


# The Law of the EUROPEAN UNION

Teaching Material



**PRINCIPLES OF CONSTITUTIONAL LAW:  
THE RELATIONSHIP BETWEEN THE COMMUNITY  
LEGAL ORDER AND THE NATIONAL  
LEGAL ORDERS:  
COMPETENCIES**

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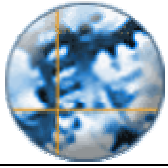
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# TABLE OF CONTENTS

NOTE AND QUESTIONS.....	1
<b>1 RELEVANT TREATY PROVISIONS .....</b>	<b>2</b>
Note and Questions .....	2
1.1 Protocol on the application of the principles of subsidiarity and proportionality .....	4
1.2 Title XII (ex Title IX) (Culture) TEC.....	7
1.3 Title XIII (ex Title X) (Public Health).....	8
<b>2 DIRECTIVE ON ADVERTISING AND SPONSORSHIP OF TOBACCO PRODUCTS.....</b>	<b>9</b>
Note and Questions .....	9
2.1 Case C-376/98: Germany v Parliament and Council.....	9
2.2 Text of the annulled Directive.....	15
2.3 Text of the new Directive.....	20
<b>3 JOINED CASES C-210/03 AND C-434/02: SWEDISH MATCH AND OTHERS (SNUS CASE).....</b>	<b>26</b>
Note and Questions .....	26
3.1 Opinion of Advocate General Geelhoed.....	26
3.2 Judgement of the Court.....	41
<b>4 THE UNION'S COMPETENCES IN THE AREA OF HUMAN RIGHTS.....</b>	<b>49</b>
4.1 Opinion 2/94 of the Court on the Accession by the Community to the ECHR .....	49
4.2 Case C-106/96: UK v Commission (social exclusion program).....	50
Note and Questions .....	50
<b>5 CONSTITUTION FOR EUROPE.....</b>	<b>56</b>
Note and Questions .....	56
5.1 Constitution for Europe: Fact sheets .....	57
5.1.1 Classification and exercise of competences.....	57
5.1.2 The subsidiarity principle and the role of national parliaments .....	60

<b>5.2</b>	<b>Relevant provisions.....</b>	<b>63</b>
<b>5.3</b>	<b>Protocols annexed to the Treaty establishing a Constitution for Europe .....</b>	<b>67</b>
5.3.1	Protocol on the Role of National Parliaments in the European Union.....	67
5.3.2	Protocol on the Application of the Principles of Subsidiarity and Proportionality .....	70
	Note and Questions.....	70
5.3.3	Protocol relating to Article I-9(2) of the Constitution on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms .....	74
<b>6</b>	<b>J.H.H. WEILER: THE TRANSFORMATION OF EUROPE .....</b>	<b>75</b>
<b>7</b>	<b>G.A. BERMANN: TAKING SUBSIDIARITY SERIOUSLY: FEDERALISM IN THE EUROPEAN COMMUNITY AND IN THE UNITED STATES.....</b>	<b>129</b>
<b>8</b>	<b>FURTHER READING .....</b>	<b>172</b>

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## **NOTE AND QUESTIONS**

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In this Unit you will find the Treaty provisions regarding subsidiarity as well as the TEC provisions on Culture and Public Health. Please pay attention in particular to Article 5 (ex Article 3b) TEC which contains the three principles of limited powers, subsidiarity and proportionality.

You will also find two articles:

- "Transformation of Europe" (Joseph Weiler in 100 Yale L.J. 2403 [1991]) on competences in general

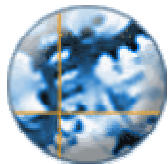
and an excerpt from:

- "Taking subsidiarity seriously" (George Bermann in 94 Columbia Law Rev. 331 [1994]) on the principle of subsidiarity.

In the next Unit you will find the full text of Opinion 2/94 of the Court of Justice regarding the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

If ratified by all the Member states, the Constitution for Europe will bring about significant changes to the system of competencies of the Union. The last part is therefore trying to give you an insight into what the future might look like.

# 1 RELEVANT TREATY PROVISIONS



## NOTE AND QUESTIONS

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1. What is the function of this Treaty Article? Legally? Politically?
2. As well as Art.5 (ex 3b) EC, see also Protocol on the Application of the principles of subsidiarity and proportionality (see below) provides inter alia that : "For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators". What form might such qualitative or quantitative indicators take?

### Article 5 (ex Article 3b) TEC

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

### Preamble of the TEU

[...]

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

[...]

## **Article 2 (ex Article B) TEU**

[...]

The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

## **Article 6 (ex Article F) TEU**

[...]

3. The Union shall respect the national identities of its Member States.

[...]

## **1.1 Protocol on the application of the principles of subsidiarity and proportionality**

(Protocol n. 30 introduced by the Amsterdam Treaty and annexed to the Treaty establishing the European Community)

THE HIGH CONTRACTING PARTIES,

DETERMINED to establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions;

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

TAKING ACCOUNT of the Interinstitutional Agreement of 25 October 1993 between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity;

HAVE CONFIRMED that the conclusions of the Birmingham European Council on 16 October 1992 and the overall approach to the application of the subsidiarity principle agreed by the European Council meeting in Edinburgh on 11<sup>th</sup> 12 December 1992 will continue to guide the action of the Union's institutions as well as the development of the application of the principle of subsidiarity, and, for this purpose,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community:

(1) In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

(2) The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire* and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(4) of the Treaty on European Union, according to which "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies".

(3) The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

(4) For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for

concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

(5) For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

(6) The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

(7) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

(8) Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

(9) Without prejudice to its right of initiative, the Commission should:

- except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;
- justify the relevance of its proposals with regard to the principle of subsidiarity;
- whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect. The financing of Community action in whole or in part from the Community budget shall require an explanation;
- take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved;
- submit an annual report to the European Council, the European Parliament and the Council on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.



(10) The European Council shall take account of the Commission report referred to in the fourth indent of point 9 within the report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with Article D of the Treaty on European Union.

(11) While fully observing the procedures applicable, the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 3b of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

(12) In the course of the procedures referred to in Articles 189b and 189c of the Treaty, the European Parliament shall be informed of the Council's position on the application of Article 3b of the Treaty, by way of a statement of the reasons which led the Council to adopt its common position. The Council shall inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is deemed to be inconsistent with Article 3b of the Treaty.

(13) Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty.

## **1.2 Title XII (ex Title IX) (Culture) TEC**

### **Article 151 (ex Article 128) TEC**

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples;
  - conservation and safeguarding of cultural heritage of European significance;
  - non-commercial cultural exchanges;
  - artistic and literary creation, including in the audiovisual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:
  - acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;
  - acting unanimously on a proposal from the Commission, shall adopt recommendations.

### **1.3 Title XIII (ex Title X) (Public Health)**

#### **Article 152 (ex Article 129) TEC**

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

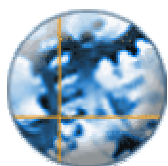
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting:

- (a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
- (b) by way of derogation from Article 37, measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
- (c) incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

## 2 **DIRECTIVE ON ADVERTISING AND SPONSORSHIP OF TOBACCO PRODUCTS**



### **NOTE AND QUESTIONS**

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1. The Community possesses an attributed competence in the field of public health – it is Article 152(ex 129), see para 1.3.6 above. Why did it not exercise it to adopt the Tobacco Advertising Directive, rather than relying - unsuccessfully - on Article 95 as the legal basis for that measure?
2. The Court of Justice annulled Directive 98/43/EC by its decision in C-376/98. Study carefully the new directive after reading the annulled text and see if the modifications made by the new text take into account the decision of the Court.

### **2.1 Case C-376/98: Germany v Parliament and Council**

**Federal Republic of Germany v European Parliament and Council of the European Union**

**Case C-376/98**

5 October 2000

Court of Justice

ECR [2000] I-08419

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of the facts and procedure:**

*On 6 July 1998 the European Parliament and the Council adopted, on the basis of the provisions relating to establishment of the internal market, freedom of establishment and freedom to provide services, a directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. That directive, which lays down a general prohibition of advertising and sponsorship relating to those products, was adopted with a view to*

*eliminating obstacles to the functioning of the internal market deriving from barriers to the movement of products and the freedom to provide services and distortions of competition resulting from differences in the relevant national rules.*

*Two cases came before the Court concerning the validity of that directive: the first was an action for annulment brought by the Federal Republic of Germany and the second was a request for a preliminary ruling from the High Court of Justice arising from proceedings in the United Kingdom brought by a number of manufacturers of tobacco products (Imperial Tobacco and Others).*

*The Federal Republic of Germany and the tobacco producers contended, inter alia, first, that the directive was in reality a measure designed to protect public health whose effects on the internal market, if any, were purely incidental and, second, that the directive did not in any event constitute a measure pursuing attainment of the internal market.*

### **Judgement:**

[...]

The choice of Articles 100a, 57(2) and 66 of the Treaty as a legal basis and judicial review thereof

- 76 The Directive is concerned with the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. The national measures affected are to a large extent inspired by public health policy objectives.
- 77 The first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.
- 78 But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies.
- 79 Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty.
- 80 In this case, the approximation of national laws on the advertising and sponsorship of tobacco products provided for by the Directive was based on Articles 100a, 57(2) and 66 of the Treaty.
- 81 Article 100a(1) of the Treaty empowers the Council, acting in accordance with the procedure referred to in Article 189b (now, after amendment, Article 251 EC) and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
- 82 Under Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital. Article 7a of the EC Treaty (now, after amendment, Article 14 EC), which provides for the measures to be taken with a view to establishing the internal market, states in paragraph 2 that that market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

- 83 Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.
- 84 Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty.
- 85 So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature (see, in particular, *Spain v Council*, cited above, paragraphs 25 to 41, and *Case C-233/94 Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 10 to 21).
- 86 It is true, as the Court observed in paragraph 35 of its judgment in *Spain v Council*, cited above, that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.
- 87 The foregoing considerations apply to interpretation of Article 57(2) of the Treaty, read in conjunction with Article 66 thereof, which expressly refers to measures intended to make it easier for persons to take up and pursue activities by way of services. Those provisions are also intended to confer on the Community legislature specific power to adopt measures intended to improve the functioning of the internal market.
- 88 Furthermore, provided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured.
- 89 It is therefore necessary to verify whether, in the light of the foregoing, it was permissible for the Directive to be adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty.

#### The Directive

- 90 In the first recital in the preamble to the Directive, the Community legislature notes that differences exist between national laws on the advertising and sponsorship of tobacco products and observes that, as a result of such advertising and sponsorship transcending the borders of the Member States, the differences in question are likely to give rise to barriers to the movement of the products which serve as the media for such activities and the exercise of freedom to provide services in that area, as well as to distortions of competition, thereby impeding the functioning of the internal market.

- 91 According to the second recital, it is necessary to eliminate such barriers, and, to that end, approximate the rules relating to the advertising and sponsorship of tobacco products, whilst leaving Member States the possibility of introducing, under certain conditions, such requirements as they consider necessary in order to guarantee protection of the health of individuals.
- 92 Article 3(1) of the Directive prohibits all forms of advertising and sponsorship of tobacco products and Article 3(4) prohibits any free distribution having the purpose or the effect of promoting such products. However, its scope does not extend to communications between professionals in the tobacco trade, advertising in sales outlets or in publications published and printed in third countries which are not principally intended for the Community market (Article 3(5)).
- 93 The Directive also prohibits the use of the same names both for tobacco products and for other products and services as from 30 July 1998, except for products and services marketed before that date under a name also used for a tobacco product, whose use is authorised under certain conditions (Article 3(2)). With effect from 30 July 2001, tobacco products must not bear the brand name, trade-mark, emblem or other distinctive feature of any other product or service, unless the tobacco product has already been traded under that brand name, trade-mark, emblem or other distinctive feature before that date (Article 3(3)(a)).
- 94 Pursuant to Article 5, the Directive is not to preclude Member States from laying down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.
- 95 It therefore necessary to verify whether the Directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.

#### Elimination of obstacles to the free movement of goods and the freedom to provide services

- 96 It is clear that, as a result of disparities between national laws on the advertising of tobacco products, obstacles to the free movement of goods or the freedom to provide services exist or may well arise.
- 97 In the case, for example, of periodicals, magazines and newspapers which contain advertising for tobacco products, it is true, as the applicant has demonstrated, that no obstacle exists at present to their importation into Member States which prohibit such advertising. However, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption, it is probable that obstacles to the free movement of press products will arise in the future.
- 98 In principle, therefore, a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products, on the lines of Directive 89/552, Article 13 of which prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes.
- 99 However, for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising. That applies, in particular, to the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned.

- 100 Admittedly, a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented. It is, however, quite clear that the prohibitions mentioned in the previous paragraph do not fall into that category.
- 101 Moreover, the Directive does not ensure free movement of products which are in conformity with its provisions.
- 102 Contrary to the contentions of the Parliament and Council, Article 3(2) of the Directive, relating to diversification products, cannot be construed as meaning that, where the conditions laid down in the Directive are fulfilled, products of that kind in which trade is allowed in one Member State may move freely in the other Member States, including those where such products are prohibited.
- 103 Under Article 5 of the Directive, Member States retain the right to lay down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.
- 104 Furthermore, the Directive contains no provision ensuring the free movement of products which conform to its provisions, in contrast to other directives allowing Member States to adopt stricter measures for the protection of a general interest (see, in particular, Article 7(1) of Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes (OJ 1990 L 137, p. 36) and Article 8(1) of Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1)).
- 105 In those circumstances, it must be held that the Community legislature cannot rely on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services in order to adopt the Directive on the basis of Articles 100a, 57(2) and 66 of Treaty.

#### Elimination of distortion of competition

- 106 In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (Titanium Dioxide, cited above, paragraph 23).
- 107 In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in paragraph 83 of this judgment, that the powers of the Community are those specifically conferred on it.
- 108 It is therefore necessary to verify whether the Directive actually contributes to eliminating appreciable distortions of competition.
- 109 First, as regards advertising agencies and producers of advertising media, undertakings established in Member States which impose fewer restrictions on tobacco advertising are unquestionably at an advantage in terms of economies of scale and increase in profits. The effects of such advantages on competition are, however, remote and indirect and do not constitute distortions which could be described as appreciable. They are not comparable to the distortions of



competition caused by differences in production costs, such as those which, in particular, prompted the Community legislature to adopt Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ 1989 L 201, p. 56).

- 110 It is true that the differences between certain regulations on tobacco advertising may give rise to appreciable distortions of competition. As the Commission and the Finnish and United Kingdom Governments have submitted, the fact that sponsorship is prohibited in some Member States and authorised in others gives rise, in particular, to certain sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events.
- 111 However, such distortions, which could be a basis for recourse to Article 100a of the Treaty in order to prohibit certain forms of sponsorship, are not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the Directive.
- 112 Second, as regards distortions of competition in the market for tobacco products, irrespective of the applicant's contention that such distortions are not covered by the Directive, it is clear that, in that sector, the Directive is likewise not apt to eliminate appreciable distortions of competition.
- 113 Admittedly, as the Commission has stated, producers and sellers of tobacco products are obliged to resort to price competition to influence their market share in Member States which have restrictive legislation. However, that does not constitute a distortion of competition but rather a restriction of forms of competition which applies to all economic operators in those Member States. By imposing a wide-ranging prohibition on the advertising of tobacco products, the Directive would in the future generalise that restriction of forms of competition by limiting, in all the Member States, the means available for economic operators to enter or remain in the market.
- 114 In those circumstances, it must be held that the Community legislature cannot rely on the need to eliminate distortions of competition, either in the advertising sector or in the tobacco products sector, in order to adopt the Directive on the basis of Articles 100a, 57(2) and 66 of the Treaty.
- 115 In view of all the foregoing considerations, a measure such as the directive cannot be adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty.
- 116 In those circumstances, the pleas alleging that Articles 100a, 57(2) and 66 do not constitute an appropriate legal basis for the Directive must be upheld.
- 117 As has been observed in paragraphs 98 and 111 of this judgment, a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Article 100a of the Treaty. However, given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down by the Directive, partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the Directive partially.
- 118 Since the Court has upheld the pleas alleging that the choice of Articles 100a, 57(2) and 66 as a legal basis was inappropriate, it is unnecessary to consider the other pleas put forward by the applicant. The Directive must be annulled in its entirety.

[...]

## 2.2 Text of the annulled Directive

Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products

(Official Journal L 213, 30/07/1998 p. 0009 - 0012)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57(2), Article 66 and Article 100a thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>2</sup>,

Acting in accordance with the procedure laid down in Article 189b of the

Treaty<sup>3</sup>,

- (1) Whereas there are differences between the Member States' laws, regulations and administrative provisions on the advertising and sponsorship of tobacco products; whereas such advertising and sponsorship transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market;
- (2) Whereas those barriers should be eliminated and, to this end, the rules relating to the advertising and sponsoring of tobacco products should be approximated, whilst leaving Member States the possibility of introducing, under certain conditions, such requirements as they consider necessary in order to guarantee the protection of the health of individuals;
- (3) Whereas, in accordance with Article 100a(3) of the Treaty, the Commission is obliged, in its proposals under paragraph 1 concerning health, safety, environmental protection and consumer protection, to take as a base a high level of protection;
- (4) Whereas this Directive must therefore take due account of the health protection of individuals, in particular in relation to young people, for whom advertising plays an important role in tobacco promotion;
- (5) Whereas in order to ensure the proper functioning of the internal market the Council adopted, on the basis of Article 100a, Directive 89/622/EEC<sup>4</sup> and Directive 90/239/EEC<sup>5</sup> concerning the labelling of tobacco products and the maximum tar yield of cigarettes, respectively;

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<sup>1</sup> (1) OJ C 129, 21.5.1992, p. 5.

<sup>2</sup> (2) OJ C 313, 30.11.1992, p. 27.

<sup>3</sup> Opinion of the European Parliament of 11 February 1992 (OJ C 67, 16.3.1992, p. 35), confirmed under the Article 189b procedure on 3 December 1993, Council Common Position of 12 February 1998 (OJ C 91, 26.3.1998, p. 34) and Decision of the European Parliament of 13 May 1998 (OJ C 167, 1.6.1998). Council Decision of 22 June 1998.

<sup>4</sup> OJ L 359, 8.12.1989, p. 1. Directive as amended by Directive 92/41/EEC (OJ L 158, 11.6.1992, p.30).

<sup>5</sup> OJ L 137, 30.5.1990, p. 36.

- (6) Whereas advertising relating to medicinal products for human use is covered by Directive 92/28/EEC<sup>6</sup>; whereas advertising relating to products intended for use in overcoming addiction to tobacco does not fall within the scope of this Directive;
- (7) Whereas this Directive will not apply to communications intended exclusively for professionals in the tobacco trade, the presentation of tobacco products offered for sale and the indication of their prices, and, depending on sales structures, advertising directed at purchasers at tobacco sales outlets and the sale of third-country publications which do not satisfy the conditions laid down in this Directive, provided, however, that they comply with Community law and the Community's obligations at international level; whereas it is for the Member States, where necessary, to take appropriate measures in these areas;
- (8) Whereas, given the interdependence between the various forms of advertising - oral, written, printed, on radio or television or at the cinema - and in order to prevent any risk of distorting competition or circumventing rules and regulations, this Directive must cover all forms and means of advertising apart from television advertising already covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities<sup>7</sup>;
- (9) Whereas all forms of indirect advertising and sponsorship, and likewise free distribution, have the same effects as direct advertising, and whereas they should, without prejudice to the fundamental principle of freedom of expression, be regulated, including indirect forms of advertising which, while not mentioning the tobacco product directly, use brand names, trade marks, emblems or other distinctive features associated with tobacco products; whereas, however, Member States may defer application of these provisions to allow time for commercial practices to be adjusted and sponsorship of tobacco products to be replaced by other suitable forms of support;
- (10) Whereas, without prejudice to the regulation of the advertising of tobacco products, Member States remain free to allow the continued use, under certain conditions, for the advertising of products or services other than tobacco products, of a brand name which was already in use in good faith both for such products or services and for tobacco products before this Directive entered into force;
- (11) Whereas existing sponsorship of events or activities which Member States may continue to authorise for a period of eight years after the entry into force of this Directive ending not later than 1 October 2006 and which will be subject to voluntary-restraint measures and decrease of expenditure levels during the transitional period should include all means of achieving the aims of sponsorship as defined in this Directive;
- (12) Whereas Member States must take adequate and effective steps to ensure control of the implementation of national measures adopted pursuant to this Directive in compliance with their national legislation,

HAVE ADOPTED THIS DIRECTIVE:

### **Article 1**

The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

### **Article 2**

For the purposes of this Directive, the following definitions shall apply:

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<sup>6</sup> OJ L 113, 30.4.1992, p. 13.

<sup>7</sup> OJ L 298, 17.10.1989, p. 23. Directive as last amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).

1. 'tobacco products': all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco;
2. 'advertising': any form of commercial communication with the aim or the direct or indirect effect of promoting a tobacco product, including advertising which, while not specifically mentioning the tobacco product, tries to circumvent the advertising ban by using brand names, trade marks, emblems or other distinctive features of tobacco products;
3. 'sponsorship': any public or private contribution to an event or activity with the aim or the direct or indirect effect of promoting a tobacco product;
4. 'tobacco sales outlet': any place where tobacco products are offered for sale.

### **Article 3**

1. Without prejudice to Directive 89/552/EEC, all forms of advertising and sponsorship shall be banned in the Community.
2. Paragraph 1 shall not prevent the Member States from allowing a brand name already used in good faith both for tobacco products and for other goods or services traded or offered by a given undertaking or by different undertakings prior to 30 July 1998 to be used for the advertising of those other goods or services.

However, this brand name may not be used except in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product.

3. (a) Member States shall ensure that no tobacco product bears the brand name, trade mark, emblem or other distinctive feature of any other product or service, unless the tobacco product has already been traded under that brand name, trade mark, emblem or other distinctive feature on the date referred to in Article 6(1);

(b) the ban provided for in paragraph 1 may not be circumvented, in respect of any product or service placed or offered on the market as from the date laid down in Article 6(1), by the use of brand names, trade marks, emblems and other distinguishing features already used for a tobacco product.

To this end, the brand name, trade mark, emblem and any other distinguishing feature of the product or service must be presented in a manner clearly distinct from that used for the tobacco product.

4. Any free distribution having the purpose or the direct or indirect effect of promoting a tobacco product shall be banned.
5. This Directive shall not apply to:
  - - communications intended exclusively for professionals in the tobacco trade,
  - - the presentation of tobacco products offered for sale and the indication of their prices at tobacco sales outlets,
  - - advertising aimed at purchasers in establishments specialising in the sale of tobacco products and on their shop-fronts or, in the case of establishments selling a variety of articles or services, at locations reserved for the sale of tobacco products, and at sales outlets which, in Greece, are subject to a special system under which licences are granted for social reasons ('periptera'),

- - the sale of publications containing advertising for tobacco products which are published and printed in third countries, where those publications are not principally intended for the Community market.

#### **Article 4**

Member States shall ensure that adequate and effective means exist of ensuring and monitoring the implementation of national measures adopted pursuant to this Directive. These means may include provisions whereby persons or organisations with a legitimate interest under national law in the withdrawal of advertising which is incompatible with this Directive may take legal proceedings against such advertising or bring such advertising to the attention of an administrative body competent to give a ruling on complaints or to institute the appropriate legal proceedings.

#### **Article 5**

This Directive shall not preclude Member States from laying down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.

#### **Article 6**

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive not later than 30 July 2001. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field covered by this Directive.
3. Member States may defer the implementation of Article 3(1) for:

- one year in respect of the press,
- two years in respect of sponsorship.

In exceptional cases and for duly justified reasons, Member States may continue to authorise the existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006, provided that:

- the sums devoted to such sponsorship decrease over the transitional period,
- voluntary-restraint measures are introduced in order to reduce the visibility of advertising at the events or activities concerned.

#### **Article 7**

The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than 30 July 2001, and subsequently every two years, a report on the implementation of this Directive, with particular reference to the implementation and effects of Article 3(2) and (3) and Article 6(3). Where appropriate, it shall submit proposals for the adaptation of this Directive to suit developments identified in the report. Such adaptation shall not affect the periods provided for in Article 6(3).

#### **Article 8**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

#### **Article 9**

This Directive is addressed to the Member States.

## 2.3 Text of the new Directive

Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission<sup>8</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>9</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>10</sup>,

Whereas:

- (1) There are differences between the Member States' laws, regulations and administrative provisions on the advertising of tobacco products and related sponsorship. Such advertising and sponsorship in certain cases crosses the borders of the Member States or involves events organised on an international level, and are activities to which Article 49 of the Treaty applies. The differences in national legislation are likely to give rise to increasing barriers to the free movement between Member States of the products or services that serve as the support for such advertising and sponsorship. In the case of press advertising, certain obstacles have already been encountered. In the case of sponsorship, distortions of the conditions of competition are likely to increase and have already been noted as regards the organisation of certain major sporting and cultural events.
- (2) Those barriers should be eliminated and, to this end, the rules relating to the advertising of tobacco products and related sponsorship should in specific cases be approximated. In particular, there is a need to specify the extent to which tobacco advertising in certain categories of publications is allowed.
- (3) Article 95(3) of the Treaty requires the Commission, in its proposals for the establishment and functioning of the Internal Market concerning health, to take as a base a high level of protection. Within their respective powers, the European Parliament and the Council also seek to achieve this objective. The legislation of the Member States to be approximated is intended to protect public health by regulating the promotion of tobacco, an addictive product responsible for over half a million deaths in the Community annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted.

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<sup>8</sup> OJ C 270 E, 25.9.2001, p. 97.

<sup>9</sup> OJ C 36, 8.2.2002, p. 104.

<sup>10</sup> Opinion of the European Parliament of 20 November 2002 (not yet published in the Official Journal) and Decision of the Council of 27 March 2003.

- (4) The circulation in the Internal Market of publications such as periodicals, newspapers and magazines is subject to an appreciable risk of obstacles to free movement as a result of Member States' laws, regulations and administrative provisions which prohibit or regulate tobacco advertising in those media. In order to ensure free circulation throughout the Internal Market for all such media, it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public such as publications intended exclusively for professionals in the tobacco trade and to publications printed and published in third countries, that are not principally intended for the Community market.
- (5) The laws, regulations and administrative provisions of the Member States relating to certain types of sponsorship for the benefit of tobacco products with cross-border effects give rise to an appreciable risk of distortion of the conditions of competition for this activity within the Internal Market. In order to eliminate these distortions, it is necessary to prohibit such sponsorship only for those activities or events with cross-border effects which otherwise may be a means of circumventing the restrictions placed on direct forms of advertising, without regulating sponsorship on a purely national level.
- (6) Use of information society services is a means of advertising tobacco products which is increasing as public consumption and access to such services increases. Such services, as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers. Tobacco advertising by both these media has, by its very nature, a cross-border character, and should be regulated at Community level.
- (7) Free distribution of tobacco products is subject to restriction in several Member States, given its high potential to create addiction. Cases of free distribution have occurred in the context of the sponsorship of events having cross-border effects and should therefore be prohibited.
- (8) Internationally applicable standards for the advertising of tobacco products and related sponsorship are the subject of negotiations for the drafting of a World Health Organisation Framework Convention on Tobacco Control. These negotiations are intended to create binding international rules complementary to those contained in this Directive.
- (9) The Commission should draw up a report on the implementation of this Directive. Provision should be made in the relevant Community programmes to monitor the effects of this Directive on public health.
- (10) Member States should take adequate and effective steps to ensure control of the implementation of measures adopted pursuant to this Directive in compliance with their national legislation, as provided for in Commission Communication to the European Parliament and the Council on the role of penalties in implementing Community Internal Market legislation and in the Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the Internal Market<sup>11</sup>. Such means should include provision for intervention of persons or organisations with legitimate interest in the suppression of activities that are not in conformity with this Directive.
- (11) The penalties provided for under this Directive should be without prejudice to any other penalty or remedy provided under national law.
- (12) This Directive regulates the advertising of tobacco products in the media other than television, i.e. in the press and other printed publications, in radio broadcasting and in information society services. It also regulates the sponsorship, by tobacco companies, of radio programmes and of events or activities involving, or taking place in, several Member States or otherwise having cross-

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<sup>11</sup> OJ C 188, 22.7.1995, p. 1.



border effects, including the free or discounted distribution of tobacco products. Other forms of advertising, such as indirect advertising, as well as the sponsorship of events or activities without cross-border effects, fall outside the scope of this Directive. Subject to the Treaty, Member States retain the competence to regulate these matters as they deem necessary to guarantee the protection of human health.

- (13) Advertising relating to medicinal products for human use is covered by Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use<sup>12</sup>. Advertising relating to products intended for use in overcoming addiction to tobacco does not fall within the scope of this Directive.
- (14) This Directive should be without prejudice to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities<sup>13</sup>, which prohibits all forms of television advertising for cigarettes and other tobacco products. Directive 89/552/EEC provides that television programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, or the provision of services, the advertising of which is prohibited by that Directive. Teleshopping for tobacco products is also prohibited by Directive 89/552/EEC.
- (15) The transnational character of advertising is recognised by Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising<sup>14</sup>. Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products<sup>15</sup>, contains provisions on the use of misleading descriptions on the labelling of tobacco products, the cross-border effect of which has also been recognised.
- (16) Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products<sup>16</sup> was annulled by the Court of Justice in Case C-376/98 Federal Republic of Germany v European Parliament and Council of the European Union<sup>17</sup>. References to Directive 98/43/EC should therefore be construed as references to this Directive.
- (17) In accordance with the principle of proportionality, it is necessary and appropriate for the achievement of the basic objective of the proper functioning of the Internal Market to lay down rules on the advertising of tobacco products and related sponsorship. This Directive does not go beyond what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty.
- (18) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure respect for the fundamental right of freedom of expression,

HAVE ADOPTED THIS DIRECTIVE:

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<sup>12</sup> OJ L 311, 28.11.2001, p. 67.

<sup>13</sup> OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

<sup>14</sup> OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).

<sup>15</sup> OJ L 194, 18.7.2001, p. 26.

<sup>16</sup> OJ L 213, 30.7.1998, p. 9.

<sup>17</sup> [2000] ECR I-8419.

## **Article 1**

### **Subject-matter and scope**

1. The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products and their promotion:
  - (a) in the press and other printed publications;
  - (b) in radio broadcasting;
  - (c) in information society services; and
  - (d) through tobacco related sponsorship, including the free distribution of tobacco products.
2. This Directive is intended to ensure the free movement of the media concerned and of related services and to eliminate obstacles to the operation of the Internal Market.

## **Article 2**

### **Definitions**

For the purposes of this Directive, the following definitions shall apply:

- (a) "tobacco products" means all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco;
- (b) "advertising" means any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco product;
- (c) "sponsorship" means any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product;
- (d) "information society services" means services within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services<sup>18</sup>

## **Article 3**

### **Advertising in printed media and information society services**

1. Advertising in the press and other printed publications shall be limited to publications intended exclusively for professionals in the tobacco trade and to publications which are printed and published in third countries, where those publications are not principally intended for the Community market.

Other advertising in the press and other printed publications shall be prohibited.

2. Advertising that is not permitted in the press and other printed publications shall not be permitted in information society services.

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<sup>18</sup> OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

**Article 4**  
**Radio advertising and sponsorship**

1. All forms of radio advertising for tobacco products shall be prohibited.
2. Radio programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products.

**Article 5**  
**Sponsorship of events**

1. Sponsorship of events or activities involving or taking place in several Member States or otherwise having cross-border effects shall be prohibited.
2. Any free distribution of tobacco products in the context of the sponsorship of the events referred to in paragraph 1 having the purpose or the direct or indirect effect of promoting such products shall be prohibited.

**Article 6**  
**Report**

No later than 20 June 2008, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive. That report shall be accompanied by any proposals for amendments to this Directive which the Commission deems necessary.

**Article 7**  
**Penalties and enforcement**

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those rules to the Commission by the date specified in Article 10 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Those rules shall include provisions ensuring that persons or organisations which, under national legislation, can justify a legitimate interest in the suppression of advertising, sponsorship or other matters incompatible with this Directive, may take legal action against such advertising or sponsorship or bring such advertising or sponsorship to the attention of an administrative body competent either to pronounce on complaints or to institute the appropriate legal proceedings.

**Article 8**  
**Free movement of products and services**

Member States shall not prohibit or restrict the free movement of products or services which comply with this Directive.

**Article 9**  
**References to Directive 98/43/EC**

References to the annulled Directive 98/43/EC shall be construed as references to this Directive.

**Article 10**  
**Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 July 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

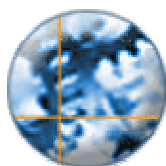
**Article 11**  
**Entry into force**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

**Article 12**  
**Addressees**

This Directive is addressed to the Member States.

### **3 JOINED CASES C-210/03 AND C-434/02: SWEDISH MATCH AND OTHERS (SNUS CASE)**



#### **NOTE AND QUESTIONS**

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The question of the delimitation of the competences of the European Union, as opposed to those of the Member States, was one of the leading questions that propelled the constitutional reform debate that led to the Constitutional Treaty. It is therefore interesting to consider how the new Treaty has dealt with this question (see below). The phenomenon that contributed most to making the competence question so controversial, namely the use of the 'functional powers' in Article 95 and 308 EC, was hardly dealt with in the Constitution, so that controversies on the use of those powers are likely to continue, as illustrated by the recent "snus" case before the ECJ.

#### **3.1 Opinion of Advocate General Geelhoed**

**Arnold André GmbH & Co. KG v Landrat des Kreises Herford  
and  
Swedish Match AB and Swedish Match AB UK Ltd v Secretary of State for Health**

**Joined Cases C-210/03 and 434/02**

7 September 2004

Opinion of Advocate General Geelhoed

ECR [2004] I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of the facts and procedure:**

*Swedish Match, the manufacturer of a tobacco product for oral use, called "snus", wished to place that product on the United Kingdom market. Arnold André, a company which markets tobacco products in Germany, wished to import snus and place it on the German market. However, the activities of both*

*companies were prevented by national laws, which transpose a 2001 Community directive<sup>1</sup>. That directive reproduces a prohibition on the marketing of tobacco products for oral use in the Member States of the European Community, which had already been introduced by a 1992 directive<sup>2</sup>. The two companies thus brought actions against the decisions taken by the national authorities, before the English court and German court respectively, claiming that that directive was in breach of various provisions of Community law. The national courts before which the cases were brought referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling.*

[footnotes omitted]

[...]

#### A – Scope of the Community competence under Article 95 EC

64. Article 95 EC is the general legal basis for measures which have as their object the establishment and functioning of the internal market. As the Court has held, Article 95 EC does not vest in the Community legislature a general power to regulate the internal market. Moreover, a measure adopted on the basis of Article 95 EC must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. According to the Court's judgment in Case C-491/01, the measure must actually contribute 'to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition. Also, while recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them ....'
65. Essentially it follows from this reasoning that two requirements apply. Obstacles (or at least seriously imminent obstacles) to free movement must exist and the Community measure must contribute to the elimination of these obstacles. If one looks in more depth at these two requirements one sees a parallel with the criteria which the Court uses when assessing the competences of a Member State under Articles 28 EC and 30 EC to prohibit or restrict the free movement of goods (or under Articles 52 EC and 59 EC in respect of services). The measures must be justified by imperative requirements in the general interest and must be suitable for securing the attainment of the objective which they pursue. However, the competence under Article 95 must be justified by shortcomings in the internal market itself.
66. In the present cases it is beyond doubt that the first requirement is met, since it is evident that a serious risk of multifarious development of national laws exists. As was stated in the preamble to the 1992 Directive, three Member States had already adopted sales bans on such tobacco products. If the ban had been lifted at Community level when the 2001 Directive was adopted, Member States themselves might have prohibited snus autonomously, but there would have been no guarantee that the Member States would have used their autonomous competences in a coordinated way.
67. In this part of my Opinion I will now analyse the second requirement, tailored to the ban on the marketing of certain products under Article 95 EC. I will discuss:

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<sup>1</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26).

<sup>2</sup> Council Directive 92/41/EEC of 15 May 1992 (OJ 1992 L 158, p. 30) amending Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1).

- legislative practice;
- the limits following the Tobacco advertising judgment;
- the prohibition of products;
- the legality of Article 8 of the 2001 Directive.

#### B – The legislative practice of the Community

68. It has been rare for the Community legislature to impose a total prohibition on the marketing of certain products. In its written and oral observations, the French Government puts forward three examples. Firstly it mentions Directive 76/768 on cosmetic products. This directive bans the marketing of cosmetic products containing certain substances or colouring agents. It does not generally prohibit the marketing of certain types of cosmetic products, for instance those that are intended to be applied in a certain manner. Nevertheless, the directive provides for the adaptation of the requirements following technical progress. A consequence of this adaptation might be that products have to be withdrawn from the market. A system having a similar effect on the marketing of products is introduced by Directive 76/769 on certain dangerous substances and preparations.
69. The third example mentioned by the French Government is Directive 2001/83 on medicinal products for human use. This directive mainly regulates the conditions to be fulfilled prior to the marketing of medicinal products: no medicinal product may be placed on the market of a Member State unless a marketing authorisation has been issued. This marketing authorisation can only be issued following a product assessment, concerning different aspects of the products.
70. The directives cited by the French Government concern inter alia the substance of the products. They (can) lead to the prohibition of the marketing of certain products, if they contain illicit substances. Although none of the provisions mentioned expressly prohibits any specific category of products, all are, as to their result, comparable to Article 8 of the 2001 Directive. They prevent the lawful marketing of categories of products if certain conditions are fulfilled.
71. It is remarkable that an express prohibition on the marketing of certain products cannot be found even in specific product schemes under Article 95 EC dealing with dangerous goods like narcotic drugs and psychotropic substances or explosives intended for civil use. However, in the case of firearms Member States are, according to a directive based solely on Article 95 EC, to take all appropriate steps to prohibit the acquisition and the possession of the firearms and ammunition classified in a certain category. The Community legislature explains the use of Article 95 EC as a legal basis by referring to the total abolition of controls and formalities at intra-Community frontiers as a fundamental condition to be fulfilled in order to establish an internal market.

#### C – The limits according to the Tobacco advertising case

72. In the Tobacco advertising case the Court stated that Article 95 EC does not vest in the Community legislature a general power to regulate the internal market. A general power would be contrary to the express wording of Article 95 and furthermore incompatible with the principle embodied in Article 5, first paragraph EC. According to paragraph 95 of that judgment it is necessary to verify whether a provision actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition. The Court stated furthermore that the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas could in no way help to facilitate trade in the products concerned.
73. It should be borne in mind that the Court considers Article 95 EC as conferring – this is my terminology – a functional competence. It is not of any importance whether the ultimate goal of a measure is to facilitate trade; what matters is whether a measure is appropriate to facilitate trade. The predominant policy goal can very well be the protection of public health.

74. The Court thus provides us with some key elements of this functional competence: (1) the object must be the improvement of the conditions for the establishment and functioning of the internal market, (2) the provisions must contribute to the elimination of obstacles, (3) distortions of competition must be removed and (4) the provisions must facilitate trade.

#### D – The prohibition of products

75. According to Article 14(2) EC, the internal market is to comprise an area without internal frontiers. It is essential to the functioning of this market that the conditions for the marketing of products are equal in the different Member States. Only if this equality is achieved can internal frontiers be removed.
76. That is the fundamental reason for the competence of the Community legislature to harmonise diverging legislation of the Member States. However, the responsibility of the Community legislature goes even further. It not only has to create the conditions for an internal market of products, but also has to guarantee that the products that appear on this market do not harm other public interests such as health, safety, environmental protection and consumer protection. This responsibility of the Community legislature has been made explicit in Article 95(3) EC, which requires a high level of protection.
77. If one or more Member States prohibit the marketing of certain products for reasons of public health whilst other Member States allow the sale of those products, internal frontiers come into being and the functioning of the internal market is affected. Intervention by the Community legislature, aiming to harmonise the divergent national legislation, can lead to the removal of obstacles at the internal frontiers of the Community. Given the divergence of national legislation, it is within the discretion of the Community legislature to decide whether to provide for restrictions on the composition of certain products or for legislation totally banning the marketing of those products. If a high level of human health protection, as also required by Article 152(1) EC, can be ensured only by a total ban, the Community legislature is definitely obliged to choose this option.
78. Of course one can object that a prohibition on selling a product cannot itself improve the conditions for the marketing of that product. In fact, the product is excluded from the market. As the claimants stated in their written observations, it is questionable whether a total ban of this kind could ever contribute to the establishment and functioning of the internal market. Such a ban can hardly be regarded as the removal of barriers to the marketing of these products, since it makes the existence of a market impossible. In other words, it prevents a lawful market from coming into being and, by so doing, establishes a barrier to trade. The claimants even seem to interpret the judgment of the Court in the Tobacco advertising case to that effect, by claiming that an absolute prohibition on advertising of certain products cannot in any way be considered to be facilitating trade in those products.
79. However, this objection does not reflect the proper meaning of Article 95 EC. Although Community measures must improve the conditions for the establishment and functioning of the internal market and must facilitate trade, this does not imply that they have to do so in respect of every individual product. The Community legislature may prohibit the marketing of a product, as I stated above. In those circumstances such products cannot lawfully appear on the market within the territory of the European Community. This diminishes enforcement costs and can even diminish the costs of the enforcement of regulations on related products. In short, if snus is not on the market of the European Union, the effort to control the marketing of other smokeless tobacco products can be reduced. In this respect, one can say that Article 8 of the 2001 Directive contributes to the removal of barriers to trade in other products.
80. In summary, it is the primary goal of the internal market provisions of the EC Treaty that one single market appear, that is not fragmented by divergent national rules. This goal does not have as a



consequence that all possible products can be sold on that market, even if they harm the health of users. A provision that expressly forbids the marketing of a certain product might not contribute to the elimination of obstacles concerning that specific product but can nevertheless contribute to the establishment and functioning of the internal market for the purposes of Article 95 EC.

#### E – Evaluation of the legality of Article 8

81. There is doubt as to whether Article 8 of the 2001 Directive must really be regarded as a total ban on a certain category of products, as was the case under the Directive on firearms, or whether the ban in Article 8 is comparable to a restriction on the composition of products, like Article 3 of the 2001 Directive.
82. Article 8 does not forbid the marketing of tobacco products in general. The ban only concerns tobacco products if they are intended to be used in a certain manner. Its scope does not differ substantially from that of a ban on products with a certain composition. On the other hand, one could defend the thesis that it forbids the marketing of a certain category of tobacco products which have a market that might well be distinguished from the market in other tobacco products (leaving aside the ‘substitution effect’, discussed elsewhere in this Opinion).
83. It is not necessary to develop the arguments put forward in the preceding paragraph. As stated above, the Community legislature is entitled to prohibit certain categories of products under Article 95 EC. Since the 2001 Directive bans only a specific, limited category of products – which differ from other permitted products not by virtue of their composition but by the way they are used – it is beyond doubt that Article 95 EC can serve as a legal basis.

#### IX – How Community competence is used: the requirement of Article 95(3) EC and the principle of proportionality

##### A – Introductory remarks

84. As stated above, the Community legislature may use its competence under Article 95 EC if obstacles (or at least seriously imminent obstacles) to free movement exist and the Community measure contributes to the elimination of these obstacles. The Community legislature has a broad discretion. However this discretion is not unlimited. In this section I will assess the limits on the Community legislature when it exercises this competence.
85. Firstly, Article 152(1) EC requires a high level of human health protection in the definition of all Community policies. Article 95(3) EC is even more specific when it comes to the use of the legislative power under Article 95 EC and refers to new developments based on scientific facts. Whereas the action of a national government which restricts the marketing of products in accordance with Articles 28 EC and 30 EC must be justified by imperative requirements in the general interest, the action of the Community legislature must ensure a high level of protection. As I stated in my Opinion in Case C-491/01, if an obstacle to free movement exists the protection of public health is dealt with by the Community legislature. Seen from the perspective of health protection, its action does not differ from the action of a national government that restricts the marketing of products in accordance with Articles 28 EC and 30 EC.
86. Secondly, the proportionality principle must be observed. According to Article 5 EC Community action is not to go beyond what is necessary, given the objectives pursued. If the main objective of a Community measure is the protection of public health – as under Article 8 of the 2001 Directive – the assessment of the proportionality principle does not differ from the assessment of a measure taken by a Member State aiming to protect public health in accordance with Articles 28 EC and 30 EC. It has to be determined whether the measure is appropriate to protect public health and whether the same result could not be reached by using less restrictive measures.

87. Thirdly, the Community legislature has to respect other principles of law that have been developed by the case-law of the Court or are mentioned in the Treaty, such as the principles that due care must be taken and legitimate expectations taken into account, and the duty to give reasons. As I stated in the introduction of this Opinion, I will not go into these principles of law, make an exception for the duty to give reasons (see below).

## B – A high level of human health protection

### 1. The particular nature of the case

88. The present cases are particular. It is beyond any doubt that the Community legislature, by banning snus, envisages a high level of health protection. However, it is uncertain whether the measure is appropriate to achieve this policy goal and it is even conceivable that the policy goal would have been better served if the Community legislature had allowed the marketing of snus.
89. The central issue in these cases is that Article 8 of the 2001 Directive bans a new product which is not yet marketed in the Member States, except for Sweden. The documents before the Court justify the assertion that the use of snus can cause oral cancer. Nevertheless this assertion alone does not justify the prohibition of snus. My second assertion is that the harmful effects of using snus are far less than the dangers caused by smoking. Last but not least, it is uncertain whether the main effect of providing snus on the market will be to encourage people to give up smoking ('substitution effect') or to make it easier to start using tobacco ('stepping-stone').
90. I will now discuss one by one the reference in Article 95(3) EC to new developments based on scientific facts, the precautionary principle in the absence of consensus on the effectiveness of a measure to benefit public health and the principle that preventive action should be taken.

