European Union Law in the Member State Courts: A Comparative View

Michael L. Wells*

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I. INTRODUCTION

On May 5, 2020, the German Federal Constitutional Court (GFCC) challenged the validity of a European Central Bank bond buying project.[1] In the bureaucratic language of its press release, the GFCC "granted several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank."[2] The GFCC ruling drew considerable attention because it flatly contradicted the European Court of Justice (ECJ),[3] which, in an earlier episode of this litigation, had already upheld the program.[4] According to the GFCC, the

1. BVerfG, 2 BvR 859/15, May 5, 2020, http://www.bverfg.de/e/rs20200505_2bvr085915en.html.

2. Press Release No. 32/2020, BVerfG, ECB Decisions on the Public Sector Purchase Programme Exceed EU Competences (May 5, 2020), *available at* https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html.

3. *See, e.g.*, Martin Arnold & Tommy Stubbington, *German Court Threatens to Thwart ECB in Buying Bonds to Ease Crisis*, FIN. TIMES, May 6, 2020, at 1; *German Constitutional Court Rules the Court of Justice's Weiss Judgment Ultra Vires Due to Poor Reasoning and Weak Standard of Review*, EU L. LIVE (May 5, 2020), https://eulawlive.com/german-constitutional-court-rules-the-court-of-justices-weiss-judgment-ultra-vires-due-to-poor-reasoning-and-weak-standard-of-review/ ("For the first time in its history, the German Federal Constitutional Court has declared a judgment of the Court of Justice (C-493/17, *Weiss and Others*), and Decisions of the European Central Bank (ECB), *ultra vires* and not applicable in Germany . . . .").

4. Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018). After a thirteen-month delay, the European Commission has responded to the GFCC's defiance of the ECJ ruling, by suing Germany for infringement of its obligations under EU law. *See* Mehreen Khan, *"Germany Hit by Brussels' Legal Action,*" FIN. TIMES, June 10, 2021, at 2 (reporting that the European Commission has launched an infringement proceeding against Germany); *Consolidated Version of the Treaty on the Functioning of the European Union* art. 260, Oct. 26, 2012, 2012 O.J. (C 326) 161 [hereinafter TFEU] (discussing the Commission's authority to bring such an action, which may result in imposition of a monetary penalty on the member state).

ECJ had not adequately justified its approval of the ECB bond purchases, as required by the Treaty on European Union (TEU).[5]

This Article is not concerned with the merits of the GFCC's ruling,[6] or its practical impact, which is probably nil.[7] My topic involves the GFCC's assertion of the authority to defy the ECJ.[8] The ECJ has long held that member state courts do not have the power to rule on issues of EU law, much less repudiate ECJ rulings, and in particular that member state courts "do not have the power to declare acts of the Community institutions invalid."[9] The GFCC's contrary ruling in *Weiss* invites

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5. The GFCC said that the ECJ's ruling had not demonstrated that the ECB's program was proportional to the need for it, thus, the ECJ ruling violated the "principle of proportionality," a bedrock doctrine in EU law. BVerfG, May 5, 2020, 2 BvR 859/15, paras. 71-100; *see also* TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 136 (2d ed. 2006) ("The principle of proportionality and its function in Community law."). For discussions of the GFCC's holding, *see, e.g.*, Philip M. Bender, *Ambivalence of Obviousness—Remarks to the Decision of the Federal Constitutional Court of Germany of May 5, 2020* (Max Planck Inst. for Tax L. & Pub. Fin., Working Paper No. 9, 2020), https://ssrn.com/abstract=3661607; Julian Nowag, *The BVerfG's Proportionality Review in the PSPP Judgment and its Link to Ultra Vires and Constitutional Core: Solange Babel's Tower Has Not Been Finalised*, LUND U. LEGAL RES. PAPER SERIES (June 2020), https://ssrn.com/abstract=3634218.

6. For a discussion of the disagreement between the GFCC and the European Court of Justice over judicial review of the ECB's actions, *see* Annelieke Mooij & Stefania Baroncelli, *What Kind of Judicial Review for the European Central Bank?* (BRIDGE Network, Working Paper No. 9, 2020), https://ssrn./com/abstract=3745244; *see also* CE Ass., Apr. 21, 2021, No. 393099, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-21/393099 (ruling by the French Conseil d'Etat, rejecting the GFCC's position on this issue).

7. *See* Martin Arnold & Guy Chazan, *Bundesbank to Keep Buying Bonds After Court Challenge*, FIN. TIMES (July 5, 2020), https://www.ft.com/content/99447f21-46db-465b-8ed0-9a214a898a74. It is also noteworthy, however, that the ECB seemed to acknowledge an obligation to meet the GFCC's "proportionality" objections to its program by documenting the need for the bond buying. *See* Martin Arnold, *ECB Seeks to Defuse Row with German Court over Bond-Buying*, FIN. TIMES (June 25, 2020), https://www.ft.com/content/7f2172f5-0118-484a-a394-7c95f827bdeb (noting how, prior to GFCC's order, the ECB's governing council debated "whether its bond-buying excessively impinged on economic and financial policy").

8. *See* Nik de Boer & Jens van't Klooster, *The ECB, the Courts and the Issue of Democratic Legitimacy After Weiss*, 57 COMMON MKT. L. REV. 1689, 1689 (2020) (describing the GFCC ruling as a "highly controversial decision . . . [that] strikes at the heart of the EU legal order"); *see also* Ana Bobić & Mark Dawson, *Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court*, 57 COMMON MKT. L. REV. 1953 (2020) (discussing the GFCC's holding that PSPP is irrelevant because it was, in respect of the principle of proportionality, incomprehensible and *ultra-vires*).

9. Case 314/85, Foto-Frost v. Hauptzollamt Lubeck-Ost, 1987 E.C.R. 4225; *see* KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, EU PROCEDURAL LAW 51 (2014) [hereinafter LMG] ("Divergences of view between courts in the Member States as to the validity of acts of Union institutions, bodies, offices, or agencies would be liable to place in jeopardy the very unity of the Union legal order and detract from the fundamental requirement of legal certainty."); *see*

discussion of the role of member state courts in the interpretation and application of EU law.

In the United States, a dispute like the one between the GFCC and the ECJ would be resolved quickly. The Supreme Court possesses the means to easily repudiate an analogous state court ruling and would surely do so. Since 1789, a federal statute has authorized the Supreme Court to review state court judgments that depend on federal law.[10] The loser at the state court level would appeal the state court decision and the Supreme Court would promptly reverse.[11] The Supreme Court would compel compliance with its mandate, under threat of sanctions.[12] But these solutions are impossible in the European Union because there is no network of lower EU courts and the ECJ has no jurisdiction to hear appeals from decisions of member state courts.

Instead, ECJ control over the content of EU law is addressed by a different means, in Article 267 of the Treaty on Functioning of the European Union (TFEU). When an unsettled issue of EU law comes up in litigation in a member state court, the judge may make a "preliminary reference" to the ECJ.[13] If the "question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law," the reference is mandatory.[14] But the ECJ, having answered the question with a "preliminary ruling," has no further role in the litigation. For example, the GFCC's May 5 ruling is just one step in continuing litigation.[15] Years prior, the GFCC made a

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also Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMPAR. L. 295, 318-20 (1993) (discussing *Foto-Frost*).

10. 28 U.S.C. § 1257 (originally enacted as the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86).

11. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (addressing state officials' defiance of the Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954), abolishing segregated public education). In *Cooper*, the Court, in an opinion signed by all nine Justices, ruled that "the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land," and that "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Id.* at 18.

12. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 476-77 (7th ed. 2015) (noting, in the context of state court judgments, the U.S. Supreme Court's authority to issue a writ of mandamus "as a means of obtaining compliance" and remedies for mandate defiance). In the United States, a challenge to federal government actions like ECB bond purchasing would probably not be litigated in state court in the first place because the United States and its officers are authorized to remove such under 28 U.S.C. § 1442(a)(1).

13. TFEU, *supra* note 4, at art. 267.

14. *Id.*

15. *See* MARTIN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 441 (2d ed. 2014) ("[T]he preliminary ruling constitutes merely an interim stage

preliminary reference and the ECJ upheld the European Central Bank's program against Treaty-based objections.[16] The May 5, 2020 GFCC decision rejects the ECJ's interpretation of the TEU. Since "[t]here are no provisions of EU law governing the subsequent continuation of these proceedings,"[17] the ECJ now has no opportunity to override the GFCC.

This episode is an especially vivid illustration of a larger theme. Some member state courts, like Belgium and Luxembourg, make preliminary references at a much higher rate than others, such as France and Germany.[18] The disparity among member state courts strongly suggests that, notwithstanding Article 267, some courts prefer to decide EU issues for themselves rather than seek answers from the ECJ. One need not resort to statistical anomalies to detect the variations. Experts in EU law have closely examined the enforcement of EU law in member state courts.[19] Most member states include a "constitutional court," similar to the GFCC, in their judicial systems.[20] The principal role of a constitutional court is, as the name suggests, to adjudicate issues of fundamental law referred by other branches of the judiciary.[21] The tendency to decline to refer EU issues to the ECJ is especially pronounced among these constitutional courts,[22] so much so that the *German Law Journal* recently devoted a symposium issue to the practice in 2015.[23]

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in the national proceedings which continue after the Court's ruling having regard to the clarification of EU law that has now been established.").

16. *See* Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

17. BROBERG & FENGER, *supra* note 15.

18. *Id.* at 38 tbl.2.2a.

19. *See, e.g.*, 1 XXIX FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN CONG., NATIONAL COURTS AND THE ENFORCEMENT OF EU LAW: THE PIVOTAL ROLE OF NATIONAL COURTS IN THE EU LEGAL ORDER (Marleen Botman & Jurian Langer eds., 2020).

20. *See* Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 INT'L J. CONST. L. 525, 533 n.39 (2014) ("The following EU Member States have concentrated constitutional courts: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.").

21. HERBERT JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 308-09 (1996) (discussing "constitutional courts" in general and the German version in particular).

22. *See, e.g.*, Tommaso Pavone & R. Daniel Kelemen, *The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited*, 25 EUR. L.J. 352 (2019); Daniele Gallo, *Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure*, 25 EUR. L.J. 434 (2019).

23. *See* Fruzsina Gárdos-Orosz, *Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*, 16 GER. L.J. 1569 (2015); Viorica Viță, *The Romanian Constitutional Court and the Principle of Primacy: To Refer or Not to Refer?*, 16 GER. L.J. 1623 (2015); Eva Julia Lohse, *The German Constitutional Court and Preliminary References—Still a Match Not Made in Heaven?*, 16 GER. L.J. 1491 (2015).

One way to study alternatives to the current jurisdictional regime is to focus on technical issues of caseload management.[24] That approach, however, does not necessarily capture all of the issues that deserve attention. In a federal system, the allocation of jurisdiction between federal and state courts also raises issues of federal-state relations. In this Article, I argue these federalism-related questions can be illuminated by taking a comparative approach. My aim is to show that the study of an analogous system of judicial federalism—the United States'—may yield insights into the advantages and disadvantages of both the EU's approach and alternatives to it.[25] In particular, federal court control of federal law is a central principle of U.S. judicial federalism. In light of this central principle, the gap between the system envisioned in Article 267 and the actual practices of member state courts deserves attention because the systematic failure to refer denies the ECJ the ability to determine the content of EU law. The inevitable result is that, to the extent EU policies depend on the member states and their courts for implementation, the EU's ability to achieve its aims is undermined.

The European Union is a work in progress. According to its basic treaty, the EU's long-term goal is "an ever closer union among the peoples of Europe,"[26] a project that requires stronger bonds among the member states, a shared commitment to EU policies, and judicial institutions that can effectively implement those goals. The United States pursued a similar project, beginning with the drafting and ratification of the constitution in 1787-88, and furthered by the Union victory in the Civil War and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments shortly afterwards.[27] Both the United States and the European Union are federal polities comprised of member states that entered the union with their own legal systems, including a judiciary, already in place. In both,

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24. *See, e.g.*, Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, 36 TEX. INT'L L.J. 555, 557 (2001) (discussing proposals for reforming the EU's judicial structure and "the broader implications and consequences of particular jurisdictional reforms," but doing so from a strictly internal EU perspective).

25. The United States is an apt comparator because, unlike many federal systems, the United States and the European Union both divide sovereignty between the "federal" and state levels. *See* Michael L. Wells, *Judicial Federalism in the European Union*, 54 HOUSTON L. REV. 697, 719-24 (2017) (discussing the "shared and differentiating features" of the U.S. and the EU systems of judicial federalism).

26. Consolidated Version of the Treaty on European Union, art. 1, Oct. 26, 2012, 2012 O.J. (C326) 16 [hereinafter TEU].

27. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 253 (1990) ("[T]he constitutional system took its final form only after the Civil War.").

the new federal government added an overlay of federal law on the pre-existing body of state law. In both, the member states retain control of state law, while they grant authority over federal law to the central government. In both, many litigated disputes present both federal and state issues. Both unions began with comparatively weak central governments. In the United States, the central government grew stronger over the years, achieving the closer union to which the TEU aspires. But the United States' strengthening central government has also retained a significant role for the fifty states. For these reasons, the history of American judicial federalism is a useful source of information, rationales, pitfalls, and grounds for caution in considering reform of the preliminary reference.

Part II of this Article compares the basic features of U.S. federalism with those of the EU. One commonality, a critical one for the study of ECJ control of EU law, is that both the United States and the European Union have expanded over time, in two distinct ways. The number of member states has grown from thirteen to fifty in the United States and from six to twenty-seven in the European Union. In addition, both central governments have increased their authority over areas of law originally left to the member states. In the United States, Congress has acted under its powers, mainly derived from Article I of the Constitution, to regulate nearly every aspect of daily life.[28] As membership has increased, the sheer volume of litigation over EU law has grown exponentially, and EU law has expanded to cover the environment, consumer protection, "all the issues of the area of freedom, security and justice, including criminal law harmonization and citizenship of the EU and, no less important, the constitutional issues of fundamental rights protection."[29]

These changes present a problem for the authoritative resolution of issues of EU law. Parts III and IV discuss two alternatives to current practice. Both draw on U.S. judicial institutions and both generate costs, measured by their inroads on state autonomy, as well as benefits, which consist mainly of more effective enforcement of EU norms and greater integration among the member states. One alternative, discussed in Part III, is to install a network of lower EU courts for adjudication of EU issues, similar to the U.S. federal court system. This reform might be accomplished without amending the TEU, depending on how Article 19's

28. For discussion of the case law tracking the growth of Congressional power, *see* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 113-39 (19th ed. 2016).

29. *See* Tamara Capeta, *EU Judiciary in Need of Reform?*, *in* RESEARCH HANDBOOK ON EU INSTITUTIONAL LAW 268 (A. Lazowski & Steven Blockmans eds., 2016).

authorization of "specialised courts" is interpreted.[30] The principal advantage of this approach is that, at least in theory, EU judicial institutions could more effectively control the content of EU law. But that strong point may be more theoretical than practical, as EU issues would continue to surface in member state litigation. In addition, the cost of such a scheme would be great, as the role of the member state judiciaries would be diminished.

Part IV discuses a more promising alternative, at least for the short- to medium-term. In place of, or in addition to preliminary reference, the TFEU would be amended to give the ECJ appellate jurisdiction to review member state rulings on EU law. The analogy here is to U.S. Supreme Court review of state court rulings on matters of federal law. This, like the Part III alternative, involves a federalism cost in the sense that the member state courts would be subject to correction by the ECJ. On the other hand, that cost would be ameliorated by a corresponding benefit: their rulings on EU law would be accorded a legitimacy currently denied to them by TFEU Article 267, which fails to recognize a role for the member state courts in the project of building a stronger European Union because it tells them that they have no role in making EU law. At the same time, appellate review assures the ECJ of more control over the content of EU law than current practice permits.

Thus, I propose EU adoption of two U.S. judicial institutions—member state court adjudication of EU law coupled with ECJ review—but reject the U.S. network of lower federal courts. Why might one draw this distinction? Despite their similarities, the United States and the European Union will probably always differ in the relative strengths of their central and member state governments. The United States is a comparatively weak federal system, with the federal government holding most of the power, while the European Union is a strong one, with the

30. *See* TEU, *supra* note 26, art. 19 ("The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts."). The General Court's main role is to rule on businesses' appeals from regulatory actions taken against them by the European Commission. *See* ROGER J. GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 60 (4th ed. 2015) (noting how the ECJ transfers to the General Court "appeals from Commission decisions in enforcing competition rules and from Council and Commission regulations imposing anti-dumping and anti-subsidy duties"). For a more detailed breakdown of the General Court's jurisdiction, *see* LMG, *supra* note 9, at 43-44. At present the only "specialised court" is the European Civil Service Tribunal, which adjudicates disputes between the EU and employees of the EU. *Id.* at 33.

member states in charge.[31] Comparisons between the United States and the European Union account for the differences, which can explain and justify diverse approaches. At least for the time being, the case for a Union-wide EU judiciary is weaker than in the United States. But comparisons should also focus on the similarities. The value of a federal forum to resolve federal issues is strong in both systems, despite the comparatively greater strength of the EU's member states.

