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The Distribution of Competences in the EU and US: A Comparative Study

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Abstract

The European Treaties distribute competences among the European Union and its Member States. Some competences are exclusive to the Union; others are shared by the European Union and its Member States; and still others as retained by Member States. This trifurcation of competences often leads to tension.

Similarly, the Tenth Amendment to the United States Constitution states that those powers not expressly delegated to the federal government are given to the states. Although the language of the Tenth Amendment is simple, it too has given rise to significant tension between the federal and state governments.

This paper explores the delegated, shared, and retained competences as well as the federal-state shared powers of America's Tenth Amendment. It considers landmark cases and identifies areas of tension. Using a comparative law approach, it analyzes strengths and weaknesses in each system, looks at proposed reforms and concludes with recommendations.

America's founding fathers -- in trying to cobble together the several states into an entity capable of speaking with one voice – had to balance the federalists' desire for a strong, central government with the antifederalists' desire for autonomous states' self-rule. Similarly, those seeking to form the European Union had to balance the desire to create a strong and functional central government with the desire to preserve the Member States' local laws and customs. The resulting systems – in both the European Union and the United States – are often inefficient, ineffective, and unwieldy and give rise to needless tensions and bickering.

Based on a comparative law analysis of European Union competences and American federal-state division of power under the Tenth Amendment, this paper recommends steps to alleviate some of these tensions.

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I. Introduction

Since its inception, the European Union (EU) has been engaged in a "delicate balancing act . . . between [s]tate sovereignty and . . . economic integration."[1] Part of this so-called balancing act involves the distribution of and sharing of powers among the European Union and its Member States. The Treaty on the Functioning of the European Union (TFEU) distributes competences among the European Union and its member states: certain competences are exclusive to the Union; other competences are shared by the European Union and member states; and some competences are retained by member states. This trifurcation of competences periodically leads to tension between the European Union and member states, and among member states.

In the American context, competences are often described as powers. Under the Tenth Amendment to the United States Constitution, those powers not expressly delegated to the federal government and those powers not expressly forbidden to the states are given to the states. Although the language of the Tenth Amendment is relatively simple and does not create the complicated shared competences present in the European context, it has given rise to significant tension between the federal and state governments in several notable United States Supreme Court cases.

This paper first explores the European framework of delegated, shared, and retained competences as well as the federal-state shared powers of America's Tenth Amendment. Next, it considers some of the laws and landmark cases concerning competences in the European context as well as those invoking the Tenth Amendment in the American context. It identifies

[1] Kaisa Huhta, *The Scope of State Sovereignty under Article 194 (2) TFEU and the Evolution of EU Competences in the Energy Sector*, 70 INT'L & COMP. L. Q. 991, 991 (2021).

areas of tension among various levels of government and considers political pressure exerted on the Supreme Court as well as the area of creeping competences in the EU. Using a comparative law approach, it analyzes strengths and weaknesses in each system and explores lessons, which could be learned from the divisions of competences and powers. Finally, it looks at some proposed reforms and concludes with recommendations for the future.

II. Competences in the European Union

The founders of the European Union "did not envisage a truly federal structure. Originally, the European Economic Community was set up and conceptualized primarily as a functionally circumscribed organization of economic integration, based on neither fixed territorial boundaries nor a direct link between its citizens and its institutions."[2]

> The relationship between the central level and sub-central levels of government is a key issue in all federal-type political systems. This is even more true in the EU, in which EU membership is increasingly viewed in terms of its effects on national sovereignty.[3]

The European Union has both vertical and horizontal divisions of power. "The structure of the EU combines vertical fragmentation of power (between EU institutions and member states) with horizontal fragmentation of power (between institutions at the EU level). In other words, it combines federalism with its own brand of separation-of-powers."[4] Nonetheless, quasi-

[2] Tanja A. Börzel, *What Can Federalism Teach Us about the European Union? The German Experience*, 15 REGIONAL & FED. STUD. 245 (2005).

[3] Ton van den Brink, *Refining the Division of Competences*, *in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE 251, 274 (Sacha Garben & Inge Govaere eds., 2017).

[4] Daniel R. Kelemen, *The Structure and Dynamics of EU Federalism*, 36 COMP. POL. STUD. 184 (2003).

federalism[5] in the European Union and federalism the United States share several similarities. "It is important to understand the EU as a unique governance hybrid in the international system that uses many components of a federal system with features similar to that of the US."[6]

While the pre-independence American colonies enjoyed some autonomy, they shared a common sovereign until the time of independence, won that independence through unified action, and had a more natural sense of shared culture, identity, and legal tradition. When the European Union was formed, its formation and powers were dependent on those transferred to it by member states, all of which had been independent sovereign nations, and many of which had histories of intergenerational animosity.

Still, the European Union's founding member states were willing to cede some power to form a Union that could offer better opportunities for trade and prosperity, and create a large enough entity to maintain European identity. "This principle is contained in Article 1 TEU, according to which the Member States establish the EU with each other, to which they delegate competences for achieving common goals."[7] Like the United States, the European Union operates under a system of shared power.

> Power is shared between the main governing bodies of the EU and its 28 Member States. Power at the state level comes from individual states' governments, while power at the federal level is concentrated in three core

[5] The author acknowledges that the EU system is not one of true federalism. The author uses the term federalism in the EU context as a catchphrase to indicate EU-level power akin to federal or national power in the United States.

[6] Brittany Stevens-Finlayson, *EU v. US Comparing the EU and US Federal Systems: Two Similar Systems of Governance*, Gold Mercury International 5 (2019). http://www.brandeu.eu/wp-content/uploads/2019/05/BEU_-EU-vs-US-.pdf.

[7] Antun Marinac, Mirela Mezak Matijević & Jasmina Mlađenović, *Division of Competences between the European Union and the Member State*, 3 EU & COMP. L. ISSUES & CHALLENGES SERIES (ECLIC) 79, 82 (2019).

> institutions. Specifically, legislative and executive power lies with the European Parliament, European Commission, and the Council of the European Union, with other bodies, like the European Council and Court of Justice of the European Union, contributing by providing guidance and transparency during the decision-making processes."[8]

There are various competences in the European Union. Some are delegated to the Union by the member states. Others are shared between the European Union and its member states. Still others are retained by the member states. Division of Competences in the European Union

Pursuant to the Treaty on the Functioning of the European Union (TFEU), there are three categories of competences within the European Union: exclusive, shared, and supporting. "EU primary law, particularly Article 2 TFEU, classifies Union competences as exclusive, shared or supporting competences with respect to Member States' powers."[9] There is "a clear distinction between the competences of the Member States and the competences of the EU. . . . [A] separate role of the EU, alongside the actions of the Member States, has been accepted from the outset."[10] However, the classification of competences is "not exactly apposite for EU external competences . . . . EU external competences - either explicit or implied - may be exclusive or non-exclusive, each category allowing for a subdivision which corresponds to its

[8] Stevens-Finlayson, *supra* note 6, at 5.

[9] Paula Garcia Andrade, *EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally*, 55 COMMON MKT. L. REV. 157, 165 (2018).

[10] Ramses A. Wessel et al., *The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities, in* LAW AND PRACTICE OF EU EXTERNAL RELATIONS: SALIENT FEATURES OF A CHANGING LANDSCAPE 152, 154 (2008).

mode of acquisition by the Union and the effects it creates on Member States' residual powers."[11]

1. Exclusive Competences

Exclusive competences are those where the European Union alone has power. Article 3 of TFEU sets forth the European Union's exclusive competence.

> 1. The Union shall have exclusive competence in the following areas:
>
> (a) customs union;
>
> (b) the establishing of the competition rules necessary for the functioning of the internal market;
>
> (c) monetary policy for the Member States whose currency is the euro;
>
> (d) the conservation of marine biological resources under the common fisheries policy;
>
> (e) common commercial policy.
>
> 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.[12]

However Article 3 also "stipulates that the EU shall respect 'national identities' as well as 'essential State functions.'"[13]

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[11] Garcia Andrade, *supra* note 9, at 165.

[12] Treaty of the Functioning of the European Union (TFEU) art. 3, Oct. 26, 2012, OJ L. 326/47-326/390.

[13] Christine Reh, *The Lisbon Treaty: De-Constitutionalizing the European Union*?, 47 JCMS: J. COMMON MKT. STUD. 625, 635 (2009).

> There are different nuances to the EU's exclusive competences, however. Exclusivity thus carries different connotations in the case of express and implied external powers. In the case of powers expressly granted for the purpose of external action . . . the breadth and open-ended nature of these powers mean that competence carries with it the power to shape external policy, to define the scope of EU international action. In most cases, this is not a power which excludes the Member States, but when it does (in the case of the CCP) its boundaries will of course be contested.[14]

Some scholars note that the external competences should be qualified. "EU competences should be qualified . . . as concurrent with national powers in the fields of readmission, legal admission of migrants and socio-economic integration."[15] Also, in some areas, such as bilateral investment treaties (BITs), the scope of the EU's exclusive competence is unclear. "Since the entry into force of the Lisbon Treaty, the EU possesses the exclusive competence in the field of 'foreign direct investment' (Article 207 TFEU). Nevertheless, the scope of application of the EU foreign investment policy is not yet clear." [16]

The European Union's exercise of its competences is limited by the principle of proportionality. "[T]he content and scope of EU action may not go beyond what is necessary

[14] Marise Cremona, *EU External Competence – Rationales for Exclusivity, in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE (Sacha Garben & Inge Govaere eds., 2017).

