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act".

[37] Madison was a Federalists at the time of the Philadelphia Convention, but in the course of the 1790s aligned with Jefferson and the Republicans.

[38] Virginia Plan, 29 May 1787, resolution 6, edu.lva.virginia.gov ("Resolved [...] that the National Legislature ought to be empowered [sic] [...] to negative all laws, passed by the several States, contravening in the opinion of the National Legislature the articles of Union - and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof"). See also MJ Klarman, *The Framer's Coup* cit. 154–62.

[39] MJ Klarman, *The Framer's Coup* cit. 254–55.

[40] See LD Kramer, 'The Supreme Court 2000 Term Forward: We the Court' (2001) HarLRev 4; WM Treanor, 'Judicial Review before *Marbury*' (2005) Stanford Law Review 455.

One of the early cases in which the supremacy of federal law and its interpretation by federal courts was tested, was *United States v Peters* (1809).[41] This case concerned the Pennsylvania legislature's refusal to apply a decree of the Committee on Appeals of the Continental Congress, which had been affirmed by a federal district judge. While the Pennsylvania legislature claimed the authority to independently interpret federal law, the US Supreme Court ordered the State to follow the federal court's ruling. It was James Madison, however, who had by now become President, who ensured that Pennsylvania could not defy the US Supreme Court's judgment. When Governor Snyder of Pennsylvania's request to Madison to intervene on Pennsylvania's side, Madison instead threatened to use federal force if the state did not obey the Supreme Court's judgment.[42] As Madison's authorship of the Virginia Resolutions was at odds with what he had written in Federalist n. 39,[43] his correspondence with Snyder seems to provide yet another change of perspective – possibly because of a corresponding change in role.[44]

Supremacy of federal law over State law, as such, did not suffice to establish a genuinely independent federal political and legal order. Such autonomy also required the capability to exercise federal powers effectively. The most important Supreme Court judgment, in this context, was *McCulloch v Maryland* (1819).[45] This case concerned an attempt of the state of Maryland to tax the Second National Bank of the United States. This attempt raised two questions: not only whether a State could interfere with a federal institution through taxation, but also whether the federal government had the power to establish a national bank in the first place. This second question had preoccupied politicians since Alexander Hamilton's first proposal for a national bank in 1790.[46]

In *McCulloch*, the US Supreme Court confirmed Congress's power to establish a national bank, and denied Maryland the right to tax the Second National Bank in view of the Supremacy Clause. It should be noted that, as such, the constitutionality of a national

[41] US Supreme Court *United States v Peters* 9 U.S. 115 (1809).

[42] In Madison's words: "the Executive of the U. States, is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is expressly enjoined by Statute, to carry into effect any such decree, where opposition may be made to it" see J Madison, 'Letter to Simon Snyder' (13 April 1809) founders.archives.gov.

[43] J Madison, 'Federalist No 39' cit. 186.

[44] On Madison's multiple identities, including that of a Federalist and main designer of the Constitution in 1787, Virginian statesman and Republican politician in the 1790s, and President in the early nineteenth century, see N Feldman, *The Three Lives of James Madison* cit.

[45] US Supreme Court *McCulloch v Maryland* 17 U.S. 316 (1819).

[46] In 1790–1791, James Madison, Thomas Jefferson and Edmund Randolph argued against the constitutionality of Hamilton's proposal for a national bank, and advised President George Washington to veto the bill after it had passed Congress. Washington decided to follow Hamilton's position, and signed the bill into law. See S Elkins and E McKitrick, *The Age of Federalism* cit. 226–233. This charter of this First National Bank expired in 1811 and was not renewed. In 1816, however, the Second National Bank of the United States was established, after the monetary and fiscal utility of a national bank had become clear during and after the War of 1812 with Britain.

bank had become considerably less controversial in the 1810s than it had been in the 1790s.[47] But *any* discussion of the autonomy and extent of federal powers was bound to be highly controversial in light of the vertical division of powers in regard to slavery.[48] Slavery rather than banking made *McCulloch* a controversial case.[49]

The US Constitution did not expressly grant Congress the power to establish a national bank. Marshall, however, held that the Second National Bank was constitutional because Congress had an implied power to this effect based on the "necessary and proper clause".[50] Leaving aside the technicalities of the case, three aspects of the judgment are particularly important for the establishment of a federal political and legal order.

Firstly, Marshall emphasised that the Constitution derived its authority from "the people", and not from the sovereign States. The counsel for the State of Maryland had argued that the Constitution emanated "as the act of sovereign and independent states", which "alone are truly sovereign".[51] As noted above, this was accurate from a strictly legal perspective.[52] Marshall, however, dismissed this argument on the basis of a nationalist understanding of the Founding:

> "'in order to form a more perfect union,' it was deemed necessary to change this alliance [the Articles of Confederation] into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The

[47] See *e.g.* B Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton University Press 1957) 233.

[48] From the Philadelphia Convention to the Civil War, slavery permeated US constitutional debates. Questions included the constitutionality of the Fugitive Slave Act 1793, which authorised the seizure and return of slaves who had escaped into a free State or a federal territory, and whether the federal government had the power to prohibit slavery in the federal territories. In US Supreme Court *Prigg v Pennsylvania*, 41 US 539 (1842), the US Supreme Court held that the Fugitive Slave Act 1793 was constitutional, and in *Dred Scott v Sandford*, 60 US 393 (1857), it held that the federal government could not bar slavery in the federal territories. On the role of slavery at the Philadelphia Convention, see MJ Klarman, *The Framers' Coup* cit. ch. 4. On the role of slavery in constitutional debates in the antebellum period, see generally DE Fehrenbacher and WM McAfee, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (Oxford University Press 2002).

[49] *McCulloch* was decided three weeks after Congress started debating the admission of Missouri as a slaveholding state, which put the question of whether Congress had the power to admit new states on the condition that slavery was barred squarely within national politics. See DE Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press 1978) 102–104. On the reception of *McCulloch* in light of concurrent debates on federal powers in relation to slavery, see MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' (2001) VaLRev 1111, 1140–1144.

[50] US Constitution, art. I, section 8: "The Congress shall have Power [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

[51] *McCulloch* cit. 402.

[52] M Farrand, *The Framing of the Constitution of the United States* cit. 190–191; MJ Klarman, *The Framers' Coup* cit. 417–422.

> Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit".[53]

Since the authority of the federal government derived from the people themselves, federal powers had to be interpreted broadly, Marshall claimed. For him, the US Constitution could not have been supposed to "contain an accurate detail of all the subdivisions of which its great powers will admit".[54] Instead, "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves".[55] By way of conclusion, Marshall reminded the reader, that "we must never forget that it is *a Constitution* we are expounding".[56] In other words, the autonomous legitimacy of the Union could only be guaranteed by granting the federal government sufficiently flexible powers to legislate. As Koen Lenaerts, José Gutiérrez-Fons and Stanislas Adam observed, the logic of *McCulloch* resonates in the autonomy of the EU legal order and the broadly construed legislative powers of the EU legislature.[57]

Thirdly, after having concluded that the Second National Bank was constitutional, the Supreme Court held that Maryland could not tax the Bank. In response to Maryland's claim to exercise its sovereign right to tax corporations within its jurisdiction, Marshall responded as follows:

> "The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the

[53] *McCulloch* cit. 404–405.

[54] *Ibid*. 407.

[55] *Ibid*.

[56] *Ibid*.

[57] "The philosophy underpinning [Marshall's] famous passage ['we must never forget that it is *a Constitution* we are expounding'] finds an echo in the autonomy of the EU legal order: since the EU legal order is a self-referential system of norms that is both coherent and complete, the Treaties and the Charter must be read with sufficient flexibility in order for the EU legal system 'to endure for ages to come, and consequently to be adapted to the various crises of human affairs'" in K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 84. The connection between the autonomy of the legal and political order and the broad powers of the EU legislature is visible in the ECJ's case law on the interpretation of art. 114 TFEU. See *e.g.* case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035 para. 77: "With regard to judicial review of compliance with those conditions, the Court has accepted that in the exercise of the powers conferred on it the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue […]".

> United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme [...] The American people have declared their Constitution and the laws made in pursuance thereof to be supreme, but this principle [for which Maryland contends] would transfer the supremacy, in fact, to the States".[58]

Taken together, these three points purported to establish the political and legal autonomy of the federal government as a matter of black-letter constitutional law.[59] Politically, the federal government derived an autonomous legitimacy from the people, independently of the state governments. For Marshall it followed that, legally, the Constitution should be broadly construed to grant the federal government the powers to legislate for the benefit of the people. The Supremacy Claus put the icing on the cake by pre-empting state legislation contrary to federal law in the name of "the people of the United States".

Marshall's construction of broad congressional powers so as to ensure the autonomy of the federal government led to strong resistance. In a series of pseudonymous newspaper articles following *McCulloch*, for example, "Amphictyon" and "Hampden"[60] scolded Marshall's denial that federal powers were delegated by the States.[61] Both Amphyctyon and Hampden argued that *McCulloch* gave Congress unlimited legislative power, which consolidated the national government and destroyed the sovereignty of the States.[62]

[58] *McCulloch* cit. 429.

[59] The efficacy of this black-letter constitutional law was another question. In defiance of *McCulloch*, for example, the State of Ohio persisted in imposing a State tax on the Second Bank after 1819. Only in 1824, a case against the Ohio State authorities reached the US Supreme Court, which held the Ohio State tax was unconstitutional (US Supreme Court *Osborn v Bank of the United States*, 22 US 738 (1824)).

[60] The pseudonymous essays published under the name "Amphictyon" were probably authored by Judge William Brockenbrough of the General Court in Virginia. "Hampden" was probably a pseudonym for Judge Spencer Roane of the Virginia Supreme Court of Appeals.

