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JUDICIAL INTERPRETATION AS A DISCOURSE ON POWER: AN EXAMINATION OF KEY DECISIONS FROM THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF JUSTICE

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

—James Madison, *The Federalist No.51*[1]

I. INTRODUCTION

Power. At once desired and feared, one can hardly speak of the formations of governments, or the revolutions against them, without also speaking about power.[2] The consolidation of too much power in too few hands, with no balance between central authority and peripheral autonomy ignited the American Revolution.[3] Upon attaining independence from Britain, the battle began among those who faced the daunting task of forming "a more perfect Union."[4] These Founders, in reflection upon the abuses they had just escaped, created "finely wrought and exhaustively considered"[5] procedures designed to keep separate the powers of the executive, legislative, and judicial branches of the newly created federal government so that the oppression and tyranny of King George III could not be repeated.

Connecting the dots between pre-Revolutionary oppression and constitutional sep-

1. THE FEDERALIST No. 51 (James Madison). Here, Madison argues for the twin principles of "horizontal" separation of powers, which divides the federal government into distinct branches, and "vertical" separation of powers, which recognizes the distinction between national and state governments. Working together, the two separations provide a "double security," of sorts, ensuring that the people have not abdicated all powers to the federal government. Ernest A. Young, *The Federal Separation of Powers in Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1655 (2002).

2. *See* Youngjim Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter*, 33 DENV. J. INT'L L. & POL'Y 391, 395-96 (2005). Using Iraq as a modern example, the author illustrates how power is central to governmental formation, individual self-determination, constitutional construction, and the relationship to an occupying force, especially during belligerencies.

3. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776). The signers published a list of grievances against the British monarchy, primarily involving abuses of power relating to governors, legislators, judges, and individual rights. Following this list, it states: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." Whatever else may have precipitated the American Revolution, oppression and tyranny from a centralized government was a principal reason that the colonists went to war.

4. U.S. CONST. pmbl.

5. I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

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aration of powers is a familiar exercise from basic American civics lessons. This paper attempts to go one step further, extending the line of reasoning past government structure to judicial interpretation. Whether a court tends to interpret laws textually or teleologically—that is, emphasizing the language of the law or the purpose of the law—is in part dependent on the form of federalism within which that court operates. Further, the form of federalism in question is not only a matter of governmental structures and procedures, but also includes the contemporary discourse[6] on power within the given federation. To demonstrate the hypothesis, this paper first compares the federalism of the United States with the federalism of the European Union ("EU") and includes a discussion of the contrasting corruptions of power that gave rise to each federation. Then, it compares philosophies of interpretation in the Supreme Court of the United States and the European Court of Justice ("ECJ"), the highest court in the EU, as functions of diverse federalist systems.

Section II of this article provides a brief, but working foundation of the historical roots of federalism in both the United States and the EU.[7] For the United States, this groundwork involves a brief description of the corruptions that were born out of consolidating power in the British monarchy and the resulting post-Revolutionary plan to create a federal government with structurally and procedurally separated branches to manage executive, legislative, and judicial functions.[8] The less familiar history of the EU, on the other hand, warrants a more detailed discussion.[9] Following this background, Section III focuses on one potential objection—namely, that the Supreme Court of the United States has not uniformly adopted a textualist interpretive strategy, but has at times been dominated by justices who prefer purposive or intentional hermeneutics.[10] Section IV analyzes the Supreme Court's interpretive history, both textual and teleological, as a function of the post-Revolutionary War, post-Civil War, and post-World War II discourse on the dangers of the consolidation of too much power in too few hands, the need for the separation of powers at the federal level, and the historical emphasis on natural law.[11] By way of contrast, this section also evaluates several cases from the ECJ that evidence the court's prioritization of teleological interpretation, looking to the EU's integrative purpose over and above formal adherence to the language of law, particularly in light of the

6. In socio-cultural studies, the word "discourse" is broadly used to refer to the structures, functions, rules, and patterns of language. For post-structuralists in socio-cultural studies, however, it has come to mean something even more particular; discourse refers to combinations of concerns, concepts, themes, and types of statements, all of which are historically produced and historically situated to such a degree that they exert power over language and in turn, power over a culture. *See generally* HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY (2011); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1979); ANNE WAGNER & LE CHENG, EXPLORING COURTROOM DISCOURSE: THE LANGUAGE OF POWER AND CONTROL (2011).

7. *See infra* notes 13-72.

8. *See* Bradford A. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001).

9. Though, it should be noted that a concise, clear history of the EU, its structures, and its treaties is nearly impossible, and according to some, this lack of a clear history presents a "real problem of legitimacy." *See* Young, *supra* note 1, at 1621-22. Comparing the complexity of the EU to America, Young notes that the basic workings of the American central government may be learned from three-minute cartoons. *E.g.*, *Schoolhouse Rock: America Rock* (ABC Home Video 1995).

10. *E.g.*, Theo I. Ogune, Esq., *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. BALT. L. F. 4, 14-21 (2000).

11. Clark, *supra* note 8, at 1403-04 (discussing judicial compliance with federal lawmaking procedures).

multiple languages spoken by the Member States.[12] This section ends with a proposed answer to the question raised in Section III. Section V offers a brief conclusion along with additional questions that the hypothesis raises.

II. BACKGROUND

A. American Federalism: Separation

The relationship between the colonies and Britain was not hostile in its beginning,[13] and for some time and for various reasons, the colonies even enjoyed relative autonomy.[14] By the time the British began to reassert their powers over the colonies (particularly with regard to taxation for the purposes of reducing large debts), colonial representatives had become quite skilled at employing legal rights and claims familiar to English barristers, solicitors, and the British public, and they began claiming that they should retain their rights as English citizens.[15] Each colonial government provided a seat for voicing discontent—Boston, Philadelphia, and Williamsburg—all to send the message that rights were being trampled by a governmental structure insufficient to hold back its monarch.[16] Finally, after the colonies sent representatives to the Stamp Act Congress to oppose taxation, and subsequent to the calling of two Continental Congresses to respond to abuses, boycott British goods, and petition the king, the Colonists decided that the time for negotiation had ended and that the time for independence and force had begun.[17]

One need not look further than the Declaration of Independence itself to find a litany of grievances demonstrating that unchecked power corrupts and necessarily leads to oppression.[18] Among other injuries and with regard to legislative action, the signers accused King George III of allowing his governors to pass laws without the colonists' consent, of instituting legislation that affected large groups of people until they relinquished their right to representation, of dissolving Representative Houses for opposing "his invasions on the rights of the people," and of delaying elections.[19] Regarding the judiciary, they accused the king of making judges' tenure and salary dependent on "His will" and of depriving the colonists of trials by jury.[20] According to the signers, the king further levied taxes on them without consent or representation, maintained standing armies in the colonies without consent from the legislature, and forced the colonists to quarter the troops.[21] All this, the declaration states, is the effect of "absolute Despotism."[22]

Following the Revolutionary War and borrowing heavily from philosopher John

12. *See generally* Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L. L.J. 656, 660-61 (1997).
13. JOHN R. VILE, THE WRITING AND RATIFICATION OF THE U.S. CONSTITUTION: PRACTICAL VIRTUE IN ACTION 2-3 (2012).
14. *Id.* at 3.
15. *Id.* at 3-4.
16. *Id.* at 4.
17. *Id.* at 5.
18. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

Locke, the Framers of the new American Constitution sought to create a governmental structure with only those powers necessary to protect the rights of "life, liberty, and the pursuit of happiness."[23] It was necessary, then, to divorce from government the sorts of entanglements and structures that might allow it to rule by divine fiat or without procedural encumbrances.[24] Structurally and procedurally, the Framers conceived of a legislature, executive, and judiciary that functioned separately and independently of one another as a further check on potential corruptions of power.[25] So important was this notion to the Constitution's Framers that some among them—most notably, Benjamin Franklin—believed that the executive branch should be vested in a number of persons functioning together as a council.[26] Though the Framers did not ultimately adopt his proposal, Franklin's proposal demonstrates their sensitivity to the corrupting potential of centralizing power, not only in the wrong hands, but in too few hands.[27] As a result, what marked American federalism from its outset was the separation of governmental powers and a discourse that feared the consolidation of that power.