### 2. Remarks on the evidence

91. In the course of these proceedings before the Court a great deal of attention has been paid to the (scientific) evidence underlying the ban on snus.
92. Firstly, interesting legal arguments have been put forward by the claimants (and the Swedish Government) about the relevance of new scientific evidence. They state that the Community legislature is obliged to take into account scientific developments. The principle of proportionality involves a duty to review over time whether or not a measure has become disproportionate. The applicants refer to Article 95(3) EC and also to the case-law of the Court.
93. In particular they mention the Community measures in the veterinary and zootechnical area, for example the measures taken to combat BSE, at issue in Case C-180/96 United Kingdom v Commission. In that case it was acknowledged that measures to be taken should be subjected to detailed scientific study and that new information should be taken into account. On the one hand, I agree with the claimants in so far as they state that legislation has to be reviewed when new scientific data raise doubts as to the benefits of that legislation. Continuous review is an obligation for every legislature. This obligation becomes even more important when a specific measure is included in a Community regulation or directive which is being amended because of new developments in the relevant area. In short, in the event of a fundamental amendment to the legislation on the use of tobacco products, all the measures related to the different tobacco products have to be reconsidered.
94. On the other hand, I do not agree that in the present case a review would necessarily have led to an amendment to the Community legislation on snus. The scientific reports presented to the Court show - as I stated in point 47 of this Opinion - the harmful effects of using snus and, contrary to what seems to be suggested by the claimants, do not express a fundamentally new point of view on

the health risks. I would emphasise that it follows from the case-law of the Court on Article 30 EC that public health measures restricting the free movement of goods can be taken, even in the absence of scientific consensus. I would mention the judgments of the Court in *De Peijper* and *National Farmers Union and Others*. In short, Community law recognises restrictive measures aiming to protect public health if they are based on proper and recent scientific studies. As a result of these studies unanimous scientific evidence on the health risks is not needed. Serious indications are sufficient.

95. Secondly, the evidence of the effectiveness of Article 8 itself. It is not scientifically proven that snus constitutes mainly a stepping-stone to tobacco use rather than a substitute for smoking. In fact, the lack of evidence and the scientific uncertainty do not concern the banned substance itself, but expectations about people's behaviour. The question to be answered is whether in these circumstances the ban on snus can be regarded as an effective measure to protect public health. It is precisely for this reason that I take into consideration the precautionary principle and the principle that preventive action should be taken.

### 3. The precautionary principle

96. As I emphasised above, the effectiveness of the ban on snus as a measure to protect public health is uncertain. I will discuss whether in such circumstances the Community legislature is obliged to abstain from action or whether it can base its action on the precautionary principle.
97. The precautionary principle is not defined in the Treaty, which refers to it only once, in relation to the Community policy on environmental protection in Article 174 EC. But the principle applies to much more than protecting the environment. On 2 February 2000, the Commission published a communication on the precautionary principle. In this communication, the Commission considers that the precautionary principle is a general one which should in particular be taken into consideration in the fields of environmental protection and human, animal and plant health. According to the Commission, the precautionary principle comes into play only when a potential risk has been identified, it has been scientifically studied, and the results of scientific inquiries are mixed or inconclusive.
98. The precautionary principle mainly confers on the Community legislature broader, but not unlimited, discretion. When the legislature intends to use this extended discretion it is subject to a heavy burden of proof to make sure that the alleged risk is not merely hypothetical.
99. The Court has had several opportunities to review the application of the precautionary principle in cases concerning health issues and the free movement of goods. In Case C-236/01 *Monsanto Agricoltura Italia*, the dispute concerned Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, in particular Article 12 thereof. In Cases C-192/01 *Commission v Denmark*, C-24/00 *Commission v France* and C-95/01 *Greenham and Abel*, the Court had to look at different national laws restricting additives in foodstuffs, like vitamins and minerals.
100. A proper application of the precautionary principle presupposes in the first place the identification of the potentially negative consequences for health of a specific situation and in the second place a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research. In other words, the existence of a health risk must be plausible. According to the Court, '[w]here it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures' According to that judgment, the key element of the precautionary principle is scientific

uncertainty. Measures can be taken when the desired level of protection for the environment or health is jeopardised.

101. In general the precautionary principle plays a role if government wants to regulate risk. The Declaration of Rio de Janeiro in the framework of the World Summit on Sustainable Development stated that the principle applies where there are threats of serious or irreversible damage but where there is scientific uncertainty over those threats. The fact that there is no evidence of harm should not be equated with no harm.
102. It is uncertain whether the competence under the precautionary principle to regulate risk can be used in order to ban all risk. The Court of First Instance states in Case T-13/99 Pfizer Animal Health v Council that a Community measure under the precautionary principle may, on the one hand, not be based on a 'zero-risk'-approach. On the other hand, the Community institutions must take account of their obligation under the first subparagraph of Article 152(1) EC to ensure a high level of human health protection.
103. It is in my view beyond doubt that the Community legislature can base its action on the precautionary principle if three cumulative conditions are fulfilled. There must be scientific uncertainty about the risk, the risk must be analysed and proved to be realistic and the risk must have substantial consequences for the public interest. When it comes to the substance of a measure, a measure relying on the precautionary principle may not go as far as banning all risk.
104. This brings me to the present cases. The claimants state that the precautionary principle does not apply. They refer to certain principles put forward by the Court of First Instance in Pfizer Animal Health v Council that serve to ensure that the precautionary principle is not used in an arbitrary way. Moreover the precautionary principle would only be relevant in cases where scientific uncertainty exists about the effect of certain substances or behaviour. It is invoked where an analysis of all the available scientific data has been carried out, but uncertainty still remains.
105. The claimants deny the existence of any uncertainty about the health risks of snus. They emphasise that snus is not a new product, but a product that has traditionally been marketed in some Nordic countries. So, the health risks are known. I agree with these remarks by the claimants: the precautionary principle is not relevant in relation to the effects of snus itself, a traditional product in some Nordic countries. Although the scientific reports presented to the Court are not unanimous in their evaluation of the risks of using snus, as might be clear from my earlier remarks, there is no scientific uncertainty in the sense mentioned above. The Court can accordingly base its assessment on the assumption that the use of snus can provoke oral cancer.
106. However, the effect of marketing snus throughout the whole Community on the behaviour of – mainly young – people is highly uncertain. Here we come to the impact of the observations made above: the uncertainty of the effectiveness of the ban, whether the prohibition on marketing snus will stop smokers giving up smoking or dissuade young non-smokers from starting to use tobacco.
107. In my opinion the precautionary principle cannot be applied in these circumstances:
  - The uncertainty about the risk that justifies the prohibition depends on expectations about the use of snus. This is not a risk of a scientific nature that justifies the application of the precautionary principle. The source of the uncertainty has nothing to do with the precautionary principle.
  - As to the burden of proof, the damage to public health if snus appears on the market is not plausible. I would mention the substitution effect.. The Community legislature was not in a situation in which it could base its measures on the likelihood of real harm to public health, without having unequivocal scientific evidence at its disposal.
  - However, the third condition mentioned in point 103 above is fulfilled: the risk, if it occurs, has substantial consequences for public health.

#### 4. Preventive action

108. Title XIX of the EC Treaty on Environment also mentions the principle that preventive action should be taken. This principle as laid down in Article 174(2) EC has also been recognised in relation to the protection of human health, more specifically in the case-law on BSE. The principle is usually mentioned in connection with the precautionary principle. For instance, in the case-law on BSE the Court does not attribute a separate role to the principle that preventive action should be taken.
109. In my opinion the principle plays a major role in the present cases. The Community legislature, faced with the potential health risks of the marketing of snus, does not have to wait until the 'stepping-stone' theory has been proved to be true. It can act in a preventive manner. Moreover, let us consider the situation if the Community had not been allowed to act preventively. Snus would have appeared on the market and people would have started using it. After some years it might have become clear that snus was frequently used by young people who had not smoked before (and for whom the threshold to smoking had disappeared or diminished). It would have been the responsibility of the Community legislature to get rid of a product that had become attractive and addictive to consumers. It is questionable whether such a measure would have been as effective as a ban on a product that had not yet found its way to consumers. I would mention the risk of an emerging illegal market. In addition, a ban on a product that is already marketed can damage the legitimate expectations of the producer, and may lead to the payment of compensation and/or transitional measures.
110. In short, preventive action is needed because allowing snus onto the market could have irreversible effects. If governments allowed the marketing and promotion of snus for a certain period, an effective ban on snus would no longer be feasible.

#### C – The proportionality principle

##### 1. In general

111. In its judgment in Case C-491/01 the Court deals with the principle of proportionality in relation to the 2001 Directive, bearing in mind the importance of adequate protection of public health by the Community legislature. I would refer to the extensive considerations of the Court. I mention here the crucial elements, specifically related to this case:
- the measures should be appropriate for attaining the objective pursued, that is, protecting public health by making the use of tobacco products less attractive;
  - the Community legislature enjoys a broad discretion, which entails political, economic and social choices. The legality of a measure can only be affected if the measure is manifestly inappropriate, having regard to the objective pursued (see paragraph 123 of the judgment);
  - even some far-reaching measures like the ban on the manufacture of cigarettes containing certain yields and the prohibition of existing, but presumably misleading, statements are considered to be in conformity with the principle of proportionality.
112. It follows from these considerations of the Court that a Community provision on the use of tobacco, aiming to protect public health, will not easily be annulled because it does not comply with the principle of proportionality. As we know, the principle of proportionality is not to be confused with a comparative assessment of the protection of public health and the commercial interests of private companies. The ban on snus complies with the proportionality principle if:
- the measure banning this product from the market is appropriate to remove or at least diminish the threat to public health;
  - a less restrictive measure would not guarantee the same level of health protection.

113. At the end of this section I will address an issue raised by the claimants, namely whether the measure imposes a disproportionate financial burden on specific undertakings.

## 2. Appropriateness: the competence to regulate when the benefits are uncertain

114. The uncertainty about the benefits of the ban to public health can be compared with the uncertainty that was dealt with by the Community legislature when opting for a ban on preventive vaccination in the fight against foot-and-mouth disease. In Case C-189/01 Jippes, the Court stated:

- firstly, '[w]here the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question';
- secondly, the Community legislature 'carried out a global assessment of the advantages and drawbacks of the system to be established and ... that policy ... was not on any view manifestly inappropriate in the light of the objective of controlling foot-and-mouth disease';
- thirdly, '[c]onsequently, having regard to the wide discretionary power conferred on the Council ..., it must be concluded that the ban on preventive vaccination ... does not exceed the limits of what is appropriate and necessary in order to attain the objective pursued by the Community rules.'

115. The Court, in so holding, distinguishes three criteria. The legislature has a wide discretionary power; it must carry out a global assessment of the advantages and drawbacks of a planned system, but only in the case of a manifestly incorrect assessment may a Community measure be annulled. If we transpose these criteria to the present cases, it is obvious that the ban on snus must be considered to be appropriate. I would refer to my remarks on the principle that preventive action should be taken to show that the assessment by the Community legislature was not manifestly incorrect. Allowing snus onto the Community market would have irreversible effects. The precautionary principle is not relevant.

## 3. The effectiveness of less restrictive measures

116. The claimants have outlined a set of measures of a less restrictive nature. They refer to the imposition of technical standards, such as those in Canada or those based on the principles used by Swedish Match itself. Further, they mention labelling requirements, the possibility of introducing an age-limit and restrictions on retail outlets.

117. Given the policy goal of the ban – as explained in the preamble to the 1992 Directive – alternative measures could not be as effective as a total ban. Since the objective of the Community legislature is to prevent the introduction of new products onto the market, it is evident that this goal cannot be reached by measures less restrictive than a total ban.

118. I would emphasise that technical standards can limit the harmful effects of the use of certain products, but do not eliminate those effects completely unless all the dangerous substances have to be removed from the product, including the nicotine which makes the product attractive to the user. There is no indication that such a far-reaching technical standard – which is not proposed by the claimants in the present cases – would be less restrictive on trade than the ban provided for under Community law as it stands.

119. The other alternatives mentioned above do not have the same effect as a ban. Since snus is considered to be an attractive product to young people, its mere availability on the market can incite them to use it. One could even take the view that legal restrictions like labelling provisions and age-limits might make snus even more attractive.

#### 4. The disproportionate charge on specific undertakings

120. My last point concerns the disproportionality of the charge on the manufacturers and sellers of snus. This point has been raised by the claimants in the present cases. As I stated before the ban on snus is a measure that can be taken under Article 95 EC and that – in itself – is in accordance with the proportionality principle. Nevertheless this does not exclude an obligation for the European Community to make good the damage caused by this act, according to the provision on non-contractual liability in the second paragraph of Article 288 EC.
121. However, this obligation arises only if there is substantial damage and/or if legitimate expectations have been harmed. I can be brief on these points. Snus is not yet placed on the Community market (except in Sweden) and the producers of snus could not have had the legitimate expectation that they would be allowed to manufacture and sell snus on the Community market. The ban on snus was already imposed under the 1992 Directive (before the accession of Sweden to the European Union).

#### X – The principle of equal treatment

122. The principle of equal treatment is presented in these cases as a principle that should not be confused with that of proportionality, although in the circumstances the effect of their application is fairly similar. The ban on snus is regarded as disproportionate precisely because other equally or even more harmful products are tolerated on the market.
123. Nevertheless, the many observations made to the Court on this principle require a separate assessment. The principle of equal treatment mainly requires that comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified. (44)
124. One could argue that this principle constitutes an essential limit to the discretionary powers of the Community legislature, more specifically in relation to measures aiming to restrict or even ban the marketing of specific products. If one pursues this argument even further it requires an assessment of the risks of marketing all other comparable products before adopting a Community measure.
125. I do not agree with the idea that the principle of equal treatment has such far-reaching consequences. If, for example, on a certain market – let us limit ourselves to a well-defined market such as that for tobacco products – five different products create serious health risks, it is for the legislature in its discretion to decide which of these products – and in which order – should be banned from the market or subject to other restrictive measures. The only limit imposed on the legislature in this respect is that it may not make arbitrary choices. It has to give reasons why a specific product is the object of strict rules. Part of this reasoning could be a comparison with other products on the market.
126. This brings me to the two main objections put forward by the claimants, related to the principle of equal treatment. The first objection is that equivalent products are not prohibited. According to them chewing tobacco is not prohibited although in practice it is used in the same way as snus: although it is normally called 'chewing tobacco' the tobacco is quite often not chewed but sucked.
127. At this point the claimants could be right. The difference between the two products is not evident, although there might a slight difference in substance as regards the levels of nitrosamines and nicotine. Even if the claimants' statement about the use of chewing tobacco does not reflect reality, the health effects of the way it is used are comparable: as far as the harmful effects of using smokeless tobacco products are concerned, it does not make a fundamental difference whether they are sucked or chewed. But, this being said, the similarity of the products does not lead to a breach of the principle of equal treatment. After all, the difference in treatment is not based on the

effect on the individual user, but on the difference in (potential) user groups. Whereas chewing tobacco is attractive mainly to well-defined socio-professional groups, snus is meant to be attractive to a broad range of users, as in Sweden. In short, the difference in treatment is not justified by the inherent characteristics of the products themselves but by the persons who (potentially) use them.

128. The second objection concerns the fact that contrary to the explanation of the Community legislature the product is not new, but is a traditional product, at least in some Nordic countries. The claimants use the term 'new' differently from the Community legislature and the other parties intervening before the Court. The claimants use the word in relation to the product as such, whereas the others use it in relation to the relevant market.
129. I accept that when the Community legislature referred to new products in the preamble to the 1992 Directive it did not make any reference to the internal market. However, it is obvious that it referred to products not yet available on the Community market and not to new products as such, since the 1992 Directive – like the current directive – deals only with the internal market in tobacco products, and does not concern products manufactured and available in third countries. More specifically, the term 'new' was used in the context of the policy objective to prevent young inhabitants of the European Union from starting to use tobacco products or – even worse – starting to use tobacco products which were not available to them before. Snus was not available to young people within the European Union. It was comparable to tobacco products frequently used in other continents, but not in Europe.
130. Since the Kingdom of Sweden was not yet a Member State when the 1992 Directive was adopted, the Community legislature could use the term 'new' in an unconditional way, because the products were not marketed at all within the territory of the European Community. Only later, when the Kingdom of Sweden acceded to the Community, did this context change. None the less, the difference remained, since snus is not prohibited in the only Member State where it is traditionally used.
131. I conclude that neither of the two objections points to a breach of the principle of equal treatment. As stated above, the principle of equal treatment plays a role in so far as it requires the Community legislature to give reasons for the different treatment of comparable products.
132. It is beyond any doubt that valid reasoning was given by the Community legislature in the preamble to the 1992 Directive, cited in point 5 of this Opinion. In their submissions the Commission, the Council and the European Parliament give some additional explanations for the prohibition of snus. Firstly, they mention considerations based on the functioning of the internal market, since three Member States considered banning snus, or have already imposed such a ban. Secondly, they mention rapidly increasing trends in consumption. Thirdly, they substantiate the health risks and fourthly they mention the relatively small economic costs of a ban.
133. Given my considerations above Article 8 of the 2001 Directive satisfies the principle of equal treatment.

## XI – The duty to give reasons under Article 253 EC

### A – Change of context

134. The ban on tobacco for oral use was introduced under the 1992 Directive and was based on the considerations that it concerned products that were not yet known on the Community market and could be attractive to young people. Given my views expressed in this Opinion this reasoning could sustain the ban. However, when the ban was confirmed under the 2001 Directive, no substantive reasoning was given. The preamble simply refers to the ban that existed under the 1992 Directive.



135. According to the case-law of the Court the obligation to provide a statement of reasons is an essential formal requirement that must be distinguished from the question of the correctness of that statement, which concerns the substantive lawfulness of the contested act. The statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to carry out its review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. (46)
136. I would emphasise that the obligation under Article 253 EC is more than just a formality, as has been contended by the United Kingdom Government in the present cases. The Court must be able to review whether or not a decision can be justified by the reasons given. Moreover, more detailed reasons are required where a decision deviates from usual practice or where other circumstances require more detailed reasoning so as to make sure that the Court can carry out its review.
137. According to the case-law of the Court on Article 253 EC the requirements of this article must be assessed with regard not only to their wording but also to their context. To me it is evident that the reasoning should not only be seen in the context as it was when the provision was adopted but also pay attention to substantial changes of context. This requirement is even more important when the whole policy in a certain area is subject to review. However, in the present cases the Community legislature did not pay attention to the change of context.
138. In the present cases I would point out two substantial changes of context:
- the Kingdom of Sweden acceded to the European Union;
  - the Community policy on tobacco products was fundamentally modified.

#### B – The accession of Sweden

139. In the first place, the accession of Sweden involved the accession of a country where the use of snus is traditional and widespread. This being the case, the reasoning given in the preamble to the 1992 Directive, namely that the ban should not affect traditional tobacco products for oral use, needs further consideration. After all, the premiss of this reasoning was that snus is a product that should be regarded as a product without any tradition on the internal Community market.
140. However, I attach even more importance to the impact of the accession of Sweden on the internal market of tobacco products for oral use. The Community reacted to the consequences of the accession of Sweden by compartmentalising this market. The Swedish market is separated from the internal market for these products. Moreover, the Swedish authorities are obliged to take the steps necessary to prevent products that are lawful on the Swedish market, but banned from the market of the remainder of the European Community, from being exported to the latter market.
141. This choice of the legislature offends against the concept of the internal market, by allowing a compartmentalisation of this market. At this point I should stress the importance of the establishment and functioning of the internal market as an instrument of European integration. In the present cases such a compartmentalisation is even more significant since:
- the 2001 Directive has precisely as its object the establishment and functioning of the internal market, by taking away impediments to the free movement of tobacco products. However, the exception for Sweden creates a new impediment;
  - this compartmentalisation is not limited to a transitional period. An exception for Sweden at the time of the accession made sense, since it might have been difficult for the Swedish Government

to stop the use of snus at once. However, a temporal limitation of this effect on the internal market would have been more in accordance with the importance of the internal market. One of the normal consequences of accession to the European Union is the adaptation of legislation to European Union standards.

142. In short, the absence of any reasoning related to the accession of Sweden creates two gaps. In the first place, the Community legislature should have paid attention to the effect of the ban on tobacco products that are traditional in one Member State. In the second place, it should have paid attention to the consequences of the accession for the establishment and functioning of the internal market for tobacco products.

#### C – Modification of Community policy on tobacco products

143. This brings me to the fundamental modification of the Community policy on tobacco products. In general, the 2001 Directive is an expression of a tobacco policy that has become more and more restrictive as the years have gone by. As stated above, this policy is mainly an anti-smoking policy.
144. Nevertheless, contrary to the general trend in the policy on cigarettes, it seems that the policy on smokeless tobacco products (other than snus) has tended to become more flexible. I would recall the rules on the labelling of smokeless tobacco products other than snus. Packets need no longer carry the warning 'Causes cancer'; it is sufficient if it is stated on packets that 'This tobacco product can damage your health and is addictive.' At the same time, the warnings appearing on packets of cigarettes have become much stricter, both in respect of their size and their substance. They include a warning such as 'smoking kills'.
145. To summarise, the general tendency is to make legislation on tobacco products more restrictive. The legislature provides for an exception for a specific category of tobacco products (smokeless tobacco). It would have been logical if this exception had applied to all the products belonging to this category. However, the legislature did the opposite and confirmed the strictest measure of all in relation to a specific sub-group of products belonging to this category.
146. I would emphasise that under these circumstances the preservation of the ban on snus cannot be regarded as a mere continuation of existing policy. We should recall the Court's case-law stating that a decision deviating from usual practice requires more detailed reasoning so as to make sure that the Court can carry out its review. Moreover, interested parties have a right to know on what grounds the Community legislature has decided to limit their freedom.

#### D – The consequences

147. The more a decision deviates from normal practice, the more explicit must be the grounds stated by the Community legislature. Given the important changes of context, the choice of the legislature to maintain the ban on snus, which in itself does not exceed its discretion, requires solid reasoning. The absence of any reasoning constitutes a clear and manifest breach of the obligation of the Community under Article 253 EC.
148. I conclude furthermore that this absence of any reasoning taking into account the change of context must be considered to be an infringement of an essential procedural requirement, leading to the invalidity of Article 8 of the 2001 Directive. Therefore I propose that the Court declare Article 8 of the 2001 Directive invalid.
149. Nevertheless, one should keep in mind that the assessment of the present cases has proven that the Community legislature had – in 1992 – valid reasons for the ban on snus. Furthermore, it must be observed that outright annulment of the contested provision would be likely to undermine the main effect of the ban and would seriously hamper the policy goal to prevent new and potentially

attractive tobacco products from appearing on the market. Account must also be taken of the fact that, as is apparent from my observations above, the essential legislative content of the directive is valid.

150. Given these considerations, important reasons of legal certainty, comparable to those which operate in cases where certain regulations are annulled under the second paragraph of Article 231 EC, justify the Court's limiting the effects of the annulment. Therefore I suggest that the Court decide in the particular circumstances of these cases to maintain for the time being all the effects of Article 8 of the 2001 Directive, until such time as the Council and the European Parliament have replaced it with a new provision based on proper reasoning.

[...]

## 3.2 Judgement of the Court

**Arnold André GmbH & Co. KG v Landrat des Kreises Herford  
and  
Swedish Match AB and Swedish Match AB UK Ltd v Secretary of State for Health**

**Joined Cases C-210/03 and 434/02**

14 December 2004

Court of Justice

ECR [2005] I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 26 By its second question, which should be examined first, the national court asks whether Article 8 of Directive 2001/37 is invalid in whole or in part by reason of infringement of the EC Treaty or of general principles of Community law, or by reason of misuse of powers.

The choice of Articles 95 EC and 133 EC as legal bases

- 27 The question is aimed at determining whether Article 95 EC constitutes an appropriate legal basis for Article 8 of Directive 2001/37, and if so whether recourse to Article 133 EC as a second legal basis for that provision is necessary or possible in this case.
- 28 Article 95(1) EC provides that the Council is to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
- 29 In this respect, it should be recalled that, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC (see, to that effect, Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419, paragraph 84), it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, Germany v Parliament and Council, paragraph 95, and Case C-491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453, paragraph 60).
- 30 It also follows from the Court's case-law that, while recourse to Article 95 EC as a legal basis is possible if the aim is to prevent future obstacles to trade resulting from the heterogeneous development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (see, to that effect, Case C-350/92 Spain v Council [1995] ECR I-1985, paragraph 35, Germany v Parliament and Council, paragraph 86, Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, paragraph 15, and British American Tobacco (Investments) and Imperial Tobacco, paragraph 61).

- 31 The Court has also held that, where the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (British American Tobacco (Investments) and Imperial Tobacco, paragraph 62).
- 32 It should also be noted that the first subparagraph of Article 152(1) EC provides that a high level of protection of human health is to be ensured in the definition and implementation of all Community policies and activities, and that Article 95(3) EC expressly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (British American Tobacco (Investments) and Imperial Tobacco, paragraph 62).
- 33 It follows from the foregoing that, where there are obstacles to trade or it is likely that such obstacles will emerge in 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 ensure different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality.
- 34 Depending on the circumstances, those appropriate measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (see, in the context of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24), Case C-359/92 Germany v Council [1994] ECR I-3681, paragraphs 4 and 33).
- 35 It is in the light of those principles that the Court must ascertain whether the conditions for recourse to Article 95 EC as legal basis were satisfied in the case of Article 8 of Directive 2001/37.
- 36 It must be pointed out, to begin with, that Article 8 does no more than reproduce the provisions of Article 8a of Directive 89/622 under which the Member States are to prohibit the placing on the market of tobacco for oral use. That tobacco is defined in Directive 2001/37, and in Directive 89/622, as 'all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets, or in a form resembling a food product'.
- 37 It is common ground that for those products, as indicated in the 14th recital in the preamble to Directive 92/41, there were differences, at the time of adoption of that directive, between the laws, regulations and administrative provisions of the Member States. Two of them had already prohibited the marketing of such products and a third had adopted provisions which, while not yet in force, had the same object. Those provisions were intended, according to their authors, to stop the expansion of consumption of products harmful to health which were new to the markets of the Member States and were thought to be especially attractive to young people.
- 38 As the market in tobacco products is one in which trade between Member States represents a relatively large part (see British American Tobacco (Investments) and Imperial Tobacco, paragraph 64), those prohibitions of marketing contributed to a heterogeneous development of that market and were therefore such as to constitute obstacles to the free movement of goods.
- 39 Having regard also to the public's growing awareness of the dangers to health of the consumption of tobacco products, it was likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and

intended more effectively to discourage consumption of those products (British American Tobacco (Investments) and Imperial Tobacco, paragraph 67).

- 40 Article 8 of Directive 2001/37 was adopted in a context which, from the point of view of obstacles to the free movement of goods existing in the market for tobacco products as a result of the heterogeneous development of conditions of marketing of tobacco products for oral use in the various Member States, was no different from that which existed when Article 8a of Directive 89/622 was adopted. It should be added that the Act of Accession cannot have any bearing on the assessment of that context. That Act not only excluded the Kingdom of Sweden from the scope of Article 8a, it also required that Member State to take all necessary measures to ensure that tobacco products for oral use were not placed on the market in the other Member States.
- 41 Action by the Community legislature on the basis of Article 95 EC was therefore justified with respect to tobacco products for oral use.
- 42 It follows from the foregoing that the prohibition in Article 8 of Directive 2001/37 could be adopted on the basis of Article 95 EC. It will have to be examined below whether the adoption of that measure complied with Article 95(3) EC and the legal principles referred to in the national court's questions.
- 43 As regards the question whether recourse to Article 133 EC as a second legal basis of Article 8 was necessary or possible in the present case, it suffices to recall that in paragraph 97 of *British American Tobacco (Investments) and Imperial Tobacco* the Court considered that Article 95 EC constituted the only appropriate legal basis for Directive 2001/37 and that it was incorrect for it to cite Article 133 EC as well.
- 44 However, that incorrect reference to Article 133 EC as a second legal basis for that directive does not of itself mean that the directive is invalid (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 98). Such an error in the citations of a Community act is no more than a purely formal defect, unless it gave rise to irregularity in the procedure applicable to the adoption of that act (see, to that effect, *Case 165/87 Commission v Council* [1988] ECR 5545, paragraph 19, and *Joined Cases C-184/02 and C-223/02 Spain and Finland v Parliament and Council* [2004] ECR I-0000, paragraph 44). The Court went on to hold, in paragraph 111 of *British American Tobacco (Investments) and Imperial Tobacco*, that recourse to the twofold legal basis of Articles 95 EC and 133 EC did not give rise to irregularity in the procedure for adopting the directive and that the directive was not invalid on that account.
- 45 Accordingly, Article 8 of Directive 2001/37 is not invalid on account of lack of an appropriate legal basis.

#### Article 95(3) EC and the principle of proportionality

- 46 Article 95(3) EC provides that both the Commission and also the Parliament and the Council are to take as a base a high level of protection of human health, taking account in particular of any new development based on scientific facts.
- 47 It should also be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions are appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia*, *Case 137/85 Maizena* [1987] ECR 4587, paragraph 15; *Case C-339/92 ADM Ölmühlen* [1993] ECR I-6473, paragraph 15; and *Case C-210/00 Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

- 48 With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that concerned in the present case, which involves political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Only if a measure adopted in this field is manifestly inappropriate in relation to the objective which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (see, to that effect, Case C-84/94 United Kingdom v Council [1996] ECR I-5755, paragraph 58; Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, paragraphs 55 and 56; Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 61; and British American Tobacco (Investments) and Imperial Tobacco, paragraph 123).
- 49 With regard to Article 8a inserted in Directive 89/622 by Directive 92/41, it is apparent from the preamble to the latter directive that the prohibition of the marketing of tobacco products for oral use was the only measure that appeared appropriate to cope with the real danger that those new products would be used by young people, thus leading to nicotine addiction, with those products causing cancer of the mouth in particular.
- 50 Swedish Match essentially submits that, having regard to the state of the scientific information available to the Community legislature in 2001, when Article 8 of Directive 2001/37 was adopted, on which it moreover relied in amending the rules governing the warning referred to in Article 5(4) of that directive, maintenance of the prohibition of marketing tobacco products for oral use was disproportionate in relation to the objective pursued and did not take account of the development of that scientific information.
- 51 The answer to that argument must be that, while some experts could from 1999 call into question the assertion that, as the 16th recital in the preamble to Directive 92/41 puts it, 'these new products cause cancer of the mouth in particular', all controversy on that point was not eliminated at the time of adoption of Directive 2001/37. Moreover, while part of the scientific community accepted that tobacco products for oral use could be used as substitute products for cigarettes, another part challenged the correctness of such a position. From that situation it must be inferred that the scientific information which could have been available to the Community legislature in 2001 did not allow the conclusion that consumption of the products in question presented no danger to human health.
- 52 Moreover, like all other tobacco products, those for oral use contain nicotine, which causes addiction and whose toxicity is not disputed.
- 53 Now, first, it had not been shown at the time of adoption of Directive 2001/37 that the harmful effects of those products were lesser in that regard than those of other tobacco products. Second, it had been shown that they presented serious risks to health, which the Community legislature had to take into account.
- 54 In those circumstances, it cannot be maintained that, contrary to the provisions of Article 95(3) EC, the prohibition which follows from Article 8 of Directive 2001/37 was laid down without account being taken of the development of scientific information.
- 55 Moreover, nothing that has been submitted to the Court allows the view to be taken that tobacco products for oral use were not products new to the market of the Member States as it existed at the time of adoption of Directive 92/41.
- 56 To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral

use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

- 57 As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.
- 58 It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

#### Article 28 EC and/or Article 29 EC

- 59 It is settled case-law that the prohibition of quantitative restrictions and measures having equivalent effect laid down by Articles 28 EC and 29 EC applies not only to national measures but also to measures adopted by the Community institutions (see in particular, to that effect, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15; Case C-51/93 *Meyhui* [1994] ECR I-3879, paragraph 11; and Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, paragraph 27).
- 60 Nevertheless, as Article 30 EC provides, the provisions of Articles 28 EC and 29 EC do not preclude prohibitions or restrictions on imports, exports or goods in transit justified *inter alia* on grounds of protection of the health and life of humans.
- 61 While the prohibition of marketing tobacco products for oral use under Article 8 of Directive 2001/37 constitutes one of the restrictions referred to in Articles 28 EC and 29 EC, it is nevertheless justified, as indicated in paragraph 58 above, on grounds of the protection of human health. It cannot therefore, in any event, be regarded as having been adopted in breach of the provisions of Articles 28 EC and 29 EC.
- 62 Moreover, the prohibition imposed on the Kingdom of Sweden on placing tobacco products for oral use on the markets of the other Member States derives from the provisions of point (b) of Chapter X of Annex XV to the Act of Accession, not those of Directive 2001/37.

#### Article 253 EC

- 63 It must be borne in mind that, while the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, it is not required to go into every relevant point of fact and law (see, *inter alia*, Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29).
- 64 Furthermore, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (see, in particular, Case C-100/99 *Italy v Council and Commission* [2001] ECR I-5217, paragraph 64, and, to that effect, *Spain and Finland v Parliament and Council*, paragraph 79).



- 65 The recitals in the preamble to Directive 92/41 set out clearly the reasons why a measure prohibiting the marketing of tobacco products for oral use was to be introduced in Directive 89/622. In particular, after recalling that scientific experts were of the opinion that all tobacco products entail dangers to health and that it had been proved that smokeless tobacco products were a major risk factor as regards cancer, the preamble further stated that new tobacco products for oral use appearing on the market in certain Member States were particularly attractive to young people, with the risk of their developing an addiction to nicotine if restrictive measures were not taken in time. It was also observed that the Member States most exposed to that problem had already placed total bans on those new products or intended to do so.
- 66 It should also be stated that the prohibition of marketing tobacco products for oral use laid down in Article 8 of Directive 2001/37 is confined, in the context of the recasting of earlier provisions which constitutes one of the objects of that directive, to confirming the identical measure adopted in 1992. The different treatment reserved in 1992 for those products as opposed to other smokeless tobacco products was the result of circumstances relating to the novelty on the internal market at the time of the products affected by the prohibition, their attraction for young people, and the existence of national prohibitive measures in certain Member States.
- 67 Those circumstances remained the same in 2001. Admittedly, it is common ground that the marketing of tobacco products for oral use has a long tradition in Sweden and that those products could not be regarded as new to the market corresponding to the territory of that Member State on its accession in 1995. However, since Article 151 of the Act of Accession precisely excluded the Kingdom of Sweden from the scope of the prohibition adopted in 1992, the territory of that State cannot be taken into account for the determination of the market referred to in Article 8 of Directive 2001/37 or, consequently, for the assessment with respect to that market of the novelty of the products whose marketing is prohibited there in accordance with that article.
- 68 Since Directive 2001/37 specifies, in the 28th recital in its preamble, that Directive 89/622 prohibited the sale in the Member States of certain types of tobacco for oral use and that Article 151 of the Act of Accession granted the Kingdom of Sweden a derogation from the provisions of the latter directive, it does not appear that the confirmation of that prohibition in Article 8 of Directive 2001/37 required that directive to specify other relevant points of fact and law in order to satisfy the obligation to state reasons under Article 253 EC.
- 69 Accordingly, Article 8 of Directive 2001/37 complies with the obligation to state reasons set out in Article 253 EC.

#### The principle of non-discrimination

- 70 It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, Case C-304/01 Spain v Commission [2004] ECR I-0000, paragraph 31).
- 71 Although tobacco products for oral use, as defined in Article 2 of Directive 2001/37, are not fundamentally different in their composition or indeed their intended use from tobacco products intended to be chewed, they were not in the same situation as those products. The tobacco products for oral use which are the subject of the prohibition laid down in Article 8a of Directive 89/622 and repeated in Article 8 of Directive 2001/37 were new to the markets of the Member States referred to in that measure. That particular situation thus authorised a difference in treatment, and it cannot validly be argued that there was a breach of the principle of non-discrimination.

#### The principle of freedom to pursue a trade or profession and the right to property

- 72 According to the case-law of the Court, the freedom to pursue a trade or profession, like the right to property, is one of the general principles of Community law. Those principles are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that the restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, *inter alia*, Case 265/87 Schröder [1989] ECR 2237, paragraph 15; Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 78; Case C-293/97 Standley and Others [1999] ECR I-2603, paragraph 54; Joined Cases C-37/02 and C-38/02 Di Lenardo and Dilexport [2004] ECR I-0000, paragraph 82, and Spain and Finland v Parliament and Council, paragraph 52).
- 73 The prohibition on the marketing of tobacco products for oral use laid down in Article 8 of Directive 2001/37 is indeed capable of restricting the freedom of manufacturers of such products to pursue their trade or profession, assuming that they have envisaged such marketing in the geographical region concerned by that prohibition. However, the operators' right to property is not called into question by the introduction of such a measure. No economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting that market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances (Case C-280/93 Germany v Council, paragraph 79). Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained (see Case 52/81 Faust v Commission [1982] ECR 3745, paragraph 27).
- 74 As stated above, Directive 2001/37 pursues an objective in the general interest by ensuring a high level of protection of health in the context of the harmonisation of the provisions applicable to the placing on the market of tobacco products. It does not appear, as indicated in paragraph 58 above, that the prohibition laid down in Article 8 of that directive is inappropriate to that objective. In those circumstances, the obstacle to the freedom to pursue an economic activity constituted by a measure of such a kind cannot be regarded, in relation to the aim pursued, as a disproportionate interference with the exercise of that freedom or with the right to property.

#### Alleged misuse of powers

- 75 As the Court has repeatedly held, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C-331/88 Fedesa and Others [1990] ECR I-4023, paragraph 24, and Case C-110/97 Netherlands v Council [2001] ECR I-8763, paragraph 137).
- 76 With regard in particular to the express exclusion of any harmonisation of the laws and regulations of the Member States designed to protect and improve human health laid down in the first indent of Article 129(4) of the EC Treaty (now, after amendment, the first subparagraph of Article 152(4) EC), the Court has held that other articles of the Treaty may not be used as a legal basis in order to circumvent that exclusion (Case C-376/98 Germany v Parliament and Council, paragraph 79). The Court has, however, stated that, provided that the conditions for recourse to Article 95(1) EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that the protection of public health is a decisive factor in the choices to be made (Case C-376/98 Germany v Parliament and Council, paragraph 88, and British American Tobacco (Investments) and Imperial Tobacco, paragraph 190).
- 77 First, the conditions for recourse to Article 95 EC were fulfilled in the case of Article 8 of Directive 2001/37 and, second, it has not been shown that that provision was adopted with the exclusive or

main purpose of achieving an objective other than that of eliminating the barriers to trade connected with the heterogeneous development of national laws on tobacco products for oral use.

78 Accordingly, Article 8 of Directive 2001/37 is not invalid by reason of misuse of powers.

The answer to Question 2 taken as a whole

79 The answer to Question 2, taken as a whole, must be that consideration of that question has not disclosed any factor of such a kind as to affect the validity of Article 8 of Directive 2001/37.

Question 1

80 By its first question, the national court essentially asks whether Articles 28 EC and 29 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings.

81 It should be borne in mind that, in a field which has been exhaustively harmonised at Community level, a national measure must be assessed in the light of the provisions of that harmonising measure and not of those of primary law (see Case C-37/92 Vanacker and Lesage [1993] ECR I-4947, paragraph 9, and Case C-324/99 DaimlerChrysler [2001] ECR I-9897, paragraph 32).

82 Since the marketing of tobacco products for oral use is a question that is regulated in a harmonised manner at Community level, the national legislation at issue in the main proceedings which, duly transposing the Community legislation, prohibits the marketing of those products may thus be assessed with regard only to the provisions of that Community legislation, not to those of Articles 28 EC and 29 EC.

83 In the light of the above considerations, the answer to Question 1 must be that, where a national measure prohibits the marketing of tobacco products for oral use in accordance with the provisions of Article 8 of Directive 2001/37, there is no need to ascertain separately whether that national measure complies with Articles 28 EC and 29 EC.

Question 3

84 By its third question, the national court essentially asks whether, in the event that Article 8 of Directive 2001/37 is invalid, the principles of non-discrimination, proportionality and the protection of the right to property should be interpreted as precluding a national measure prohibiting tobacco products for oral use.

85 There is no need to answer this question, since, as stated in paragraph 79 above, consideration of Question 2 has not disclosed any factor of such a kind as to affect the validity of Article 8 of Directive 2001/37.

[...]

## **4 THE UNION'S COMPETENCES IN THE AREA OF HUMAN RIGHTS**

### **4.1 Opinion 2/94 of the Court on the Accession by the Community to the ECHR**

**Accession by the Community to the European Convention for the Protection of  
Human Rights and Fundamental Freedoms**

**Opinion 2/94**

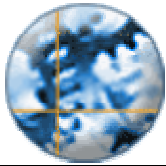
Court of Justice

28 March 1996

ECR [1996] I-01759

*Please see UNIT 7: PRINCIPLES OF CONSTITUTIONAL LAW - THE PROTECTION OF HUMAN RIGHTS*

## 4.2 Case C-106/96: UK v Commission (social exclusion program)



### **NOTE AND QUESTIONS**

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It should be emphasized that this decision, contrary to the impression given in its immediate wake, eschewed the principal issue of competences. What exercised the plaintiffs and the Court were the respective institutional competences of Commission and Council. The case was based on the implicit assumption that, had only the Council given its legislative approval, all contested expenditures would be *intra vires*. Also implicit in the decision was the notion that, were the contested expenditures truly to fall in the "non significant" pilot and exploratory category, they would be equally legitimate. The practical effect of the decision was not to limit the competences of the Community, but to limit somewhat the autonomy of the Commission and to strengthen that of the Council.

**United Kingdom of Great Britain and Northern Ireland**

**v**

**Commission of the European Communities**

**Case C-106/96**

12 May 1998

Court of Justice

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By application lodged at the Court Registry on 1 April 1996, the United Kingdom of Great Britain and Northern Ireland brought an action under Article 173 of the EC Treaty, seeking annulment of the decision or decisions referred to in the Commission's press release of 23 January 1996 (IP/96/67) announcing certain grants for European projects seeking to overcome social exclusion ('the contested press release').
2. Since the adoption of its Resolution of 21 January 1974 concerning a social action programme (OJ 1974 C 13, p. 1), the Council has established various programmes to combat poverty and social exclusion, based on Article 235 of the EC Treaty.
3. First, it adopted Decision 75/458/EEC of 22 July 1975 concerning a programme of pilot schemes and studies to combat poverty (OJ 1975 L 199, p. 34), amended, most recently, by Council Decision 80/1270/EEC of 22 December 1980 concerning a supplementary programme to combat poverty (OJ 1980 L 375, p. 68), which covered the period from December 1975 to November 1981, then Council Decision 85/8/EEC of 19 December 1984 on specific Community action to combat poverty (OJ 1985 L 2, p. 24), which covered the period from January 1985 to 31 December 1988,

and, finally, Council Decision 89/457/EEC of 18 July 1989 establishing a medium-term Community action programme concerning the economic and social integration of the economically and socially less privileged groups in society (OJ 1989 L 224, p. 10), which established a programme for the period from 1 July 1989 to 30 June 1994 ('the Poverty 3 programme').

4. Under Article 2 of that latter decision, the aims of the Poverty 3 programme were: (subparagraph (a)) to ensure overall coherence between all Community operations having an impact on the economically and socially less privileged groups in society, whilst adhering to the respective rules applicable to those operations; (b) to contribute to the development of preventive measures to assist groups at risk and of corrective measures to meet the needs of the very poor; (c) to produce, from a multidimensional viewpoint, innovatory organisational models for the integration of the persons concerned, involving all economic and social agents; (d) to conduct an information, coordination, assessment and exchange of experience operation at Community level; and, finally, (e) to continue to study the characteristics of the groups in question.
5. With a view to achieving those aims, the Commission was authorised, under Article 3 of the Poverty 3 programme, to promote and/or financially support: (subparagraph (a)) the carrying-out of pilot projects integrated into the fabric of local society and aimed at fostering the economic and social integration of the groups concerned by coordinating local initiatives with national or regional policies, such pilot projects having to correspond to the actual needs of those persons and to allow them to play an active role in order to become genuinely integrated into society; (b) innovatory measures to foster the economic and social integration of certain groups of people suffering from specific forms of isolation, in particular those measures undertaken by non-governmental organisations; (c) the assessment of schemes, the intra-Community exchange of knowledge and the transfer of methods, to be carried out by a network of research and development units whose members were to be appointed by the Commission in consultation with the Member States concerned; and, finally, (d) the exchange on a regular basis of comparable data on the groups in question and the improvement of knowledge of the phenomenon.
6. In accordance with Part I of the Annex to that decision, pilot projects had to relate, inter alia, to several aspects of the situation of the less privileged and to have the support of private participants or associations and of the public authorities. Furthermore, in accordance with Part II of the same annex, when measures were selected, account was to be taken of, inter alia, the extent to which they encouraged the independence and self-confidence of the persons concerned, helped the employment situation, channelled aid to the most disadvantaged and concentrated on socially and economically disadvantaged areas.
7. In order to continue and extend that action, the Commission submitted on 22 September 1993 a proposal for a Council Decision establishing a medium-term action programme to combat exclusion and promote solidarity: a new programme to support and stimulate innovation (1994-1999) (COM (93) 435 final, not published in the Official Journal of the European Communities, hereinafter 'the Poverty 4 proposal'). That proposal envisaged a programme to be implemented between 1 July 1994 and 31 December 1999.
8. Under Article 2 of the Poverty 4 proposal, actions to combat exclusion and promote solidarity were to be specifically aimed at the economic and social integration of the economically and socially least-privileged groups and persons exposed to social exclusion, especially in urban areas. Such integration was to be ensured through multi-dimensional action covering all relevant fields in society, an indicative list of which was annexed. Employment and training were among the fields of action listed.
9. Article 3 of the Poverty 4 proposal stated that the aims of the programme were to include (subparagraph (a)) contributing through model actions to the development of preventive and curative measures at local, national or regional levels and (b) supporting the creation and development of transnational networks of partnership projects.