[61] *E.g*. Amphictyon, 'Essay in the *Richmond Enquirer*' (30 March 1819) reprinted in G Gunther (ed.), *John Marshall's Defense of McCulloch v. Maryland* (Stanford University Press 1969) 55–56: "Who gave birth to the constitution? The history of the times, and the instrument itself furnish the ready answer to the question. The federal convention of 1787 was composed of delegates appointed by the respective state legislatures; and who voted by states; the constitution was submitted on their recommendation, to conventions elected by the people of the several states, that is to say, to the states themselves in their highest political, and sovereign authority: by those separate conventions, representing, not the whole mass of the population of the United States, but the people only within the limits of the respective sovereign states, the constitution was adopted and brought into existence".

[62] See *e.g*. *Ibid*. 57–58: "The doctrine [of *McCulloch v. Maryland*, if admitted to be true, would be of fatal consequences to the rights and freedom of the people of the states. If the states are not parties to the compact, the legislatures of the several states, who annually bring together the feelings, the wishes, and the opinions of the people within their respective limits, would not have a right to canvass the public measures of Congress, or of the President, nor to remonstrate against the encroachments of power nor to resist the advances of usurpation, tyranny and oppression".

In practice, these debates remained largely theoretical because the federal government did not heed the Court's invitation to exercise broad federal powers.[63] Several internal improvement bills[64] were vetoed by presidents James Madison, James Monroe and Andrew Jackson in the 1810s to 1830s, and the federal government would not pass any substantial federal legislation until after the Civil War.[65] However, the broad construction of national power in *McCulloch* did legitimise the Federalist conception of a powerful national government with its own sovereign rights and competences, and provided a precedent that paved the way for consolidating federal powers in the twentieth century.

II.3. Establishing federal judicial supremacy

In addition to asserting a nationalist interpretation of the federal order, the Marshall Court also claimed to be the final arbiter in all constitutional questions. This claim held significant importance for the vertical division of powers between the States and the Union. In the first decades of the American republic, several State supreme courts claimed to possess ultimate authority over the meaning of the US Constitution.

Determining which institution had the final word on the meaning of the Constitution, and whether this authority would be vested in a *judicial* institution at all,[66] was not an easy question. The Constitution had established the US Supreme Court, but had left the establishment of other federal courts to Congress.[67] Soon after the Founding, a system of federal courts was set up by the Judiciary Act of 1789. A pivotal provision of that Act was Section 25, which granted the US Supreme Court jurisdiction to review judgments of the highest State courts pertaining to the interpretation of federal law. However, up until the Civil War several State supreme courts challenged the constitutionality of Section 25 Judiciary Act 1789, and asserted their prerogative to decide on the meaning of the Constitution within their respective jurisdictions.[68] Without denying the supremacy of federal law as such, these State courts claimed that *they* possessed the ultimate authority to interpret federal law.

One of the most important judgments in this regard was *Martin v Hunter's Lessee* (1816).[69] This case arose out of the confiscation of British Loyalists' property by the Commonwealth of Virginia during the American Revolution. The Treaty of Paris between Great Britain and the United States had provided for the return of this property to their original owners. The case concerned the property of the Loyalist Thomas Lord Fairfax, which he

[63] See also MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' cit. 1130–1131.

[64] "Internal improvement bills" were congressional acts providing for federally funded projects to improve American transport infrastructure, particularly by building roads and digging canals.

[65] See MJ Klarman, 'How Great Were the "Great" Marshall Court Decisions?' cit. 1132–1133.

[66] See *e.g.* the Virginia and Kentucky Resolutions of 1798 and 1799.

[67] Art. III of US Constitution.

[68] For an overview, see L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 169–170.

[69] US Supreme Court *Martin v Hunter's Lessee*, 14 U.S. 304 (1816).

had left to Denny Martin. The property, however, had also been confiscated by Virginia and had been legally transferred to David Hunter.

In 1810, the Virginia Supreme Court of Appeal – the highest Virginia State court – reversed the Virginia district court's judgment and dismissed Martin's claim for return of his property.[70] The US Supreme Court, exercising appellate jurisdiction under Section 25, reversed the Court of Appeal's judgment based on the Treaty of Paris and the Supremacy Clause.[71] On remand, however, the Virginia Supreme Court of Appeal plainly ignored the US Supreme Court's judgment and claimed that Section 25 was unconstitutional. It held that "the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States".[72] According to Judge Cabell, the US Supreme Court simply could not have appellate jurisdiction in relation to a state court: "[t]he term appellate, however, necessarily includes the idea of *superiority*. But one Court cannot be correctly said to be *superior* to another, unless both of them belong to the same sovereignty".[73]

The forceful assertion of sovereignty by the Virginia Court's *vis-à-vis* the US Supreme Court is especially visible in the following observation in Judge Cabell's Opinion, where he compares the relationship between Virginia and the Union to the relationship between a foreign country and the Union:

> "It has been contended that the constitution contemplated only the objects of appeal, and not the tribunals from which the appeal is to be taken; and intended to give to the Supreme Court of the United States appellate jurisdiction in all the cases of federal cognizance. But this argument proves too much, and what is utterly inadmissible. It would give appellate jurisdiction, as well over the courts of England or France, as over the State courts; for, although I do not think the State Courts are foreign Courts in relation to the Federal Courts, yet I consider them not less independent than foreign Courts".[74]

When the case again reached the US Supreme Court, Justice Story not only declared Section 25 constitutional, but also insisted on the Supreme Court's right to decide on the constitutionality of federal law. He relied on multiple arguments to this effect, such that the Constitution "was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States'".[75] Thus, for Story there could be "little doubt [...] that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment,

[70] Virginia Supreme Court of Appeal *Hunter v Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810).
[71] US Supreme Court *Fairfax's Devisee v Hunter's Lessee*, 11 US 603 (1813).
[72] Virginia Supreme Court of Appeal *Hunter v Martin*, 18 Va. (4 Munf.) 1, 59 (1815).
[73] *Ibid*. emphasis in the original.
[74] *Ibid*.
[75] US Supreme Court *Martin v Hunter's Lessee* cit. 324.

incompatible with the objects of the general compact, to make the powers of the State governments, in given cases, subordinate to those of the nation [...]".[76]

Story subsequently noted that "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere".[77] And the only way to guarantee the equal rights of all citizens was to grant the final word on the meaning of the Constitution to the *federal* courts[78] – an argument that echoes in recent debates about the primacy of EU law as well.[79]

Martin v Hunter's Lessee was not the final word on the division of powers between the State and federal courts. Throughout the antebellum period, compact theory continued to inform both judicial and political resistance to the position of the US Supreme Court as the final arbiter in constitutional questions.[80] Relying on the basic point made by the Virginia and Kentucky Resolutions, Amphictyon for instance argued that the US Supreme Court could never be the final arbiter on the meaning of the Constitution. The US Supreme Court was, after all, a federal institution and could itself transgress the powers delegated to it by the States: "the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the judiciary, as by the executive, or the legislature".[81]

In the early 1830s, this same argument was also central to South Carolina's resistance of a federal protective tariff.[82] This tariff set taxes on imported goods that harmed the southern economy, and ultimately led to its unilateral nullification by South Carolina in 1832.[83] The South Carolinian politician and political theorist John C. Calhoun was one of the most visible defenders of the sovereign right of the States to judge whether the

[76] *Ibid.* 325.

[77] *Ibid.* 345.

[78] *Ibid.* 348-349.

[79] K Lenaerts, 'No Member State is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) verfassungsblog.de: "[i]t is only by the judicial enforcement of uniformity and primacy of EU law that European citizens find equal justice under that law".

[80] See *e.g.* Georgia Supreme Court *Padelford, Fay & Co. v Mayor & Aldermen of City of Savannah*, 14 Ga. 438 (1854); California Supreme Court *Johnson v Gordon*, 4 Cal. 368 (1854); Wisconsin Supreme Court *Ableman v Booth*, 11 Wis. 498 (1859). For an overview, see L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 169–170.

[81] Ampictyon, 'Letter to the Richmond Enquirer' (30 March 1819).

[82] Federal import tariffs had been installed since 1816 in order to protect American manufacturers, which were mainly based in the northeastern States. The southern economy, however, was heavily focused on agriculture and was mostly harmed by the tariff, which made imported British goods more expensive and also affected cotton export to Britain.

[83] South Carolina Ordinance of Nullification of 24 November 1832. South Carolina's resistance to the federal tariff was probably caused by a combination of the sluggish economy in the 1820s and political opposition to the exercise of federal power against the background of slavery. See WW Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina* (Oxford University Press 1192) chs. 2–3.

federal government had transgressed its competences. In his famous Fort Hill Address on 26 July 1831, when he was still Vice President,[84] Calhoun recalled the main principles from the Virginia and Kentucky Resolutions, which had likewise informed Amphictyon:

> "The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the Judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled in various ways
> […]
> Were it possible that reason could settle a question where the passions and interests of men are concerned, this point would have been long since settled for ever by the State of Virginia. The report of her Legislature […] says: 'It has been objected' (to the right of a State to interpose for the protection of her reserved rights) 'that the judicial authority is to be regarded as the sole expositor of the Constitution […] But the proper answer to the objection is, that the […] resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the Judicial Department may also exercise or sanction dangerous powers, beyond the grant of the Constitution'".[85]

Irrespective of the normative question of whether the US Supreme Court ought to be the final arbiter, the actual ability of US Supreme Court to ensure enforcement of its judgments was highly limited. Notwithstanding the bold proclamation of judicial review of federal legislation in *Marbury v Madison* (1803) and of State legislation in *Fletcher v Peck* (1810),[86] the vulnerability of the Court's position was obvious to both its interlocutors and the Justices themselves. For instance, merely six days after *Marbury* the Supreme Court rejected a constitutional complaint against the so-called 1802 Repeal Bill, which repealed the 1801 Judiciary Act,[87] even though internal correspondence proves that at least two Justices considered the Repeal Bill unconstitutional.[88] The Justices seemed to have been

[84] Calhoun was Vice President between 1825 and 1832. In December 1832, he resigned after he had been elected to substitute Robert Hayne as US Senator from South Carolina.