II. COMPARATIVE JUDICIAL FEDERALISM: THE EUROPEAN UNION AND THE UNITED STATES

In federal systems, like the United States and the European Union,[32] two sovereigns each produce a body of law. Any piece of litigation may raise both federal and state law issues. Two sets of courts—national and local—compete for jurisdiction over these hybrid disputes. "Judicial federalism" is the body of law that allocates judicial power between the two sets of courts. In both systems, the division of judicial power between federal and state governments has been a major source of conflict between federal and state judicial power since the beginning of the republic.

A. Judicial Federalism in the United States

At the Constitutional Convention in 1787, the delegates were united on the need for a federal "Supreme Court" to ultimately decide issues of

31. *See* Wells, *supra* note 25, at 719-24. Compare, for example, U.S. and EU fiscal responses to COVID-19. Member States take the initiative in the EU, *see, e.g.*, Bojan Pancevski & Laurence Norman, *How Angela Merkel's Change of Heart Drove Historic EU Rescue Plan*, WALL ST. J. (July 21, 2020), https://www.wsj.com/articles/angela-merkel-macron-covid-coronavirus-eu-rescue-11595364124. In the United States, Congress is in charge, *see, e.g.*, Deirdre Walsh, *Congress Passes $900 Billion Coronavirus Relief Bill, Ending Months-Long Stalemate*, NPR (Dec. 21, 2020), https://www.npr.org/2020/12/21/948862052/house-passes-900-billion-coronavirus-relief-bill-ending-months-long-stalemate.

32. This Article treats the European Union as a federal system because it divides power between the federal level (the EU) and the Member states. *See* Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT'L L.J. 746, 748 (1997) ("Federalism, as a means of structuring the relationship between interlinked authorities, can be used either within or without the framework of a nation-state."). For a stricter definition of federalism, which requires that "the federation as a whole claims universal and exclusive sovereignty within its territory and in its external relations," *see* KAARLO TUORI, EUROPEAN CONSTITUTIONALISM 345 (2015). According to Tuori, "[i]t should be evident that the European Union is not a federation in this standard sense." *Id.*

federal law,[33] but disagreed over whether lower federal courts were needed.[34] The advocates of a strong federal government, called "federalists" in the early United States, sought a powerful federal judicial system. Their localist opponents, called "anti-federalists," tried to retain authority for state governments and courts.[35] They resolved the dispute by leaving the role of federal courts up to Congress. Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[36] Congress set up a network of lower federal courts in the Judiciary Act of 1789.[37] The 1789 statute authorized the federal courts to adjudicate federal criminal cases, admiralty cases, and suits involving the United States.[38] It also authorized U.S. Supreme Court review of state court judgments that turn on federal issues where the state court ruled against the federal claimant.[39]

It soon became apparent that debates over the scope of federal judicial power would persist,[40] but neither side managed to prevail consistently. The Federalists held power in the early years of the republic, but they lost the 1800 election on both the presidential and congressional levels. Before leaving office, the outgoing Federalist Congress expanded

33. U.S. CONST. art. III, § 1; *see* JULIUS GOEBEL JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 196-250 (Stanley Katz ed., 2009) (discussing the background of Article III).

34. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 7 (1973) (explaining how "ardent pro-Constitutionalists" insisted that "all original jurisdiction . . . be vested entirely in the courts of the state"); FALLON ET AL., *supra* note 12, at 7-8 (highlighting Rutledge and Madison's disagreement over creating a system of lower federal courts).

35. For a discussion of the debates between the two across a range of issues, *see* DAN T. COENEN, THE STORY OF THE FEDERALIST: HOW MADISON AND HAMILTON RECONCEIVED AMERICA (2007). Coenen focuses on the Federalist papers, written in support of a strong federal state. For an introduction to the anti-federalist view, *see* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION (Herbert Storing ed., 1985).

36. U.S. CONST. art. III, § 1.

37. Judiciary Act of 1789, ch. 20, §§ 2-4, 1 Stat. 73, 73-75. For a discussion of the background of this statute, *see* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515 (2005) (noting the persistence of sharp disputes over the role of federal courts).

38. Judiciary Act of 1789, § 9.

39. *Id.* § 25.

40. *See* Alison LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205, 215-16 (2012) ("One of the central points of disagreement concerning the jurisdiction of the lower federal courts in the early Republic was the structural relationship between the judicial and legislative powers of the United States.").

federal jurisdiction to the outer boundaries of Article III,[41] only to have the statute repealed shortly afterward by a new congressional majority that favored stronger state governments.[42] In 1812, the Supreme Court curbed federal judicial power by holding that the federal courts could not "exercise a common law jurisdiction in criminal cases,"[43] thus leaving most criminal law to the state courts. In 1816, the Court took a different tack, upholding its authority to review state court judgments in *Martin v. Hunter's Lessee*.[44] In the course of *Hunter's Lessee*'s opinion, Justice Joseph Story identified several policies served by Supreme Court review, including concern "that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct . . . the regular administration of justice,"[45] "the importance, and even necessity of *uniformity* of decisions throughout the whole United States,"[46] and providing access to a federal forum.[47]

Several years later, in *Osborn v. Bank of the United States*, the Court broadly construed the Article III "arising under" jurisdiction of the federal courts.[48] Writing for the Court in *Osborn*, Chief Justice John Marshall set forth principles that have since guided U.S. judicial federalism. Chief Justice Marshall asserted that "the legislative, executive, and judicial powers, of every well-constructed government, are co-extensive with each other."[49] It follows that "[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws."[50] Any case that contained a federal "ingredient," which means a federal element that

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41. *Id.* at 207 n.4 (referring to the passage of An Act to Provide for the More Convenient Organization of the Courts of the United States, § 11, 2 Stat. 89 (1801), otherwise known as the Judiciary Act of 1801). *Id.* at 208, 212.

42. *See* FALLON ET AL., *supra* note 12, at 26-27 (discussing how "incoming Jeffersonians . . . repealed [the Judiciary Act of 1801]").

43. United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812); *see also* United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816) (ruling as in *Hudson*, but noting a "difference of opinion . . . still exists, among the members of the court").

44. 14 U.S. (1 Wheat.) 304 (1816); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (upholding Supreme Court authority to hear appeals from state criminal convictions).

45. *Martin*, 14 U.S. at 347.

46. *Id.* at 347-48.

47. *See id.* at 348-49 (emphasizing that access to federal court, namely federal removal, helps prevent the scenario where a "plaintiff . . . always elect[s] the state court" to deprive a defendant "of all the security which the constitution intended in aid of his rights").

48. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

49. *Id.* at 818.

50. *Id.* at 818-19.

may or may not be at issue in the litigation, passes Article III muster for federal jurisdiction.[51]

Osborn permits, but does not require, expansive federal jurisdiction. Exercising its Article III powers, Congress has generally made federal courts available "for vindication of those interests which, because the Congress has considered them of national importance, have become the subject of the federal substantive law."[52] Article III and *Osborn* laid the foundation for a complex body of jurisdictional law. Congress and the Supreme Court have developed a jurisdictional system in which virtually every case that turns on federal law can either be brought in the lower federal courts or reviewed by the Supreme Court. State courts, however, also have a significant role in adjudicating federal issues. When the federal issue arises as a defense to a state law claim, or as an element in a state case, it will typically be decided by a state court, not by a lower federal court.[53] The Supreme Court may review a state judgment that presents a federal issue, but not if the state ruling rests on "adequate and independent" state grounds.[54]

Overall, the important takeaways from this history are that (1) the United States has had a network of lower federal courts since 1789; (2) ongoing competition between federal and state judicial power has resulted in a division of authority, not complete domination by either; (3) federal courts possess the means to control the content of federal law, but state courts also have a role in adjudicating federal issues; and (4) the Supreme Court may review any state court judgment that depends on federal law. Taken together, these features sharply distinguish the U.S. system of judicial federalism from that of the EU.

B. Preliminary Rulings by the ECJ

The European Union judiciary is smaller and weaker than the federal judiciary in the United States.[55] Unlike the nation-wide system of federal courts in the United States, there is no network of lower EU courts. Article

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51. *See* Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824) (decided along with *Osborn*); LaCroix, *supra* note 40, at 227-28 (describing the facts and disposition of *Planters' Bank* and *Osborn*); *infra* Section III.A (discussing *Osborn* in more detail).

52. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 238 (1948).

53. *See, e.g.*, Gunn v. Minton, 568 U.S. 251 (2013) (federal element in state cause of action); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (federal defense).

54. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

55. For a comprehensive description of the system, *see* LMG, *supra* note 9, at 13-47.

19 of the TEU provides that "[t]he Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts."[56] The only specialized court yet created is a "civil service court," which decides disputes between the EU and its own employees. The General Court's main role is to review decisions by the European Commission, a powerful administrative agency that enforces competition law (i.e., antitrust law).[57] The highest court, the European Court of Justice, consists of one Justice from each member state typically chosen by the government of the member state.[58] Justices serve for six-year terms and may be reappointed. According to the TEU, the role of the ECJ is to "ensure that in the interpretation and application of the Treaties the law is observed."[59] The ECJ has original jurisdiction over suits involving member states as plaintiffs or defendants.[60] As plaintiffs, the member states sue EU institutions, claiming that they have overstepped their bounds under the treaties. As defendants, the member states are sued by the Commission, on the ground that the member state is liable for "infringement" of its obligations under the treaties.[61] In addition, the ECJ exercises appellate review over rulings by the General Court.

None of these three EU courts hears appeals from member state courts. The TFEU sets up a different process for the ECJ to resolve issues of EU law that arise in the member state courts. Article 267 of the TFEU provides that "any court or tribunal of a Member State . . . may, if it considers that a decision on [a question of EU law] is necessary to enable it to give judgment, request the Court to give a ruling thereon."[62] If the EU issue arises in litigation in a member state court "against whose decisions there is no judicial remedy under national law," the Treaty states that the court "shall" make a reference.[63] According to the CJEU, this language

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56. TEU, *supra* note 26, art. 19; *see* KOEN LENAERTS & PIET VAN NUFFEL, EUROPEAN UNION LAW 523-38 (Robert Bray & Nathan Cambien eds., 3d ed. 2011) (detailing the CJEU's purpose and establishment, jurisdiction, composition, procedure, and internal organization).

57. For descriptions of the work of the European Commission, *see* LENAERTS & VAN NUFFEL, *supra* note 56, at 505-22; DICK LEONARD, GUIDE TO THE EUROPEAN UNION 47-53 (9th ed. 2005).

58. *See* GOEBEL ET AL., *supra* note 30, at 55 ("The Court of Justice consists of one Judge designated by each Member state . . . .").

59. TEU, *supra* note 26, art. 19.

60. LENAERTS & VAN NUFFEL, *supra* note 56, at 527.

61. TFEU, *supra* note 4, arts. 258-59, at 160-61; *see* GOEBEL, ET AL., *supra* note 30, at 91-114 (examining Commission enforcement proceedings against member states).

62. TFEU, *supra* note 4, art. 267.

63. *Id.*; LMG, *supra* note 9, at 48, 94.

makes the reference mandatory.[64] More than half of the ECJ's business consists of ruling on these "preliminary references" from member state courts.[65]

The decision on whether to refer is for the member state court alone,[66] "whether or not the parties to the main proceedings have expressed the wish that it do so."[67] The content of the question, however, is not solely for the member state court to determine. The ECJ may reformulate the question if, in its judgment, the question is "imprecise or confused."[68] It may decline to answer questions that, in its judgment, "are not articulated clearly enough for it to be able to give any meaningful response."[69] The Court will not answer hypothetical questions, but it also holds that "questions concerning European Union law enjoy a presumption of relevance," such that "the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of

64. *See* Joined Cases 35 & 36/82, Morson & Jhanjan v. Netherlands, 1982 E.C.R. 3723, 3734 ("[T]he third paragraph of [TFEU Article 267] provides that where any such question is raised before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the court.").

65. GOEBEL ET AL., *supra* note 30, at 67.

66. *See* LMG, *supra* note 9, at 65 ("From the text of Art. 267 TFEU it follows that only the national court is entitled to apply to the Court of Justice for a preliminary ruling."). Although uncommon, issues may arise as to whether a given member state body qualifies as a court. *Id.* at 52 ("Generally, the expression 'court or tribunal of a Member State does not raise any difficulties."). For example, the ECJ distinguishes between investigating magistrates, who may refer, and prosecutors, who may not. *See* GOEBEL ET AL., *supra* note 30, at 82-83 (discussing Case 14/86, Pretore di Salò v. Persons Unknown, 1987 E.C.R. 2565, and Joined Cases C-74 & 129/95, Procura della Republica v. X, 1996 E.C.R. I-6609).

67. GOEBEL ET AL., *supra* note 30, at 69-70 (quoting *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 2012 O.J. (C 338) 1, 2).

68. GOEBEL ET AL., *supra* note 30, at 73 ("From its earliest judgments, the Court [of Justice] has followed two policies intended to facilitate the effectiveness of the preliminary ruling procedure: first, granting the referring court or tribunal maximum discretion concerning when to refer questions, . . . and secondly, reformulating the questions if they are imprecise or confused."); *see, e.g.*, Case C-384/08, Attanasio Grp. Srl v. Comune di Carbongnano, 2010 E.C.R. I-2059, 2066 ("[I]f questions have been improperly formulated or go beyond the scope of the powers conferred on the Court by Article 267 TFEU, the Court is free to extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EU law requiring an interpretation having regard to the subject-matter of the dispute." (citing Case 83/78, Pigs Mktg. Bd. v. Redmond, 1978 E.C.R. 2347, 2366)); *see also* Urška Šadl & Anna Wallerman, *'The Referring Court Asks, in Essence': Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-making Approach?*, 25 EUR. L.J. 416 (2019) (discussing several reasons why the ECJ reformulates questions).

69. GOEBEL ET AL., *supra* note 30, at 73; *see, e.g.*, Case 14/86, Pretore di Saló v. Persons Unknown, 1987 E.C.R. 2565.

European Union law that is sought is unrelated to the actual facts of the main action or its purpose."[70] The ECJ does not resolve issues of fact or of member state law.[71] It is up to the member state court to decide how to apply the ECJ's answer.[72]

In some respects, preliminary reference resembles the certification process in U.S. judicial federalism. Federal courts certify unsettled state law questions to the state supreme court. The reason federal courts do this is that any answer they may give will be tentative since only the state courts possess the authority to resolve state law issues.[73] Nearly every state has enacted a statute that allows a federal court to send questions of state law to the state Supreme Court.[74] Certification enables federal courts to obtain authoritative answers to state law questions, but it has not escaped criticism, and some of these criticisms apply to preliminary reference as well. Both certification and preliminary reference lead to delays in adjudicating disputes.[75] Preliminary reference, however, raises a distinct set of objections because it has greater practical importance for the development and implementation of EU law than the role of certification in the state law context. Certification is an occasional practice and a discretionary one. It is triggered when a federal court happens to encounter an unsettled state law issue, as it does in certain cases within its diversity jurisdiction, or in cases challenging a state practice on federal grounds and the federal issue can be avoided or altered depending on the answer to the state law issue. It concerns state law issues that are of interest primarily to the particular state. Most of state law is adjudicated by more conventional means, in the courts of that state. Preliminary reference is the sole means

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70. Case C-225/09, Jakubowska v. Maneggia, 2010 E.C.R. I-12333, I-12345-46; *see* LMG, *supra* note 9, at 87 (elaborating on the Court of Justice's "well known formula" regarding this presumption of relevance and the instances where the Court may refuse to rule on questions referred by national courts).

71. GOEBEL ET AL., *supra* note 30, at 70 (citing *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 2012 O.J. (C 338) 1, 2); *see, e.g.*, Case 38/77, Enka v. Inspecteur der Invoerrechten en Accijnzen, 1977 E.C.R. 2204, 2213.

72. *See* LMG, *supra* note 9, at 242 ("Naturally, it falls in any event to the national court to dispose of the case. . . . [T]he [Court's] judgment . . . is always 'preliminary'. . . .").

73. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

74. *See* FALLON ET AL., *supra* note 12, at 1116 ("In the decades since Pullman, nearly all states have adopted procedures that permit federal courts, while retaining jurisdiction of a case, to certify uncertain state law issues to the state's supreme court for authoritative resolution.").

75. *See id.* at 1118 ("Presumably based on his experience on the First Circuit, Judge Selya complains that certification "frequently adds time and expense to litigation that is already overlong and overly expensive" without achieving its intended purposes."); GOEBEL ET AL., *supra* note 30, at 71 ("Despite its benefits, the preliminary reference mechanism has a major disadvantage, the delay in awaiting the Court's response . . . .").

by which the ECJ rules on issues of EU law that come up in member state litigation, even though EU policies apply throughout the Union.

