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Beyond the Law – Competence Conflicts between the CJEU and Member State Constitutional Courts

Theses of the Doctoral Dissertation

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Introduction

The European Union rests on the aspiration of forging an "ever closer union" among the peoples of the continent. From the very beginning, courts have played a central role in this process, often advancing along the path of "integration through law" even when the political leadership of the member states would have preferred to move in the opposite direction. Although several of the continent's political leaders viewed with unease the process orchestrated by the Court of Justice of the European Communities – today the Court of Justice of the European Union (CJEU) – they proved unable to halt or reverse it, allowing the judicial transformation and "constitutionalization" of European law to proceed seemingly without obstacle.

Following the Treaty of Maastricht, however, the *Bundesverfassungsgericht*, the German Federal Constitutional Court, delivered a clear message: European integration remains a form of cooperation among sovereign states with limited powers. Because the member states endowed the institutional framework of the European Union with limited authority, it follows that the power to determine competences (*Kompetenz-Kompetenz*) – which, as the conceptual counterpart of sovereignty, denotes unlimited power – could not have been transferred. The member states were therefore bound to retain the prerogative of establishing whether a particular EU legal act had been adopted in excess of conferred powers (*ultra vires*), and the German Federal Constitutional Court did not hesitate to identify itself as the ultimate guardian of any such review. The CJEU has taken, and continues to take, a fundamentally different view: in its understanding, the power to determine the scope of EU competences does not amount to some form of unlimited authority but rather constitutes a technical, interpretive task – the elucidation and construction of those EU norms that define conferred competences in concrete terms. The interpretation of EU law has been entrusted to the CJEU, and the Treaties themselves provide procedures before the CJEU for situations in which European institutions might act unlawfully, including by exceeding their powers. In the view of the German Federal Constitutional Court, however, it cannot be excluded that the CJEU itself may be the one to commit such an excess of competence – a view that, although not shared by all, has since been adopted by several other member states' constitutional courts.

Within the European Union, then, the right to the final word concerning jointly exercised competences – and, ultimately, concerning the validity of EU norms – is claimed by both the EU and the member state levels, carrying within it the latent possibility of open conflict. That possibility has materialized on several occasions: over the past decade and a half, we have witnessed instances in which a member state constitutional court (the German court among

them) has declared the CJEU to have acted *ultra vires* and pronounced one of its judgments inapplicable.

How can this contradiction be resolved? From the perspective of radical constitutional pluralism, the two positions stand in irreconcilable opposition, representing parallel legal realities between which there exists not only no relationship of hierarchy but no legal coordination whatsoever. This theory thus concludes, in essence, that the question admits of no legal answer: the collision of competing claims to ultimate constitutional authority has no correct legal resolution – or, conversely, several "correct" legal answers exist, depending on the perspective adopted. It follows that, on the logic of radical pluralism, a collision between the two legal orders is not merely a problem that is legally difficult to resolve, but a problem that cannot be resolved in legal terms at all – a constitutional crisis, properly so called.

This dissertation seeks to map the European practice of these confrontations between competing claims to ultimate constitutional authority, together with their historical and theoretical background. It approaches the subject – which may, both domestically and internationally, seem in many respects to have been exhausted – from an entirely new perspective and constructs its own distinctive narrative. To that end, the dissertation moves beyond the doctrinal analysis of CJEU and constitutional court decisions and adopts a wider angle of vision, placing the inter-court conflict within its broader context. Alongside an analysis of the substance of the CJEU's transformative case law, the dissertation traces the political and ideological background of that case law. In order to render the resistance of constitutional courts more fully intelligible, it endeavors to capture the underlying processes in all their complexity. Having mapped the evolution of this resistance, the dissertation devotes separate attention to its culminating expressions – the *ultra vires* decisions – examining, again through a realist lens, the circumstances surrounding the emergence and resolution of each conflict, and seeking to reveal both the doctrinal and the extra-doctrinal forces at work. Because the central question raised by these confrontations is whether and how they can be resolved, the dissertation pays particular attention to the events that follow *ultra vires* rulings, highlighting that the seemingly irreconcilable contradiction between mutually disqualifying judicial decisions has almost invariably been defused, in practice, by some form of political settlement. Since the family of theories collectively known as constitutional pluralism offers the most prominent – and the most frequently criticized – theoretical framing of the conflict between the CJEU and member state constitutional courts in European scholarship, one of the dissertation's contributions is to systematize both these theories and the criticisms levelled against them. On that basis, while