B. European Federalism: Integration

If it can be said that the corruption inherent in the over-consolidation of power precipitated the formation of the United States, then it might also be said that the corruptions inherent in the failure to consolidate any regional power precipitated the formation of the European Union.[28] That is, it was the complete disintegration of regional European interests that created the necessary sociopolitical context for what was essentially an eighty-year civil war, running from the Franco-Prussian War in 1870, until the end of World War II ("WWII").[29] Several attempts were made to remedy the political tensions, but each failed.[30] The Treaty of Versailles, signed after World War I ("WWI"), was essentially a document meant to place war guilt on Germany.[31] The League of Nations, a precursor of sorts to the United Nations was formed in 1919, within just one year of the end of the war, to ensure mutual regional security; however, its strategy was also doomed to fail for numerous structural and sociological reasons that have been outlined at length.[32]

In 1951, following WWII and the formation of the Organization for European Economic Cooperation,[33] six nations signed the Treaty Establishing the European Coal

23. GEORGE M. STEPHENS, LOCKE, JEFFERSON, AND THE JUSTICES: FOUNDATIONS AND FAILURES OF THE US GOVERNMENT 13 (2002).
24. *Id.* at 17.
25. TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 142 (Herman Belz et al. eds., 1992).
26. SYDNEY GEORGE FISHER, THE TRUE BENJAMIN FRANKLIN 357 (1898).
27. *Id.*
28. Mark C. Anderson, *A Tougher Row to Hoe: The European Union's Ascension as a Global Superpower Analyzed through the American Federal Experience*, 29 SYRACUSE J. INT'L L. & COM. 83, 92 (2001).
29. *Id.*
30. Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314, 319-20 (2005).
31. *Id.*
32. *See* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 632-33 (2002).
33. Anderson, *supra* note 28, at 88. The Organization for European Economic Cooperation was created to coordinate the Marshall Plan's infusion of funds into the European post-war rebuilding effort.

and Steel Community ("ECSC").[34] Prior to the ECSC,[35] the individual sovereign nations of Europe had not consolidated any powers or regional interests.[36] This lack of consolidation created the environment necessary for what amounted to a decades-long civil war that culminated in WWII.[37] The purpose of the ECSC, in light of the years of European turmoil, was to forge interdependence between key European nations on the coal and steel resources necessary for the manufacture of ammunitions as well as post-war rebuilding efforts.[38] Creating the ECSC eased tensions after WWII by deincentivizing attacks on neighboring countries and informing all ECSC countries if one ECSC country attempted to mobilize its forces.[39] The ECSC's progeny of subsequent treaties built upon this initial effort to create an increasingly interdependent Europe—one that prioritized the free movement of goods and people throughout Europe while still respecting member state sovereignty.[40] The arc of EU federalism, then, is bent toward increased interdependence as a response to its historical failure to integrate any of its regional interests.[41]

The ECSC's immediate purpose was to remove internal trade barriers in the respective industries, but many envisioned it as "a first step in the federation of Europe."[42] Six years later, in 1957, the same six nations signed two treaties in Rome, one creating the European Economic Community ("EEC") and the other the European Atomic Energy Community ("Euratom").[43] The EEC Treaty in particular expanded the fledgling federation to include a common market and even called on its members to harmonize certain aspects of economic policy, such as agriculture (Articles 38 to 47), transport (Articles 74 to 84), and trade (Articles 110 to 116).[44] It also created the basic structural arrangements that characterize the current EU: the Council of Ministers, which is made up of representatives of Member State governments; the European Commission, which, among other things, initiates legislation and monitors the implementation of the treaties; the European Council, a parliamentary assembly that possesses little power, but provides guidance; and the European Court of Justice, the court tasked with interpreting EU law and enforcing its obligations.[45]

Following the EEC and Euratom Treaties, Europe witnessed increased membership

34. Young, *supra* note 1, at 1623.

35. Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter "ECSC Treaty"], *available at* http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm. The ECSC Treaty was the first in a succession of treaties creating the European Community and eventually creating the European Union as it is today.

36. Anderson, *supra* note 28, at 88-89.

37. Larry Cata Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331, 1332 (1998).

38. Members of the ECSC included France, Italy, West Germany, Belgium, the Netherlands, and Luxembourg.

39. *See* Young, *supra* note 1.

40. GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN UNION LAW 17 (2d ed. 2002).

41. Young, *supra* note 1, at 1732-33.

42. *Id.* at 1623 (quoting Robert Schuman, Foreign Minister of France from 1948-1953, Robert Schuman, *Declaration of 9 May 1950*, *in* THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN COMMUNITY 58, 59 (David Weigall & Peter Stirk eds., 1992)).

43. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169 [hereinafter "Euratom Treaty"].

44. Treaty on the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (now Article 234 of the EEC Treaty) [hereinafter "EEC Treaty"].

45. *Id.*

in the treaty community and significant advances in economic integration, culminating in the Single European Act ("SEA"), signed in 1986 in Luxembourg.[46] Member States designed the SEA to remove the remaining barriers to the single European market, making it more difficult for any one country to veto proposed legislation and giving its parliamentary body more power.[47] The Maastricht Treaty of 1992 ("Treaty on the EU") advanced consolidation even further by officially creating the "European Union" and transforming the European Community, as it was then called, into only one of the three "pillars" that comprise the "competences" of the EU—common market, common foreign and security policy, and cooperation on home affairs and justice.[48] Additionally, the Treaty on the EU set the timetable for the eventual introduction of the Euro.[49]

Three additional treaties complete the EU picture: The Treaty of Amsterdam,[50] the Treaty of Nice,[51] and the Treaty of Lisbon.[52] Anticipating the entrance of new Member States, the Treaty of Amsterdam and the Treaty of Nice were both designed to make the EU more efficient in preparation for new Member States, primarily through enhanced transparency in decision making and redefined voting systems.[53] The Treaty of Lisbon, which was signed in 2007 and entered into force in 2009, sought to make the EU more democratic and better able to address global concerns, such as climate change, by employing a single perspective.[54] It also initiated structural changes to the bodies of the EU, such as providing a president to the European Council, granting more power to the European Parliament, and introducing additional changes to the voting procedures in the European Council.[55] Finally, the Treaty of Lisbon clarified which powers belonged exclusively to the EU, which powers belonged to Member States, and which powers were shared.[56]

Similar to the treaties, an account of the governmental bodies within the EU[57] "defies easy description."[58] The legislative powers are divided between three bodies: the Council of Ministers, the European Commission, and the European Parliament.[59] A fourth institution, the ECJ, exercises judicial authority over the EU.[60] Suffice it to say, any attempt to fit the EU legislative institutions into an American framework would be misleading.[61] One scholar has summarized the institutional organization by saying,

46. Single European Act, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 (1987).
47. *Id.*
48. Treaty on European Union (Maastricht Treaty) 1992 O.J. (C 191).
49. *Id.*
50. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, 1997 O.J. (C 340).
51. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. (C 80).
52. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. (C 306) [hereinafter "Treaty of Lisbon"].
53. *See* Young, *supra* note 1.
54. *See* Treaty of Lisbon, *supra* note 52.
55. *Id.*
56. *Id.*
57. While the inner workings of the legislative process within the EU are fascinating and worth noting, these issues are outside the scope of this article.
58. Young, *supra* note 1, at 1626.
59. *Id.* at 1625.
60. *Id.*
61. *Id.* at 1628-29.