C. Problems with the Preliminary Reference System

In the early years of the European Economic Community, as it was then called, the role of preliminary references was unclear.[76] Under traditional principles of international law, EU law would be derived from the treaty[77] and would consist of a set of rules that related solely to relations between the member states and relations between member states and EU institutions,[78] not to disputes involving private persons.[79] Morten Rasmussen notes that "using the preliminary reference system as a mechanism of European law enforcement at the hands of private litigants and their advocates . . . had not been part of the treaty design."[80] This view was supported by a literal interpretation of the ECC Treaty, "in combination with the long established interpretive principle according to which transfers of sovereignty are to be interpreted narrowly."[81] When treaty obligations are understood in this way, there may be only occasional need for member state courts to seek preliminary references. No reference was made from the inception of the organization until 1962.[82]

Very soon, however, the role of EU law in litigation in member state courts increased considerably. The leading case is *Van Gend en Loos v.*

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76. *See* Morten Rasmussen, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, 12 INT'L J. CONST. L. 136, 146 n.56 (2014) ("It was by no means clear how the preliminary reference mechanism would be used. Not even the judges of the EEC seemed to agree.").

77. *See* G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 596 (1989) ("[T]he instrument giving rise to the Community was a traditional multilateral *treaty*.").

78. For an early illustration of the ECJ's rejection of this line of reasoning, *see* Joined Cases 90 & 91/63, Comm'n v. Luxembourg & Belgium, 1964 E.C.R. 626; *see* GOEBEL ET AL., *supra* note 30, at 92-93.

79. The Court rejected this proposition when it adopted the "direct effect" doctrine in Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 2. *See also* GOEBEL ET AL., *supra* note 30, at 117.

80. M. Rasmussen, *supra* note 76, at 156.

81. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING 12 (1986).

82. *See* M. Rasmussen, *supra* note 76, at 146-51 (tracing the origins of resort to the preliminary reference process); Karin van Leeuwen, *Paving the Road to "Legal Revolution": The Dutch Origins of the First Preliminary References in European Law (1957-1963)*, 24 EUR. L.J. 408, 410 (2018) (noting that "the use of the procedure . . . was all but self-evident" and the "occasion . . . allegedly was celebrated with champagne in Luxembourg").

Nederlandse Administratie der Belastingen[83] where the ECJ recognized the "direct effect" of EU law.[84] The direct effect doctrine holds that EU treaty obligations may apply not only to relations among governments, but also to ordinary litigation in the member state courts, involving government regulation of persons and businesses.[85] As Morten Rasmussen puts it, "[t]he judgment constituted at the most fundamental level an attempt to differentiate European law from what was perceived as traditional international public law."[86] The Court's adoption of the direct effect doctrine greatly expanded the potential universe of cases in which member state courts apply EU law.[87] That potential was realized in the ensuing decades. Over time, the number of preliminary references has exploded, and the preliminary reference is increasingly inadequate to the task of maintaining ECJ control over the content and application of EU law.

The key objection to preliminary reference is that it is not aligned with the EU's current needs. The preliminary reference "was and still is designed as an international law procedure . . . [which] takes place primarily between institutions and states."[88] Over the course of time, *Van Gend en Loos* shifted the focus of litigation over EU law. "The current disputes . . . are increasingly concerned with not just adjudicating disputes *between* Member States, but more and more *within* the Member States."[89]

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83. Case 26/62, 1963 E.C.R. 2; *see* Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 3 (1981) (discussing *Van Gend en Loos*).

84. *See* H. RASMUSSEN, *supra* note 81, at 11-12 (discussing the judge-made direct effect doctrine arising from *Van Gen den Loos*); T C HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 209 (7th ed. 2010) (describing *Van Gend en Loos* as "one of the most important judgments ever handed down by the Court").

85. *See* LENAERTS & VAN NUFFEL, *supra* note 56, at 809 ("Ever since the 1963 judgment in *Van Gend & Loos*, it is clear that individuals may derive rights directly from Union . . . law."); J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991) (noting how Community law "operates not only in creating enforceable legal obligations between the member states and individuals, but also among individuals *inter se*").

86. M. Rasmussen, *supra* note 76, at 155.

87. *See* Leeuwen, *supra* note 82, at 408-09 (explaining how *Van Gend en Loos* "was used by the ECJ to transform the preliminary reference mechanism into a route for private litigants to challenge national policies via EEC law"); Weiler, *supra* note 85, at 2414 ("In practice direct effect meant that member states violating their Community obligations could not shift the locus of dispute to the interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individuals within their own legal order.").

88. Michal Bobek, *The Court of Justice, the National Courts, and the Spirit of Cooperation: Between* Dichtung *and* Warheit, *in* RESEARCH HANDBOOK ON EU INSTITUTIONAL LAW 353, 358 (A. Lazowski & S. Blockmans eds., 2016) [hereinafter *Spirit of Cooperation*].

89. *Id.*

Contrary to *Osborn*'s norm, preliminary reference does not furnish the EU with "the means of expounding, as well as enforcing, [its] own laws."[90] To a large extent, the EU suffers from that very deficiency. This is so for multiple reasons. First, answering questions may serve the "expounding" role, but does nothing on the enforcement side. Second, absent EU authority to find facts, to review fact finding, or at least to review the application of law to fact, EU norms can easily be discounted by recalcitrant member state courts. Third, member state courts, not litigants, control the reference process and may simply decline to refer. Fourth, if member state courts do not refer, the ECJ lacks means to enforce sanctions against them. Fifth, the precedential force of preliminary rulings in later litigation may be limited and cannot be enforced.

1. Answering Questions vs. Adjudicating Disputes

Preliminary reference separates litigation over EU law into two parts. The member state court adjudicates most of the dispute and the ECJ answers questions of EU law. It is unclear whether the ECJ can effectively expound and enforce EU law, or inspire allegiance to EU judicial institutions, by answering questions rather than by directly adjudicating at trial or on appeal. Thus, "[t]he type of cooperation instituted by the preliminary rulings procedure has as its consequence a certain dissociation between the individual case and the decision of the Court."[91] Part of the problem is that the questions are formulated by the member state judge, not the parties.[92] But the judge—whose training and experience are mainly in the law of the member state—may not be as well-versed in EU law as the parties and the questions may not be well-framed.[93] When the dispute moves to the ECJ, the parties have only a secondary role in the ensuing ECJ proceedings. Though "[t]he parties to the original case are naturally entitled to submit observations . . . it is the Member States and the EU institutions that are the chief players."[94]

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90. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824).

91. *Spirit of Cooperation*, *supra* note 88, at 361.

92. *See* LMG, *supra* note 9, at 69 ("Certainly, the parties to the main proceedings are at liberty to make proposals, but it is the Judge alone who determines whether he or she accepts them wholly or in part or completely deviates from them.").

93. *See id.* at 69-70 (describing how the Court of Justice may reformulate questions referred by national courts).

94. Michal Bobek, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Reference Procedure*, 10 EUR. CONST. L. REV. 54, 78 (2014).

Certain features of U.S. public law litigation suggest that this approach may not work as well as a party-centered method for resolving disputes. For example, the law on "standing to sue" in the U.S. federal courts emphasizes the value of the adversarial presentation of issues. The rationale is that litigants, who have a "personal stake in the outcome," may be better suited to argue effectively for their respective positions.[95] The U.S. Supreme Court requires this "personal stake" because it "enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance."[96] Preliminary reference attenuates the link between the litigants and the dispute.

Since the "chief players" in the preliminary reference process are not the litigants, but rather the member states and EU institutions, the views of these institutional participants may receive more weight than they deserve. Because the EU issue has been severed from the rest of the litigation, the ECJ may pay too little attention to the underlying dispute. Neither the institutions nor the ECJ may fully grasp the practical significance of its ruling. The member state judge "may wonder whether the Court has . . . genuinely thought through the consequences, impact and the potential life of its case law in [member state] courts."[97] The problem is not just that the ECJ ruling may be "difficult to follow."[98] Over time, "[i]f the norm-setting authority keeps enacting rules which are, for whatever reason, not able to regulate social reality to any reasonable degree, it becomes irrelevant and consequently may be perceived as illegitimate."[99]

Besides the impact on particular EU policies, severing the issue of EU law from the underlying litigation interferes with the broader goal of further European integration.[100] The "question-answering" approach signals to litigants and others that the ECJ's role is only "to provide general guidance on matters of EU law."[101] Even if the member state court decides that the ECJ's answer is decisive for the particular case, the ultimate decision will have been made by the member state court. In this way, the preliminary reference process assures that both the credit and the blame

95. Flast v. Cohen, 392 U.S. 83, 99 (1968).

96. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

97. *Spirit of Cooperation*, *supra* note 88, at 373.

98. *Id.*

99. *Id.* at 375.

100. *See* TEU, *supra* note 26, art. 1 (noting the EU's objective to create "an ever closer union").

101. *Spirit of Cooperation*, *supra* note 88, at 361.

for ultimate decisions belongs to the member state court that adjudicates the claim. That court, and not the ECJ, will be viewed as the institution that is primarily responsible for administering the law, with the ECJ merely providing answers (of varying utility) to specific questions.

2. Fact Finding and the Application of Law to Fact

Effective enforcement of a legal norm hinges on findings of fact and the application of law to fact. Sometimes fact finding and application of law to fact are uncontroversial. Not always, though. Especially in close cases that call for discretionary judgments, the enforcement of a legal norm depends on the talent and sympathy of the judges who find the facts and apply the norm to the facts. Hostile, indifferent, mediocre, or inexperienced judges may formally respect the norm, but subvert the policy behind it, either deliberately or unintentionally, by distorted fact findings or applications of law to fact. A recurrent theme in U.S. judicial federalism is that federal courts will typically apply federal law more effectively than state courts.[102] Acting on this premise, the U.S. Congress and the Supreme Court have often granted original jurisdiction over federal law to the network of lower federal courts, especially when federal policy conflicted with that of the states. That option is not available in the European Union since there is no network of lower courts.

The preliminary reference assigns the important tasks of fact finding and application of law to fact exclusively to the member state courts.[103] A rough U.S. analogue is the enforcement of federal law by the state courts. But the analogy serves only to highlight a weakness of the EU's approach, at least from the perspective of achieving greater integration. The critical difference between the U.S. and EU systems is that, in the United States, the Supreme Court is not limited to ruling on abstract matters of federal law. The Court may review the record to assure that the evidence supports the state court's conclusions and overturn findings of fact that are not sufficiently supported by the record.[104] Having remanded a case to state

102. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (criticizing the assumption "that federal and state trial courts are equally competent forums for the enforcement of federal constitutional rights").

103. *See* LMG, *supra* note 9, at 233-34, 242 (discussing the national court's jurisdiction in the context of preliminary references and how the ECJ does not rule on facts or points of national law).

104. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 284-85 (1964) ("[W]e deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in

court, the Court may later review the state court's application of federal law. Even if the state court rests its holding on a state law ground, the U.S. Supreme Court may review the judgment to determine whether the state ground is adequate to support the judgment.[105]

Osborn recognized the value of federal court fact-finding in implementing federal policy.[106] U.S. Supreme Court appellate review of state judgments rests on the principle that enforcement of federal law requires oversight of the judges who find facts and apply law to fact.[107] The Supreme Court may reverse the judgment, give directions for further proceedings, and impose sanctions on state court judges if they defy its mandates.[108] In the European Union, however, the preliminary reference process begins and ends the ECJ's involvement in the case. Having answered the question presented to it, the ECJ has no authority to oversee the implementation of its ruling.[109]

3. Failure to Refer

If the decision whether to make a preliminary reference were for the parties, one could count on references of any issues that might provide a party ammunition for his or her side of the case. But the decision to refer is exclusively for the member state court.[110] Under TFEU Article 267, reference is optional for most member state courts other than courts of last resort. A busy member state court, whose "chief interest . . . is to do its own job properly: to deliver a decent decision within reasonable time and,

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proper cases review the evidence to make certain that those principles have been constitutionally applied."); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232-38 (1985) (discussing the "vexing" distinction between questions of law and those of fact).

105. *See* Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1919 (2003) (advocating "the Supreme Court has ancillary jurisdiction to review state-court determinations of state law in [certain] cases" and rejecting criticism thereof).

106. *See supra* notes 48-54 and accompanying text (discussing the benefits of a strong federal judiciary as espoused by *Osborn*).

107. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. . . . [T]he exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.").

108. *See* FALLON ET AL., *supra* note 12, at 476-77 (discussing the Supreme Court's authority in light of a state court judgment contrary to federal law).

109. *See* BROBERG & FENGER, *supra* note 15.

110. *See* LMG, *supra* note 9, at 52 ("[T]he initiative of referring the question must emanate from 'a court or tribunal . . . of a Member State . . . .").

if possible, with minimal effort" may not invest the time and energy needed to refer many questions.[111] At the lower court level, then, issues of EU law will routinely be adjudicated with no opportunity for ECJ or other EU court review. Member state control over references is an important reason why the ECJ lacks control over the content and application of EU law.

Article 267 makes preliminary reference mandatory when the EU issue arises in litigation before a member state court from which there is no recourse within the member state judicial system.[112] This means that the member state constitutional courts, including the GFCC, do not have a choice.[113] But an exception to this rule permits member state courts to avoid preliminary reference without flatly ignoring Article 267. Under the *acte clair* doctrine, announced in *SRL CILFIT v. Ministry of Health*, "the correct application of [Union] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."[114] According to the ECJ in *CILFIT*, its own prior rulings "may deprive the [referral] obligation of its purpose [i.e., resolving an EU issue] and thus empty it of its substance."[115] Under *CILFIT*, if the member state court determines that EU law is clear, it is relieved of its duty to refer the issue. *CILFIT*'s *acte clair* doctrine gives the member state courts considerable room to maneuver without necessarily violating Article 267 because *CILFIT* may apply "even though the questions at issue are not strictly identical."[116] Furthermore, *acte clair* does not depend on whether the ECJ has ruled on an issue, so long as "the correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt."[117] Thus, the application of this exception to Article 267 depends on the extent to which member state courts decide that their preferred reading of EU law is sufficiently obvious. One need not disparage the good

111. *Spirit of Cooperation*, *supra* note 88, at 371.

112. *See* TFEU, *supra* note 4 ("Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.").

113. *See* LMG, *supra* note 9, at 94 ("[T]he highest [national courts] . . . are under a general duty to make a preliminary reference . . . .").

114. LMG, *supra* note 9, at 99 (quoting Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3417, 3430); *see also* GOEBEL ET AL., *supra* note 30, at 79 (explaining the *acte clair* doctrine "essentially means that when a court or tribunal is convinced that it knows how to properly interpret and apply the Treaty or other rules of Community, it may properly do so").

115. Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415, 3429.

116. *Id.*

117. *Id.* at 3430.

faith of member state judges in order to doubt whether this principle will always be applied in a rigorous fashion.[118]

The ECJ can determine the content and application of EU law only when member state courts refer questions to it. Michal Bobek demonstrates that strict application of the *CILFIT* criteria would result in many more references than at present. In his view, "the number of requests for preliminary rulings . . . would not stand roughly in the realm of several hundred as at preset, but there would be several more zeros at the end of that figure," while in practice, "the CILFIT requirements today are considerably diverging from reality in the member states."[119] Emboldened by the *acte clair* doctrine, some member state judiciaries make far fewer references per capita than others. Many EU member states include in their judiciaries a "constitutional court," with jurisdiction over issues of fundamental law. As of 2015, "[o]ut of 18 Constitutional Courts in the EU, only 9 [had] resorted to preliminary reference."[120] The French Constitutional Council had made just one reference in the sixty-year history of the European Union.[121] The failure to refer is not limited to constitutional courts. One study found that between 1998 and 2008, the per capita rate of referrals was ten times as great from Austria as from France and almost six times as great from Belgium as from Spain.[122] A recent update of the data finds similar differences in the period from 2009 to 2019.[123] Michal Bobek estimates that, in a given year, EU law applies in "several millions of cases in all the courts of member states and tens of thousands of decisions in courts of last instance."[124] Yet the number of

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118. *See, e.g.*, Alexander Kornezov, *The New Format of the Acte Clair Doctrine and Its Consequences*, 53 COMMON MKT. L. REV. 1317, 1317-18 (2016) (asserting that this doctrine "was seen by some as a convenient general waiver which freed national courts of last instance from the obligation to make references to Luxembourg in the majority of cases").

119. Michal Bobek, *Institutional Report*, *in* NATIONAL COURTS AND THE ENFORCEMENT OF EU LAW: THE PIVOTAL ROLE OF NATIONAL COURTS IN THE EU LEGAL ORDER, *supra* note 19, at 89.

120. Maria Dicosola, Cristina Fasone & Irene Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis,* 16 GERMAN L. REV. 1317, 1318 (2015).

121. *See* François-Xavier Millet, *How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195, 195-96 (2014) ("[T]he first preliminary reference of the Constitutional Council to the ECJ, which occurred on April 4, 2013 in the *Jeremy F.* case, came as a surprise.") (footnote omitted).