broadly endorsing the criticisms directed at the jurisprudential foundations and the normative variants of constitutional pluralism, the dissertation nevertheless makes use of a minimalist, realist, and descriptive reading of radical constitutional pluralism. Finally, by introducing a historical analogy drawn from the United States, the dissertation lifts the question out of its narrow European Union setting. It demonstrates that Thomas Jefferson, James Madison, and John C. Calhoun deployed essentially the same line of argument at the turn of the eighteenth and nineteenth centuries that certain European constitutional courts have, over time, come to discover for themselves – namely, that the right to the final word concerning the limits of jointly exercised federal-level competences resides with the member states rather than with federal courts. In the antebellum United States, too, states proceeded to declare federal action *ultra vires*, and the resulting conflicts were defused by political shifts and political compromises. This parallel is significant for three reasons. First, it shows that disputes over the locus of the final word in matters of competence allocation are by no means a peculiarity of the *sui generis* European legal order. Second, it reinforces the dissertation's claim that the conflict does not stem from any substantive ambiguity in the Treaties concerning the primacy of European law. Third, the dissertation uses the parallel to underscore its central narrative, namely that the allocation of competences between member states and the central level is a "mega-political" question – one that touches on the essence of the political community and on issues that fundamentally define or divide it. Those who feared the encroachment of federal power on the rights of the American states placed their trust not in the judicial enforceability of a detailed catalogue of competences but in systemic political guarantees designed to secure the allocation of authority and the long-term sustainability of the union.

Theses of the Dissertation

1. From a legal standpoint, European integration has from the outset been the work not of the political leadership of the member states but of courts – above all the Court of Justice of the European Union (CJEU): "integration through law" advanced even when political integration stalled.

2. Since the Treaty of Maastricht, the German *Bundesverfassungsgericht* (and, following its lead, several other member state constitutional courts) has articulated the counter-thesis that the EU is a form of cooperation among sovereign states with limited powers. The competence to determine competences (*Kompetenz-Kompetenz*) cannot have been

transferred to EU bodies, and the member states – ultimately their constitutional courts – therefore retain the authority to subject *ultra vires* EU acts to constitutional review.

3. The CJEU, by contrast, treats this competence as exclusively its own and frames it as a technical, interpretive task. Both sides thus claim the right to the final word, and that latent conflict has materialized repeatedly over the past decade and a half.

4. The central question of the dissertation is how this contradiction can be resolved. According to the thesis of radical constitutional pluralism, the two positions stand in irreconcilable opposition and the collision admits of no purely legal answer – the problem amounts, in constitutional terms, to a crisis.

5. The three foundational tenets of the European legal order – autonomy, direct effect, and primacy in application – along with the CJEU's exclusive claim to *Kompetenz-Kompetenz*, cannot be read out of the text of the Treaties; they emerge instead from the CJEU's transformative case law (*Van Gend en Loos*, *Costa v ENEL*, *Internationale Handelsgesellschaft*, *Simmenthal*, *Foto-Frost*).

6. Two institutional features define the distinctive character of the CJEU: its general and compulsory jurisdiction over member states, and the preliminary reference procedure. By means of these two instruments the CJEU was able, from the earliest stages of integration, to render "transformative" judgments; in practice, moreover, the preliminary reference procedure has become less a vehicle for the abstract interpretation of EU law than an instrument for the CJEU's review of national law.

7. It is to these doctrines that the European legal order owes its "constitutionalization": the European legal system has come to resemble the constitutional architecture of a federal state – not by Treaty amendment, but by judicial construction.