"[e]ach of the organs is thought to represent a certain constituency in the centre's decision-making process: the European Commission [represents] the common interest, the Council [represents] the Member States, and the European Parliament [represents] the peoples of Europe."[62] The commission proposes EU legislation, but the council and parliament can request that the commission consider particular subjects.[63] The council has the authority to approve the commission's proposal and can even make amendments, acting in conjunction with the European Parliament.[64] Depending on the subject of the proposed legislation, however, the role of Parliament changes.[65]

The ECJ serves to interpret and enforce EU law, and thus serves a judicial and quasi-executive function.[66] Its decisions have established principles of EU law such as direct effect and supremacy of EU law, as well as a number of unenumerated human rights, all of which fall outside the textual provisions of the treaties.[67] It is from these extratextual hermeneutical maneuvers that this article's hypothesis benefits in comparing the interpretive strategies of the Supreme Court of the United States to that of the ECJ.[68]

American federalism, marked by a separation of powers, arose as a response to the corruption inherent in the consolidation of too much power in too few hands.[69] Consequently, the Supreme Court has a long history of textual interpretations, even when including purpose or intent in its analysis, as a way of not intruding too far into legislative territory.[70] By contrast, European federalism, marked by increased integration, has slowly arisen through amended treaties as a response to the failure of the region to consolidate any power in any hands.[71] Accordingly, the ECJ has a history of teleological interpretations—even some that go beyond the text altogether—as a way of ensuring that the EU maintains the integration to which all of its treaties testify.[72] Because of the emphasis on teleological interpretation, the EU law framework is "far from being rigid and immovable," but is full of "shifting contours" because the Member States are always negotiating the relationship between their own sovereignty and their combined commitments to Community integration.[73]

62. Volker Ruben, *Constitutionalism of Inverse Hierarchy: The Case of the European Union* 3 (N.Y.U. L. Working Paper No. 62 2003).
63. Young, *supra* note 1, at 1626.
64. *Id*.
65. *Id*.
66. *Id*. at 1631-32.
67. *See* BERMANN ET AL., *supra* note 40. The EU doctrine of Direct Effects gives citizens of EU Member States the right to commence litigation in national forums and tribunals based on EU law even while it does not create a cause of action in national law. The supremacy of EU law developed slowly over several cases and requires that when national law and EU law conflict, national law must be ignored so that EU law can take effect. The ECJ has also created several "fundamental rights" such as human dignity, right to life, respect for family and private life, right to found a family, right to education, and right to asylum.
68. Young, *supra* note 1, at 1630-31.
69. Markus G. Puder, *Supremacy of the Law and Judicial Review in the European Union: Celebrating* Marbury v. Madison *with* Costa v. ENEL, 36 GEO. WASH. INT'L L. REV. 567, 581 (2004).
70. *Id*.
71. Young, *supra* note 1, at 1624-25.
72. Fennelly, *supra* note 12, at 664-66.
73. Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INT'L L.J. 1338, 1345-46 (2010).

III. OBJECTION

Before proceeding into the analysis, it is worth acknowledging that, although the differences between the forms of federalism in the United States and the European Union differ in key ways, these differences obviously do not lead to absolute distinctions in judicial interpretation such that the Supreme Court of the United States is purely textual or that the European Court of Justice purely teleological. The most cursory review of the history of American legal hermeneutics reveals that the Supreme Court has employed a variety of interpretive strategies along the textual-teleological spectrum—from the judicial passivity integral to textualism, to the so-called judicial activism integral to more teleological approaches.[74]

At first glance, this objection would seem to militate, and quite reasonably so, against the stated hypothesis. The structure of American federalism, defined in part by its separation of federal powers, has remained relatively constant since the nation's founding, yet there have been, at significant times throughout American history, especially those moments when America as a nation has been most aware of power and its potential abuses, shifts toward teleological constitutional and statutory interpretations. Since WWII and following the western world's shift away from post-Enlightenment modernism toward postmodernism,[75] America's discourse on power has become skeptical of formulaic and synchronic interpretations of texts and has shifted to include indications of the law's purpose and intent in addition to its text.[76]

This shift is not unique to America; it also mirrors the post-war discourse in Europe, and also happens to coincide with the seeds that eventually led to the creation of the European Union.[77] It is reasonable, then, for the modern American Supreme Court to include interpretative strategies similar to those that have been operative in the ECJ since its inception. In fact, as Section IV demonstrates, it is not only the *modern* American Supreme Court that has looked to purpose or intent, but these factors have played an important role in *early* American interpretation. The Court in key decisions interpreted the Constitution and later Amendments at times in light of the text, and at times in light of purpose, but always within the framework of the contemporaneous discourse on power.[78]

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74. Ogune, *supra* note 10, at 21-40 (comparing passivity and activism in American courts).

75. Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 668 (2008). The author discusses the differences between "postmodern unsettlement," principles of certainty, and authority in statutory interpretation, such that in a postmodern world judges may be textualists and yet still reach "differing, even diametrically opposed" decisions. *Id.*

76. *See* Geoffrey Schotter, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241, 1250 (2010):

> Judges ascertain structural teleological meaning by analyzing the position that the provision at issue occupies in the Constitution's contemporary structural framework at the moment of decision. But structural teleological meaning acknowledges the dual nature of this framework that results from the Constitution's writtenness. A constitution is first and foremost not a document but a system by which a political power—between the various branches of government, between the federal government and state governments, and between the sovereign "We the People" and the political institutions governing on its behalf—is allocated.

Id.

77. Anderson, *supra* note 28, at 83-84.

78. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 420-21 (1996).

IV. ANALYSIS

The assertion that judicial interpretation is somehow structurally restrained or a function of a broader social discourse is certainly not axiomatic.[79] Indeed, there are those who contend, and not without reason, that differences among interpretative strategies are attributable to the "variances in education, personalities, responses to the world around us, and outlooks on the world in which we live" of the individual judges.[80] In a culture marked by an ideological commitment to individualism (whether or not such an ideology bares resemblance to reality),[81] it is appealing to believe that "[e]ach judge is a distinct world unto himself or herself"[82] and that judicial pluralism is a matter of individual psychological and experiential differences between judges.[83] Commitment to such a belief, however, ignores the degree to which legal interpretation, as an extension of the creation of the law, is subject to sociological forces that transcend the individual judge—forces such as institutional legitimization,[84] social construction,[85] cultural production,[86] and a historically and structurally fluid national discourse on the law and power.[87]

That lawmaking and judicial power transcends, but still includes, the individual through both structural arrangements and social discourse is not a modern or even a particularly American idea.[88] In the late 1640s, John Locke adopted the separation of powers as a principle thesis in his philosophical work on governments.[89] A half-century later, Montesquieu further refined this tenet.[90] The works of both men influenced English political theorists and changed the shape of how the British Crown and Parliament func-

79. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 21 (2002).

80. *Id.* at 23.

81. *See generally* Alpheus T. Mason, *American Individualism: Fact or Fiction*, 46 AM. POL. SCI. REV. 1 (1952) (arguing that the modern world's shift toward larger corporations and larger government has lessened American individualism, and criticizing the historical roots that it ever truly existed in the first place).