[15] Garcia Andrade, *supra* note 9, at 169.

[16] Marc Bungenberg, *The Division of Competences between the EU and its Member States in the Area of Investment Politics, in* INTERNATIONAL INVESTMENT LAW AND EU LAW 29, 35 (2011).

to achieve the objectives of the Treaties . . . ."[17] Sir Francis Jacobs details some of the importance and origin of the principle of proportionality as follows:

> [P]robably the most important and the most pervasive general principle of European law is that of proportionality. The proportionality principle was also derived from German law, and its introduction into European law resulted, again from ideas put to the ECJ by the German courts which queried the validity of European measures as infringing this principle (*Verhältnismässigkeit)*.[18]

The principle of proportionality limits the "competence of the Union."[19] Pursuant to this principle, a public authority should "not impose obligations on an individual unless they are strictly necessary and justified in the public interest . . . ."[20]

Exclusive competences give power to the European Union, but there are areas of shared competences as well.

2. Shared Competences

Although the European Union has some areas of exclusive competence as shown above, there are also areas where the Union and its member states share competences. Article 4 of TFEU delineates areas of shared competence.

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[17] *Competences of the Court of Justice of the European Union, Fact Sheets on the European Union*, EUROPEAN PARLIAMENT (May 15, 2022). https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union.

[18] Sir Francis Jacobs, *Comparative Law and European Union Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 538 (Mathias Reimann & Reinhard Zimmermann eds., 2019).

[19] *Id.* at 539.

[20] *Id.*

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

> 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.[21]

Where an area is one of "shared competence, legally binding acts may be created and adopted by the Union and the Member States."[22] The term "shared competence" is somewhat misleading, as there still is an element of deference from the Member States to the European Union. "'Shared competence'" means that both the EU and its Member States may adopt legally binding acts in the area concerned. However, the Member States can do so only where the EU has not exercised its competence or has explicitly ceased to do so."[23] Nonetheless, the "Protocol on the Exercise of Shared Competences curtails the supranational level: 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.'"[24]

It is in the area of shared competence that most tensions arise, as it can be "unclear whether the Union or the member states have the competence for a particular action."[25] Under

[21] Art. 4 TFEU.

[22] Marinac et al. *supra* note 7, at 84.

[23] *FAQ – EU Competences and Commission Powers*, European Union: European Citizens' Initiative. https://europa.eu/citizens-initiative/how-it-works/faq/faq-eu-competences-and-commission-powers_en.

[24] Reh, *supra* note 13, at 635.

[25] Marinac et al. *supra* note 7, at 85.

shared competences, the European Union retains primacy but it must do so while applying principles of "subsidiarity and proportionality."[26]

Under the principle of subsidiarity, "in the area of its non-exclusive competences, the EU may act only if — and in so far as — the objective of a proposed action cannot be sufficiently achieved by the EU countries, but could be better achieved at EU level."[27] In other words, "[u]nder the principle of subsidiarity, articulated in Article 5 of TFEU, member states retain decisions as long as EU intervention is not necessary."[28] Thus, subsidiarity attempts to perform a balancing test. "[S]ubsidiarity seeks to balance the exercise of EU and national competences. . . ."[29]

3. Supporting Competences

In the case of supporting competences, the European Union can intervene only to support the actions of Union countries. As Sir Francis Jacobs notes:

> European law is not primarily law between states. On the contrary, it is, for the most part, law *within* the state – as it applies uniformly within twenty-eight jurisdictions. Therefore, European law is *national* law in that almost all its law is applicable, either directly or indirectly, within the Member States.[30]

This Articles 5 and 6 of TFEU concern supporting competences. Article 5 provides:

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[26] *Id.*

[27] *Division of Competences in the EU*, EUR-Lex (Jan. 26, 2016). https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html.

[28] *Id.*

[29] Mark Dawson, *Integration through Soft Law: No competence Needed? Juridical and Bio-Power in the Realm of Soft Law*, *in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE 263 (Sacha Garben & Inge Govaere eds., 2017).

[30] Jacobs, *supra* note 18, at 526 (emphasis in original).

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.[31]

Article 6 expands on the notions of European Union support to its member states and provides:

> The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
>
> (a) protection and improvement of human health;
>
> (b) industry;
>
> (c) culture;
>
> (d) tourism;
>
> (e) education, vocational training, youth and sport;
>
> (f) civil protection;
>
> (g) administrative cooperation. [32]

A crucial issue when dealing with supporting competences is that of harmonization. "Legally binding EU acts must not require the harmonisation of EU countries' laws or regulations."[33] However, the European Union "can take measures to ensure that EU countries coordinate their economic, social and employment policies at EU level."[34] However, as Schieck notes:

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[31] Art. 5 TFEU.

[32] Art. 6 TFEU.

[33] *Division of Competences, supra* note 27.

[34] *Id.*

"Leading questions behind any critique of European harmonisation would include whether harmonisation will contribute to any of the aims established in Article 2 EC, or whether it increases the degree to which the EU contributes to a peaceful world wide legal order."[35]

However, any discussion of harmonization must also include an acknowledgement of harmonization by stealth. Harmonization by stealth

> in areas of Member States' retained powers is possible, because the various limits to EU competence only apply in relation to the specific legal basis to which they directly relate, and not to action undertaken on the basis of other legal bases or outside the Treaties.[36]

Harmonization by stealth is a type of creeping competence, as will be discussed below.

One of the most striking features of EU competences concerns the amendment of treaties. "[T]he amendment of the Treaties is exclusively a matter for the Member States, not for the Union itself."[37] The fact that the Member States are empowered to amend the Treaties is "one of the most significant structural differences between the [European] Union and a federal system."[38]

B. Investment Policy Competence through the Treaty of Lisbon

[35] Dagmar Schiek, *Comparative Law and European Harmonisation-A March Made in Heaven or Uneasy Bedfellows*, 21 Eur. Bus. L. Rev. 203, 208 (2010).

[36] Sacha Garben,"Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator," *in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE (Sacha Garben & Inge Govaere eds., 2017) 335.

[37] Jacobs, *supra* note 18, at 553.

[38] *Id.*

Prior to the Treaty of Lisbon, the "EU did not possess the necessary competences for an effective EU investment policy in terms of a competition of systems. . . ."[39] Signed by member states on Dec. 13, 2007, the Treaty of Lisbon[40] went into effect on Dec. 3, 2009. The Treaty of Lisbon amends the Treaty on European Union (TEU) as well as the Treaty on the Functioning of the European Union (TFEU). "Lisbon bolsters the Treaties' constitutive role and clarifies the division of competences between the national and the supranational level -- but that it achieves such clarity by decidedly curtailing the European arena."[41]

Critics of the Treaty of Lisbon argued that the Treaty would weaken democracy by making power too centralized.[42] The Lisbon Treaty "confirms rather than breaks with this tradition of interlocked competences – a tradition that decreases transparency, makes it difficult to assign responsibility and thus challenges accountability."[43]

Proponents of the Treaty of Lisbon contended that it would strengthen the European Parliament and would provide much-needed checks and balances. The goal of the Lisbon Treaty was to strengthen the EU. "The intention of the Lisbon Treaty's far-reaching transfer of competences in aspects of foreign direct investment is to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy."[44] However, the Treaty also raises questions about the various competences of the EU and its member states. "With the entry into force of the Treaty of Lisbon on 1 December 2009, multiple questions resulting

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[39] Bungenberg, *supra* note 16, at 34. Although Bungenberg contends that the post-Lisbon Treaty EU system also needs improvement.

[40] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, European Union, Dec. 13, 2007, 2007/C 306/01.

[41] Reh, *supra* note 13, at 641.

[42] *See*, e.g., Helfa Zepp-LaRouche, *European Parliamentarian Calls for Referenda on Anti-Nation Lisbon Treaty: Interveiw with Jens-Peter Bonde,* 35-14 EXEC. INTELL. REV. (EIR) 19 (Apr. 4, 2008).

[43] Reh, *supra* note 13, at 638.

[44] Bungenberg, *supra* note 16, at 40.

from a new division of competences between the EU and its Member States in the area of international investment policy have to be answered."[45]

From a competences analysis standpoint, perhaps the "most important innovation of the Lisbon Treaty . . . is the obligation imposed on the Union to respect national identity (Article 4(2)(TEU)."[46]

> This provision, by referring also to the fundamental political and constitutional structions, national security etc., Is much more detailed than its predecessor in the Maastricht Treaty. . . .It may be read as defining the hard core of national sovereignty, which must remain immune from Union intervention.[47]

While this is a laudable goal, it often gives rise to tensions, as the cases discussed below will illustrate.