8. The work behind this "constitutionalization" was not carried out by the CJEU in isolation. Following the collapse of political federalization in the 1950s (with the failure of the European Defence Community and the European Political Community), a Eurofederalist legal community – the Fédération Internationale pour le Droit Européen (FIDE), the Legal Service of the European Commission under Michel Gaudet, and key CJEU judges such as Robert Lecourt and Alberto Trabucchi – consciously embraced the strategy of "integration through law." The *Van Gend en Loos* and *Costa v ENEL* cases are paradigmatic "test cases" arising from that strategy.

9. If the CJEU overstepped the intentions expressed by the member states in the Treaties, why did the member states not stop it? Two answers are possible: they did not wish to stop it, or they were unable to do so.

10. Intergovernmentalism (Garrett): the member states did not actually wish to stop the CJEU, since its activity in essence served their interests; the CJEU practiced cost–benefit self-restraint whenever it feared resistance from the larger member states.

11. Neofunctionalism (Burley, Mattli, Slaughter, Alter): the CJEU often deepened integration against the will of the member states. The process was driven by institutional self-interest (on the part of the CJEU, the Commission, and lower-level national courts) and by the way the legal idiom served as a "mask and shield," protecting through judicial channels political objectives that might otherwise have attracted open political resistance.

12. Effective political resistance by the member states was also rendered impossible by structural institutional obstacles (most notably the joint-decision trap). These obstacles are not neutral institutional features: they generate one-directional incentives, since EU-level decisions – including CJEU judgments – are extremely difficult to reverse politically, while no corresponding structural counterweight to further deepening of integration exists. The lasting consequences of this structural imbalance are identified in the dissertation's concluding chapter as a deficiency in the political safeguards of federalism.

13. A synthesis of the relevant empirical scholarship (Carrubba–Gabel–Hankla, Stone Sweet–Brunell, Larsson–Naurin, Castro-Montero, Ovádek) shows that the CJEU exhibits a clear supranational bias and pays comparatively little attention to member state preferences, with its judgments tracking far more closely the legal positions of the Commission. In limited circumstances, however, the CJEU does engage in strategic self-restraint – most notably during Intergovernmental Conferences (IGCs), when the risk of an unfavorable Treaty amendment temporarily rises.

14. "Disaggregated state": lower-level national courts became the CJEU's natural allies, and this partnership effectively foreclosed unified action by the member states.

15. For these reasons, the early political attempts – de Gaulle's 1968 proposal, the Foyer–Debré bill of 1978, Giscard d'Estaing's court-packing plan, and the British proposals of

1996 – directed against the Court's jurisprudence or competences had practically no effect.

16. Declaration 17 attached to the Treaty of Lisbon recorded the primacy of EU law not as a treaty rule but as a "reminder" referring to the case law of the CJEU – not a consensual member state endorsement of primacy, but a consensual decision to leave the question open.

17. Following the failure of political resistance, the focus shifts to constitutional-court resistance. The product of the *Simmenthal* doctrine and the disaggregation of the state is the phenomenon of "displacement" (Komárek): the cooperation between the CJEU and lower-level national courts gradually pushes constitutional courts – which had previously held a monopoly on judicial review of legislation – out of their established constitutional role.

18. The reservations expressed by constitutional courts are generally not directed against the principle of primacy as such, but against the absolute primacy – extending even over national constitutions – that emerges from *Internationale Handelsgesellschaft* and *Simmenthal*. The dispute is not, at bottom, about the conflict-of-laws rule governing two simultaneously valid norms; it concerns the structure of authorization that grounds the validity of those norms in the first place.

19. The Italian *controlimiti* doctrine (*Frontini*, *Granital*, *Fragd*): the fundamental principles of the Constitution and inalienable human rights constitute counter-limits to the primacy of EU law, and, on the principle of conferral, *Kompetenz-Kompetenz* remains with the member states. EU law can be subjected to constitutional review through review of the act of accession.

20. The German *Solange–Maastricht–Lisbon* line: from the initial fundamental-rights reservation in *Solange I* through to the *Maastricht* judgment, which makes clear that *Kompetenz-Kompetenz* remains with the member states because the EU is an association of states (*Staatenverbund*) rather than a sovereign state, and that the *Bundesverfassungsgericht* retains the option of *ultra vires* review. The *Lisbon* judgment confirms this approach and introduces an additional identity review (*Identitätskontrolle*).