82. Barak, *supra* note 79, at 23.

83. *Id.*

84. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593-94 (1995) (criticizing, yet acknowledging, the role played by institutional and political commitments in restraining statutory interpretation, which tends to idealize passive "judicial restraint" as the only legitimate hermeneutic).

85. *See* Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 728-29 (1989) (positing a "social reality of the legal person" that borrows from a broad spectrum of social theories and literary criticism to describe differences in legal interpretation across cultures, particularly American and European).

86. *See* Backer, *supra* note 37, at 291-92 (exploring the law, its articulation, and its interpretations as an example of cultural "norm making" and arguing that courts are recipients rather than architects of the law as a cultural product).

87. *See* Robert J. Lukens, *Discoursing on Democracy & the Law—A Deconstructive Analysis*, 70 TEMP. L. REV. 587, 592-95 (1997) (leaning on Habermas throughout, Lukens argues that the law, as well as society's willingness to voluntarily obey it, is the result of democratic participation as a means of public discourse, which in turn shapes the ways in which the law is interpreted). *See also* Robert F. Nagel, *Nationalized Political Discourse*, 69 FORDHAM L. REV. 2057, 2057 (2001) (providing examples of how public political discourse has affected not only the judicial nomination and confirmation process, but also legal interpretation).

88. *See* Pushaw, *supra* note 78, at 400 (discussing the philosophical influence of Locke and Montesquieu on the evolution of constitutional separation of powers and the need for distinct spheres of legal authority shared among the several branches of government).

89. *Id.*

90. *Id.*

tioned, both independently and interdependently.[91]

The American Revolution both affirmed the British ideal of separation of powers and accused the British government of trampling that ideal.[92] The Declaration of Independence cataloged the ways in which the separation of powers were enshrined in the structure of British government but were nowhere to be found in its function.[93]

After the Revolutionary War, the Federalists[94] confronted the daunting task of formulating a new expression of the doctrine of separation of powers.[95] Without an American equivalent to the British system of "hereditary aristocracy and monarchy,"[96] the Federalists argued that the People were the sovereigns and that separate governmental authorities were "the People's agents and representatives."[97] It is in this context—a discourse on the failed structural arrangement of British separation of powers and the national discourse following the Revolutionary War—that the American Constitution was formulated.[98] In addition to considerations regarding executive and legislative powers, the Federalists, building on Montesquieu,[99] contributed to the discourse on governmental power in ways that ultimately won the day with regard to the government's structure and function, arguing for a court of "supreme and final jurisdiction" as its own distinct branch:

> The only question that seems to have been raised concerning [the Supreme Court], is, whether it ought to be a distinct body or a branch of the legislature . . . . It may . . . be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an

91. *Id*. at 404.
92. *Id*. at 407.
93. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
94. The Federalists' commitments to particular structures and functions within a central government were, at the very least, a reflection of the post-Revolutionary War discourse on power—the notion that it was necessary but dangerous if unchecked. As both recipients of and participants in a particular discourse on power, the Federalists proposed the centralization of power along with procedural safeguards to protect the interests of the People. References in this paper to the Federalists are meant to bring to mind not only their distinct political principles but also the contribution they made through the creation of social artifacts, such as The Federalist Papers, to the broader socio-cultural discourse on power.
95. Clark, *supra* note 8, at 1346-47 (discussing the history of the Constitution as a re-imagination of federalism that not only addresses the flaws in the British system but also remedies flaws in the early attempts at self-governance within the framework of the Articles of Confederation).
96. Pushaw, *supra* note 78, at 411.
97. *Id*.
98. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 346-48 (1969).
99. Pushaw, *supra* note 78, at 405-06 (*citing* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748)).

> Montesquieu was the first to conceptualize "judicial power" as a distinct component of government (not merely an extension of executive authority) and thus assumed the burden of explaining why it had to be kept separate. First, judicial and executive power had to be divorced to avoid a tyranny in which "the judge might behave with violence and oppression." Second, if judicial power were "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control," because decisions would reflect the judge's personal opinion rather than existing legal rules.

Id.

> inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.[100]

With the fight for independence still fresh on their minds, the Federalists were all too aware "that a mere demarcation on parchment of the constitutional limits of the several departments, [was] not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[101] The Federalists contended that the Constitution must not only delineate the separate functions of the disparate branches, but it must also provide for functional "checks and balances" as a means of keeping the branches in their distinct and "proper places."[102] These checks and balances operate in two primary ways: first, they impose a limit on each branch's authority by requiring the consent of different governmental bodies to make law; and second, they separate legislation from other government functions.[103]

The separation of powers was enshrined in the Constitution as a protection for the people, and the Federalists relied primarily on the judicial branch to ensure its effectiveness.[104] The judicial "check" on the other branches exists in the form of judicial review,[105] while the principle of justiciability provides "balance" in the separation of pow-

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100. THE FEDERALIST NO. 81 (Alexander Hamilton). Throughout this paper, Hamilton answers objections to a supreme court as a co-equal branch of the federal government. His responses make it clear that the founders were concerned, throughout the process of drafting and ratifying the Constitution, with internal power dynamics and the potential for abuse.

101. THE FEDERALIST NO. 48 (James Madison). In this paper, Madison argues that it is not enough simply to write a governing document that calls for structural separation of powers, as evidenced by the charges against the British Crown in the Declaration of Independence. There must, in addition, be functional checks and balances to protect against abuse and the consolidation of power.

102. THE FEDERALIST, NO. 51 (James Madison).

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.

Id.

103. Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1282-83 (2002).

104. *Id.* at 1283. *See also* THE FEDERALIST NO. 47 (James Madison); Wood, *supra* note 98, at 598. Wood argues that while suspicions of the judiciary ran deep during the Revolution, by the time the Constitution was ratified, judges were viewed as a vehicle of, rather than a threat to, popular sovereignty. *Id.*

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

ers.[106] Though neither the phrase "judicial review" nor the word "justiciability" appear anywhere in the Constitution,[107] that does not mean that the Constitution proffers an "unbounded judiciary."[108] Article III grants "judicial power" that the Court may exercise in a broad, but not infinite, array of proceedings.[109] This constitutional grant of limited jurisdiction restrains judges from issuing decisions that are subject to executive or legislative review, essentially advisory opinions, or encroachments on the constitutional spheres of congressional or presidential authority.[110] Two early cases illustrate these concepts: *Hayburn's Case*[111] and *Marbury v. Madison*.[112]

A. Supreme Court of the United States: Decisions Following the American Revolution

In *Hayburn's Case*,[113] three circuit court judges—Wilson, Jay, and Iredell—wrote opinion letters to President Washington, advising him that a 1792 statute[114] requiring federal circuit courts to determine the pension eligibility of disabled veterans authorized Congress and the Secretary of War to review the courts' decisions.[115] Counter to unequivocal constitutional tenets, the statute in question required federal courts to exercise non-judicial power and, in turn, to abdicate judicial power to non-judicial branches, since under the law the judgments of the court could be "revised and controlled by the legislature, and by an officer in the executive department."[116] In addition to laying out a principled analysis of the essential connection between separation of powers and issues such as judicial independence and judicial review, the letters presented a constitutional rationale for restraint on all branches.[117] The letters each affirmed the constitutionally-defined spheres of authority: Congress alone can exercise Article I[118] legislative power, the President alone can exercise Article II[119] executive power, and the judiciary alone can exercise Article III[120] judicial power.[121] According to the judges, the statute was "radically

106. *See generally* Pushaw, *supra* note 78, at 451-52 (presenting a lengthy historical and sociological outline of the evolution of the doctrine of justiciability, its relationship to judicial review, and its importance in the separation of power).
107. U.S. CONST.
108. Pushaw, *supra* note 78, at 438.
109. U.S. CONST. art. III, § 1.