10. Under Article 4 of the Poverty 4 proposal, the measures designed to attain those aims were to comprise, for example, the carrying-out of model actions at local and national levels, in partnership between the public and private sectors.
11. In Annex 1 to the Poverty 4 proposal, it was stated that in selecting model actions, account should be taken of, inter alia, the fact that they should devise effective ways of channelling aid to the population most concerned, that they should encourage the independence and self-confidence of the persons concerned, that they should enhance employment possibilities and that they should concentrate on socially and economically disadvantaged areas.
12. By late June 1995, it was apparent that the Poverty 4 proposal would not be adopted by the Council.
13. Heading B3-4103 of the general budget of the European Union for the financial year 1995 (OJ 1994 L 369, p. 1) provided for expenditure of ECU 20 000 000 to combat poverty and social exclusion. According to the budgetary remarks relating to that heading, it was to cover both the expenditure on the programme in the Poverty 4 proposal and other expenditure outside that programme.
14. It is apparent from the contested press release that during 1995 the Commission decided to fund, under budget heading B3-4103, 86 projects to combat social exclusion, a list of which was annexed, for a total amount of approximately ECU 6 000 000.
15. That decision was preceded, in particular, by the Commission's press release of 11 August 1995 announcing a programme in the field of social exclusion for 1995 (IP (95) 918), and by an information note from the Commission dated 16 August 1995, entitled 'European Funding for Projects Seeking to Overcome Social Exclusion — 1995' and comprising a set of guidelines for organisations potentially interested in the programme in question. Those guidelines described, inter alia, the types of initiative which would qualify for funding and the procedure to be followed by potential applicants.
16. The guidelines stated: 'Support may be given to activities aimed at identifying and encouraging best practice in:
  - (i) revitalising urban society / social integration in cities and conurbations with problems of high unemployment and social exclusion;
  - (ii) enabling socially excluded people to move towards employability.

Areas of interest should be upstream from employment as such, and should focus on reducing the degree of exclusion which currently prevents target groups from even taking the first steps towards approaching the labour market.

Commission support can be given to the creation and development of exchange and self-help networks (such as lone parent families, women afflicted by poverty, long-term unemployed, families in extreme poverty), the improvement of social integration in urban communities, the improvement of urban amenities and access to urban services, from the point of view of the excluded populations.

Specific examples could be actions such as: reducing isolation in urban areas, innovative transport arrangements enabling excluded people to move closer towards the labour market (such as approaching information points regarding employment and training), socialising with others so as to prevent and break down isolation, creation of self-help groups or drop-in centres, improving access to health care and access to public services such as housing, welfare, information, citizens' advice and legal aid.

This list is not intended to be exhaustive, but rather indicative. Actions should help to generate new ideas helpful to socially excluded people with a combination of difficulties, and they should stimulate other projects aiming to overcome social exclusion.'

17. In support of its action for annulment of the decision or decisions to fund the 86 projects referred to in the contested press release, the United Kingdom Government puts forward two pleas in law alleging, first, lack of competence on the part of the Commission and breach of Article 4 of the EC Treaty and, second, infringement of an essential procedural requirement.

The plea alleging lack of competence on the part of the Commission and breach of Article 4 of the Treaty

18. In the submission of the United Kingdom, supported by the Federal Republic of Germany, the Kingdom of Denmark and the Council, the Commission did not have competence to commit the expenditure for funding the 86 contested projects under budget heading B3-4103. The Commission thus also acted in breach of Article 4 of the Treaty, in accordance with which each institution is to act within the limits of the powers conferred upon it by that Treaty.
19. Any Community expenditure, it is submitted, requires a dual legal basis: entry in the budget and, as a general rule, prior adoption of an act of secondary legislation authorising the expenditure in question. The only exception to the latter requirement concerns the funding of non-significant actions, namely pilot projects or preparatory actions designed to assess the policy pros and cons of a proposal for a basic measure. In that event, the legal basis lies in the Commission's power of initiative derived directly from the Treaty. The contested projects are clearly not such non-significant actions. No other basic act authorising their funding was, however, adopted by the Council.
20. The Commission, supported by the Parliament, whilst accepting that only non-significant Community action may be funded on the sole basis of the entry of the corresponding appropriation in the budget, considers that the contested projects fall within that category and that it was thus competent to decide to fund them.
21. In responding to the parties' arguments, it must first be borne in mind that under Article 205 of the EC Treaty, the Commission is to implement the budget, in accordance with the provisions of the regulations made pursuant to Article 209 of that Treaty, on its own responsibility and within the limits of the appropriations.
22. It is also clear from the Court's case-law (see, to that effect, in particular, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others v Commission and Council* [1985] ECR 2523, paragraph 56; Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 28; Case 242/87 *Commission v Council* [1989] ECR 1425, paragraph 18; and Case 16/88 *Commission v Council* [1989] ECR 3457, paragraphs 15 to 19) that, in the system of the Treaty, any implementation of expenditure by the Commission in principle presupposes, in addition to the entry of the relevant appropriation in the budget, an act of secondary legislation (commonly called the 'basic act') from which the expenditure derives.
23. The Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1; 'the Financial Regulation'), as amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 (OJ 1990 L 70, p. 1), which was adopted on the basis of Article 209 of the Treaty, specifies, in the second subparagraph of Article 22(1): 'The implementation of appropriations entered for significant Community action shall require a basic act, in accordance with the procedure and the provisions laid down in paragraph 3(c) of Section IV of the Joint Declaration of 30 June 1982.'



24. Paragraph 3(c) of Section IV of the Joint Declaration of 30 June 1982 by the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure (OJ 1982 C 194, p. 1), states:

'The implementation of appropriations entered for significant new Community action shall require a basic regulation. If such appropriations are entered the Commission is invited, where no draft regulation exists, to present one by the end of January at the latest.

The Council and the Parliament undertake to use their best endeavours to adopt the regulation by the end of May at the latest.

If by this time the regulation has not been adopted, the Commission shall present alternative proposals (transfers) for the use during the financial year of the appropriations in question.'

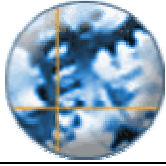
25. In a statement appended to the Interinstitutional Agreement of 29 October 1993 on budgetary discipline and improvement of the budgetary procedure (OJ 1993 C 331, p. 1), the European Parliament, the Council and the Commission confirmed their support for those principles and undertook to improve their application.
26. It follows from the above that implementation of Community expenditure relating to any significant Community action presupposes not only the entry of the relevant appropriation in the budget of the Community, which is a matter for the budgetary authority, but in addition the prior adoption of a basic act authorising that expenditure, which is a matter for the legislative authority, whereas implementation of budgetary appropriations for Community action which does not fall within that category — namely non-significant Community action — does not require prior adoption of such a basic act.
27. It is true that no definition of what constitutes significant Community action is given either in the Financial Regulation or in the abovementioned interinstitutional declarations of 1982 and 1993.
28. However, the requirement that a basic act must be adopted before an appropriation is implemented derives directly from the scheme of the Treaty, in accordance with which the conditions governing the exercise of legislative powers and budgetary powers are not the same (Case 242/87, cited above, paragraph 18).
29. Moreover, according to a statement entered in the minutes of the meeting of 28 June 1982 between the Council, the European Parliament and the Commission in the context of the interinstitutional tripartite dialogue, which took place two days before the adoption of the abovementioned interinstitutional declaration of 1982, the requirement that a basic act be adopted before an appropriation entered in the budget for significant Community action can be used is to enable the Commission, in accordance with standard practice, to assume its rightful role and in particular exercise its powers of initiative by initiating, on its own responsibility, the studies or projects required to prepare its proposals.
30. Furthermore, as the Commission itself accepted in its communication of 6 July 1994 to the budgetary authority concerning legal bases and maximum amounts (SEC (94) 1106 final), because implementation of expenditure on the basis of the mere entry of the relevant appropriations in the budget is an exception to the fundamental rule that a basic act must first be adopted, it cannot be assumed that Community action is non-significant and the Commission must therefore clearly demonstrate that the planned measure is not significant Community action.
31. In the present case, however, the Commission has not succeeded in refuting the United Kingdom Government's assertion that the projects to which the contested press release refers in fact cover actions which were already included under the Poverty 3 programme and could have been adopted

under the Poverty 4 programme. Nor is it denied that those two programmes concern significant Community action which therefore required the adoption of a basic act for the relevant appropriations to be implemented.

32. In that regard, it must be noted that, of the contracts given Community funding in 1995 on the sole basis of budget heading B3-4103, those referred to by the Commission in support of its submission in the present proceedings concern: a literacy programme for families living in disadvantaged areas with a view to improved access to employment; a training programme for unemployed school leavers living in an area with high youth unemployment; and a programme to assist with social rehabilitation for unemployed single mothers and unemployed people suffering from alcohol addiction.
33. Such actions were specifically covered by the Poverty 3 programme and the Poverty 4 proposal. Article 3(a) and (b) of the Poverty 3 programme allowed the Commission to promote or financially support pilot projects integrated into the fabric of local society and aimed at fostering the economic and social integration of economically and socially less privileged groups, and innovatory measures to foster the economic and social integration of certain groups of people suffering from specific forms of isolation. Similarly, it is clear from a reading of Article 2 of the Poverty 4 proposal in conjunction with Annex 1 thereto that the proposal provided for implementation by the Commission of actions aimed at the economic and social integration of the economically and socially least-privileged groups and persons exposed to social exclusion through action in various fields, including training, with a view to improving their chances of employment.
34. Thus, contrary to what the Commission has argued, the purpose of the projects mentioned above was not to prepare future Community action or launch pilot projects. Rather, it is clear from the activities envisaged, the aims pursued and the persons benefited that they were intended to continue the initiatives of the Poverty 3 programme, at a time when it was obvious that the Council was not going to adopt the Poverty 4 proposal, which sought to continue and extend Community action to combat social exclusion.
35. In support, however, of its argument that the contested projects constitute non-significant action, the Commission points out that they relate to short-term activities, with a maximum duration of one year, which are not coordinated inter se and which entail considerably less expenditure than the pluriannual programmes under the Poverty 3 programme and the Poverty 4 proposal, which involve the creation of an Observatory on National Policies to Combat Social Exclusion to coordinate those actions.
36. That argument must be rejected. There is nothing to prevent significant Community action from entailing limited expenditure or having effects for only a limited period. To accept the contrary would be tantamount, moreover, to allowing the Commission to circumvent application of the principle that a basic act must first be adopted merely by limiting the scope of the action in question while carrying it over from one year to the next. Nor, similarly, can the degree of coordination to which action is subject at Community level determine whether it is significant or not.
37. It must thus be concluded that the Commission was not competent to commit the expenditure necessary to fund the projects referred to in the contested press release under budget heading B3-4103 and that it acted in breach of Article 4(1) of the Treaty, so that the decision to commit that expenditure must be annulled.
38. It is therefore unnecessary to rule on the plea in law alleging the lack of a proper statement of reasons.

[...]

## 5 CONSTITUTION FOR EUROPE



### NOTE AND QUESTIONS

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Study Articles I-11 to I-18, and the Protocol on Subsidiarity and Proportionality from the Treaty establishing a Constitution for Europe (below).

1. Pay attention both to the way powers are attributed to the EU and to the new monitoring mechanism (in the Protocol).
2. The division of competencies and the question of who is best placed to fulfil which policy objective remains of central concern and enflames high emotion among general public, fearing the encroachment of Union action into areas of national heritage, power and tradition. Where is the margin between Union and national competence?
3. To what extent does the text of the Constitution make this division clearer?
4. The issue of competencies continues to be subject to principles of proportionality and subsidiarity. It is clear that something has changed in the text of the draft Constitution. What, in your opinion, might be the effect of these changes?
5. The major concern of most Member States and candidate countries is that the provisions of the Constitution as drafted provide for a potential back door for further assumption of power by the Union, making inroads into what may be seen as traditionally national territory, while the objective was to clarify competencies and thus dispel the feeling of the EU gradually extending its ambit of power. Are such concerns legitimate?
6. German constitutional judge Siegfried Bross finds that one of the biggest problems with the draft Constitution is that it does not account for a dispute over competences between the EU and its member states. He calls for a separate court to judge on disputes over competences. In his view the European Court of Justice cannot do this as it may not rule on national constitutional law and the equivalent national courts may not do it as they cannot rule on interpretation of European law. Such a new court should be at European level and should have a representative from each member state - but it should not be a European institution.

He used the dispute between the EU and Germany over EU legislation to ban tobacco advertising as an example of where such a court would be useful. "In the tobacco case the problem was whether it was about economics law, competition law or health law. Such a case would be for the competence court as Germany disputed the EU's competence in this matter". Judge Bross feels such cases will become more common in the future when the EU claims more and more competences for itself. The subsidiarity principle - which says that the EU should only act if the goal cannot be better achieved by the member states - offers no relief to the competence confusion, according to Bross. This is because once the member states transfer powers to the Commission, they implicitly acknowledge that it is better done at the EU level and so they cannot invoke the subsidiarity principle at a later stage. Comment!

## **5.1 Constitution for Europe: Fact sheets**

Excerpt from: [http://europa.eu.int/scadplus/constitution/index\\_en.htm](http://europa.eu.int/scadplus/constitution/index_en.htm)

### **5.1.1 Classification and exercise of competences**

The Constitution clarifies the distribution of competences between the European Union (EU) and the Member State. It devotes a specific title to the principles governing this distribution of competences and to the different categories of competence.

The lack of clarity and precision in the current demarcation of competences has three major drawbacks which prompted this change:

- European citizens complain they do not understand "who does what" within the EU;
- the EU gives the impression of wanting to legislate (encroaching on the competences of the Member States), either in areas where it is not appropriate for it to do so, or in too detailed a way;
- there are not always adequate checks to ensure that demarcations of competence and, in particular, the principle of subsidiarity are observed.

The general classification adopted in Article I-12 of the Constitution identifies three categories of competence: exclusive competence, shared competence and supporting, coordinating or complementary competence.

The Constitution also stipulates that the Union has powers to coordinate economic and employment policies as well as powers to define and implement a common foreign and security policy (CFSP).

Moreover, the Constitution retains a flexibility clause whereby the Union can act, where necessary, beyond the powers conferred on it. It also introduces stronger checks on compliance with the demarcation of powers.

Finally, it should be noted that the amendments are basically minor ones and that changes in competences (in the form of a transfer of powers) are almost non-existent.

### **GENERAL PRINCIPLES**

Article I-11 of the constitutional Treaty restates the principle of conferral of competences whereby the Union can only act within the limits of the competences conferred on it to attain the objectives set out in the Constitution. The same Article expressly states that "competences not conferred upon the Union in the Constitution remain with the Member States".

The main innovation introduced by the Constitution is to specify the various types of competence that exist, which was never done in any of the previous Treaties. It should be pointed out, however, that the case law of the Court of Justice had prefigured such a categorisation, in that it defines three types of competences (exclusive, shared and complementary).

In addition, preference has been given to the method of conferring powers based on defining specific actions to be taken by the Union, i.e. the constitutional Treaty lists areas of competence. This clarifies matters in so far as the existing Treaties define the legislative powers of the Union both in terms of objectives to be achieved and by subject, which makes it more difficult to understand the whole. However, at the same time, it should be noted that Article I-12 stipulates that "the scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part

III". While it is true that this provision allows some flexibility to be maintained, at the same time it diminishes the usefulness of the classification, since it will always be necessary to analyse the provisions of Part III in order to know precisely "who does what".

Among the general principles concerning competences, mention should also be made of Article I-6 on the subject of Union law, which enshrines in the Treaties for the first time the principle of the primacy of Union law over the law of the Member States in the exercising of the competences conferred on the Union. This is an important innovation in that this principle, deriving from the Court of Justice's famous judgment in *Costa v ENEL* in 1964, had not previously been affirmed in Union primary law.

## THE VARIOUS TYPES OF COMPETENCE

Articles I-12 to I-17 describe in detail the various types of competence:

- Exclusive competence (Article I-13)

The Union has exclusive competence in a specific area when it alone is able to legislate and adopt legally binding acts. The Member States may intervene in the areas concerned only if empowered to do so by the Union or in order to implement Union acts. Article I-13 specifies the areas in which the Union has exclusive competence. These areas are the same as before.

- Shared competence (Article I-14)

In this particular case, the Member States and the Union have powers to legislate and adopt legally binding acts in a specific area. The Member States exercise their powers in so far as the Union has not exercised, or has decided to stop exercising, its competence. This is an affirmation of the case law on preemption. Most of the Union's competences fall into this category. Article I-14 contains a non-exhaustive list of shared competences that correspond more or less to existing ones except that they also include some advances in certain areas such as freedom, security and justice. This Article also lists certain competences which were previously regarded as parallel. The areas in question are research, technological development, space, development cooperation and humanitarian aid. However, in these areas the principle of preemption does not apply, in that Member States may continue to exercise their competences in parallel with the Union, even if the Union has exercised its own competences in these areas.

- Supporting, coordinating or complementary competences (Article I-17)

In certain areas and in the conditions laid down by the Constitution, the Union will have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. The Union's support will essentially be financial in nature. Legally binding acts adopted by the Union in this connection may not entail harmonisation of Member States' laws or regulations. The areas in which this type of competence applies are listed exhaustively in Article I-17. It should be emphasised that the explicit referral to the Union's competence in the areas of sport, administrative cooperation, tourism and civil protection is an innovation.

Apart from this new classification, a limited number of Member States will always be able to exercise competences using the enhanced cooperation mechanism. For example, Article I-44 states that Member States that wish to do so may establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences. The Constitution's provisions on enhanced cooperation are fairly similar to those currently found in the EU treaty. The most notable changes are: the disappearance of the restrictions with regard to CFSP and the ad hoc rules for police and judicial cooperation in criminal

matters; the possibility, within the context of enhanced cooperation, of switching from unanimity to qualified majority voting or from a special legislative procedure to an ordinary legislative procedure; and the minimum threshold for participating Member States, which has been changed from the current eight to one third of the Member States.

## EXERCISE OF COMPETENCES: MONITORING AND FLEXIBILITY

Article I-11 states that the exercise of the Union's competences is governed not only by the principle of conferral but also by the principles of subsidiarity and proportionality. The constitutional Treaty strengthens the monitoring of compliance with the demarcation of competences, and in particular the principle of subsidiarity, thanks to introducing the involvement of the national parliaments. The protocol on the application of the principles of subsidiarity and proportionality sets up an early warning system which closely involves the national parliaments.

To retain some flexibility in the system for distributing competences, there is a clause enabling the Union to act beyond the powers of action conferred on it if action by the Union is necessary to attain one of the objectives set by the Constitution. This provision, in Article I-18, echoes Article 308 of the Treaty establishing the European Community and remains subject to unanimity. Its scope no longer applies merely to the operation of the common market but has been extended to cover the policies referred to in Part III of the Constitution. As regards the procedure, the Parliament must now approve each measure rather than just being consulted as in the past.

Article I-18 stipulates that the Commission must inform national parliaments of proposals that are based on the use of this flexibility clause, so that they can monitor compliance with the subsidiarity principle.

## SUMMARY TABLE

Articles	Subject	Comments
Articles I-11 to I-18	Union competences	-
Article I-6	Primacy of Community law	New provisions
Article I-11	The principle of conferral of competences, subsidiarity and proportionality	-
Article I-12	Categories of competence	New provision
Article I-13	Exclusive competence	
Article I-14	Shared competence	
Article I-17	Supporting, coordinating or complementary competences	
Article I-18	Flexibility clause	-
Article I-44	Enhanced cooperation	

### **5.1.2 The subsidiarity principle and the role of national parliaments**

The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether the Union can intervene or should let the Member States take action. In accordance with this principle, the Union may intervene in areas which do not fall within its exclusive competence only insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The principle of proportionality is the second major principle governing the exercise of powers. By virtue of this principle, action taken by the Union, in terms of its form and content, does not exceed what is required to achieve the objectives set out in the Constitution.

The current Treaties stipulate that both principles must be applied by all the institutions. This is also stated in the text of the Constitution. However, the Constitutional Treaty introduces a major innovation in this regard, suggesting that the national parliaments should be directly involved in monitoring the proper application of the subsidiarity principle.

The Constitutional Treaty thus strengthens the application of the subsidiarity principle and the active role of national parliaments via:

- increased information and transparency in relation to national parliaments (forwarding of Commission proposals, etc.);
- the new role assigned to national parliaments, allowing them to deliver a reasoned opinion if they consider that the principle of subsidiarity has not been complied with (early warning system).

These new provisions allow the national parliaments to establish political control, which ensures that the Commission does not take initiatives for which it is not competent, while at the same time taking care not to prejudice its right of initiative or slow down the legislative process.

Two protocols are attached to the Constitution which, to a large extent, incorporate and amend the existing protocols introduced following the Amsterdam Treaty:

- Protocol on the role of national parliaments in the decision-making process;
- Protocol on the application of the principles of subsidiarity and proportionality.

### **APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY**

The Constitution adapts the Protocol on the application of the principles of subsidiarity and proportionality, which was attached to the Treaty establishing the European Community (EC Treaty) in Amsterdam.

The main innovation is the creation of a system for monitoring the application of the principle of subsidiarity which for the first time directly involves the national parliaments. This allows the national parliaments to publicly notify the European institutions and their own government of any draft European legislative act which they feel does not comply with the principle of subsidiarity. They have six weeks to do so, starting from the date on which a draft European legislative act is forwarded.

Each national parliament will thus be able to review these drafts and submit a reasoned opinion if it considers that the principle of subsidiarity has not been complied with. If one third of the parliaments share the same view, the Commission or the institution from which the draft legislative act originates must review its proposal. At least a quarter of the parliaments must share the same view in the case of proposals from the Commission or initiatives from a group of Member States concerning the area of

freedom, security and justice. Following this review, the Commission or any of the other institutions concerned may decide to withdraw, maintain or amend its proposal, and must give reasons for its decision.

The Protocol also gives national parliaments the right to bring actions before the Court of Justice, via their Member State, on the grounds of infringement of the principle of subsidiarity by a legislative act.

The Protocol confirms that draft European legislative acts must be justified with regard to the principle of subsidiarity. The Constitutional Treaty even recommends the use of a 'subsidiarity statement' containing a detailed assessment.

Finally, the Constitution stipulates that the Commission must simultaneously send all its draft legislative acts and its amended drafts to the national parliaments of the Member States and to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers must also be sent to the national parliaments of the Member States. It also provides that when, in cases of exceptional urgency, the Commission cannot conduct public consultations, it must give reasons for the decision in its proposal.

## **PROTOCOL ON THE ROLE OF NATIONAL PARLIAMENTS**

The Protocol on the role of national parliaments in the EU, which was annexed to the EC and EU Treaties in Amsterdam, has also been adapted to meet the need for greater transparency and more effective document transmission. It contains more precise obligations on the Commission, the Council of Ministers and the Court of Auditors in terms of the dissemination of information:

- In addition to forwarding directly all Commission consultation documents (green and white papers and communications), the Commission also sends the national parliaments "the annual legislative programme as well as any other instrument of legislative planning or policy strategy that it submits to the European Parliament and to the Council of Ministers". Moreover, the revised version of the Protocol asks that the Commission simultaneously send all its draft European legislative acts directly to the national parliaments and to the European Parliament and the Council.
- The Council of Ministers must send the agendas and minutes of its meetings to the Member States' governments and to the national parliaments; this is a new requirement. The Court of Auditors is also now required to send its annual report to national parliaments, for information. Other than in emergencies, a period of six weeks must be observed between a draft legislative act being sent to the national parliaments and being recorded in the Council's agenda. Moreover, a period of ten days is observed between the recording of the draft act in the Council's agenda and its adoption.

In terms of interparliamentary cooperation, no changes have been made concerning the role of the Conference of European Affairs Committees (COSAC). This Conference brings together members of national parliaments from the national parliamentary committees responsible for European affairs and continues to have the right to submit contributions, for example concerning subsidiarity, to the European Parliament, the Council and the Commission.



## SUMMARY TABLE

Articles	Subject	Comments
I-11	Proportionality and subsidiarity	Major changes
Protocol on the role of national parliaments	Role of national parliaments	Major changes
Protocol on the application of the principles of subsidiarity and proportionality	Subsidiarity and role of national parliaments	Major changes

## **5.2 Relevant provisions**

### *Article I-9* **Fundamental rights**

[...]

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

[...]

### *Article I-11* **Fundamental principles**

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 within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution 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 insofar 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 shall ensure compliance with that principle 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 Constitution.

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.

### *Article I-12* **Categories of competence**

1. When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in

that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by Part III, which the Union shall have competence to provide.
4. The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part III.

#### *Article I-13*

#### **Areas of 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 insofar as its conclusion may affect common rules or alter their scope.

#### *Article I-14*

#### **Areas of shared competence**

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.
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 Part III;
  - (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 Part III.
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.

#### *Article I-15*

#### **The coordination of economic and employment policies**

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies.  
  
Specific provisions shall apply to those Member States whose currency is the euro.
2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

#### *Article I-16*

#### **The common foreign and security policy**

1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.
2. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.

#### *Article I-17*

#### **Areas of supporting, coordinating or complementary action**

The Union shall have competence to carry out supporting, coordinating or complementary action.

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, youth, sport and vocational training;
- (f) civil protection;
- (g) administrative cooperation.

*Article I-18*

**Flexibility clause**

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

## **5.3 *Protocols annexed to the Treaty establishing a Constitution for Europe***

### **5.3.1 Protocol on the Role of National Parliaments in the European Union**

(Protocol n. 1 annexed to the Treaty establishing a Constitution for Europe)

THE HIGH CONTRACTING PARTIES,

RECALLING that the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State;

DESIRING to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft European legislative acts as well as on other matters which may be of particular interest to them,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe and to the Treaty establishing the European Atomic Energy Community:

#### **TITLE I**

#### **INFORMATION FOR NATIONAL PARLIAMENTS**

##### **Article 1**

Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.

##### **Article 2**

Draft European legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments.

For the purposes of this Protocol, 'draft European legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act.

Draft European legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council.

Draft European legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament.

Draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council.

### **Article 3**

National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the reasoned opinion or opinions to the governments of those Member States.

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the reasoned opinion or opinions to the institution or body concerned.

### **Article 4**

A six-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft European legislative act during those six weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft European legislative act on the provisional agenda for the Council and the adoption of a position.

### **Article 5**

The agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments.

### **Article 6**

When the European Council intends to make use of Article IV-444(1) or (2) of the Constitution, national Parliaments shall be informed of the initiative of the European Council at least six months before any European decision is adopted.

#### **Article 7**

The Court of Auditors shall forward its annual report to national Parliaments, for information, at the same time as to the European Parliament and to the Council.

#### **Article 8**

Where the national Parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component chambers.

### **TITLE II**

#### **INTERPARLIAMENTARY COOPERATION**

#### **Article 9**

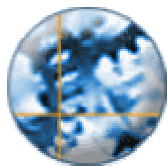
The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

#### **Article 10**

A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.



### 5.3.2 Protocol on the Application of the Principles of Subsidiarity and Proportionality



#### **NOTE AND QUESTIONS**

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Leading EU politicians were clashing over powers to be given to national parliaments to ensure that the EU institutions do not exceed their competencies. Three conflicting proposals have been debated:

*- subsidiarity watchdog*

A new body to police the Commission and the Council and judge whether decisions should be taken by Brussels or by national or local authorities. One representative of each national parliament would sit in the body. They would gather in Brussels around six times a year but would be in permanent contact to rule whether the principle of subsidiarity is respected when new legislation is proposed in Brussels. They would raise concerns when they would believe the Brussels institutions have exceeded their powers. But such subsidiarity watchdog could do no more than delay the process, it would be in the end for the EU institutions, including the European Court of Justice, to rule whether Brussels is entitled to legislate or not.

*- check in conciliation committee*

The existing conciliation committee, gathering representatives of the EU states and of the European Parliament would find agreement on EU legislation, should take care of the role. Members of the conciliation committee would judge and check with national parliaments whether the EU institutions were entitled to propose the respective law.

*- 20 members of each national parliament to judge on subsidiarity*

20 members of each national parliament would gather in Brussels at the beginning of each year to discuss the working plan of the Commission and of the Council to decide under which procedure each law should be adopted. The body of national parliamentarians would rule whether a certain proposal would take the shape of a soft law, a recommendation to the member states, or a regulation, for instance.

Beyond discussions on subsidiarity, the members of the Convention judge the involvement of national parliaments in the EU decision-making, and the debates indicate the general trend is to favour the status quo. Members of the Convention believed it is not up to the EU to alter national rules which provide for a certain degree of involvement in the EU decisions.

But none of these proposals has been adopted in the end. Read the text of the adopted Protocol on the application of the principles of subsidiarity and proportionality below. What kind of impact would you expect it to have?

(Protocol n. 2 annexed to the Treaty establishing a Constitution for Europe)

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution, and to establish a system for monitoring the application of those principles,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe:

### **Article 1**

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-11 of the Constitution.

### **Article 2**

Before proposing European legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

### **Article 3**

For the purposes of this Protocol, 'draft European legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act.

### **Article 4**

The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

## **Article 5**

Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

## **Article 6**

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft European legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft European legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

## **Article 7**

The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

Where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III-264 of the Constitution on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft European legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

### **Article 8**

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

### **Article 9**

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article I-11 of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.

### **5.3.3 Protocol relating to Article I–9(2) of the Constitution on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms**

(Protocol n. 32 annexed to the Treaty establishing a Constitution for Europe)

THE HIGH CONTRACTING PARTIES HAVE AGREED on the following provisions, which shall be annexed to the Treaty establishing a Constitution for Europe:

#### **Article 1**

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article I-9(2) of the Constitution shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

#### **Article 2**

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

#### **Article 3**

Nothing in the agreement referred to in Article 1 shall affect Article III-375(2) of the Constitution.

## 6 J.H.H. WEILER: THE TRANSFORMATION OF EUROPE

(100 Yale L.J. 2403 [1991])

### INTRODUCTION

In 1951, France, Germany, Italy, and the Benelux countries concluded the Treaty of Paris establishing the European Coal and Steel Community. Lofty in its aspirations, and innovative in some of its institutional arrangements, this polity was perceived, by the actors themselves—as well as by the developers of an impressive academic theoretical apparatus, who were quick to perceive events—as an *avant garde* international organization ushering forth a new model for transnational discourse. Very quickly, however, reality dissipated the dream, and again quickly following events, the academic apparatus was abandoned.<sup>1</sup>

Forty years and more later, the European Community is a transformed polity. It now comprises more than double its original Member States, has a population exceeding 350 million citizens, and constitutes the largest trading bloc in the world. But the notion of "transformation" surely comes from changes deeper than its geography and demography. That Europe has been transformed in a more radical fashion is difficult to doubt. Indeed, in the face of that remarkable (and often lucrative) growth industry, 1992 commentary, doubt may be construed as subversion.

The surface manifestations of this alleged transformation are legion, ranging (in the eyes of the beholder, of course) from the trivial and ridiculous<sup>2</sup> to the important and sublime. Consider the changes in the following:

- (1) the scope of Community action. Notice how naturally the Member States and their Western allies have turned to the Community to take the lead role in assisting the development and reconstruction of Eastern Europe.<sup>3</sup> A mere decade or two ago, such an overt foreign policy posture for the Community would have been bitterly contested by its very own Member States.<sup>4</sup>
- (2) the mode of Community action. The European Commission now plays a central role in dictating the Community agenda and in shaping the content of its policy and norms. As recently as the late 1960's, the survival of supranationalism was a speculative matter,<sup>5</sup> while

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<sup>1</sup> For a review of Integration Theory and its demise, see, e.g., Greilsammer, *Theorizing European Integration in its Four Periods*, 2 JERUSALEM J. INT'L REL. 129 (1976); Krislov, Ehlermann & Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, in 2:1 INTEGRATION THROUGH LAW 3, 6-11 (1986).

<sup>2</sup> The winning song in the popular Eurovision Song contest last year was entitled "Altogether 1992." The Times (London), May 7, 1990 at 6, col. 8.

<sup>3</sup> See *European Commission Defines A General Framework for Association Agreements ("European Agreements") Between the EEC and the Countries of Eastern and Central Europe* EUROPE Doc. (No. 1646/47) 1 (Sept. 7, 1990) (reprint of Commission communication to Council and Parliament).

The evolution is limited, however. For example, the absence of a true Community apparatus for foreign policy rendered the political (not military) initiative in relation to the Iraqi crisis no more than hortatory. See e.g., *Gulf Crisis: Positions Taken By the Twelve and the Western European Union* EUROPE Doc. (No. 1644) 1 (Aug. 23, 1990) (statements of Aug. 2, 10, & 21, 1990); *Gulf/EEC: The Foreign Ministers of the Twelve Confirm Their Position and Intend to Draft an "Overall Concept" for their Relations with the Region's Countries*, EUROPE Doc. (No. 5413) 3-4 (Jan. 19 1991). The Community has taken, however, a leading role in the Yugoslav crisis.

On the evolving foreign policy posture of the Community in the wake of 1992, see generally R. DEHOUSSE & J. WEILER, *EPC AND THE SINGLE ACT: FROM SOFT LAW TO HARD LAW* (European University Institute Working Papers of the European Policy Unit, No. 90/1).

<sup>4</sup> In 1973, the French Foreign Minister, M. Jobert, pressed the separateness [of the Framework for European Political Cooperation which dealt with foreign policy] from the Community to a point of forcing the Ministers to meet in EPC in Copenhagen in the morning, and to assemble the same afternoon in Brussels as a Community Council to deal with Community business.

Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution* in 1:3 INTEGRATION THROUGH LAW 63 (1986).

<sup>5</sup> See, e.g. Heathcote, *The Crisis of European Supranationality*, 5 J. COMMON MKT. STUD. 140(1966).

- in the 1970's, the Commission, self-critical and demoralized, was perceived as an overblown and overpaid secretariat of the Community.<sup>6</sup>
- (3) the image and perception of the European Community. Changes in these are usually more telling signs than the reality they represent. In public discourse, "Europe" increasingly means the European Community in much the same way that "America" means the United States

But these surface manifestations are just that - the seismographer's tell-tale line reflecting deeper, below-the-surface movement in need of interpretation. Arguably, the most significant change in Europe, justifying appellations such as "transformation" and "metamorphosis," concerns the evolving relationship between the Community and its Member States.<sup>7</sup>

How can this transformation in the relationship between the Member States and the Community be conceptualized?

In a recent case, the European Court of Justice spoke matter-of-factly of the EEC Treaty<sup>8</sup> as "the basic constitutional charter" of the Community.<sup>9</sup> On this reading, the Treaties have been "constitutionalized" and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state. Put differently, the Community's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles.

This judicial characterization, endlessly repeated in the literature,<sup>10</sup> underscores the fact that not simply the content of Community-Member State discourse has changed. The very architecture of the relationship, the group of structural rules that define the mode of discourse, has mutated. Also, the characterization gives us, as analytical tools, the main concepts developed in evaluating nonunitary (principally federal) polities. We can compare the Community to known entities within meaningful paradigms.

This characterization might, however, lead to flawed analysis. It might be read (and has been read<sup>11</sup>) as suggesting that the cardinal material locus of change has been the realm of law and that the principal

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<sup>6</sup> See, e.g., B. BIESHEUVEL, E. DELL & R. MARJOLIN, REPORT ON EUROPEAN INSTITUTIONS 10-12, 49-56 (1980) (report of the Committee of Three to the European Council, Oct. 1979) [hereinafter REPORT ON EUROPEAN INSTITUTIONS]; see also *Proposal for Reform of the Commission of the European Communities and its Services* (1979) (report made at the request of the Commission by an independent Review Body under the Chairmanship of Mr. Dirk Spierenburg) (report requested in part because of sense of malaise in Commission) [hereinafter *Spierenburg Report*]. For a self-mocking but penetrating picture, see M. VON DONAT, EUROPE: QUI TIRE LES FICELLES? (1979).

<sup>7</sup> The juxtaposition of Community/Member States is problematic. The concept of the Community, analogous to the concept of the Trinity, is simultaneously both one and many. In some senses Community is its individual Member States: in other senses it is distinct from them. This inevitable dilemma exists in all federal arrangements. Moreover, the notion of an individual state itself is not monolithic. When one talks of a Member State's interests, one usually sacrifices many nuances in understanding the specific position of that state. [D]ifferent, conflicting and often contradictory interests, either objective or subjective, are frequently expressed as unified, subjective "national" interests. Behind these articulated, subjective "national" interests, however, lie a variety of sets of social, economic and political relations, as well as different relationships between private and public economic organisations and the state.

F. SNYDER, NEW DIRECTIONS IN EUROPEAN COMMUNITY LAW 90 (1990) (footnote omitted); see also *id.* at 32, 37. While the danger of sacrificing these many voices within a state cannot be avoided, I shall try to minimize it by referring to the interest of the Member States in preserving their prerogatives *as such* in the Community polity.

<sup>8</sup> EEC Treaty, as amended by the Single European Act (SEA).

<sup>9</sup> Case 294/83, *Parti ecologiste, 'Les Verts' v. European Parliament*, 1986 E.C.R. 1339, 1365 [hereinafter *Les Verts*].

<sup>10</sup> For fine recent analyses, see Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990); Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989); and literature cited in both.

The importance of the legal paradigm as a characterizing feature of the Community is recognized also in the nonlegal literature. See e.g., Keohane & Hoffmann, *Conclusions: Community Politics and Institutional Change*, in THE DYNAMICS OF EUROPEAN INTEGRATION 276, 278-282 (W. Wallace ed. 1990).

<sup>11</sup> "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe." Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM.J. INT'L L. 1, 1 (1981); see also A. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE (1969).

actor has been the European Court. But this would be deceptive. Legal and constitutional structural change have been crucial, but only in their interaction with the Community political process.

The characterization might also suggest a principal temporal locus of change, a kind of "Big Bang" theory. It would almost be natural, and in any event very tempting, to locate such a temporal point in that well-known series of events that have shaken the Community since the mid-1980's and that are encapsulated in that larger-than-life date, 1992.<sup>12</sup> There is, after all, a plethora of literature which hails 1992 as the key seismic event in the Community geology.<sup>13</sup> But, one should resist that temptation too. This is not to deny the importance of 1992 and the changes introduced in the late 1980's to the structure and process of Community life and to the relationship between Community and Member States. But even if 1992 is a seismic mutation, explosive and visible, it is nonetheless in the nature of an eruption.

My claim is that the 1992 eruption was preceded by two deeper, and hence far less visible, profound mutations of the very foundational strata of the Community, each taking place in a rather distinct period in the Community's evolution. The importance of these earlier subterranean mutations is both empirical and cognitive. Empirically, the 1992 capsule was both shaped by, and is significant because of, the earlier Community mutations. Cognitively, we cannot understand the 1992 eruption and the potential of its shockwaves without a prior understanding of the deeper mutations that conditioned it.

Thus, although I accept that the Community has been transformed profoundly, I believe this transformation occurred in three distinct phases. In each of the phases a fundamental feature in the relationship of the Community to its Member States mutated; only the combination of all three can be said to have transformed the Community's "operating system" as a non-unitary polity.

These perceptions condition the methodological features of my Article. One feature is a focus on evolution. I shall chart the principal characteristics of the new "operating system" in an historical framework. In other words, I shall tell a story of evolution over time. This approach will enable me not only to describe but also to analyze and explain. Each evolving facet of the new system will be presented as a "development" that needs systemic and historical analysis.

Second, in this analysis I shall focus on what I consider to be the two key *structural* dimensions of constitutionalism in a nonunitary polity: (a) the relationships between political power in the center and the periphery and between legal norms and policies of the center and the periphery; and (b) the principle governing the division of material competences between Community and Member States, usually alluded to as the doctrine of enumerated powers. The structure and process of the Community will thus occupy pride of place rather than substantive policy and content.

The final feature of my methodological approach relates to the position of law in the evolution of the Community. In a sharp critique of a classic study of the European Community legal order, Martin Shapiro made the following comments, which could be levelled against much of the legal literature on the Community:

[The study] is a careful and systematic exposition of the judicial review provisions of the "constitution" of the European Economic Community, an exposition that is helpful for a newcomer to these materials. But - ... [i]t is constitutional law without politics. ... [I]t presents the Community as a juristic idea; the written

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<sup>12</sup> 1992 actually encapsulates, in a game which resembles some new Cabala of Community life, a temporal move to an ever increasing higher celestial sphere. The key dates in this game of numbers are: the 1984 European Parliament Draft Treaty of European Union and the 1985 Commission White Paper (completing the Internal Market), endorsed by the 1986 Single European Act (which entered into force in July 1987), and to which was added the April 1988 Commission (Delors) Plan of Economic and Monetary Union, endorsed in the 1989 Madrid Summit and strengthened by the Dublin 1990 decision to hold two Intergovernmental Conferences leading to a new treaty in 1991. The new treaty is to deal with Economic and Monetary Union as well as Political Union and is to come into effect by the date of arrival at the highest sphere of all, 1992.

<sup>13</sup> "The Single European Act . . . represents the most comprehensive and most important amendment to the EEC Treaty to date." Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects* 11 MICH. J. INT'L L. 1097, 1103 (1990) thereafter "*1991 Project*". Although I agree with Ehlermann that the SEA is the most important formal amendment, I contend that earlier developments without formal amendment should be considered even more important. For a recent comprehensive bibliography of 1992 literature, see 11 MICH. J. INT'L L. 571 (1990).



constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology... [S]uch an approach has proved fundamentally arid in the study of [national] constitutions ... it must reduce constitutional scholarship to something like that early stage of archaeology that resembled the collection of antiquities ... oblivious to their context or living matrix.<sup>14</sup>

The plea for a "Law and ..." approach is of course *de rigueur*, be it Law and Economics, Law and Culture, Law and Society—Law in Context. At one level, a goal of this Article will be precisely to meet aspects of this critique of, and challenge to, European legal literature. I shall try to analyze the Community constitutional order with particular regard to its living political matrix; the interactions between norms and norm-making, constitution and institutions, principles and practice, and the Court of Justice and the political organs will lie at the core of this Article.

And yet, even though I shall look at relationships of legal structure and political process, at law and power, my approach is hardly one of Law in Context—it is far more modest. In my story, de Gaulle and Thatcher, the economic expansion of the 1960's, the oil crisis of the 1970's, Socialists and Christian Democrats, and all like elements of the political history of the epoch play pithy parts. It is perhaps ironic, but my synthesis and analysis are truly in the tradition of the "pure theory of law" with the riders that "law" encompasses a discourse that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable.

The shortcomings of this "purism" (not total to be sure) are self-evident: my contribution cannot be but a part of a more totalistic and comprehensive history. But, if successful, the "pure" approach has some virtues, as its ultimate claim is that much that has happened in the systemic evolution of Europe is self-referential and results from the internal dynamics of the system itself, almost as if it were insulated from those "external" aspects.<sup>15</sup>

## I. 1958 TO THE MID-1970'S: THE FOUNDATIONAL PERIOD—TOWARD A THEORY OF EQUILIBRIUM<sup>16</sup>

The importance of developments in this early period cannot be overstated. They transcend anything that has happened since. It is in this period that the Community assumed, in stark change from the original conception of the Treaty, its basic legal and political characteristics. But understanding the dynamics of the Foundational Period is of more than historical interest; the patterns of Community-Member State interaction that crystalized in this period conditioned all subsequent developments in Europe.

In order to explain the essentials of the Foundational Period, I would like to make recourse to an apparent paradox, the solution to which will be my device for describing and analyzing the European Community system.

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<sup>14</sup> Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 538 (1980). In his comment Shapiro alludes to what in its own terms is a model analysis: Barav, *The Judicial Power of the European Economic Community* 53 S. CAL. L. REV. 461 (1980). And, of course, not all constitutional scholarship of the Community falls into this trap. See, e.g., F. SNYDER, *supra* note 7; Lenaerts, *supra* note 10; Mancini, *supra* note 10.

<sup>15</sup> The "insulation" cannot be total. External events are mediated through the prism of the system and do not have a reality of their own. Cf. Teubner, *Introduction to Autopoietic Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (G. Teubner ed. 1988) (the autopoietic approach to law, pioneered by Niklas Luhmann and elaborated by Gunther Teubner, acknowledges a much greater role to internal discourse of law in explaining its evolutionary dynamics; autopoiesis also gives a more careful explanation to the impact of external reality on legal system, a reality which will always be mediated by its legal perception).

<sup>16</sup> The intellectual genesis of this Article is rooted in my earlier work on the Community. See Weiler, *The Community System: The Dual Character of Supranationalism* 1 YB. EUR. L. 267 (1981). It was later developed in J. WEILER, *IL SISTEMA COMUNITARIO EUROPEO* (1985) (an attempt to construct a general theory explaining the supranational features of the European Community). In the present work I have tried, first, to locate my construct, revised in the light of time, within a broader context of systemic understanding and, second, to use it as a tool to illuminate the more recent phenomenon of 1992.