122. BROBERG & FENGER, *supra* note 15, at 38 tbl.2.2a.

123. Memorandum from Anna Marie Whitacre, Rsch. Assistant, U. Ga. Sch. L. (July 9, 2020) (on file with author).

124. Michal Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF

referrals is well under a thousand.[125] The result is a large body of member state case law that includes unreviewable rulings on EU law, or that wholly ignores relevant EU law. The absence of both lower EU courts and ECJ appellate review means that, as a practical matter, the member state courts are largely unaccountable for these rulings. Current preliminary reference practice does not enable the EU judiciary to maintain control over the content and application of EU law.[126]

4. Weak Sanctions

Among its other virtues, appellate review provides a means by which a superior court in a judicial hierarchy may impose a sanction for a lower court's violation of a rule. The sanction may be as subtle as a reversal, or perhaps a summary reversal without briefing or argument. A less subtle repudiation might include some unusually critical language. But the certainty of reversal is probably enough to deter most lower court judges from crossing clear lines between permissible and forbidden acts. The preliminary reference procedure does not hand the ECJ a similar tool for enforcing its rules on member state courts who break them by failing to refer or by ignoring ECJ rulings after a reference. The May 5, 2020 *Weiss* ruling by the GFCC illustrates this point.[127] The GFCC rejected the ECJ's earlier ruling on the same issue in a preliminary reference.[128] The ECJ may ignore the GFCC ruling, or even issue a statement in opposition,[129] but has no jurisdiction to directly repudiate it.

THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED 197, 211 (Maurice Adams, Johan Meeusen, Gert Straetmans & Henri de Waele eds., 2013).

125. *See Institutional Report*, *supra* note 119, at 87 (reporting a preliminary figure of 641 for 2019).

126. Michal Bobek is now an Advocate General at the Court of Justice. In that capacity, he recently proposed a reform of the CILFIT procedure, recommending that the rules be changed "to a more objective imperative of securing uniform interpretation of EU law across the European Union. In other words, the duty to refer a question for a preliminary ruling should not be focused primarily on the correct answers, but rather on identifying the right questions." Case C-561/19, Opinion of Advocate General Bobek, ECLI:EU:C:2021:291, ¶ 4 (Apr. 15, 2021).

127. *See supra* notes 1-5 and accompanying text (discussing *Weiss* case and GFCC's holding).

128. *See supra* notes 8-9 and accompanying text (explaining how GFCC's *Weiss* holding conflicts with the ECJ's).

129. *See* Sam Fleming & Martin Arnold, *EU's Top Court Reasserts Primacy After German Challenge*, FIN. TIMES (May 8, 2020), https://www.ft.com/content/894369cd-9631-43cc-8844-d6cd515e874b (reporting ECJ's statement that "the EU's legal order would be jeopardised if national courts diverged from its rulings on whether EU institutions' actions were compliant with the law").

In both the failure-to-refer context and the *Weiss* fact pattern, the absence of appellate review makes it impossible for the ECJ to enforce the referral obligation on its own initiative.[130] The available sanctions are not aimed at the member state court but at the member state itself. For example, the Treaty authorizes the European Commission to sue a member state for "infringement" of its obligations under EU law.[131] The ECJ treats failure of a court of last resort to refer and failure to follow an ECJ preliminary ruling as infringement.[132] In response to *Weiss*, the European Commission may sue Germany in the ECJ.[133] But this remedy does not directly address the German Court's ruling. Actions taken against Germany may have no impact on the German Court. Under the German conception of separation of powers, the German executive and legislature may lack authority to take such an action as well.[134] In addition, the Commission may not choose to act, for reasons unrelated to the German Court's holding. The Commission's litigation agenda may not give a high priority to this type of litigation, especially against Germany, the most powerful member state.[135] Moreover, *Weiss* is not typical, as the GFCC's defiance in that case was self-evident. In many cases it is far harder to show that the member state court has failed to follow EU rules. Perhaps

130. *See* Pavone & Kelemen, *supra* note 22, at 352-53 ("[T]he European Union lacks the coercive and bureaucratic capacity that national states use to govern from the top down. EU institutions must therefore project their authority by forging subnational 'compliance constituencies' comprised of on-the ground networks of regulators, NGOs, civic organizations, and lawyers.").

131. TFEU, *supra* note 4, art. 258-60; *see* LMG, *supra* note 9, at 159 (explaining actions for infringement of Union law by a member state "ensure the enforcement of Union law as part of the system of judicial protection enshrined in the Treaties").

132. *See* LMG, *supra* note 9, at 205-14, 244 (discussing the consequences of a judgment declaring a member state failed to fulfil its Treaty obligations including sanctions for member state non-compliance); Araceli Turmo, *A Dialogue of Unequals—The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU*, 15 EUR. CONST. L. REV. 340, 341 (2019) (discussing *CILFIT* along with "the broader issues at stake and the need for the [ECJ] to reassert its authority as the supreme court of the EU legal order as well as the obligations of national courts of last instance").

133. For other instances of the Commission filing suit with the ECJ against a member state for Union law infringement, *see, e.g.*, Case C-154/08, Commission v. Spain, 2009 E.C.R. I-187; Case C-129/00, Commission v. Italy, 2003 E.C.R. I-1467.

134. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 153-62 (1994).

135. The Commission may be influenced by factors besides the merits in determining whether to take action against a member state. *See* Arthur Dyevre & Timothy Yu-Cheong Yeung, *Disciplining Member States: Does Public Mood Influence the European Commission?*, SSRN (May 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607804 (investigating the effect of public opinion on the European Union centralized compliance monitoring system).

the *acte clair* doctrine provides arguable grounds for failure to refer. Or perhaps, in response to the ECJ's ruling on a preliminary reference, the member state court sidesteps the ECJ ruling by finding member state law that will support its judgment.

Besides an infringement case brought by the Commission, another option is a suit for damages, brought against the member state by a litigant who loses a case in the member state system, but might have won if the member state court had referred an EU issue to the ECJ.[136] This, too, is an unsatisfactory option. Disappointed litigants must clear several hurdles in order to win. They must sue the member state in the member state's court; they must show a high level of culpability on the part of the member state in connection with the failure to refer; and they must prove a causal connection between the failure to refer and his ultimate defeat in the prior litigation.[137] Few litigants succeed in these suits for damages against member states, whether they are based on "failure to refer" or other violations of EU law.[138] In addition, the relief will have no direct effect on the offender, namely, the court that ignored its referral obligation.

5. Uncertain Precedents

The ECJ asserts that a ruling in response to a preliminary reference is not limited to the case for which the reference was made. It asserts that, like the case law of a common law court, its "rulings constitute binding precedents."[139] Under this doctrine, courts across the European Union are

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136. *See, e.g.*, Case C-224/01, Köbler v. Republik Österreich, 2003 E.C.R. I-10209; *see also* LMG, *supra* note 9, at 103, 142 ("Union law requires Member States to recognize the possibility of a claim in damages against the public authorities where an infringement by a court of last resort of its obligation to make a reference for a preliminary ruling demonstrably thwarts a right conferred on individuals by Union law."); Zsófia Varga, *National Remedies in the Case of Violation of EU Law by Member State Courts*, 54 COMMON MKT. L. REV. 51 (2017) (discussing remedies available in the various member state courts).

137. *See* Wells, *supra* note 25, at 743-46 (discussing remedies for failure to refer or failure to implement the CJEU's ruling).

138. *See* Tobias Lock, *Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Frankovich*, 49 COMMON MKT. L. REV. 1675, 1700 (2012) ("Both the statistical findings and the analysis of national court decisions . . . suggest that Member State liability is not a successful means of enforcing European Union law."); *see also Spirit of Cooperation*, *supra* note 88, at 361-62 (noting that plaintiffs in prominent cases establishing the duty to compensate ultimately lost their cases).

139. GOEBEL ET AL., *supra* note 30, at 72; *see also* LMG, *supra* note 9, at 244. For a discussion of the ECJ's doctrine of precedent, *see* Mattias Derlén & Johan Lindholm, *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions*, 16 GERMAN L.J. 1073 (2015). The authors conducted an empirical study and found that "the

obliged to follow its holding. In this sense, the relationship between the ECJ and the member state courts is hierarchical with the ECJ at the top. In a more important sense, however, the supposed hierarchy may be an illusion. With no appellate review available, the preliminary reference procedure relies upon "the spirit of cooperation."[140] Michal Bobek asks: "Do national courts generally follow the case law of the Court of Justice?"[141] His "frank answer is that no one knows, at least at the overall European level."[142] Some academic studies assert that member state courts do comply, but those studies are unpersuasive, according to Bobek. They focus on the adoption of especially prominent ECJ cases by a small number of national courts. We have no answer to the more general question because "[a]s of today, there are no large-scale empirical studies which could shed any reliable light on what is the reality in application of EU law in national courts."[143]

The real-world administration of the preliminary reference process heightens the likelihood that many preliminary rulings will have no application beyond the case that gave rise to the reference. Under TFEU Article 267, the ECJ's jurisdiction over preliminary references is mandatory. This means that the ECJ decides every preliminary reference, unless the reference is defective in some way.[144] In order to manage its workload the ECJ divides the references according to their importance.[145] Comparatively minor questions go to a panel of three Justices; more important ones receive a hearing before five Justices; and only the most important cases get a "Grand Chamber" of fifteen.[146] On rare occasions the entire group of twenty-seven will hear a case.[147] The smaller panels

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greatest precedential and persuasive power of case law can be found among cases brought as preliminary rulings." *Id.* at 1087.

140. *See Spirit of Cooperation*, *supra* note 88, at 354.

141. *Id.* at 365.

142. *Id.*

143. *Id.* at 365-66.

144. A reference may be rejected if it comes from an official or body other than a "court or tribunal," within the meaning of TFEU Article 267. *See, e.g.*, Joined Cases C-74 & 129-95, Procura della Repubblica v. X, 1996 E.C.R. I-6629 (Italian prosecutor is not empowered to make references); *see also* LMG, *supra* note 9, at 52. A reference may also be rejected if the issue raised is not sufficiently relevant to the proceeding in the member state court. *See id.* at 82; GOEBEL ET AL., *supra* note 30, at 84-85.

145. *See* GOEBEL ET AL., *supra* note 30, at 56.

146. *See* LMG, *supra* note 9, at 19-20.

147. *See id.* at 19 n.46.

often respond to the question with a "reasoned order," which briefly cites earlier cases or other legal materials.[148]

III. EXPANDING THE EU JUDICIARY

Two features of U.S. judicial federalism assure compliance with *Osborn*'s maxim that "governments which are not extremely defective in their organization must possess, within themselves, the means of expounding, as well as enforcing, their own laws."[149] One is the network of lower federal courts in the United States. The other is U.S. Supreme Court review of state court judgments.[150] Both are missing from the EU's judicial system. Each of these features of U.S. federal-state relations suggests a possible reform of EU judicial institutions. This part of the Article examines the pros and cons of establishing a network of lower EU courts. Part IV discusses ECJ appellate review of member state rulings that depend on EU law.

Adherence to the U.S. model favors adoption of both of these reforms. Indeed, the second is necessary even if the first is adopted because EU issues would continue to be litigated in member state courts, just as federal issues are routinely adjudicated in state courts in the United States.[151] In addition, a group of lower federal courts would produce as much disuniformity as in the United States. Whether the lower court is state or federal, appellate review helps to achieve uniform national law.[152] The two reforms may be complementary, yet they require separate treatment because the network alternative alters the current federal-state balance in the European Union to a greater extent than appellate review. Since its federalism costs are greater, its benefits are harder to justify.

Both reforms shift the EU's version of federalism away from the current Member-State-centered version and closer to the U.S. approach to judicial federalism. As in the United States, channeling more EU judicial business to the EU courts weakens the authority of the member state judiciaries in one way or another, either by depriving them of jurisdiction

148. *See* Arthur Dyevre, Monika Glavina & Michael Ovádek, *Case Selection in the Preliminary Ruling Procedure*, AUSTRIAN J. PUB. L. (Dec. 9, 2019), https://ssrn.com/abstract=3489741.

149. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819-20 (1824).

150. *See* LaCroix, *supra* note 40, at 206.

151. For example, in the United States, state courts adjudicate federal issues that arise as defenses to state law claims.

152. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 115 n.60 (2009).

or by ECJ oversight.[153] It follows that both reforms depend on the willingness to diminish, in one way or another, the current role of member state courts for the sake of greater integration among the member states.[154] But ECJ review seems the better choice, at least for the time being, because it is less intrusive and recognize a role for member state courts in the development of EU law. As the process of integration proceeds, and the need for EU courts to adjudicate EU law becomes more pressing, the "network" alternative may become more palatable.

A. A Network of Lower EU Courts: Judicial Federalism in U.S. History

At first glance, the notion of setting up a network of lower EU courts to adjudicate EU issues seems to be the better choice because it comes closer to the goal of control of EU law in an EU judiciary, as required by the *Osborn* norm.[155] A court with original jurisdiction, or in European vocabulary, a court of "first instance,"[156] hears the witnesses, examines the evidence, decides the facts, and applies the law to the facts. This system is arguably superior not only to preliminary reference but also to appellate review.[157]

One problem with appellate review is the size of the system. In a large polity with many member state courts, like the European Union or the United States, appellate review cannot hope to provide full oversight of their rulings on federal law.[158] Even if the appellate court could review every case, that court has no firsthand knowledge of the case and can only

153. *Cf.* LaCroix, *supra* note 40, at 210 ("Marshall's and [Justice Joseph] Story's commitment to building the power of the inferior federal courts . . . stemmed from their deeply held belief that the 'judicial power of the United States' described in Article III of the Constitution represented the chief bulwark against the wayward, localist tendencies of the states.").

154. TEU, *supra* note 26, art. 1.

155. Chief Justice John Marshall and Justice Joseph Story—the strongest advocates of federal judicial power in the early 19th century U.S.—would surely agree. *See* LaCroix, *supra* note 40, at 206 ("Marshall and Story were deeply committed to the belief that the inferior federal courts were and ought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized space of the cities, towns, and countryside of the United States."); *see also id.* at 236-37 (discussing Marshall and Story's preference for original over solely appellate jurisdiction).

156. *See, e.g.*, JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 43-46 (2d ed. 2008) (describing the French criminal and civil systems of first instance).

157. *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 292 (2007) (arguing that absent a network of lower federal courts, "state courts would essentially control the meaning of federal law").

158. *See* Bobek, *supra* note 124, at 216 & n.66.

review the record of the proceedings. To a significant extent, the appellate court must defer to decisions made by the trial judge. Indeed, *Osborn* stressed this distinction between trial and appeal. Chief Justice Marshall said that a litigant with a federal claim should not "be restricted to the insecure remedy of an appeal upon an insulated point, after [the case] has received that shape which may be given to it by another tribunal."[159]

The history of judicial federalism in the United States furnishes some evidence of the role of federal courts in enforcing federal law. That history reflects persistent efforts, over a long period of time, and in a range of substantive contexts, to implement *Osborn*'s principles.[160] From the beginning of the Republic, "[e]xpanding federal judicial power to the inferior federal courts . . . [has] long been a crucial element of the Federalists' project of ensuring national supremacy . . . ."[161] Throughout U.S. history, federal judicial power has grown in tandem with federal legislative and executive power. The process was always resisted by advocates of state authority, the so-called "anti-federalists" of the 1780s and their descendants. Though *Osborn*, decided in 1824, set the stage for development of a strong federal judiciary,[162] many decades passed before Congress and the Supreme Court substantially implemented *Osborn*'s principles.

1. Federal Courts in the Pre-Civil War Era

Before the 1861-65 Civil War, federal courts were mainly concerned with diversity jurisdiction, in which the litigants were citizens of different states and the issues involved state law. The corpus of federal law was small and there was no general federal question jurisdiction during virtually this entire period.[163] Many federal constitutional provisions did not apply to the states at all.[164] Even in this period, however, several episodes illustrate the special role of federal courts in enforcing federal law:

- In the Judiciary Act of 1789, Congress granted the lower federal courts jurisdiction over suits brought by the United

159. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (1824).

160. *See* FALLON ET AL., *supra* note 12, at 779; *see also* PETER HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY (2016).

161. LaCroix, *supra* note 40, at 207.

162. *See id.* at 226-35 (discussing *Osborn* and its background).

163. *See* FALLON ET AL., *supra* note 12, at 779-81.

164. *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights only applies to the national government).

States,[165] federal criminal cases,[166] admiralty cases,[167] "suits against consuls and vice-consuls,"[168] and petitions for writs of habeas corpus.[169] The jurisdiction over federal crimes and admiralty was "exclusive," meaning that the state courts could not adjudicate those cases.