21. The Spanish model (TC 1/2004): a sharp doctrinal distinction between supremacy (validity-based primacy, hierarchy) and primacy of application. On this view, the

supremacy of the Constitution and the primacy of EU law are not mutually exclusive; however, EU law that is unconstitutional cannot be regarded as valid, and therefore cannot enjoy primacy of application either.

22. The constitutional courts of the post-communist member states (Czech, Polish, Romanian, Hungarian) combine elements of the foregoing approaches, invoking the principle of conferral, sovereignty, or constitutional identity.

23. There is no universally applicable template by reference to which a constitutional court decision may be classified as an *ultra vires* ruling. The dissertation highlights those cases in which a member state (constitutional) court has, in some form, made clear that a particular CJEU judgment, by reason of an excess of competence and/or of unconstitutionality, cannot be applied within the relevant member state: the Czech Republic (*Landtová–Holubec*), Denmark (*Dansk Industri–Ajos*), Italy (*Taricco*), Germany (*Weiss–PSPP*), Romania (*EuroBox*), and Poland (*K 3/21*).

24. Constitutional-court resistance has typically been closely connected with the phenomenon of displacement (as in the Czech, Italian, Romanian, and Polish cases).

25. Constitutional-court resistance breaks through the "mask and shield" protection that law affords the CJEU: it answers legal reasoning with legal reasoning, and it is not without precedent for such resistance to lead to a modification of a CJEU judgment (as in *Taricco*).

26. The phenomenon of the "disaggregated state" reappears here as well, but in reverse: the confrontation has often been driven by tensions between constitutional courts and ordinary courts within the member state, and, in the subsequent settlement of the conflict, national governments have frequently taken positions against their own constitutional courts.

27. Irreconcilable contradictions generated at the judicial level by mutually disqualifying decisions have almost invariably been smoothed over, in practice, by political solutions.

28. The idea of constitutional pluralism posits, over a single geographic territory, a multiplicity of ultimate constitutional authorities, thereby of necessity detaching the concepts of legal order and constitutionalism from the state.

29. Constitutional pluralism is not a single theory. The theories that attach themselves to this label cover a remarkably wide spectrum and sometimes contradict one another.

They may be grouped according to whether they are descriptive accounts of how overlapping legal orders in fact operate (such as MacCormick or Scarcello), or normative approaches aimed at coordinating their coexistence (Kumm, Maduro, and – in another mode – MacCormick as well).

30. The critiques of constitutional pluralism likewise align along a descriptive–normative axis: (1) some regard pluralism as descriptively mistaken, "illusory," or conceptually self-contradictory (Loughlin, Somek, Davies, Avbelj); (2) others view normative pluralism, which resolves inter-system conflict by introducing a third, external normative order, as self-contradictory and as a kind of disguised monism (Loughlin); (3) still others reject the underlying assumptions of pluralism on normative grounds, as endangering legal certainty or, more specifically, the uniform application of EU law (Eleftheriadis, Baquero Cruz, Kelemen).

31. Notwithstanding these well-founded critiques, the dissertation argues that a minimalist, descriptive, and realist version of radical pluralism remains analytically useful – one stripped of normative presuppositions, which does not claim that the competing claims to ultimate constitutional authority are equally correct, but only records that, as a matter of practice, neither claim fully displaces the other.

32. On this reading, the question of theoretical irresolvability separates from the question of practical irresolvability. The conflict cannot be resolved through the instruments of judicial adjudication; setting aside withdrawal from the Union, only two outcomes are available: legal-applicative chaos, or political intervention undertaken to avert crisis.

33. Most of the cases examined in the dissertation (*Landtová*, *Ajos*, *EuroBox*, *PSPP*) confirm the realist reading of radical pluralism: an apparently irreconcilable judicial conflict has, in almost every instance, been brought to a close by political means.