> The 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. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Id.
110. Pushaw, *supra* note 78, at 436.
111. Case of Hayburn, 2 U.S. (2 Dall.) 408 (1792).
112. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
113. *Case of Hayburn* was oddly titled, since it was really no "case" at all. It was essentially an advisory opinion, or three separate advisory opinions, in the form of letters to the President about whether a particular law was constitutional.
114. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.
115. Pushaw, *supra* note 78, at 438-39.
116. *Case of Hayburn*, 2 U.S. (2 Dall.) at 410.
117. Pushaw, *supra* note 78, at 439.
118. U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
119. U.S. CONST. art. II, § 1. "The executive power shall be vested in a President of the United States of America."
120. U.S. CONST. art. III, § 2.

inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle [separation of powers] which is so strictly observed by the [C]onstitution of the United States."[122]

By pointing out how the 1792 statute violated the principles of separation of powers and checks and balances, *Hayburn's Case* demonstrated a commitment to federalist principles, which were the dominant discourse on power. At the same time, the letters, which were little more than advisory opinions, undercut the principles they sought to protect, illustrating that the eventual functions of these principles were still in their early evolutionary stages.[123] While writing advisory opinions was a common practice in England and in several states following the Revolutionary War,[124] delegates nonetheless rejected them during the drafting of the Constitution.[125] Attempts to include advisory opinions within the powers delegated to the judiciary failed for two reasons. First, the judicial branch could not be functionally independent if judges delivered opinions about laws that might later come before them in a lawsuit.[126] Second, the constitutional integrity of the executive branch demanded that the President execute the law without consulting judges.[127] Eventually, these concerns were embodied in the doctrine of justiciability, a functional expression of the separation of powers.[128]

Marbury v. Madison,[129] another early case that established the foundation for the Court's exercise of judicial review,[130] provides a second functional expression of the separation of powers. In *Marbury*, the Court at once asserted and denied the federalist principle of separation of powers, both structurally and functionally.[131] The *Marbury* Court considered several questions, including whether the Judiciary Act of 1789 ("Act")[132] represented a constitutional exercise of congressional power.[133] The Act sought to grant the Supreme Court original jurisdiction to issue writs of mandamus "to any courts appointed, or persons holding office, under the authority of the United

121. *Id*.
122. Case of Hayburn, 2 U.S. (2 Dall.) 408, 410 (1792).
123. Pushaw, *supra* note 78, at 443.
124. *Id*. at 442.
125. *Id*. at 443.
126. *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 153-56 (1973) (explaining that advisory opinions were disfavored because they did not cast the law in the light through the process best designed to yield a "true interpretation" of it).
127. Pushaw, *supra* note 78, at 443 n.230.
128. *Id*. at 441.
129. Marbury v. Madison, 5 U.S. (1 Cranch) at 137 (1803).
130. SHELLEY L. DOWLING, THE JURISPRUDENCE OF UNITED STATES CONSTITUTIONAL INTERPRETATION: AN ANNOTATED BIBLIOGRAPHY 3 (2d ed. 2010).
131. Pushaw, *supra* note 78, at 444.
132. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.
133. *Marbury*, 5 U.S. (1 Cranch) at 174.

> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Id.

States,"[134] which amounted to an expansion of the Court's jurisdiction under Article III of the Constitution.[135]

In its opinion, the Court contended that it had the requisite constitutional authority to review executive and congressional actions, such as the Act's attempted jurisdictional expansion, famously stating, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[136] Beyond this principle, the Court further affirmed that it is the Constitution, and not the "laws of the United States generally" that is the "*supreme* law of the land."[137] The decision ends with the dictum, "[t]hus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."[138]

However, the decision in *Marbury* was, at least on its surface, paradoxical in that its rationale differed with respect to the executive and legislative branches.[139] In reaching its decision, the Court asked whether the case was justiciable.[140] In determining whether the case was justiciable, the Court sought to distinguish those matters of the executive's performance that constitute an exercise of discretionary political power, which are "politically examinable"[141] from those matters that involve the executive's ministerial duties, which are "judicially examinable."[142] Essentially, the Court attempted to distinguish political questions from questions within the Court's authority for purposes of separation of powers.[143] Regarding legislative action, the Court's interpretation of the statute at issue has led some modern commentators to conclude that Chief Justice Marshall was looking for a way to create a check on other governmental branches inherent in judicial review.[144] By interpreting the statute as he did, Chief Justice Marshall "transformed judicial review from the enforcement of explicit fundamental law against conceded violation into the open-ended exposition of supreme written law."[145] The Court's decision effectively seized the federalist tenet that the judicial branch could examine the actions of the executive and legislative branches, while at the same time "ignor[ing] key limits on such review."[146]

Writing in 1804, Thomas Jefferson also questioned the Court's motive in *Marbury*, saying:

134. *Id*. at 148.
135. U.S. CONST. art. III, §§ 1-2.
136. *Marbury*, 5 U.S. (1 Cranch) at 177.
137. *Id*. at 180 (emphasis in original).
138. *Id*. (emphasis in original).
139. Pushaw, *supra* note 78, at 444.
140. *Id*. at 445.
141. *Marbury*, 5 U.S. (1 Cranch) at 166.
142. *Id*. at 165.
143. Pushaw, *supra* note 78, at 445.
144. *Id*. at 446-47.
145. *Id*. at 448 (quoting SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 123 (1990)).
146. *Id*. at 448.

> The judges, believing the [sedition law] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and executive also in their spheres, *would make the judiciary a despotic branch*.[147]

Marbury, like *Hayburn's Case*, represents a fascinating example of how the early Supreme Court and Justices that had participated in the drafting and ratification of the Constitution experimented with the functional separation of powers within the constitutional structure.[148] Doctrines like justiciability and judicial review are more products of the post-Revolutionary discourse on the consolidation of power than on the inevitable consequences of the first three articles of the Constitution, and Chief Justice Marshall's decision represents the ways in which judicial interpretation is initially influenced by the discourse that is subsequently shaped.[149] Aspects of the opinions, like the doctrines themselves, are compatible with the federalist priority of separating legal powers between functionally separate branches of government, while others militate against the principles of separation for the purpose of strengthening the central government and consolidating power. [150]

B. Supreme Court of the United States: Decisions Following the Civil War

Following the Civil War, a new group of lawmakers passed several constitutional amendments that were not only intended to abolish slavery, but also to ensure that former slaves could enjoy all of the "privileges and immunities" of citizenship irrespective of their race, color, or status as former slaves.[151] While the Fourteenth Amendment makes

147. 8 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 310 (1897) (emphasis added).
148. *See* Molot, *supra* note 103, at 1250-51.
149. *See* Backer, *supra* note 37, at 1346.
150. *See* Pushaw, *supra* note 78, at 448-49. The author's argument throughout his discussion of *Marbury*, that Marshall's decision does not represent the most rational interpretation of the statute and even at times contradicts Federalist principles, introduces the proposition that early Court decisions were made from a teleological rather than textual perspective. This does not necessarily militate against this paper's hypothesis, which states in part that American federalism with its emphasis on separation of powers lends itself to textual hermeneutics, since these earliest decisions were made by people who fought the Revolution, created the laws, and precipitated their initial applications. Later courts, though, still committed to the separation of powers, had to rely on the text of laws themselves rather than their own recent memories of creating those laws. In some instances, they were more cautious with the drafting of the laws, attempting to ensure that the text and intent more closely matched.
151. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

no specific reference to slavery or involuntary servitude, in the context of the Thirteenth and Fifteenth Amendments and its passage following the Civil War, there was no uncertainty in American courts regarding its meaning.[152] This is plainly illustrated in the Slaughter-House Cases.[153]