- In 1801, an outgoing federalist majority in Congress enacted general federal question jurisdiction, though the statute was quickly repealed by the new majority in 1802.[170]
- More targeted efforts to use federal courts to protect federal policies were more enduring. For example, a nineteenth century statute permitted certain federal officers to remove cases brought against them from state to federal court, at least if the officer asserted a federal defense.[171]

Osborn and a companion case, *Bank of the United States v. Planter's Bank of Georgia*,[172] illustrate a related theme. Early in U.S. history, Congress established the First Bank of the United States in order to facilitate government borrowing, tax collection, and the "augmentation of the active or productive capital."[173] This was a controversial exercise of federal power because the Bank displaced state control of the financial system and no constitutional provision explicitly authorized a national bank.[174] In *Osborn*, for example, Ohio officials had entered a branch of the Bank by force and had taken $100,000 that, according to the state, the Bank owed in taxes. In the companion case, Planter's Bank had declined to pay the

165. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73.

166. *Id.* §§ 9, 11.

167. *Id.* § 9.

168. *Id.* The statute also gives lower federal courts jurisdiction over "diversity" cases, which mainly consist of suits between citizens of different states, in which the issues are governed by state law. *See id.* § 11.

169. *Id.* § 14.

170. FALLON ET AL., *supra* note 12, at 780-81; *see* LaCroix, *supra* note 40, at 207-08 (discussing this episode).

171. 28 U.S.C. § 1442 (derived from Act March 3, 1875, c. 130, § 8, 18 Stat. 401; Feb. 8, 1894, c. 25, § 1, 28 Stat. 36); *see* Tennessee v. Davis, 100 U.S. 257 (1880) (upholding the federal-officer removal statute); *see also* FALLON ET AL., *supra* note 12, at 27-28 (discussing other pre-Civil War episodes, "a series of collisions between federal and state authority [which] provoked Congress to extend federal jurisdiction to meet threats to federal interests").

172. 22 U.S. (9 Wheat.) 904 (1824).

173. FELDMAN & SULLIVAN, *supra* note 28, at 89.

174. The Court upheld the creation of the bank as an exercise of Congress's Article I power to take steps "necessary and proper" to achieve its other Article I powers. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

Bank of the United States money owed under promissory notes Planter's Bank had issued. These episodes help to explain the Court's broad holding, that Congress may grant federal jurisdiction whenever a case contains a federal "ingredient," whether or not the federal ingredient is at issue in the litigation. That holding is often understood as a means of protecting the bank from hostile state courts by guaranteeing that federal lower court jurisdiction would be available for virtually any litigation involving the bank.[175] As Justice Johnson acknowledged in his dissent in *Osborn*, "a state of things [had] now grown up, in some of the States, which renders all the protection necessary, that the general government can give to this Bank."[176]

2. The Civil War, the Union Victory, and its Aftermath

More than four decades after *Osborn*, victory over the secessionist Confederacy boosted the strength of the national government and transformed American federalism.[177] This spurred a radical shift in the role of the federal courts. Nationalist legislators, now in control of Congress, altered both the substantive law of federal-state relations and the balance between the roles of federal and state courts.[178] The Thirteenth Amendment to the Constitution, enacted in 1865, abolished slavery.[179] The Fourteenth, enacted in 1868, imposed new substantive constitutional limits on state authority, obliging them to accord all persons "equal protection of the laws," and forbidding them from depriving persons of life, liberty, or property without "due process of law."[180] Two years later, the Fifteenth stopped states from denying the right to vote on account of race.[181] Congress expanded federal power by enacting "a compendious

175. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting); *see also* FALLON ET AL., *supra* note 12, at 800, 801-02.

176. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 871-72 (1824) (Johnson, J., dissenting).

177. *See* Henry J. Friendly, *Federalism: A Foreword*, 88 YALE L.J. 1019, 1021 (1977) ("The watershed was the war between the states, the adoption of the three Reconstruction amendments, especially the Fourteenth, and enactment of the various civil rights acts with jurisdiction in the federal courts to enforce them.") (footnote omitted).

178. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 57 (1928) ("The supremacy of national authority, the extension of federal activities, the resort to federal agencies, were vindicated both in theory and practice to the mind of the dominant North.").

179. U.S. CONST. amend. XIII.

180. *Id.* amend. XIV, § 1.

181. *Id.* amend. XV.

series of statutes extending the jurisdiction of the federal courts."[182] In 1867, it expanded state prisoners' access to federal habeas corpus review of their convictions,[183] and in 1871 it authorized federal suits against state officers for constitutional violations.[184]

In 1875, Congress went a step further. It replaced the old piecemeal approach to federal jurisdiction with general "federal question" jurisdiction over cases "arising under" federal law.[185] The federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[186] When uniformity, expertise, and hospitality to federal claims are especially important, Congress has made federal jurisdiction exclusive of the state courts.[187] Although sensitive issues of federalism arise when federal law collides with state policy, the post-Civil War Supreme Court guaranteed federal court enforcement of the Fourteenth Amendment.[188] The landmark case is *Ex parte Young*,[189] which held that federal law challenges to state action can be brought against state officers in federal court, despite the general rule that states may assert sovereign immunity from suit.[190] The *Young* doctrine in effect carves out an exception to that immunity for forward-looking remedies,[191] and is widely considered to be "indispensable to the establishment of constitutional government and the rule of law."[192] Another period of rapid growth occurred in the 1960s, with the Supreme Court's case law expanding the scope of constitutional rights and the jurisdictional tools

182. FALLON ET AL., *supra* note 12, at 28

183. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

184. Act of April 20, 1871, §§ 1-2, 6, 17 Stat. 13-15. The statute has been amended several times since then and is currently codified as 42 U.S.C. § 1983. Among other provisions aimed at quelling Ku Klux Klan terrorism, section 1 of this statute authorized a damages remedy for violations of constitutional rights "under color of" state law. That provision statute remained largely dormant for ninety years, until the Court ruled that it applied to unconstitutional conduct even if state law provided a remedy. *See* Monroe v. Pape, 365 U.S. 167 (1961).

185. 28 U.S.C. § 1331 (originally enacted as Act of March 3, 1875, § 1, 18 Stat. 470).

186. FRANKFURTER & LANDIS, *supra* note 178, at 65.

187. *See* Gulf Offshore, Co. v. Mobil Oil Corp., 453 U.S. 473, 483-84 (1981).

188. *See* FALLON ET AL., *supra* note 12, at 927 n.1.

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

190. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

191. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

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

needed to enforce them in federal court.[193] All of these developments enhanced the role of the federal courts, as Marshall and Story had envisioned. Writing on the occasion of the bicentennial of the federal judiciary, Daniel Meltzer concluded that, "[i]nsofar as modern lawyers have a common intellectual heritage, the federal courts are its primary source."[194]

B. High Costs and Low Benefits of the Network Solution

The history of federal courts in the United States suggests that a network of EU courts, located throughout the member states and exercising original jurisdiction over EU claims, would strengthen the integration of the European Union. A network would help to realize the *Osborn* principle that a government should have a judicial system that is adequate to enforce its law. But a radical change in the current EU approach has costs as well as benefits. These costs must also be considered. Such a system would produce greater costs and fewer benefits in the European Union than in the United States, at least at present, because of differences between the two polities.

1. Benefits of a Network

Supreme Court case law identifies several justifications for federal jurisdiction, including "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."[195] This model seems to imply that the benefit of a network of EU courts is more uniformity, expertise, and hospitality for EU law. In recent years, however, analysts questioned whether the actual operation of the federal courts yields all of these benefits.[196]

a. Uniformity, Expertise, and Hospitality

Over time, both the body of federal law and the number of federal judges have grown exponentially. The federal judiciary now consists of more than eight hundred active judges, along with several hundred senior

193. *See* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737.

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

195. Tafflin v. Levitt, 493 U.S. 455, 464 (1990) (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-84 (1981)).

196. *See* Seinfeld, *supra* note 152, at 109-32; Preis, *supra* note 157, at 247-48.

judges who still decide cases.[197] State courts and federal administrative agencies also decide federal issues. The multiplicity of decision makers as well as the ever-increasing complexity of federal law belie "the notion that the lower federal courts meaningfully advance the interest in a uniform interpretation of federal law."[198]

Federal judges may have greater expertise in federal law since they spend more of their time adjudicating federal law than do state judges, and practice improves performance. The shortcoming of the "expertise" rationale is the amount and variety of federal law. Federal judges adjudicate lots of federal law, but in a wide range of contexts, such that they rarely learn enough about any one area to claim expertise.[199] The argument is strong in certain contexts. For example, the Federal Circuit Court of Appeals specializes in patent law,[200] among other things.[201] But it is unrealistic to expect federal judges to develop special skills in most areas of federal law. For that matter, on some issues, such as Fourth, Fifth, and Sixth Amendment rights, state judges may have a greater claim to expertise since those rights are routinely adjudicated in state criminal trials. By comparison, federal criminal law makes up a small part of the federal docket.

The third policy underlying federal jurisdiction is more complex. Professor Seinfeld occasionally uses the label "bias" to describe it. He points out that bias exists at some periods and not others and that the bias of a given set of judges may point in different directions depending on the specific federal right at issue. He finds little evidence of state court bias against federal claims today and concludes that the bias rationale is at least as weak as uniformity and expertise.[202] But "bias" is a loaded word, suggesting lack of impartiality and potentially setting up a straw man that is easy to knock down. The Court's term is "hospitality,"[203] which is a more neutral way to characterize the federal interest in providing a federal forum, across all federal substantive issues and all historical periods.

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197. *Authorized Judgeships*, U.S. COURTS (2020), https://www.uscourts.gov/sites/default/files/allauth.pdf.

198. Seinfeld, *supra* note 152, at 115.

199. *See id.* at 124.

200. *See id.* at 130.

201. *See* 28 U.S.C. § 1295.

202. *See* Seinfeld, *supra* note 152, at 110-14.

203. *See supra* note 195 and accompanying text.

b. The Federal Courts Franchise

Understood as hospitality, the value served by federal jurisdiction is distinct from the interest in an impartial, unbiased forum. Across substantive areas, state lines, and historical periods, litigants asserting federal rights, especially in cases that challenge state official action on federal grounds, have generally preferred federal court, especially in litigation challenging state law on federal grounds.[204] The biggest reason for preferring federal court is neither bias, nor uniformity, nor expertise. It is that, by and large, federal judges differ from state judges in their stance toward federal law. They approach federal questions with a "psychological set" that disposes them to uphold federal constitutional values.[205] Expertise aside, they bring a higher level of "technical competence" to federal issues.[206] Because they are guaranteed tenure during "good behavior,"[207] they are more insulated than state judges from majoritarian pressures.[208] Litigants, or their lawyers, are more comfortable in federal court. Professor Seinfeld distinguishes this theme from bias, employs the metaphor of a "franchise," and draws an apt analogy:

> Just as many people value the ability to walk into a Starbucks store anywhere in the country and have at least a general sense of what to expect in terms of the menu and service, as well as the conventions and vocabulary pertinent to getting what one wants, so do many litigants (and, more to the point, their attorneys) value the opportunity to walk into a court and have a sense of what to expect in terms of the services provided as well as the conventions and vocabulary pertinent to litigating effectively.[209]

These considerations largely explain why litigants with federal claims often choose federal court over state court and why state governments and state officers typically try to channel constitutional litigation to state courts.

This argument for EU federal courts with original jurisdiction is not a backhanded way of accusing state courts in the United States, much less the member state courts, of bias. It does not imply that member state courts in the European Union will disobey the clear commands of EU law.[210] The

204. *See* Neuborne, *supra* note 102, at 1106.

205. *Id.* at 1124.

206. *Id.* at 1120.

207. U.S. CONST. art. III, § 1; *see* FALLON ET AL., *supra* note 12, at 9-10.

208. Neuborne, *supra* note 102, at 1127.

209. Seinfeld, *supra* note 152, at 133.

210. Evidence that a member state's courts ignore clear EU principles would furnish an especially compelling ground for channeling litigation to EU courts, including courts of "first

distinction drawn here between U.S. federal and state courts simply acknowledges the reality that the two sets of courts bring different values, experiences, and incentives to the task of adjudication of close cases that do not have easy answers. Since there is no current network of lower EU courts, there is no hard evidence that a similar divergence of preferences would exist in litigation over EU issues. Still, many if not most member state judges, like state judges in the United States, are politically or culturally oriented toward member state values, and may not implement EU law as vigorously as a hypothetical EU judiciary.

Richard Pildes calls this theme "institutional realism."[211] The premise of institutional realism is that law is often indeterminate. Many matters are not governed by a black letter rule or by drawing inferences from black letter rules. Even when the rule is clear, the application of law to fact may depend on the exercise of judicial discretion.[212] Judges also have discretion on other matters, such as the admission of arguably problematic evidence. The cumulative impact of such rulings, by judges sharing the same orientation, will move the law in one direction or the other. Thus, "institutional realism . . . entails constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrines to take account of how these institutions actually function in, and over, time."[213]

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instance." Some have argued, for example, that courts in Hungary, Poland, and Romania violate EU "rule of law" values. *See, e.g.*, Anna Labedzka, *The Rule of Law—A Weakening Lynchpin of the European Union*, *in* UNIV. MILAN-BICOCCA SCH. L., RSCH. PAPER SERIES NO. 20-03 (2020); Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT'L L.J. 875 (2019); Dimitry Kochenov, *The EU and the Rule of Law—Naivete or a Grand Design*, *in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM (Maurice Adams et al. eds., 2017). A rough analogy is the Supreme Court's response in the 1960s to courts in the South that often ignored or otherwise failed to enforce federal constitutional and statutory civil rights. For documentation of the practices at issue and efforts to combat them, *see* Anthony Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). For relevant Supreme Court cases *see, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (easing access to federal court to sue state officers for damages for constitutional violations); Fay v. Noia, 372 U.S. 391 (1963) (removing barriers to federal habeas corpus suits to challenge state convictions); Dombrowski v. Pfister, 380 U.S. 479 (1965) (allowing access to federal court to challenge state prosecutions brought in bad faith to harass civil rights workers).

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

212. Thus, many matters fall into the "open texture" of the law, in which judges use their discretion and may reach divergent outcomes without any of them violating the law. *See* H.L.A. HART, THE CONCEPT OF LAW 123, 128-36 (2d ed. 1994).

213. Pildes, *supra* note 211.

This rationale has proven to be durable in the United States, but it is weaker in the EU context. The lower federal courts obtained their "franchise" value through their performance over many decades. That value has persuaded shifting political majorities in Congress and the Supreme Court to adhere to a judgment that the benefits of a system of lower federal courts are worth the federalism costs that come with it. In the European Union, however, the value of an "EU lower court franchise" is as purely hypothetical as the network itself. Like any franchise, that value would not instantly appear when the network is created. It would be lower than in the current United States, at least in the early years. As with the U.S. federal courts, it would need to be earned over time. In addition, whatever the value of such a network, the federalism costs of obtaining it may be too high.

2. Federalism Costs

In both the United States and the European Union, the federal courts have the ultimate authority to decide federal issues, but the state courts are similarly in charge of state law. A network of lower federal courts may produce federalism costs when it adjudicates state law issues. In the United States, federal diversity jurisdiction produces such costs, and is the source of ongoing controversy, since it grants power to federal courts to decide state law issues in suits between citizens of different states.[214] But lower federal court jurisdiction over federal questions does not ordinarily produce high federalism costs because the issues in most of these cases are mainly governed by federal law. The general rule is that "[a] suit arises under the law that creates the cause of action."[215] Congress has enacted statutes that authorize suits to enforce many federal constitutional and statutory rights, including constitutional claims against state officers,[216] antitrust, labor, and intellectual property. The federal causes of action created by these statutes typically include federal rules for most of the issues relevant to the litigation, either in the statutory text or by judicial implication from the statutory text and purpose.

Litigation to enforce constitutional rights, brought under 42 U.S.C. § 1983, illustrates this point. The statute authorizes suits against "[e]very person" who "under color of" state law violates federal constitutional

214. *See* WRIGHT & KANE, *supra* note 192, at 143-53 (discussing the pros and cons of diversity jurisdiction).

215. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

216. 42 U.S.C. § 1983.

rights, as well as certain federal statutory rights. This statute, and judge-made federal law implementing it, determine who can be sued, what remedies are available, what causal link the plaintiff must establish, and available defenses. The main issue governed by state law is the statute of limitations, which bars suits for lack of timeliness.[217] Otherwise, federal law governs virtually every aspect of § 1983 litigation. Federal statutes similarly cover the field for other areas of federal law. There is little room for state law and thus few occasions on which federal courts would inflict federalism costs by deciding state law issues.

Unlike the United States, EU law does not occupy the field in private litigation,[218] because the European Union has not created private causes of action to enforce EU law. Instead, the TEU and ECJ case law mandate that the member states must provide adequate remedies for violations of EU rights.[219] Setting up a network of lower EU courts and authorizing them to adjudicate cases brought under member state law to enforce EU norms carries a heavy federalism cost because member state law would govern many of the issues in these cases. The closest U.S. analogy is litigation in which state law provides a cause of action and federal law furnishes the liability rule. The Supreme Court has generally rejected federal jurisdiction for such cases because the federalism costs are too high.[220]

Instead of EU causes of action, the body of EU law relevant to private litigation consists mainly of constraints on member state law, which are embodied in "regulations" and "directives." Regulations set boundaries on the law of the member states,[221] and oblige member states to provide

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217. *See* Robertson v. Wegmann, 436 U.S. 584 (1978).