34. The constitutional-law debates of the antebellum United States bear a striking resemblance to the present situation of the European Union. Jefferson (Kentucky) developed the doctrine of nullification, while Madison (Virginia) developed the doctrine of interposition in response to the Alien and Sedition Acts. Madison's Report of 1800 makes clear that, were the interpretation of the constitutional compact the exclusive prerogative of the federal courts, the very state sovereignty that grounds the constitution would be destroyed – a federal court can commit an excess of competence no less than the other branches of the central government.

35. Building on the principle of the indivisibility of sovereignty, Calhoun further developed the Jeffersonian–Madisonian argument by equating the power to determine competences with sovereignty itself. On the basis of the compact theory of the Constitution, he therefore concluded that the states necessarily retain the authority to establish a violation of the constitutional compact by way of vertical excess of competence.

36. In the antebellum United States there were several instances in which a state declared the federal government to have exceeded its powers or to have acted unconstitutionally – conflicts that were resolved by political means.

37. The core of the argument advanced by Jefferson, Madison, and Calhoun coincides with the reasoning of the *Bundesverfassungsgericht* and other European constitutional courts: the states that founded the union never made the central institutions the final arbiter of the scope of the powers conferred upon them, and the "final word" therefore remains with the member states. The exercise of this final word by a member state is treated by Madison as it is by today's European constitutional courts – as an exceptional, *ultima ratio* recourse.

38. The essential difference between the two settings is not one of principle but of culture and institutional form: in the American political-constitutionalist tradition, nullification was articulated through legislative or special-convention channels; in the European legal-constitutionalist tradition, the same function is performed by constitutional courts.

39. The clear supremacy clause of the American Constitution did not preclude *ultra vires* argumentation. This carries an important lesson for the EU: enshrining primacy in the Treaties would not, by itself, resolve the *Kompetenz-Kompetenz* problem.

40. On a realist reading of radical pluralism, the reasoning of the CJEU and that of the constitutional courts constitute two parallel and internally coherent universes resting on different premises, at which point purely legal argumentation reaches its limits. The same phenomenon could be observed in the antebellum American debates: Madison, Jefferson, and Calhoun, on the one hand, and Daniel Webster or John Marshall, on the other, built their arguments on entirely different premises – holding radically different views of what counts as the political community, the constituent power, or the sovereign. Their disagreements followed, above all, from those underlying presuppositions.

41. There is a tradition in American scholarship, reaching back to Madison and continuing through Wechsler, Tushnet, and Young, that approaches the question of competence allocation not primarily through the courts but through the lens of structural and political design. The central thesis of this tradition is that a federal structure can be sustained over time only if it is "self-enforcing" or "incentive-compatible": the institutional actors within the system, acting on their own self-interest, are led to behaviors that preserve the equilibrium of competence allocation, because political incentives are structurally balanced. The pressure for judicial enforcement stands in inverse relation to this balance: the stronger the structural political safeguards, the less the allocation of competences needs to be enforced by courts – and vice versa. Through this conceptual lens, the diagnosis of the European situation comes more sharply into focus.

42. The disputes over the legal bases (*legal basis*) that give substance to the allocation of competences in the European Union are likewise primarily political in nature, taking shape through political bargaining among the EU institutions (the Commission, the Parliament, and the Council). Once agreement among those institutions has been reached, the possibility of CJEU review provides no meaningful check (Ovádek, Leino).

43. Viewed from this perspective, the intermittent resistance of member state constitutional courts – their challenges to individual CJEU judgments – stems precisely from the absence of these political incentives and institutional checks. Constitutional courts are seeking to fill that vacuum: not because their institutional role uniquely qualifies them for the task, but because they are the only institutional actors in possession of the legal and political instruments by which the protection of the member state level can be taken up against the one-directional integrative momentum of the EU institutions.

44. The involvement of constitutional courts is itself, however, problematic, and does not offer a real solution. On the one hand, such involvement is necessarily ex post, ad hoc, and bound to the logic of the national constitutional order in question; on the other hand, every confrontation in itself poses a significant challenge to the EU legal order, and the systemic consequence of after-the-fact political conflict management is the further erosion of the internal position of constitutional courts – an acceleration of displacement.