C. Implied and Creeping Competences

As seen above, not all of the competences are expressly spelled out in TFEU. There are also implied and creeping competences.

1. Implied Competence

Although TFEU sets forth express competences, there are also implied competences. "Since Union policies may only exist in fields in which the Union has been granted internal competences, this provision, combined with the principle of conferral of Article 5 TEU, may be said to retain the essence of the doctrine of implied external competences."[48] The area of

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[45] *Id.* at 29.

[46] Christiaan Timmermans, *The Competence Divide of the Lisbon Treaty Six Years After, in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE 23 (Sacha Garben & Inge Govaere eds., 2017).

[47] *Id.* at 23.

[48] Garcia Andrade, *supra* note 9, at 161.

implied competences is constantly evolving. "Since the early 1970s the scope of Community competences has gradually been expanded – mainly through the Court's teleological interpretation and doctrine of 'implied powers' as well as a generous use of Art. 308 TEC . . . ."[49]

Looking at ECJ case law, scholars conclude that the European Union "can only exercise an implied external competence if this constitutes the only way to achieve the objectives of the internal competence from which it was deduced."[50] The Union's Common Foreign and Security Policy (CFSP) is one area where implied shared competences obtain. The CFSP system "seems to point to the existence of 'shared', or better, 'parallel' competences: both the EU and its Member States seem to be competent to conclude treaties in the area of CFSP . . . ."[51]

Although the ECJ has been quick to recognize implied exclusive external competences, the field of implied non-exclusive external competences is murkier.

> The existence and nature of implied non-exclusive external competences of the Community have always been a tad enigmatic. The doctrine, with very few exceptions, centred its considerable attention on implied exclusive competences, while 'beating around the bush' regarding their non-exclusive counterpart. Early - partly very early case law - is still being interpreted equivocally in this matter.[52]

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[49] Reh, *supra* note 13, at 636.

[50] Garcia Andrade, *supra* note 9, at 173.

[51] Wessel et al., *supra* note 10 at 157.

[52] Markus Klamert & Niklas Maydell, *Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law*, 13 EUR. FOREIGN AFF. REV. 493 (2008).

Any discussion of implied competences must also include an acknowledgement of soft law. Soft law refers to "hortatory, rather than legally binding, obligations. . . . [T]hings that fall short of international law are called soft law."[53] Mark Dawson terms soft law the "Rasputin" of the "competence debate."[54] "Each chronicle of its death foretold has been met with many signs of lasting durability."[55]

2. Creeping Competence

In addition to implied competences, scholars have also found evidence of creeping competences.[56] Creeping competences occur when "the EU somehow manages to legislate and/or otherwise act in areas where it has not been conferred a specific competence."[57] Garben identifies five categories in which "harmonization by stealth" occurs as "indirect legislation, the case law of the CJEU, economic governance, EU soft law and parallel integration outside the Treaties."[58]

In areas of creeping competences, the Commission is able to "'stretch' an existing treaty-based competence . . . to a policy area that has always been extremely sensitive for member states."[59] Areas were creeping competences occur include telecommunications, energy, environmental protection and information technology.[60] With creeping competences

[53] Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 172 (2010).

[54] Dawson, *supra* note 29, at 235.

[55] *Id.*

[56] For an excellent discussion of creeping competences, *see*, Manuele Citi*, Revisiting Creeping Competences in the EU: The Case of Security R&D Policy*, 36 J. EUR. INTEGRATION 135 (2014).

[57] Garben, *supra* note 36 at 300.

[58] *Id.* at 335.

[59] Citi, *supra* note 56 at 141.

[60] *Id.* at 135 (citations omitted).

the Commission "will be allowed to elaborate a policy response that exceeds, sometimes marginally, sometimes more substantially, its treaty-based policy competences."[61]

What does the constantly-evolving area of creeping competences mean? For some scholars, such as Sacha Garben, the solution is to introduce "a general legislative competence for the EU, coupled with limits on integration 'by stealth' through soft law, parallel integration and CJEU case law . . . ."[62] These proposed reforms to the area of competences, as well as other proposed reforms will be discussed later in this paper.

3. Competence in Specific Fields – Energy, Migration, and FITAs

Specific fields have particular competences. For example, the field of energy is "a sector where shared competences apply."[63] Articles 192(2)(c) and 194(2) TFEU both "restrict EU competences when the measure affects a Member State's choice between energy sources and the general structure of its energy supply."[64]

Migration is another field with particular competences. "Article 79(3) TFEU contains the only external competence conferred on the EU in the field of migration . . . ."[65] However, reality necessitates that we "affirm the existence of an EU competence to conclude international agreements with third countries on short-term visas, borders, admission of legal migrants, socio-economic integration of legal residents and the fight against irregular immigration."[66]

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[61] *Id.*at 141.

[62] Sacha Garben, & Inge Govaere, *The Division of Competences, in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE (Sacha Garben & Inge Govaere eds., 2017). Garben identifies five areas of "'harmonization by stealth': indirect legislation, the case law of the CJEI, economic governance, EU soft law and parallel integration outside the Treaties." Garben, *supra* note 36, at 335.

[63] Huhta, *supra* note 1, at 993.

[64] *Id.*

[65] Garcia Andrade, *supra* note 9, at 164.

[66] *Id.* at 163.

However, the European Union's power over immigration is not limitless. For example, "Article 79(5) TFEU preserves the decision on volumes of admission of migrants for economic purposes as an exclusive power of Member States, and thus excludes any EU external competence in this field."[67]

Besides migration, another field with particular competences is that of Free International Trade Agreements (FITAs) and Bilateral Trade Agreements (BITs). Pursuant to the Lisbon Treaty, the European Union "possesses the exclusive competence in the field of 'foreign direct investment' (Article 207 TFEU)."[68] Article 207 TFEU provides, in pertinent part:

> 1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
>
> 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.[69]

[67] *Id.* at 164.
[68] Bungenberg, *supra* note 16, at 35.
[69] Art. 207 TFEU.

Although Article 207 uses the language "foreign direct investment," BITs themselves often "use the much broader term 'investment' or the narrower terms 'establishment and 'enterprise.'"[70] This change in language can give rise to confusion over the competences to be exercised. The Lisbon Treaty's categorization of exclusive competence for foreign direct investment "created potentially serious problems for . . . BTIs concluded by the Member States. As a transitional measure the Member States have been authorized . . . to maintain and conclude BITs with third countries."[71] This transitional authorization is significant; it illustrates that "the EU may choose to authorize the Member States to act in cases of exclusive competence."[72]

D. Landmark European Union Cases

Although the TFEU lists categories of competences, much of the real debate concerning competences occurs in the courts – specifically in the European Court of Justice (ECJ). The ECJ is "the EU's judicial branch. Its mandate is to interpret the EU's treaty base and secondary legislation passed pursuant to the treaties in the arbitration of conflicts among EU institutions and among these institutions, member states, and citizens."[73] The ECJ must engage in a delicate balancing act; it must "strike a dynamic balance between 'unity' and 'diversity.'"[74] In other words, the ECJ must "ensure the uniform interpretation of the laws of the EU, whilst deferring to the common constitutional traditions of the Member States and,

[70] Bungenberg, *supra* note 16, at 35.

[71] Cremona, *supra* note 14, at 142.

[72] *Id.*

[73] George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L ORG. 357, 358 (2001).

[74] Koen Lenaerts, *The European Court of Justice and the Comparative Law Method*, 25 EUR. REV. PRIV. L. 297, 297 (2017).

where necessary, allowing room for value diversity."[75] Several landmark cases discuss competences in the European Union and reveal tensions therein.

1. Primacy of European Union Law

A doctrine developed in a line of several competences cases is the doctrine of primacy. Under this doctrine, "EU law has absolute primacy over domestic law, and this primacy has to be taken into account by domestic courts in their decisions."[76] In *Van Gend en Loos v Nederlandse Administratie der Belastingen*,[77] Van Gend, a transportation company, imported formaldehyde from West Germany. Van Gend was charged a tariff, which it claimed violated Article 12 of the Treaty of Rome, which prohibited member states from "introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect. . . ."[78] The tariff commission contended that Van Gend lacked standing because the agreement was between member states, and Van Gend was an importer, not a member state. The *van Gend* Court stated:

> The European Economic 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 the Member States but also their nationals.[79]

[75] *Id.*
[76] Competences Fact Sheet, *supra* note 17.
[77] (1963) 26-62.
[78] Treaty of Rome Art. 12.
[79] *Van Gend*, para. 3.