## A. A PARADOX AND ITS SOLUTION: EXIT AND VOICE

If we were to ask a lawyer during the Foundational Period to compare the evolution of the European Community with the American experience, the lawyer would have said that the Community was becoming "more and more like a federal (or at least pre-federal) state." By contrast, if we were to ask a political scientist at the same point in time to compare the European system with, say, the American system, the political scientist would have given a diametrically opposite answer: "they are growing less and less alike."

The paradox can be phrased in noncomparative terms: from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration. It is not surprising, therefore, that lawyers were characterizing the Community of that epoch as a "constitutional framework for a federal-type structure,"<sup>17</sup> whereas political scientists were speculating about the "survival of supranationalism."<sup>18</sup>

Identifying the factual and conceptual contours of this paradox of the Community and explaining the reasons for it will be the key to explaining the significance of the Foundational Period in the evolution of the Community.

What then are the contours of this legal-political puzzle? How can it be explained? What is its significance?

In *Exit, Voice and Loyalty*,<sup>19</sup> Hirschman identified the categories of Exit and Voice with the respective disciplines of economics and politics. Exit corresponded to the simplified world of the economist, whereas Voice corresponded to the messy (and supposedly more complex) world of the political scientist. Hirschman stated:

Exit and Voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance. In developing my play on that basis I hope to demonstrate to political scientists the usefulness of economic concepts *and to economists the usefulness of political concepts*. This reciprocity has been lacking in recent interdisciplinary work ...<sup>20</sup>

The same can be said about the interplay between legal and political analysis. The interdisciplinary gap there is just as wide.

The interplay of Exit and Voice is fairly clear and needs only a brief adjustment for the Community circumstance. Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation. Apart from identifying these two basic types of reaction to malperformance, Hirschman's basic insight is to identify a kind of zero-sum game between the two. Crudely put, a stronger "outlet" for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice. And although Hirschman developed his concepts to deal with the behaviour of the marketplace, he explicitly suggested that the notions of Exit and Voice may be applicable to membership behaviour in any organizational setting.

Naturally I shall have to give specific characterizations to Exit and Voice in the Community context. I propose first to discuss in legal categories the Exit option in the European Community. I shall then introduce Voice in political categories.

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<sup>17</sup> Stein, *supra* note 4, at 1.

<sup>18</sup> Heathcote, *supra* note 5.

<sup>19</sup> A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

<sup>20</sup> *Id.* at 19 (emphasis in original).

## B. EXIT IN THE EUROPEAN COMMUNITY: FORMAL AND SELECTIVE

Formal (or total) Exit is of course an easy notion, signifying the withdrawal of a Member State from the European Community. Lawyers have written reams about the legality of unilateral Member State withdrawal.<sup>21</sup> The juridical conclusion is that unilateral withdrawal is illegal. Exit is foreclosed. But this is precisely the type of legal analysis that gives lawyers a bad name in other disciplines. It takes no particular insight to suggest that should a Member State consider withdrawing from the Community, the legal argument will not be the critical or determining consideration. If Total Exit is foreclosed, it is because of the high enmeshment of the Member States and the potential, real or perceived, for political and economic losses to the withdrawing state.

Whereas the notion of Total Exit is thus not particularly helpful, or at least it does not profit from *legal* analysis, I would introduce a different notion, that of Selective Exit: the practice of the Member States of retaining membership but seeking to avoid their obligations under the Treaty, be it by omission or commission. In the life of many international organizations, including the Community, Selective Exit is a much more common temptation than Total Exit.

A principal feature of the Foundational Period has been the closure, albeit incomplete, of Selective Exit with obvious consequences for the decisional behavior of the Member States

## C. THE CLOSURE OF SELECTIVE EXIT

The "closure of selective Exit" signifies the process curtailing the ability of the Member States to practice a selective application of the *acquis communautaire*, the erection of restraints on their ability to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions.

In order to explain this process of "closure" I must recapitulate two dimensions of E.C. development: (1) the "constitutionalization" of the Community legal structure; and (2) the system of legal/judicial guarantees.

### 1. The Foundational Period: The "Constitutionalization" of the Community Legal Structure

Starting in 1963 and continuing into the early 1970's and beyond,<sup>22</sup> the European Court of Justice in a series of landmark decisions established four doctrines that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states.

#### a. The Doctrine of Direct Effect

The judicial doctrine of direct effect, introduced in 1963 and developed subsequently,<sup>23</sup> provides the following presumption: Community legal norms that are clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the Community or the Member States) must be regarded as the law of the land in the sphere of application of Community law. Direct effect (a rule of construction in

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<sup>21</sup> For further discussion, see Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISRAEL L. REV. 282, 284-288 (1985).

<sup>22</sup> The process of constitutionalization is an ongoing one. I suggest the 1970's as a point of closure since, as shall be seen, by the early 1970's all major constitutional doctrines were already in place. What followed were refinements.

<sup>23</sup> On the doctrine of direct effect and its evolution, see T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 183-218 (1988).

result) applies to all actions producing legal effects in the Community: the Treaty itself and secondary legislation. Moreover, with the exception of one type of Community legislation,<sup>24</sup> direct effect operates not only in creating enforceable legal obligations between the Member States and individuals, but also among individuals *inter se*. Critically, being part of the law of the land means that Community norms may be invoked by individuals before their state courts, which must provide adequate legal remedies for the E.C. norms just as if they were enacted by the state legislature.

The implications of this doctrine were and are far reaching. The European Court reversed the normal presumption of public international law whereby international legal obligations are result-oriented and addressed to states. Public international law typically allows the internal constitutional order of a state to determine the method and extent to which international obligations may, if at all, produce effects for individuals within the legal order of the state. Under the normal canons of international law, even when the international obligation itself, such as a trade agreement or a human rights convention, is intended to bestow rights (or duties) on individuals within a state, if the state fails to bestow the rights, the individual cannot invoke the international obligation before national courts, unless internal constitutional or statutory law, to which public international law is indifferent, provides for such a remedy. The typical remedy under public international law in such a case would be an inter-state claim. The main import of the Community doctrine of direct effect was not simply the conceptual change it ushered forth. In practice direct effect meant that Member States violating their Community obligations could not shift the locus of dispute to the interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individuals within their own legal order.

Individuals (and their lawyers) noticed this practical implication, and the number of cases brought on the basis of this doctrine grew exponentially. Effectively, individuals in real cases and controversies (usually against state public authorities) became the principal "guardians" of the legal integrity of Community law within Europe similar to the way that individuals in the United States have been the principal actors in ensuring the vindication of the Bill of Rights and other federal law.

#### *b. The Doctrine of Supremacy*

The doctrine of direct effect might not strike all observers as that revolutionary, especially those observers coming from a monist constitutional order in which international treaties upon ratification are transposed automatically into the municipal legal order and in which some provisions of international treaties may be recognized as "self-executing." The full impact of direct effect is realized in combination with the second "constitutionalizing" doctrine, supremacy. Unlike some federal constitutions, the Treaty does not include a specific "supremacy clause." However, in a series of cases starting in 1964<sup>25</sup> the Court has pronounced an uncompromising version of supremacy: in the sphere of application of Community law, any Community norm, be it an article of the Treaty (the Constitutional Charter) or a minuscule administrative regulation enacted by the Commission, "trumps" conflicting national law whether enacted before or after the Community norm. Additionally, although this has never been stated explicitly, the Court has the "Kompetenz-Kompetenz" in the Community legal order, i.e. it is the body that determines which norms come within the sphere of application of Community law.<sup>26</sup>

<sup>24</sup> Community directives may produce direct effects in the vertical relationship between public authority and individuals but not in the horizontal relationship of individuals *inter se*. See Case 148/78, *Pubblico Ministero v. Tullio Ratti*, 1979 E.C.R. 1629; Case 152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority*, 1986 E.C.R. 723.

<sup>25</sup> For a particularly subtle analysis of the supremacy of Community law and its evolution, see J. USHER, *EUROPEAN COMMUNITY LAW AND NATIONAL LAW—THE IRREVERSIBLE TRANSFER* 30-38 (1981). For a more skeptical view, see De Witte, *Retour à Costa*, *La primauté du droit communautaire à la lumière du droit international*, 20 REVUE TRIMESTRIELLE DU DROIT EUROPEENNE, [RTDEUR] 425 (1984). For a survey and analysis of the most recent constitutional developments, see Jacobs, *Constitutional Developments in the European Community and the Impact of the Single European Market After 1992*, 11 MICH. J. INT'L L. 887 (1990). Recently the final resistance to Supremacy was removed with the decision of the French Conseil d'Etat in *Raoul Georges Nicolo and Others* 119901 CMLR 173.

<sup>26</sup> The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within *its sphere of competence*. This more accurate characterization of supremacy renders crucial the question of defining the spheres of competence and in particular the concomitant institutional question which court will have the final decision as to the definition of spheres, i.e. the question of Kompetenz-Kompetenz. The European Court has never addressed this issue squarely, but implicit in the case law is the clear understanding that the Court has, as a matter of Community law, the ultimate say on the reach of

In light of supremacy the full significance of direct effect becomes transparent. Typically, in monist or quasi-monist states like the United States, although treaty provisions, including self-executing ones, may be received automatically into the municipal legal order, their normative status is *equivalent* to national legislation. Thus the normal rule of "later in time" (*lex posterior derogat lex anteriori*) governs the relationship between the treaty provision and conflicting national legislation. A national legislature unhappy with an internalized treaty norm simply enacts a conflicting national measure and the transposition will have vanished for all internal practical effects.<sup>27</sup> By contrast, in the Community, because of the doctrine of supremacy, the E.C. norm, which by virtue of the doctrine of direct effect must be regarded as part of the Law of the Land, will prevail even in these circumstances. The combination of the two doctrines means that Community norms that produce direct effects are not merely the Law of the Land but the "Higher Law" of the Land. Parallels to this kind of constitutional architecture may, with very few exceptions, be found only in the internal constitutional order of federal states.

### c. *The Doctrine of Implied Powers*

One possible rationale underlying the Court's jurisprudence in both direct effect and supremacy has been its attempt to maximize the efficiency by which the Community performs the tasks entrusted to it by the Treaty. As part of this rationale, one must consider the question of specific powers granted the Community to perform these tasks. Direct effect and supremacy will not serve their functions if the Community does not have the necessary instruments at its disposal. The issue in which this consideration came to the fore, in 1970, was the treaty-making power of the Community. The full realization of many E.C. internal policies clearly depended on the ability of the Community to negotiate and conclude international treaties with third parties. As is the case with Member States, the problems facing the Community do not respect its internal territorial and jurisdictional boundaries. The Treaty itself was rather sparing in granting the Community treaty-making power, limiting it to a few specified cases.

In its landmark decision of that period<sup>28</sup> (the period *circa* 1971) the European Court held that the grant of internal competence must be read as implying an external treaty-making power. The European Court added that Community international agreements would be binding not only on the Community as such, but also, as appropriate, on and within the Member States.<sup>29</sup> The significance of this ruling goes beyond the issue of treaty-making power. With this decision, subsequently replicated in different contexts,<sup>30</sup> the European Court added another rung in its constitutional ladder: powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it. Beyond its enormous practical ramifications, the critical point was the willingness of the Court to sidestep the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimizes

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Community law. See e.g., Case 66/80, *Spa Int'l Chemical Corp. v. Amministrazione delle Finanze dello Stato*, 1981 E.C.R. 1191; Case 314/85, *Firma Foto Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199, cases in which the Court reserved to itself the prerogative of declaring Community law invalid.

In principle, under the EEC Treaty, art. 173, there are several reasons for annulling a measure of Community law for example, infringement of an essential procedural requirement under EEC law. This issue, clearly, seems to belong in the exclusive province of the European Court of Justice. On second look however, one of the grounds for annulment, indeed the first mentioned in Article 173, is "lack of competence." If the issue of competence relates only to the respective competence of the various Community institutions, there is no problem in regarding this issue too as falling exclusively in the hands of the European Court of Justice. But the phrase "lack of competence" clearly applies also to the question of general competence of the Community vis-à-vis its Member States. The question as to what part of legislative competence was granted the Community by the Member States is, arguably, as much an issue of Member State constitutional law as it is of Community law. By claiming in the aforementioned cases exclusive jurisdiction to pronounce on these issues the Court was implicitly, but unquestionably, asserting its *Kompetenz-Kompetenz*, its exclusive competence to determine the competence of the Community. Of course one rationale of the decision is to ensure the uniform application of Community law throughout its legal space. But this rationale, functionally persuasive as it may be, does not necessarily override from the perspective of a Member State the interest in the integrity of a state's constitutional order.

<sup>27</sup> Of course, on the international plane, a wrong, for which state responsibility would lie, would have been committed. The remedies for this wrong would be on the international plane as well.

<sup>28</sup> Case 22/70, *Commission of the European Communities v. Council of the European Communities*, 1971 E.C. R. 263 [hereinafter *ERTA*].

<sup>29</sup> For the evolution of the foreign relations power of the Community, see J.GROUX & P. MANIN, *THE EUROPEAN COMMUNITIES IN THE INTERNATIONAL ORDER* (1985); Lachman, *International Legal Personality of the EC: Capacity and Competence*, 1984 *LEGAL ISSUES EUR. INTEGRATION* 3; Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and The Federal Principle in MIXED AGREEMENTS* 35(1983).

<sup>30</sup> The doctrine of implied powers is discussed fully in Tizzano, *Les Compétences de la Communauté* in *TRENTE ANS DE DROIT COMMUNAUTAIRE* 45,49-52 (European Commission, Perspectives Européennes, 1982).

encroachment on state sovereignty. The Court favored a teleological, purposive rule drawn from the book of constitutional interpretation.

In a parallel, although much less noticed, development, the European Court began to develop its jurisprudence on the relationship between areas of Community and Member State competence. The Treaty itself is silent on this issue. It may have been presumed that all authority granted to the Community was to be shared concurrently with the Member States, subject only to the emerging principle of supremacy. Member States could adopt national policies and laws, provided these did not contradict Community law in the same sphere.

In a bifurcated line of jurisprudence laid in place in the early 1970's and continued thereafter, the European Court developed two complementary doctrines: exclusivity and preemption.<sup>31</sup> In a number of fields, most importantly in common commercial policy, the European Court held that the powers of the Community were exclusive. Member States were precluded from taking any action per se, whether or not their action conflicted with a positive measure of Community law. In other fields the exclusivity was not an a priori notion. Instead, only positive Community legislation in these fields triggered a preemptive effect, barring Member States from any action, whether or not in actual conflict with Community law, according to specific criteria developed by the Court.

Exclusivity and preemption not only constitute an additional constitutional layer on those already mentioned but also have had a profound effect on Community decision making. Where a field has been preempted or is exclusive and action is needed, the Member States are pushed to act jointly.

#### *d. The Doctrine of Human Rights*

The last major constitutional tremor was in the field of human rights.<sup>32</sup> The Treaty contains no Bill of Rights and there is no explicit provision for judicial review of an alleged violation of human rights. In a much discussed line of cases starting in 1969, the Court asserted that it would, nonetheless, review Community measures for any violation of fundamental human rights, adopting for its criteria the constitutional traditions common to the Member States and the international human rights conventions to which the Member States subscribed. This enormously complex jurisprudence will be discussed later in this Article, but its symbolic significance in a "constitution-building" exercise deserves mention here. The principal message was that the arrogation of power to the Community implicit in the other three doctrines would not be left unchecked. Community norms, at times derived only from an implied grant of power, often directly effective, and always supreme, would be subjected to a human rights scrutiny by the Court. This scrutiny is important given the "Democracy Deficit" in Community decision making.

If nothing else, this jurisprudence was as clear an indication as any of the audacious self-perception of the European Court. The measure of creative interpretation of the Treaty was so great as to be consonant with a self-image of a constitutional court in a "constitutional" polity. It should be noted further that the human rights jurisprudence had, paradoxically, the hallmarks of the deepest jurists' prudence. The success of the European Court's bold moves with regard to the doctrines of direct effect, supremacy, implied powers, and human rights ultimately would depend on their reception by the highest constitutional courts in the different Member States.

The most delicate issue in this context was that of supremacy. National courts were likely to accept direct effect and implied-powers, but found it difficult to swallow the notion that Community law must prevail even in the face of an explicit later-in-time provision of a national legislature to whom, psychologically, if not in fact constitutionally, Member State courts owed allegiance. Accepting supremacy of Community law without some guarantee that this supreme law would not violate rights fundamental to the legal patrimony

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<sup>31</sup> See Waelbroeck, *The Emergent Doctrine of Community Pre-emption Consent and Re-delegation* in 2 COURTS AND FREE MARKETS 548 (1982).

<sup>32</sup> See Weiler, *Eurocracy and Distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

of an individual Member State would be virtually impossible. This especially would be true in Member States like Italy and Germany where human rights enjoy constitutional protection. Thus, even if protection of human rights per se need not be indispensable to fashioning a federal-type constitution, it was critical to the acceptance by courts in the Member States of the other elements of constitution-building. One by one, the highest jurisdictions in the Member States accepted the new judicial architecture of Europe.<sup>33</sup>

The skeptic may, however, be justified in challenging the "new legal order" I have described incorporating these doctrines,<sup>34</sup> especially the sharp lines it tries to draw in differentiating the "new" Community order from the "old" public international law order. After all, a cardinal principle of international law is its supremacy over national law. The notion of direct effect, or at least self-execution, is also known to international law, and implied powers jurisprudence has operated in the jurisprudence of the International Court of Justice as well.<sup>35</sup> If international law shares these notions of supremacy, direct effect, and implied powers,<sup>36</sup> the skeptic may be correct in challenging the characterization of Community development in the Foundational Period as something out of the ordinary.

One reply is that the Community phenomenon represents a quantitative change of such a magnitude that it is qualitative in nature. Direct effect may exist in international law but it is operationalized in so few instances that it must be regarded as the exception which proves the general rule of its virtual nonexistence. In the Community order direct effect is presumptive.<sup>37</sup> The question of supremacy, however, brings the key difference between the two systems into sharp relief. International law is as uncompromising as Community law in asserting that its norms are supreme over conflicting national norms. But, international law's horizontal system of enforcement, which is typically actuated through the principles of state responsibility, reciprocity, and counter measures, gives the notion of supremacy an exceptionally rarified quality, making it difficult to grasp and radically different from that found in the constitutional orders of states with centralized enforcement monopolies.

The constitutionalization claim regarding the Treaties establishing the European Community can only be sustained by adding one more layer of analysis: the system of judicial remedies and enforcement. It is this system, as interpreted and operationalized by the European judicial branch, that truly differentiates the Community legal order from the horizontality of classical public international law.

## **2. The Community System of Judicial Review**

As mentioned above, the hierarchy of norms within the European Community is typical of a nonunitary system. The Higher Law of the Community is, of course, the Treaty itself. Neither Community organs nor the Member States may violate the Treaty in their legislative and administrative actions. In addition, Member States may not violate Community regulations, directives, and decisions. Not surprisingly, then, the Community features a double-limbed system of judicial review, operating on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: (1) the measures of the Community itself (principally acts of the Council of Ministers, Commission, and European Parliament), which are reviewable for conformity with the Treaties; and (2) the acts of the Member States, which are reviewable for their conformity with Community law and policy, including the above-mentioned secondary legislation.

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<sup>33</sup> The story of acceptance of the principle of supremacy by national courts is charted in H. SCHERMERS & D. WAELEBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 115-24 (1987). See also M. VAN EMPEL, LEADING CASES ON THE LAW OF THE EUROPEAN COMMUNITIES 203-39 (1990).

<sup>34</sup> See e.g. Wyatt, *New Legal Order, or Old?* 7 EUR. L. REV. 147 (1982); see also De Witte, *supra* note 25.

<sup>35</sup> See e.g., *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174.

<sup>36</sup> One could also argue that protection of fundamental human rights has become part of the customary law patrimony of international law. Cf., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (deliberate torture under color of official authority violates universally accepted norms of international law of human rights).

<sup>37</sup> See Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983).

Needless to say, in the context of my discussion of the closure of Exit and of Member States' attempts to disregard those obligations they dislike, the effectiveness of review of the second set of measures assumes critical importance. I, therefore, focus only on that aspect of judicial review here.

#### *a. Judicial Review at the Community Level*

Either the Commission or an individual Member State may, in accordance with Articles 169-72 of the EEC Treaty, bring an action against a Member State for failure to fulfill its obligations under the Treaty. Generally, this failure takes the form either of inaction in implementing a Community obligation or enactment of a national measure contrary to Community obligations. The existence of a mandatory and *exclusive* forum for adjudication of these types of disputes sets the Community apart from many international organizations.

The role of the Commission is even more special. As one commentator noted, "[u]nder traditional international law the enforcement of treaty obligations is a matter to be settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent Community body, the Commission, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State."<sup>38</sup>

At the same time, the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear. Four weaknesses are particularly glaring:

- (1) the procedure is political in nature; the Commission (appropriately) may have nonlegal reasons not to initiate a prosecution;
- (2) a centralized agency with limited human resources is unable adequately to identify, process, and monitor all possible Member State violations and infringements;
- (3) Article 169 may be inappropriate to apply to small violations; even if small violations are properly identified, dedicating Commission resources to infringements that do not raise an important principle or create a major economic impact is wasteful; and finally, and most importantly,
- (4) no real enforcement exists; proceedings conclude with a "declaratory" judgment of the European Court without enforcement sanctions.

#### *b. Judicial Review at the Member State Level*

The weaknesses of Articles 169-172 are remedied to an extent by judicial review within the judicial systems of the Member States in collaboration with the European Court of Justice. Article 177 provides, *inter alia*, that when a question concerning the interpretation of the Treaty is raised before a national court, the court may suspend the national proceedings and request a preliminary ruling from the European Court of Justice in Luxembourg on the correct interpretation of the Treaty. If the national court is the court of last resort, then it must request a European Court ruling. Once this ruling is made, it is remitted back to the national court which gives, on the basis of the ruling, the opinion in the case before it. The national courts and the European Court are thus integrated into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. That, apparently, is how the framers of the Treaty understood it.<sup>39</sup> However, very often the factual situation in which Article 177 comes into play involves an individual litigant pleading in national court that a rule, measure, or national practice should not be applied because it violates the Community obligations

<sup>38</sup> Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 EUR. L. REV. 442, 443 (1979).

<sup>39</sup> Pescatore, *Les Travaux du "Groupe Juridique" dans la Négociation des Trairés de Rome*, 34 STUDIA DIPLOMATICA 159, 173 (1981)

("Pour autant que je m'en souviens, l'acceptation de cette idée dans son principe, ne fit pas de difficultés: je penche à croire que tous, peut-être, n'avaient pas conscience de l'importance de cette innovation.").



of the Member State. In this manner the attempts of Member States to practice selective Community membership by disregarding their obligations have become regularly adjudicated before their own national courts. On submission of the case, the European Court has rendered its interpretation of Community law within the factual context of the case before it. Theoretically, the European Court may not itself rule on the *application* of Community law. But, as one scholar notes:

[I]t is no secret ... that in practice, when making preliminary rulings the Court has often transgressed the theoretical border line ... [I]t provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.<sup>40</sup>

The fact that the national court renders the final judgment is crucial to the procedure. The binding effect and enforcement value of such a decision, coming from a Member State's own court, may be contrasted with a similar decision handed down in declaratory fashion by the European Court under the previously discussed Article 169 procedure. A national court opinion takes care of the most dramatic weakness of the Article 169 procedure: the ability of a Member State, in *extremis*, to disregard the strictures of the European Court. Under the 177 procedure this disregard is impossible. A state, in our Western democracies, cannot disobey its own courts.

The other weaknesses of the 169 procedure are also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions; small as well as big violations are adjudicated; and, in terms of monitoring, the Community citizen becomes, willy-nilly, a decentralized agent for monitoring compliance by Member States with their Treaty obligations.

The Article 177 system is not complete, however. Not all violations come before national courts; the success of the system depends on the collaboration between national courts and the European Court of Justice; and Member States may, and often have, utilized the delays of the system to defer ruling.

On the other hand, the overall effect of the judicial remedies cannot be denied. The combination of the "constitutionalization" and the system of judicial remedies to a large extent *nationalized* Community obligations and introduced on the Community level the *habit of obedience* and the respect for the rule of law which traditionally is less associated with international obligations than national ones.<sup>41</sup>

It is at this juncture that one may speculate about the most profound difference between the Community legal order and international law generally. The combined effect of constitutionalization and the evolution of the system of remedies results, in my view, in the removal from the Community legal order of the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and countermeasures. The Community legal order, on this view, is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure.<sup>42</sup> Without these features, so central to the classic international legal order, the Community truly becomes something "new."

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<sup>40</sup> Rasmussen, *Why is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR L. REV. 112, 125 (1980).

<sup>41</sup> See H.L.A. HART, *THE CONCEPT OF LAW* (1961) (especially chs. 3 & 10); see also Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System*, 17 CORNELL INT'L L.J. 1 (1984).

<sup>42</sup> The argument for treating the Community as a fully self-contained regime in which states cannot resort to countermeasures rests, briefly, on two lines of reasoning. First, the Treaty itself provides for a comprehensive system of compulsory judicial dispute resolution and remedies, akin to that in a federal state, which would exclude the apparatus of state responsibility and countermeasures, a creature of the self-help horizontality of international law. Cf. Submissions of the Commission cited approvingly by the Court in Joined Cases 142 & 143/80, *Amministrazione Delle Finanze Dello Stato v. Essevi*, 1981 E.C.R. 1413, 1431 ([a]bove all, it must be pointed out that in no circumstances may the Member States rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty"); Joined Cases 90 & 91/63, *EEC Commission v. Luxembourg*, 1964 E.C.R. 625; Case 232/78, *EEC Commission v. France* 1979 E.C.R. 2729. See also *Ministere Public v. Guy Blangueron* [1990] 2 CMLR 340 ("[A]ccording to settled case law, a Member state cannot justify failure to fulfill its obligation . . . by the fact that other Member States have also failed to fulfill theirs. . . . Under the legal system laid down by the Treaty the implementation of Community law by Member States cannot be subject to a condition of reciprocity.") (p. 6).

At the end of the day the debate about the theoretical difference between international law and Community law may have the relevance of some long-lasting theological disputes—i.e. none at all. Whatever the differences in theory, there can be no argument that the Community legal order as it emerged from the Foundational Period appeared in its operation much closer to a working constitutional order, a fact which, as will shortly emerge, had a fundamental impact on the way in which it was treated by its Member States.

#### D. THE DYNAMICS OF VOICE IN THE FOUNDATIONAL PERIOD

I return to the main theme of this part of the analysis: the relationship between Voice and Exit.

The closure of Exit, in my perspective, means that Community obligations, Community law, and Community policies were "for real." Once adopted (the crucial phrase is "once adopted"), Member States found it difficult to avoid Community obligations. If Exit is foreclosed, the need for Voice increases. This is precisely what happened in the European Community in the Foundational Period. In what may almost be termed a ruthless process, Member States took control over Community decision making.

We may divide the Community decision making process into the following phases: (1) the political impetus for a policy; (2) the technical elaboration of policies and norms; (3) the formulation of a formal proposal; (4) the adoption of the proposal; and (5) the execution of the adopted proposal.

The Treaty's original decision making process had strong supranational elements. The European Commission, the Community body par excellence, had virtually exclusive proposal-making competence (the nearly exclusive "right of initiative"), essentially enabling it to determine the agenda of the Community. The Commission was also responsible for preparing the proposals for formal adoption by the Council of Ministers (comprising the representatives of the Member States) and for acting as the secondary legislature of the Community. The adoption process was supranational, especially in relation to most operational areas, in that it foresaw, by the end of the transitional period, decision by majority voting. Finally, execution (by administrative regulation) was, again, the preserve of the Commission.

During the Foundational Period, in every phase of decision making, the Member States, often at the expense of the Commission, assumed a dominant say. The cataclysmic event was the 1965 crisis brought about by France, which objected to the entry into force of the Treaty provisions that would actually introduce majority voting at the end of the Transitional Period. The crisis was "resolved" by the legally dubious Luxembourg Accord,<sup>43</sup> whereby, de facto, each and every Member State could veto Community proposed legislation. This signaled the rapid collapse of all other supranational features of Community decision making.

The European Council of Ministers, an organ *dehors* the Treaties, assumed the role of giving impetus to the policy agenda of the Community. The Commission formally retained its exclusive power of proposal, but in reality was reduced to something akin to a secretariat. Technical elaboration became infused with Member State influence in the shape of various groups of national experts.<sup>44</sup> In the proposal formulation process the Commission commenced a practice of conducting a first, unofficial round of negotiations with

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Second, even in an extreme case in which a Member State failed to execute a judgment of the European Court, the recourse to countermeasures would inevitably affect individuals removed from the dispute, militating against the very notion of a "new legal order of international law . . . the subjects of which comprise not the only Member States but also their nationals." Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming Van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. Recital 2 [hereinafter *Van Gend & Loos*]. Contra Simma, *Self Contained Regimes*, 16 NETHERLANDS Y.B. INT'L L. 111, 123-29 (1985) (sustains ultimate recourse, even for Community, to public law and classical state responsibility).

<sup>43</sup> The text may be found in B:2 ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW ¶ B10-336. Although the Accord does not as such sanction the veto power, "a convention giving each Member State, in effect, a right of veto in respect of its 'very important interests' was established by the practice of the Council after 1965." *Id.* at ¶ B10-337.

<sup>44</sup> See e.g., REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6; A. SPINELLI, TOWARDS THE EUROPEAN UNION (1983).

COREPER, the sub-organ of Council.<sup>45</sup> In addition, as mentioned, the Luxembourg Accord debilitated the Council's voting process, giving each Member State control over proposals and their adoption. Even in the execution of policies, the Commission and Community were "burdened" with a vast range of management and other regulatory committees composed of Member State representatives who controlled that process as well.<sup>46</sup>

Increased Voice is thus a code for a phenomenon of the Member States jointly and severally taking control of decision making, leading to the process by which the original institutional structures foreseen in the Treaties broke down. It caused the so-called *Lourdeur*<sup>47</sup> of the Community process and is believed by many to be the source of much of the Community malaise of that period and beyond.

## E. THE RELATIONSHIP BETWEEN EXIT AND VOICE IN THE FOUNDATIONAL PERIOD

How then do we explain these conflicting developments on the legal and political planes? I suggest explanations at three overlapping levels. The combination captures the richness and significance of the Community experience in the Foundational Period.

First, the developments in each of the respective political and legal domains can be explained as entirely self-referential and self-contained. Thus, for example, the very advent of de Gaulle had a major negative impact in the political realm.<sup>48</sup> Within the realm of law there was a clear internal legal logic which led the Court from, for example, the doctrine of direct effect to the doctrine of supremacy.<sup>49</sup>

The second explanation is that in the face of a political crisis already manifest in the 1960's, resulting from, *inter alia*, a new posture of France under de Gaulle and declining political will among the Member States to follow the decision making processes of the Treaty and to develop a loyalty to the European venture, the European Court of Justice stepped in to hold the construct together.<sup>50</sup> In this second level of analysis the relationship is unidirectional. The integrating federal legal development was a response and reaction to a disintegrating confederal political development.

The most fascinating question in this regard is how to explain the responsiveness of the Member State courts to the new judicial architecture. We have already noted that absent such responsiveness—normatively in accepting the new constitutional doctrines and practically in putting them into use through the application of the preliminary reference procedure of Article 177—the constitutional transformation ushered by the European Court would have remained with all the systemic deficiencies of general public international law. One could hardly have talked with credibility about a new legal order.

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<sup>45</sup> COREPER, the Committee of Permanent Representatives, is composed of permanent representatives of the Member States to the Community who fulfill the essential day-to-day role of State representatives to Council. On the role of COREPER within the work of the Council of Ministers, see e.g., REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6 at 39-41.

<sup>46</sup> In passing, I should note that Member State control meant governmental-executive control. One net effect of this process was the creation of the so-called democracy deficit, which I discuss *infra*. See *infra* text following note 61.

<sup>47</sup> The heaviness of the decisional process, debilitating to the efficiency of the Council and the Community as a whole. See e.g., REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6 at 27-29, 37-38.

<sup>48</sup> "Throughout the eleven years during which General de Gaulle [who was 'allergic' to anything supranational] remained in power, no notable progress could be made in integration, either in the political domain, the institutional domain, the monetary domain or in the geographical extension of the common market." Greilsammer, *supra* note 1, at 141.

<sup>49</sup> If one accepts, as one must, the principle of the uniform application of Community law throughout the Community, a clear link exists whereby a holding of direct effect compels a holding of supremacy. In *Van Gend & Loos*, 1963 E.C.R. Recital 2, the Commission and the Advocate General differed as to whether direct effect existed. The Advocate General argued that since the Community had no principle of supremacy there was no direct effect. The Commission argued that direct effect would compel supremacy. Thus, although they disagreed on the result, they acknowledged the linkage between the two.

<sup>50</sup> The most radical challenge to the Court as an integrationist activist transcending the political will of the Member States is H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986), which also critiques most books on the Court that support this approach. But see Cappelletti, *Is the European Court of Justice "Running Wild"?* 12 EUR. L. REV. 3 (1987); Weiler, *The Court of Justice on Trial* (Review Essay) 24 COMMON MKT. L. REV. 555 (1987) (reviewing H. RASMUSSEN, *supra*).

Due to its nature, reply to the question must remain speculative. In addition, probably no one answer alone can explain this remarkable phenomenon. The following are some possible explanations in brief, all of which may have contributed to the overall enlistment of the judicial branch in Europe.

The first reply, one which holds considerable force, is the most obvious. Courts are charged with upholding the law. The constitutional interpretations given to the Treaty of Rome by the European Court of Justice carried legitimacy derived from two sources: first from the composition of the Court, which had as members senior jurists from all Member States, and second from the legal reasoning of the judgments themselves. One could cavil with this or that decision,<sup>51</sup> but the overall construct had an undeniable coherence, which seemed truly to reflect the purposes of the Treaty to which the Member States had solemnly adhered.

Secondly, it is clear that a measure of transnational incrementalism developed. Once some of the highest courts of a few of the Member States endorsed the new constitutional construct, their counterparts in other Member States heard more arguments that those courts should do the same, and it became more difficult for national courts to resist the trend with any modicum of credibility. The fact that the idea of European integration in itself held a certain appeal could only have helped in this regard.

Last, but not least, noble ideas (such as the Rule of Law and European Integration) aside, the legally driven constitutional revolution was a narrative of plain and simple judicial empowerment. The empowerment was not only, or even primarily, of the European Court of Justice, but of the Member State courts, of lower national courts in particular. Whereas the higher courts acted diffidently at first, the lower courts made wide and enthusiastic use of the Article 177 procedure. This is immediately understandable both on a simple individual psychological level and on a deep institutional plane. Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation. For many this would be heady stuff. Even in legal systems such as that of Italy, which already included judicial review, the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land. Institutionally, for courts at all levels in all Member States, the constitutionalization of the Treaty of Rome, with principles of supremacy and direct effect binding on governments and parliaments, meant an overall strengthening of the judicial branch vis-à-vis the other branches of government. And the ingenious nature of Article 177 ensured that national courts did not feel that the empowerment of the European Court of Justice was at their expense.<sup>52</sup>

Finally there is a third, critical, layer, that explains the relationship between the contrasting legal and political developments during the Foundational Period. It might be true that the Court of Justice stepped in the face of a political decline. But it would be wrong to consider the relationship in exclusively unidirectional terms. The relationship has been bidirectional and even circular. The integrating legal developments at least indirectly influenced the disintegrating political ones.

I suggest a tentative thesis, which perhaps could even be part of a general theory of international lawmaking. This thesis meshes neatly with Hirschman's notion of Exit and Voice and posits a relationship between "Hard Law" and "Hard Lawmaking." The "harder" the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law's "opposability" to them. When the international law is "real," when it is "hard" in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decision making suddenly becomes important, indeed crucial.<sup>53</sup> This is a way of explaining what happened in the Community in that period.

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<sup>51</sup> Indeed, in several of the key cases, such as *Van Gend & Loos*, the Court's own Advocate General differed from the Court. For an analysis, see Stein, *supra* note 4. See also H. RASMUSSEN, *supra* note 50.

<sup>52</sup> In some areas, such as human rights, the high courts of at least some of the Member States needed some judicial persuasion. See *supra* text following note 32 and *infra* text following note 84.

<sup>53</sup> For example, in the United Nations, the following structure exists: in the General Assembly, resolutions (in principle, not binding) may be adopted by majority vote; in the Security Council, resolutions (binding) may be vetoed by the Permanent Members. The Permanent Members must be seen, at least partially, as representative of the major interests of the different political groupings in the General Assembly.

What we called, in Hirschmanian terms, the closure of Selective Exit was just that: the process by which Community norms and policy hardened into binding law with effective legal remedies. The increase in Voice was the "natural reaction" to this process. The Member States realized the critical importance of taking control of a decision making process, the outcome of which they would have to live with and abide by. By "natural reaction" I do not mean to imply a simplistic causal relationship. I do not suggest that, as a direct result of the decisions of the Court, in say, *Van Gend & Loos*<sup>54</sup> (in 1963) or *Costa v. ENEL*<sup>55</sup> (in 1964), the French government decided (in 1965) to precipitate the crisis that led to the Luxembourg Accord. I suggest that the constitutionalization process created a normative construct in which such a precipitous political development becomes understandable. Because Community norms in terms of substance were important,<sup>56</sup> and because they were by then situated in a context that did not allow selective application, control of the creation of the norm itself was the only possible solution for individual states.<sup>57</sup>

Historically (and structurally) an equilibrium was established. On the one hand stood a strong constitutional integrative process that, in radical mutation of the Treaty, linked the legal order of the Community with that of the Member States in a federal-like relationship. This was balanced by a relentless and equally strong process, also deviating radically from the Treaty, that transferred political and decision making power into a confederal procedure controlled by the Member States acting jointly and severally.

The linkage between these two facets of the Community may explain and even resolve several issues regarding the process of European integration.

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The Council of Europe, to a certain extent, with the exception of the human rights apparatus, has a similar construction. Year after year the Council of Europe passes resolutions and treaties in a seemingly effortless stream. This is so because resolutions and draft treaties of the Council of Europe do not, as such, bind the Member States. Members can always "go home," think about individual proposals, and decide to accept or reject them.

A similar linkage exists with relation to conclusion of multilateral treaties and the permissible regime of reservations. Under the old regime, texts of multilateral treaties were adopted, unless otherwise provided, by unanimous vote of the contracting parties (Enhanced Voice). The corollary was that states were highly restricted in their ability to make reservations; these had to be accepted by all parties to the Treaty (Limited Exit). Under the new treaty law-ushered by the Reservation to the Convention on Genocide Case, 1951 I.C.J. 15, and later by the Vienna Convention on the Law of Treaties (1969) Articles 9(2) and 19-21-the text of a multilateral treaty could be adopted by the vote of two-thirds of the states present and voting (Reduced Voice), but the corollary was the greater ease with which States could make reservation to such texts. In some modern conventions such as the 1982 Law of the Sea Convention the unanimous adoption (Enhanced Voice) was again accompanied by a prohibition on reservations (Reduced Exit). A similar development may be noted in relation to the doctrine of the Persistent Objector in the formation of customary law. It is clear that the modern approach to custom is more lenient towards the formation of custom with more limited participation of states in that formation (Reduced Voice). It has been predicted that this in turn will lead to a greater invocation by states of the doctrine of Persistent Objector (Enhanced Exit), *See Stein, The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law* 26 HARV. INT'L L.J. 457 (1985).

The relationship between decision making and normative outcomes exists beyond the realm of public law and may be found in private law institutions as well. Thus Gilmore, in discussing the evolution of contract theory, contrasts the 19th century model, which embraced a narrow consideration theory (whereby it was difficult to enter into a contract), but also a narrow excuse theory (difficult to get out). In our terms this would correspond to High Voice and Restricted Exit. Twentieth century contract theory saw a move towards "a free and easy approach to the problem of contract formation" (Reduced Voice), which "goes hand in hand with a free and easy approach to the problem of contract dissolution or excuse" (Easy Exit). G. GILMORE, *THE DEATH OF CONTRACT* 48 (1974).

<sup>54</sup> *Supra* note 42.

<sup>55</sup> Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

<sup>56</sup> Even if the Community did not, in its initial phases, affect the lives of many citizens, it was crucial in some important economic and political sectors, for example, agriculture.

<sup>57</sup> It is difficult to adduce hard proof for this thesis, but the following is evocative. In the British White Paper presented to Parliament by the Prime Minister in July 1971 advocating British accession to the Community, the linkage is rather clear. *See THE UNITED KINGDOM AND THE EUROPEAN COMMUNITIES*, 1971, CMND 4715, ¶¶ 29-30 [hereinafter *THE UK AND THE EC*]. In *MEMBERSHIP OF THE EUROPEAN COMMUNITY: REPORT ON RENEGOTIATION*, 1975, CMND 6003, the linkage is actually made. In a section entitled "The Special Nature of the Community," ¶ 118, one finds first an explanation of "The direct applicability of Community law in member countries," ¶ 122, corresponding to our analysis of the constitutionalization and the closure of Selective Exit. Immediately afterwards, in "Power of member governments," ¶¶ 123-25, one finds: "[T]he importance of accommodating the interests of individual member states is recognised in the Council's general practice of taking decisions by consensus, so that each member state is in a position to block agreement unless interests to which it attaches importance are met." ¶ 124. The authoritative *ENCYCLOPAEDIA OF EEC LAW*, in interpreting the Luxembourg Accord and the veto power, states: "the existence of that convention [veto power] was a significant factor in the decision by Denmark and the United Kingdom, and subsequently by Greece, to enter the Communities." B:2 *ENCYCLOPAEDIA OF EEC LAW*, *supra* note 43, at 11 B10-337.

In *ERTA*, *supra* note 28, one of the key "constitutionalizing" cases, Advocate General Dutheil de Lamoignon seems to suggest the same type of linkage: "Finally, from the point of view of the development of common policies, are there not grounds for fearing that the Ministers would resist the adoption of regulations which would result in the loss, in cases not provided for by the Treaty, of their authority in international matters?" *Id.* at 292.

The first issue relates to the very process of constitutionalization in the 1960's and early 1970's, a phenomenon that has been, as noted, at the center of legal discourse about the Community. Indeed, insiders refer to this period, especially in the jurisprudence of the European Court, as the "Heroic Period." But, as we observed, these profound constitutional mutations took place in a *political* climate that was somewhat hostile to, and suspicious of, supranationalism. How then — and this is the dilemma — could changes so profound, which would normally require something akin to a constitutional convention subject to elaborate procedures of diplomatic negotiation and democratic control, occur with a minimal measure of political (read: Member State) opposition?<sup>58</sup> Part of the answer rests, of course, in the fact that constitutionalization during the Foundational Period was judicially driven, thus attaching to itself that deep-seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts.

The explanation I suggest is derived from the Hard Law/Hard Lawmaking theorem, from the interplay of Exit and Voice. Instead of a simple (legal) cause and (political) effect, this subtler process was a circular one. On this reading, the deterioration of the political supranational decisional procedures, the suspension of majority voting in 1966, and the creation and domination of intergovernmental bodies such as COREPER and the European Council constituted the political conditions that allowed the Member States to digest and accept the process of constitutionalization. Had no veto power existed, had intergovernmentalism not become the order of the day, it is not clear to my mind that the Member States would have accepted with such equanimity what the European Court of Justice was doing. They could accept the constitutionalization because they took real control of the decision making process, thus minimizing its threatening features.

Our speculation should not stop here; while this description of the legal-political equilibrium may explain how and why the Member States were willing to digest, or accept, the constitutional revolution, it does not explain their interest in doing so. A theory of state action without interest analysis is incomplete. What, then, was the interest of the Member States in not simply accepting the changing morphology of the Community but actually pursuing it?

The fundamental explanation is that the Member States, severally and jointly, balanced the material and political costs and benefits of the Community. Both the Community vision and its specific policy agenda were conceived as beneficial to the actors. It may, at first sight, seem reasonable when thinking about the Community and its Member States to conceive of this relationship as a zero-sum game: the strengthening of the Community must come "at the expense" of the Member States (and vice-versa). However, the evolution of the Community in its Foundational Period ruptures this premise of zero-sum. The strengthening of the Community was accompanied by the strengthening of its Member States.<sup>59</sup> Stanley Hoffmann gave a convincing political explanation of this phenomenon.<sup>60</sup> But the phenomenon also derives from the unique legal-political equilibrium of the Community structure.

The interplay between the Community normative and decision making regimes, as explained above, gave each individual Member State a position of power brokerage it never could have attained in more traditional fora of international intercourse. The constitutional infrastructure "locked" the Member States into a communal (read: Community) decision making forum with a fairly rigorous and binding legal discipline. The ability to "go it alone" was always somewhat curtailed, and in some crucial areas, foreclosed. The political super-structure, with its individual veto power and intergovernmental discourse, gave each Member State a decisive position of influence over the normative outcome.

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<sup>58</sup> Our confusion is enhanced if we consider that the changes introduced by the Single European Act in 1986 were *per se* less radical, and yet necessitated a tortuous political process, including a constitutional challenge in the supreme court of one of the Member States. See *Crotty v. An Taoiseach*, 49 Common Mkt. L.R. 666 (1987) (Irish Supreme Court).

<sup>59</sup> It is easy to identify the interest that the small states would have in this structure: their weight in, and power over, decision making in inherently interdependent policy areas becomes incomparably larger compared to outside arms-length negotiations. In principle this is true also for larger Member States. *Cf.* THE UK AND THE EC, *supra* note 57, at 7- 14. In addition, the larger Member States had particular interests that could be vindicated effectively through the Community.

Examples are the French interest in a European-wide common agricultural policy and the German interest in relegitimation.