The Slaughter-House Cases were responses to a Louisiana law that created a slaughterhouse monopoly under the guise of public health and safety, which the state could have achieved through other means such as zoning restrictions or health regulations.[154] Claims regarding public health and safety aside, the law was marked by an "odor of corruption," though the allegations of bribery and local corruption are historically uncertain.[155] In their complaint, the plaintiffs, who were not former slaves, cited provisions of the newly passed Thirteenth, Fourteenth, and Fifteenth Amendments, equating their injuries under the monopoly with involuntary servitude.[156] The plaintiffs claimed that the Louisiana law had abridged their privileges and immunities without due process, had denied them equal protection, and had deprived them of property without due process, leading the Court to engage in a detailed analysis of the language, scope, and purpose of each Amendment.[157]

In issuing its decision, the Court first looked to the plain language of the Thirteenth Amendment,[158] which specifically mentions slavery and involuntary servitude.[159] In its analysis, the Court affirmed that the purpose of the Amendment was to declare that the "personal freedom of all the human race [is] within the jurisdiction of this government" and that the Thirteenth Amendment was "designed to establish the freedom of four millions of slaves."[160] The amendment was written, and quickly thereafter interpreted, within this racially charged discourse. Finding in favor of the plaintiffs on this argument, then, would require "withdraw of the mind from the contemplation of this grand yet simple" purpose and would "with a microscopic search endeavor to find in [the Thirteenth Amendment] a reference to servitudes" at no time contemplated by those who wrote and fought for the Amendment.[161]

The Court then looked to the purpose and intent of the Fourteenth Amendment,[162]

> the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

152. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

153. *See generally id.*

154. *Id.* at 43.

155. RONALD M. LABBE & JOHNATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 84 (2003).

156. *Slaughter-House*, 83 U.S. (16 Wall.) at 66.

157. *Id.*

158. *Id.* at 68-69.

159. US. CONST. amend. XIII, § 1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

160. *Slaughter-House*, 83 U.S. (16 Wall.) at 69.

161. *Id.*

162. US. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

which mentions neither slavery nor involuntary servitude, but was nonetheless intended to protect the rights of former slaves.[163] Even after the Thirteenth Amendment, which abolished slavery, the life chances and conditions of former slaves would have been "almost as bad as [they were] before" if the federal government had not provided additional procedural protections.[164] According to the Court, Congress intended the due process and equal protection provisions of the Fourteenth Amendment to address racial disparities and injustices felt most acutely by former slaves.[165] With the Civil War and abolition of slavery "almost too recent to be called history," the Court asserted that no one could miss the "one pervading purpose" of the Amendment—specifically, the freedom of former slaves.[166]

Like the Marshall Court in *Marbury*, the Court in the Slaughter-House Cases was able to draw on recent memory to interpret constitutional language.[167] Each Justice was aware that the Amendments were passed with former slaves in mind and that the Amendments were meant to protect the former slaves' rights in a society that was largely hostile to them. Those rights both shaped and were shaped by the national discourse on power, with special regard for how the federal government would relate to individuals and states.[168] The Slaughter-House Cases' majority drew on both a textual and teleological hermeneutic to protect one set of federalist priorities, those related to the relationship between a central government and its peripheries, while the dissent called for a purely textual examination of the plain language of the Amendments in the interests of another set of federalist priorities, those related to the strict functional separation of powers.[169] The Slaughter-House Cases demonstrate the ways in which the American discourse on power and the shape of federalism, nearly a decade after the Civil War, was evolving to apply the principles of federalism in new ways to new circumstances.[170]

C. Supreme Court of the United States: Decisions Following World War II

Within the context of a war with Europe in full force and political pressure on government officials to "persecute and even prosecute allegedly disloyal citizens,"[171] an action was brought against a naturalized citizen, William Schneiderman, for his association with the Workers (Communist) Party of America and the Young Workers (Communist)

> the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

163. *Slaughter-House*, 83 U.S. (16 Wall.) at 70.
164. *Id.*
165. *Id.* at 72.
166. *Id.* at 71.
167. *Id.*
168. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).
169. *Id.* at 83 (Fields, J., dissenting). Justice Field's dissenting opinion is strictly limited to the language of the Amendments and does not draw on a discussion of purpose or intent.
170. LABBE & LURIE, *supra* note 155, at 1-2. Despite debate over the rationale in the Slaughter-House Cases, "Miller's decision has not been overruled. Moreover, it did not prevent his Court, sometimes with his concurrence, from finding awesome breadth in the [Fourteenth] [A]mendement—a process that accelerated after his death and especially during the mid and late twentieth century." *Id.*
171. David Fontana, *A Case for the Twenty-First Century Constitutional Canon:* Schneiderman v. United States, 35 CONN. L. REV. 35, 42 (2003).

League of America.[172] To become a naturalized citizen, Schneiderman was statutorily required to, and in 1927 did in fact,[173] claim to be a person who was "attached to the principles of the Constitution of the United States."[174] Twelve years later, in 1939, the United States attempted to revoke his citizenship, "most likely to strike a blow against possible disloyalty, especially pro-Communist or pro-Nazi [sentiment]" at a time when America was quite literally at war with Communist forces in Europe.[175] In its denaturalization suit against Schneiderman, the United States claimed that his "citizenship was illegally procured,"[176] because Schneiderman's communist activities meant that he necessarily could not be "attached to the principles of the Constitution of the United States" and that he "advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence."[177]

The Solicitor General focused on the meaning of the statutory language regarding attachment to the principles of the Constitution, acknowledging that, for purposes of proving non-attachment, it was not enough to prove that a defendant believed "that the laws and the Constitution should be amended in some or many respects."[178] But even if an alien voiced certain dissatisfactions with the government, "an alien must believe in and sincerely adhere to the 'general political philosophy' of the Constitution."[179] Essentially, the government argued that there are greater and lesser fundamental constitutional principles, and that being "attached to the principles of the Constitution" means not wanting to change the more fundamental principles.[180]

Schneiderman argued that "a person can be attached to the Constitution no matter how extensive the changes are that he desires, so long as he seeks to achieve his ends within the framework of Article V."[181] In other words, according to Schneiderman, the only limitations on constitutional changes were procedural requirements themselves, rather than a principle of absolute entrenchment.[182] The Court agreed with Schneiderman

172. Schneiderman v. U.S., 320 U.S. 118, 121-22 (1943).
173. *Id*. at 120.
174. Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596.
175. *Schneiderman*, 320 U.S. at 121; Fontana, *supra* note 171, at 43.
176. *Schneiderman*, 320 U.S. at 121.
177. *Id*. at 120-21.
178. *Id*. at 139.
179. *Id*. at 140.
180. Fontana, *supra* note 171, at 44, n.41. The author discusses the ramifications of the government's argument as well as some important questions that come to light: "Are some provisions of the Constitution more important than others? . . . How easy or hard should it be to change those provisions? . . . Does believing in one of those provisions mean that changing such a provision should be impossible or more difficult or somehow problematic?" *Id.*
181. U.S. CONST. art. V.