Van Gend is incredibly significant because it articulates the "principle of 'direct effect,'"[80] after which "Europe's legal community has widely agreed on the existence of a 'thin' supranational constitution."[81] Thus, *Van Gend* is significant because it sets for the doctrine of "the primacy of EU Law. . . . EU law has absolute primacy over domestic law, and this primacy has to be taken into account by domestic courts in their decisions."[82]

The doctrine of primacy was also followed in *Flaminio Costa v E.N.E.L.*,[83] where Costa, an Italian citizen who owned shares in an electric company, contended that the Italian law nationalizing Italy's electricity sector violated the Treaty of Rome. The ECJ held that Costa, as an individual, lacked standing to challenge. In discussing the European Community in the context of primacy, the *Costa* Court stated:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[84]

Thus, *Costa* furthers the principle of the supremacy of EU law over national law; national law is not null and void; it is merely inapplicable. Post-*Costa*, the supremacy . . . of Community

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[80] Reh, *supra* note 13, at 631.
[81] *Id.*
[82] *Competences* Fact Sheet, *supra* note 17.
[83] *Flaminio Costa v ENEL* (1964) 6-64.
[84] *Costa* 593.

law has become an established legal principle as well as a pre-condition for citizens' equality under Community law. As such, supremacy – together with direct effect – is at the heart of constitutionalization:"[85]

Internationale Handelsgesellschaft[86] concerned a conflict between German national law and The Common Agricultural Policy, which required exporters to obtain an export license upon paying a deposit of money. German exporters claimed that the Common Agricultural Policy's regulation violated their business rights under the German constitution. The ECJ disagreed, noting:

> It follows from all these considerations that the fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of article 40 (3) of the treaty, for carrying out the common organization of the agricultural markets and also conforms to the requirements of article 43.[87]

Simmenthal[88] concerned an Italian regulation, which imposed a public health inspection fee on beef, which crossed its borders. Beef importers argued that the Italian law was in conflict with European Community regulations. The ECJ, once again, affirmed that EU had primacy, stating:

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[85] Reh, *supra* note 13, at 633 (citations omitted).

[86] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) 11-70.

[87] *Internationale* para. 20.

[88] *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978) Case 106/77.

> [T]he relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.[89]

The absolute primacy of EU law over the laws of its member states gives rise to tensions between the EU and its member states, as will be discussed further, below.

2. Tensions between European Union and Member States

As was seen in the above primacy cases, the Lisbon Treaty often creates tension between the European Union and its member states. One reason for this tension may be that the European Union has obligations under international law as distinct from the obligations of the Member States."[90] Another reason for this tension is "that the relationship between the EU and its Member States in the Common Foreign and Security Policy (CFSP or second pillar) . . . is still clearly different from the relation the same Member States maintain with the European Community. . . ."[91]

[89] *Simmenthal* para. 17.
[90] Wessel et al., *supra* note 10, at 156.
[91] *Id.* at 153.

In *Poland v. European Parliament*,[92] an European Union directive prohibited the sale of menthol cigarettes. Poland filed a lawsuit to annul this directive. The Court sided with the Union, stating:

> [W]hen there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products such as to bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to intervene by adopting appropriate measures, in compliance with Article 114(3) TFEU and with the legal principles mentioned in the FEU Treaty or identified in the case-law. . . .[93]

The Court also noted that "for Article 114 TFEU to be capable of constituting an adequate legal basis for the contested provisions of Directive 2014/40, it is sufficient to establish that divergences exist between the national rules concerning tobacco products containing a characterising flavour, as a whole, which are such as to present obstacles to the free movement of those products, or that it is likely that such divergences will emerge in the future."[94] However, the Court concluded that "the prohibition on the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary in order to attain the objective sought."[95]

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[92] *Republic of Poland v. European Parliament* (2014), Case C-358/14.
[93] *Republic of Poland* para. 36.
[94] *Id.* para. 56.
[95] *Id.* para. 96.

In *European Commission v. Hungary*,[96] Hungary replaced the Parliament-appointed data protection ombudsman (Andras Jori) with a national authority for data protection (Attila Peterfalvi). The European Commission sued Hungary and contended that "by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under Directive 95/46/EC of the European Parliament. . . ."[97] The ECJ agreed with the EC, and ruled against Hungary. In its decision, the ECJ held that:

> Hungary compelled the Supervisor to vacate office in contravention of the safeguards established by statute in order to protect his term of office, thereby compromising his independence for the purposes of the second subparagraph of Article 28(1) of Directive 95/46.[98]

As seen in *Poland v. European Parliament* and *European Commission v. Hungary*, where there are tensions between Member States and the EU, the ECJ often sides with the EU. However, as is discussed below, there are also tensions among Member States themselves.

3. Tensions between Member States

As the above cases illustrate, there are often tensions between the EU and its member states. However, there are also tensions between member states.

In 2014, the European Commission approved the UK's plan to use state aid to build the Hinkley Point nuclear power plant. Austria asked the EC to annul its approval of the UK

[96] *European Commission v. Hungary*, C-288/12.
[97] *Id.* para. 1.
[98] *Id.* para. 59.

plan and contended that the Commission was biased in favor of nuclear energy. In *Austria v Commission*[99] The Court held that, pursuant to Article 194(2) TFEU, each member state "has the right to choose between the different energy sources those they prefer.'"[100] The Court stated:

> [I]t must be concluded that it is sufficiently clear from the grounds of the contested decision that the Commission considered that, even though the measures at issue related to nuclear energy, in so far as they constituted State aid, it was appropriate to assess their compatibility with the internal market in accordance with Article 107(3)(c) TFEU. . . . [T]he Commission considered that, in the context of the application of that provision, notably as regards the characterisation of the promotion of nuclear energy as a public interest objective for the purposes of that provision, it was necessary to take the provisions of the Euratom Treaty into account. Those grounds thus enabled the Republic of Austria to ascertain the reasons for that decision and enable the Court to exercise its power of review.[101]

In *Cassis de Dijon*,[102] Rewe, a German company, wanted to import and sell cassis, a blackcurrant liquor manufactured in France. A German law required fruit liquors to have 25% alcohol by volume. The blackcurrant liquor had only 20%. Rewe claimed that the German law violated the Treaty of Rome. The ECJ agreed, finding that the German regulation hampered the free movement of goods and, thus, violated the Treaty. The Court stated:

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[99] *Austria v.* Commission, Case T-356/15.
[100] *Austria v. Commission*, para. 97 (cited by Huhta, *supra* note 1, at 995).
[101] *Id.* para. 67.
[102] *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* (1979) Case C-120/78.

> The concept of "quantitative restrictions on imports and all measures having equivalent effect" within the meaning of Article 30 of the EEC Treaty must be interpreted as meaning that the fixing at national level of a minimum wine-spirit content for potable spirits as a condition for authorization to market within the Member State concerned, where its result is that traditional products of other Member States whose wine-spirit content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, constitutes such a measure.[103]

The Court noted: "requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community."[104]

While *Cassis* concerned the free movement of goods between member states, *Bosman*[105] concerned the free movement of persons. The *Bosman* court stated that professional sport is an economic activity whose exercise may not be hindered by rules of football federations governing the transfer of players or restricting the number of nationals of other Member States. "[P]rovisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community

[103] *Id.* 653.
[104] *Id.* para. 14.
[105] *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman,*1995 Case C-415/93.

citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State . . . ."[106]

In *Brasserie du Pêcheur*,[107] a German regulation required beer to be "pure." A French brewery sued, claiming that the German Biersteuergesetz 1952 violated Article 30 (the free movement of goods). The *Brasserie* Court stated:

> In order to define the conditions under which a Member State may incur liability for damage caused to individuals by a breach of Community law, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, the full effectiveness of Community rules and the effective protection of the rights which they confer and the obligation to cooperate imposed on Member States by Article 5 of the Treaty.[108]

In the companion case of *Factortame II*,[109] Spanish fishermen claimed that the UK's conditions for registering as a British vessel violated Article 52. The Court noted that "Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."[110]

Where Member States have conflicting laws, what is the EU supposed to do? This raises the specter of harmonization. However, it should be noted that the European Union --

[106] *Id.* para. 94.
[107] *Brasserie du Pêcheur v Germany* (1996) C-46/93.
[108] *Id.* para. 4.
[109] *R (Factortame) v SS for Transport* (No 3) (1996) C-48/93.
[110] *Brasserie du Pecheur*, para. 51.

as a general rule -- lacks competence to harmonize conflicting legislation in member states.[111] Article 2 TFEU provides that "legally binding acts of the Union . . . relating to these areas shall not entail harmonisation of Member States' laws or regulations."[112] As will be discussed later, however, "harmonization by stealth" sometimes occurs.