<sup>60</sup> Hoffman, *Reflection on the Nation-State in Western Europe Today*, in THE EUROPEAN COMMUNITY-PAST, PRESENT & FUTURE 21, 22 (L. Tsoukalis ed. 1983).

Finally, in at least an indirect way, these basic features of the Foundational Period accentuate and explain a permanent feature of the Community: its so-called democracy deficit.<sup>61</sup>

As already mentioned, the reference to "Member State" as a homogeneous concept/actor is misleading in several ways<sup>62</sup>—and increasingly so in an ever more complex Community.<sup>63</sup> In discussing the Democracy Deficit it is more accurate to speak instead of the "government," i.e. the executive branch, of each Member State. Admittedly, the Treaty itself laid the seeds for the Democracy Deficit by making the statal executive branch the ultimate legislator in the Community. The decision making Council members are first of all members of their respective executive branches and thus directly representative of their home state governments. The only democratic check on Council decisions is a submission to the meek control of the European Parliament. Direct democratic accountability, by design or by default, remains vested in national parliaments to whom the members of the Council are answerable.

The mutations of the legal structure and the political process in the Foundational Period impacted this basic deficiency in a variety of ways.

The process of constitutionalization, hardening Community measures into supreme, often directly effective, laws backed with formidable enforcement mechanisms, meant that once these laws were enacted, national parliaments could not have second thoughts or control their content at the national, implementing level. The only formal way in which accountability could be ensured would be by tight ex ante control by national parliaments on the activities of ministers in Community fora. This has proved largely not feasible.<sup>64</sup> The net result is that the executive branches of the Member States often act together as a binding legislator outside the decisive control of any parliamentary chamber.

The changes in the decision making processes meant that it was not simply the Voice of the Member States that was enhanced, but the Voice of "governments." It is not entirely fanciful to surmise that the acceptability of the Community system in the Foundational Period was not simply because it vindicated the interests of Member States but also because it enhanced the power of governments (the executive branch) per se.

## F. CONCLUSIONS TO THE FOUNDATIONAL PERIOD

The Foundational Period has been characterized by legal scholars as an heroic epoch of constitution-building in Europe, as a time of laying the foundation for a federal Europe. It has been described by political scientists as a nadir in the history of European integration, as an era of crumbling supranationalism. The thrust of my argument has been that a true understanding of this period can only be achieved by a marriage of these two conflicting visions into a unified narrative in which the interaction of the legal and the political, and the consequent equilibrium, constitute the very fundamental feature of the Community legal structure and political process.

This very feature helps explain the uniqueness and stability of the Community for much of its life: a polity that achieved a level of integration similar to that found only in full-fledged federal states and yet that contained unthreatened and even strengthened Member States.

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<sup>61</sup> See D. MARQUAND, *PARLIAMENT FOR EUROPE* 64-66 (1979); see also *Report drawn up on behalf of the committee on Institutional Affairs on the democratic deficit in the European Community*, PE DOC. NO. A 2-276/87, (Feb. 1, 1988) [hereinafter *Toussaint Report*].

<sup>62</sup> See *supra* note 7.

<sup>63</sup> See F. SNYDER, *supra* note 7, at 32-36.

<sup>64</sup> See Sasse, *The Control of the National parliaments of the Nine over European Affairs* in *PARLIAMENTARY CONTROL OVER FOREIGN POLICY* 137 (A. Cassese ed. 1980). Denmark may be the exception. See Mendel, *The Role of Parliament in Foreign Affairs in Denmark* in *PARLIAMENTARY CONTROL OVER FOREIGN POLICY*, *supra* at 53, 57.

## **II. 1973 TO THE MID-1980'S: MUTATION OF JURISDICTION AND COMPETENCES**

### **A. INTRODUCTION**

The period of the mid-1970's to the mid-1980's is traditionally considered a stagnant epoch in European integration. The momentum created by the accession of Great Britain, Ireland, and Denmark did not last long. The Oil Crisis of late 1973 displayed a Community unable to develop a common external posture. Internally the three new Member States, two of which, the U.K. and Denmark, were often recalcitrant partners, burdened the decision making process, forcing it to a grinding pace. It is not surprising that much attention was given in that period to proposals to address a seriously deteriorating institutional framework and to re-launch the Community.<sup>65</sup>

And yet it is in this politically stagnant period that another large scale mutation in the constitutional architecture of the Community took place, a mutation that has received far less attention than the constitutional revolution in the Foundational Period. It concerned the principle of division of competences between Community and Member States.

In most federal polities the demarcation of competences between the general polity and its constituent units is the most explosive of "federal" battlegrounds. Traditionally, the relationship in nonunitary systems is conceptualized by the principle of enumerated powers. The principle has no fixed content and its interpretation varies from system to system; in some it has a stricter and in others a more relaxed construction. Typically, the strength by which this principle is upheld (or, at least, the shrillness of the rhetoric surrounding it) reflects the strength of the belief in the importance of preserving the original distribution of legislative powers as a defining feature of the polity. Thus, there can be little doubt about the very different ethos that underscored the evolution of, for example, the Canadian and U.S. federalisms, in their formative periods and beyond, regarding enumeration. Nowhere is this different ethos clearer than in the judicial rhetoric of enumeration. The dicta of Lord Atkin<sup>66</sup> and Chief Justice Marshall<sup>67</sup> concerning powers are the theatre pieces of this rhetoric. Likewise, the recurring laments over the "death of federalism"<sup>68</sup> in this or that federation are typically associated with a critique of a relaxed attitude towards enumeration and an inevitable shift of power to the center at the expense of the states.

The different views about the strictness or flexibility of enumeration reflects a basic understanding of federalism and integration. Returning to the Canadian/U.S. comparison, we find the Atkin and Marshall dicta re-conceptualized as follows: Wade, in the context of the Canadian experience, suggests that:

The essential elements of a federal constitution are that powers are divided between the central and provincial governments and that neither has legal power to encroach upon the domain of the other, except through the proper process of constitutional amendment. ... [T]he spirit ... which is inherent in the

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<sup>65</sup> See REPORT ON EUROPEAN INSTITUTIONS, *supra* note 6; *Spierenburg Report*, *supra* note 6; The six Reports and Resolution of the European Parliament on Institutions of July 9, 1981 (Hänsch, Diligent Baduel Glorioso, van Miert, Elles, Antoniozzi); *The institutional system of the Community: Restoring the balance*, BULL. EUR. COMMUNITIES (Supp. 3/82) 5; *French government memorandum on revitalization of the Community* 14 BULL. EUR. COMMUNITIES (11-1981) 92; *German Italian initiative: Draft European Act*, 14 BULL. EUR. COMMUNITIES (11-1981) 87 (*Genscher-Colombo Initiative*); *Report on European political cooperation*, BULL. EUR. COMMUNITIES (Supp. 3/81) 14. See generally, on that epoch and these proposals, Weiler, *The Genscher-Colombo Draft European Act: The Politics of Indecision* 6 J EUR. INTEGRATION 129 (1983).

<sup>66</sup> On enumeration, Lord Atkin stated:

No one can doubt that this distribution [of legislative powers between the Dominion and the Provinces] ... is one of the most essential conditions, probably the most essential condition [in the Canadian federal arrangement]. ... While the ship of state now sails on larger ventures ... she still retains the watertight compartments which are an essential part of her original structure.

*A.-G. Canada v. A.-G. Ontario*, 1937: 1 D.L.R. 673, 682-84 (P.C.).

<sup>67</sup> Over a century before, Chief Justice Marshall asserted: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>68</sup> E.g., van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).



whole federal situation [is] that neither side, so to speak, should have it in its power to invade the sphere of the other.<sup>69</sup>

In contrast, Sandalow, reflecting on the U.S. experience, suggests that:

The disintegrative potential of [questions concerning the legality of governmental action] is especially great when they [challenge] the distribution of authority in a divided or federal system. ... [Where] Congress determines that a national solution is appropriate for one or another economic issue, its power to fashion one is not likely to be limited by constitutional divisions of power between it and the state legislatures.<sup>70</sup>

These differences in approach could be explained by formal differences in the structure of the British North American Act (which predated the current Canadian Constitution) as compared to the U.S. Constitution. But they also disclose a principled difference in the way the two systems value enumerated powers within the federal architecture, a difference between ends and means, functions and values. In the Wade conception of the Canadian system the division of powers was considered a *per se* value, an end in itself. The *form* of divided governance was considered to be on par with the other fundamental purposes of a government, such as obtaining security, order, and welfare, and was viewed as part of its democratic architecture. In the United States, the federal distribution retained its constitutional importance as the system evolved. In practice, however, it would seem that the principle of division was subjected to higher values and invoked as a useful *means* for achieving other objectives of the U.S. union. To the extent that the division became an obstacle for the achievement of such aims it was sacrificed.<sup>71</sup> We may refer to this approach as a functional one. The dichotomy is, of course, not total; we find strands of both the functional and *per se* approaches in each of the systems. Nevertheless, clear differences exist in the weight given to each of the strands and in the evolution of the two federations. In addition, the legal debate about division of powers was (and remains) frequently the code for battles over raw power between different loci of governance, an aspect ultimately of crucial importance.

In Europe, the Treaty itself does not precisely define the material limits of Community jurisdiction.<sup>72</sup> But it is clear that, in a system that rejected a "melting pot" ethos and explicitly in the preamble to its constituent instrument affirms the importance of "an ever closer union among the *peoples* of Europe," that saw power being bestowed by the Member State on the Community (with residual power thus retained by the Member States) and consecrated in an international Treaty containing a clause that effectively conditions revision of the treaty on ratification by parliaments of all Member States,<sup>73</sup> the "original" understanding was that the principle of enumeration would be strict and that jurisdictional enlargement (*rationae materiae*) could not be lightly undertaken. This understanding was shared not only by scholars,<sup>74</sup> but also by the Member States and the political organs of the Community, as evidenced by their practices,<sup>75</sup> as well as by the Court of Justice itself. In its most famous decision, *Van Gend & Loos*, the Court affirmed that the Community constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit in limited fields*."<sup>76</sup> And earlier, in even more striking language, albeit

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<sup>69</sup> Wade, *Amendment of the Constitution of Canada: The Role of the United Kingdom Parliament* in BRITISH NORTH AMERICA ACTS: THE ROLE OF PARLIAMENT, 2 HC 42, at 102, 108 (1981) (memorandum and evidence submitted to the Foreign Affairs Committee of the House of Commons).

<sup>70</sup> Sandalow, *The Expansion of Federal Legislative Authority*, in COURTS AND FREE MARKETS 49, 49-50 (1982) (I have reversed the order of quoted sentences).

<sup>71</sup> These developments have had their critics. *E.g.* van Alstyne, *supra* note 68; *cf.* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

<sup>72</sup> Articles 2 and 3 of the EEC Treaty set out the "tasks" or "purposes" of the Community, from which its competences are derived in rather open-textured language.

<sup>73</sup> EEC Treaty, art. 236.

<sup>74</sup> Judge Pescatore, who later became one of the formidable champions of an expansive and evolutive view of the Community, offered a classic endorsement of this original narrow understanding in at least some of its aspects. Pescatore, *Les relations extérieures des Communautés européennes*, RECUILS DES COURS [RDC] I [1961-II].

<sup>75</sup> For example, in the enactment of Council Regulation No.803/68, O.J. (L 148) 6,6 (June 28, 1968), relating to the customs value of goods, a matter at the heart of the common market and the economic sphere of Community activity, the Council resorted to Article 235 of the Treaty as legal basis, not believing it had inherent authority in the Customs Union provisions of the Treaty.

<sup>76</sup> *Van Gend & Loos* (emphasis added).

related to the Coal and Steel Community, the Court explained that [t]he Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those.<sup>77</sup>

In light of the Member States' vigorous reaction to the constitutional mutation of the Community during the Foundational Period, seizing effective control of Community governance, and the fact that a lax attitude to enumeration would indeed seem to result in a strengthening of the center at the expense of the states, we would expect that this "original" understanding of strict enumeration would be tenaciously preserved.

I characterize the period of the 1970's<sup>78</sup> to the early 1980's as a second and fundamental phase in the transformation of Europe. In this period the Community order mutated almost as significantly as it did in the Foundational Period. In the 1970's and early 1980's, the principle of enumerated powers as a constraint on Community *material* jurisdiction (absent Treaty revision) substantially eroded and in practice virtually disappeared.<sup>79</sup> Constitutionally, no core of sovereign state powers was left beyond the reach of the Community. Put differently, if the constitutional revolution was celebrated in the 1960's albeit "in limited fields," the 1970's saw the erosion of these limits. As an eminent authority assesses the Community today: "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."<sup>80</sup>

The 1970's mutation I describe went largely unnoticed by the interpretive communities in Europe: the Member States and their governments, political organs of the Community, the Court and, to an extent, academia.<sup>81</sup> This lack of attention is all the more ironic and striking when it is noted that the interaction among those interpretive communities brought about this fundamental mutation. To be sure, the expansion of Community jurisdiction in the 1970's and early 1980's was widely observed. Indeed, this growth was, as mentioned above, willed by all actors involved.

What was not understood was that, during this process of growth and as a result of its mechanics, the guarantees of jurisdictional demarcation between Community and Member States eroded to the point of collapse. This cognitive dissonance in accounts of the period is so striking that I shall attempt to explain not only the legal-political process by which strict enumeration eroded and practically disappeared, but also the reasons so fundamental a change in the Community architecture was not obvious to all.<sup>82</sup>

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<sup>77</sup> Joined Cases 7/56, 3-7/57, *Dinecke Algera v. Common Assembly of the European Coal and Steel Community*, 1957-58 E.C.R. 39 [hereinafter *Algera*].

<sup>78</sup> 1973 seems an appropriate signpost since it followed the European Council meeting of October 1972 in which an explicit decision was made to make full (and on my reading, expansive) use of Article 235 as part of general reinvigoration of the Community. This process coincided with the accession of the three new Member States. Declaration of Paris Summit, BULL. EUR. COMMUNITIES (10-1972).

<sup>79</sup> I should emphasize that my analysis is confined to the question of material competences. Organic and institutional changes are jealously guarded. That, as shall emerge, is part of my thesis. In other words, it is the fact that organic and institutional changes are kept under tight control (essentially conserving the prerogatives of the Member States gained in the Foundational Period) that enables the Member States to be lax about material demarcation.

<sup>80</sup> Lenaerts, *supra* note 10, at 220. Note that Lenaerts refers in this statement to what I have termed in this article "absorption."

<sup>81</sup> But see Tizzano, *Lo sviluppo delle competenze materiali delle Comunità europee* RIVISTA DIR. EUR. 139 (1981); Sasse & Yourow, *The Growth of Legislative Power of the European Communities* in COURTS AND FREE MARKETS 92 (1982).

<sup>82</sup> The erosion of jurisdictional limits did not mean that the Community and its Member States would never resort to Treaty amendment. Clearly changes as to the method of exercising jurisdiction such as the shift from unanimity to majority voting *ex* Article 100 would require such amendment. Not all Treaty amendment concerns jurisdictional limits. More interestingly, even in areas where jurisdiction was already clearly asserted, such as in the environmental field, the Member States would, for example in the Single European Act, "reinvent the wheel." And in matters concerning monetary and economic union they are now negotiating Treaty amendments to give effect to the new monetary constructs. My claim is that this has become their choice and if they had wished they could have introduced the new monetary regime *ex* Article 235, easily showing, in the light of other practice concerning 235 that it was necessary for the good functioning of the common market. There are however many advantages to pursuing the Treaty amendment route: to mention just two, the new regime becomes entrenched and cannot be changed by simple legislation (something important for, say, the independence of the proposed central European bank), and it enjoys a higher level of political legitimacy since it calls for ratification by all Member State parliaments.

It is also important to understand that I am not claiming that in this period jurisdictional expansion was *quantitatively* impressive. This would be strange in a Community that was decisionally stagnant. In fact there were many areas of explicit Community competence, such as transport regulation, where nothing was done. The interesting tale concerns the variety of new fields into which the Community moved, each on its own of

Naturally, because the process itself went largely unnoticed when it occurred, its far-reaching consequences and significance were not appreciated at the time. It is a general theme of this article that the first series of mutations in the Foundational Period conditioned those that followed in the 1970's. I additionally argue that the consequences and significance of the then-unnoticed mutations in the 1970's are becoming acutely transparent today in the final phase of Community evolution. Together with the early mutations, the mutations of the 1970's define the very significance of the Community's evolution.

## B. A TYPOLOGY OF JURISDICTION IN THE EUROPEAN COMMUNITY

In mapping the original understanding of the distribution of competences of the Community and Member States in schematic terms, the following picture emerges.

- (1) there are areas of activity over which the Community has no jurisdiction
- (2) there are areas of activity that are autonomous to the Community (therefore beyond the reach of the Member States' jurisdiction as such); and
- (3) there are large areas of activity where Community and Member State competences overlap.

A very strict concept of enumeration would suggest that this jurisdictional demarcation, whatever its precise content, could and should change only in accordance with the provisions for Treaty amendment. Jurisdictional mutation in the concept of enumeration would occur where there is evidence of substantial change in this map without resort to Treaty amendment.

In fact, during the period in question, mutation thus defined occurred. Moreover, it was not occasional or limited, but happened in a multiplicity of forms, the combination of which leads to my claim of erosion of constitutional guarantees of enumeration. The picture may best be grasped by thinking of mutation as occurring in four distinct categories or prototypes.

## C. THE CATEGORIES OF MUTATION<sup>83</sup>

### 1. *Extension*

Extension is mutation in the area of autonomous Community jurisdiction. The most striking example of this change is the well-known evolution of a higher law of human rights in the Community. As already mentioned, the Treaty contains elaborate provisions for review of Community measures by the European Court of Justice.<sup>84</sup> It does not include a "Bill of Rights" against which to measure Community acts, nor does it mention, as such, human rights as a grounds for review. Yet, as mentioned earlier, in a process starting in 1969 but consolidated in the 1970's,<sup>85</sup> the Court constructed a formidable<sup>86</sup> apparatus for such review. Despite legal and policy rationales, such a development could not have occurred had the Court

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relatively little importance. In fact, it could be argued that these activities emerged as a distraction, given the Community's inability to deal with its truly pressing problems. But the cumulative effect of all these activities was significant.

<sup>83</sup> It is important that we do not use the term "mutation" loosely. As a "Framework Document," the Treaty itself often calls for, or allows, change without Treaty amendment. I want to reserve the term mutation to those instances where the change is fundamental. Obviously, as shall be seen, when mutation does occur it is always justified by some reference to the Treaty and its "implicit" principles. It is important to understand that I do not make a normative or interpretative argument for some construction of a legal basis in the Treaty. The strict "legal" evaluation is of little interest in my view. My point is that the relevant interpretative communities, by choosing to opt for the wide and flexible reading of the Treaty, have transformed strict enumeration into a very flexible notion, practically emptied of material content in the Community.

<sup>84</sup> See *supra* text surrounding note 32.

<sup>85</sup> For a comprehensive description and analysis of human rights jurisprudence in the Community, see Clapham, *European Union: The Human Rights Challenge* in 1 HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW (1991).

<sup>86</sup> For a critique, see Clapham, *supra* note 85; Weiler, *supra* note 29.

taken a strict view of permissible change in the allocation of competences and jurisdiction. Had the Court taken such a view, such a dramatic change could have taken place only by Treaty amendment.

An equally striking example from an area of autonomous Community jurisdiction concerns the standing of the European Parliament. The plain and simple language of the Treaty would seem to preclude both action against and by the European Parliament.<sup>87</sup> Yet the Court, in an expansive, systemic (and, in my view, wholly justified<sup>88</sup>) interpretation of the Treaty, first allowed Parliament to be sued<sup>89</sup> and then, after some hesitation,<sup>90</sup> granted Parliament standing to sue other Community institutions.<sup>91</sup>

The category of extension requires four ancillary comments.

First, it must be emphasized that the analysis of extension (and indeed the other categories of mutation) is intended, for the time being, to be value-neutral. I do not present these examples as a critique of the Court "running wild" or exceeding its own legitimate interpretative jurisdiction. Evaluating these developments, to which I shall return later, involves considerations far wider and weightier than the often arid discussion of judicial propriety. What is important, if there is any force in my argument, is the recasting of known judicial developments, usually analyzed in other legal contexts,<sup>92</sup> as data in the analysis of jurisdictional mutation.

Second, in the case of extension, the principal actor instigating extension was the Court itself, although, of course, at the behest of some plaintiff. Other actors played a more passive role. The action of the Court must be viewed simultaneously as reflective of a flexible, functional approach to enumeration and constitutive of such an ethos in the Community.

Third, this jurisdictional mutation, despite the radical nature of the measures themselves, was rather limited, since it was confined to changes within the autonomous sphere of the Community and did not have a direct impact on the jurisdiction of the Member States. Indeed, the human rights jurisprudence actually curtailed the freedom of action of the Community.<sup>93</sup> The changes of standing concerning the Parliament were similar in potentially chilling the legislative power of Commission and Council, although in a more muted form.

Finally, and perhaps not altogether surprisingly, these developments and others like them were, with limited exceptions, both welcomed and accepted by the different interpretative communities in Europe, partly because they were seen as pertaining to the other legal categories and partly because they did not encroach directly on the Member State jurisdiction. (In any event, these developments were hardly perceived as pertaining to the question of jurisdictional demarcation.)

## **2. Absorption**

Absorption is a far deeper form of mutation. It occurs, often unintentionally, when the Community legislative authorities, in exercising substantive legislative powers bestowed on the Community, impinge on areas of Member State jurisdiction outside the Community's explicit competences.

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<sup>87</sup> See EEC Treaty, art. 173.

<sup>88</sup> Weiler, *Pride and Prejudice—Parliament v. Council*, 14 EUR. L. REV. 334 (1989).

<sup>89</sup> Parti Ecologiste "Les Vertes" v. European Parliament 1986 E.C.R. 1339.

<sup>90</sup> Case 302/87, *Comitology* Decision of September 27, 1988 (not yet reported).

<sup>91</sup> Case 70/88, *Tchernobyl* Decision of May 22, 1990 (not yet reported).

<sup>92</sup> Thus the human rights jurisprudence has been discussed essentially as part of a debate on judicial review and not seen as an issue of enumerated powers. Likewise, the issue of Parliamentary standing has been seen as an issue of procedure and institutional balance but, again, not as one of enumeration ethos.

<sup>93</sup> Indirectly of course, this curtails the freedom of the Member States acting qua Council of the Community.

One of many striking illustrations<sup>94</sup> is offered by the events encapsulated in the *Casagrande* case.<sup>95</sup>

Donato Casagrande, an Italian national, son of Italian migrant workers, lived all his life in Munich. In 1971 and 1972 he was a pupil at the German Fridtjof-Nansen-Realschule. The Bavarian law on educational grants (BayAföG) entitles children who satisfy a means test to receive a monthly educational grant from the Länder. The city of Munich refused his application for a grant relying on Article 3 of the same educational law, which excluded from entitlement all non-Germans except stateless people and aliens residing under a right of asylum.

Casagrande, in an action seeking a declaration of nullity of the educational law, relied principally on Article 12 of Council Regulation 1612/68.<sup>96</sup> The article provides that "the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship, and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory." Further, the Member States must encourage "all efforts to enable such children to attend these courses under the best possible conditions."<sup>97</sup>

The Bayerisches Verwaltungsgericht, in an exemplary understanding of the role of review of the European Court of Justice, sought a preliminary ruling on the compatibility of the Bavarian educational provision with Article 12 of the Council Regulation.

The submission of the Bavarian public prosecutor's office (Staatsanwaltschaft), which intervened in the case, illustrated the issue of powers and mutation well. It was submitted that the Council exceeded its powers under Articles 48 and 49 of the EEC Treaty.<sup>98</sup> These Articles concern the conditions of workers. "Since individual educational grants come under the sphere of educational policy [in respect of which the Council has no jurisdiction] . . . it is to be inferred that the worker can claim the benefit of assimilation with nationals [as provided in Article 12] only as regards social benefits which have a direct relation with the conditions of work itself and with the family stay."<sup>99</sup>

Under this view, Article 12 of the Regulation must be read as entitling children of migrants to be admitted to schools under the same conditions as children of citizens, but not to receive educational grants. If we give the Bavarian public prosecutor's assertion its strongest reading, he denied the very possibility of a conflict between Article 12 and the Bavarian BayAföG, since Article 12 simply could not apply to educational grants. Under a weaker interpretation, he was pleading for a narrow interpretation of the Article 12 provision because of the jurisdictional issue. Underlying this submission was the deeper ground that if education is outside the Community competence, then the Regulation itself transgressed the demarcation line. In any event, the interpretation sought by Casagrande could not stand.

How then did the Court deal with the question? One can detect two phases in the process of judicial consideration. The first phase consisted of an interpretation of the specific Community provision in an effort to understand its full scope. While engaging in this phase the Court acted as if it were in an empty jurisdictional space with no limitations on the reach of Community law. Not surprisingly, the Court's rendering of Regulation 12 led it to the conclusion that the Article did cover the distribution of grants.<sup>100</sup>

In the second phase of analysis the Court addressed the jurisdictional mutation problem.<sup>101</sup> We must remember that the primary ground for the illegality of a measure, the infringement of the Treaty, certainly

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<sup>94</sup> See, e.g., Joined Cases 6 & 11/69, EEC Commission v. France, 1969 E.C.R. 523 and the discussion thereof in Lenaerts *supra* note 10.

<sup>95</sup> Case 9/74. Casagrande v. Landeshauptstadt München, 1974 E.C.R. 773 [hereinafter *Casagrande*].

<sup>96</sup> 1968 O.J. (L 257) 2.

<sup>97</sup> *Id.* at art. 12.

<sup>98</sup> *Casagrande*, 1974 E.C.R., at 776.

<sup>99</sup> *Id.*

<sup>100</sup> *Casagrande*, at Judgment Recitals 8, 9.

<sup>101</sup> *Casagrande*, at Judgment Recitals 10-15.

includes jurisdictional competence.<sup>102</sup> The Court first acknowledged that "educational and training policy is not as *such* included in the spheres that the Treaty had entrusted to the Community institutions."<sup>103</sup> The allusion to the Community institutions is important: the case after all deals with an issue of "secondary legislation" enacted by the political organs. But, in the key, although oblique, phrase the Court continued, "it does not follow that the exercise of powers transferred to the Community," enlarging thus the language from Community institutions to the Community as a whole and hence from secondary legislation to the entire Treaty, "*is in some way limited if it is of such a nature as to affect ... [national] measures taken in the execution of a policy such as that of education and training.*"<sup>104</sup> Now we understand the importance of the two-phased judicial analysis.

In phase one the Court explained the meaning of a Community measure. The interpretation may be teleological but not to the same extent as the Court's performance in the evolution of the higher law of human rights. Absorption is in this way distinguishable from extension. In the second phase, the Court stated that to the extent that national measures, even in areas over which the Community has no competence, conflict with the Community rule, these national measures will be absorbed and subsumed by the Community measure. The Court said that it was not the Community policy that was encroaching on national educational policy; rather, it was the national educational policy that was impinging on Community free-movement policy and thus must give way.

The category of absorption also calls for some interim commentary. First, in this higher form of mutation at least two interpretative communities are playing a role in the erosion of strict enumeration: principally the legislative interpretative community, comprising in this case the Commission, Parliament, and the Council (with a decisive role for the governments of the Member States), and the judicial one.<sup>105</sup> This is important in relation to the question of the acceptance of the overall mutation of jurisdictional limits. As a simple examination of extension might have indicated, it cannot be seen as a judicially led development, although legal sanctioning by the Court plays an important role in encouraging this type of legislation in future cases.

Second, the limits of absorption are important. Although absorption extends the effect of Community legislation outside the Community jurisdiction, it, critically, does not give the Community original legislative jurisdiction (in, for example, the field of education). The Community could not, in light of *Casagrande*, directly promulgate its own full-fledged educational policy.

This distinction should not diminish the fundamental importance of absorption and its inclusion as an important form of mutation. This can be gauged by trying to imagine the consequences of a judicial policy that would deny this possibility of absorption. The scope of effective execution of policy over which the Community had direct jurisdiction would, in a society in which it is impossible to draw neat demarcation lines between areas of social and economic policy, be significantly curtailed. But at the same time there is a clear sacrifice and erosion of the principle of enumeration. And, of course, the absorption doctrine invokes a clear preference for Community competence over Member State competence. In a sense the language of the Court suggests a simple application of the principle of supremacy. But this is not a classical case of supremacy. After all, in relation to issues of jurisdiction, supremacy may only mean that each level of government is supreme in the fields assigned to it. Here we have a case of conflicts of competences. The Court is suggesting that in such conflicts Community competence must prevail. This is the doctrinal crux of absorption.

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<sup>102</sup> See EEC Treaty, art. 173.

<sup>103</sup> *Casagrande*, at Judgement Recital 12 (emphasis added).

<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> The case highlights the fiction of assimilating government with Member State. Bavaria is as much a part of the Federal Republic of Germany as the central German government.

### 3. Incorporation<sup>106</sup>

The term is borrowed from the constitutional history of the United States and denotes the process by which the federal Bill of Rights, initially perceived as applying to measures of the federal government alone, was extended to state action through the agency of the Fourteenth Amendment. The possibility of incorporation within the Community system appears at first sight improbable. We noted already the absence of a Community "Bill of Rights." Community incorporation would entail not one but two acts of high judicial activism. First, the creation of judge-made higher law for the Community, and then its application to acts of the Member States.

Looking at this issue not through the prism of human rights discourse, but as a problem of jurisdictional allocation, suggests that incorporation may not, after all, be so inconceivable. In the field of human rights, incorporation invokes no more than a combination of extension and absorption. The frequency and regularity by which these two other forms of Community mutation are exercised suggest that incorporation is a distinct possibility.

The interplay of the actors in pushing for this form of mutation is interesting. In an early case, the Court, of its own motion, seemed to open the door to this development. In subsequent cases, the Commission pushed hard for such an outcome, but the Court's responses have been mixed. In some cases it seemed to be nodding in this direction, while in other cases it firmly rejected the possibility.<sup>107</sup>

I cannot therefore present incorporation as a *fait accompli* in the evolving picture of mutation of jurisdictional limits. But the concept, even in its current embryonic Community form, is important for two reasons.

First, it shows again the internal interplay of the various actors in pushing the frontiers of Community jurisdiction. At times it is the Court; at other times the legislative organs in conjunction with the Court; at other times still the Commission trying, as in the *Cinéthèque* case, to enlist the Court's support (in this case rather unsuccessfully<sup>108</sup>).

Second, it shows the dynamics of the of enumeration. That incorporation could be tried, more than once—at first causing a split between the opinions of the Court and its Advocate General, which later developed into a somewhat bifurcated jurisprudence<sup>109</sup>—is only conceivable in a legal-political environment which has already moved, through the agencies of extension and incorporation, far away from a strict concept of enumeration.

### 4. Expansion and its Causes

Expansion is the most radical form of jurisdictional mutation. Whereas absorption concerned Community legislation in a field in which the Community had clear original jurisdiction, and describes a mutation occurring when the effects of such legislation spill over into fields reserved to the Member States, expansion refers to the case in which the original legislation of the Community "breaks" jurisdictional limits.

I have already alluded to the expansive approach to implied powers adopted by the Court as part of the constitutionalization process in the Foundational Period. If expansively applied, the implied powers

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<sup>106</sup> I dealt with this issue extensively in Weiler, *The European Court at a Cross Roads: Community Human Rights and Member State Action*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION* 821 (F. Caportorti ed. 1987), and present here merely the bare bones of the argument.

<sup>107</sup> For cases and analysis, see Weiler, *supra* note 106.

<sup>108</sup> See Case 60-61/84, *Cinéthèque S.A. v. Federation National des Cinémas Français*, 1985 E.C.R. 2605.

<sup>109</sup> For discussion, see Weiler, *supra* note 106, at 824-30.

doctrine may have the de facto consequence of permitting the Community to legislate and act in a manner not derived from clear grants of power in the Treaty itself. This would not constitute veritable expansion. The implied powers doctrine is not veritable expansion because typically the powers implied are in an area in which the Community clearly is already permitted to act, and the powers to act would be construed precisely as "instruments" enabling effective action in a permissible field. Thus, in the leading case of implied powers,<sup>110</sup> there was no question that the Community could act in the field of transport policy; what the Court did was to enable it, within this field, to conclude international agreements.

Even though the implied powers doctrine cannot be construed strictly as true expansion as defined above, it is important in this context. First, the way a court approaches the question of implied powers is in itself an indirect reflection of its attitude toward enumeration. Even if implying powers as such does not constitute a mutation, a court taking a restrictive approach to enumeration will tend to be cautious in implying powers, whereas a court taking a functional, flexible approach to enumeration will be bolder in its implied powers jurisprudence. It is interesting that the European Court of Justice itself has changed its attitude toward implied powers and, by implication, toward enumeration. In its very early jurisprudence, it took a cautious and reserved approach to implied powers; it was really only in a second phase that it changed direction on this issue as part of the process of constitutionalization.<sup>111</sup>

Second, even though, strictly speaking, the implied powers doctrine is intended to give the Community an instrument in a field within which it already has competence, these distinctions often break down in reality. When the Court in the 1970's considered and construed the powers that flowed from the common commercial policy, it did, even on a very conservative reading, extend the jurisdictional limits of the Community.<sup>112</sup>

It is, however, in the context of Article 235 of the Treaty that we find the locus of true expansion. Article 235 is the "elastic clause" of the Community—its "necessary and proper" provision. Article 235 provides that:

if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

On its face, this is no more than a codified version of an implied powers doctrine; clearly, Article 235 should not be used to expand the jurisdiction of the Community (which derives from its objectives and functional definition as explicitly and implicitly found elsewhere in the Treaty) by adding new objectives or amending existing ones. Since however the language of the Article is textually ambiguous, and concepts such as "objectives" are by their nature open-textured, there has been a perennial question how far beyond the literal Treaty definition of the Community's spheres of activities and powers the use of Article 235 will permit without actually amending the Treaty.

The history of Article 235 in legislative practice, judicial consideration, and doctrine includes several changes which reflect the changes in the development of the Community itself.

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<sup>110</sup> See *ERTA*, *supra* note 28, at 273, 290.

<sup>111</sup> Compare *Algeria*, *supra* note 77 (denying right to set aside administrative measures) with *ERTA*, *supra* note 28 (establishing right to enter into agreements with third countries).

<sup>112</sup> See, e.g., Opinion 1/78, Opinion given pursuant to the second subparagraph of Article 238(1) of the EEC Treaty, 1979 E.C.R. 2871 9 (*Rubber*). The Council (and France and Britain as interveners) claimed that conclusion of the Rubber Agreement, as an instrument of Cooperation and Development which also impinges on broader strategic concerns of the Member States, was outside the scope and competence of the Community's Common Commercial Policy. The Court gave an extensive reading to the limits of the exclusive (!) Common Commercial Policy and held that, "it is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade." *Id.* at 2912, Recital 43.



In the period 1958 to 1973, Article 235 was used by Community institutions relatively infrequently<sup>113</sup> and, when used, was usually narrowly construed. Under the restrictive view, shared by all interpretative communities at the time,<sup>114</sup> the function of Article 235 was to compensate *within an area of activity explicitly granted by the Treaty* for the absence of an explicit grant of legal power to act. Two examples demonstrate the early conception of the Article. One was the enactment on the basis of Article 235, in 1968, of Regulation 803/68 on Customs Valuation, setting out the criteria by which the value of imported goods to the Community for the purpose of imposing customs duties would be calculated. Implicit in this recourse to Article 235 was the belief that:

- (1) customs valuation was necessary to attain the objectives of the Treaty; but
- (2) since the reach of the Community spheres of activity had to be narrowly construed, one could not use the common commercial policy or Article 28 as a legal basis, as these did not explicitly cover customs valuation.

A second example is the use of Article 235 as a legal basis for extending the list of food products in Annex II to the Treaty.<sup>115</sup> Here it was clear that the sphere of activities did cover the measure in question, but that there was no specific grant of power in relation to new products. Recourse to Article 235 seemed necessary. The explanation for this restrictive quantitative and qualitative usage is simple. Quantitatively, in that phase of establishing the basic structures of the Community system, the Treaty was relatively explicit in defining the legislative agenda and granting legal powers. The initial legislative program simply did not call for frequent recourse to Article 235. Qualitatively, that period, especially since the mid-1960's, was characterized by a distinct decline in the "political will" of at least some of the Member States to promote expansion of Community activity.

Following the Paris Summit of 1972, where the Member States explicitly decided to make full use of Article 235 and to launch the Community into a variety of new fields, recourse to Article 235 as an exclusive or partial legal basis rose dramatically.

Therefore from 1973 until the entry into force of the SEA, there was not only a very dramatic quantitative increase in the recourse to Article 235, but also a no less dramatic understanding of its qualitative scope. In a variety of fields, including, for example, conclusion of international agreements, the granting of emergency food aid to third countries, and creation of new institutions,<sup>116</sup> the Community made use of Article 235 in a manner that was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense. Only a truly radical and "creative" reading of the Article could explain and justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states.<sup>117</sup> But this wide reading, in which all political institutions partook,<sup>118</sup>

<sup>113</sup> For quantitative analysis, see J. WEILER, *IL SISTEMA COMUNITARIO EUROPEO* 195 (1985).

<sup>114</sup> *E.g.*, Usher, *The Gradual Widening of European Community Policy on the Basis of Article 100 and 235 of the EEC Treaty* in *STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY* 30 (1988) ("Article 235 was obviously intended as an exceptional measure.").

<sup>115</sup> Article 38(3) of the EEC Treaty provides, *inter alia*, that "products subject to [the Common Agricultural Policy of the EEC] are listed in Annex 11 to this Treaty." It also explicitly foresees that this list should be enlarged by adding new products. And yet despite this explicit invitation the political organs did not believe that they had the power to amend the list without recourse to Article 235.

<sup>116</sup> For fuller accounts of the wide use and wide construction, see, *e.g.*, Usher, *supra* note 114; H. SMIT & P. HERZOG, *6 LAW OF THE EUROPEAN COMMUNITY* 269 (1991).

<sup>117</sup> The Community Framework Regulations on food aid policy and food aid management were initially based jointly on Article 43 (Common Agricultural Policy) and Article 235 of the EEC Treaty. See Council Food Aid First Framework Regulation No. 3391/82, 1982 O.J. (L 352) 1; Council Food Aid Second Framework Regulation No. 3972/86, O.J. (L 370) 1 (1986), as amended by Regulation No. 1930/90, O.J. (L 174) 6 (1990), is based exclusively on Article 235. Before the adoption of Framework Regulations there were a few decisions on emergency operations which were based exclusively on Article 235. See, *e.g.*, Council Regulation No. 1010/80, 1980 O.J. (L 108) 1; Council Regulation No. 3827/81, 1981 O.J. (L 392) 1 (both concerning supply of sugar to UNRWA as food aid for refugees); Council Regulation No. 3723/81 1981 O.J. (L 373) 11 (concerning the supply of exceptional food aid to the least developed countries). So long as the food aid is a mechanism for disposal of Common Agricultural Policy (CAP) surpluses there is no question of legal basis and competence based on Article 43 of the EEC Treaty. The inclusion of Article 235 would cover the incidence of food aid that is not so tied to CAP objectives and mechanisms. The current exclusive reliance on 235 is deliberate in order to disconnect food aid from the CAP and emphasize that it is not an instrument of the CAP. Laudable as the granting of food aid is, it is difficult to see how the functioning of the common market, a condition for the recourse to Article 235, is served by granting humanitarian food aid to non-associated countries. *But see* Marengo, *Les Conditions d'Application de l'Article 235 du Traité CEE*, 12 *REVUE DU MARCHÉ COMMUN [RMC]* 147 (1970).

<sup>118</sup> Parliament has pushed for the usage of Article 235 as well, since, *inter alia*, it is one of the provisions under which consultation with Parliament is obligatory.

meant that it would become virtually impossible to find an activity which could not be brought within the "objectives of the Treaty."<sup>119</sup> This constituted the climax of the process of mutation and is the basis for my claim not merely that no core activity of state function could be seen any longer as still constitutionally immune from Community action (which really goes to the issue of absorption), but also that no sphere of the material competence could be excluded from the Community acting under Article 235. It is not simply that the jurisdictional limits of the Community expanded in their content more sharply in the 1970's than they did as a result of, for example, the Single European Act. The fundamental systemic mutation of the 1970's, culminating in the process of expansion, was that any sort of constitutional limitation of this expansion seemed to have evaporated.

It is important to emphasize again that, for this inquiry, the crucial question is not the per se legality of the wide interpretation of Article 235.<sup>120</sup> In the face of a common understanding by all principal interpretative communities, that question has little if any significance and perhaps no meaning.<sup>121</sup> Far more intriguing and far more revealing is to explore the explanation for and the significance of the phenomenon. One should not, after all, underestimate its enormity in comparison to other nonunitary (federal) systems. Not only did the Community see in this second phase of its systemic evolution a jurisdictional movement as profound as any that has occurred in federal states, but even more remarkable, indeed something of a double riddle, this mutation did not, on the whole, ignite major "federal" political disputes between the actors (for example, between the Member States and the Community).

No one factor can explain a process so fundamental in the architecture of the Community. I suggest the following as some of the more important factors of this change.

#### a. Incrementalism

Part of the explanation to the riddles can be found already in the very description I offered of the process of jurisdictional mutation. There is no single event, no landmark case, that could be called the focal point

<sup>119</sup> Elsewhere I have argued, tongue in cheek, that, on this reading defense would also be a permissible usage of Article 235, since the common market could hardly function with the territories of the Member States under occupation. J. WEILER, *supra* note 113, at 188. For broad interpretation of the "objectives" of the Community, see Case 242/87, *Commission v. Council*, 1989 E.C.R. 1425 [hereinafter *Erasmus*].

<sup>120</sup> The Court tacitly sanctioned this wide usage. Broadly speaking, two principal conditions must be fulfilled to invoke Article 235. The measure must be "necessary," in the course of the operation of the common market, to attain one of the objectives of the Treaty. In addition, Article 235 may be used when the Treaty does not provide the "necessary" powers. The Court addressed both conditions liberally in the leading case of the early period, Case 8/73, *Hauptzollamt Bremerhaven v. Massey Ferguson GmbH*, 1973 E.C.R. 897 [hereinafter *Massey Ferguson*]. Regarding the second, the Court was explicit. In an action for annulment of the regulation adopting the above-mentioned Community customs valuation regime, the Court had to decide whether reliance on Article 235 as an exclusive basis was justified. While acknowledging that a proper interpretation of the alternative legal bases in the EEC Treaty (arts. 9, 27, 28, 111, & 113) would provide an adequate legal basis, and thus, under a strict construction, render Article 235 not "necessary," the Court, departing from an earlier statement, nonetheless considered that the Council's use of Article 235 would be "justified in the interest of legal certainty." *Massey Ferguson, supra*, at 908. Legally, this might have been an unfortunate formulation since an aura of uncertainty almost ipso facto attaches to a decision to make recourse to Article 235. Politically, it may have been wise, for a more rigid interpretation could have thwarted the desire of the Member States, consonant with the Treaty objectives, to expand greatly the areas of activity of the Community, even if by dubious use of Article 235. Practically speaking, recourse to Article 235 in that period made little difference in the content of measures adopted because virtually all measures were adopted under the penumbra of de facto unanimity. Taking their cue from this case, Community institutions henceforth made liberal use of Article 235 without exhaustively considering whether other legal bases existed. Regarding the first requirement that the measure be "necessary" to attain one of the objectives of the Treaty, the Court was willing to construe Community legal reach and the notion of objectives very widely, not only in a whole range of cases not directly concerned with 235, but also in *Massey Ferguson* itself. Since Member States had the ability to control the usage of Article 235, disagreements, often acrimonious, on the proper scope to be given to the first condition were resolved within the Council and not brought before the Court.

<sup>121</sup> The doctrinal writing continues the attempt to ascribe material limitations on the usage of Article 235 even in the face of this overwhelming practice. THE ENCYCLOPAEDIA OF EC LAW is a typical example: "Art. 235 does not open unlimited opportunity to increase the powers of the Community. In the first place, recourse to Art. 235 is limited by the objectives of the Treaty." Then comes the retreat: "Extensive interpretation as to the nature of these objectives is, of course, always possible, but the strongest guarantee against abuse is the required unanimity of the Council. . . ." B:2 ENCYCLOPAEDIA OF EC LAW, *supra* note 43, at B10/70/19, General Note to Article 235, (Release 40:23-ix-86). The learned commentator implicitly admits the futility of the task and then, abandoning an analytical attempt to circumscribe the Article in normative terms, resorts to an institutional guarantee, as if the Council could not itself, even if acting unanimously, abuse Article 235. Where writers try to insist on material limits, they end up flying in the face of the legislative practice. See, e.g., LES GUILLONS, EXTENSION DES COMPETENCE DE LA CEE PAR L' ARTICLE 235 DU TRAITE DE ROME AFDI 996 (1974); Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 COMMON MKT. L. REV. 447 (1981). For other more or less successful attempts, see Giardina, *The Rule of Law and Implied Powers in the European Communities* 1 ITAL. YB. 99 (1975); Marengo, *supra* note 117; Olmi, *La place de l'article 235 CEE dans le système des attribution de compétence de la Communauté*, in MELANGES F. DEHOUSSE 279 (1979); Waelbroeck, *Article 235*, in 15 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE 521, 530 (1987).

of the mutation. Even some of the important cases I mentioned, such as those in the field of human rights, were not seen through the prism of jurisdictional mutation. Instead, there was a slow change of climate and ethos whereby strict enumeration was progressively, relentlessly, but never dramatically, eroded. Extension, absorption, incorporation, and powers implied by the Court, all feed on each other in cog-and-wheel fashion so that no dissonances are revealed within the constitutional architecture itself as it is changing. When the Court is very activist in an area, in extension, for example, it is so toward the Community as such and not the more sensitive Member States.<sup>122</sup> By contrast, in the cases of absorption and expansion, areas where the mutative effect impinges on Member State jurisdiction, the role of the Court is in a kind of "active passivism," reacting to impulses coming from the political organs and opting for the flexible rather than strict notion of enumeration. In its entire history there is not one case, to my knowledge, where the Court struck down a Council or Commission measure on grounds of Community *lack of competence*.<sup>123</sup> The relationship between Court and political organs was a bit like the offense in American football.<sup>124</sup> The Court acted as the "pass protectors" from any constitutional challenge; the political organs and the Member States made the winning pass.