[85] JC Calhoun, 'Address on the relation which the States and General Government bear to each other', Fort Hill, South Carolina, 26 July 1831 (hereinafter 'Fort Hill Address'). Calhoun quotes here from a Virginia legislature's committee report drafted by James Madison in response to the criticisms targeted at the Virginia Resolution of 1798 ('Report of the Committee to whom were referred the communications of various states, relative to the Resolutions of the last General Assembly of this state, concerning the Alien and Sedition Laws', House of Delegates, Session of 1799–1800 (7 January 1800)).

[86] US Supreme Court *Fletcher v Peck*, 10 US 87, 136 (1810).

[87] The 1801 Judiciary Act was part of the Federalists' attempt to maintain a power base in the federal judiciary, among others by reducing the number of Supreme Court Justices from 6 to 5 and by expanding the lower federal judiciary. It was promptly repealed by the new Republican Congress by the 1802 Repeal Bill, which thereby also abolished the tenures of newly appointed federal judges.

[88] US Supreme Court *Stuart v Laird*, 5 US 299 (1803). After *Marbury*, it took more than half a century for the Supreme Court to invalidate a second federal law in *Dred Scott v Sanford*, 60 US 393 (1857). The Court

well aware that if they invalidated the Repeal Bill, they would simply be ignored or even impeached.[89]

One of Marshall's renowned tactics to avoid defiance was to establish precedents for federal judicial supremacy that simply could not be defied.[90] In 1820, for example, two brothers – P.J. Cohen and M.J. Cohen – were fined for selling National Lottery tickets in Virginia in violation of a Virginia law. On appeal to the US Supreme Court, the Cohens argued that the Virginia law violated the federal act establishing the National Lottery. The resulting judgment in *Cohens v Virginia* became a landmark judgment for confirming the Supreme Court's appellate jurisdiction.[91] In response to Virginia's argument that the US Supreme Court lacked jurisdiction, Marshall emphasised the Supreme Court's right to determine the final meaning of the Constitution: "[T]he necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved".[92]

Therefore, "[t]he evident aim of the plan of the national convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union".[93] Knowing that the Virginia courts would refuse to follow a US Supreme Court's judgment against Virginia, however, Marshall decided against the Cohens, denying the Virginia courts the possibility to defy his judgment.[94]

During most of his tenure, Marshall was able to maneuver between judicial integrity and politics, steadily building a nationalist jurisprudence while avoiding overt clashes in

invalidated a State law for the first time in 1810, in the *Fletcher v Peck*, 10 US 87 (1810). See further section IV.2. of this *Article*).

[89] See DJ Levinson, 'Parchment and Politics' cit. 683, fn 79.

[90] Marshall used the same tactic in *Marbury v Madison*. Marshall's proclamation that "[i]t is emphatically the duty of the Judicial Department to say what the law is" would have been inconsequential if the judgment could have been defied by the federal government. But Marshall decided in favour of President Jefferson by denying the Supreme Court's jurisdiction to issue a writ of mandamus. The Court struck down Section 13 of the Judiciary Act of 1789 – which had provided for the Supreme Court's jurisdiction in this case – knowing that the newly installed Republican Congress would never re-instate it. Hence, while Jefferson was reportedly outraged by the judgment, there was nothing he could do to defy the precedent.

[91] US Supreme Court *Cohens v Virginia*, 19 US 264 (1821).

[92] *Ibid.* 416.

[93] *Ibid.* 420.

[94] Deciding the case in favour of Virginia did not, however, subdue principled criticism. Spencer Roane, now writing under the pseudonym Algernon Sidney, commented on *Cohens v Virginia* in a five-part opinion piece in the Richmond Enquirer. In the first article, he wrote among others: "It is of no account, that the judgment in question was rendered *for* the state of Virginia. That great and opulent state is, indeed, permitted to retain the paltry sum of one hundred dollars: but this permission is only grounded, if I may so say, upon the defectiveness of the pleadings [...] The case is, most emphatically, decided against them. It is so decided, on grounds and principles which go the full length, of destroying the state government altogether, and establishing on their ruins, one great, national, and consolidated government" see A Sidney, 'On the Lottery Decision. No. 1' (Richmond Enquirer, 25 May 1821).

which the Court's authority could be defied.[95] This jurisprudence became the foundation of what we may call the autonomy of the US federal legal order. Throughout the 1830s to the 1850s, Marshall's interpretation of the Constitution remained contested, and it could not avoid the increasingly poisonous relationships among the States over slavery. This history, which culminated in the Civil War, is however beyond the scope this *Article*.[96]

I want to end this overview with two interconnected episodes from the early 1830s that are indispensable to understand both the fragility of both the Supreme Court and the federal government, as well as its growing strength.

From 1830 to 1833, Georgia bluntly undermined federal law in a land dispute with the Cherokee Nation. In a series of treaties between the US federal government and the Cherokee, the latter had been given federal guarantees to their sovereignty.[97] These Cherokee lands were however contested by the Georgian State, which claimed full sovereignty of the land. In 1829, Georgia entered the Cherokee lands and confiscated their property.[98] What is more, in 1830 Georgian authorities bluntly defied a US Supreme Court order. A Georgia State court had convicted a Cherokee man named George Corn Tassel for murder within Cherokee territory. When the US Supreme Court accepted Tassel's appeal, Georgian authorities ignored the Supreme Court's writ of habeas corpus and promptly executed Tassel.[99]

Two years later, at the Cherokees' second attempt[100] at targeting Georgia's violation of federal treaties, the US Supreme Court in *Worcester v Georgia* (1832) struck down Georgia's emergency session laws over the Cherokee land dispute.[101] The Justices knew that their judgment would be defied if not backed by federal power, which seemed unlikely, but felt they had no choice but to do their constitutional duty.[102]

[95] After 1827, in the last years of his tenure, Marshall became more sensitive to States' rights and deferential to the States' regulatory freedom. See RK Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Louisiana State University Press 2007) 410–413.

[96] For a magisterial history, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press 1981).

[97] S Breyer, 'The Cherokee Indians and the Supreme Court' (2003) Georgia Historical Quarterly 408, 409–410.

[98] *Ibid*. 411.

[99] J Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (McGraw-Hill 1996) 95–98.

[100] In the first case, the US Supreme Court declined original jurisdiction to adjudicate the case, which was a direct lawsuit by the Cherokees against the State of Georgia. The US Supreme Court held that the Cherokee were not a "foreign State" in the sense of art. III section 2 of the US Constitution, so that it could not sue Georgia (*Cherokee Nation v Georgia*, 30 US 1 (1831)).

[101] US Supreme Court *Worcester v Georgia*, 31 US 515 (1832).

[102] C Warren, *The Supreme Court in United States History* vol. 1 cit. 755–762; RK Newmyer, *John Marshall and the Heroic Age of the Supreme Court* cit. 451–458. On 8 March 1932, five days after the US Supreme Court had delivered its judgment in *Worcester v Georgia*, Justice Story wrote in private correspondence: "Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere unless public opinion among the religious of the Eastern and Western and Middle States should to bear strong upon him. The rumor is, that

Around the same time, as mentioned above, South Carolina decided to finally act upon the theory of the Virginia and Kentucky Resolutions, and nullified the federal tariff within its territory after a long dispute with the federal government.[103] Few States endorsed South Carolina's nullification ordinance,[104] and President Andrew Jackson threatened with federal enforcement to uphold the federal tariff.[105] While Jackson allegedly sympathised with Georgia in the Cherokee case, it was hardly possible to distinguish the position of Georgia from that of South Carolina.[106] Georgian authorities recognised that Jackson had little choice but to back the US Supreme Court, and agreed to a compromise with the federal government in the case that had given rise to *Worcester v Georgia*.[107]

Consequently, "[w]ith this union of [President] Andrew Jackson, [Senator] Daniel Webster[108] and John Marshall in support of the supremacy of the Nation, the [US Supreme] Court [...] now found itself in a stronger position than it had been for the past fifteen years".[109] Indeed, the US Supreme Court's ability to consolidate its position as the final arbiter in constitutional questions between the 1800s and 1830s – in the face of continuous, fierce resistance from both State courts and other State authorities – might have been caused by the multilateral context of conflicts between the federal and State governments.[110] While the US Supreme Court had too little power to prevail in bilateral conflicts with any of the States, it could usually rely on the support of several other States which had an interest in opposing the State that claimed to have the power to defy federal law.[111] Although State supreme courts continued to question, and sometimes defy, the US Supreme Court throughout the 1840s and 1850s, no State or State court could gather sufficient support from the other States to really threaten the Supreme Court's

he has told the Georgians he will do nothing [...] The Court has done its duty. Let the Nation now do theirs" (cited in C Warren, *The Supreme Court in United States History*, vol. 1 cit. 757).

[103] South Carolina Ordinance of Nullification, 24 November 1832.

[104] See WW Freehling, *Prelude to Civil War* cit. 323–327.

[105] A Jackson, 'Proclamation to the People of South Carolina' (10 December 1832). Jackson was given the power to enforce federal law against obstructions to its execution by the states in the Force Bill of 1833.

[106] C Warren, *The Supreme Court in United States History*, vol. 1 cit. 775–776.

[107] *Ibid*. 776.