E. Centralized European Union Power? Federalists and Intergovernmentalists

At issue in both the European Union and the United States is the tension between centralized and local power. In the European Union, federalists favor a powerful, centralized government, while intergovernmentalists favor retaining more competences for the member states. "At the risk of oversimplifying, we suggest that intergovernmentalists who focus on treaty bargaining view the EU's institutional structure as the dependent variable. . . . Supranationalists, in contrast, view the EU's institutions as actors, not dependent variables: the Commission, Court, and Parliament undertake actions that affect the direction of European integration."[113] However, in his seminal 1993 article, Andrew Moravcsik claimed that "European integration was largely about the pursuit of economic preferences."[114]

The American founding also rested at least partially on economic concerns relating to taxation. Colonies united against a common colonial power forged a common identity, through war, that transcended economic considerations. While the American founders wanted to ensure that smaller states were not dominated by the political whims of the larger and more

[111] FAQ, *supra* note 23.

[112] Art. 2 TFEU.

[113] Tsebelis, *supra* note 73, at 385.

[114] Mareike Kleine & Mark Pollack, *Liberal Intergovernmentalism and Its Critics*, 56 JCMS: J. COMMON MKT. STUD. 1493, 1494 (2018) (citing Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 JCMS: J. COMMON MKT. STUD. 473 (1993)).

prosperous states, they appear to have also had an interest in articulating a nationally coherent set of values that would guide the larger American project.

The antifederalists were concerned with the danger of having too strong a centralized government.

> The Antifederalists demonstrated high sensitivity towards the consequences of expanding the space of political and economic rule and the winners and losers this may produce, which is widely lacking in current political thought.[115]

Some scholars believe that the "path of accelerating supranationalism, instead of salvaging and even reinvigorating integration, may instead contribute to the further disintegration of the EU."[116] This same centralized-local struggle for power is also seen in the United States, as the following United States' Tenth Amendment cases demonstrate.

III. The Tenth Amendment

Under the Tenth Amendment to the United States Constitution, those powers not expressly delegated to the federal government and those powers not expressly forbidden to the states are reserved to the states. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[117]

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[115] Dirk Jörke & Jared Sonnicksen, *Towards an Antifederalist Theory of the EU: Democratic Federal Lessons for the European Union*, 58 JCMS: J. COMMON MKT. STUD. 217, 218 (2020).

[116] *See,* e.g.*, Id.*, at 229.

[117] U.S. CONST. amend. X.

Although the language of the Tenth Amendment is relatively simple, the Tenth Amendment has given rise to significant tension between the federal and state governments in several landmark cases.

A. History of the Enactment

Similar to Article II of the Articles of the Confederation,[118] the Tenth Amendment was first proposed in 1789 and was ratified in December of 1791. Like the Constitution itself, the Tenth Amendment needed to balance two competing interests: "the need to join together to form a strong national government and the need to protect sovereign interests of the states. . . ."[119] A main purpose of the Tenth Amendment was to appease anti-federalists, who were concerned that the federal government would be too strong. Federalists, on the other hand, felt that the Tenth Amendment was unnecessary. "Because the federal government could not reach objects not granted to it, the Federalists originally argued, there was no need for a federal bill of rights."[120] When introducing the Tenth Amendment, James Madison stated: "several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States."[121]

B. Language

[118] "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II (1777).

[119] Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Amendment,* 29 LOY. L. REV. 99, 102 (1995).

[120] Charles Cooper, *Reserved Powers of the States*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (Matthew Spalding & David F. Forte eds., 2d ed. 2014).

[121] James Madison, *Annals of Congress, House of Representatives*, 1st Congress, 1st Session, 441 (June 8, 1789).

The language of the Tenth Amendment is forthright, simple and appears unambiguous: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[122] American jurisprudence has strayed away from the plain meaning of the Tenth Amendment, creating ambiguous precedent and various tensions. The current Supreme Court appears willing to abandon clearly erroneous precedent and may be open to rehabilitating the strong protections of state powers implied by the original text.

The significant state-federal tensions arising from prevailing Tenth amendment jurisprudence will be discussed at greater length later in this paper.

C. Federalism -- Significance of the Tenth Amendment?

How does the Tenth Amendment impact federalism? According to one scholar, it reaffirms federalism: "[t]he Amendment expresses the principle that undergirds the entire plan of the original Constitution: the national government possesses only those powers delegated to it, and 'leaves to the several States a residuary and inviolable sovereignty over all other objects.'"[123]

The Tenth Amendment imposes limits on Congress. For example, Congress may preempt state law or pass conditional spending provisions. However, Congress cannot commandeer a branch of a state government to do its bidding. In commenting on recent Tenth Amendment cases, one scholar noted that a "clear trend toward states' rights is bringing about a phoenix-like resurrection of federalism."[124]

The Tenth Amendment acknowledges the autonomy and power of local governments.

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[122] U.S. CONST. amend. X.

[123] Cooper, *supra* note 120 (citing James Madison, Federalist No. 39).

[124] Stanley Mosk, *Rediscovering the Tenth Amendment*, 20 JUDGES J. 16, 16 (1981).

> States are embodied, as equal and autonomous units, in the U.S. Senate; they are accorded votes in the electoral college that selects the President; they may invoke the original jurisdiction of the Supreme Court when they are parties to a lawsuit." The states are regarded within the system as political subdivisions that are expected to express the will of their citizens on matters of national importance and of concern within their own boundaries.[125]

The Tenth Amendment "offers an enriched concept of state sovereignty, which protects not only the position of the states in the federal system, but the multifaceted political participation that their sovereignty was structured to secure."[126]

D. Landmark US Cases

Several Tenth Amendment cases highlight both the tensions among various levels of government as well as the Court's difficulty in interpreting the Tenth Amendment. In looking at the following cases, it is useful to consider: 1) the time in which the case arose; 2) the area which the regulation is attempting to control; and 3) the manner in which a federal regulation is attempting to obtain state action.

1. Traditional State Activity – *Usery* and *Garcia*

In 1974, Congress amended the Fair Labor Standards Act to apply minimum wage and maximum work hour requirements to state employees. In *National League of Cities v. Usery*[127] several cities and states argued that Congress had exceeded its constitutional powers. The Court agreed. For the *Usery* Court, the decision as to whether there was state immunity

[125] Kathryn Abrams, *On Reading and Using the Tenth Amendment*, 93 YALE L. J. 723, 736 (1983).
[126] *Id.* at 743.
[127] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

from federal regulation hinged on whether the state activity at issue was a traditional state activity or was integral to state government. "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decision regarding the conduct of integral governmental functions are to be made."[128]

The *Usery* Court was decided 5-4 and consisted of the following opinions. Justice Rehnquist authored the majority. He was joined by Chief Justice Burger, and Justices Stewart, Blackmun, and Powell. Justice Blackmun also wrote a separate concurrence. Justice Brennan dissented; he was joined in his dissent by Justices White and Marshall. Justice Stevens wrote a separate dissent.

Decided in 1976, *Usery* was overruled shortly thereafter in 1985 by *Garcia v. San Antonio Metropolitan Transit Authority*.[129] In *Garcia*, the San Antonio Metropolitan Transit Authority (SAMTA) was a transit authority, which received federal funds. The Department of Labor concluded that SAMTA was obliged to comply with federal minimum wage and maximum hour requirements. Refusing to follow the principle of *stare decisis*, the *Garcia* Court began by finding fault with the "traditional state activity" standard articulated just nine short years earlier in *Usery.*

> The precedent in National League of Cities v. Usery is untenable because it provides a standard that cannot be consistently implemented, which requires courts to consider whether the federal regulation infringes on traditional governmental functions of the state. There was no guidance in that decision for courts to separate traditional governmental functions from others. As a result,

[128] *Usery*, 855.

[129] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

> lower courts have reached many clashing conclusions in this area based on illusory distinctions.[130]

The *Garcia* Court found that the *Usery* "traditional/integral" analysis was "unsound in principle and unworkable in practice."[131]

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.[132]

In *Garcia*, the Court opted out of judicial enforcement and, instead, adopted political safeguards of federalism.

> [N]either the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that, within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be.[133]

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[130] *Garcia* 535.
[131] *Garcia* 546.
[132] *Garcia* 546-47.
[133] *Garcia* 545-46.

The *Garcia* court gave a significant nod to states' autonomy, believing that it is not up to the Supreme Court to police federalism.

Garcia, like *Usery* was also decided as a 5-4 decision. The majority opinion was written by Blackmun, who was joined by Brennan, White, Marshall, and Stevens. Powell authored a dissent in which Burger, Rehnquist, and O'Connor joined. Rehnquist authored his own dissent, and O'Connor authored a dissent in which Rehnquist and Powell joined.

The holding in *Garcia* raises an interesting question about Constitutional law: does the Court's attitude to Congressional control over the states evolve over time or does it fluctuate based on the political composition of the Court? At least one commentator seems to favor the latter view. Swan writes:

> The narrow Garcia majority presented a **rare overruling of so recent a precedent** as National League of Cities. Justice Powell's dissent in Garcia found that there have been few cases in which the *stare decisis* principle has been ignored so abruptly as in Garcia.[134]

2. No Commandeering – *New York* and *Printz*

The Court expanded on the idea of states' autonomy without Congressional interference in *New York v. United States*,[135] where the Low-Level Radioactive Waste Policy Amendments Act of 1985 required states to take title to waste, which was not disposed of before 1996. The Court held that the "take title" obligation violated the Tenth Amendment.