45. A substantive response to the question of how the sustainability of European integration is to be secured – rather than a merely cosmetic or symptomatic treatment of the proliferation of conflicts over the final word – would therefore consist in rendering the

allocation of competences between the EU and the member states incentive-compatible and self-enforcing by strengthening the political safeguards of federalism. Building on Young's insight: the pressure for judicial restraint on central power stands in inverse relation to the strength of the political and institutional checks; the EU presently suffers from the weakness of those checks, and strengthening them would diminish the need for constitutional-court *ultra vires* rulings.

46. The stakes of this approach are particularly high in the present European context. Since Brexit, the possibility of disintegration has become more tangible than ever before, while the prospect of EU enlargement – by increasing the number of constitutional courts in the system – also increases the likelihood of further conflicts.

Structure of the Dissertation

Following the introductory chapter, the *second chapter* explores the historical and institutional process by which the European legal order departed from international law in the traditional sense. It shows that this distinctive trajectory rested on principles that are themselves familiar, but that were generated less by the text of the Treaties adopted by the member states than by the transformative case law of the CJEU. The chapter first surveys the CJEU's distinctive jurisdiction, organizational structure, and institutional history, placing particular emphasis on the central role of the preliminary reference procedure. The judicial-transformative and "constitutionalizing" process is then presented chiefly through an analysis of the CJEU's foundational judgments – *Van Gend en Loos*, *Costa v ENEL*, *Internationale Handelsgesellschaft*, *Simmenthal*, and *Foto-Frost*. The chapter also briefly reviews the scholarship on the movement-based and ideological background of "constitutionalization," drawing in particular on Morten Rasmussen, Karen J. Alter, Antoine Vauchez, and Endre Orbán to show how, following the failure of European political federalization in the 1950s, the Eurofederalist legal community, the Legal Service of the European Commission, and some prominent judges of the CJEU chose a different path: when political integration appeared unattainable, the federalist objective was pursued through "integration through law," along a strategy focused on technical and legal procedures.

The *third chapter* addresses the question why, given that the CJEU did in fact considerably overstep the intentions originally expressed by the member states in the Treaties, this process did not provoke significant resistance on the part of the member states. The chapter approaches the question through the contrast between the two principal theoretical schools that have sought

to explain the expansive practice of the CJEU: intergovernmentalism and neofunctionalism. According to the former, the CJEU did not in fact run counter to the interests of the member states; according to the latter, it did so, but the structural conditions for effective member state resistance were lacking. After setting out these theoretical frameworks, the chapter synthesizes the results of the relevant empirical research (notably by Michal Ovádek, Olof Larsson, Daniel Naurin, Alec Stone Sweet, and Thomas Brunell). The chapter shows that the CJEU's practice exhibits a clear supranational – "more Europe" – bias in competence disputes and is comparatively unresponsive to member state preferences; however, when the political and other costs of effective member state resistance temporarily fall during Intergovernmental Conferences, the CJEU tends toward strategic self-restraint grounded in institutional self-interest. The chapter further identifies those factors that have insulated the CJEU and rendered it resilient even in the face of significant member state opposition. Drawing chiefly on the work of Karen Alter and Hjalte Rasmussen, it concludes with an account of several unsuccessful political attempts by member states to reverse the CJEU's practice or to curtail its powers.