[108] Daniel Webster was a distinguished lawyer and politician, who had won, among others, the *McCulloch* case before the US Supreme Court, and who was a Senator from Massachusetts from 1827 to 1841. During his time as a Senator, he became a leading defender of nationalism and a staunch critic of unilateral nullification by States.

[109] C Warren, *The Supreme Court in United States History*, vol. 1 cit. 778.

[110] Similarly, the multilateral context of conflicts between national (constitutional) law and EU law has also come to the attention of several commentators. See F Fabbrini, 'After the *OMT* Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) German Law Journal 1003; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' (2020) German Law Journal 1006; K Lenaerts, 'No Member State is More Equal than Others' cit.

[111] See also SJ Boom, 'The European Union after the *Maastricht* Decision: Will Germany Be the "Virginia of Europe?"' (1995) AmJCompL 177, 194.

authority. In the multilateral context of US antebellum federalism, there was no other institution that could legitimately claim to be the final arbiter.[112]

III. Justifying legal order

The previous section aimed to show, by way of an overview to some key constitutional events in US antebellum history, that the early American federal experience reveals interesting and pertinent similarities with current constitutional debates in the EU. This section and the following one provide a preliminary legal-theoretical analysis of these similarities. In this section, I focus on the *rhetorical structure* of constitutional debate.

Before diving into the structure of legal arguments purporting to justify a particular understanding of legal order, however, I wish to make a brief point about the (re-)construction of legal orders in general. Recent scholarship on constitutional pluralism in the EU has emphasised the importance of distinct perspectives on the normative structure of legal orders.[113] From the perspective of the ECJ, the EU Treaties are the highest source of law within the EU legal order.[114] From the perspective of, for instance, the German Federal Constitutional Court, the highest legal source is the German Basic Law.[115] Thus, there are currently at least 28 different perspectives on what "really" is the highest legal source (the perspective from the EU Treaties, plus the perspectives from the 27 Member States presumably recognising their own constitutions as the highest legal source[116]). This empirical fact has led to abundant scholarly analyses on how these perspectives can be reconciled, whether it makes sense to consider one perspective more correct than the other, and whether traditional legal theory is capable of explaining these concurrent perspectives on legal order.[117]

[112] See also CG Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (University of California Press 1944) 562, 661–662.

[113] See *e.g.* N MacCormick, 'The *Maastricht-Urteil*: Sovereignty Now' (1995) ELJ 259; N Walker, 'The Idea of Constitutional Pluralism' (2002) ModLRev 317; M Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014)

[114] See *e.g.* Opinion 2/13 *Accession of European Union to the ECHR* ECLI:EU:C:2014:2454 para. 193.

[115] See *e.g.* German Constitutional Court judgment of 5 May 2020 cit. para. 101.

[116] Exceptions may include the case law of the Netherlands Supreme Court and the Estonian Supreme Court, which appears to recognise the validity and primacy of EU law independently of their respective constitutions. See Hoge Raad (Netherlands Supreme Court) Judgment of 2 November 2004 NL:HR:2004:AR1797 paras 3(5) and 3(6); Riigikohus (Estonian Supreme Court) Judgment of 11 May 2006 3-4-1-3-06, para. 16.

[117] Among numerous insightful contributions, see *e.g.* J Dickson, 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); G Letsas, 'Harmonic Law' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012); and K Culver and M Giudici, *Legality's Borders* (Oxford University Press 2009). In his insightful contribution to this special issue, George Letsas

In this *Article*, I do not want to discuss the question which perspective on the "real" structure of the legal order is correct, nor enter into the debate of whether the concept of legal order or legal system is even helpful to understand law as a social and moral practice.[118] Instead, I want to focus on the rhetorical dimensions of perspectivism, which is less emphasised in the literature. By "rhetorical dimensions", I refer to the argumentative practices which parties to constitutional debates employ to try to *persuade* their audiences of their claims about the structure of legal order. Both in the EU and in the early American republic, debates about federal autonomy appear to be asymmetric, which leads them to often talk past one another.

III.1. The asymmetry of constitutional debates in the EU

In the EU, arguments purporting to demonstrate that the EU legal order is "autonomous" are generally *functionalist* arguments, while arguments aimed at showing that EU law derives its legality from, and is ultimately dependent on the national legal orders, are generally arguments based on constitutional authorisation and the "nature" or "identity" of the EU Treaties.

Already in *Costa v ENEL*, the Court of Justice provided a functionalist argument for the autonomy and primacy of EU law: "the executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in article 5(2) and giving rise to the discrimination prohibited by article 7".[119]

The Court subsequently also noted: "[t]he precedence of Community law is confirmed by article 189, whereby a regulation "shall be binding" and "directly applicable in all member state". This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law".[120]

The logic of this argument is basically as follows. The objectives of the Treaties cannot be attained without uniform, effective application of EU law. Uniform and effective application requires EU law to be autonomous from national law.

As the subsequent case law of the Court elaborated, uniform and effective application also requires one central umpire to decide on the interpretation of EU law in order

forcefully claims such discussions are not really helpful to either legal theory or legal practice. See G Letsas, 'Does Anything Hang on the Autonomy of EU Law?' (2023) European Papers www.europeanpapers.eu 1293.

[118] See P Westerman, 'Weaving the Threads of a European Legal Order' (2023) European Papers www.europeanpapers.eu 1301; P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255. See also D Burckhardt, 'The Relationship between the Law of the European Union and the Law of its Member States – A Norm-based Conceptual Framework' (2019) EuConst 73.

[119] Case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66 594.

[120] *Ibid*.

to ensure its uniform meaning.[121] The justification for autonomy is therefore thoroughly functional.[122]

This is quite different for the argument for the supremacy of the national legal orders and their respective courts, which translates into the possibility of some form of *ultra vires* control by the national courts.[123] There are few truly functionalist arguments available to this position. Justifications for this claim usually involve arguments about the nature of the EU as a treaty between sovereign States, and the limits of constitutional authorisation by the Member States.

I call this authorisation-based and identity-based argument a "formal" – as opposed to a functionalist – argument because it essentially appeals to the formal nature of the EU. The EU is not autonomous because it has been created by the adoption and ratification of a treaty in accordance with the formal requirements of constitutional and international law. As the German Federal Constitutional Court, in its *Maastricht* judgment, recalled, "[t]he exercise of sovereign powers by a compound of States such as the European Union is based upon authorisation by States which retain their sovereignty".[124]

It is usually inferred from this nature of the EU that the relevant judicial institutions of the Member States *must* remain the final arbiter of questions about the vertical division of competences. It they do not, the premise of contingent authorisation and the retention of sovereignty arguably would not hold.[125] The Federal Constitutional Court's *Honeywell* judgment puts the argument succinctly:

> "As autonomous law, Union law remains dependent on assignment and empowerment in a Treaty. For the expansion of their powers, the Union bodies remain dependent on amendments to the Treaties which are carried out by the Member States in the framework of the respective constitutional provisions which apply to them and for which they take responsibility [references omitted]. The applicable principle is that of conferral (Article 5.1 sentence 1 and Article 5.2 sentence 1 TEU). The Federal Constitutional Court is hence empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity

[121] See also case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335 para. 7; case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452 para. 15–16.

[122] See also J Lindeboom, 'The Autonomy of EU Law' cit. 282–293; and in relation to the nexus between effectiveness and primacy, J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) German Law Journal 1032.

[123] *E.g.* German Constitutional Court judgment of 5 May 2020 cit. para. 105.

[124] German Constitutional Court judgment of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92.

[125] One may point out that art. 50 TFEU defeats this argument. Thus, the Member States retain their sovereignty because they are free to leave the EU. Judicial *ultra vires* control by the national constitutional court is not necessary for a Member State to retain its sovereignty. However, my point in this section is not to ascertain whether the arguments in favour and against the autonomy of EU law are correct, but merely to identify a central asymmetry in this debate.

> which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law) [references omitted], and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences".[126]

In various forms and shapes, the same argument can also be seen in the vast literature on the topic. In his famous exchange with Joseph Weiler and Ulrich Haltern, Teodor Schilling asserted for instance: "[t]he international law interpretation of the European Treaties thus leads to the conclusion that the ECJ is not the ultimate umpire of the system [...] The constitutions of the Member States generally do not allow the transfer of *Kompetenz-Kompetenz* to the Community. Therefore, the Member States, individually, must have the final word on questions concerning the scope of the competences they have delegated to the Community".[127]

Thus, while proponents of a strong version of the autonomy of the EU legal order – including the Court of Justice as the final arbiter on the interpretation of the EU Treaties – focus on the functional need to ensure the effectiveness of EU law, proponents of some form of *ultra vires* control by the Member States rely on "formal" arguments about the nature of the EU and the constitutional authorisation by the Member States.

It is important to note that the argument for some form of *ultra vires* control usually includes what may be called a "functional concession". If Member State sovereignty implies that the national constitutional or supreme courts necessarily are the final arbiters within their jurisdiction, formally there is no apparent reason why the national court could not always substitute the Court of Justice's interpretation of EU law with its own.[128] Within the domestic legal order, the domestic judiciary is always supreme, regardless of the magnitude of the alleged infraction.[129] This position, of course, would destroy effectiveness and uniformity. Again the German Federal Constitutional Court's jurisprudence shows how the formal argument against autonomy is usually mitigated by a functional concession:

> "If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences [...] The ultra vires review must be exercised with restraint, giving effect to the

[126] German Constitutional Court judgment of 6 July 2010 – 2 BvR 2661/06 para. 55.

[127] T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) HarvIntLJ 389, 407.

[128] See also *ibid*. 408.

[129] In some jurisdictions, there may be a constitutional provision mandating a degree of deference towards the ECJ, such as art. 23 of the German Basic Law. However, this provision as such can also be regarded as legitimising a functionalist concession to the primacy of the Basic Law.