Nevertheless, incrementalism alone cannot explain a change so radical and a reaction so muted. Politically, the Community architecture at the end of the Foundational Period was unlike any other federal polity. Therein lies one emphatically important aspect of this development. Even if the judicial signals indicated that strict enumeration would not be enforced by the Court, these could, after all, have remained without a response by the political organs and the Member States.

Two factors, one historical and one structural, combine to explain the aggressiveness with which the political process rushed through the opening judicial door. Both factors are rooted in the heritage of the Foundational Period.

#### b. A Strategy of Revival

In a determined effort commencing in 1969,<sup>125</sup> the end of the de Gaulle era, and culminating in the successful negotiation of the British, Danish, and Irish accessions in 1973, the Community sought ways to revitalize itself, to shake off the hangovers of the Luxembourg Crisis, to extricate itself from the traumas of the double British rejection, and to launch itself afresh. The Paris Summit of 1972, in which the new Member States participated, introduced an ambitious program of substantive expansion of Community

<sup>122</sup> The exception to this institutional "coziness" is the case law concerning the "exclusive" competence of the Community. See Weiler, *The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle*, *supra* note 29, at 71-72.

<sup>123</sup> There have been many cases of annulment of Council and Commission measures, but not on grounds that the Community exceeded its competences. In Joined Cases 281, 283-85, 287/85, F.R.G. v. Commission of the Eur. Communities. 1987 E.C.R. 3203 (Re: The Immigration of Non-Community Workers), the Court annulled a Commission decision as going beyond the scope of Commission's powers under Article 118. The parties invited the Court to consider the social sector as being the preserve of the Member States, "from which it follows that, like all the other fundamental choices made in the Treaty, that choice may only be amended by use of the procedure provided for in Article 236." *Id.* at 3232. The Court, however, pointedly refrained from endorsing that proposition, gave a wide reading to the scope of action of the Community in the social field, and annulled the decision on the grounds that the Commission exceeded its powers, not that the Community had no competence in the field. In Recitals 23 and 24 of the judgment the Court said, [M]igration policy is capable of falling within the social field within the meaning of Article 118 only to the extent to which it concerns the situation of workers from non-member countries as regards their impact on the Community employment market and working condition. As a result, in so far as Decision 85/38 I/EEC includes the promotion of cultural integration as a whole among the subjects for consultation it goes beyond the social field in which, under Article 118, the Commission has the task of promoting cooperation between Member States. This judgment has been read as a decision implicitly excluding cultural integration from Community competence. Bradley, *The European Court and the Legal Basis of Community Legislation*, 13 EUR. L. REV. 379, 384 (1988). I disagree with this reading. The Court specifically mentions that it is interpreting the meaning of the social field within the meaning of Article 118, which is special in that it gives certain powers to the Commission. In the light of the broad reading given by the Court to the scope of Community objectives in the context of Article 235. Compare Erasmus, *supra* note 119 (where the Court construed the objectives of the Community to include the enhancement of the quality of teaching and formation furnished by Community universities with a view to insure the competitiveness of the Community in world markets and also "the general objective" of creating a citizens' Europe). This underlies the broad reading of the term 'objectives' which will be sanctioned by the Court. I submit that, had the same decision been made by the Council on the legal basis of Articles 118 and 235, the Court would have, in the light of the judgment, held it to be within Community competence.

<sup>124</sup> Of which, despite five years in the Midwest, I am still happily ignorant of most nuances.

<sup>125</sup> Prompted by and reflected in the *Report of the Working Party examining the problem of the enlargement of the powers of the European Parliament*. BULL. EUR. COMMUNITIES (Supp. 4/72) 1 (Vedel Report).

jurisdiction and a revival of the dream of European union. Article 235 was to play a key role in this revival. In retrospect this attempt was a failure, since the Community was unable to act in concert on the issues that really mattered during the 1970's, such as developing a veritable industrial policy or even tackling with sufficient vigor Member State obstacles to the creation of the common market. The momentum was directed to a range of ancillary issues, such as environmental policy, consumer protection, energy, and research, all important of course, but a side game at the time. Yet, although these were not taken very seriously in substance (and maybe because of that), each required extensive and expansive usage of Article 235 and represented part of the brick-by-brick demolition of the wall circumscribing Community competences.

### *c. Structuralism: The Abiding Relevance of Exit and Voice*

But the structural, rather than historical, explanation of the process of expansion and its riddles is the critical one. The process of decline in the decisional supranational features of the Community during the Foundational Period, demonstrated by the enhanced Voice of the Member States in the Community policymaking and legislative processes, was the key factor giving the Member States the confidence to engage in such massive jurisdictional mutation and to accept it with relative equanimity.

In federal states, such a mutation would by necessity be *at the expense* of Member State government power. In the post-Foundational Period Community, in contrast, by virtue of the near total control of the Member States over the Community process, the community appeared more as an instrument in the hands of the governments rather than as a usurping power. The Member State governments, jointly and severally, were confident that their interests were served by any mutative move.<sup>126</sup> If the governments of the Member States could control each legislative act, from inception through adoption and then implementation, why would they fear a system in which constitutional guarantees of jurisdictional change were weakened? Indeed, they had some incentive, in transferring competences to the Community, to escape the strictures, or nuisance, of parliamentary accountability. In federal states, the classical dramas of federalism in the early formative periods presuppose two power centers: the central and the constituent parts. In the Community, in its post-Foundational Period architecture, the constituent units' power was the central power.

As we see in several cases from that period, it was hardly feasible politically, although it was permissible legally, for a Member State to approve an "expansive" Community measure and to challenge its constitutionality as *ultra vires*.<sup>127</sup> It is easy also to understand why the Commission (and Parliament) played the game. The Commission welcomed the desire to reinvigorate the Community and to expand its (and the Commission's own) fields of activity. Since most Community decision making at that time was undertaken in the shadow of the veto consecrated by the dubiously legal Luxembourg Accord, the Commission found no disadvantage, and in fact many advantages, in using Article 235. Neither the Commission, nor Parliament which was to be consulted under the Article 235 procedure, were likely to challenge judicially the usage. Moreover, since Article 235 enabled the adoption of "measures," whether regulations, directives, or decisions, it provided a flexibility not always available when using other legal bases.

## **D. EVALUATING THE MUTATION OF JURISDICTIONAL LIMITS AND THE EROSION OF STRICT ENUMERATION IN THE 1970'S.**

<sup>126</sup> To be sure, Article 235 provides for unanimity: Member State confidence was boosted because of the knowledge that also in the implementation of any measure their interests would be guaranteed.

<sup>127</sup> A Member State may challenge an act even if it voted in favor of it. Case, 166/78, Government of the Italian Republic v. Council of the Eur. Communities, 1979 E.C.R. 2575, 2596. But it will normally not choose to challenge on grounds of lack of competence. In Case 91/79, Commission v. Italy 1980 E.C.R. 1099, Italy was sued by the Commission for failure to implement an environmental protection directive the *vires* of which (pre-SEA) could have been challenged in defense; Italy explicitly elected not to do so.

The process of mutation is evidence of the dynamic character of the Community and its ability to adapt itself in the face of new challenges. It is also evidence that what were perceived as negative and debilitating political events in the 1960's had unexpected payoffs. I do not believe that the Community would have developed such a relaxed and functional approach to mutation had the political process not placed so much power in the hands of the Member States. Yet even then at least two long-term problems were taking root.

## 1. The Question of Constitutionality

I have argued that the de facto usage of Article 235, from 1973 until the Single European Act, implied a construction, shared by all principal interpretive communities, that opened up practically any realm of state activity to the Community, provided the governments of the Member States found accord among themselves. This raised two potential problems of a constitutional nature.

From the internal, autonomous legal perspective, it is clear that Article 235 could not be construed simply as a procedural device for unchecked jurisdictional expansion. Such a construction would empty Article 236 (Treaty Revision) of much of its meaning and would be contrary to the very structure of Article 235. Legal doctrine was quick to find autonomous internal constructions which would not empty the Article of meaning, but which would emphasize its virtually limitless substantive scope. Thus it has been suggested that Article 235 cannot be used in a way that would actually violate the Treaty.<sup>128</sup> Few writers (or actors) sought to check the expansive use of the Article.<sup>129</sup> The general view had been (and in many quarters remains) that the requirement of unanimity does effectively give the necessary guarantees to the Member States. If there has been a debate over the Article's meaning, it concerns the analytical construction of the Article. The Community is no different from any other legal polity. Language, especially such contorted language as found in Article 235, has never been a serious constraint on a determined political power.

The constitutional problem with an expansive interpretation of Article 235, and in general with the entire erosion of strict enumeration, does not thus rest in the realm of autonomous positivist legalisms.

The constitutional danger is of a different nature. As we saw, results of the constitutional "revolution" of the Community in the 1960's and the system of judicial remedies upon which they rest depend on creating a relationship of trust, a new community of interpretation, in which the European Court of Justice and Member State courts play complementary roles.

The overture of the European Court toward the Member State courts in the original constitutionalizing decisions, such as *Van Gend & Loos*, was based on a judicial-constitutional contract idea. Suggesting that the new legal order would operate "in limited fields,"<sup>130</sup> the European Court was not simply stating a principle of European Community law, which, as the maker of that principle, it would later be free to abandon. It was inviting the supreme Member State courts to accept the new legal order with the understanding that it would, indeed, be limited in its fields.

The acceptance by the Member State legal orders was premised, often explicitly, on that understanding. Thus the Italian Constitutional Court, when it finally accepted supremacy, did so "on the basis of a *precise criterion of division of jurisdiction*."<sup>131</sup>

The danger in this process is now clear. Whereas the principal political actors may have shared a common interest in the jurisdictional mutation, it was, like still water, slowly but deeply boring a creek in

<sup>128</sup> As mentioned earlier, institutional and organic changes would in principle require Treaty amendment, though Usher, *supra* note 114, gives examples of institutional changes *ex* 235.

<sup>129</sup> See Lachmann, *supra* note 121 (detailing strong Danish principled opposition to wide use of Article 235).

<sup>130</sup> *Van Gend & Loos*, *supra* note 42.

<sup>131</sup> *Frontini v. Amministrazione Delle Finanze*, 1974 Common Mkt. L.R. 372, 385 (emphasis added).

the most important foundation of the constitutional order, the understanding between the European Court and its national counterparts about the material limits to Community jurisdiction. The erosion of enumeration meant that the new legal order, and the judicial-legal contract which underwrote it, was to extend to all areas of activity — a change for which the Member State legal orders might not have bargained. With the addition of the SEA, what was an underground creek will become one of the more transparent points of pressure of the system.

There is another, obvious sense in which erosion of enumeration is problematic from a constitutional perspective. The general assumption that unanimity sufficiently guarantees the Member States against abusive expansion is patently erroneous. First, it is built on the false assumption that conflates the government of a state with the state. Constitutional guarantees are designed, in part, to defend against the political wishes of this or that government, which government after all, in a democratic society, is contingent in time and often of limited representativeness. Additionally, even where there is wall-to-wall political support, there will not necessarily be a recognition that constitutional guarantees are intended to protect, in part, individuals against majorities, even big ones. It is quite understandable why, for example, political powers might have a stake in expansion. One of the rationales, trite yet no less persuasive, of enumeration and divided powers is to anticipate that stake to prevent concentration of power in one body and at one level. When that body and that level operate in an environment of reduced public accountability (as is the case of the Commission and the Council in the Community environment) the importance of the constitutional guarantee even increases.

## 2. Mutation and the Question of the Democratic Character of the Expansion

Treaty amendment by Article 236 satisfies the constitutional requirement all Member States have that calls for assent of national parliaments. The expansive usage of Article 235 evades that type of control. At a very formal level, the jurisdictional mutation of the nature that occurred in the 1970's accentuates the problems of democratic accountability of the Community. This deficit is not made up by the nonbinding consultation of the European Parliament in the context of 235.

The "democratic" danger of unchecked expansion is not, however, in the formal lack of Member State parliamentary ratification: the structure of European democracies is such that it is idle to think that governments could not ram most expansive measures down willing or unwilling parliamentary throats. After all, in most European parliamentary democracies, governments enjoy a majority in their national parliaments and members of parliaments tend to be fairly compliant in following the policies of the party masters in government. The danger of expansion rests in a more realistic view of European democracies.

The major substantive areas in which expansion took place were social: consumer protection, environmental protection, and education, for example. These are typically areas of diffuse and fragmented interests. Whether we adopt a traditional democratic or a neo-corporatist model,<sup>132</sup> we cannot fail to note that the elaboration of the details of such legislation in the Community context had the effect of squeezing out interest groups representing varying social interests, which had been integrated to one degree or another into national policymaking processes.<sup>133</sup> The Community decision making process, with its lack of transparency and tendency to channel many issues into "state interests," tends to favor certain groups well-placed to play the Community-Member State game and disfavor others—especially those that depend on a parliamentary chamber and the "principle of re-election" to vindicate diffuse and fragmented interests.

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<sup>132</sup> Parliament is only one of the actors in the outplay of the democratic choices. Cf. P. SCHMITTER, DEMOCRATIC THEORY AND NEO-CORPORATIST PRACTICE (Eur. U. Inst. Working Papers, No. 83/74).

<sup>133</sup> On the ambivalent position of pressure groups at the E.C. level, see, e.g., Loosli-Surrans, *Quelle Sécurité pour les Consommateurs Européens?*; Micklitz, *Considerations Shaping Future Consumer Participation in European Product Safety Law* in C. JOERGES, PRODUCT LIABILITY AND PRODUCT SAFETY IN THE EUROPEAN COMMUNITY (Eur. U. Inst. Working Papers, No. 89/404). See generally A. PHILIP, PRESSURE GROUPS IN THE EUROPEAN COMMUNITY (U. Ass'n for Contemp. Eur. Stud. Occasional Papers, No. 2, 1985).

Expansion thus did not simply underscore the perennial democracy deficit of the Community, but actually distorted the balance of social and political forces in the decisional game at both the Member State and Community level.

## E. CONCLUSION

The principal feature of the period lasting from the mid-1970's into the 1980's is that precisely in this period, one of political stagnation and decisional malaise, another important, if less visible, constitutional mutation—the erosion of the limits to Community competences—took place. The full importance of this mutation and some of its inherent dangers and risks come to light only now, in the 1992 epoch. And yet a final word is called for. Unlike the constitutional revolution in the Foundational Period, which seems irreversible and which constitutes the very foundation of the Community, the mutation of the 1970's can perhaps be checked. I shall return to this theme below.

## III. 1992 AND BEYOND

### A. INTRODUCTION

The 1992 program and the Single European Act (SEA) determine both the current agenda of the Community and its *modus operandi*.<sup>134</sup> Neither instrument is on its face functionally radical; the White Paper<sup>135</sup> goal of achieving a single market merely restates, with some nuances, the classical (Treaty of Rome) objective of establishing a common market. The bulk of the 1992 program is little more than a legislative timetable for achieving in seven years what the Community should have accomplished in the preceding thirty. The SEA is even less powerful.<sup>136</sup> Its forays into environmental policy and the like fail to break new jurisdictional ground, and its majority voting provisions, designed to harmonize non-tariff barriers to trade, seem to utilize such restrictive language, and open such glaring new loopholes,<sup>137</sup> that even some of the most authoritative commentators believed the innovations caused more harm than good in the Community.<sup>138</sup> Clearly, the European Parliament and the Commission were far from thrilled with the new act.<sup>139</sup>

<sup>134</sup> See generally J. DERUYT, L'ACTE UNIQUE EUROPÉEN (1989); 1992: ONE EUROPEAN MARKET (1988); Berman, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANS-NAT'L L. 529 (1989); Dehousse, *1992 and Beyond: The Institutional Dimension of the Internal Market Programme*, 1 LEGAL ISSUES OF EUR. INTEGRATION 109 (1989); Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987) [hereinafter *Internal Market*]; Ehlermann, "1992 Project," *supra* note 13; Glaesner, *The Single European Act*, 6 Y.B. EUR. L. 283 (1986); Glaesner, *L'Article 100 A: Un Novel Instrument Pour la Realisation du Marche Commun*, 25 CAHIERS DE DROIT EUROPÉEN 615 (1989); Moravcsik, *Negotiating the Single European Act; national interests and conventional statecraft in the European Community*, 45 INT'L ORGANIZATION 19 (1991).

<sup>135</sup> COMPLETING THE INTERNAL MARKET (Milan, June 28-29, 1985), Com (85) 310 (White Paper from the Commission to the European Council). In this White Paper the Commission outlined its internal market strategy, later to be called the 1992 program.

<sup>136</sup> "Measured against Parliament's Draft Treaty of European Union and other recent reform proposals, as well as against the stated preferences of the Commission and certain Member States, the Single European Act is not a revolutionary product." Berman, *supra* note 134, at 586.

<sup>137</sup> See, e.g., SEA, art. 100a(4) (supplementing the EEC Treaty, art. 100).

<sup>138</sup> See, e.g., Pescatore, *Some Critical Remarks on the Single European Act*, 24 COMMON MKT. L. REV. 9 (1987) (describing SEA as a "severe setback" for the European Community); see also Pescatore, *Die "Einheitliche Europäische Acte," Eine ernste Gefahr für den Gemeinsamen Markt*, 21 EUROPARECHT 153 (1986).

<sup>139</sup> See Address by Commission Vice President Frans Andriessen, Signing Ceremony for SEA (1986) BULL. EUR. COMMUNITIES (2-1986) point 1.1.1. (giving SEA decidedly cool reception); see also Address by Jacques Delors, Programme of the Commission for 1986, reprinted in BULL. EUR. COMMUNITIES (SUPP. 1/86). Delors gave the Act a cool reception but put on a brave face: "You [Parliament] have your reservations, we have ours; but it would be a mistake to be *overly* pessimistic." (emphasis added). Ehlermann in his 1987 paper comments that "[c]omparing the final text of the Single European Act with the Commission's original ideas shows that the differences are greatest in the area of the internal market. Nowhere does the end result depart so radically from the Commission's original paper." Ehlermann, *The Internal Market*, *supra* note 134, at 362. This is revealing since it suggests that at its core, the internal market, the SEA seemed at first disappointing. Ehlermann's comments are particularly authoritative since he was Director General of the Commission's Legal Service and privy to most developments from the inside. His assessments also reflect the Commission's moods. See *Parliament Fights On For More Say*, Eur. Parliament News, Jan. 1986, at 1, col. 1 (UK ed.) (report on Parliament's negative reaction to outcome of intergovernmental conference).

And yet, with the hindsight of just three years, it has become clear that 1992 and the SEA do constitute an eruption of significant proportions.<sup>140</sup>

Some of the evidence is very transparent. First, for the first time since the very early years of the Community, if ever, the Commission plays the political role clearly intended for it by the Treaty of Rome. In stark contrast to its nature during the Foundational Period and the 1970's and early 1980's, the Commission in large measure both sets the Community agenda and acts as a power broker in the legislative process.<sup>141</sup>

Second, the decision making process takes much less time. Dossiers that would have languished and in some cases did languish in impotence for years in the Brussels corridors now emerge as legislation often in a matter of months.<sup>142</sup>

For the first time, the interdependence of the policy areas at the new-found focal point of power in Brussels creates a dynamic resembling the almost forgotten predictions of neo-functionalist spillover.<sup>143</sup> The ever-widening scope of the legislative and policy agenda of the Community manifests this dynamic. The agreement to convene two new intergovernmental conferences to deal with economic and monetary union just three years after the adoption of the SEA symbolizes the ever-widening scope of the agenda, as does the increased perception of the Community and its institutions as a necessary, legitimate, and at times effective locus for direct constituency appeal.

But if the instruments themselves (especially the SEA) are so meager, how can one explain the changes they have wrought?

In the remainder of the Article I shall do the following: First, I shall take a closer look at the impact of the SEA on the elements of Community structure and process analyzed in the preceding sections of this Article. I shall try to show that the changes are greater than meet the eye. I believe that their significance, analyzed in the light of the transformation effected in the previous two periods in the Community evolution, is far-reaching. Then, instead of elaborating further on the promise inherent in this last period in Community evolution, a subject on which there has been no shortage of comment and celebration, I shall attempt to point out dangers and raise critical questions.

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See the following debates of the European Parliament: Resolution following the debate on the statement by the Council and the Commission after the meeting of the European Council on Dec. 2-3, 1985, in Luxembourg, 1985 O.J. (C 352) 60; Resolution on the position of the European Parliament on the Single Act approved by the Intergovernmental Conference on Dec. 16-17, 1985, 1986 O.J. (C 36) 144; Resolution on European Union and the Single Act, 1986 O.J. (C 120) 96; Resolution on relations between the European Parliament and the Council, 1986 O.J. (C 283) 36; Resolution on relations between the European Parliament and the Commission in the Institutional Context of the Treaties, 1986 O.J. (C 283) 39; Resolution on the ratification procedure for the Single Act in national parliaments and on the attainment of European Union 1986 O.J. (C 29) 119; Resolution on the Single European Act, 1987 O.J. (C 7) 105; Resolution on the strategy of the European Parliament for achieving European Union, 1987 O.J. (C 190) 71; Resolution on the results obtained from implementation of the Triple Act, 1988 O.J. (C 309) 93; Resolution on relations between parliaments and the European Parliament, 1989 O.J. (C 69) 149.

<sup>140</sup> Again Ehlermann can serve as our barometer. Writing in 1990 he comments: "The '1992 Project' has radically changed the European Community. It has given the 'common market' new impetus and has lifted the Community out of the deep crisis in which it was bogged down in the first half of the 1980's." He adds, "[the] Single European Act . . . represents the most comprehensive and most important amendment to the EEC Treaty to date . . . The core and the 'raison d'être' of the [SEA] are the provisions on the internal market." Ehlermann, "1992 Project," *supra* note 13, at 1097, 1103. This change in nuance in assessing the SEA reflects a general shift in opinion in European Institutions. My own assessment has been that the dynamics generated by the SEA and 1992 surprised most observers and actors.

<sup>141</sup> This development is the expected result of "returning" to majority voting. Amendments to Commission proposals must be unanimous. EEC Treaty, art. 149 (1). But, the Commission "may alter its proposal at any time during the procedures [of decision making]." EEC Treaty, art. 149 (3). The Commission may amend its own proposal, finding a via media among contrasting amendments. None of the amendments on its own could gain unanimity, but a compromise version, in the form of a Commission's altered proposal, may gain a majority. This prerogative of the Commission obviously gives it considerable power it did not have under the shadow of the veto.

<sup>142</sup> See Ehlermann, "1992 Project," *supra* note 13, at 1104-06.

<sup>143</sup> Cf. Keohane & Hoffmann, Conclusions: community politics and institutional change, in *THE DYNAMICS OF EUROPEAN INTEGRATION* 276, 282ff (W. Wallace ed. 1990). For a review of neo-functionalist spillover, see Greilsammer, *supra* note 1.



## B. STRUCTURAL BACKGROUND TO 1992 AND THE SINGLE EUROPEAN ACT—THE TENSION AND ITS RESOLUTION

The balance of constitutionalism and institutionalism, of reduced Exit and enhanced Voice, was the heritage of the Foundational Period and explains much of the subsequent strength and stability of the Community polity.<sup>144</sup> But the Foundational Period equilibrium was not without its costs. Those costs are the ones inherent in consensus politics: the need to reach unanimous agreement in policymaking and governance.

From the little empirical evidence available, we know that consensus politics did not significantly impede policy management during the 1960's, 1970's, and into the 1980's.<sup>145</sup> However, the Community became increasingly unable to respond to new challenges, that called for real policy choices. Thus, while consensus politics (the manifestation of enhanced Voice) explains the relative equanimity with which the jurisdictional limits of the Community broke down in the 1970's, this very consensus model also explains why, within the Community's expanded jurisdiction, it was unable to realize its most traditional and fundamental objectives, such as establishing a single market in the four factors of production.<sup>146</sup> From a structural point of view, one critical impediment to these goals was the growth in the number of Member States. In just over a decade the number of Member States doubled. But the new Member States entered a Community with decisional processes that were created in the Foundational Period and that were not changed to accommodate the increased number of participants. Achieving consensus among the original six was difficult enough. It became substantially more difficult with the first enlargement to nine and virtually debilitating when the number grew to twelve. In addition, the entry first of Britain, Ireland, and Denmark and then of Greece, Spain, and Portugal caused the Community to lose a certain homogeneity of policy perception and cultural orientation. This loss of homogeneity accentuated a problem that would exist in any event by the pure numbers game. Community decision making fell into deep malaise. It is not surprising that almost every initiative between 1980 and the SEA recognized the need to change processes of decision making, usually by moving to some form of majority voting.

Another structural element encouraged change. The evolving rules concerning the free movement of goods and other factors of production between the Member States created a regulatory gap in the European polity. A rigorous (and courageous<sup>147</sup>) jurisprudence of the Court of Justice seriously limited the ability of the Member States to adopt protectionist measures vis-à-vis each other.<sup>148</sup> Indeed, it went further. The Court held that once the Community enacted measures regulating non-tariff barriers to movement of goods, such measures would preempt any subsequently enacted Member State legislation that frustrated the design of the extant Community measures.<sup>149</sup> In addition, it is important to remember that this was an area in which the Treaty provided for unanimous decision making. The Treaty rule on decision making and the Court's jurisprudence on the preemptive effect of such decision making combined to chill the climate in which the Community and its Member States were to make critical decisions to eliminate the numerous barriers to a true common market. Not only was it difficult to achieve consensus on one Community norm to replace the variety of Member State norms, but also there was the growing fear that once such a norm was adopted, it would lock all Member States into a discipline from which they could not exit without again reaching unanimity. If the Community once agreed on a norm on, for example, the permissible level of lead in gasoline, no Member State could subsequently reduce the level further without the consent of all twelve Member States within the Community decision making

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<sup>144</sup> See *supra* Sections I.D-E.

<sup>145</sup> See Krislov, Ehlermann & Weiler, *supra* note 1, at 30-57.

<sup>146</sup> For an analysis of the fragmented market despite close to three decades of a common market regime, see J. PELKMANS & A. WINTERS, *EUROPE'S DOMESTIC MARKET* (1988).

<sup>147</sup> Unlike those of most other systems in Europe, judges on the European Court serve for renewable terms (Article 167 EEC). This rule compromises the appearance of independence. Currently the intergovernmental conference holds a proposal to extend the terms of judges to 12 years and make them non-renewable. See Resolution of European Parliament on the Intergovernmental Conference PE 146.824, art. 167.

<sup>148</sup> The famous line of decision from Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville*, 1974 E.C.R. 837 and its progeny. See generally L. GORMLEY, *PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC* (1985).

<sup>149</sup> See, e.g., Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629, 1643 (Recital 27); Case 5/77, *Tedeschi v. Denavit Commerciale*, 1977 E.C.R. 1555, 1576-77 (Recital 35) [hereinafter *Denavit*].

process. The combination of legal structure and political process militated against easy consensus even on nonprotectionist policy.

The deep political subtlety of the Commission white paper outlining the 1992 program becomes clear in this context, as does its ultimate success. Unlike all earlier attempts and proposals to revive the Community, the 1992 White Paper, although innovative in its conception of achieving a Europe without frontiers,<sup>150</sup> was entirely functional. It delineated the ostensibly uncontroversial goal of realizing an internal market, and, in the form of a technical list of required legislation, the uncontroversial means necessary to achieve that goal. Critically, it eschewed any grandiose institutional schemes. These were to come as an inevitable result, once 1992 was in place. Because of this technocratic approach, the White Paper apparently appealed to those with different, and often opposing, ideological conceptions of the future of Europe. To some, it represented the realization of the old dream of a true common marketplace, which, because of the inevitable connection between the social and the economic in modern political economies, would ultimately yield the much vaunted "ever closer union among the peoples of Europe." To others, it offered a vision of the European dream finally lashed down to the marketplace, and, importantly, a market unencumbered by the excessive regulation that had built up in the individual Member States. Dismantling regulation that impeded intra-Community trade would, on this reading, yield the dismantling of regulation altogether.

The key to the success of the 1992 strategy occurred when the Member States themselves agreed to majority voting. They took this step clearly not as a dramatic political step toward a higher level of European integration in the abstract, but rather as a low-key technical necessity in realizing the "non-controversial" objectives of the White Paper. This movement found expression in the single most important provision of the SEA, Article 100a.

As indicated above, this provision at face value seems minimalist and even destructive. First, the move to majority voting in Article 100a is couched as a residual measure and derogation from the principal measure, which requires unanimity, namely old Article 100.<sup>151</sup> Second, the exception to Article 100a, Article 100a(4), was drafted in an even more restrictive form by the heads of state and government themselves.<sup>152</sup> The exception states that for enactments by majority voting a Member State may, despite the existence of a Community norm, adopt national safeguard measures.<sup>153</sup> Indeed, this exception may be seen as an ingenious attempt by the Member States to retain the equilibrium of the Foundational Period in the new context of majority voting.

The essence of the original equilibrium rested on the acceptance by the Member States of a comprehensive Community discipline on the condition that each would have a determinative Voice, the veto, in the establishment of new norms. In Article 100a, the Member States, by accepting a passage to majority voting, seemed to be destroying one of the two pillars of the foundational equilibrium. But, by allowing a Member State to derogate from a measure even in the face of a Community norm (adopted by a majority!) the other pillar of comprehensive Community jurisdiction seems to be equally eroded, thereby restoring the equilibrium. The exception breaks, of course, the rule of pre-emption established by the Court in cases where harmonization measures were adopted.<sup>154</sup>

Finally, as an indication of the low-key attitude toward the new voting procedure, a proposal to formally "repeal" the Luxembourg Accord was rejected by the Member States. Indeed, when presenting the SEA

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<sup>150</sup> Ehlermann, "1992 Project" *supra* note 13, at 1099.

<sup>151</sup> See Article 100a (1) ("By way of derogation from Article 100 ....").

<sup>152</sup> See Ehlermann, *Internal Market*, *supra* note 134, at 381.

<sup>153</sup> Article 100a (4):

If, after the adoption of a harmonization measure by the Council acting by a qualified majority a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36 . . . it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

<sup>154</sup> See *Denkavit*, *supra* note 150.

to their national parliaments, both the French and British ministers for foreign affairs claimed that the Single European Act left the Luxembourg Accord intact. Thus the French Foreign Minister solemnly declared in the *Assemblée Nationale*, responding to concerns that the SEA gave too much power to the Community at the expense of the Member States, that "*en toute hypothèse, même dans les domaines où s'applique la règle de la majorité qualifiée, l'arrangement de Luxembourg de janvier 1966 demeure et conserve toute sa valeur.*" Likewise, in the House of Commons the British Foreign Secretary assured the House that "as a last resort, the Luxembourg compromise remains in place untouched and unaffected."<sup>155</sup>

These three elements together may have given the Member States the feeling that the step they took was of limited significance and the outside observer the impression that the basic equilibrium was not shattered. It is most striking in this connection to note that even Mrs. Thatcher, the most diffident Head of Government among the large Member States, characterized the Single European Act on the morrow of its adoption by the European Council as a "modest step forward."<sup>156</sup> But shattered it was, since each of these precautions was either ill-conceived or rendered impracticable because of open textured drafting and a teleology that traditionally presaged for construing derogations to the Treaty in the narrowest possible way.

Although the language of the provision suggests the new system was intended as a derogation, the prevailing view is that Article 100a has become the "default" procedure for most internal market legislation, and that the procedure of other articles is an exception.<sup>157</sup> Significantly, the connection between Article 100a and Article 8a means that majority voting should take place, except where specifically excluded,<sup>158</sup> for all measures needed to achieve the objective of an internal market. The internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."<sup>159</sup> This requirement of majority voting extends the scope of Article 100a procedure beyond the harmonization of technical standards affecting the free movement of goods. The net result is that few cases exist that would *compel* resort to the old legal basis and its unanimity requirement. The Commission proposes the legal basis of decisions; any change of such basis would be subject itself to a unanimous Council vote, which would be difficult to achieve. In any event, even if Council could change the legal basis, the Court, if a challenge were brought, would tend to side with the Commission on issues of legal basis.<sup>160</sup>

Likewise, and contrary to some of the doomsday predictions,<sup>161</sup> the derogation to the principle of preemption in Article 100a(4), so carefully crafted by prime ministers and presidents, has had and must have very little impact. It allows a Member State to adopt, under strict conditions and subject to judicial review, unilateral derogation of Community harmonizing measures when the Member State seeks to uphold a higher level of protection. But that does not seem to be the real battlefield of majority voting. The

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<sup>155</sup> On the failure of the proposal to repeal the Accord, see Ehlermann, "1992 Project," *supra* note 13, at 1106. For declarations in the British Parliament and the French Parliament on the continued existence of the Luxembourg Accord even after the SEA, see 96 PARL. DEB., H.C. (5th ser.) 320 (1986) (Debates of the House of Commons of April 23, 1986); Séance of the Assemblée Nationale (Nov. 20, 1986), J.O. No. 109 111 A.N. (C.R.), 8th Législature, 81st Séance 6611 (Nov. 21, 1986).

<sup>156</sup> Washington Post, Dec. 4, 1985, at A29, col. 1.

<sup>157</sup> "Article 100a thus gives the Council enormous scope for action, which is limited principally, I suspect, only by the existence of other enabling provisions," Ehlermann, *Internal Market*, *supra* note 134, at 384. Ehlermann argues convincingly that Article 100a will be used in most cases, even in amending old Article 100 legislation, a Case in which Article 235's provision for unanimity may have been used in the past. He says it will be used also for legislation of a scope that goes beyond the grounds of Article 100, which was limited to harmonization of national measures that affected the establishment or functioning of the common market. Thus, Article 100a will be used, in most cases, when *new* legislation to achieve the common market is needed. *Id.*

<sup>158</sup> *E.g.*, SEA, art. 100a(2).

<sup>159</sup> SEA, art. 8a.

<sup>160</sup> In a series of cases, starting with Case 45/86, *Commission of the European Communities v. Council of the European Communities*, 1987 E.C.R. 1493 (GTP), the Commission has challenged the Council's use of Article 235 (which provides for unanimity) rather than alternative legal bases in the Treaty. In a clear departure from its precedent, which would have allowed the Council to do so, in *Massey Ferguson*, *supra* note 120, the Court sided with the Commission. See also Case 51/87 *Commission of E.C. v. Council of E.C.*, 1988 E.C.R. 5459, Case 165/87, *Commission of E.C. v. Council of E.C.*, 1988 E.C.R. 5545; Case 275/87, *Commission of E.C. v. Council of E.C.*, 1989 E.C.R. 259; Case 288/87. But see Case 242/87, *Commission of E.C. v. Council of E.C.*, 1989 E.C.R. 1425.

<sup>161</sup> See, e.g., Pescatore, *supra* note 138.

real battlefield is regulation by the Community in areas in which Member States may feel that they do not want any regulation at all, let alone a higher Community standard.<sup>162</sup>

The sharpest impact, however, of majority voting under the SEA does not turn on these rather fine points. Earlier I explained that, although the language of the Luxembourg Accord suggested its invocation only when asserting a vital national interest, its significance rested in the fact that practically all decision-making was conducted under the shadow of the veto and resulted in general consensus politics.<sup>163</sup>

Likewise, the significance of Article 100a was its impact on *all* Community decision making. Probably the most significant text is not the SEA, but the consequently changed rules of procedure of the Council of Ministers, which explain the rather simple mechanism for going to a majority vote.<sup>164</sup> Thus, Article 100a's impact is that practically all Community decision making is conducted under the shadow of the vote (where the Treaty provides for such vote). The Luxembourg Accord, if not eliminated completely, has been rather restricted. For example, it could not be used in the areas in which Article 100a provides the legal basis for measures. In addition, to judge from the assiduousness with which the Member States argue about legal bases, which determine whether a measure is adopted by majority or unanimity,<sup>165</sup> it is rather clear that they do not feel free to invoke the Luxembourg Accord at whim. If the Accord persists at all, it depends on the assertion of a truly vital national interest, *accepted as such* by the other Member States, and the possibility of any Member State forcing a vote on the issue under the new rules of procedure. In other words, in accordance with the new rules, to invoke the Luxembourg Accord a Member State must persuade at least half the Member States of the "vitality" of the national interest claimed.

## C. UNDER THE SHADOW OF THE VOTE I

Majority voting thus becomes a central feature of the Community in many of its activities.<sup>166</sup> A parallel with the opposite (Luxembourg Accord veto) practice of the past exists: today, an actual vote by the majority remains the exception. Most decisions are reached by consensus. But reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto. The possibility of breaking deadlocks by voting drives the negotiators to break the deadlock without actually resorting to the vote. And, as noted above, the power of the Commission as an intermediary among the negotiating members of Council has been considerably strengthened.

This Article has emphasized the relationships between the transformations of each of the definitional periods of the Community. In discussing each of the earlier periods, I have already pointed out the evolution of some important structural elements, such as the growth in the number of the Member States, that partially caused this "return" to majority voting.

But, of course, the crucial linkage to the past is not cause but effect. The "(re)turn" to majority voting constitutes a transformation as momentous as those that occurred earlier in the life of the Community because of those earlier changes. It is trite but worth repeating, that absent the earlier process of constitutionalization, a process that gave a real "bite" to Community norms, adoption by majority would be of far lesser significance. What puts the Community and its Member States in a new "defining" situation is

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<sup>162</sup> Britain strongly opposed, on principle, the adoption of Council Directive No. 89/662 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning the labelling of tobacco products, 1989 O.J. (L 359). It did not oppose the low standard of the regulation but argued that the Community did not have competence in the field of health. The derogation in Article 100a(4) was useless in the face of this type of opposition. Britain had recourse only if it wanted a higher standard of protection against the danger of smoking.

<sup>163</sup> The only habitual prior exception concerned decisions within the process of adopting the Community budget.

<sup>164</sup> See amendment of the Council's Rules of Procedure adopted by the Council on July 20, 1987, 1987 O.J. (L 291) 27. New Article 5 provides: 1. The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open voting proceedings on the invitation of a member of the Council or of the Commission, provided that a majority of the Council's members so decides.

The new rules do not differentiate between votes *ex* Article 100a and any other legal basis which provides for majority voting in the Treaty.

<sup>165</sup> See Article 235 cases, *supra* note 161.

<sup>166</sup> Several important Community areas remain that require unanimity. Article 100a(2) provides for exceptions from majority voting in the field of movement of persons, fiscal provisions, and rights and interests of employed persons.

the fact that the Foundational equilibrium, despite attempts to rescue it in the actual drafting of the SEA, seems to be shattered.<sup>167</sup> Unlike any earlier era in the Community,<sup>168</sup> and unlike most of their other international and transnational experience, Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders.

Likewise, the erosion of enumeration is far more significant in the environment of majority voting. There is something almost pitiful in the rude awakening of some of the Member States. For example, in 1989, the Council, in a hotly contested majority vote on the basis of Article 100a, adopted the new Community cigarette labelling directive, which specifies a menu of mandatory warnings. Manufacturers must choose a warning to print on all cigarette packets.<sup>169</sup> The directive was hotly contested not because of the content of the warnings or even the principle of warnings, but because one of the Member States challenged the competence of the Council (meeting as a Council of Health Ministers) to adopt legislation pursuing the *objective* of health. Strictly speaking, to achieve a common market in tobacco products, it would be enough to pass a measure providing that cigarette packages carrying any of the warnings agreed upon could not be impeded in its intra-Community free movement. This directive goes much further, however. Instead of stopping at the Market rationale, its legal basis includes the European Council meeting of June 1985, which launched a European action program against cancer and the Resolution of July 1986 on a program of action of the European Communities against cancer.<sup>170</sup>

What, in June 1985 (prior to the SEA), may have seemed a totally banal resolution under which Member States could control any operationalization of the action program against cancer, attained an altogether different meaning in 1989, when the measures could be, and were, adopted by majority vote. However, in the light of the erosion of the principle of enumeration in the 1970's, a challenge to the constitutionality of the measure as *ultra vires* would likely fail.

Member States thus face not only the constitutional normativity of measures adopted often wholly or partially against their will, but also the operation of this normativity in a vast area of public policy,<sup>171</sup> unless the jurisprudence changes or new constitutional amendments are introduced.<sup>172</sup>

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<sup>167</sup> If the Member States did not want to be in this situation, why did they, in practice, construe the SEA as they did? One can only speculate as to the answer: Critically, Member States differ in relation to the turn to majority voting. Some feel that the reality of interdependence is such that a blocking possibility pays less than the ability to force a recalcitrant major player in certain circumstances. In addition, it seems that, as in earlier episodes, some simply did not appreciate the significance of their constitutionalizing moves and unwittingly found themselves in the "trap" of Community discipline, where the stakes of rupture are possibly very high. It always seems difficult to root an explanation in ignorance by, or mistake of, major state actors. But how else does one explain the statements made by the British and French Foreign Ministers in their respective parliamentary assemblies? See *supra* note 156. Or how does one explain Thatcher's early evaluation of the SEA as a "modest" step, a step which later has come to be regarded as the "most comprehensive and most important amendment to the EEC Treaty to date . . ." Was she deliberately underestimating the nature of change brought about by, in particular, the shift to majority voting, or was she, as I argue in the text, not fully aware of the limits to the safeguards built into the revised Article 100a? Failure of Member States to appreciate the full impact of their action is not new. As indicated above, it would appear that in negotiating Article 177 the Member States were not fully aware of its far-reaching constitutional implications. See *supra* text accompanying note 39.

<sup>168</sup> There were a few episodes in which the Luxembourg Accord did not "save" a Member State. The Agricultural Price increase episode in 1982 is an example. See *The (London) Times*, May 19, 1982 at 1, 5, 30 (articles on EEC override of British veto); *A Failure for Europe*, *id.* at 15 see also *Editorial Comments: The Vote on the Agricultural Prices: A New Departure?*, 19 COMMON MKT. L. REV. 371 (1982).

<sup>169</sup> See Cigarette Labelling Directive, *supra* note 163.

<sup>170</sup> 1986 O.J. (C 184) 19.

<sup>171</sup> Admittedly, legislating on the outer reaches of Community jurisdiction requires resorting to Article 235, which does provide for unanimity. But, as discussed *supra* at text following note 158, Article 100a could be used in some instances instead of 235, especially given the new Commission strategy, supported by the Court, of limiting the use of 235 whenever another Treaty legal basis exists; the cigarette labelling directive illustrates this point quite forcefully.

<sup>172</sup> In fact, in this new decisional climate a heightened sensitivity to demarcation of competences exists, one which hardly existed in the past. See Resolution of Parliament of July 12, 1990, on the principle of Subsidiarity, (PE 143.504):

[H]aving regard to the future development of the Community, in particular its commitment to draw up a draft constitution for European Union and the fact this process of transforming the European Community requires a clear distinction to be made between the competences of the union and those of the member States. . .

Preamble to Resolution, at 13 (emphasis added); see also 27th Report of the Select Committee on the European Communities [of the British House of Lords] on Economic and Monetary Union and Political Union of October 30, 1990 (HL Paper 88-I) at ¶¶ 143-44, 204 ("There is also a more general fear that the Community is taking collective decisions in areas where such choices could perfectly well be left to the member States.") [hereinafter Select Comm.] See generally Jacqué & Weiler, *On the Road to European Union. A New Judicial Architecture: An Agenda*

## D. UNDER THE SHADOW OF THE VOTE II: QUESTION MARKS

As indicated above, I think enough has been written about the promise of the enhanced "efficiency" of the decisional process and the internal dynamic generated and manifested, for example, in the current intergovernmental conferences.<sup>173</sup>

In contrast, I wish to explore less visible implications of the change. Since the SEA does rupture a fundamental feature of the Community in its Foundational Period, the equilibrium between constitutional and institutional power, it would follow from the analysis of the Foundational Period that the change should have implications that go beyond simple legislative efficiency. On this reading, the SEA regime does truly constitute a defining experience for the Community. The lack of any temporal perspective suggests great caution in this part of the analysis, and I pose my points as questions and challenges rather than affirmations.

### 1. *The Challenge of Compliance*<sup>174</sup>

Although the problem of compliance with Community norms by the Member States is not new, the context of the SEA regime changes our evaluation.

In reading the explanation earlier that the Community has developed effective mechanisms for the enforcement of Community law, one should not be misled to think that no violations, by Member States, Community institutions, or individuals, occur. They occur regularly and, as Community activities and impact expand, increasingly.<sup>175</sup> In this respect the Community is no different (in principle) than, for example, any state of equivalent size and complexity. Indeed, that was the critical factor in our analysis. When violation takes place it does so in a constitutional context with an ethos of domestic rather than international law. Since the Member States were able to control the elaboration of Community legislation in all its phases and were able to block any measure not to their liking, the noncompliance reflex would tend to operate at a surface and convenience level and thus would not indicate fundamental discontent.<sup>176</sup>

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for the Intergovernmental Conference, 27 COMMON MKT. L. Rev. 185, 199-206 (1990); *Editorial Comments*, 27 COMMON MKT. L. Rev. 181 (1990).