218. Some types of EU litigation are governed entirely by EU law. *See, e.g.*, LMG, *supra* note 9, at 159 (suits brought by the European Commission against member states for "infringement" of the member state's obligations under EU law); *Id.* at 253 (suits brought for "annulment of assertedly illegal acts by EU institutions"). Both infringement and annulment suits are litigated exclusively in EU courts.

219. *See* TEU, *supra* note 26, art. 19; LENAERTS & VAN NUFFEL, *supra* note 56, at 624; GOEBEL ET AL., *supra* note 30, at 280-96 (collecting materials on "the adequacy of national remedies").

220. *See, e.g.*, Gunn v. Minton, 568 U.S. 251 (2013) (federal intellectual property issue embedded in a state tort case, no federal jurisdiction); Merrell-Dow Pharms. Inc. v. Thompson, 478 U.S. 804 (1986) (federal pharmaceutical warning requirement embedded in state product liability suit for failure to warn, no federal jurisdiction.) A "special and small category," *Gunn*, 568 U.S. at 258 (quoting Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)), of suits fitting this fact pattern are suitable for federal jurisdiction, but only when "the importance of the issue to the federal system as a whole" can be shown. *Gunn*, 568 U.S. at 260.

221. *See* LENAERTS & VAN NEUFFEL, *supra* note 56, at 893.

effective remedies for EU rights.[222] These are similar to the types of constraints placed on states by U.S. constitutional and statutory restrictions. For example, Regulation 1612/68 imposes limits on the member state's power to limit the free movement of workers among the member states.[223] Directives are sometimes, though not necessarily, more open-ended. They set goals the member states are expected to meet in their own legislation.[224] A directive identifies a norm the member states must achieve and gives them leeway in how the norm should be incorporated into the member state's law.[225] An illustration is the "Equal Pay Directive" which defines "equal work" and "require[s] member states to undertake vigorous enforcement of the right to equal pay."[226] But a directive typically leaves many details to the discretion of the member states. The "Products Liability Directive" requires the member states to create causes of action for product defect and includes definitions of defect.[227] But the member states retain much authority to regulate product safety.[228]

In a products liability case, for example, one issue may be whether the member state's rule meets the requirements of the EU directive; another issue may be whether the product satisfies the member state's test for a "state of the art" defense. If these cases are channeled to an EU court, as they would be under the network approach, the EU court will be charged with determining both the EU issues and the member state issues. The federalism cost is that EU courts would sometimes misunderstand member state law, just as U.S. federal courts sometimes misunderstand state law. This kind of misunderstanding produces interference with the implementation of state policy and unintentional corruption of the state's

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222. *See* LMG, *supra* note 9, at 118; *see also* F.G. Wilman, *The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies It Provides For*, 53 COMMON MKT. L. REV. 887 (2016).

223. *See* GOEBEL ET AL., *supra* note 30, at 447-48.

224. *See* LENAERTS & VAN NEUFFEL, *supra* note 56, at 896.

225. The treaty provision is TFEU Article 288, but the treaty does not define the term. *See* GOEBEL ET AL., *supra* note 30, at 155; SACHA PRECHAL, DIRECTIVES IN EC LAW 13 (2005).

226. *See* GOEBEL ET AL., *supra* note 30, at 1308 (discussing Council Directive 75/117 of 10 Feb. 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19).

227. Council Directive 85/374 of July 25, 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29.

228. *See, e.g.*, Case C-183/00, Sánchez v. Medicina Asturiana SA, 2002 E.C.R. I-03905 (upholding a Spanish law that provided more extensive rights for consumers than provided in the Products Liability Directive); Case C-300/95, Commission v. United Kingdom, 1997 E.C.R. I-2663 (rejecting the Commission's claim that the UK's version of the "state of the art defense" violated the directive).

doctrine—until and unless the error can be corrected. Even in the United States, which already has a network, federal jurisdiction is generally unavailable for similar tort cases.[229]

3. Friction Costs

Federal causes of action aside, U.S. federal law often resembles EU law, interacting with state law rather than supplanting it altogether.[230] In both the United States and the European Union, many disputes raise both federal and state issues. Yet it is usually impractical to cut up a piece of litigation into component parts and send part of it to each system.[231] In the U.S., federal courts sometimes decide state issues and state courts adjudicate federal issues. The federal issue may be a defense to a state law claim, or an element in a state law cause of action.[232] A consequence of this overlap is that the parties to a dispute may each sue the other, one in state court, the other in federal court.

Consider an illustrative case in which *A* and *B* make a contract that may or may not be valid under federal antitrust law. When *B* fails to perform, *A* sues in state court since his contract rights depend on state law. The federal antitrust issue will be raised as a defense in state court. But to complicate matters a bit, *B* sues *A* in federal court, claiming that the contract is invalid under federal antitrust law.[233] The federal court litigation may require adjudication of state contract issues as well as federal antitrust issues. In this scenario, a federal court might be required to decide any of several questions raised by potential friction between the two pieces of litigation, including: (1) Should the federal suit be dismissed in favor of the state suit; (2) Should the state suit be enjoined in order to prevent interference with the federal suit; (3) If the state suit is completed first, should the federal court defer to the outcome? Answers that interfere with the state court's enforcement of state law may have federalism costs.

In the United States, Congress and the Supreme Court have developed a complex body of law to deal with these and other problems

229. *See supra* note 220 and accompanying text.

230. *See* FALLON ET AL., supra note 12, at 488-89.

231. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 621 (1981).

232. *See, e.g.*, Gunn v. Minton, 568 U.S. 251 (2013) (federal element in a state law claim is generally not sufficient for federal jurisdiction); Holmes Grp., Inc. v. Vornado Air Circulation Sys., 535 U.S. 826 (2002) (federal issue must generally arise on the face of a well-pleaded complaint in order to support federal jurisdiction).

233. *Cf.* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) (facts roughly similar to the hypothetical case used in the text).

created by competing state and federal judiciaries. Federal courts are required to give "full faith and credit" to state courts' resolution of federal issues in earlier litigation involving the same parties and the same dispute;[234] litigants may not obtain lower federal court review of an earlier state judgment;[235] and federal courts may be required to defer to member state court adjudication of matters at issue in ongoing litigation.[236] Member state courts may not enjoin federal court litigation,[237] and a federal statute allows federal courts to enjoin state litigation only in narrow circumstances.[238]

This brief account omits many details which typically make up a large chunk of a law school course on federal courts.[239] A summary may, however, be sufficient to make the point that a complicated body of law is made necessary by the very existence of two lower court systems operating at the same time in the same territory. The cost of managing the systems is significant, even if resources needed to minimize the friction between the two is well spent in the United States, which has already committed itself to a dual judicial system.[240] For EU policymakers, the issue is whether to add a layer of courts. They should carefully consider whether the benefits of a network of lower EU courts are worth the cost of a substantial amount of litigation over competing claims to jurisdiction.

IV. MEMBER STATE COURT ADJUDICATION OF EU ISSUES COUPLED WITH ECJ REVIEW

Under TFEU Article 267, member state courts are told to refrain from ruling on unsettled issues of EU law. Instead, they must refer those issues to the ECJ.[241] In practice, however, member state courts routinely decide EU issues, without any oversight from the ECJ.[242] From the perspective of the ECJ, this body of member state doctrine has no precedential force.

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234. 28 U.S.C. § 1738.

235. *See* Exxon Mobil v. Saudi Basic Indust. Corp., 544 U.S. 280 (2005).

236. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

237. Donovan v. City of Dall., 377 U.S. 408 (1964).

238. Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs., 398 U.S. 281 (1970).

239. *See* FALLON ET AL., *supra* note 12, at 1061-1192, 1365-1411.

240. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954).

241. TFEU, *supra* note 4. The "unsettled" qualifier derives from Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3417, 3430 ("[T]he correct application of Community law may be so obvious as to leave no scope for any reasonable doubt . . . [such that] the national court or tribunal [may] refrain from submitting the question to the Court of Justice.").

242. *See Spirit of Cooperation*, *supra* note 88, at 364-70.

Nonetheless, these member state rulings in fact control the outcomes of litigation and guide primary conduct. This approach works to the disadvantage of both the member state courts and the European Union. The institutional interest of the member state judiciary is to take part in the elaboration of EU law, and the institutional interest of the ECJ is to supervise and control the content of EU law. Yet under the current regime, member state courts do not issue valid rulings on EU law, those rulings nonetheless govern primary conduct, and the rulings cannot be reviewed by an EU court.

This part of the Article proposes a hypothetical regime in which the ECJ accepts the legitimacy of these member state holdings on EU law. Crucially, that reform should be accompanied by replacing the preliminary reference with ECJ appellate review of member state rulings on EU law. The two reforms do not merely complement but support one another. ECJ review presumes the legitimacy of the ruling under review. Allowing member state courts to rule on EU law, without also authorizing appellate review, compromises the integrity of EU law. Without ECJ review, a grant of authority to the member state courts to determine EU issues would result in lack of ECJ control over the content of EU law. Member state courts would disagree among themselves. Some member state courts would interpret EU law narrowly in ways that interfere with the realization of EU policy. As a result, the content of EU law would become increasingly incoherent over time.

In this alternative approach to EU judicial federalism, each side of the federal state/ member state dichotomy gives up some of the authority it holds, if only formally, under the current model. The ECJ cedes some of its formal control over EU law. By comparison with the current situation, however, the ECJ loses little substantive power since member state courts already adjudicate EU issues. The member state judiciaries give up their independence from ECJ review, but that loss of authority only extends to EU issues. In evaluating the comparative merits of the current regime and the proposed reform, the choice is not between member state adjudication and no member state adjudication. It is between the "limited oversight" approach currently followed and an approach that would both affirm and constrain the practice of member state adjudication. The advantage of the proposed reform over current law is that, as matters stand today, member state courts adjudicate EU law *without* any appellate review. On the one hand, these rulings lack the status of EU law as they are not recognized as legitimate by the ECJ; on the other, the ECJ has no ready opportunity to review them in order to assure their correctness.

This proposal is not a perfect solution to the problem of balancing ECJ control of EU law against respect for member state sovereignty. Both of those goals are compromised. But the history of judicial federalism in the United States belies the notion that there may be a perfect solution. The aim should be to obtain many of the benefits of a stronger EU judiciary, but to do so at a cost that is acceptable to member states, many of whom favor a prominent role for state judiciaries. To that end, one virtue of the appellate review model, discussed in Section A, is enhanced integration of member state judiciaries into EU governance. Another, discussed in Section B, is more effective ECJ oversight of member state court decisions on EU law.

Section C addresses the costs of moving to the appellate-review model. The abandonment of ECJ exclusivity may diminish the authority of the ECJ given the ECJ's acknowledgement that member state courts also contribute to deciding EU issues. That cost, however, is mainly formal rather than substantive since the member state courts already adjudicate EU law. A more significant federalism cost is that appellate review entails ECJ supervision of member state judiciaries, arguably to the detriment of their control over member state law. On this point, the U.S. experience is instructive. Absent special circumstances, the Supreme Court's oversight extends only to state court outcomes that turn on federal law and only to the federal issues adjudicated in those cases. Thus, the appellate review model would not entail undue ECJ interference with the member state judiciaries' ability to control member state law. A distinct issue is whether ECJ appellate review implies the "primacy" of EU law over member state law. Though the ECJ holds that view, there is no necessary link between appellate review and primacy. The appellate review model could be adopted without endorsing EU primacy.

A. Member State Court Adjudication of EU Law

State court adjudication of federal issues, coupled with Supreme Court review, has been the U.S. approach since 1789. Article III implicitly accepted state court adjudication by mandating the creation of "one supreme Court" while leaving the existence and role of lower federal courts up to Congress.[243] Though Article III does not explicitly provide for Supreme Court review, Alexander Hamilton surmised in Federalist No. 82 that "an appeal would certainly lie from the [state courts] to the Supreme

243. U.S. CONST. art. III, § 1; *see* FALLON ET AL. *supra* note 12, at 7-8.

Court."[244] Endorsing Hamilton's view, Congress authorized the Supreme Court to review state judgments in section 25 of the Judiciary Act of 1789.[245] The Supreme Court upheld section 25 against constitutional objections in *Martin v. Hunter's Lessee* in 1816.[246] The history of U.S. judicial federalism suggests that this regime—federal law in state courts coupled with Supreme Court review of state court judgments—is a workable model for reform of EU judicial institutions.

1. Promoting EU Integration

Like the member state courts in the European Union, the state courts pre-exist the United States. The state courts took over the role of colonial courts when the Americans declared their independence.[247] State courts operated for a decade or more as the courts of sovereign states before the constitutional convention in 1787.[248] The U.S. Constitution's framers took the view that the state courts would adjudicate federal issues unless Congress displaced them by providing for exclusive federal jurisdiction.[249] In Federalist No. 82, Alexander Hamilton wrote that the state courts not only retain their pre-existing jurisdiction, but also have jurisdiction over federal cases unless Congress provided otherwise.[250] In the core passage of this essay, Hamilton explained *why* the state courts would adjudicate federal law: they would do so because "the State governments and the national government [were] parts of ONE WHOLE."[251] Acting on this view, the framers conceived of the state judiciaries as integral parts of the new judicial system. In the 1789 Judiciary Act, Congress provided for exclusive federal jurisdiction only over federal criminal cases, certain suits

244. THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

245. 1 Stat. 73, 85 (Sept. 24, 1789).

246. Martin v. Hunter's Lessee, 14 U.S. (1Wheat.) 304 (1816).

247. *See generally* SCOTT GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787 xiv (2011) ("[C]hronicling how the original 13 states and their colonial antecedents treated their respective judiciaries.").

248. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87, at 453-63 (1969) (describing the work of state courts during this period); JEFFREY S. SUTTON ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 931-49 (2010) (describing post-Revolution state constitutional developments, which included judicial provisions).

249. *See* Charles Warren, *New Light on the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923).

250. THE FEDERALIST NO. 82, *supra* note 244, at 492-93 (Alexander Hamilton).

251. *Id.* at 493.

"against consuls or vice-consuls," and admiralty cases, but not, for example, over "suits at common law where the United States sue."[252]

General "federal question" jurisdiction did not become established until Congress authorized federal jurisdiction over cases "arising under" federal law in 1875.[253] In construing the 1875 statute and other jurisdictional provisions, the Supreme Court has always declined to interpret the statute as expansively as Article III allows. It has done so despite some evidence that the legislative intent was to authorize federal district court jurisdiction to the Article III limits.[254] *Osborn* had held that Article III allows federal jurisdiction whenever federal law is an "ingredient" in the case.[255] Yet the Court has interpreted the statute in ways that keep many federal issues in the state courts, even when they are central to the litigation. For example, federal defenses are typically adjudicated in state court,[256] as are most federal issues that arise in the adjudication of state law causes of action.[257] Even when the cause of action is authorized by federal law, the Supreme Court has generally rejected exclusive federal jurisdiction unless Congress has explicitly required it or given clear indication of legislative intent.[258]

This approach tells the state courts that they have "been entrusted with a great and important task," and thus "evoke[s] . . . a sense of responsibility."[259] The message is that state courts are trusted both to apply federal law and to resolve unsettled federal issues when the occasion arises. In the United States, the path toward federal-state harmony has not always been smooth. Over the course of U.S. history, the integration of state and federal courts into "one whole" judicial system has produced friction between state courts and lower federal courts, as both systems

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252. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. For a discussion of "how the framers of the First Judiciary Act dealt with the . . . capacity of non-Article III tribunals to entertain Article III business," *see* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1520 (2005).

253. Act of March 1, 1875, §§ 2-3, 18 Stat. 335-36; *see also* FRANKFURTER & LANDIS, *supra* note 178, at 65; FALLON ET AL., *supra* note 12, at 779-82 (noting the brief period in 1801-02 in which Congress adopted and then revoked general federal question jurisdiction).

254. *See* FALLON ET AL., *supra* note 12, at 807-08.

255. *See supra* note 51 and accompanying text.

256. *See, e.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (stating the rule that federal jurisdiction is ordinarily available only if the federal issue arises on the face of a "well-pleaded" complaint, i.e., one which does not anticipate defenses).

257. *See, e. g.*, Gunn v. Minton, 568 U.S. 251 (2013) (federal intellectual property issue embedded in a state law malpractice case).

258. *See* Tafflin v. Levitt, 493 U.S. 455 (1990).

259. Bator, *supra* note 231, at 605, 624.

have vied for jurisdiction over particular matters.[260] During periods when Congress and the federal courts have expanded the scope of federal constraints on the states, the friction has sometimes produced considerable tension between federal and state courts.[261] The "appellate review" model for the European Union may not implement federal policy as well as federal district court jurisdiction,[262] but there is a trade-off. The appellate-review model also avoids much of the friction since member state courts would not face competition from a network of lower federal courts. In this sense, the process of integration might proceed more smoothly in the European Union than it has in the United States.