> Constitution's openness to European integration [...] Yet the mandate conferred in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded [...] The mandate, conferred upon the CJEU in Art. 19(1) second sentence TEU, to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that the CJEU be granted a certain margin of error".[130]

The formal argument against the autonomy of EU law, and the functionalist argument for the autonomy of EU law permeate constitutional debates about the nature of EU law. This may not be surprising. While both side of the debate usually present their arguments as inevitable truths about *the* structure of legal order, the choice for a particular kind of argument is obviously influenced by the strengths and weaknesses of the respective position. The argument against the autonomy of EU law is weak from a functional perspective. It *needs* the formal argument based on sovereignty and constitutional authorisation to protect the identity of the constitution document. In contrast, the argument in favour of autonomy is weak from a formal perspective. The EU is indisputably based on a treaty ratified by States in their sovereign capacities. The claim for autonomy *needs* a functional argument, which takes account in particular of the multilateral context of European integration and the mutual relationships between the Member States.[131]

III.2. The asymmetry of constitutional debates in the US

Debates on US antebellum constitutionalism were similar in their rhetorical structure to those in current European constitutionalism. Compact theorists strongly relied on the fact that the US Constitution was formally ratified by the States. They frequently also added functionalist arguments, such as the argument that the US Supreme Court was an agent of the federal government and had an interest in expanding federal powers beyond their lawful limits.[132] These functionalist arguments, however, remained premised on the formal argument that the US Constitution was a compact of States.

Reversely, while nationalists sometimes purported to make a similar formal argument by claiming that the US Constitution was ratified by "the people of the United States",[133] they mostly relied on functional arguments like the need to have a uniform interpretation of federal law. This functionalism, similar to the Court of Justice's case law on primacy of EU law, is clearly visible in *United States v Peters* (1809), *Martin v Hunter's Lessee* (1816) and *Cohens v Virginia* (1821).

[130] German Constitutional Court judgment of 5 May 2020 cit. paras 111–112 (references omitted).

[131] F Fabbrini, 'After the OMT Case' cit.; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' cit.; K Lenaerts, 'No Member State is More Equal than Others' cit.

[132] For the argument that the US Supreme Court could not possibly be a neutral arbiter in a conflict between the federal government and a State, see *e.g.* Amphictyon, 'Letter to the Richmond Enquirer' cit. 58; JC Calhoun, 'Fort Hill Address' cit.

[133] See *e.g.* US Supreme Court *Martin v Hunter's Lessee* cit. 324; *McCulloch* cit. 429–430.

In *United States v Peters*, Chief Justice Marshall clearly stated his view on the possibility for States to defy a federal court judgment:

> "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves".[134]

A very similar functionalism is visible in Justice Story's Opinion in *Martin v Hunter's Lessee*. One of his arguments against the supposed unconstitutionality of Section 25 of the Judiciary Act of 1789 specifically addresses the need for a central umpire deciding on the interpretation of the US Constitution:

> "A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact, and the appellate jurisdiction must continue to be the only adequate remedy for such evils".[135]

In *Cohens v Virginia*, Marshall again emphasised the consequences of denying the US Supreme Court the final word:

> "'Thirteen independent Courts,' says a very celebrated statesman (and we have now more than twenty such Courts) 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.' Dismissing the unpleasant suggestion that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United

[134] US Supreme Court *United States v Peters* cit. 136.
[135] US Supreme Court *Martin v Hunter's Lessee* cit. 347–348.

> States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved".[136]

Compact theorists, instead, relied mostly on formal arguments regarding the nature of the Constitution as a compact between States. Legally, they emphasized that the US Constitution had not been adopted by "the people" as a whole, but rather by the separate States and by the means chosen by those States themselves.[137] They concluded that the states necessarily had retained the sovereign right to decide on "deliberate, palpable and dangerous" exercises of federal power. In response to *McCulloch*, for instance, Amphictyon, wrote: "[t]he Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation".[138]

The same view was famously expressed by John Calhoun in his Fort Hill Address in 1831:

> "The great and leading principle is, that the General Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not. from all of the people forming one aggregate political community; that the Constitution of the United States is, in fact, a compact, to which each State is a party, in the character already described and; that the several States, or parties, have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, they have the right, in the last resort, to use the language of the Virginia Resolutions, 'to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them'".[139]

The limitation to "deliberate, palpable and dangerous" infractions of the Constitution is essentially a functional concession similar to today's concessions on part of, for example, the German Federal Constitutional Court.[140] Notwithstanding their principled arguments about the States' authority to declare federal laws invalid, compact theorists

[136] US Supreme Court *Cohens v Virginia* cit. 415–416.

[137] M Farrand, *The Framing of the Constitution of the United States* cit. 190-191; MJ Klarman, *The Framers' Coup* cit. 417-422.

[138] Amphictyon, 'Essay in the Richmond Enquirer' cit. 61-62.

[139] JC Calhoun, 'Fort Hill Address' cit. (emphasis in original).

[140] See *e.g.* German Constitutional Court judgment of 5 May 2020 cit. paras 110: "The Court may only hold that an act violates the principle of conferral where institutions, bodies, offices and agencies of the European Union have exceeded the limits of their competences in a manner that specifically runs counter to the principle of conferral (Art. 23(1) GG); in other words, *it must be established that the violation of competences is sufficiently qualified*. This requires that the act manifestly exceeds EU competences, resulting in a structurally significant shift in the division of competences to the detriment of the Member States" (emphasis added).

understood that a general States' right to declare any federal violation of the Constitution invalid would be unworkable.[141]

IV. Autonomy, dual federalism and the monism–dualism dichotomy

This section discusses the relevance of the monism–dualism dichotomy in constitutional debates in the early American republic and functionally similar debates in the present EU. By "monism" I refer to the view there necessarily is only one legal order, either globally[142] or within a particular geographical territory.[143] By "dualism" I mean the view that international law and each of the domestic legal orders are legally separate. This distinction is central to our contemporary thinking about the relationship between international (including supranational) and national law. This could not have been more different in the early American republic, decades before the theories of monism and dualism even emerged.

While the previous section revealed a deep rhetorical *similarity* between constitutional debates in the early American republic and in the contemporary EU, this section emphasises a major *difference* between both streams of constitutional debate. Consequently, antebellum constitutional debates about the relationship between the federal and State legal orders in the US may help us better understand the (ir)relevance of this dichotomy to both the US and the EU legal landscape.

IV.1. The autonomy of EU law and the monism–dualism dichotomy

According to some scholars, the autonomy of the EU legal order implies a monistic relationship between EU law and the law of the Member States. Christina Eckes, for example, has described EU law as the "poster child of Kelsen's *Pure Theory of Law*" and argued that "[w]ithin the EU legal order, that is vis-à-vis national law, the ECJ adheres closely to Kelsen's monism".[144]

[141] See *e.g.* JC Calhoun, 'Fort Hill Addess' cit.: "I am not ignorant that those opposed to the doctrine have always, now and formerly, regarded it in a very different light, as anarchical and revolutionary. Could I believe such, in fact, to be its tendency, to me it would be no recommendation. I yield to none, I trust, in a deep and sincere attachment to our political institutions and the union of these States [...] With these strong feelings of attachment, I have examined, with the utmost care, the bearing of the doctrine in question; and, so far from anarchical or revolutionary, I solemnly believe it to be the only solid foundation of our system, and of the Union itself; and that the opposite doctrine, which denies to the States the right of protecting their reserved powers, and which would vest in the General Government (it matters not through what department) the right of determining, exclusively and finally, the powers delegated to it, is incompatible with the sovereignty of the States, and of the Constitution itself, considered as the basis of a Federal Union".

[142] *E.g.* H Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 1992) 113.

[143] See *e.g.* P Elefetheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' cit. 1270-1274, 1279-1281.

[144] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1.

Others have analysed the relationship between EU law and national law in dualistic terms. Pavlos Eleftheriadis, for instance, has argued that the EU legal order and the national legal orders do not overlap, and conceives of the EU legal order as a cosmopolitan construct that is part of the law of nations.[145] Elsewhere I have put forward a different dualist understanding of the autonomy of EU law, in which EU law and national law are legally separate but geographically overlapping normative orders that compete for the social practices of legal officials.[146]

In their traditional formulations, both monism and dualism are difficult to apply to the European legal landscape, in which the legal orders of the EU and the Member States are legally interconnected, without abolishing their normative separation.[147] The EU legal order and the national legal orders are connected, to name one example, through the preliminary reference procedure.[148] National courts operate as EU courts when they apply EU law.[149] Reversely, the EU legislature obtains its identity in part through concepts and institutions from the national legal orders.[150] This legal interconnection – which is both structural and geographical – fits uncomfortably with the formal separation of legal orders according to dualism. Thus, dualism must lose its sharp theoretical edges in order to be compatible with the actual claims and behaviour of the relevant legal officials.[151]

[145] P Eleftheriadis, *A Union of Peoples* cit.

[146] J Lindeboom, 'The Autonomy of EU Law' cit.

[147] As Lenaerts and Gutiérrez-Fons observed, for example, the autonomy of the EU legal order essentially means that the EU legal order has its own rule of recognition (K Lenaerts and JA Gutiérrez-Fons, 'A Constitutional Perspective' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018) 107). In J Lindeboom, 'The Autonomy of EU Law' cit., I took a stab at formulating the rule of recognition of the EU legal order.

[148] Art. 267 TFEU.

[149] See *e.g.* case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49 paras 20–21.

[150] For example, according to art. 16(2) TEU the Council "shall consist of a representative of each Member State at ministerial level". Therefore, the Council can only be identified by reference to national laws which determine the natural persons who are at any given moment ministers of the national government.