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Id.; *Schneiderman*, 320 U.S.at 140.
182. Fontana, *supra* note 171, at 46.

for the most part, viewing both the statute in question and the Constitution through a largely proceduralist lens.[183] Proceduralism is at once textual and teleological, looking to the language of a statute or the Constitution, and also taking into account the intended democratic means for change in substance, interpretation, or function.[184]

Though *Schneiderman* does not occupy the same place in the American canon of constitutional law that *Marbury* or the Slaughter-House Cases hold,[185] it fits well with them for illustrative purposes. Following times of cultural shift and increases in the national discourse on power—such as the Revolutionary War, the Civil War, and World War II—the Court has employed textual, teleological, or hybrid strategies to address concerns regarding the ability of the federal government to employ ideological litmus tests,[186] as well as the balance of powers between branches of government[187] and between the federal government and states.[188] At each turn, far from being a mere function of differences between individual Justices, the rationales and holdings of the Court, though occurring within a relatively static federalist structure, seem to have been more responsive to the historically and culturally situated discourse on power.[189]

D. European Court of Justice: Supremacy of EU Law

Costa v. ENEL established the supremacy principle in the European Union.[190] Though not an exact parallel to *Marbury*, *Costa* played a similar role in the EU, establishing the doctrine that domestic law must give way to EU law when there is a conflict.[191] The Italian Republic created the National Electricity Board (Ente Nazionale per l'Energia Elettrica or "ENEL") in 1962.[192] Flaminio Costa, a lawyer and shareholder in one of the electrical companies subject to the nationalization scheme, refused to pay an electricity bill to ENEL for the power that the private predecessor company supplied to him.[193] In an action before a national judge, Costa alleged that the 1962 law creating the nationalization scheme conflicted with provisions of the Treaty Establishing the European Economic Community ("EEC") of 1957.[194] Article 177 of the EEC, which was incorporated into Italian law by Law No. 1203 of October 14, 1957, provided "[w]here such a question is raised before any court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this

183. *Schneiderman*, 320 U.S. at 137. "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come." *Id.*
184. *See* John A. Drennan, *Words That Bind: Judicial Review and the Grounds of Modern Constitutional Theory*, 94 MICH. L. REV. 1510, 1512-14 (1996) (comparing proceduralism to originalism and other interpretive strategies).
185. Though Fontana makes a strong argument that it should, especially following September 11, 2001. Fontana, *supra* note 171, at 35-37.
186. *Schneiderman*, 320 U.S. 118.
187. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
188. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
189. One of the elements of the Court's discourse is acknowledgement of a generalized fear of the "other"– British imperialists in *Marbury*, former slaves in The Slaughter-House Cases, and Communists in *Schneiderman.*
190. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.
191. Puder, *supra* note 69, at 575.
192. *Id.* at 571.
193. *Id.*
194. *Id.* at 571-72.

question, request the Court of Justice to give a ruling thereon."[195] Relying on that provision, the Italian judge stayed the proceeding and requested an order from the ECJ.[196]

The Italian government took the position that the national courts were barred from referring questions to the ECJ when they could apply domestic law to resolve a dispute.[197] Despite the fact that the EEC Treaty had been incorporated into national law, the Italian government argued that the provisions in the treaty had no effect on national law because the subsequent 1962 law creating ENEL overturned those provisions, invalidating the earlier law.[198] Essentially, the government asserted that the conflict was between two statutes rather than a clash between a superior treaty and an inferior statute.[199]

The ECJ concluded, however, that it had jurisdiction over the matter and that the EEC Treaty gave rise to rights and obligations for citizens of Member States that were directly enforceable in national courts.[200] The court went on to state that the 1962 domestic law could not take precedence over the treaty provisions, even though it came later in time.[201] "The integration into the laws of each Member State of provisions which derive from the Community . . . make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity."[202]

Following the establishment of jurisdiction and the unequivocal statement regarding the supremacy of EU law, the ECJ provided the Italian court binding instruction on how to construe the elements of the treaty provisions in relation to Costa's action.[203] The court's order became one of the most significant ECJ decisions, particularly in regards to the relationship between the domestic laws of Member States and the legal order of the EU.[204]

Costa is especially significant because the supremacy principle is not explicitly stated anywhere in any of the EU treaties, then or now; rather, the court created the principle extratextually, inferred from the intentions of the Member States as a means of maintaining the developing European integration, particularly as it concerned the common market.[205] For the Court in *Marbury*, the source of the supremacy of federal law over States was the Constitution itself, while for the ECJ, the source of the supremacy of European Community law over national law was the newly created legal system, as evidenced by the *Costa* court's statement, "[b]y creating a Community . . . the Member

195. EEC Treaty, art. 177 (now Article 234 of the EC Treaty) provided:
> The Court of Justice shall be competent to make a preliminary decision concerning: the interpretation of this Treaty; the validity and interpretation of acts of the institutions of the Community; and the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide. Where such a question is raised before any court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

196. Puder, *supra* note 69, at 572-73.
197. *Id.* at 573-74.
198. *Id.* at 574.
199. *Id.*
200. *Id.* at 575.
201. Puder, *supra* note 69, at 575.
202. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 593-94.
203. Puder, *supra* note 69, at 575.
204. *Id.* at 573.
205. *Id.* at 577.

States have . . . created a body of law which binds both their nationals and themselves."[206]

E. European Court of Justice: Direct Effect of EU Law

The ECJ also created a second extratextual principle—the principle of direct effect.[207] Direct effect means that, without any Member State action, treaty provisions that are clear and conditional[208] impose obligations and confer rights to individual citizens that those citizens can invoke before their national courts, even in the absence of any national legislation implementing the provision.[209]

Van Gend en Loos v. Nederlandse Administratie der Belastingen established the principle of direct effect.[210] Van Gend en Loos was a transportation company that imported urea-formaldehyde from the Federal Republic of Germany (i.e., West Germany) into the Netherlands.[211] The Dutch revenue authorities applied a tariff on the import, to which Van Gend en Loos objected on the grounds that the tariff was contrary to established European Community law, specifically, Article 12 of the EEC Treaty.[212] Van Gend en Loos brought its case before a national court which, pursuant to Article 177[213] of the EEC Treaty, referred the question to the ECJ for a preliminary ruling.[214]

At the time, Article 12 stated, "Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."[215] At issue was "[w]hether Article 12 of the ECC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect."[216] Nowhere in the language of Article 12 were individual citizens of Member States mentioned. Rather, the language was specifically directed toward the Member States themselves.[217] Van Gend en Loos argued, that even in the absence of language regarding individual citizens, "infringement of [Article 12] adversely affects the fundamental principles of the [European] Community, and individuals as well as the Community must be protected against such infringements."[218]

The governments of Belgium, The Netherlands, and Germany each asserted that the effect of Treaty provisions on Member States was a matter to be decided by national law rather than the Treaty itself.[219] However, the Commission on the EEC reasoned that

206. *Id*. (quoting *Costa*, 1964 E.C.R. at 593).
207. Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 307, 314-19 (1998).
208. *Id*. at 315.
209. *Id*. at 315-16.
210. Case 26/62, Van Gend en Loos v. Nederlandse Adminstratie der Belastingen, 1963 E.C.R. 1.
211. *Id*. at 4.
212. *Id*. at 4-5.
213. EEC Treaty art. 177 (as in effect 1958) (now EEC art. 234).
214. *Van Gend en Loos*, 1963 E.C.R. at 5.
215. EEC Treaty art. 12 (as in effect 1958) (now TFEU art. 30).
216. *Van Gend en Loos*, 1963 E.C.R. at 3.
217. *Id*. at 7.
218. *Id*.
219. *Id*. at 5-6.

such a finding "would have the paradoxical and shocking result that the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State."[220]