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[134] George Steven Swan, *The Political Economy of Commerce Clause- Amendment Tensions: Garcia v. San Antonio Metropolitan Transit Authority*, 6 HAMLINE J. PUB. L. 199, 212 (1985) (emphasis supplied).

[135] *New York v. United States*, 505 U.S. 144 (1992).

Although Congress can use its spending or commerce powers to encourage states to adopt regulations, it cannot directly compel states to enforce federal regulations. "Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program . . . ."[136]

It is noteworthy that the state of New York did not contest Congress' power to regulate the disposal of radioactive waste. Selling space across state lines would affect interstate commerce, and thus, would implicate Congress' commerce power. Instead the state of New York argued that Congress' *method* of regulation – i.e. directing the states to regulate – violated the Tenth Amendment as the Constitution allows Congress to regulate *individuals* not states.

New York v. United States' prohibition against congressional commandeering was followed by the Court in *Printz v. United States*.[137] After John Hinckley's attempted assassination of President Reagan, Congress enacted the Brady Handgun Violence Prevention Act (Brady Act), which required states to conduct background checks on those people who wanted to purchase handguns. Following *New York v. United States*, the *Printz* Court stated that, since the Brady Act "forced participation of the State's executive in the actual administration of a federal program,"[138] it violated the Tenth Amendment.

The *Printz* Court noted that the federal government was trying to control states in the following manner.

> [T]he Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory

[136] *New York v. United States*, 145.
[137] *Printz v. United States*, 521 U.S. 898 (1997).
[138] *Printz* 918.

> scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs . . . Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional.[139]

The *Printz* Court held that it is impermissible to make state executive officers implement a federal mandate. Referring to *New York*, the *Printz* Court stated:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.[140]

Like the Congressional directive in *New York*, the Brady Act in *Printz* was an unconstitutional commandeering of state government by Congress.

3. *Lopez*

In *United States v. Lopez*,[141] the Gun-Free School Zones Act prohibited the possession of handguns within 1,000 feet of a school. The Court held that Congress had overreached its Commerce Clause power and that a federal statute could not prohibit loaded guns in school zones under the guise of the Commerce power.

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[139] *Id.* at 904-05.
[140] *Id.* at 935.
[141] *United States v. Lopez*, 514 U.S. 549 (1995).

> The Act exceeds Congress' Commerce Clause authority. First, although this Court has upheld a wide variety of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce.[142]

Lopez's 5 to 4 decision "signaled the Court's attempt to arrest the expansion of the federal Commerce Clause power. . . ."[143]

In his concurring opinion, Justice Kennedy (joined by Justice O'Connor) distinguished *Lopez* from other Tenth Amendment cases.

> This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy. . . . While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.[144]

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[142] *Id.* at 549.
[143] Ching, *supra* note 119, at 123.
[144] *Lopez* at 583 (Kennedy, J., concurring).

In assessing the Courts' Tenth Amendment cases, several questions arise: Are there limits on Congress' powers derived from the fact that states are separate sovereigns? Are these limits substantive or procedural? How much control can Congress wield with respect to the states? As the above cases illustrate, Congress may preempt state law, or pass conditional spending provisions. However, Congress cannot commandeer the state legislative branch (*New York v. United States*) or the state executive branch (*Printz v. United States*).

E. National -- Local Tensions

Though enacted to diffuse the concerns of antifederalists, the Tenth Amendment has caused ongoing tension between national and local governments. No discussion of the Tenth Amendment would be complete without a mention of some of Congress' concomitant enumerated powers.

1. Taxing and spending

Congress' powers to tax and to spend are enumerated powers found in Article I of the United States Constitution.[145] "In recent years, congressional use of its Spending Clause power, alone or together with its Commerce Clause power, has been the foremost factor in the expansion of federal powers and the attendant surrender of states' rights."[146] Issues arise on how and to what extent Congress may attach conditions to federal funds given to the states. "In situations of creative federalism . . . the national government uses its spending power to promote goals of uniformity and social change, which are goals that states may not share."[147]

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[145] U.S. CONST. art. I, § 8.

[146] Ching, *supra* note 119, at 124.

[147] Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here - Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 894 (1999).

In *South Dakota v. Dole*,[148] the Supreme Court upheld a federal statute, which required states to raise the drinking age in order to receive federal highway grant funds. The *Dole* Court articulated a four-prong test to use in evaluating spending clause legislation. A potential fifth prong considers whether the legislation is unduly coercive.

More recently, The Patient Protection and Affordable Care Act (ACA) has highlighted federal-state tensions once again. The ACA has two parts: first, an individual mandate; and second, a Medicaid expansion. In *National Federation of Independent Business v. Sebelius*,[149] several entities challenged the constitutionality of the ACA. The Court held that the individual mandate portion of the ACA was unconstitutional under the Commerce Clause but was constitutional as a valid exercise of Congress' taxing power. In his dissent, Justice Thomas sharply criticized the Court's continued expansion of Congress' commerce power.

> I write separately to say a word about the Commerce Clause. The joint dissent and The Chief Justice correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause . . . . I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases."[150]

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[148] 483 U.S. 203 (1987).

[149] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). The *Sebelius* court was sharply divided. Chief Justice John Roberts authored the opinion upholding the individual mandate. Justice Ginsburg concurred in part and dissented in part. Justice Thomas dissented. Justices Scalia, Kennedy, Thomas, and Alito wrote another dissent.

[150] *Sebelius* (Thomas, J. dissenting).

As *Sebelius* demonstrates, Congress' enumerated powers continue to create federal-state tensions, which the Amendment was designed to eliminate.

2. Directing Local Government

In *Garcia v. San Antonio Metropolitan Transit Authority,*[151] the Court upheld Congress' power to extend the Fair Labor Standards Act to local governments. In doing so, the Court rejected the concept of state immunity from direct regulation, stating that it would not limit Congress' authority to regulate local matters. In *New York v. United States*[152] and *Printz v. United States*,[153] the Court articulated the anti-commandeering doctrine, under which the federal government cannot coerce state governments into doing its bidding.

IV. Tensions – European Union and United States

As the above cases illustrate, the assertion and delegation of power between the European Union and its member states or between the federal and state governments gives rise to areas of tension. Smaller regional governments, whether those of European Union member states or U.S. states, are more directly politically representative of, and responsive towards, their constituents. Consequently, they may feel political pressure to assert regional power in situations where the laws and rules imposed by the larger identity do not align with regional values or interests.

Both the European Union and the United States federal government can reach their full potential of effectiveness only when they are able to harmonize standards, and impose overarching law, upon all member states or U.S. states. Consequently, the larger entities are understandably hesitant to encourage, recognize, or strengthen the powers of the more

[151] 469 U.S. 528 (1985).
[152] 505 U.S. 144 (1992).
[153] 521 U.S. 898 (1997).

regional government entities. The resulting tension encourages both the smaller and umbrella government bodies to claim power even when the other level of entity is better suited to respond to political concerns or administer specific policies.

One solution to effectively overcome "the division of competences" may be mixity.[154] While the division between powers, or competences, is muddied in the American context, in the European context, the division of competences is relatively clearly demarcated. Where agreements implicate areas of shared competency, facultative mixity can allow member states and the European Union to both exercise relevant competencies and engage in the lawmaking process.

In 2013, the European Union and Singapore agreed to a Bilateral Free Trade Agreement (FITA). At issue was the question of whether the European Union had the power to enter into the FITA without ratification by Member States. In other words, the Court was asked "to determine how far the EU's external competence stretches post-Lisbon."[155] The Court discussed the EU's exclusive competence in the area of common commercial policy as follows:

> It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is

[154] Wessel et al., *supra* note 10, at 156.

[155] Hannes Lenk, *Mixity in EU Foreign Trade Policy is here to Stay: Advocate General Sharpston on the Allocation of Competence for the Conclusion of the EU-Singapore Free Trade Agreement*, 2 EUR. PAPERS 357, 357 (2017).

> essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it . . . .[156]

The Court noted, however, that some areas, such as transport services, were not part of common commercial policy.

> [T]he commitments contained in Chapter 8 of the envisaged agreement relate to international maritime transport services, rail transport services, road transport services and internal waterways transport services, and to services inherently linked to those transport services, they do not fall within the common commercial policy, but must be approved in accordance with the division of competences between the European Union and the Member States in the field of the common transport policy.[157]

The Court considered several policies such as the need to speak with one voice and the need to enter into agreements in an expeditious manner. However, the Court concluded:

> [T]he need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties. . . . [T]he fact that there is not a complete overlap between what is to be regarded as 'trade policy' or 'investment policy' in international relations (and is therefore

[156] Op. 2/15 (May 16, 2017) para. 36.
[157] *Id.* at para. 168.