[151] Pavlos Eleftheriadis has offered a sophisticated and strictly dualistic account of EU law in P Eleftheriadis, *A Union of Peoples* cit. Eleftheriadis' dualism entails, in my view, a *theoretically* coherent theory of how EU law and national law relate to each other. The challenge for this theory is that it fits uncomfortably with the case law of the ECJ on the autonomy, primacy and direct effect of EU law, and the EU law obligations for national authorities within their own national legal orders. To be clear, the internal point of view and self-understanding of (some of) the participants of a legal order need not correspond to the best available theory of that legal order. To use an analogy borrowed from A Marmor, *Foundations of Institutional Reality* (Oxford University Press 2023) ch 6, the "internal point of view" that two spouses take towards the institutions of "family" and "marriage" might be that marriage is an expression of love and equal respect. According to some feminist critiques of the institution of the family, however, marriage *really* is an expression of patriarchy and female subordination. The best available theory of some social practice *might* therefore well be different from the internal point of view of the participants of that social practice, or the subjective rationalization of the social practice by its participants. However, the internal point of view of the

At the same time, monism is not a viable theory of the EU legal order, as Eleftheriadis in my view rightly observed.[152] The EU legal order does not subsume the national legal orders, nor does EU law control the validity of national legal norms.[153] While the case law of some of the Member States' constitutional courts could be described as "national law monism",[154] this case law cannot serve as a compelling normative basis for the multilateral context of the European legal landscape. Genuine national law monism only considers its own domestic legal order as "law", which results in national legal solipsism.

Accordingly, neither monism nor dualism accurately describes the relationship between EU law and national law. This conclusion appears to leave us in *aporia*. From an international law perspective, there is no third alternative between monism and dualism. However, in US antebellum constitutional debates neither term was used, even though these debates were similar to contemporary debates in EU law, and compact theorists in particular considered the relationship between State law and federal law as similar to the relationship between State law and international law. The absence of a monism–dualism dichotomy in the early American republic, then, may tell us something about the (ir)relevance of this dichotomy to EU law today.

IV.2. Competing monisms in the early American republic

In contrast to otherwise similar debates in EU constitutionalism, antebellum constitutional debates about the nature of the US Constitution and the final say about its meaning were not framed in terms of monism and dualism.

At first glance, it seems that this distinction simply was not relevant to the antebellum period for two reasons. Firstly, the Constitution makes clear that federal law is supreme over State law,[155] and that the federal government can act directly on individuals,[156] which suggests that applying a dichotomy central to the relationship between national and international law is a category mistake. Secondly, the monism–dualism dichotomy

participants of a practice should, in my view, still be part of the relevant empirical factors that a theory of that practice seeks to explain.

[152] P Eleftheriadis, *A Union of Peoples* cit. ch. 3.

[153] Case C-13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* ECLI:EU:C:1962:11 p. 49–50; joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl, and Others* ECLI:EU:C:1998:498 para. 21. See also J Lindeboom, 'The Autonomy of EU Law' cit. 302.

[154] For a classic formulation of "national law monism", see H Kelsen, *General Theory of Law and State* (Transaction Publishers 2006 [1949]) 382–386.

[155] Art. VI of US Constitution.

[156] See *e.g.* US Constitution, art. I, section 8: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; [...] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes".

itself is a product of late-nineteenth century and early twentieth century legal theory.[157] Both reasons suggest that the dichotomy simply does not make sense in the context of US antebellum constitutionalism.

The first objection, however, can be discarded quickly. As the analysis in sections II and III above aimed to show, the United States did not comprise a consolidated legal order, and the nationalist view of the Constitution was at the time most likely a minority view.[158] While it was recognised that the Constitution had created a federal government that was in some way "national",[159] and the relationship between the States differed from the relationship between States in international law,[160] the distinction between "federal" and "international" remained blurry and ambiguous.[161]

On the second point, it is true that the monism–dualism dichotomy was foreign to US antebellum constitutionalism. Dualism as a theory of law emerged in the second half of the nineteenth century, and is particularly associated with the work of Heinrich Triepel.[162] According to Cassese, monism as a theory of law was first proposed by the German legal theorist Wilhelm Kaufmann,[163] and is of course mainly associated with the work of Hans Kelsen.[164]

[157] Until far into the nineteenth century, there was no need for a theory of the relationship between national and international law, as they were regarded as strictly separate. See also J Rendl, 'The Sphere of Intervention: EU Law Supranationalism and the Concept of International Treaty' (2023) European Papers www.europeanpapers.eu 1333.

[158] See JR Paul, *Indivisible: Daniel Webster and the Birth of American Nationalism* (Riverhead Books 2022).

[159] See *e.g.* J Madison, 'Federalist No 39' cit. 187: "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national".

[160] This was particularly clear in the context of slavery. As Lord Mansfield had recognised in the *Somerset* judgment (Court of King's Bench *Somerset v Stewart* (1772) 98 ER 499), slavery could only be introduced by positive (domestic) law. Whenever an enslaved person set foot on a country in which slavery did not exist, the enslaved person would become free. The *Somerset* judgment was extensively discussed in US constitutional law. The northern states which had abolished slavery nonetheless were bound by the Fugitive Slave Clause (US Constitution, art. IV, section 2, clause 3) and the Fugitive Slave Act 1793. They also recognised the right of slaveowners to bring their slaves with them on travels to the northern states without those slaves acquiring freedom until roughly the 1830s. See Finkelman, *An Imperfect Union* cit. 70–100.

[161] See DM Golove and DJ Hulsebosch, 'The Federalist Constitution as a Project in International Law' (2021) Fordham Law Review 1831. This ambiguity was partly rooted in the origin of the term "federal" which was – unlike its common meaning today – closely related to the terms "international" and "confederal". See R Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) CMLRev 1069.

[162] H Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899).

[163] P Gaeta, JE Viñuales and S Zappalá, *Cassese's International Law* (Oxford University Press 2020 3rd edn) 220.

[164] See *e.g.* H Kelsen, *General Theory of Law and State* cit. 363–382.

Nonetheless, it is possible to *reconstruct* early antebellum constitutional debates in terms of monism. Both nationalists and compact theorists initially took what we would call monistic views on the nature of the US legal order. Nationalists believed that the ratification of the Constitution had been a sovereign act of the people, and that the States were legally subordinate to the federal legal order that had been created. This became clear soon after the Founding in the remarkable case of *Chisholm v Georgia* (1793).[165] This case dealt with the question whether a State could be sued against its will in a federal court by a citizen of another State. In his Opinion, Justice Wilson dramatically set the scene as follows:

> "This is a case of uncommon magnitude. One of the parties to it is a State – certainly respectable, claiming to be sovereign. The question to be determined is whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still, and, may, perhaps, be ultimately resolved into one no less radical than this: 'do the people of the United States form a Nation?'"[166]

Wilson answered this question in the affirmative, and concluded – like a majority of the Justices – that Georgia indeed could be sued. The vulnerability of nationalist monism became immediately clear by the reception of the Supreme Court's judgment. As Gordon Wood observes, "[t]his decision represented such a serious assault on state sovereignty that it could not stand; even Federalists in Massachusetts were appalled by it".[167] Within two years, the judgment was overruled by the ratification of the Eleventh Amendment.[168]

A second example of nationalist monism is the landmark judgment *Fletcher v Peck* (1810), in which the Supreme Court, for the first time, struck down State legislation for violating the Constitution. In his Opinion, Marshall observed among others:

> "But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts".[169]

[165] US Supreme Court *Chisholm v Georgia*, 2 US 419 (1793).

[166] *Ibid*. 453.

[167] GS Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press 2011) 415.

[168] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

[169] US Supreme Court *Fletcher v Peck* cit. 136.

Though Marshall used different terms, in effect this claim amounts to what we would call "national law monism" or perhaps in this case "federal law monism". The State was not supposed to be regarded as the highest source of legal authority, and State law would be normatively subordinate to federal law.

Compact theorists also presupposed monism, by claiming that the Constitution derived its legality and legitimacy from the ratification by the separate States.[170] The Virginia and Kentucky Resolutions of 1798–1799 amounted to what we might call "State law monism". Since the US Constitution was a compact among sovereign States which had retained sovereignty, State laws and State courts were the highest legal authority, from which the federal government's authority derived.

Both nationalists and compact theorists could explain the nascent federal legal order from their respective monist perspectives. In the day-to-day functioning of federal and State law, which of the two monisms was correct often did not matter. However, in cases of overt conflict between a State and the federal government, or between a State court and a federal court, a choice had to be made as to which institution *really* was the final arbiter. This choice could not be made on legal grounds, but was rather a matter of power, rhetoric and perhaps ethics.[171]

In most situations of constitutional crisis, the federal government seemed to prevail in fact.[172] Nonetheless, compact theory and States' rights theories continued to resist nationalist monism. After the South Carolina nullification crisis, overt conflicts remained limited, also because the US Supreme Court by and large became more sensitive to States' rights[173] – that is, outside the context of slavery.[174] Competing monisms were substituted by an ostensibly clear separation of powers between the federal and State governments under the name of "dual federalism". While this development could not avoid escalating animosity between the northern and southern States in regard to slavery,[175] the move towards dual federalism nonetheless shows how the US antebellum constitutionalism purported to grapple with the impasse created by competing monisms.

[170] See *e.g.* JC Calhoun, 'Fort Hill Address' cit.

[171] In the EU context, I have argued elsewhere that the question of whether national law or EU law takes ultimate precedence is also not a legal but an ethical question. See J Lindeboom, 'Legal Embarrassment after PSPP and K 3/21: The Bogus Distinction between Primacy- and Supremacy and the Need for an Ethics of EU Law Supremacy' (2 November 2021) EU Law Live eulawlive.com.