On the other hand, differences between the United States and the European Union point toward greater difficulties in integrating member state courts into "one whole" EU judiciary. The United States began as a union of thirteen states that shared a common language, history, and culture. They had fought together to win independence from Great Britain. After independence, they all kept the English common law as the bases for their legal systems.[263] During the war for independence, they had already seen the need for some sort of union by drafting the Articles of Confederation.[264] Just a few years into the regime of the Articles, the Constitutional Convention of 1787 was prompted by general recognition that a stronger form of union was needed.[265] But advocates of a less centralized government also helped to shape the document. With respect to the judiciary, it was probably inevitable that the framers reached a compromise in which the state and federal legal systems would constitute "one whole" since both sides of the debate exerted considerable pressure.[266]

The European Union was formed by nation states with different languages, legal systems, and cultures. Each of them had a long pre-EU history and a distinctive national identity. A prominent feature of their common history was that they had fought among themselves for centuries, and the wars included two recent ones that devastated Europe. A major rationale for stronger union was the need to protect some members from

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260. *See supra* Part III.A.

261. *See* Neuborne, *supra* note 102, at 1106-15.

262. *See id.* at 1116 nn. 45-46.

263. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968).

264. *See* WOOD, *supra* note 248, at 354-63; RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-89, at 80 (1987).

265. *See* WOOD, *supra* note 248, at 393.

266. *See* FALLON ET AL., *supra* note 12, at 7-9.

aggression by others. It is no accident that the European Union grew out of the "European Coal and Steel Community," an institution devised after World War II in order to take away from governments, especially the German government, control over the basic materials of war.[267] At the outset of the European Union, it was inconceivable that the judicial systems of the member states and the judicial system of the European Union could be "one whole." As originally conceived, the Common Market was the product of an international agreement, albeit one that promised especially close ties among the signatory states.[268] Thus, the agreement was called a treaty and remains such, despite an aborted effort in the early 2000s to adopt a "constitution."[269] The rule that only the ECJ could decide issues of EC law followed the standard practice in international relations in which only an international court could decide issues of treaty interpretation. Since the EEC Treaty creates obligations only for the member state, not its citizens, jurisdiction was lodged in a court that was staffed by judges from all the signatories of the treaty, separate from their legal systems.[270]

Over time, the economies and cultures of EU member states grew more integrated, to the benefit of all. The European Union was transformed into a distinctive polity, not quite a nation state but much closer to one than at the outset.[271] Yet the EU's judicial institutions are little changed. Article 267 of the TFEU, stating the rule that only the ECJ may decide issues of EU law, is an artifact of the earlier era.[272] It is hardly radical to propose that the EU's judicial architecture should reflect the "transformation of Europe."

The current approach sends a clear message that the European Union is a distinct entity from the member states, so much so that member state courts have no contribution to make to the corpus of EU law. For example, the ECJ held, in *Foto-Frost v. Hauptzollamt Lubeck-Ost*, that the member

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267. *See* LEONARD, *supra* note 57, at 4-5.

268. *See, e.g.*, Mancini, *supra* note 77, at 595-96 ("Unlike the United States, the EC was born as a peculiar form of international organization. . . . [T]he instrument giving rise to the Community was a traditional multilateral *treaty*."); M. Rasmussen, *supra* note 76, at 156 & n.113; Jan Klabbers, *Straddling the Fence: The EU and International Law*, *in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 52 (Anthony Arnull & Damian Chalmers eds., 2015) (stating that, though the EU was "[s]et up as an international organization . . . [it] is no longer generally regarded as a normal international organization").

269. *See* GOEBEL ET AL., *supra* note 30, at 23-24.

270. *See* Weiler, *supra* note 85, at 2413-14.

271. *See id.* at 2405-10.

272. *See* GOEBEL ET AL., *supra* note 30, at 67 (noting that the current rule can be traced back to the original treaty).

state courts "do not have the power to declare acts of the Community institutions invalid," even on the ground that the EU measure violates higher EU law.[273] The ECJ approach rejects a valuable insight of U.S. judicial federalism. It tells member state judges that "to the greatest possible extent, all the important shots will be called by someone else," and thereby discourages member state judges from "feel[ing] institutional responsibility for vindicating [EU] rights."[274]

2. Interpretive Pluralism

TEU Article 19 declares that the "Court of Justice of the European Union shall . . . ensure that in the interpretation and application of the Treaties the law is observed."[275] That obligation does not necessarily exclude a role for the member state courts as well. In the United States, the benefits of welcoming the contributions of state judges are shared by the whole judicial system. Since state courts bring a distinctive perspective to bear on the resolution of federal issues,[276] their participation enables all courts, including the Supreme Court, to take account of the whole range of factors that bear on the development of doctrine. The current EU approach of Article 267—that the ECJ and other EU judicial institutions alone adjudicate EU law—seems to rest on the premise that law making is a strictly positivist project,[277] "which conceives of lawmaking in hierarchical terms and sees fidelity to law primarily as a matter of complying with pronouncements coming from a higher authority."[278] The value of reliance on a wider array of courts emerges when it is understood that lawmaking is better viewed as "a cooperative enterprise," in which each member of "a moral and legal community . . . [is] reciprocally charged with the mutual and reciprocal elaboration" of legal principles.[279] In the European Union, as in the United States, that community includes the member state courts.

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273. Case 314/85, 1987 E.C.R. 4225, 4231.

274. Bator, *supra* note 231, at 624-25.

275. TEU, *supra* note 26, art. 19.

276. *See* Bator, *supra* note 231, at 633-34; *cf.* GARETH Davies, *Interpretive Pluralism Within EU Law*, *in* RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW 332 (Gareth Davies & Mtej Avbelj eds., 2018) (championing "interpretive pluralism," which endorses the notion that member state courts may disagree among themselves indefinitely, and to some extent with the ECJ, on EU issues).

277. *See* Davies, *supra* note 276.

278. Bator, *supra* note 231, at 634.

279. *Id.*

3. Transitioning From Preliminary Reference to Appellate Review

If preliminary reference worked as Article 267 and ECJ directives seem to envision, the ECJ would never have the benefit of member state rulings on EU law. In practice, many such rulings exist despite Article 267 and the ECJ's doctrine,[280] and those rulings are available to the ECJ if it chooses to study them. But appellate review has other advantages. One is that, in contrast to preliminary reference, appellate review puts the parties, not the lower court, in charge of identifying and framing issues for review. Unlike the state judge, whose motivations may be varied,[281] the parties have a keen interest in the outcome and a strong incentive to give close attention to the potential relevance of federal law. In the United States, this value underlies the law of "standing to sue," which requires litigants to demonstrate "a personal stake"[282] and a "distinct and palpable injury"[283] in order to raise federal issues. Member state judges are comparatively ill-suited to the task. They are trained in local law and habituated to its use. The judge is less likely to discover an EU issue, or to appreciate the relevance of an EU issue, even if a party points it out. Or the judge may perceive that EU law is relevant but present the question imprecisely.

By accepting the legitimacy of member state adjudication of EU issues, the ECJ would affirm that the member state judiciaries are not merely functionaries who carry out commands received from the ECJ, but full-fledged participants in the larger EU judicial system. From the perspective of European integration, there is a significant difference between calling the GFCC's May 5, 2020 *Weiss* ruling the illegitimate act of a renegade court, as current ECJ doctrine seems to imply, and treating that ruling as an effort to interpret the EU treaties, even if the outcome is mistaken. Moreover, the appellate review model provides an opportunity for the ECJ to correct the mistake rather than merely complain about it.[284]

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280. *See* Kornezov, *supra* note 118, at 1318 ("[E]xperience has shown that, as current EU law and practice stand, the obligation to refer under Article 267(3) TFEU is, essentially, unenforceable.").

281. *See* Marie-Pierre F. Granger, *When Governments Go to Luxembourg: The Influence of Governments on the Court of Justice*, 29 EUR. L. REV. 3, 28-31 (2004) (discussing the influence of governments on preliminary references).

282. Flast v. Cohen, 392 U.S. 83, 101 (1968).

283. Warth v. Seldin, 422 U.S. 490, 501 (1975).

284. *See supra* notes 1-5 and accompanying text.

B. ECJ Review of Member State Judgments

Under TFEU Article 267, the respective roles of the ECJ and the member state courts are clearly defined: (1) The member state courts may not declare EU law invalid,[285] and (2) the ECJ does not exercise appellate review member over state judgments.[286] If (1) accurately described the practices of member state courts, (2) would make sense. But the real-world EU legal system does not work that way. Member state courts do in fact resolve issues of EU law, or else ignore its relevance to the case at hand. They also find facts that bear on EU issues and apply EU law to those facts.[287] Still, fidelity to the current "no appellate review" regime might be defended on the ground that the member state court determinations of EU law are illegitimate exercises of judicial power and thus should be ignored. In Section A, I have argued that the better approach is to accept reality and authorize member state rulings on EU law.

That step should be coupled with ECJ appellate review. Taken alone, legitimation of member state adjudication of EU issues probably creates more problems than it would solve. Even though "preliminary reference" would be an option, member state courts would face no adverse consequences from foregoing it.[288] It is highly predictable that member state courts would differ among themselves in their rulings on EU law, would sometimes misunderstand or misapply EU legal materials, and would sometimes fail to give EU norms the weight they deserve. With the "network" solution excluded on account of high federalism costs and low benefits in the EU context,[289] appellate review is the only viable way to meet the need for access to an EU forum for EU issues.

1. Systemic Benefits of the Appellate-Review Model

This proposed change in the ECJ's jurisdiction inevitably faces stiff resistance since it would intrude on member state courts' prerogatives.[290]

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285. *See supra* note 9 and accompanying text.

286. It may, however, review those judgments in an "infringement" action. *See* GOEBEL ET AL., *supra* note 30, at 91-114. For example, the Commission has sued Germany on account of the GFCC's May 5, 2020 ruling. *See supra* note 4.

287. *See Spirit of Cooperation*, *supra* note 88, at 364-74.

288. As noted above, see *supra* note 286, the European Commission might bring an "infringement" action, but the defendant in such a case is the member state, not the court. The decision as to whether to bring an infringement action is for the Commission, not the parties. *See* TFEU, *supra* note 4, art. 258.

289. *See supra* Part IV.C.

290. *Cf.* Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMPAR.

It would also require the member state courts to acknowledge that the European Union is not merely an arrangement among signatories to a treaty,[291] even if the European Union is not precisely described as a federal state.[292] Still, the appellate-review model is a comparatively mild encroachment. It takes less authority away from the member state courts than does the "network" alternative described in Part III since it allows access to an EU court only after the facts were found and the law was applied to the facts. It would provide the litigant with an EU claim only an "insecure remedy . . . upon an insulated point, after [the case] has received that shape which may be given to it by another tribunal, into which he is forced against his will."[293] It would, however, take a significant step beyond the current preliminary reference process (1) in assuring the uniformity of EU law, (2) in correcting member state courts' errors as to the content of EU law, (3) in providing access to a forum that is sympathetic to the principles, values, and goals of EU law, and (4) in reinforcing the ECJ's legitimacy.

These goals are distinct. Each contributes value in a system of appellate review. Suppose that all the member state courts ruled the same way on a given point, thus satisfying uniformity, and suppose the uniform rule favored EU values at the expense of member state interests, thus satisfying sympathy. The member state courts should still be accountable to the ECJ. In this hypothetical case, they all may have given too much weight to EU values, and too little to the member states' goals, and thus reached the wrong outcome. Thus, in a somewhat analogous context, the U.S. Supreme Court must choose which cases it will review out of thousands of petitions of certiorari. The Court has rejected the notion that it should only accept cases in which the putative federal right-holder was

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L. 421, 445 (1996) ("A system of appellate review was of course unacceptable to the original Member States . . .").

291. Susanna Cafaro has pointed out to me that a long and consolidated case law supports this proposition. For a classic article on the point, *see* Weiler, *supra* note 85, at 2407 (1991) ("[The EU's] "closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state.").

292. For example, the German Federal Constitutional Court would be obliged to modify its assertion that "the Member States . . . remain the masters of the Treaties." BVerfG, 2 BvE 2/08, June 30, 2009, para. 207, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2009/06/es20090630_2bve000208en.pdf?__blob=publicationFile&v=1. Under the appellate-review model, the ECJ would have the final word on interpretation of the treaties, *cf.* Cooper v. Aaron, 358 U.S. 1 (1958) (asserting Supreme Court authority to finally interpret the U.S. Constitution), though of course the member states may amend them, and a member state may choose to withdraw from the European Union. *See* TEU, *supra* note 26, art. 50.

293. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (1824).

the loser below.[294] It has instead chosen to give other factors, such as maintaining the uniformity and correctness of federal law, at least as much weight as guaranteeing a sympathetic forum.[295] Perhaps the most important criterion is whether the ruling at hand creates a split among lower courts.[296]

2. Sociological Legitimacy and the ECJ

The fourth point, on legitimacy, involves the ECJ's institutional interest in guaranteeing that it is taken seriously by the member states, their judiciaries, and other audiences. A court's legitimacy depends in part on its fidelity to legal and moral norms, but also on whether its rulings are "accepted (as a matter of fact) as deserving of respect or obedience."[297] In this latter sense, which Richard Fallon calls "sociological legitimacy,"[298] the GFCC ruling in *Weiss* is a serious threat. The GFCC "would very comfortably accept the compliment of being *primus inter pares* among constitutional courts in Europe and, come to think of it, well beyond."[299] By defying the ECJ, the GFCC sent a message that it does not consider the ECJ ruling deserving of respect, obedience, or even acquiescence. The ruling implicitly invites others to follow its example, perhaps across a range of cases involving issues that touch daily life more than the bond-buying question at issue in *Weiss*.

In the late 1950s, the U.S. Supreme Court faced a roughly analogous situation when state courts in the South refused to follow its rulings on school desegregation. But the Supreme Court had more effective means than the ECJ to enforce its holdings and bolster its sociological legitimacy. In *Cooper v. Aaron*,[300] the Governor of Arkansas defied *Brown v. Board of Education*,[301] declared a high school "off-limits" to Black students, and deployed the National Guard to enforce his orders. In an opinion signed

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294. Before 1914, a federal statute limited the Court's authority to review state judgments to such cases. *See* FALLON ET AL., *supra* note 12, at 462.

295. *See* Michigan v. Long, 463 U.S. 1032 (1983).

296. *See* FALLON ET AL., *supra* note 12, at 464.

297. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005); *see also* Bobek, *supra* note 124, at n.2 (legitimacy might be measured by "voluntary compliance, acceptance or willingness to follow").

298. *See* Fallon, *supra* note 297, at 1827-33.

299. Editorial Comments, *Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment*, 57 COMMON MKT. L. REV. 965, 965 (2020).

300. 358 U.S. 1 (1958).

301. 347 U.S. 483 (1954) (striking down racially-segregated public education on Equal Protection grounds).

by all nine Justices, the Supreme Court addressed a "claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution."[302] The Court's response was that, contrary to Arkansas's position, "the federal judiciary is supreme in the exposition of the law of the Constitution."[303] Although *Cooper* did not involve an appeal from a defiant state court, the Court unequivocally signaled that it would reverse state court rulings at odds with *Brown*.

Maintaining the kind of sociological legitimacy that comes from compliance is a challenge for any court that addresses its orders to governments.[304] *Cooper* was backed up by President Eisenhower, who had sent federal troops to Little Rock, Arkansas to enforce judicially decreed desegregation.[305] The ECJ is in a far weaker position. Lacking both an army and the power of appellate review, the ECJ could only respond with a public statement deploring the GFCC's decision.[306] If the legitimacy of ECJ rulings were solidly established, an errant member state ruling might do little damage. But the ECJ's legitimacy is a lively topic of debate,[307] and the extent to which member state courts follow ECJ rulings in the "thousands of dull tax cases, consumer protection actions, common customs tariff classification disputes, trans-border enforcement of small civil claims, companies' shareholder quarrels and so on" is unknown.[308] Before *Weiss*, the Czech Constitutional Court and the Danish Supreme Court had disobeyed the ECJ.[309] *Weiss*, however, is "the most significant" instance of disobedience, "touching on a politically divisive matter in a field where the EU enjoys exclusive competence."[310] Critics of the GFCC ruling argue that the ECJ is "the final arbiter in matters concerning the interpretation and application of the Treaties."[311] But that assertion rings hollow if the Court is helpless to enforce its interpretations by way of appellate review.

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302. *Cooper*, 358 U.S. at 4.

303. *Id.* at 18.

304. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1822 (2009).

305. *See* JACK BASS, UNLIKELY HEROES 153-54 (1981).

306. *See* Fleming & Arnold, *supra* note 129.

307. For an example of various arguments regarding ECJ legitimacy, *see* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED, *supra* note 124.

308. Bobek, *supra* note 124, at 201.

309. *See* Editorial Comments, *supra* note 299, at 965 n.2.