> covered by an agreement such as the EUSFTA) and what constitutes the common commercial policy as a matter of EU law is not relevant when determining whether the European Union has exclusive competence to conclude such an agreement[158]

The Court's opinion highlights both the tensions inherent in drafting EU agreements as well as the inefficiencies which can result from the various divisions of competences.

Perhaps more importantly, some larger agreements necessarily implicate some areas where the European Union has exclusive competence while also implicating other areas that fall under the exclusive competence of member states. Since some competences clearly belonging to each body are implicated, both are involved in law making and/or ratification. Both can exercise areas of exclusive competence where they are best suited to deliver quality, and both bodies have political investment in the rule, law, or agreement.

V. A Comparative Law Approach

How do the European Union and the United States deal with tensions arising from the various competences? In which areas does each entity function more efficiently? What lessons can be learned from each other? A comparative law approach may be of assistance in answering some of these questions.

A. Similarities

There are significant similarities between the power structures of the European Union and the United States. First, European Union law generally prevails over the laws of its Member States just as federal law generally prevails over state law in the United States.

[158] *Id.* at para 565, 566.

Second, like each of the fifty states in the United States, each Member State has its own court system.[159]

> There is however an all-important respect in which the European Union resembles a federal system: European law prevails (necessarily, it might be said, although possible with some limitations) over the law of the Member States, just as federal law prevails over state law under the US Constitution. Also, the Member States of the European Union each have their own legal system, just like the states in the United States.

Thus, the federal-local structures of both the EU and the US share similarities, and the structural system of the EU is at least quasi-federal in nature.

Both systems also share the desire to protect states from too much federal intrusion. In the European Union

B. Differences between EU and US

Although both the Europen Union and the United States have some similarities in their structure of competences, there are significant differences between the two systems as well. These differences include: the powers given to the Member States; the option to opt out; the European Unions's heterarchical structure; and powers in the areas of taxation and treaties.

One important difference between the EU and the US is the power retained by the Member States' courts.

> It is true that in the European system, the Court of Justice has a key role, but it remains a single court for the entire Union, supported by the General Court. This latter even today has a rather limited jurisdiction, which does not extend

[159] Jacobs, *supra* note 18, at 553.

> to preliminary rulings. . . . [T]he national courts of the Member States play a very important role even with regard to EU law.[160]

Unlike the courts in Member States, state courts in the United States are far less likely to play an important role in the interpretation of federal law.

Another important difference between the structure of the EU and the US may be the EU member states' option to "opt out." "Europe remains an association of sovereign national states ("Staatenverbund") whose member states, as Brexit is a constant reminder, retain the kind of exit options that American states lack."[161]

Another difference may be the EU's heterarchical structure. "Mainstream European constitutional theory still conceptualizes relations of authority within the EU as heterarchical, rather than hierarchical, and refers to an ethos of constitutional tolerance through which respect for authority as "invited" rather than commended from the top down. . . .[This] set[s] the EU apart from established federal systems."[162] The EU's confederational structure "make it less democratic by forgoing a 'checks and balances' system in favour of placing more power at the state level."[163] Fabrini highlights the uniqueness of the EU's structure:

> What appears to be distinctive about the EU territorial organization is exactly the coexistence of confederal and federal institutions and processes. . . . The main confederal elements of the EU are represented by the intergovernmental conferences of the European Council of heads of state and governments of the

[160] *Id.*

[161] Vlad Perju, *Identity Federalism in Europe and the United States*, 53 VAND. J. TRANSNAT'L L. 207, 213 (2020).

[162] *Id.* 214.

[163] Stevens-Finlayson, *supra* note 6, at 21.

various member states, whereas the federal elements are the Commission, the Court of Justice and the European Parliament . . . .[164]

The taxation system also differs between the EU and the US. In the US, "federal and state governments share responsibility when it comes to taxation. The tax system in the US is complex and citizens are expected to pay federal and state taxes on items like property, sales, imports, and income."[165] In the EU, however, member states "are solely responsible for collecting taxes and setting tax rates."[166] Thus, the EU avoids the "double taxation" seen in the US.

Another difference is in the area of treaties. As noted above, "one of the most significant structural differences between the Union and a federal system [is that] in the Union, the amendment of the Treaties is exclusively a matter for the Member States, not for the Union itself."[167]

C. Speaking with a Single Voice

As discussed above, there are some similarities, but also major differences in the distribution of competences in the EU and in the US. Some scholars admire the US' ability to speak with a "single voice." "The USA seems to be more flexible and regarding its external competences it is 'better equipped' than the EU. The latter is facing the difficulty of being an economic superpower, without being capable of negotiating with a single voice, due to the distribution of competences between itself and the Member States."[168] The EU is also

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[164] SERGIO FABBRINI, DEMOCRACY AND FEDERALISM IN THE EUROPEAN UNION AND THE UNITED STATES: EXPLORING POST-NATIONAL GOVERNANCE 10 (2005).

[165] Stevens-Finlayson, *supra* note 6.

[166] *Id.*

[167] Jacobs, *supra* note 18.

[168] Bungenberg, *supra* note 16, at 34-35.

hampered from speaking as a "single voice" by Article 2 TFEU's prohibition against harmonization. The EU lacks competence to harmonize conflicting legislation in member states,[169] because Article 2 states that "legally binding acts of the Union . . . relating to these areas shall not entail harmonisation of Member States' laws or regulations."

D. Turning to Local Government

Other scholars admire the EU's willingness to turn to local government. Unlike the United States, European countries give more autonomy to the local level. In Germany, Länder are aided by the national body. Länder "take part in the decision-making process through a constant dialogue with the federal administration."[170] In Switzerland, the federal spending power is limited. "Unlike the United States, which accepts the general spending power . . . Switzerland can only give grants or subventions when explicitly empowered to do so by a federal statute."[171] In his dissent in *Printz*, Justice Breyer remarks: "the federal systems of Switzerland, Germany, and the European Union. . . all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body. . . ."[172] Member States also "retain more autonomy in decision-making processes across a number of policy areas than do their US counterparts. . . ."[173] The EU's system of shared powers "promote[s] accountability, as is shown by the European Commission's ability to report Member States to the European Court of Justice if they fail to comply with federal energy laws."[174]

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[169] FAQ, *supra* note 23.

[170] Giullana Giuseppina Carboni, *Fiscal Federalism and Comparative Law*, 5 COMP. L. REV. 1, 16 (2014).

[171] Thomas Fleiner & Maya Hertig, *Swiss Confederation* in DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES, 266, 278 (2006).

[172] *Printz* (Breyer, J. dissenting) (cited by Perales, *supra* note 147, at 906).

[173] Stevens-Finlayson, *supra* note 6, at 20.

[174] *Id.*at 21-22.

The EU needs to be able to rely on local governments, because its administrative structure is so small.

> The vast majority of legislative competences in the EU are currently at least de facto shared or concurrent; responsibilities for policy execution mostly rest with the member states. The EU has an administrative machinery that is too small in size to implement and enforce EU policies. This functional division of competences and the sharing of legislative powers grant member state governments a strong role in European institutions.[175]

The EU's attitude of reliance on, and cooperating with, local governments is in sharp contrast to the US cases of New York and Printz, where the federal government was attempting to "commandeer" the state governments.

E. Lessons to be Learned

Any attempt to compare European Union and United States federalism may be met with outrage. "Comparing the EU and the United States within a conceptual framework of federalism triggers spontaneous objections, particularly by those who equate EU federalism with Brussels centralism."[176] The differences in the federal systems of the EU and the US, as well as the various national-local tensions which exist in both systems, highlight lessons which can be learned from each system. "[S]ome American scholars have found that 'the most interesting developments in federalism are happening in Europe' and have looked for

[175] Börzel, *supra* note 2.

[176] Thomas Kleinlein, & Bilyana Petkova, *Federalism, Rights, and Backlash in Europe and the United States*, 15 INT'L J. CONST. L. 1066 (2017).

'European structures and solutions [that] may offer some options that Americans have previously failed to consider or appreciate.'"[177]

1. EU Strengths

The EU competences system has several strengths, which warrant a thoughtful examination. First, the power of Member States' courts to opine on and play an active role in EU law[178] is a strength rarely exercised in US state courts. Second, Member States' option to "opt out,"[179] may be looking increasingly attractive to US states in light of recent turmoil in the United States.

The EU also does a good job in keeping taxation as "a state-level power."[180] The United States taxes primarily at the national level and, indeed, in recent years has been limiting the degree to which states can effectively operate bespoke taxation schemes with maneuvers like capping the total deductible amount of state and local taxes (SALT) at $10,000.[181]

2. US Strengths

The US does a good job of speaking with a single voice. Also the US system is, in some instances, more autonomous, more efficient, and more flexible than is its European counterpart.

Also the US system of enumerating federal powers while leaving reserved powers to the states is less confusing than the EU's attempt to articulate different competences but then have to deal with implied and creeping competences.

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[177] Perju, *supra* note 161, at 4.

[178] *See*, e.g., Jacobs, *supra* note 18, at 553

[179] *See*, e.g., Carboni, *supra* note 170, at 16.