For a recent harsh critique of the unchecked expansion of jurisdiction, see Hailbronner, *Legal-Institutional Reforms of the EC: What can we learn from Federalism Theory and Practice*, EC 92 AND BEYOND: NEW POLITICAL STRUCTURES AND CONSTITUTIONAL PROBLEMS OF EUROPEAN INTEGRATION (E. Petersman ed. forthcoming).

In the recently leaked "Non-Paper" of the Luxembourg Presidency of April 15, 1991, setting out the state of negotiation of the Intergovernmental Conference, the Principle of Subsidiarity has been inserted as an operational part of the Treaty. The proposal is included as an amendment to EEC Treaty, art. 3 and reads as follows:

La Communauté agit dans les limites des compétences qui lui sont conférées et des objectifs qui lui sont assignés par le présent traité. Dans les domaines que ne relèvent pas de sa compétence exclusive, la Communauté intervient conformément au principe de la subsidiarité, si et dans la mesure où les objectifs qui lui sont assignés peuvent être mieux réalisés au niveau communautaire qu'au niveau des Etats membres oeuvrant isolément, en raison des dimensions ou des effets de l'action envisagée.

*Non-Paper: Projet D'Articles De Traite, En Vue De La Mose En Place D'Une Union Politique* 12 (Luxembourg. April 15, 1991).

If this proposal survives the Conference and is ultimately adopted it would, on my reading, provide a new criterion for judicial review by the Court *ex* Articles 173 and 177(b). The fact that subsidiarity, often thought of as a principle incapable of translation into an operative positive obligation, has been included, is an indication of the strength of feeling concerning the question of erosion of jurisdictional limits.

<sup>173</sup> For the "bright side of the moon" see Ehlermann, "1992 Project," *supra* note 13.

<sup>174</sup> See generally Weiler, *The White Paper and the Application of Community Law*, in 1992: ONE EUROPEAN MARKET? 337 (1988).

<sup>175</sup> The White Paper raises the issue explicitly in § 152.

<sup>176</sup> The Commission drew a bleak picture in the White Paper:

Of the total number of complaints received by the Commission, some 60%, i.e. on average 255 each year, relate to Articles 30-36 of the Treaty, but because of the lack of resources it can, in a given year, settle only one hundred cases. The resulting delays and backlogs benefit the infringing States, impede systematic action, proceedings, and frustrate the confidence of industry as well as that of the man in the street. Measures have to be taken to remedy the situation.

*Id.* at § 153. One should not minimize the pragmatic nature of the problem, accentuated by the ability of Member States to disregard judgments of the Court in direct Article 169 actions. Nonetheless, it is interesting to note that the protectionist violation the Commission points out has been in some measure at least a response to the jurisprudence of the Court and not to consensual legislation. As far as directives are concerned, in most

Under the new regime noncompliance could become more of a strategy. If the equilibrium of Voice and Exit is shattered by reducing the individual power of Member State Voice, the pressure might force a shift to strategies of Exit, which, in the Community context means selective application rather than withdrawal. There are some signs that this may be happening.<sup>177</sup> In any event, although the Community is impressively on course in "implementing" the 1992 legislative program, a "black hole" of knowledge exists regarding the true level of Member State implementation.<sup>178</sup>

This problem of compliance is merely one manifestation of the deep dilemma involved in dismantling the Foundational equilibrium. It is useful here, albeit in a very loose manner, to introduce Hirschman's third notion, Loyalty. Two possible readings of the future present themselves. On one reading, the dismantling of the Foundational equilibrium will constitute a destabilizing act of such dimension that it threatens the acceptance not simply of a particular Community measure but of the very constitutional foundation. Alternatively, acceptance of Community discipline may have become the constitutional reflex of the Member States and their organs.<sup>179</sup> A Loyalty to the institution may have developed that breaks out of the need for constant equilibrium. The two decades of enhanced Voice thus constitute a learning and adaptation process resulting in socialization; at the end of this period decisional changes affecting Voice will not cause a corresponding adjustment to Exit. Time will tell, but there are signs that Loyalty with a large mixture of expediency may prevent or at least reduce the otherwise destabilizing effect of the new change.

## 2. Challenges of "Democracy" and "Legitimacy"<sup>180</sup>

1992 also puts a new hue on the question of the Democracy Deficit. A useful starting point could indeed be a focus on the European Parliament and its role.

It is traditional to start an analysis of the role of the European Parliament in the governance structure of the Community with a recapitulation of the existing Democracy Deficit in E.C. decision making. This deficit informs, animates, and mobilizes the drive to change the powers of the European Parliament. In addition, to the extent that the governments of the Member States have responded, weakly and grudgingly, to this drive, it is surely because even they recognized the compelling power of the Democracy Deficit argument.

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cases, nonincorporation is a result of objective constitutional and procedural difficulties at the national level (especially in Italy and Belgium) and not from an evasive or defiant strategy by a Member State.

<sup>177</sup> The problem was considered sufficiently grave to merit specific mention in the conclusions of the Dublin Summit of June 25-26, 1990, which set up the new Intergovernmental Conferences. Thus, in Annex I, mention was made of the need to give consideration to the automatic enforceability of Article 169 and 171 judgments of the European Court and of Member States ensuring the implementation and observance of Community law and European Court judgments. Dublin Summit, Annex I, *reprinted in Conclusions of the European Council Dublin 25 & 26 June 1990*, EUROPE DOC. (No. 1632/1633) 9 (June 29, 1990).

The European Parliament in its proposed Treaty Amendments submitted to the Intergovernmental Conference suggested amending Article 171 to read:

The court may combine its judgments with financial sanctions against the Member State that has been found to be in default. The amount and method of collection of such sanctions shall be determined by a regulation adopted by the Community in accordance with the procedure laid down pursuant to Article 188(b). The Court may also impose on recalcitrant states other sanctions such as suspension of right to participate in certain Community programmes, to enjoy certain advantages or to have access to certain community funds.

art. 171, PE 146.824. The Select Committee of the House of Lords, in its Report on Economic and Monetary Union and Political Union, observed: "[T]here are Member States which seem to treat their obligation to translate Directives into national law by a certain date as little more than a vague guideline." Select Comm., *supra* note 173, ¶ 146: *see also id.* ¶¶ 45-48, 205.

<sup>178</sup> On the general picture of implementation, see Septième Rapport Annuel au Parlement Européen Sur Le Contrôle De L'application Du Droit Communautaire, Com (90) 288 final (May 22, 1990). *See also* Commission Reports on the Implementation of the White Paper.

<sup>179</sup> For suggestions that this issue may be not quite as settled as one may wish, not even among the courts of the Member States, see, e.g., Cartabia, *The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990); Szyszczak, *Sovereignty: Crisis, Compliance, Confusion, Complacency?*, 15 EUR L. REV. 480 (1990).

<sup>180</sup> See Weiler, *Parlement européen, intégration européenne, démocratie et légitimité*, in LE PARLEMENT EUROPEEN 325 (1988), in which I have elaborated these points more expansively. I have been considerably helped by, and have drawn in particular on, the following works: L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989); T. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); J. HABERMAS, *LEGITIMATION CRISIS* (1975); L. HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990); Dahl, *Federalism and the Democratic Process*, in *LIBERAL DEMOCRACY*, XXV NOMOS at 95 (1983). My own synoptic presentation cannot do justice to the richness of the works cited.

The typical argument views the European Parliament as the only (or at least principal) repository of legitimacy and democracy in the Community structure. The phrase most often used in this context is "democratic legitimacy."<sup>181</sup> The Commission, in this view, is an appointed body of international civil servants, and the Council of Ministers represents the Executive branch of each national government which, through Community structures, has legislative powers it lacks on respective national scenes.

Thus, the Council, a collectivity of Ministers, on a proposal of the Commission, a collectivity of nonelected civil servants, could, and in some instances must, pass legislation which is binding and enforceable even in the face of conflicting legislation passed by national parliaments. This occurs without corresponding parliamentary scrutiny and approval. Indeed, the Council could pass the legislation in the face of the European Parliament's disapproval. This happens often enough to render the point not simply theoretical. What is more, the Council can legislate in some areas that were hitherto subject to parliamentary control at the national level. We have already seen how the constitutionalization process in the Foundational Period and the erosion of enumerated powers in the second period accentuated this problem.

According to this view of the Community, the powers of the European Parliament are both weak and misdirected. They are weak in that the legislative power (even post-SEA) is ultimately consultative in the face of a determined Council. Even the Parliament's budgetary powers, though more concrete, do not affect the crucial areas of budgetary policy: revenue raising and expenditure on compulsory items.<sup>182</sup> The power to reject the budget *in toto* is a boomerang which has not always proved effective, although in 1984 the budget ultimately was amended in a direction that took account of some of Parliament's concerns. The possibility of denying a discharge on past expenditure lacks any real sanction power.

Those parliamentary powers that are real, the powers to dismiss the Commission, to ask questions of the Commission, and to receive answers, are illusory at best and misdirected at worst. They are illusory because the power to dismiss is collective and does not have the accompanying power to appoint. They are misdirected because the Council is the "Villain of the Piece" in most European Parliament battles.

All these well-known factors taken together constitute the elements of the Democracy Deficit and create the crisis of legitimacy from which the Community allegedly suffers.

Although the Democracy Deficit is prominent in Parliamentary rhetoric, the day-to-day complaint of Parliament especially in the pre-SEA days was not that the Community legislator (the Council) was over-vigorous and violated democratic principles, but rather that it failed to act vigorously enough. Critics argued that the Council had incapacitated itself and the entire Community by abandoning Treaty rules of majoritarian decision making by giving a *de facto* veto to each Member State government that asserts a "vital national interest."

The veto power arrogated by the Member States produced another facet of the Democracy Deficit: the ability of a small number of Community citizens represented by their Minister in the Council to block the collective wishes of the rest of the Community.

Parliamentarians almost uniformly claim that both facets of the malaise could be corrected by certain institutional changes, which on the one hand would "de-block" the Council by restoring majority voting, but which would also significantly increase the legislative and control powers of Parliament.

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<sup>181</sup> The problem of democratic structures is addressed this way by the Dublin Summit, Annex I, *supra* note 178, at 8.

<sup>182</sup> Parliament has a final say (within limits set by the Commission) only on expenditure items which are not mandated by the Treaty itself. For the best explanation of Parliamentary powers in this field, see J. JACQUÉ, R. BIEBER, V. CONSTANTINESCO & D. NICKEL, *LE PARLEMENT EUROPÉEN* 178 (1984). See also Case 34/86, Council v. Parliament, 1986 E.C.R. 2155 (Re: the 1986 Budget) (especially opinion of Advocate General Mancini). Parliament was granted real approval control as regards Association Agreements *ex* Article 238 and accession of new Member States *ex* Article 237. It has no formal powers, even of consultation as regards trade agreements *ex* Article 113.



Increased powers to the Parliament, directly elected by universal suffrage, would, so it is claimed, substantially reduce the Democracy Deficit and restore legitimacy to the Community decision making process.

It is further argued that, regarding the decisional malaise, Parliament has over the years boasted a *Communautaire* spirit which would, if given effective outlet, transcend nationalistic squabbles and introduce a dynamism far more consonant with the declared objectives of the Treaties. The large majority accorded to the Draft Treaty Establishing the European Union is cited as a typical example of this dynamism. Although these points seem obvious, they receive little critical analysis.

The absence of a critical approach derives in part from a loose usage of the notions of democracy and legitimacy. Very frequently in discourse about Parliament and the Community the concepts of democracy and legitimacy have been presented interchangeably although in fact they do not necessarily coincide.

To be sure, today, a nondemocratic government or political system in the West could not easily attain or maintain legitimacy, but it is still possible for a democratic structure to be illegitimate—either *in toto* or in certain aspects of its operation.<sup>183</sup>

In spite of all the conceptual difficulties of dealing with "legitimacy,"<sup>184</sup> even in this brief excursus it may be useful to draw one classical distinction between formal (legal) legitimacy and social (empirical) legitimacy.

The notion of formal legitimacy in institutions or systems implies that all requirements of the law are observed in the creation of the institution or system. This concept is akin to the juridical concept of formal validity. In today's Europe, as in the West generally, any notion of legitimacy must rest on some democratic foundation, loosely stated as the People's consent to power structures and process. A Western institution or system satisfies formal legitimacy if its power structure was created through democratic processes.<sup>185</sup> Thus, in the Community context, I simply point out that the Treaties establishing the Community, which gave such a limited role to the European Parliament, were approved by the national parliaments of all founding Member States and subsequently by the parliaments of six acceding Member States. Proposals to give more power to the European Parliament have failed, for a variety of reasons, to survive the democratic processes in the Member States.<sup>186</sup>

This definition of formal legitimacy is thus distinct from that of simple "legality." Formal legitimacy is legality understood in the sense that democratic institutions and processes created the law on which it is based (in the Community case the Treaties).

Thus, in this formal sense, the existing structure and process rests on a formal approval by the democratically elected parliaments of the Member States; and yet, undeniably, the Community process suffers from a clear Democracy Deficit in the classical sense outlined above.

"Social legitimacy," on the other hand, connotes a broad, empirically determined societal acceptance of the system. Social legitimacy may have an additional substantive component; legitimacy occurs when the

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<sup>183</sup> A stark example may drive the point home better than an abstract explication: Germany during the Weimar period was democratic but the government enjoyed little legitimacy. Germany during National Socialism ceased to be democratic once Hitler rose to power, but the government continued to enjoy widespread legitimacy well into the early 1940's. Cf. G. CRAIG, *GERMANY 1866-1945*, at chs. 15,18 (1981).

<sup>184</sup> See generally Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

<sup>185</sup> Franck's synthesis of "legitimacy" as it applies to the rules applicable to states is: "*Legitimacy is a property of a rule or rule making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*" T. FRANCK, *supra* note 181, at 24 (emphasis in original).

<sup>186</sup> The SEA, which touches only slightly the so-called Democracy Deficit, was ratified by the parliaments of all the Member States. Likewise, with each Community enlargement, in 1973, 1981, and 1986, national parliaments had the opportunity to protest the nondemocratic character of the Community, but instead, reconfirmed the governance system.

government process displays a commitment to, and actively guarantees, values that are part of the general political culture, such as justice, freedom, and general welfare.<sup>187</sup>

An institution, system, or polity, in most, but not all, cases, must enjoy formal legitimacy to enjoy social legitimacy. This is most likely the case in Western Democratic traditions, which embody the Rule of Law as part of their political ethos. But a system that enjoys formal legitimacy may not necessarily enjoy social legitimacy. Most popular revolutions since the French Revolution occurred in polities whose governments retained formal legitimacy but lost social legitimacy.

These admittedly primitive distinctions will become relevant to our discussion with one further excursus into the notions of integration and democracy.<sup>188</sup>

Obviously, democracy cannot exist in a modern polity as in "the Greek Polis" or "the New England town." Representative democracy replaces direct participation. Nonetheless, democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed. Although this formula is vague, it is sufficient for present purposes.

Imagine three independent polities, each enjoying a representative democracy. Let us further assume that each government enjoys legislative and regulatory power in the fields of education, taxation, foreign trade, and defense. In relation to each of these four functions the electors can influence directly their representatives, through elections and the like, as to the polity's education policy, level of taxation, type of foreign trade (e.g., protectionist or free), and defense force composition and policy. Assume finally that for a variety of reasons the three polities decide to integrate and "share their sovereignty" in the fields of taxation, foreign trade and defense.

If this decision to integrate was democratically reached within each polity, the integrated polity certainly enjoys formal legitimacy. However, by definition, initially the new integrated polity's "responsiveness" will be less than that of the three independent polities. Prior to the integration, the majority of electors in polity A would have a controlling influence over their level of taxation, the nature of their foreign trade policy, and the size and posture of their army. In the integrated polity, even a huge majority of the electors in polity A can be outvoted by the electors of polities B and C.<sup>189</sup> This will be the case even if the new integrated polity has a perfectly democratically elected "federal" legislator. The integrated polity will not be undemocratic but it will be, in terms of the ability of citizens to influence policies affecting them, less democratic.<sup>190</sup>

This transformation occurs, in reverse form, when a centralized state devolves power to regions, as in the cases of Italy, Spain, and recently France. Regionalism, "the division of sovereignty" and granting of it to

<sup>187</sup> Franck usefully sorts legitimacy theories into three groups. The first group regards legitimacy as process. He cites Weber:

Weber postulates the validity of an order in terms of its being regarded by the obeying public "as in some way obligatory or exemplary" for its members because, at least, in part, it defines "a model" which is "binding" and to which the actions of others "will in fact conform ...." At least, in part, this legitimacy is perceived as adhering to the authority issuing an order, as opposed to the qualities of legitimacy that inhere in an order itself.

T. FRANCK, *supra* note 181, at 16-18, 250 n.29 (quoting from M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (1968)). The second group mixes

process and substance. This notion "is interested not only in how a ruler and a rule were chosen, but also in whether the rules made, and commands given, were considered in the light of all relevant data, both objective and attitudinal." T. FRANCK, *supra* note 181, at 17. Franck quotes Habermas: "Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just ...." T. FRANCK, *supra* note 181, at 248 n.27 (quoting J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178-79 (1979)). His third group, primarily neomarxist, focuses on outcomes. "In this view, a system seeking to validate itself . . . must be defensible in terms of the equality, fairness, Justice, and freedom which are realized by those commands." T. FRANCK, *supra* note 181, at 18.

We do not have to choose among these different conceptualizations of legitimacy, since all three support my simple proposition distinguishing social legitimacy from both democracy and legal validity simpliciter.

<sup>188</sup> See generally Dahl, *supra* note 181.

<sup>189</sup> The dilution in Voice operates on two levels: a diminution in the specific gravity of each voter's weight in the process, and a diminution in the gravity of each voter's state.

<sup>190</sup> Different federal options will of course have consequences also for the allocation choices of voters and substantive policy outcomes. For a sustained discussion of this issue, see Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152 (1981).

more or less autonomous regions is in some respects the opposite of integration. One of the prime motivations for regionalism is to enhance democracy in the sense of giving people more direct control of areas of public policy that affect their lives.

To suggest that in the process of integration there is a loss, at least in one sense, of democracy, does not, as such, condemn the process of integration. The electors in polities *A*, *B*, and *C* usually have formidable reasons for integrating despite this loss of some direct control over policy when it is made in the larger polity. Typically the main reason is size. By aggregating their resources, especially in the field of defense, total welfare may be enhanced despite the loss of the more immediate influence of their government's policies. Similar advantages may accrue in the field of foreign trade. Phenomena such as multi-national corporations, which may manage to escape the control of any particular polity, may exist, and only an integrated polity can tax or regulate them effectively. In other words the independence and sovereignty of the single polities may be illusory in the real interdependent world. Nonetheless, the ability of the citizens of polity *A*, *B*, or *C* directly to control and influence these areas will have diminished.

Even within each polity the minority was obliged to accept majority decisions. So why do I claim that in the enlarged, integrated polity, in which an equally valid majoritarian rule applies, a loss of democracy occurs? This is among the toughest aspects of democratic theory.

What defines the boundary of the polity within which the majority principle should apply? No theoretical answer exists to this question. Long term, very long term, factors such as political continuity, social, cultural, and linguistic affinity, and a shared history determine the answer. No one factor determines the boundaries; rather they result from some or all of these factors. People accept the majoritarian principle of democracy within a polity to which they see themselves as belonging.<sup>191</sup>

The process of integration—even if decided upon democratically—brings about at least a short-run loss of direct democracy in its actual process of governance. What becomes crucial for the success of the integration process is the social legitimacy of the new integrated polity despite this loss of total control over the integrated policy areas by each polity.

How will such legitimacy emerge? Two answers are possible. The first is a visible and tangible demonstration that the total welfare of the citizenry is enhanced as a result of integration. The second answer is ensuring that the new integrated polity itself, within its new boundaries, has democratic structures. But more important still is giving a temporarily enhanced voice to the separate polities. It is not an accident that some of the most successful federations which emerged from separate polities—the United States, Switzerland, Germany—enjoyed a period as a confederation prior to unification. This does not mean confederation is a prerequisite to federation. It simply suggests that in a federation created by integration, rather than by devolution, there must be an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority.<sup>192</sup>

From the political, but not legal, point of view the Community is in fact a confederation. The big debate is therefore whether the time is ripe for a radical change toward a more federal structure, or whether the process should continue in a more evolutionary fashion.

These answers about the possible emergence of legitimacy can be at odds with each other. Giving an enhanced Voice to each polity may impede the successful attainment of the goals of integration. Denying sufficient Voice to the constituent polities (allowing the minority to be overridden by the majority) may bring about a decline in the social legitimacy of the integrated polity with consequent dysfunctions and even disintegration. In terms of democratic theory, the final objective of a unifying polity is to recoup the

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<sup>191</sup> "Thus it does not seem possible to arrive at a defensible conclusion about the proper unit of democracy by strictly theoretical reasoning: we are in the domain not of theoretical but of practical judgement." Dahl, *supra* note 181, at 106; see also L. BRILMAYER, *supra* note 181, at 13-27, 52-78 (ch. 1, "Political Legitimacy and Jurisdictional Boundaries" and ch. 3, "Boundary Assumptions in Domestic Political Theory").

<sup>192</sup> We do not have to take the formal transfer as the actual transfer. Arguably, the United States became truly federal only after the Civil War.

loss of democracy inherent in the process of integration. This "loss" is recouped when the social fabric and discourse are such that the electorate accepts the new boundary of the polity and then accepts totally the legitimacy-in its social dimension-of being subjected to majority rule in a much larger system comprised of the integrated polities.

We can now see how these notions play out in a reconstructed analysis of the democracy issue in the Community.

As stated above, a premise of the traditional analysis is that the Community suffers from a legitimacy crisis. Is the absence of legitimacy formal? Surely not. The Community, including its weak Parliament, appointed Commission, and unaccountable Council, enjoys perfect formal legitimacy. The Treaties all have been approved by the Community electorate through their national parliaments in accordance with the constitutional requirement of each Member State. In addition, the Treaties have been approved several times more with the accession of each new Member State and most recently with the adoption of the Single European Act.

If there is a crisis of legitimacy it must therefore be a crisis of social (empirical) legitimacy. What is the nature of this crisis of social legitimacy, if indeed it exists?

The traditional view is that the absence of legitimacy is rooted in the Democracy Deficit. As stated above, the implication is that any increase in the legislative and control powers of the European Parliament at the expense of the Council contributes to an elimination of this legitimacy crisis. I challenge the premise and the conclusion. I believe that Parliament should be given enhanced powers, because I acknowledge the Democracy Deficit in the formal sense explained above. But I think that it is at least questionable whether this will necessarily solve the legitimacy problems of the Community. It may even enhance them.

The legitimacy problem is generated by several factors, which should be discussed separately. The primary factor is, at least arguably, that the European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which their *national* voice becomes a minority which can be overridden by a majority of representatives from other European countries. In theoretical terms there is, arguably, still no legitimacy to the notion that the boundaries within which a minority will accept as democratically legitimate a majority decision are now European instead of national. It is interesting, and significant, that for the first time national parliaments are taking a keen interest in the structural process of European integration and are far from enamored with the idea of solving the Democracy Deficit by simply enhancing the powers of the European Parliament.<sup>193</sup>

At its starkest, this critical view claims that in terms of social legitimacy no difference exists between a decision of the Council of Ministers and a decision of the European Parliament. To the electorate, both chambers present themselves as legislative, composed of Member State's representatives. In both cases, until time and other factors resolve this dimension of legitimacy, the electorate of a minority Member State might consider it socially illegitimate that they have to abide by a majority decision of a redefined polity.

On this view, the most legitimating element (from a "social" point of view) of the Community was the Luxembourg Accord and the veto power. To be sure, a huge cost in terms of efficient decision making and progress was paid. But this device enabled the Community to legitimate its program and its legislation. It provided the national electorates an ex ante "insurance policy" that nothing could pass without the electorate Voice having a controlling say. The "insurance policy" also presented an ex post legitimation as well: everything the Community did, no matter how unpopular, required the assent of national ministers. The legitimacy of the output of the Community decisional process was, thus, at least partially due to the public knowledge that it was controllable through the veto power. The current shift to majority voting might therefore exacerbate legitimacy problems. Even an enhanced European Parliament, which would operate on a co-decision principle, will not necessarily solve the legitimacy problem. The

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<sup>193</sup> See, e.g., Select Comm., *supra* note 173, at ¶¶ 157, 158, 210.

legitimacy crisis does not derive principally from the accountability issue at the European level, but from the very redefinition of the European polity.

Pulling all the threads together, the conclusion provides at least food for thought: in a formal sense, majority voting exacerbates the Democracy Deficit by weakening national parliamentary control of the Council without increasing the powers of the European Parliament. But even increasing the powers of the European Parliament (to full co-decision on the most ambitious plan) does not wholly solve the problem. It brings to the fore the intractable problem of redefining the political boundaries of the Community within which the principle of majority voting is to take place. It is an open question whether the necessary shift in public loyalty to such a redefined boundary has occurred even if we accept the formalistic notion of state parliamentary democracy.

#### **IV. BEYOND 1992: TWO VISIONS OF THE PROMISED LAND – THE IDEOLOGY, ETHOS, AND POLITICAL CULTURE OF EUROPEAN INTEGRATION**

By way of conclusion I would like to examine, far more tentatively, another facet of the transformation of Europe: the ideology, ethos, and political culture of European integration, particularly in relation to 1992.<sup>194</sup>

Ideological discourse within the Community, especially in the pre-1992 period, had two peculiar features. On the one hand, despite the growing focus of Community activity on important issues of social choice, a near absence of overt debate on the left-right spectrum existed. 1992 (as a code for the overall set of changes) represents a break from this pattern.

On the other hand, there was abundant discourse on the politics and choices of the integration model itself. But this discourse was fragmented. In specialized political constituencies, especially those concerned with Community governance, public discourse was typically a dichotomy between those favoring the Community (and further European integration) and those defending "national sovereignty" and the prerogatives of the Member State.

The outcome of the debate was curious. In the visible realm of political power from the 1960's onwards, it seemed that the "national interest" was ascending.<sup>195</sup> The "high moral ground" by contrast, seemed to be occupied fairly safely by the "integrationists."

So far as the general public was concerned, the characterizing feature of public discourse was a relatively high level of indifference, disturbed only on rare occasions when Community issues caught the public imagination. Although opinion polls always showed a broad support for the Community, as I argued

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<sup>194</sup> In the earlier parts of this Article I rested my interpretation, as much as possible and at least in its factual matrix, on an "objective" reality rooted in "empirical" and consequently "refutable" data. Likewise, my analytical moves were transparent enough to open them to rational critique. Obvious and inevitable limitations on the resulting "scientific objectivity" of the Article exist. Clearly, to give the most banal example, my own prejudices, overt and less overt, shaped the selection of factual data, and, of course, their perception and analysis. Readers are always better placed than the writer to expose those prejudices and discount them in assessing the overall picture. In turning to ethos, ideology, and political culture, the screening process of the "self" (my "self") plays an even bigger role in the narrative. To try to "document" my assertions and conclusions here would be to employ the semblance of a scholarly apparatus where it is patently not merited. I do not, and cannot, claim to root this part of the Article on the kind of painstaking research and complex tools that characterize the work of the social historian or the historical sociologist. *Caveat Lector!* Nonetheless, my brief narrative will, I hope, serve a function. Compared to the plethora of systemic and substantive theories and analyses of the processes of European integration, a real dearth of ideological and cultural scrutiny exists. Two recent extremely illuminating reflections on these issues are E SNYDER, *supra* note 7, and J. ORSTROM MOLLER, *TECHNOLOGY AND CULTURE IN A EUROPEAN CONTEXT* (1991). By offering my perspective on these issues I hope the reader is drawn to reflect, and thereby, challenged to take position.

<sup>195</sup> The constitutional revolution was not immediately apparent even to relatively informed audiences. See Weiler, *Attitudes of MEPs Towards the European Court*, 9 EUR. L. REV. 169 (1984). One of the interesting conclusions of this survey of attitudes is that even those Members of the European Parliament strongly opposed to the dynamics of European integration and the increase in power of the Commission and Parliament regarded the Court with relevant equanimity.

earlier, it was still possible to gain political points by defending the national interest against the threat of the faceless "Brussels Eurocracy."

Here, the importance of 1992 has not been only in a modification of the political process of the Community, but also in a fascinating mobilization of wide sections of general public opinion behind the "new" Europe. The significance of this mobilization cannot be overstated. It fueled the momentum generated by the White Paper and the Single European Act, and laid the ground auspiciously for creating Community initiatives to push beyond 1992. These Community initiatives included the opening in December 1990 of two new Intergovernmental Conferences designed to fix the timetable and modalities of Economic and Monetary Union, as well as the much more elusive task of Political Union. Although no one has a clear picture of "political union,"<sup>196</sup> with open talk about Community government, federalist solutions, and other such codes,<sup>197</sup> even if the actual changes to the existing structure will be disappointing, in the ideological "battle" between state and Community, the old nationalist rhetoric has become increasingly marginalized and the integrationist ethos has fully ascended. The demise of Prime Minister Thatcher symbolizes this change.

The impact of 1992, however, goes well beyond these obvious facts of mobilization and "European ascendancy." Just below the surface lurk some questions, perhaps even forces, which touch the very ethos of European integration, its underlying ideology, and the emergent political culture associated with this new mobilization. Moreover, in some respects the very success of 1992 highlights some inherent (or at least potential) contradictions in the very objectives of European integration.

I shall deal first with the break from the Community's supposed ideological neutrality, and then turn to the question of the ethos of European integration in public discourse.

## A. 1992 AND THE "IDEOLOGICAL NEUTRALITY" OF THE COMMUNITY

The idea of the single market was presented in the White Paper as an ideologically neutral program around which the entire European polity could coalesce in order to achieve the goals of European integration. This idea reflected an interesting feature of the pre-1992 Community: the relative absence of ideological discourse and debate on the right-left spectrum. The chill on right-left ideological debate derived from the governance structure of the Community.<sup>198</sup>

Since in the Council there usually would be representatives of national governments from both right and left, the desired consensus had to be one acceptable to all major political forces in Europe. Thus, policies verged towards centrist pragmatic choices, and issues involving sharp right-left division were either shelved<sup>199</sup> or mediated to conceal or mitigate the choice involved. The tendency towards the lowest common denominator applied also to ideology.

Likewise, on the surface, the political structure of the European Parliament replicates the major political parties in Europe. National party lists join in Parliament to sit in European political groups. However, for a

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<sup>196</sup> The term has no fixed meaning and is used to connote a wide variety of models from federalist to intergovernmentalist. *See generally* R. MAYNE & J. PINDER, *FEDERAL UNION: THE PIONEERS* (1990); *THE DYNAMICS OF EUROPEAN UNION* (R. Pryce ed. 1987) (usefully tracing evolution of concept of political union over history of European integration up to Single European Act); *EUROPEAN UNION: THE EUROPEAN COMMUNITY IN SEARCH OF A FUTURE* (J. Lodge ed. 1986).

<sup>197</sup> *See e.g.*, President Delors' speech to the European Parliament of January 17, 1990: "Cet exécutif [of the future Community on which Delors was speculating] à la Commission according to the logic of the Founders] devra être responsable, bien entendu, devant les institutions démocratique de la future *fédération*....." *Jacques Delors Présente Le Programme de la Commission et Dessine Un Profil de L'Europe de Demain*, *EUROPE Doc.* (No. 1592) 7 (Jan. 24, 1990) (emphasis added). Likewise, when speaking approvingly of Mitterrand's idea of an "all European Confederation," Delors adds: "Mais ma conviction est qu'une telle confédération ne pourra voir le jour qu'une fois réalisé l'Union politique de la Communauté!" *Id.* at 4.

<sup>198</sup> Of course I do not suggest that choices with ideological implications were not made. But they were rarely perceived as such.

<sup>199</sup> Thus, the proposed European company statute was shelved for many years because of the inability to agree, especially on the role of labor in the governance structure of the company.

long time the politics of integration itself, especially on the issues of the European Parliament's power and the future destiny of the Community, were far more important than differences between left and right within the chamber. The clearest example was the coalescing of Parliament with a large majority behind the Independent-Communist Spinelli and his Draft Treaty for European Union.<sup>200</sup>

Most interesting in this perspective is the perception of the Commission. It is an article of faith for European integration that the Commission is not meant to be a mere secretariat, but an autonomous political force shaping the agenda and brokering the decision making of the Community. And yet at the same time, the Commission, as broker, must be ideologically neutral, not favoring Christian Democrats, Social Democrats, or others.

This neutralization of ideology has fostered the belief that an agenda could be set for the Community, and the Community could be led towards an ever closer union among its peoples, without having to face the normal political cleavages present in the Member States. In conclusion, the Community political culture which developed in the 1960's and 1970's led both the principal political actors and the political classes in Europe to an habituation of all political forces to thinking of European integration as ideologically neutral in, or ideologically transcendent over, the normal debates on the left-right spectrum. It is easy to understand how this will have served the process of integration, allowing a nonpartisan coalition to emerge around its overall objectives.

1992 changes this in two ways. The first is a direct derivation from the turn to majority voting. Policies can be adopted now within the Council that run counter not simply to the perceived interests of a Member State, but more specifically to the ideology of a government in power. The debates about the European Social Charter and the shrill cries of "Socialism through the back door," as well as the emerging debate about Community adherence to the European Convention on Human Rights and abortion rights are harbingers of things to come. In many respects this is a healthy development, since the real change from the past is evidenced by the ability to make difficult social choices and particularly by the increased transparency of the implications of the choice. At the same time, it represents a transformation from earlier patterns with obvious dysfunctional tensions.

The second impact of 1992 on ideological neutrality is subtler. The entire program rests on two pivots: the single market plan encapsulated in the White Paper, and its operation through the new instrumentalities of the Single European Act. Endorsing the former and adopting the latter by the Community and its Member States — and more generally by the political class in Europe—was a remarkable expression of the process of habituation alluded to above. People were successfully called to rally behind and identify with a bold new step toward a higher degree of integration. A "*single European market*" is a concept which still has the power to stir. But it is also a "*single European market*." It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology, and political culture: the culture of "the market." It is also a philosophy, at least one version of which—the predominant version—seeks to remove barriers to the free movement of factors of production, and to remove distortion to competition as a means to maximize utility. The above is premised on the assumption of formal equality of individuals.<sup>201</sup> It is an ideology the contours of which have been the subject of intense debate within the Member States in terms of their own political choices. This is not the place to explicate these. Elsewhere, two slogans, "The One Dimensional Market" and "Big Market as Big Brother," have been used to emphasize the fallacy of ideological neutrality.<sup>202</sup> Thus, for example, open access, the cornerstone of the single market and the condition for effective nonprotectionist competition, will also put pressure on local consumer products in local markets to the extent these are viewed as an expression of cultural diversity. Even more dramatic will be the case in explicit "cultural products," such as television and cinema. The advent of Euro-brands

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<sup>200</sup> Typically, right and left have differed sharply in Parliament on issues of foreign affairs and extra-Community policies.

<sup>201</sup> There is an alternative construction of the Community political ideology also present in the European debate, one which recognizes "inequalities but deploring their inequities, considers the market to be just one of several basic means of governing society." E SNYDER, *supra* note 7, at 89.

<sup>202</sup> Biener, Dehousse, Pinder & Weiler, *Back to the Future: Policy, Strategy and Tactics of the White Paper on the Creation of a Single European Market*, in 1992: ONE EUROPEAN MARKET? 18-20 (1988).

has implications, for better or for worse, which extend beyond the bottom line of national and Community economies. A successful single market requires widespread harmonization of standards of consumer protection and environmental protection, as well as the social package of employees. This need for a successful market not only accentuates the pressure for uniformity, but also manifests a social (and hence ideological) choice which prizes market efficiency and European-wide neutrality of competition above other competing values.

It is possible that consensus may be found on these issues, and indeed that this choice enjoys broad legitimacy. From my perspective, it is important to highlight that the consensus exudes a powerful pressure in shaping the political culture of the Community. As such, it is an important element of the transformation of Europe.

## B. THE ETHOS OF EUROPEAN INTEGRATION: EUROPE AS UNITY AND EUROPE AS COMMUNITY

As indicated above, 1992 also brings to the fore questions, choices, and contradictions in the very ethos of European integration. I shall explore these questions, choices, and contradictions by construing two competing visions of the Promised Land to which the Community is being led in 1992 and beyond. The two visions are synthetic constructs, distilled from the discourse and praxis of European integration.

Unitarian and communitarian visions share a similar departure point. If we go back in time to the 1950 Schuman Declaration and the consequent 1951 Treaty of Paris establishing the European Coal and Steel Community, these events, despite their economic content, are best seen as a long-term and transformative strategy for peace among the states of Western Europe, principally France and Germany.<sup>203</sup> This strategy tried to address the "mischief" embodied in the excesses of the modern nation-state and the traditional model of statal intercourse among them that was premised on full "sovereignty," "autonomy," "independence," and a relentless defense and maximization of the national interest. This model was opposed not simply because, at the time, it displayed a propensity to degenerate into violent clashes, but also because it was viewed as unattractive for the task of reconstruction in times of peace.<sup>204</sup> The European Community was to be an antidote to the negative features of the state and statal intercourse; its establishment in 1951 was seen as the beginning of a process<sup>205</sup> that would bring about their elimination.

At this point, the two visions depart.

According to the first—unity—vision, the process that started in 1951 was to move progressively through the steps of establishing a common market and approximating economic policies<sup>206</sup> through ever tighter economic integration (economic and monetary union), resulting, finally, in full political union, in some version of a federal United States of Europe. If we link this vision to governance process and constitutional structure, the ultimate model of the Community and the constitutionalized treaties stands as the equivalent, in the European localized context, of the utopian model of "world government" in classical international law. Tomorrow's Europe in this form would indeed constitute the final demise of Member

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<sup>203</sup> See, e.g., Schuman Declaration of May 9, 1950, reprinted in 13 BULL. EUR. COMMUNITIES 14, 15 (1980) [hereinafter Schuman Declaration] ("The gathering of the nations of Europe requires the elimination of the age-old opposition of France and the Federal Republic of Germany."); Preamble to 1951 Treaty of Paris, reprinted in EUR. COMMUNITY INFO. SERVICE, TREATIES ESTABLISHING THE EUR. COMMUNITIES (1987) ("Considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it . . .").

<sup>204</sup> This does not mean that states and leaders were engulfed in some teary eyed sentimentalism. Signing on to the Community idea was no doubt also a result of cool calculation of the national interest. See A. MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE 1945-51 (1984). But this does not diminish the utility of seeking the overall ethos of the enterprise that they were joining.

<sup>205</sup> On the one hand: "In taking upon [it]self for more than 20 years the role of champion of a united Europe, France has always had as [its] essential aim the service of peace." On the other hand: "Europe will not be made all at once, or according to a single . . . plan." Schuman Declaration, *supra* note 204, at 15.

<sup>206</sup> EEC Treaty, art. 2.



State nationalism and, thus, the ultimate realization of the original objectives through political union in the form of a federalist system of governance.<sup>207</sup>

The alternative—community—vision also rejects the classical model of international law which celebrates statal sovereignty, independence, and autonomy and sees international legal regulation providing a "neutral" arena for states to prosecute their own ("national") goals premised on power and self-interest.<sup>208</sup> The community vision is, instead, premised on limiting, or sharing, sovereignty in a select albeit growing number of fields, on recognizing, and even celebrating, the reality of *interdependence*, and on counterpoising to the exclusivist ethos of statal autonomy a notion of a *community* of states and peoples sharing values and aspirations.

Most recently, it has been shown convincingly, not for the first time, how the classical model of international law is a replication at the international level of the liberal theory of the state.<sup>209</sup> The state is implicitly treated as the analogue, on the international level, to the individual within a domestic situation. In this conception, international legal notions such as self-determination, sovereignty, independence, and consent have their obvious analogy in theories of the individual within the state. The idea of community is thus posited in juxtaposition to the international version of pure liberalism and substitutes a modified communitarian vision.

Since the idea of "community" is currently in vogue and has become many things to many people, I would like to explain the meaning I attach to it in this transnational European context.<sup>210</sup> The importance of the EEC inter-statal notion of *community* rests on the very fact that it does not involve a negation of the state. It is neither state nor community. The idea of community seeks to dictate a different type of intercourse among the actors belonging to it, a type of self-limitation in their self-perception, a redefined self-interest, and, hence, redefined policy goals. To the interest of the state must be added the interest of the community. But crucially, it does not extinguish the separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community, and committed to an elusive search for an optimal balance of goals and behavior between the community and its actors. I say it is crucial because the unique contribution of the European Community to the civilization of international relations — indeed its civilizing effect on intra-European statal intercourse — derives from that very tension among the state actors and between each state actor and the Community. It also derives from each state actor's need to reconcile the reflexes and ethos of the "sovereign" national state with new modes of discourse and a new discipline of solidarity.<sup>211</sup> Civilization is thus perceived not in the conquering of Eros but in its taming.<sup>212</sup>

Moreover, the idea of Europe as community not only conditions discourse among states, but it also spills over to the peoples of the states, influencing relations among individuals. For example, the Treaty provisions prohibiting discrimination on grounds of nationality, allowing the free movement of workers and their families, and generally supporting a rich network of transnational social transactions may be viewed not simply as creating the optimal conditions for the free movement of factors of production in the

<sup>207</sup> Of course, even in this vision, one is not positing a centrist unified Europe but a federal structure of sorts, in which, local interests and diversity would be maintained. Thus, although Delors speaks in his Oct. 17, 1990, speech of Europe as federation, he is in good faith always careful to maintain respect for "pluralism." See Jacques Delors at the College of European In Bruges reprinted in EUROPE Doc. (No. 1576) 1, 5 (Oct. 21, 1989) [hereinafter *Delors Speech of Oct 17, 1990*].

<sup>208</sup> This, of course, is the classical model of international law. It is not monolithic. There are, in international law, voices, from both from within and without, calling for an alternative vision expressed in such notions as "common heritage of humankind." See e.g., R SANDS, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE (World Resources Inst., 1990).

<sup>209</sup> M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, at XVI *passim* (1989).

<sup>210</sup> I certainly do not find it useful to make an explicit analogy to the theories of community of domestic society, although I would not deny their influence on my thinking. See, e.g., M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE (1983), and the fierce debates about these, see, e.g., Dworkin, *To Each His Own*, NEW YORK REVIEW OF BOOKS, Apr. 14, 1983; *Spheres of Justice; an Exchange*, NEW YORK REVIEW OF BOOKS, July 21, 1983.

<sup>211</sup> Cf. EEC Treaty, art. 5.

<sup>212</sup> This tension between actor and community finds evocative expression in the Preamble and opening Article of the EEC Treaty, the foundation of the current Community. The Preamble speaks of "an ever closer union among the *peoples* of Europe" (emphasis added) whereas Article 2 speaks of "closer relations between the *States* belonging to it" (emphasis added). Note, too, that the Preamble speaks about the peoples, of Europe rejecting any notion of a melting pot and nation building. Finally, note the "ever closer union": something which goes on for "ever" incorporates, of course, the "never." See EEC Treaty, preamble.

common market. They also serve to remove nationality and state affiliation of the individual, so divisive in the past, as the principal referent for transnational human intercourse.

The *unity* vision of the Promised Land sees then as its "ideal type" a European polity, finally and decisively replacing its hitherto warring Member States with a political union of federal governance. The *community* vision sees as its "ideal type" a political union in which Community and Member State continue their uneasy co-existence, although with an ever-increasing embrace. It is important also to understand that the voice of, say, Thatcher is not an expression of this community vision. Thatcherism is one pole of the first vision, whereby Community membership continues to be assessed and re-evaluated in terms of its costs and benefits to a Member State, in this case Great Britain, which remains the ultimate referent for its desirability. The Community is conceived in this way of thinking not as a redefinition of the national self but as an arrangement, elaborate and sophisticated, of achieving long-term maximization of the national interest in an interdependent world. Its value is measured ultimately and exclusively with the coin of national utility and not community solidarity.

I do not think that 1992 can be seen as representing a clear preference and choice for one vision over the other. But there are manifestations, both explicit and implicit, suggesting an unprecedented and triumphal resurgence and ascendancy of the unity vision of Europe over the competing vision of community: part and parcel of the 1992 momentum. If indeed the road to European union is to be paved on this unity vision, at the very moment of ascendancy the Community endangers something noble at its very core and, like other great empires, with the arrival of success may sow the seeds of self-destruction.

Why such foreboding? Whence the peril in the unity vision?

At an abstract logical level it is easy to challenge the unity vision which sets up a fully united Europe as the pinnacle of the process of European integration. It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state. It would be equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism. The problem with the unity vision is that its very realization entails its negation.

But the life of the Community (like some other things) is not logic, but experience. And experience suggests that with all the lofty talk of political union and federalism we are not about to see the demise of the Member States, at least not for a long time. The reports leaking out of the intergovernmental conference suggest fairly modest steps on this road.

That being the case, the unease with the unity vision nonetheless remains. For if the unity ethos becomes the principal mobilizing force of the polity, it may, combined with the praxis and rhetoric of the 1992 single market, compromise the deeper values inherent in the community vision, even if the Community's basic structure does not change for years to come.

I suggested above that these values operated both at the interstate level by conditioning a new type of statal discourse and self-perception and at the societal and individual level by diminishing the importance of nationality in transnational human intercourse. How then would the unity vision and the 1992 praxis and rhetoric corrode these values?