[172] SJ Boom, 'The European Union after the *Maastricht* Decision' cit. 194.

[173] See *e.g.* US Supreme Court *Charles River Bridge v Warren Bridge*, 36 U.S. 420 (1837); *Briscoe v Bank of Commonwealth of Kentucky*, 36 U.S. 257 (1837); *Cooley v Board of Wardens*, 53 US 299 (1851).

[174] Within the context of slavery, the U.S. Supreme Court rather took a nationalist approach in *Prigg v Pennsylvania*, 41 U.S. 539 (1842). In that case, the Court held constitutional the Fugitive Slave Act of 1793 and declared unconstitutional a Pennsylvania law banning the kidnapping of black people to another State in order to enslave them. *Prigg* led to further resistance towards the Fugitive Slave Act in the northern States.

[175] See generally P Finkelman, *An Imperfect Union* cit. chs 5–7.

IV.3. From competing monisms to dual federalism

Dual federalism refers to the legal theory which stipulates that the US Constitution provides for a strict separation of powers between the federal government and the State governments. Consequently, each government is supreme within its own jurisdiction. In *Ableman v Booth* (1859), a case concerning the status of enslaved persons accompanying their slave-owners in northern States, Chief Justice Roger Taney described dual federalism as follows: "[t]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres".[176]

Disputes between States and the federal government were to be resolved by the US Supreme Court. After the South Carolina nullification crisis, it had become clear that the only alternative to a common final arbiter was anarchy:

> "And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it, to make the Constitution and laws of the United States uniform, and the same in every State, and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them".[177]

This theory of dual federalism in US constitutionalism shares with contemporary dualism the separation of spheres of legitimate authority. However, dual federalism differs from dualism in emphasising the *legal* interconnections of the State and federal legal orders. Dualism implies that national legal orders and the international legal order are *legally* separate. Consequently, their respective legal norms do not relate to each other in a legally meaningful manner.[178] By contrast, dual federalism recognised the substantively and geographically overlapping sources of authority of the States and the federal governments.

In the context of the dormant Commerce Clause doctrine,[179] for example, the federal courts purported to delineate unjustifiable interferences by the States with interstate commerce and the legitimate exercise of the States' police power.[180] Since the federal

[176] US Supreme Court *Ableman v Booth*, 62 U.S. 506, 516 (1859).

[177] *Ibid*. 518–519.

[178] D Dyzenhaus, 'Kelsen's Contribution to International Law' (4 May 2020) papers.ssrn.com 37.

[179] The "dormant Commerce Clause doctrine" refers to the application of the Commerce Clause of the US Constitution (art. I, section 8, clause 3) to State laws. The Commerce Clause grants Congress the power "to regulate Commerce [...] among the several States" and could in this sense be compared to art. 114 TFEU in EU law. The US Constitution, however, does not contain explicit provisions similar to the fundamental freedoms of the EU internal market. The dormant Commerce Clause doctrine "remedies" this defect insofar as the Commerce Clause is understood as limiting the States' ability to regulate interstate commerce, even if Congress has not yet exercised its powers to adopt federal legislation.

[180] See *e.g*. US Supreme Court *Willson v. Black-Bird Creek Marsh Co*., 27 U.S. 245 (1829); *Cooley v Board of Wardens* cit.

power to regulate commerce among the States and the State police powers inevitably overlapped both geographically and substantively, the courts were forced to delineate the federal and States' respective spheres of authority through legal doctrine.[181]

The application of, and interaction between, legal orders was complex and messy, if only because both legal orders applied within the same geographic territory, and were applied by the same (State) courts. From the 1930s, the influence of dual federalism in US constitutional law increasingly waned.[182] As a legal *theory* about how the federal and State governments and their respective legal orders relate to each other, however, arguably dual federalism is still central to US constitutionalism. Since the 1830s, competing monisms have never resurfaced effectively.[183]

IV.4. The irrelevance of monism and dualism to US and EU constitutionalism

Based on the analysis of the development towards dual federalism in the early American republic, and its similarities with the US constitutional structure, I tentatively suggest that the monism–dualism dichotomy is ultimately unhelpful both to US and to EU constitutionalism for two reasons:

i) in both cases, a consistently applied theory of monism seems legally and politically untenable legally and politically, as it fails to recognise that the legal orders remain, in a particular way, distinct, even though they are legally and factually interconnected.

[181] In US Supreme Court *Cooley v Board of Wardens* cit., for example, the Supreme Court held that the States retained the power to legislate in "local" aspects of commerce as long as Congress had not exercised its commerce power, while the States lacked the power to legislate in relation to commerce of a "national" character. In *United States v E.C. Knight Co*., 156 U.S. 1 (1895) and *Carter v Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court somewhat differently relied on the distinction between "direct" and "indirect" effects on interstate trade to delineate the scope of the dormant commerce clause.

[182] See *e.g.* US Supreme Court *NLRB v Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), overturning the approach in *Carter v Carter Coal Co.* cit.; *United States v Darby Lumber Co.*, 312 U.S. 100 (1941), overturning *Hammer v Dagenhart*, 247 U.S. 251 (1918). For an overview, see E Ryan, *Federalism and the Tug of War Within* (Oxford University Press 2012) 84–98. Dual federalism is, however, still visible in the anti-commandeering doctrine, according to which the federal government cannot command State authorities to adopt or execute federal laws. See *e.g.* US Supreme Court *New York v United States*, 505 U.S. 144 (1992); *Printz v United States*, 521 U.S 898 (1997). The idea of dual federalism has also resurfaced in the Supreme Court's recent case law limiting the scope of federal powers under the Commerce Clause: *United States v Alfonso D. Lopez, Jr*., 514 U.S. 549 (1995); *United States v Morrison*, 529 U.S. 598 (2000); and *National Federation of Independent Business v Sebelius*, 567 U.S. 519 (2012).

[183] After the Supreme Court's judgment in *Brown v Board of Education* cit., the spirit of the Virginia and Kentucky Resolutions of 1798–1799 emerged briefly in so-called statements of interposition that were issued in some southern States. These interposition statements protested against the Supreme Court's judgment and declared it unconstitutional. See *e.g*. Interposition Resolution by the Florida Legislature in Response to *Brown v Board of Education*, 2 May 1957; Act No. 2 of First Extraordinary Session, LSA-R.S. 49:801 of 4 November 1960.

ii) in both cases, the legal and factual interconnectedness of legal orders is such that dualism must lose its sharp theoretical edges in order to be compatible with the actual claims and behaviour of the relevant legal officials.

In contemporary legal theory, it is hard to imagine a "third alternative" between monism and dualism. However, the inescapability of the monism–dualism dichotomy is itself the product of an "international law framing" of the relationship between international or supranational and national law. The monism–dualism dichotomy only appears unavoidable because the distinction between national and international law is usually the starting point for analysing the idiosyncracies of EU constitutionalism.

The history of the early American republic shows, however, that international law need not be the starting point for conceptualising a supranational, or in the US context a "supra-State",[184] legal order.[185] The American Founders and their successors were aware that they had, in Justice Kennedy's words, "split the atom of sovereignty"[186] and had created something *sui generis*.[187] The subsequent development into dual federalism in US antebellum constitutionalism is compatible with neither monism nor dualism.

From a jurisprudential perspective, dual federalist doctrine in US constitutional law may be explained by Joseph Raz's and John Gardner's theories of law.[188] Raz and Gardner built on HLA Hart's theory of law, according to which legal systems are characterised by a union of primary and secondary rules that is identified by a "rule of recognition" reflecting the social practices of "legal officials".[189] Raz and Gardner followed Hart in identifying

[184] In the European context, the term "supranational" is obviously well-known, while the term "supra-State" is hardly used. The latter is also true in the American context, arguably because the commonplace term "federal" obviates any reference to the "supra-State" governance exercised at federal level. Of course, the term "national" is deeply confusing in any US–EU comparative constitutional analysis, since it refers to the respective sub-entities within the EU constitutional structure, while it refers to the federal government in US constitutionalism.

[185] Though it should be noted that the Framers were heavily influenced by international law, as David Golove and Daniel Hulsebosch recently showed. See D Golove and DJ Hulsebosch, 'The Federalist Constitution as a Project in International Law' cit.

[186] US Supreme Court *U.S. Term Limits, Incl. et al. v Thornton et al*., 514 U.S. 779, 838 (1995), concurring opinion of J Kennedy.

[187] Robert Schütze has argued against the use of the term "*sui generis*" both in the context of US federalism and that of EU constitutionalism. In both cases, he claims, the constitutional structure is best described as a "federation of States". See Schütze, 'On "Federal" Ground' cit. In my view, Schütze somewhat underestimates the ambivalence of the constitutional structure that the US Constitution had created, and the persistent disagreements even among the Founders. While some of them, such as Washington and Hamilton, were strong nationalists in favour of a consolidated government – much like the European States at the time – others, such as Madison and Jefferson, espoused a more restrictive, "internationalist" interpretation of federal powers.

[188] See generally J Raz, *The Concept of a Legal System* (2nd edn Clarendon Press 1980); J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn Oxford University Press 2009); J Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012).