The issues raised in the case, then, concern the nature of power and its various balances within the early European Community. That is, in the relationship between the Community and Member States, between Member States and their citizens, and between citizens and the Community, who has the power to interpret Community law, what obligations and rights does it create, and for whom? To answer the questions before it, the ECJ asserted, "it is necessary to consider the spirit, the general scheme and the wording of [Treaty] provisions."[221] In its reasoning, the court explicitly considered the purpose of Community law, and not merely the law's structure or text, as essential if such law is going to be at all meaningful or effective.[222]

In its decision, the court affirmed that the objective of the EEC Treaty is to establish a common market (essentially a free trade block) among the Member States.[223] The court further stated that the Community can fulfill this objective only if the relationship between Community law, Member State obligations, and the rights of citizens are in balance.[224] To this end, the court concluded, "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."[225] The purpose of Community law itself, quite apart from the texts of EEC Treaty provisions or Member State legislation, confers upon citizens "rights which become part of their legal heritage,"[226] and "[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [EEC Treaty provisions] to the diligence of the Commission and of the Member States."[227]

From within this post-war European discourse on integration—emphasizing a common market and a shared sense of obligation among the Community, Member States, and citizens—it follows that under "the *general scheme* and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."[228] By looking to the objectives of the EEC Treaty, even absent any such affirmative language within Article 12, the ECJ created a doctrine meant to effectuate the hoped-for integration.[229]

Van Gend en Loos and *Costa*, taken together, establish the twin principles that Community law is supreme over all conflicting national laws, including constitutions, and that "national courts are bound to give effect to Community law by setting aside any conflicting national law or practice."[230] The rationale employed by the court in reaching

220. *Id.* at 6.
221. *Van Gend en Loos*, 1963 E.C.R. at 12.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Van Gend en Loos*, 1963 E.C.R. at 12.
227. *Id.* at 13.
228. *Id.* at 13 (emphasis added).
229. *Id.* at 12-13.
230. Fennelly, *supra* note 12, at 660.

its decisions is just as significant as the principles those decisions created.[231]

The court's preferred hermeneutic consists of Van Gend en Loos's formulation of "the spirit, the general scheme and the working" of Community law, with the recent addition of "context" as an interpretive tool.[232] The operative language in the ECJ's rationale, with slight changes from case to case, has been that interpretations of Community law must consider "not only its wording, but also the context in which it occurs and the objects of the rules of which it is a part."[233]

Part of the context of European Community law for which United States law has no parallel is the variety of languages within the community, and the fact that no official language exists, and therefore every law and every decision are written in every language of the Member States.[234] This makes a purely textual hermeneutic impossible, since interpretation of Community law according to a strict examination of text would necessarily privilege one language—and by extension the Member States who speak that language—over all others.[235] Such a privileging of language would militate against the Community's primary objective of integration "among the peoples of Europe, . . . economic and social progress . . . by common action to eliminate the barriers which divide Europe [and] . . . the removal of existing obstacles . . . in order to guarantee a steady expansion, balance trade and fair competition . . . ."[236] The recognition that the Community is made up of multiple and distinct linguistic and socio-cultural groups offers a pragmatic reason to prefer a teleological interpretive approach; however, absent the larger objective of integration, the Community could move toward a textual method by simply designating an official language for legal purposes. That this has not happened evidences the Community's awareness of the power imbalance that such a privileging would create.[237]

Individual members of the ECJ have explained their reliance on a teleological approach, stating "[t]he Court constantly uses teleological interpretation . . . [and] seeks to apprehend the meaning of law in the light of its purpose . . . ."[238] This has led the ECJ to adopt a rule, sometimes in spite of the specific language of a treaty provision or Community law, that is "most conducive to the ultimate objective of Community integration."[239]

If this paper's hypothesis were only concerned with the relationship between judicial interpretation and an existing federalist structure, then the objection, noted above in Section III, would indeed be problematic. It would be problematic because the different respective structures of American and European federalism do not necessarily lead to absolute distinctions in textual versus teleological interpretive methods. However, the evolving discourse on power is also operative in determining how laws are interpreted.[240]

231. *Id*. at 664-66 (discussing the reasons why the ECJ relies on the teleological method of interpretation).
232. *Id*. at 664.
233. *Id*.
234. *Id*. at 664-65.
235. Fennelly, *supra* note 12, at 665.
236. *Id*. at 670 (quoting from the Preamble to the Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 9-10).
237. *Id*. at 667.
238. *Id*. at 667 (quoting Judge Constantinos Kakouris of the ECJ).
239. *Id*.
240. *See generally* Larry Cata Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 29 (2000); Lukens, *supra* note 87; John P. McCormick, *Max*

V. CONCLUSION

Though what likely remains at the end of this article are more questions than compelling answers, the hypothesis that preferred methods of judicial interpretation (i.e., whether a court applies a textual or teleological interpretive method) are functions of historically-located discourses on power within federalist systems may nevertheless contribute something to the conversation regarding judicial interpretation. That conversation, at least at the popular level, has become fraught with personal accusations and devoid of a sociological understanding of how judicial interpretations are both products of a broader discourse on power and participants in that discourse.[241]

For the United States Supreme Court, the national discourses on separation of powers that occurred during the newly forming government following the Revolutionary War, after the abolition of slavery following the Civil War, and fear of fascist sentiment following WWII influenced how the Court interpreted and applied federal law to the States.[242] In other words, the United States Supreme Court, from the nation's inception, has been a participant in the nation's discourse on power. During times of conflict, that discourse has been amplified and so has its effect on the Court's decisions. This can be seen in decisions during the formation of our government following the Revolutionary War, when the discourse was particularly sensitive to the need for governmental powers to remain structurally and functionally separate. It can be seen in decisions immediately following the Civil War, when the discourse was particularly sensitive to our tendency to treat fellow human beings as commodities. Finally, it can be seen in decisions during and immediately following WWII, when the discourse was particularly sensitive to fear of fascist sentiments and the shocking scale of the atrocities they caused.

For the ECJ, post-WWII Community discourses about the long history of disintegration of sovereign States that created intent to share power among the various sovereigns influenced how the court interpreted Community law and applied it to the Member States.[243] The shaping effect of Europe's discourse can be seen in the twin principles of supremacy and direct effect of Community law— each principle a judicial creation of the ECJ in an attempt to keep the Community integrated.

As the United States and Europe face new conflicts—whether internal or external—new concerns about power and its potential abuses will emerge, and courts will continue to shape and be shaped by the resulting discourses.

L. Riley Kern

Weber and Jurgen Habermas: The Sociology and Philosophy of Law During Crises of the State, 9 YALE J.L. & HUMAN. 297 (1997); Nagel, *supra* note 87.

241. *See e.g.*, Richard A. Posner, *Richard Posner Responds to Antonin Scalia's Accusation of Lying*, NEW REPUBLIC (Sept. 20, 2012), http://www.tnr.com/blog/plank/107549/richard-posner-responds-antonin-scalias-accusation-lying#. This story also contains links to the previous parts of the exchange.

242. *See supra* notes 105-10 and 129-50 and accompanying text for a discussion of *Marbury*; *see supra* notes 113-28 and accompanying text for a discussion of *Hayburn's Case*; *see supra* notes 154-70 and accompanying text for a discussion of The Slaughter-House Cases; *see supra notes* 171-89 and accompanying text for a discussion of *Schneiderman*.

243. *See supra* notes 191-206 and accompanying text for a discussion of *Costa*; *see supra* notes 210-29 and accompanying text for a discussion of *Van Gend en Loos*.