[180] Stevens-Finlayson, *supra* note 6.

[181] *See*, *e.g.,* Emily Berg, *Just A Pinch of Salt Is Not Enough*, 92 Temp. L. Rev. 445 (2019); David Gamage & Darien Shanske, *The Future of SALT: A Broader Picture*, 88 STATE TAX NOTES 13 (2018).

Although each system has its strengths, each also has room for improvement, perhaps by adopting the best elements of the other.

F. Room for Improvement

When comparing European Union laws and cases with those of the United States, one can appreciate that both systems have space to draw from one another. The concept of federalism "provides a good tool for understanding the current structure and functioning of the European system of multi-level governance."[182] Improvements by the EU could be in the area of efficiency and in the area of international investment policy, while improvements in the US could be in the areas of better insulating the Supreme Court from political pressure and being more responsive to state and local governments.

1. Improvements in the EU

EU's current system of competences leads, in some areas, to various inefficiencies. One area of inefficiency lies in the structure of the EU itself.

> The sheer inefficiency of having to produce a near-uniform "Community" law by means of directives that, in most cases, must be transposed into national law, is daunting when compared to the effective fiat of federal law in the United States.[183]

In the area of international investment policy, there are still "insufficient EU competences,"[184] as the area of investment competence is restricted exclusively to foreign direct investment

[182] Börzel, *supra* note 2.

[183] Fischer, Thomas C., *Federalism in the European Community and the United States: A Rose by any other Name...,* 17 FORDHAM INT'L L. J. 389 (1993).

[184] Bungenberg, *supra* note 16, at 41.

(FDI).[185] One possible solution could be a "plurilateral investment promotion and protection platform, an agreement signed by both the EU and its Member States which is open for signature to third countries, too."[186] In the areas of both taxation and international investment, "a further transfer of competences from the Member States to the EU seems necessary to allow the EU to have a coherent and efficient investment policy in its international economic relations"[187]

2. Improvements in the US

As its Tenth Amendment cases demonstrate, the United States' jurisprudence is too dependent on the political composition of its Supreme Court. The rapid turnaround in the Supreme Court's decisions from *Usery* in 1976 to *Garcia* in 1985 shows that the political composition of the Court is far more important than the founding fathers envisioned.[188] By granting life tenure to Supreme Court justices, the founding fathers hoped to insulate them from political pressure.[189] However, as the impending *Roe v. Wade* reversal illustrates,[190] the Supreme Court's decisions are still very dependent on the political motivations of those who appoint justices to those lifetime seats. Perhaps the United States' legislature could take some lessons from the Lisbon Treaty and do a better job of articulating the separation of powers in the United States.

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[185] August Reinish, *The Division of Powers between the EU and its Member States "After Lisbon*," *in* INTERNATIONAL INVESTMENT LAW AND EU LAW 29, 46 (2011).

[186] Bungenberg, *supra* note 16, at 41.

[187] *Id.* at 40.

[188] *See*, e.g., Swan, *supra* note 134, at 212.

[189] *See*, e.g., James E. DiTullio, & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 Va. L. Rev. 1093, 1095 (2004).

[190] *See*, e.g. Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico (May 2, 2022). https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473. In a recently leaked draft opinion authored by Justice Alito, the Supreme Court expressed its decision to overrule its 1973 decision in *Roe v. Wade*. *Id.* The draft opinion is a "full-throated, unflinching repudiation of the 1973 decision which guaranteed federal constitutional protections of abortion rights." *Id.*

The United States could also take a lesson from the European Union in the European Union's willingness to rely on its local governments. The United States could look to the European Union for inspiration in finding ways to make a federal level government more responsive to regional differences in values and economic priorities. The European Union, with a more voluntary membership, must be responsive to minority views in ways that the United States federal government sometimes is not. The United States could also benefit from a rehabilitated Tenth Amendment and a more explicit division of powers between the federal and state governments. Ultimately, Americans might find that the present moment's rapid pace of commerce and technology necessitates enumerating additional powers, or assigning additional competencies, to the federal government. Still, such powers would be assigned explicitly and clearly demarcated to ensure the exercise of power, and the political responsibility for such exercise, occurs at the most appropriate level.

3. Calls for Competences Reform

Recently, several scholars have called for reform in the area of EU competences.[191] In an article entitled *Refining the Division of Competences*, van den Brink calls for more consideration of national discretion.[192] "Remarkably, no connection has been made thus far between national discretion and the division of competences between the EU and the Member States. Yet, taking national discretion into account is crucial for a proper understanding of how EU and national legislative competences are divided."[193]

In an article entitled *Restating the Problem of Competence Creep*, Sacha Garben notes that attempting to classify competences too strictly will always be unsuccessful. "[O]rganising

[191] For an excellent discussion on European Union competences, as well as the need for reform, *see* Garben & Goavere, *supra* note 62.

[192] van den Brink, *supra* note 3 at 275.

[193] *Id.*

the EU's constitutional settlement as a system of 'categorical' or 'dual' federalism, characterized by strict competence demarcation between different levels of government, is bound to fail."[194]

Matthew Dawson believes that it is time to "think more radically about competence control."[195] According to Dawson, in his article entitled *Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the Realm of Soft Law*, "competence control according to the categories of Articles 2-6 TFEU is largely redundant and could be abolished altogether. . . ."[196]

Considering the above calls for reform, as well as the previously-identified areas where improvements are needed, the following recommendations can be made. The United States' federal government should follow the example of the European Union in relying more on and cooperating more with local governments. By working with local governments more, federal legislators can avoid regulations which "commandeer" state compliance and undermine public confidence in democracy.

As the myriad justices majority, concurring, and dissenting opinions in *Usery*, *Garcia*, and *Sebelius* reveal, definitive jurisprudence on the Tenth Amendment is far from simple and far from settled. The tension between federal-state powers should not be resolved by relying on the political whims of the nine Justices on the Supreme Court.

Expressly articulating and categorizing competences has not worked efficiently for the European Union. In addition to contending with expressly-articulated competences found in the TFEU, the European Union also has to deal with implied competences, creeping competences, and harmonization by stealth. Perhaps the European Union could consider a

[194] Garben, *supra* note 36, at 335.
[195] Dawson, *supra* note 29, at 250.
[196] *Id.*

model like the United States' Tenth Amendment – enumerating some powers for the European Union as a whole and then reserving the unenumerated powers for the local governments.

The European Union should also consider following van den Brink's advice and should attempt to rely more on national discretion.

VI. Conclusion

America's founding fathers -- in trying to cobble together the several states into an entity capable of speaking with one voice – had to balance the federalists' desire for a strong, central government with the antifederalists' desire for autonomous states' self-rule. Similarly, those seeking to form the European Union had to balance the desire to create a strong and functional central government with the desire to preserve the Member States' local laws and customs. "In Europe, the overall trajectory of the EU as a common project is contested. Visions include a full-fledged federation but also a renationalization and cutback of the EU's competencies, a more socially oriented EU following a welfare-state model, and a reinforced focus on market liberalization."[197] The resulting systems – in both the European Union and the United States – are often inefficient, ineffective, and unwieldy and give rise to needless tensions, bickering, and animosity.

The attempt of the TFEU to articulate the various levels of competences has, at times, backfired as implied competences, harmonization by stealth, and creeping competences enable countries to circumvent the European Union's articulated competences. Likewise, the U.S. Constitution's attempt with the simple language of the Tenth Amendment has led to

[197] Thomas Kleinlein, & Bilyana Petkova, *Federalism, Rights, and Backlash in Europe and the United States*, 15 INT'L J. CONST. L. 1066, 1071 (2017).

federal-state tension in the areas of gun control, highway funding, and health care as well as many divisive opinions authored by Justices on the Supreme Court.

Any reading of the Tenth Amendment and/or the Treaty of Lisbon accompanied by the ensuing caselaw shows that it is impossible to anticipate and legislate for all instances of tensions, and that tensions will inevitably arise between different governmental powers. However, it may be possible to forestall some of the tensions created by adopting the above recommendations.

Based on a comparative law analysis of European Union competences and American federal-state division of power under the Tenth Amendment, the following steps may alleviate some of the federal-local tensions that arise. The European Union can obviate some of this tension by 1) relying more on national discretion;[198] 2) recognizing that a strict system of competences classification is untenable;[199] and 3) considering abolishing the categories articulated in Articles 2 through 6 of the TFEU.[200]

The United States federal government should avoid browbeating state governments by passing regulations, which attempt to commandeer either the state's executive or legislative branches. Instead, the federal government should rely on and cooperate with state governments in a system similar to those seen in Germany and Switzerland. Just as German Länder engage in a "constant dialogue with the federal administration,"[201] so should the state and federal governments in the United States.

[198] van den Brink, *supra* note 3.
[199] Garben, *supra* note 36.
[200] Dawson, *supra* note 29.
[201] Carboni, *supra* note 170, at 16.