310. *Id.* at 965.

311. *Id.* at 966.

C. Costs of the Appellate-Review Model

The benefits of appellate review must be balanced against its costs. Two federalism-based objections to this proposal require attention: (1) that appellate review unduly threatens the sovereignty of member states, and (2) that it obliges the member states to accept the "primacy" of EU law.

1. Sovereignty and Accountability

EU affirmation of the legitimacy of member state rulings on EU law would be a double-edged sword for the member state courts. That shift recognizes that the member state courts are full-fledged participants in the project of building a more fully integrated European Union. But the price of that recognition is that their rulings on EU law should be subject to appellate review. One rationale for appellate review is that they may make mistakes in deciding open issues of EU law. Absent review, their errors on EU law could not be corrected and the aims of EU law could be frustrated. Another justification for review is the systemic value of accountability. Every government institution should answer to some other authority, in order to minimize the risk that it will abuse its power.[312] Thus, the ECJ is subject to the authority of the member states, who may amend the Treaty to curb what they regard as abuse or incompetence.[313] The member states may be checked by the Commission, which may sue them for "infringement" of their Treaty obligations.[314] Member state courts are subject to their States' legislative and constitutional processes when they adjudicate member state law. Under present practice, member state courts decide EU issues with no accountability to anyone.

An objection to holding member state courts accountable in this way is that the proposed reform takes away some of the member state courts' sovereign power. Early in U.S. history, this objection was advanced against U.S. Supreme Court review. The Virginia Supreme Court of Appeals, in response to a U.S. Supreme Court reversal of its holding in a

312. *Cf.* THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter, ed., 1961) (arguing that "the necessary partition of power" among government institutions can be achieved "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"). *See also* COENEN, *supra* note 35, at 107 (discussing the system of checks and balances in the U.S. Constitution).

313. *See* Gareth Davies, *Legislative Control of the European Court of Justice*, 51 COMMON MKT. L. REV. 1579 (2014) (acknowledging that amendment of the treaties is the main avenue for controlling the ECJ but suggesting possible legislative actions as well).

314. *See* TFEU, *supra* note 4, art. 258.

dispute over title to a vast tract of land,[315] declined to obey. Writing for the Virginia Supreme Court in *Hunter v. Martin*, Judge Cabell said:

> [B]efore one Court can dictate to another, the judgment it shall pronounce, it must bear, to that other, the relation of an appellate Court. The 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. . . . [The] Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty."[316]

In response, the U.S. Supreme Court again reversed, in *Martin v. Hunter's Lessee*, the case that established once and for all the validity of Supreme Court review of state judgments.[317] In *Hunter's Lessee*, the Court acknowledged, and indeed relied on, the proposition that the U.S. Constitution meant to "deprive [the states] altogether of the exercise of some powers of sovereignty."[318]

Intrusion on member state sovereignty would be a cost of ECJ appellate review, just as it was in the United States. U.S. practice, however, shows that this cost can be a limited one. The *Osborn* rationale for access to federal court applies only to federal law, and the Supreme Court has carefully limited its review of state court judgments to cases that turn on federal law.[319] Following these principles, member state courts' accountability to the ECJ should be narrowly confined. It should extend only to rulings on EU law and then only to issues that influence the outcome. On matters of EU law, but only on those matters, the member states have already given up sovereignty by signing on to the TEU, just as the American states gave up some sovereignty by ratifying the U.S. Constitution.[320]

The federalism problem raised by appellate review is that, like much federal law in the United States, the aspects of EU law litigated in the member state courts are typically intertwined with member state issues.

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315. *See* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812).

316. *See, e.g.*, Hunter v. Martin, 18 Va. (4 Munif. 1) 1, 12 (1815), *rev'd*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

317. 14 U.S. (1 Wheat.) 304 (1816).

318. *Id.* at 328.

319. *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935). Earlier the Court had held that, absent special circumstances, only the federal issues in a case would be subject to Supreme Court review. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

320. *See Hunter's Lessee*, 14 U.S. at 325 ("[T]he sovereign powers vested in the state governments . . . remained unaltered and unimpaired, except so far as they were granted to the government of the United States.").

The danger is that the ECJ, in the course of appellate review, will meddle in matters of member state law, on which it has no authority. For example, one issue may be whether or not a member state regulation violates EU rules against discrimination against out-of-state products, while another issue is whether the member state regulation in fact applies to the situation that gave rise to the litigation. The former is an EU issue, the latter a member state issue. In the United States, similar entwinements are routine. A state criminal case may involve issues of state criminal law and criminal procedure as well as federal constitutional regulation of the state criminal process. Appellate review of member state rulings in such cases raises the concern that the appellate court—whether it be the U.S. Supreme Court or the ECJ—will review not only the state court's holdings on federal law but its holdings on state law as well. The latter type of review would violate the federalism principle that the member state is sovereign over member state law.

This problem is to draw lines between issues that are and are not within the ECJ's purview. The ECJ may profit from the Supreme Court's efforts to deal with the parallel issue in U.S. judicial federalism. The Court has worked out a body of principles that distinguish between the set of cases that depend on federal law, for which Supreme Court review is justified, and those which turn entirely on state law, for which review should be denied. In order to illustrate the Supreme Court's rule, consider a version of the hypothetical case described in the preceding paragraph, in which the member state court issues two rulings: (a) that EU law forbids regulating the product in question, and (b) that the state's rule does not cover this product. If the ECJ were to adopt the Supreme Court's approach, it would not review the judgment because the outcome of the litigation would be the same no matter how (a) is decided. Put another way, (b) a ruling on member state law, is adequate to support the judgment in favor of the seller. In the jargon of U.S. Supreme Court review, the state ground would be "independent . . . and adequate" to sustain the judgment because any ruling on the EU issue would not affect the outcome.[321] Now suppose the member state court had decided that the state's rule does cover the product. In that case, the EU issue would be decisive and, thus, reviewed. Even in that case, however, the ECJ would not address (b), the issue of member state law.

321. Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

2. The "Primacy" Issue

Article VI of the United States Constitution declares that federal law is "supreme."[322] In practice this means that state law is always subordinate to federal law. Any inconsistency between the two is fatal to the validity of state law.[323] The issue of how EU-member state conflicts should be resolved is not so clear-cut.[324] The TEU includes a "principle of sincere cooperation," under which the "Member States shall take any appropriate measure . . . to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union,"[325] which is sometimes called a "duty of loyalty."[326] The ECJ holds that this provision signifies the "primacy" of EU law,[327] and "primacy" suggests, if it does not imply, supremacy. For example, in a leading case on the topic, the ECJ said that "the law stemming from the Treaty . . . could not, because of its special and original nature, be overridden by domestic legal provisions."[328] Some of the member states endorse the ECJ's view.[329] Others agree that EU law overrides ordinary member state legislation but reject EU primacy when EU law conflicts with the fundamental law of the member state. Germany, the most powerful member state, is in this group,[330] as are the Czech Republic, Hungary, and Denmark.[331]

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322. U.S. CONST. art. VI, § 2.

323. *See* FELDMAN & SULLIVAN, *supra* note 28, at 285. For a discussion of the implications of federal supremacy for the law of judicial federalism, *see* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES xi-xii (2009) (taking an ambitious view of federal power).

324. *See* Monica Claes, *The Primacy of EU Law in European and National Law*, *in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW, *supra* note 268, at 178 (noting that "primacy remains sensitive and contested").

325. TEU, *supra* note 26, art. 4.

326. *See* GOEBEL ET AL., *supra* note 30, at 134.

327. *See, e.g.*, Case 48/71, Commission v. Italy, 1972 E.C.R. 527; Case 6/64, Costa v. Ente Nazionale Energia Elettrica (ENEL), 1964 E.C.R. 587; *see also* LENAERTS & VAN NUFFEL, *supra* note 56, at 633.

328. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 594.

329. *See* GOEBEL ET AL., *supra* note 30, at 309-12 (discussing Belgian decisions and stating, that others in this camp "apparently include Luxembourg, the Netherlands, the Slovak Republic, Bulgaria, Romania, the Baltic States (Estonia, Latvia, and Lithuania), Cyprus, and Malta"). *Id.* at 312.

330. *See, e.g.*, BVerfG, 2 BvE 2/08, June 30, 2009, paras. 204, 209-12 (holding the Act Approving the Treaty of Lisbon (Zustimmungsgesetz zum Vertrag von Lissabon) is compatible with the German constitution, otherwise known as "Basic Law").

331. *See* GOEBEL ET AL., *supra* note 30, at 325-26; *see also* Rostane Mehdi, *French Supreme Courts and European Union Law: Between Historical Compromise and Accepted Loyalty*, 48 COMMON MKT. L. REV. 439 (2011) (discussing the complexities of the French approach to primacy); Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for*

The primacy of EU law is not the focus of this Article.[332] But the topic cannot be avoided entirely because the primacy issue is related to ECJ review of member state courts. As Judge Cabell pointed out in *Hunter v. Martin*, when one court hears appeals from another court's rulings, the relationship is that of a superior authority to an inferior because the appellate court can override the court from which the appeal is taken.[333] Thus, ECJ review would imply a hierarchical relationship in which the ECJ outranks the member state courts. The ECJ's assertion of the primacy of EU law would hold sway in situations in which member state law conflicted with EU law, just as it does today in ECJ rulings on preliminary references. Arguably, the "appellate review" approach would strengthen the ECJ's position vis-à-vis the GFCC and other member state courts that reject full primacy.

Nonetheless, adoption of the appellate review model does not concede full primacy to EU law over member state law. The two issues are not logically linked to one another, such that primacy of EU law over member state law necessarily follows once preliminary reference is replaced by a system of ECJ appellate review.[334] Appellate review serves at least two functions: (a) it enables a central government to control the content of central government law; and (b) it enables a central government to maintain the supremacy of central government law over competing state law. The former does not necessarily imply the latter.

The distinction between (a) and (b) is between judicial hierarchy and substantive-law hierarchy. Appellate review of EU issues involves the former, even if the latter remains contested. ECJ control over the content of EU law is all that appellate review requires. For example, in a hypothetical world in which the ECJ's primacy doctrine were rejected in favor of the GFCC's position, many important matters would remain under the control of the member states, regardless of EU law to the contrary.[335] On those matters, a ruling on EU law would fall before the

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National Identity Under the Lisbon Treaty, 48 COMMON MKT. L. REV. 1417 (2011) (discussing arguments that the Lisbon Treaty's provision of respect for national identity provides a rationale for limits on primacy).

332. For a discussion of some of the issues raised by the debate over primacy, see Wells, *supra* note 25, at 769-74.

333. *See supra* note 316 and accompanying text.

334. *Cf.* Editorial Comments, *supra* note 299, at 966-68 (distinguishing between the issue of whether member state courts may disobey ECJ rulings on EU law and the issue of primacy and showing that recognition of a duty to obey does not imply primacy).

335. *See* BVerfG, 2 BvE 2/08, June 30, 2009, paras. 202, 204, 216-17, 225. For example, paragraph 249 states that German law requires member state control of "citizenship, the civil and

primacy of member state law. But the ECJ would remain the ultimate authority on the content of EU law, just as the state courts in the United States have ultimate control over state law, despite the supremacy of federal law.[336] As applied to the GFCC's May 5, 2020 ruling, the ECJ would have the power to review and reverse the GFCC holding that the bond buying violated the Treaty. But the GFCC would not, as an implication of that hypothesized reversal, be precluded from ruling that the German Central Bank was forbidden by German law from participating in the purchases. Germany would also not be precluded from asserting that its law overrides EU law on the point, or from ordering the German Central Bank to comply with the GFCC ruling, or from leaving the European Union in the event the conflict could not be resolved.[337]

The point of distinguishing between (a) and (b) is to exclude the primacy issue from a discussion of whether to adopt an appellate review model because it is beside the point. If the arguments advanced above in favor of appellate review are strong enough to justify a shift from the current preliminary reference practice, that change can be made without resolving the primacy issue in the ECJ's favor. Primacy can be left to one side, to be debated on its merits and in the context of specific measures, without allowing it to unduly influence the appellate review-preliminary reference issue.

V. CONCLUSION

Besides the "network" and "appellate review" alternatives examined in this Article, a third approach to the issues raised by EU law in member state courts is to do nothing, to maintain the status quo. Some analysts of EU law favor a version of interpretive pluralism, in which member state courts are not subject to ECJ review of their EU rulings. Instead, in this version, member state courts may rule as they please on EU issues, the ECJ may disagree when and if the issue comes to it, and disagreements may persist, at least up to a point and for a significant period of time, as to

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the military monopoly on the use of force, revenue and expenditure . . . and all elements of encroachment that are decisive for the realization of fundamental rights, . . . the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology." *See also* Luke Dimitrios Spieker, *Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts*, 57 COMMON MKT. L. REV. 361 (2020).

336. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

337. TEU, *supra* note 26, art. 50 ("Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.").

the meaning of the Treaty of the European Union, the Treaty on Functioning of the European Union, and other aspects of EU law. The core idea of this type of interpretive pluralism is that each member state has its own culture and values, that the interpretation of EU law can turn on culture and values, and that disparities across the European Union as to the content of EU law are a positive feature of the European Union, not a shortcoming.[338]

In the United States, this idea was put to rest by the holding in *Hunter's Lessee* that upheld Supreme Court review of state court judgments. Since the ECJ cannot review member state court judgments, the notion of unbounded interpretive pluralism flourishes in academic debate over the relations between the European Union and the member states, with both champions and detractors.[339] In some ways, this version of interpretive pluralism resembles the Supreme Court's practice of allowing an issue to "percolate" in the lower courts before addressing it. In this way, the Court can learn from a variety of perspectives a diverse array of lower courts brings to bear on the issue. Since the Court chooses whether and when to address an issue, differences may persist for many years.[340] But the similarity is misleading. The premise underlying percolation is that the Supreme Court will have the final say on the content of federal law, when the Court decides the time is right. Interpretive pluralism allows differences between the ECJ and a member state court to remain in place, with no definitive resolution.

Both the "network" and the "appellate review" models described in this Article reject unbounded interpretive pluralism, because its costs outweigh its benefits. The benefit is the leeway currently afforded the member state courts. The costs include sacrificing *Osborn*'s principle that a federal forum should be available for federal issues, foregoing the opportunity to further the process of EU integration, and leaving member state courts' rulings on EU law in a kind of limbo, in which they determine outcomes but lack legitimacy. The EU legal system as a whole would provide better guidance and inspire more confidence if a single court were truly, and not just formally, in charge of EU law, even if that court

338. *See* Davies, *supra* note 276, at 323-34; *cf.* TEU, *supra* note 26, art. 4 (providing that the European Union "shall respect" the member states' "national identities, inherent in their fundamental structures, political and constitutional").

339. For such debate over interpretive pluralism, *see, e.g.*, the essays collected in RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW, *supra* note 276.

340. *See* Seinfeld, *supra* note 152, at 118.

sometimes makes mistakes.[341] One of the objections to Supreme Court review in *Hunter's Lessee* was that the Court might abuse its power. Justice Story responded that, "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse."[342]

For the past several decades, the European Union has relied largely on the European Commission to implement its policies.[343] In the long run, the realization of EU goals will likely require reliance on the member states and their courts.[344] If the member states and the leaders of the European Union are content to maintain the current federal-state balance, interpretive pluralism may serve the EU's needs well enough, with occasion interventions by the European Commission to correct systematic defiance of EU norms by member state courts.[345] If, however, the overriding goal of the European Union is "an ever closer union among the peoples of Europe,"[346] the role of EU law will grow larger, disputes between national courts and the ECJ will become more frequent, and persistent disagreements will become less tolerable. Adjustments to current EU judicial federalism will be needed. Sooner or later, those adjustments should include ECJ appellate review of member state judgments, and perhaps eventually a network of lower EU courts as well.

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341. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 109 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing "the principle of institutional settlement").

342. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 345 (1816).

343. *See* JOHN PEET & ANTON LA GUARDIA, UNHAPPY UNION: HOW THE EURO CRISIS—AND EUROPE—CAN BE FIXED 19 (2014) ("At the heart of both the EU and the euro stands the European Commission. . . . The Commission is the guardian of the treaties, has the near-exclusive right of legislative initiative, administers competition and state-aid law and conducts certain third-party negotiations, for instance on trade, on behalf of the EU as a whole."); *see also* STINE ANDERSON, THE ENFORCEMENT OF EU LAW: THE ROLE OF THE EUROPEAN COMMISSION (2012). Distinguish implementation of policy from making policy, a role that ultimately belongs to the member states acting as the European Council. *See* LENAERTS & VAN NUFFEL, *supra* note 56, at 476 ("[T]he European Council defines the strategic guidelines for legislative and operational planning . . . [and] identif[ies] the strategic interests and objectives of the Union's external action.").

344. *See* Wilman, *supra* note 222, at 889 (noting "the vital role of private enforcement in the EU's legal order.").

345. *See* Davies, *supra* note 276, at 332.

346. TEU, *supra* note 26.