[189] HLA Hart, *The Concept of Law* (3rd edn Clarendon Press 2012) ch 5.

legal systems on the basis of the social practices of legal officials. Hart probably believed that each political community could have only legal system and one rule of recognition.[190] By contrast, Raz and Gardner left open the possibility that conflicting norms as well as multiple rules of recognition can be applied within the same geographic territory by a group of legal officials.[191] These legal officials, moreover, need not necessarily be uniform in their beliefs or commitments, as Alexander Somek observed.[192]

The interaction between the EU and the national legal orders could be conceptualised in similar terms.[193] Such a theory could recognise that the EU legal order operates as a self-referential legal system with its own "rule of recognition", without either claiming that the EU legal order absorbs all national legal orders,[194] or claiming that these legal systems are legally or otherwise normatively closed to each other.[195]

A theory of the EU legal order, however, need not be a "positivist" one. As I argued elsewhere,[196] the best jurisprudential theory of the EU legal order may need to recognise that what legal officials treat as the rule of recognition of their legal order may be different from what actually *is* the rule of recognition of their legal order.[197] Distinguishing between what people consider to be the rule of recognition of their legal order, and what actually is the rule of recognition of that legal order, gives rise to numerous complex and intriguing legal-philosophical questions, which cannot be discussed in this – already long – *Article*.[198] This distinction may, however, explain an important part of the social practices of judges and other legal officials. Rather than taking for granted that whatever most of

[190] See *e.g*. *ibid*. 105–107; P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' cit.

[191] See *e.g*. J Raz, *Practical Reason and Norms* (Clarendon Press 1979) 146–148; J Gardner, *Law as a Leap of Faith* cit. 281–288 (as applied to EU law); J Gardner, 'Fifteen Themes from *Law as a Leap of Faith*' (2015) Jurisprudence 601, 605.

[192] A Somek, *The Legal Relation: Legal Theory after Legal Positivism* (Cambridge University Press) 69–72.

[193] J Gardner, *Law as a Leap of Faith* cit. 281–288; NW Barber, 'Legal Pluralism and the European Union' (2006) ELJ 306; J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

[194] See *e.g*. J Lindeboom, 'The Autonomy of EU Law' cit.

[195] While I recognised elsewhere that autonomous legal systems need not be entirely closed *vis-à-vis* each other in an *extra-legal* sense (J Lindeboom, 'Why EU Law Claims Supremacy' cit.; J Lindeboom, 'The Autonomy of EU Law' cit.), in those writings I aimed to explore the "internal point of view" of certain legal officials within the EU legal system. This led me to conclude that the EU legal system may be cognitively open, but is closed to other (legal) systems from a legal-normative point of view. However, I have come to realise that the intricate *legal-normative* relationship between *e.g*. the US federal and State legal systems shows that separate legal systems can be *legally* connected to each other in a particular way, notwithstanding each of them having their own rules of recognition. This may also affect how legal systems interact with each other from the internal point of view.

[196] J Lindeboom, 'The Autonomy of EU Law' cit. 303–305.

[197] For a jurisprudential theory focusing on the distinction between what rule is treated as the rule of recognition within a certain community and what rule is the rule of recognition within that community, see K Toh, 'Legal philosophy à la carte' in D Plunkett, SJ Shapiro and K Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

[198] See *e.g*. K Toh, 'Legal philosophy à la carte' cit.

their fellow judges treat as law *is* the law, judges frequently cast doubt on what other judges – rightly or mistakenly – take to be the law, even if the latter are in the majority.

One may even doubt whether it is useful to conceive of the relationship between legal orders, as well as between courts within overlapping legal orders, in terms of "chains" or "pyramids" of legal validity. As Pauline Westerman argues in her contribution to this special issue, the "building metaphor" of law may not be the best theoretical representation of our legal practices.[199]

Her alternative proposal to conceive of legal order in terms of a web of deontic statuses which allocates power across society seems particularly appropriate to both the US antebellum federal legal order and the contemporary EU legal order. In the early American republic, reconstructions of legal normativity resulting in competing monisms were, indeed, *reconstructions* with particular justificatory aims. In reality, the political and legal developments of the US early American republic reveal a struggle for political and legal power rather than a hierarchically organised normative structure. A crucial role in the proliferation of power was played by Section 25 of the Judiciary Act 1789, which connected the State legal systems to the federal judiciary.[200] John Marshall and his brethren brilliantly interpreted this structural provision as providing for a clear judicial hierarchy with the US Supreme Court at its apex. But the fragility of the US Supreme Court's legitimacy and power in the first decades of the American republic reveals that this judicial hierarchy was anything but inevitable. The allocation and proliferation of power through deontic statuses[201] only developed into a hierarchical normative structure as federal legal *and political* power consolidated, initially in the 1830s and more consequentially after the Civil War.

The role of Section 25 of the Judiciary Act 1789 in the early American republic may remind EU constitutional lawyers of the essential role of art. 267 TFEU in the development of EU law and the possibility for the EU legal order to operate as an "autonomous" legal order.[202] Despite essential differences,[203] Section 25 of the Judiciary Act 1789 and art. 267 TFEU share an important function: they contribute to the centralisation of judicial power by providing for "normative bridges" between the State and supra-State levels of legal governance. In the (antebellum) US federal legal order and the EU legal order, the efficacy of supra-State law depends considerably on the degree to which the supra-State legal order connects – in real (legal) life – to the State legal orders.

[199] See P Westerman, 'Weaving the Threads of a European Legal Order' cit.

[200] On the role of legal rules as tools to proliferate power within a particular community, see *ibid*. 1309-1312.

[201] *Ibid*.

[202] See *e.g*. JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press 1999) 32–35, 192–195.

[203] Most notably, Section 25 of the Judiciary Act of 1789 granted the US Supreme Court the power to *review* State court judgments, while art. 267 TFEU only grants the ECJ the power to answer preliminary questions on the interpretation of EU law by the Member State courts.

However, although the manner in which structural provisions such as Section 25 Judiciary Act 1789 and art. 267 TFEU may have been a necessary condition to create an autonomous federal legal order, such provisions were by no means a sufficient condition for, nor a justification of, federal autonomy. The constitutional history of the early American republic shows that there was nothing inevitable about the course of US history, the structure and autonomy of the federal legal order, and the role that the US Supreme Court eventually acquired. The same is undoubtedly true for the role of art. 267 TFEU in the process of European integration.

V. Conclusion

This *Article* analysed the constitutional history of the early American republic through the lens of contemporary European constitutionalism. It focused in particular on the role of the US Supreme Court in the development of an independent federal legal order, and the question who possessed the "final say" in constitutional matters. This history reveals salient similarities to ongoing constitutional debates about the autonomy of the EU legal order and the ECJ's final say on the interpretation of EU law.

As mentioned in the introduction of this *Article*, the constitutional similarities between the early American republic and contemporary Europe have not gone unnoticed to other scholars. Friedman Goldstein observed in her 2001 book that

> "[i]t turns out that virtually every institutional reform advocated by rebellious voices during those antebellum decades of state protest against U.S. Supreme Court authority was implemented in one or another version on the European side. The only exceptions to this were the suggestions for state powers to nullify federal law (a power claimed but not acted upon by the Constitutional Court in Italy and Germany, and not institutionalized in the EU) and state power to secede from the union".[204]

Some two decades later – after defiance of the Court of Justice by a number of national courts[205] as well as Brexit – arguably even these are exceptions no more.[206]

These constitutional similarities extend in particular to the reasons given by proponents and opponents of an autonomous federal legal order to justify their understanding of the "real" normative structure of legal order. The asymmetry between nationalists'

[204] L Friedman Goldstein, *Constituting Federal Sovereignty* cit. 43.

[205] Czech Constitutional Court Judgment of 31 January 2021 Pl. ÚS 5/12 *Slovak pensions*; Danish Supreme Court judgment of 6 December 2016 case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*; German Constitutional Court judgment of 5 May 2020 cit.; Polish Constitutional Tribunal Judgment of 7 October 2021 cit. While these constitutional courts did not strictly speaking "nullify" EU law – although the Polish Constitutional Tribunal's K3/21 decision comes close to it in regard to arts 1, 4(3) and 19(1) TEU – these judgments are very similar to the judgments of some State courts in the US antebellum period to which Friedman Goldstein refers.

[206] It should of course be noted that the United Kingdom's withdrawal from the EU was not an exercise of raw state power, but a procedure governed by Treaty law.

mostly functional arguments and compact theorists' mostly formal, identity-based arguments – which caused them to largely talk past each other – mirrors contemporary debates about the autonomy of EU law. In those debates, the ECJ mostly uses functional arguments concerning the effectiveness of EU law, while national constitutional and supreme courts mostly use formal arguments emphasising the ultimate sovereignty of the Member States and the constitutional authorisation at the foundation of the EU legal order.

While the structure of legal arguments about the autonomy of the federal order is similar in US antebellum constitutionalism and in EU law, the absence of a monism–dualism dichotomy in US antebellum constitutionalism is an important conceptual difference. The monism–dualism dichotomy, which is central to our contemporary thinking about the relationship between national and international law, frames questions about the "nature" of the EU legal order from an international law viewpoint. Constitutional debates in the early American republic show that this perspective is not inescapable.

Moving beyond an international law perspective on the relationship between the EU legal order and the national legal orders does not mean that the EU is a "federal State", nor does this departure deny that the EU is a creation of public international law. Indeed, it is unproductive, in my view, to conflate the day-to-day functioning of a particular legal structure with its origin.

Moving beyond an international law framing of EU constitutionalism also does not mean that the legality or effectiveness of the EU legal order may ultimately be contingent either for any particular Member State or for the Member States collectively. However, as long as the EU legal order exists and functions according to its own logic, its autonomy cannot be fully understood in traditional international law terms.[207] In this regard, the example of the early American republic reinforces a distinctly federal perspective on the EU and its legal structure.[208]

[207] See also K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit., and J Rendl, 'The Sphere of Intervention: EU Law Supranationalism and the Concept of International Treaty' cit. Cf *e.g.* P Eleftheriadis, *A Union of Peoples* cit.; T Moorhead, 'European Union Law as International Law' (2012) European Journal of Legal Studies 126; D Wyatt, 'New Legal Order, Or Old?' (1982) ELR 147.

[208] See also R Schütze, 'On "Federal" Ground' cit.; S Larsen, *The Constitutional Theory of the Federation* cit.