Following the failure of political resistance, the focus shifts to constitutional-court resistance. The *fourth chapter* begins by examining – drawing in particular on Jan Komárek and Michal Bobek – the internal tensions that the preliminary reference procedure and the case law of the CJEU produced within the judicial systems of the member states. While lower-level ordinary courts gained substantial prestige and new powers through the application of EU law, the constitutional courts – which had previously held a monopoly on judicial review of legislation – were progressively pushed to the margins, giving rise to the phenomenon of "displacement." The chapter systematizes the most important constitutional-court decisions and the reservations they articulate, from the early Italian (*Frontini*, *Granital*) and German (*Solange*, *Maastricht*, *Lisbon*) and later Spanish decisions through to the case law of the Central and Eastern European member states that acceded after 2004 (the Czech Republic, Poland, Romania, and Hungary). The trajectory of these reservations culminates in cases involving direct confrontation between the CJEU and a member state constitutional court – typically through the latter's declaration that the former had exceeded its powers (*ultra vires*). The constitutional-court decisions that have so declared – the Czech Constitutional Court's ruling following the CJEU's *Landtová* judgment, the Danish *Ajos* case, the Italian *Taricco* line of cases, the German Federal Constitutional Court's *PSPP* decision, the Romanian *EuroBox* case, and the Polish Constitutional Tribunal's *K 3/21* ruling – are analyzed not only doctrinally but also in context,

with attention to the forces that gave rise to each conflict and to the circumstances under which it was resolved.

The *fifth chapter* examines the theoretical background of the conflicts presented in the preceding chapter, identifying the theoretical frameworks on which the claims of the CJEU and of member state constitutional courts rest, or by which they may be justified. The chapter then turns to the most ambitious attempt to bring this opposition under a single coherent narrative – the concept of constitutional pluralism – drawing principally on the work of Neil MacCormick, Mattias Kumm, Miguel Poiares Maduro, Orlando Scarcello, Nico Krisch, Neil Walker, Klemen Jaklic, Matej Avbelj, Jan Komárek, and Cormac Mac Amhlaigh. Because this strand of thought offers the most prominent – and the most heavily contested – theoretical framing of the conflict in European scholarship, the dissertation provides a similarly systematic treatment of the relevant critiques (including those of Alexander Somek, Gareth Davies, Martin Loughlin, Julio Baquero Cruz, and R. Daniel Kelemen). While the dissertation broadly endorses the critiques directed at constitutional pluralism – above all at its normative variants – it nevertheless makes use of a minimalist, realist, and strictly descriptive reading of radical constitutional pluralism, on which the collision of competing claims to ultimate authority gives rise to a conflict that cannot be resolved by purely legal or judicial means and that therefore renders political intervention necessary in order to avert crisis.

The *sixth chapter* reviews and critically examines institutional reform proposals advanced in the scholarship that seek either to prevent or to formally resolve the competence conflicts described in the preceding chapters. The chapter considers concrete proposals such as the introduction of a reverse preliminary reference procedure (Peter M. Huber, Christoph Grabenwarter, Rajko Knez, Ineta Ziemele), the restriction of the preliminary reference procedure to supreme or constitutional courts (Jasaron Bajwa), and the establishment of a dedicated European competence-review tribunal (Joseph Weiler, Daniel Sarmiento, Ulrich Haltern, Franz C. Mayer, Jean-Paul Jacqué).

One of the principal contributions of the dissertation is contained in the *seventh chapter*, which, through the introduction of a historical American analogy, places the problem in an entirely new perspective. This chapter lifts the question of competence allocation out of its narrow European setting and shows that what is at stake is not a peculiarity of the *sui generis* EU legal order but a fundamental dilemma of federal unions. While this parallel has been mentioned in the European scholarship, the chapter's engagement with the primary sources sets out, with a depth that is largely without precedent, the profound – and indeed striking – affinity between the

antebellum American debates over nullification and the situation observable in the EU today. The chapter draws extensively on the writings of Thomas Jefferson, James Madison, and John C. Calhoun.

The *eighth chapter* draws on the historical parallel to reinforce the central narrative of the dissertation: that the allocation of competences between the member states and the central level is a "mega-political" question, one that touches on the essence of the political community and on issues that fundamentally define or divide it. Those who feared the encroachment of federal power on the rights of the American states placed their trust not in the judicial enforceability of a detailed catalogue of competences but in systemic political guarantees designed to secure the allocation of authority and the long-term sustainability of the union. Finally, the chapter draws on the work of Mark Tushnet, Herbert Wechsler, and Ernest Young on the political safeguards of American federalism and on the self-enforcing, "incentive-compatible" operation of competence allocation, and reflects on the possible application of these ideas in a European context.