The successful elimination of internal frontiers will, of course, accentuate in a symbolic and real sense the external frontiers of the Community. The privileges of Community membership for states and of Community citizenship for individuals are becoming increasingly pronounced. This is manifest in such phenomena as the diffidence of the Community towards further enlargement (packaged in the notion of the concentric circles),<sup>213</sup> in the inevitable harmonization of external border controls, immigration, and asylum policies, and in policies such as local European content of television broadcasting regulation. It

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<sup>213</sup> See Delors Speech of Oct. 17, 1990, *supra* note 208.

assumes picaresque character with the enhanced visibility of the statal symbols already adopted by the Community: flag, anthem, Community passport. The potential corrosive effect on the values of the community vision of European integration are self-evident. Nationality as referent for interpersonal relations, and the human alienating effect of *Us* and *Them* are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We have made little progress if the *Us* becomes European (instead of German or French or British) and the *Them* becomes those outside the Community or those inside who do not enjoy the privileges of citizenship.

There is a second, slightly more subtle, potentially negative influence in this realm. A centerpiece of the agenda for further integration is the need of Europe to develop the appropriate structures for a common foreign and defense policy.<sup>214</sup> It has indeed been anomalous that despite the repeated calls since the early 1970's for a Europe that will speak with one voice,<sup>215</sup> the Community has never successfully translated its internal economic might to commensurate outside influence. There could be much positive in Europe taking such a step to an enhanced common foreign and security policy. The potential corrosive element of this inevitable development rests in the suspicion that some of the harkening for a common foreign policy is the appeal of strength and the vision of Europe as a new global superpower. Europe *is* a political and economic superpower and often fails to see this and discharge its responsibilities appropriately. But the ethos of strength and power, even if transferred from the Member State to the European level, is closer to the unity rather than community notion of Europe and, as such, partakes of the inherent contradiction of that vision.

All these images and the previous question marks are not intended as an indictment of 1992 and the future road of European integration. Both in its structure and process, and, in part, its ethos, the Community has been more than a simple successful venture in transnational cooperation and economic integration. It has been a unique model for reshaping transnational discourse among states, peoples, and individuals who barely a generation ago emerged from the nadir of Western civilization. It is a model with acute relevance for other regions of the world with bleak histories or an even bleaker present.

Today's Community is impelled forward by the dysfunctioning of its current architecture. The transformation that is taking place has immense, widely discussed promise. If I have given some emphasis to the dangers, it is not simply to redress a lacuna in the literature. It is also in the hope that as this transformation takes place, that part, limited as it may be, of the Community that can be characterized as the modern contribution of Europe to the civilization of interstatal and intrastatal intercourse shall not be laid by the wayside.

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<sup>214</sup> *Id.*; see also Proposals of European Parliament to Intergovernmental Conference, PE 146.824, new art. 130u (proposing full-fledged apparatus for European foreign and security policy).

<sup>215</sup> On the history of European Political Cooperation and the idea of Europe speaking with one voice, see Stein, *supra* note 4.

## 7 G.A. BERMANN: TAKING SUBSIDIARITY SERIOUSLY: FEDERALISM IN THE EUROPEAN COMMUNITY AND IN THE UNITED STATES

### Introduction

For a principle that has dominated discussions of European federalism for over five years, subsidiarity has received surprisingly poor academic mention. Subsidiarity has been criticized as "inelegant ... Eurospeak,"<sup>1</sup> "the epitome of confusion,"<sup>2</sup> and simple "gobbledegook."<sup>3</sup> It has been described by some as nothing new<sup>4</sup> and by others as quite novel and actually quite dangerous.<sup>5</sup> The President of the Commission of the European Communities, said to be an enthusiast of subsidiarity, finds it used at times as an "alibi,"<sup>6</sup> and more specifically as "a fig leaf ... to conceal [an] unwillingness to honour the commitments which have already been endorsed."<sup>7</sup> Despite subsidiarity's apparent difficulties, the drafters of the Maastricht Treaty on European Union (TEU) nevertheless chose to make the principle a central tenet of the Community's latest constitutional reform.<sup>8</sup>

<sup>1</sup> Graham P. Smith, *Subsidiarity and Article 9*, 1992 Int'l Merger Law: Events and Commentary (no. 24); see also Lord Mackenzie-Stuart, A Formula for Failure, *The Times* (London), Dec. 11, 1992, at 18 (Lord Mackenzie-Stuart was President of the Court of Justice of the European Communities from 1984 to 1988). Subsidiarity has been called by one European academic "basically an empty shell devoid of concrete substance." Guenther F. Schaefer, *Institutional Choices: The Rise and Fall of Subsidiarity*, 23 *Futures* 681, 688 (1991). Others agree. See Daniela Obradovic, *Community Law and the Doctrine of Divisible Sovereignty*, 1 *Legal Issues of Eur. Integration* 1, 1417 (1993).

<sup>2</sup> Editorial Comment, *Subsidiarity: Furthering the Confusion*, 5 *Europe* 2000 - Executive Review (June 1992); see also Andrew Adonis & Andrew Tyrie, *Subsidiarity: No Panacea* (1992) (arguing that subsidiarity is fundamentally incapable of playing the role Maastricht's authors envision); Les Metcalfe, *Redesigning Europe*, Paper Delivered at Third Biennial International Conference of the European Community Studies Association, Washington, D.C. (May 27-29, 1993) (on file with the Columbia Law Review) (the meaning of subsidiarity varies with the model of public management employed).

For a somewhat more favorable description, see Dominik Lasok, *Subsidiarity and the Occupied Field*, 142 *New L.J.* 1228, 1228 (1992) (subsidiarity is "vague but not unintelligible"). For other basically positive assessments of subsidiarity, see generally Deborah Z. Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 *Common Mkt. L. Rev.* 1107 (1992); Ulrich Everling, *Reflections on the Structure of the European Union*, 29 *Common Mkt. L. Rev.* 1053, 1071 (1992). For a general discussion of the concept, see Chantal Million-Delsol, *Le Principe de Subsidiarite* (1993).

<sup>3</sup> According to one British columnist, former Prime Minister Thatcher described the term subsidiarity as "gobbledegook." Philip Howard, *The Times* (London), Oct. 15, 1992, at 16; see also Mackenzie-Stuart, *supra* note 1 (similarly describing the term).

<sup>4</sup> See Reinhard Rack, *Social Legislation in the European Community and in the Member States - A Case of Subsidiarity?*, Paper Delivered at Symposium on Subsidiarity and Harmonization: Defining European Federalism, Rutgers (Camden) School of Law (Mar. 26, 1993) (on file with the Columbia Law Review).

<sup>5</sup> n5. See A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 *Common Mkt. L. Rev.* 1079, 1105 (1992). According to Toth, the principle of subsidiarity "is not only not part of pre-Maastricht Community law but [also] totally alien to and contradicts the logic, structure and wording of the founding Treaties and the jurisprudence of the European Court of Justice." *Id.* at 1079.

n10.

<sup>6</sup> Jacques Delors, *The Principle of Subsidiarity: Contribution to the Debate*, in *Subsidiarity: The Challenge of Change* 7, 16 (Proceedings of Colloquium organized by European Institute of Public Administration, Mar. 21-22, 1991).

<sup>7</sup> *Id.* at 13; see also Jean-Louis Dewost, *EC Model at the Crossroads: The EC Perspective on Subsidiarity* 8 (Salzburg Seminar on Perspectives on Federalism, Salzburg, Austria, May 28, 1993) (describing subsidiarity as a doctrine that might lead to curtailment of the powers of the European Commission and reversion to more intergovernmental action). In its latest communication on subsidiarity, the Commission called attention to this risk and stated its determination to avoid it. Thus, subsidiarity "cannot be used as a pretext for challenging measures in areas such as the internal market where the Community has a clearly defined and undeniable obligation to act," and "debate should not be reopened ... on the fundamental principles of Community policies, or on particular points of an instrument considered essential by one or other Member State." Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM(93)545 final at 2, 6. In general, this Report seems to illustrate the significant difficulties involved in implementing subsidiarity, especially in so far as revisions of existing legislation are concerned. *Id.* at 58.

<sup>8</sup> According to Article A of the Treaty on European Union [TEU], the European Communities, including the EEC, constitute "a European Union." This "new stage in the process of creating an ever closer union among the peoples of Europe," *id.*, entails, in addition to the Communities, certain forms of intergovernmental cooperation, notably in justice and home affairs, TEU, tit. VI, and foreign and security policy, TEU, tit. V. Moreover, Article G of the TEU amends the Treaty Establishing the European Economic Community in order to rename the European Economic Community (EEC) the European Community (EC). For simplicity's sake, I refer throughout this article to the EC Treaty. Technically speaking, that Treaty was known as the EEC Treaty (Treaty Establishing the European Economic Community) up until the entry into force of the TEU.

As set out in the TEU, subsidiarity enjoins the institutions of the Community to act in areas of concurrent competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."<sup>9</sup> According to the principle, the Community institutions should refrain from acting, even when constitutionally permitted to do so, if their objectives could effectively be served by action taken at or below the Member State level. The drafters' apparent purpose was to reassure Member State populations, and subcommunities within those populations, that the Community's seemingly inexorable march toward greater legal and political integration would not needlessly trample their legitimate claims to democratic self-governance and cultural diversity.

In this Article, I seek to understand the apparent contradiction between subsidiarity's high claims and its relatively low esteem. The Article consists of four parts. Part I offers a largely historical explanation for the importance that Community leaders have apparently ceded to subsidiarity, while Part II confronts the realities of making subsidiarity in Europe more than a purely rhetorical device. In Part III, I conduct a search for subsidiarity as a principle and practice of U.S. federalism, in the belief that the exercise may instruct us about the utility for the Community of an instrument as seemingly problematic as subsidiarity, as well as about the relationship between subsidiarity and federalism more generally. Part IV sets out the results of this comparison.

My overall reasoning and conclusions are as follows. In the first place, it seems clear that making subsidiarity into a meaningful and manageable instrument of political control will not in any event be an easy task. Therefore, before requiring that the political branches practice subsidiarity, or that the Court of Justice possibly police their performance in doing so, one must first mount a strong case for the principle itself. Subsidiarity, in other words, must not only mean something; it must matter. Part I of this Article accordingly seeks to define the subsidiarity principle and to show why it has assumed such singular significance in the Community's present constitutional situation. In my view, the principle of subsidiarity is not only a plausible response to the federalism patterns that have developed in the Community over the past thirty-five years, but a compelling one.

I also conclude that, while elusive and sometimes deeply confusing, subsidiarity is a meaningful and useful notion. However, I maintain that in order for subsidiarity to achieve its purpose - namely to redress what is claimed to be a serious and growing power imbalance within the Community's divided-power system<sup>10</sup> - it will have to be practiced as well as preached. If political participants conclude that other players succeed in paying pure lip service to subsidiarity, they will be tempted to do likewise; in that event, subsidiarity, far from reassuring Member States, will only erode whatever confidence they have in the Community and its institutions. To be taken seriously, subsidiarity must direct a genuine legislative inquiry into the consequences of the Community's refraining from taking a measure that it may legitimately take, in deference to the Member States' capacity to accomplish the same objectives. Moreover, even if they conduct a credible subsidiarity inquiry, the Community institutions may have difficulty demonstrating that they have practiced subsidiarity in fact. This is the case in part because one's judgment about whether a measure comports with the principle of subsidiarity is a profoundly political one, in the sense that it depends intimately on one's assessment of the measure's merits; it is also the case, however, because the practice of subsidiarity entails predicting the consequences, in terms of the attainment of Community objectives, of allowing the Member States to act. It is fully an exercise in speculation as well as judgment.

Part II thus addresses the extremely difficult analytic aspects associated with putting subsidiarity into practice. In this Part, I first examine what practicing subsidiarity might entail for the political branches, drawing as much as possible from the guidelines announced at the European Council's 1992 Edinburgh

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<sup>9</sup> TEU art. G(5), adding a new Article 3b to the Treaty Establishing the European Economic Community [EC Treaty]. See *infra* note 41 and accompanying text.

<sup>10</sup> The term "divided-power system" comes from Eric Stein, *On Divided-Power Systems: Adventures in Comparative Law*, 1983/1 *Legal Issues of Eur. Integration* 27 (1983). See also Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *Am. J. Comp. L.* 205, 263 (1990) ("Federalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order.").

Summit,<sup>11</sup> but also heavily amplifying them. I compare the principle of subsidiarity in this regard with the fundamental Community principle of proportionality,<sup>12</sup> concluding that the two bear a much more awkward relationship to each other than is commonly supposed, and that resolving their tensions raises an even more decidedly "political" question than either principle raises alone.

Subsidiarity accordingly presents the Community with a special challenge. By its nature the principle is one that the Community institutions may plausibly be said to violate every time they determine whether or not to act. My basic view is that the Community should respond to this challenge by recasting subsidiarity from a jurisdictional principle (that is, a principle describing the allocation of substantive authority between the Community and the Member States) into an essentially procedural one (that is, a principle directing the legislative institutions of the Community to engage in a particular inquiry before concluding that action at the Community rather than Member State level is warranted).

The same considerations I have just described also suggest that the Court of Justice<sup>13</sup> should consider subsidiarity to be a justiciable issue, but that the nature of the review and the degree of judicial scrutiny entailed should reflect subsidiarity's highly problematic character. The Court should insist that, before adopting a measure, the Community institutions inquire meaningfully into the capacity of the Member States to attain the objectives that the measure is intended to achieve and explain why they conclude that action at the Community level is necessary. In ensuring that the institutions ask and answer the right questions before acting, the Court in effect enforces a procedural mandate, something it is well equipped to do.

The Court is not, however, especially well equipped to make the substantive judgment as to whether the institutions correctly identified and assessed the consequences of Community inaction; at the very most it can determine whether the institutions' decision to act, based on the information available to them, was egregiously mistaken. Although the Court's level of scrutiny should therefore be plainly and unapologetically deferential, its willingness to entertain the question of subsidiarity would significantly reinforce its essential procedural demand that the political branches themselves take subsidiarity seriously. Finally, I suggest that the Court of Justice may actually have before it an even more difficult task than deciding whether and how to police the institutions' respect for the principle of subsidiarity; the Court may have to examine the impact of its own case law on the balance between the Community and the Member States and, more specifically, square the principle of subsidiarity with its far-reaching jurisprudence on the direct effect<sup>14</sup> of the Community treaties.

Although subsidiarity has not figured as a term in United States constitutionalism, it plainly touches on issues of enduring concern to the federalism balance in this country as well. Part III of this Article analyzes critically the attempts that have been made in the United States to confine legally the exercise by the federal government of powers that are, jurisdictionally speaking, its to exercise, so as to allow state and local governments to act where they can satisfactorily do so. The inquiry is necessarily a far-ranging one, covering sources of authority as diverse as the Tenth Amendment and various Executive Orders addressed to the federal agencies, and drawing upon both statements of principle and patterns of practice. My conclusion, upon examining these sources, as well as the general drift of reform, is that while there are growing misgivings in the United States about leaving the state of federalism entirely to an

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<sup>11</sup> See European Council in Edinburgh, Conclusions of the Presidency, Dec. 1213, 1992 (summarizing results of the Edinburgh Summit) [hereinafter *Edinburgh Conclusions*]. See generally European Community: Cheery Faces, *The Economist*, Dec. 19, 1992, at 48.

<sup>12</sup> n12. The principle of proportionality holds that "the individual should not have his freedom of action limited beyond the degree necessary for the public interest." Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125, 1127, [1972] 10 C.M.L.R. 255, 256. See generally Derrick Wyatt & Alan Dashwood, *European Community Law* 8991 (3d ed. 1993).

<sup>13</sup> The Court of Justice of the European Communities is responsible for "ensuring that in the interpretation and application of [the EC treaty] the law is observed." EC Treaty art. 164. Upon request from Member State courts, it may render preliminary rulings on the validity and interpretation of community acts. The court also hears original actions against both the Member States and the Community institutions themselves for alleged breaches of Community law. On the Court, see generally George A. Bermann et al., *Cases and Materials on European Community Law* 6972, 96165 (1993); Ulrich Everling, *The Court of Justice as a Decision making Authority*, 82 *Mich. L. Rev.* 1294 (1984). See *infra* note 142.

<sup>14</sup> Under the principle of direct effect, national courts may be bound to recognize and enforce the rights or obligations placed on individuals by Community law. The Court of Justice established the principle in Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12, [1963] 2 C.M.L.R. 105, 117. See *infra* notes 5771 and accompanying text.

unstructured political process, no real attempt has been made to ensure respect for subsidiarity as such, either as a jurisdictional or a procedural principle. The federal political process is still relied upon to guarantee that due attention will be paid to the values of localism.

I nevertheless conclude in Part IV that the U.S. experience should not cause the Europeans to shy away from taking subsidiarity seriously. After surveying certain obvious differences in the settings of U.S. and EC federalism, I weigh the importance in regard to subsidiarity of the Community's distinctive institutional arrangements. I find that, although the Council of Ministers of the Community<sup>15</sup> represents the Member States as such, it offers even weaker assurances than Congress that policy choices on matters of predominantly local concern will be left in the hands of the states and their political subcommunities; I further find that none of the other Community institutions affords substantial assurances [\*338] of that sort either. Moreover, I observe that while the Community is heavily dependent on the Member States for its resources, it also systematically lays claim to the States' own resources in precisely those ways that would be frowned upon as "commandeering" under emerging U.S. Supreme Court doctrine.<sup>16</sup> For both of these reasons, subsidiarity should be taken especially seriously in Europe.

Judging by the U.S. experience, even a proceduralized requirement of subsidiarity will be difficult to police effectively; determining whether Member State measures can adequately accomplish Community objectives will prove to be a delicate and irreducibly political exercise, much as the parallel exercise in the United States has been. Nevertheless, the Court of Justice will substantially enhance the legitimacy of the Community's limitations on State sovereignty if it requires the institutions to make the relevant legislative analyses before taking action in areas of shared competence. The Court will thereby help the Community to take subsidiarity seriously, while at the same time respecting the proper institutional balance between itself and the Community's political branches.

## I. Subsidiarity and the European Community

The notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved can be applied in any polity in which governmental authority is lodged at different vertical levels. In a federal system (or a system developing along federal lines) the power-sharing at issue will commonly be between the central government and the constituent states.<sup>17</sup> In the European Community context, this essentially means Brussels and the Member States, respectively.

Advocates of subsidiarity in the European Community trace the concept to twentieth-century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno*.<sup>18</sup> According to

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<sup>15</sup> The Council of Ministers is the Community's chief legislative body. It consists of representatives of each of the twelve Member States. Representatives vote in the Council in the name of the Member State that they represent. Action on some issues requires unanimity among the twelve ministers. Action on other issues requires an absolute majority vote, i.e., support by seven Member States. A third, and rapidly growing, category of issues requires qualified majority voting. On the workings of qualified majority voting, see *infra* note 38.

<sup>16</sup> See *infra* Part III.C.

<sup>17</sup> The allocation of governmental authority within each Member State may, of course, also be subjected to a principle of subsidiarity. This possibility is most obvious in a Member State such as Germany, which itself is organized as a federal system, or in such prospective Member States as Austria or Switzerland. Some EC Member States, notably Belgium, Italy, Spain, and the UK, have regional subdivisions which, while falling short of constituent states as such, can and sometimes do advance subsidiarity-based claims. Finally, every State, even the most unitary, exhibits power-sharing between central and a variety of different levels of more local authority. The German Constitution (*Grundgesetz* or Basic Law) provides that, in areas of shared competence, the federal government may legislate only if necessary, that is, if the states cannot effectively achieve the goal sought. Article 72(2) provides:

The Federation shall have the right to legislate on [matters within the concurrent legislative powers of the Federation and the Lander (states)] to the extent that a need for regulation by federal law exists because:

1. a matter cannot be effectively regulated by the legislation of individual Lander, or
2. the regulation of a matter by a Land law might prejudice the interests of other Lander or of the entire community, or
3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a Land necessitates such regulation.

*Grundgesetz* [Constitution] art. 72 (Germany). See generally Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition?"*, 17 *Eur. L. Rev.* 383, 38890 (1992).

<sup>18</sup> It is a fixed and unchangeable principle ... that just as it is wrong to take away from individuals what they can accomplish by their own ability and effort and entrust it to a community, so it is an injury and at the same time both a serious evil and a disturbance of right order to assign a larger and higher society what can be performed successfully by smaller and lower communities. The reason is that all social activity, of its very power and nature, should supply help [subsidiary] to the members of the social body, but may never destroy or absorb them.... Let those in power,

that document, subsidiarity requires that "smaller social units ... not be deprived of the possibility and the means for realizing that of which they are capable [and] larger units ... restrict their activities to spheres which surpass the powers and abilities of the smaller units."<sup>19</sup> For reasons that will become clear in the next section, Community leaders were content to distill from the ecclesiastical literature on subsidiarity a very rudimentary but quite suggestive concept. Though solemn in tone, and certainly solemn in origin, subsidiarity nevertheless speaks in unmistakably political terms. In this Part, I seek a better understanding of the concept of subsidiarity, first and briefly as a purely analytic matter, and then much more extendedly as a response to the European Community's distinctive legal and political evolution.

## A. Toward Clarity about Subsidiarity

Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purposes. Although the virtues of local governance are sometimes treated as self-evident, they actually depend on our willingness to draw connections between local governance and certain more fundamental values. It is important to identify these values, both because subsidiarity should not be viewed in isolation from them - as if an end in itself - and because intelligent application of the subsidiarity principle on any given occasion may require knowing precisely what values are at stake.

1. Self-Determination and Accountability. - Individuals are generally thought to have a greater opportunity to shape the rules governing their personal and business affairs when those rules are made at levels of government at which they are more effectively represented. The opportunity to participate increases the likelihood that the law and policy that result will reflect the interests of the population concerned and will, on that account, enhance the individual's sense of dignity and autonomy within the larger community. In both respects, self-determination advances essentially democratic values.<sup>20</sup>

Just as localism tends to enhance a community's self-determination in the initial making of policy, it also enhances its self-determination in the reaction to policy once made and implemented. A community is simply better able to express its dissatisfaction with government when government is continuously dependent on that community for support.<sup>21</sup> In other words, heightened political accountability of government to a community is an important dimension of that community's self-determination.

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therefore, be convinced that the more faithfully this principle of subsidiarity function is followed and a graded hierarchical order exists among the various associations, the greater also will be both social authority and social efficiency, and the happier and more prosperous too will be the condition of the commonwealth.

Joseph Komonchak, *Subsidiarity in the Church: The State of the Question*, 48 *The Jurist* 298, 299 (1988) (quoting Pius XI, *Quadragesimo Anno* 79 (1931)).

<sup>19</sup> Franz-Xaver Kaufmann, *The Principle of Subsidiarity Viewed by the Sociology of Organizations*, 48 *The Jurist* 275, 280 (1988); see also Thomas J. Green, *Subsidiarity During the Code Revision Process: Some Initial Reflections*, 48 *The Jurist* 771, 798-99 (1988) (quoting Cardinal Dopfner's statement at the 1969 synod to the effect that subsidiarity "signifies that the higher instances and organisms must respect the capacities, competences and tasks of individuals and communities, in theory and in practice [so that] ... a healthy and vigorous life, adapted to different situations, can develop").

<sup>20</sup> The European Council, meeting at Edinburgh in 1992, emphasized that subsidiarity brings decision-making "as closely ... as possible to the citizen." *Edinburgh Conclusions*, supra note 11, Annex 1 to Part A, at 2. On the linkage between subsidiarity and self-determination, see Delors, supra note 6, at 89. Joseph Weiler in effect described the relationship of subsidiarity to democracy and control when he wrote:

The European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which their national voice becomes a minority which can be overridden by a majority of representatives from other European countries.... There is, arguably, [not yet a consensus] that the boundaries within which a minority will accept as democratically legitimate a majority decision are now European instead of national.

J.H.H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403, 2472-73 (1991) [hereinafter Weiler, *Transformation*]. See also Alain G. Gagnon, *The Political Uses of Federalism*, in *Comparative Federalism and Federation* 15 (M. Burgess & A. Gagnon eds., 1993) [hereinafter *Comparative Federalism*] (arguing that federalism serves as a shield for minority groups and provides a means for the expression of innovative democratic practices). The constitutional principle of democracy played a major role in the constitutional challenge in Germany to that country's ratification of the Maastricht Treaty on European Union. In its October 1993 ruling, the German Constitutional Court held that the German Parliament could not constitutionally ratify a treaty that deprived the German people of their right to democratic participation, but that ratification of the Maastricht Treaty did not entail such a deprivation. See Judgment of Oct. 12, 1993, *Bundesverfassungsgericht* [Constitutional Court] 2 BVerfG 2134/92, 2 BVerfG 2159/92 (Germany) [hereinafter *German Constitutional Court Maastricht Decision*]; see also Michael Burgess & Franz Gress, *The Quest for a Federal Future: German Unity and European Unrest*, in *Comparative Federalism*, supra, at 168.

<sup>21</sup> See Centre for Economic Policy Research, *Making Sense of Subsidiarity: How Much Centralization for Europe?* 4142 (1993) [hereinafter *Making Sense*].



2. Political Liberty. - Subsidiarity may also advance democratic values through its tendency toward the fragmentation of power. Although James Madison forcefully underscored the advantages of larger units of government in limiting the political power of "factions," or dominant local interests,<sup>22</sup> the framers of the U.S. Constitution acted on the basic belief that individual freedom would be advanced by preventing the undue concentration of power in the same governing hands.<sup>23</sup> To the extent that subsidiarity promotes the diffusion of authority among different levels of government within the European Community, it can serve as a similar check against political oppression and tyranny and, like self-determination, also promote individual freedom.<sup>24</sup>

3. Flexibility. - Much as it may help to promote individual self-determination, subsidiarity permits a community to reflect more closely the unique combination of circumstances - physical, economic, social, moral, and cultural - that obtain at any given moment. It may also enable the community to respond appropriately to the changes of circumstances that occur within it from time to time. By enhancing the law's responsiveness to the population it serves, subsidiarity affords a flexibility that advances democracy at the same time as it produces good government.

4. Preservation of Identities. - One result of organizing power in ways that promote self-determination and responsiveness is that local populations can better preserve their sense of social and cultural identity. The law is of course not the only or even the main determinant of identity, but it can be an important instrument in strengthening or diluting the specificity of a community's distinctive combination of forms and values.<sup>25</sup>

5. Diversity. - At the same time as it affords local populations the benefits of self-determination and responsiveness, and thereby encourages the survival of social and cultural identities, subsidiarity also fosters diversity within the larger polity. Social and cultural diversity may be valued in its own right,<sup>26</sup> but it may also be considered conducive to social, cultural and political experimentation, and therefore instrumentally advantageous as well.<sup>27</sup>

6. Respect for Internal Divisions of Component States. - A further virtue of subsidiarity - one with particular resonance in the Community - is its tendency to preserve the formal allocations of power internal to the Member States themselves. The transfer of normative powers to the Community has unquestionably disturbed the preestablished federalism balance within the Federal Republic of Germany and may have similar effects in other Member States. As representatives of the German Lander have argued,<sup>28</sup> governance of certain matters that under the German Constitution are theirs to govern has

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<sup>22</sup> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. ... To secure the public good and private rights against the danger of ... faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.

The Federalist No. 10, at 16, 1920 (James Madison) (Roy P. Fairfield ed., 1981). See also Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 1415 (1990) (discussing Madison's view of republican government).

<sup>23</sup> This belief is manifested both in the doctrine of separation of powers and in the general reservation of governmental action to the states. See generally The Federalist Nos. 45, 46 (James Madison).

<sup>24</sup> See Emiliou, *supra* note 17, at 38586.

<sup>25</sup> The European Council, meeting at Edinburgh in 1992, asserted that subsidiarity "contributes to ... respect for the national identities of Member States," at the same time as it "safeguards their powers." See Edinburgh Conclusions, *supra* note 11, at 2. For a discussion of the relation between federalism and the preservation of cultural identities, see Daniel J. Elazar, *Exploring Federalism* 6, 33, 99 (1987); Sunstein, *supra* note 22, at 35.

<sup>26</sup> See Jacques Santer, *Some Reflections on the Principle of Subsidiarity*, in *Subsidiarity: The Challenge of Change*, *supra* note 6, at 19, 30 (claiming that "extraordinary and rich diversity ... is Europe's greatest asset").

<sup>27</sup> See Klaus Grottelmann, *The Subsidiarity Principle: Who Is to Do What in an Integrated Europe?*, in *Subsidiarity: The Challenge of Change*, *supra* note 6, at 45, 5051 (European diversity "represents a playground for experiments."). The theme of states as "laboratories" for social and economic experimentation is not exclusively European. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may ... serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>28</sup> See Bruno De Witte, *Community Law and National Constitutional Values*, 1991/2 *Legal Issues of Eur. Integration* 1, 1314 (1991); *Editorial Comments, The Subsidiarity Principle*, 27 *Common Mkt. L. Rev.* 181, 182 (1990); Marc Wilke & Helen Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community* 34 (Royal Institute of International Affairs, Discussion Paper No. 27, 1990). In fact the notion of subsidiarity surfaced specifically in the 1988 discussions in Bonn between Commission President Delors and the Minister-Presidents of the German Lander. See Delors, *supra* note 6, at 9. For a discussion of constitutional amendments introduced in Germany to strengthen the voice of the Lander in Germany's participation in Community decision-making, see *infra* note 264 and accompanying text. In its October 1993 decision upholding the constitutionality of the German law ratifying the Maastricht Treaty (as well as the laws amending the German Basic Law to permit

effectively been transferred to the Community, a level at which the Member States' own distinctive subcommunities are not efficiently represented politically. It stands to reason that, by reducing Community intervention to the necessary minimum, subsidiarity tends to slow down this erosion of the power of the Member States' own component parts.<sup>29</sup> This last consideration underscores the special relationship that exists between subsidiarity and federalism.

Each of these values - self-determination and accountability, political liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states - has figured importantly in the rhetoric of subsidiarity in the Community,<sup>30</sup> sometimes in conjunction with still other values.<sup>31</sup> More often, however, the term subsidiarity is invoked in the interest of some vague sense of "localism," and without any clear indication of the positive values meant to be served. It is true that discussions of subsidiarity have tended to proceed without close regard to localism's costs either, and that these costs are also real.<sup>32</sup> Aside from the risk that Madison associated with the dominance of local factions,<sup>33</sup> the principal risk of subsidiarity in the Community context is its possible impairment of a common internal market and, more generally, its interference with the efficient attainment of the Community's substantive policy goals. Though largely sympathetic to subsidiarity, I endeavor to bring this risk, where relevant, into consideration. The evolution of Community federalism traced in the next two sections shows, however, that it is the putative virtues of subsidiarity, and not its possible drawbacks, that are animating the subsidiarity debate. This Article accordingly gives them more focused attention.

## B. Subsidiarity and the European Community Treaties

Given subsidiarity's linkage to the positive values set out in the previous section, it is not surprising that the European Parliament was the first of the Community institutions to introduce the principle prominently into debates over European federalism.<sup>34</sup> The Draft Treaty on European Union, which the Parliament produced and overwhelmingly endorsed in 1984 as a blueprint for Community reform, featured subsidiarity as a general constitutional rule. In all matters falling within the concurrent competences of the prospective European Union and the Member States, the Union was only "to carry out those tasks which

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the ratification), the German Constitutional Court declined to decide whether the Treaty violated the basic constitutional principle of federalism. That particular claim was deemed inadmissible. However, the Court ruled that the constitutional principle of democratic legitimacy requires that the Member States retain a certain minimum of sovereign legislative power:

As long as the peoples of the Member States remain the source of democratic legitimacy acting through the intermediary of the national parliament - as is the case at present - the principle of democracy places limits on the expansion of competences of the European Communities .... The States must have areas of their own competence that are sufficiently large, in which the people of each State can express and organize themselves within the framework of a process of defining their political will, legitimated and directed by that people in such a way as to give legal expression to that which unites them, at least relatively homogeneously, on the spiritual, social and political level. It follows from this that the Member State legislature must reserve powers and competences of some substantial importance.

German Constitutional Court Maastricht Decision, *supra* note 20, at 4647. The Court concluded under the circumstances that "the grant of powers and competences to the European Union provided for by the Treaty on European Union still leaves Bundestag sufficient powers and competences of a substantial political weight." *Id.* at 76.

<sup>29</sup> On the other hand, the dispersion of power within a federally-organized Member State may in some respects reduce that State's effectiveness as a governmental mechanism, at least insofar as the attainment of Community objectives is concerned. This may, paradoxically, give the Community institutions greater cause to doubt the efficacy of Member State action as compared to Community action in attaining those objectives and thus, in keeping with the principle of subsidiarity, cause them to take action themselves. On the importance of the subsidiarity principle to a prospective federal Member State, such as Austria, see Rack, *supra* note 4.

<sup>30</sup> See, e.g., European Council in Brussels, Declaration on the Entry into Force of the Treaty on European Union (Oct. 29, 1993), DOC/93/8.

<sup>31</sup> For example, subsidiarity is sometimes assumed to favor the politics of "deregulation," in that the less Brussels regulates, the less regulation there is likely to be. See Henning Christophersen, Subsidiarity and Economic Monetary Union, in *Subsidiarity: The Challenge of Change*, *supra* note 6, at 65, 66. This assumes, however, that Member States will not use subsidiarity as a rationale for national intervention.

<sup>32</sup> See *Making Sense*, *supra* note 21, at 3639; A.E. Dick Howard, The Values of Federalism, 1 New Eur. L. Rev. 143, 15660 (1993) (discussing negative experiences of federalism in the United States).

<sup>33</sup> See *supra* note 22. The Madisonian risk is not as significant in the European Community as it was in America in the 1780s. The Member States are, for the most part, large polities. Moreover, they are mature polities, and those among them that contain cultural minorities at risk of oppression - Belgium, Italy, Spain, and the UK, for example - have developed internal regional policies to cope with that risk.

<sup>34</sup> The European Parliament, as described in Article 137 of the EEC Treaty, consists of "representatives of the peoples of the States brought together in the Community." In other words, it represents the people of Europe, rather than either the Community interest itself or the interests of the Member States as such. Except where the Treaty indicates otherwise, the Parliament's legislative role within the Community is basically a consultative one only. Since 1987, its legislative role has been enhanced, notably through introduction of a parliamentary cooperation procedure and a parliamentary co-decision procedure. See *infra* note 134 and accompanying text. The term subsidiarity had figured into the Commission's 1975 Report on European Union. See Bull. Eur. Communities Comm'n Supp. 5/75, at 1011. For discussion of its significance in that context, see Toth, *supra* note 5, at 108889; see also Cass, *supra* note 2, at 111216 (tracking the early development of subsidiarity in the Community).

may be undertaken more effectively in common than by the Member States acting separately."<sup>35</sup> The Draft Treaty proved much too ambitious in its federal designs to suit the Member States, and the Luxembourg intergovernmental conference that was convened in the mid-eighties to draft amendments to the Community treaties ultimately settled on a more modest document, the 1986 Single European Act (SEA).<sup>36</sup> The SEA expressly embraced the principle of subsidiarity, though in one domain only - environmental protection, one of the new competences that the SEA conferred on the Community.<sup>37</sup> While it did not pass unnoticed, this limited appearance of subsidiarity took backstage to other more conspicuous features of the SEA, most notably the decision to permit the Member States to adopt Community legislation in the Council of Ministers by qualified majority voting rather than by unanimity, where such legislation was deemed necessary to create a barrier-free internal market by the end of 1992. It was easy to dismiss the SEA's limited recognition of subsidiarity as peculiar to the politically sensitive environmental agenda and, even then, as purely hortatory in nature.

If the SEA did not itself spotlight the principle of subsidiarity, it nevertheless created the conditions that would soon make subsidiarity one of the Community's most prominent concerns. Under the system of qualified majority voting, a Commission proposal could ripen into Council legislation over the opposition of several Member States.<sup>38</sup> This change made it easier for the Council to pass legislation, which in turn made the Commission bolder in its legislative initiatives and more determined in advancing them. The Member States were left in need of new instruments for controlling the Community institutions, especially since the SEA had also extended the Community's sphere of action to new areas (worker health and safety, research and technology, and regional development, as well as environmental protection). Expectations were that the next few years would bring still further treaty amendments, and still new legislative competences for the Community, among them the creation of an economic and monetary union.<sup>39</sup>

It is no coincidence then that the 1992 Maastricht Treaty on European Union (TEU) - which emerged from two 1990 intergovernmental conferences, one on economic and monetary union and the other on European political union - put subsidiarity in plain view, making it a central principle of Community law. Article A of the TEU proclaims that in the new European Union, "decisions are [to be] taken as closely as possible to the citizen."<sup>40</sup> Article B of the TEU requires the Community institutions, in pursuing their objectives under the TEU, to "respect ... the principle of subsidiarity," a principle spelled out as such in a new Article 3b added to the EC Treaty:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action

<sup>35</sup> Draft Treaty Establishing the European Union, art. 12(2), 1984 O.J. (C 77) 33, 38. The Draft Treaty suggested that Union action would be appropriate for tasks "whose execution requires action by the Union because their dimension or effects extend beyond national frontiers." *Id.* As early as 1982, the European Parliament had formally declared that "the principle of subsidiarity [was] one of the essential principles of the union." Resolution on the European Parliament's Position Concerning the Reform of the Treaties and the Achievement of European Union, 1982 O.J. (C 238) 26.

<sup>36</sup> Single European Act [SEA], I Treaties Establishing the European Communities 1005 (Office for Official Publications of the European Communities, 1987); see also Jean De Ruyt, *L'Acte Unique Européen* 2565 (1989); Don't Take Europa to Brussels, They Cry, *The Economist*, Nov. 8, 1986, at 55 (SEA Treaty confers no significant new powers on the Commission, with even majority voting provision easily subjected to minority blocking and veto).

<sup>37</sup> "The Community shall take action relating to the environment to the extent to which the objectives [assigned to it] can be attained better at [the] Community level than at the level of the individual Member States." EC Treaty art. 130r(4) (as amended 1987).

<sup>38</sup> Under qualified majority voting, the Member States have differing numbers of votes depending very crudely on their relative populations. Luxembourg has two votes; France, Germany, Italy, and the UK have ten apiece; the others have numbers in between. The current total votes in the Council under qualified majority voting is 76, and 54 affirmative votes are required for action. All of a state's votes are cast as a bloc.

<sup>39</sup> See Report of the Committee for the Study of Economic and Monetary Union [hereinafter the Delors Committee Report] Bull. Eur. Communities Comm'n, Sept. 1989 at 8, which outlined the essentials of an economic and monetary union and expressly called for application of the principle of subsidiarity to legislation in that area.

<sup>40</sup> TEU, art. A.

cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>41</sup>

As if to emphasize the connection between subsidiarity and the expansion of the Community's powers, the drafters of the TEU put language into virtually every new treaty chapter underscoring their intention that the Member States continue to exercise primary responsibility in these new Community spheres. This is the case with education,<sup>42</sup> vocational training,<sup>43</sup> culture,<sup>44</sup> health,<sup>45</sup> consumer protection,<sup>46</sup> and industrial competitiveness,<sup>47</sup> each of which the TEU brings within the sphere of Community action.

The drafters took similar precautions with matters that the TEU does not make into Community competences as such, but nevertheless expressly subjects to Community "coordination." I refer here chiefly to the TEU's separate title on cooperation in the fields of justice and home affairs<sup>48</sup> and to the separate Agreement on Social Policy,<sup>49</sup> which was in fact concluded outside the EC Treaty framework and only among the eleven Member States other than the UK. Both texts contain language highly suggestive of subsidiarity.<sup>50</sup> Viewed as a whole, the Maastricht Treaty thus reflects a strong linkage between the expansion of Community competences and the necessity of self-restraint in their exercise.

Some observers have doubted that the drafters of the Maastricht Treaty could possibly have taken the principle of subsidiarity seriously if they coupled it with so significant an extension of Community powers. A recent study by leading European economists concludes that the drafters erred not only in making macroeconomic policy and social policy matters of Community concern, but also in failing to reduce the scale of Community involvement in existing competences, such as agricultural policy, labor and capital mobility, regional development, and much of environmental regulation.<sup>51</sup> By contrast, I see no

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<sup>41</sup> EC Treaty art. 3b (as amended 1992). The final paragraph of the new Article 3b reads: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." *Id.* This paragraph expresses what is commonly known as the principle of proportionality. See *infra* notes 157160 and accompanying text.

<sup>42</sup> The TEU (amending EC Treaty art. 126) guarantees that the Community, while contributing to educational quality, will "fully respect[] the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity." EC Treaty art. 126(1) (as amended 1992).

<sup>43</sup> The TEU (amending EC Treaty art. 127) guarantees that the Community, while supporting and supplementing the Member States' vocational training policies, will "fully respect[] the responsibility of the Member States for the content and organization of vocational training." EC Treaty art. 127(1) (as amended 1992).

<sup>44</sup> The TEU binds the Community to respect the Member States' national and regional diversity even while "bringing the common cultural heritage to the fore." EC Treaty art. 128(1) (as amended 1992).

<sup>45</sup> The TEU (amending EC Treaty art. 129) emphasizes that the Community's legislative role in the field of health is confined to "encouraging cooperation between the Member States and, if necessary, lending support to their action." EC Treaty art. 129(1) (as amended 1992).

<sup>46</sup> The TEU (amending EC Treaty art. 129a) similarly limits the Community to taking such consumer protection action as "supports and supplements the policy pursued by the Member States." EC Treaty art. 129a(1)(b) (as amended 1992).

<sup>47</sup> The TEU (amending EC Treaty art. 130) simply calls on the Commission to "promote" coordination among the Member States in their industrial policies and otherwise to take specific measures "in support of action taken in the Member States" to foster industrial competitiveness. EC Treaty art. 130g (as amended 1992). The SEA, in adding EC Treaty Article 130g on research and technological development, had similarly confined the Community to "complementing the activities carried out in the Member States."

<sup>48</sup> The TEU, art. K.3(2)(b), invites the Council, on the initiative of a Member State (or in some cases the Commission) to adopt joint action on asylum, border controls, immigration policy, control of drug trafficking and addiction, anti-terrorism activities, international crime prevention, and judicial cooperation in civil and criminal matters, but only "in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged." *Id.*

<sup>49</sup> Article 1 of the Agreement on Social Policy, annexed to the Protocol on Social Policy (which is itself attached to the TEU), requires the Community and the States to "implement measures which take account of the diverse forms of national practices." More to the point, Article 2 of the Agreement describes the Community's role as "supporting and complementing the activities of the Member States" in fields covered by the term "social policy" (worker health and safety, working conditions, worker consultation, equality of men and women in access to and conditions of employment, and expansion of the labor market). TEU, Protocol on Social Policy, Agreement on Social Policy, arts. 1, 2, Bull. Eur. Communities Comm'n Supp., 1992. The 1989 Social Charter, whose program the Protocol and Agreement on Social Policy seek to implement, itself incorporates subsidiarity. According to paragraph 27 of the Charter: "It is more particularly the responsibility of the Member States, in accordance with national practices ... to guarantee the fundamental social rights in this Charter and to implement the [necessary] social measures." European Community Charter of the Fundamental Social Rights of Workers, 27 (Office for Official Publications of the European Community, 1989). The Preamble of the Charter specifically reaffirms the principle of subsidiarity: "By virtue of the principle of subsidiarity, responsibility for the initiatives to be taken with regard to the implementation of these social rights lies with the Member States or their constituent parts and, within the limits of its powers, with the European Community." *Id.*

<sup>50</sup> See *supra* notes 4849.

<sup>51</sup> See *Making Sense*, *supra* note 21. The authors of the report were understandably most dubious about the Community's involvement in social policy. "The Social Chapter of the Maastricht Treaty is ... in direct contradiction with the subsidiarity principle that the same Treaty espouses." *Id.* at 114. See also Figuring Out Subsidiarity, *The Economist*, Nov. 27, 1993, at 58.

contradiction, either logically or politically, between extending the field in which the institutions may take action and requiring them to practice self-restraint in doing so. The major difficulty with my position is that it positively requires taking subsidiarity seriously.

### C. Subsidiarity and the Evolution of Community Federalism

What accounts for the urgency with which subsidiarity has been pressed upon the European Community? The answer to this question lies in the magnitude of constitutional change that the Community has experienced over its brief history.<sup>52</sup> Certain elements of what Joseph Weiler calls the "transformation" of Europe<sup>53</sup> were immediately apparent at the time they occurred, chiefly because they took the form of explicit doctrinal pronouncements by the Court of Justice and because they differed markedly from conventional assumptions about the relationship between domestic and international law. Other aspects of the transformation were less conspicuous. But the cumulative effect was to alter profoundly the balance of power between the Community and the Member States, and eventually generate pressures for a doctrine like subsidiarity.

1. The Court of Justice and its Supranationalist Creation. - The Court's fundamental doctrines concerning the relationship between Community law and the law of the Member States - notably the doctrines of direct applicability, direct effect, and supremacy, expounded by the Court in a series of rulings of the early 1960s<sup>54</sup> - are by now well known.<sup>55</sup> While this section does not dwell on these doctrines, it examines their role in escalating the rhetoric of subsidiarity.

The principle of direct applicability posits that the adoption of legal norms by the Community institutions is sufficient to integrate them into the legal orders of the Member States as well. In other words, whatever a State's ordinary treatment of international agreements might be, Community enactments do not need to be transposed, incorporated, or otherwise formally received into a Member State's law in order to become law within that State.<sup>56</sup> The direct effects doctrine makes the further claim that Community law norms, if expressed clearly and unconditionally enough, confer on private parties rights that are legally enforceable against the Member States and that the institutions of those States, administrative and judicial alike, are required to protect. Put differently, a directly effective Community norm imposes obligations on the governments of the Member States in favor of private parties, which the latter may invoke directly, if need be, in national courts.

Lastly, the principle of supremacy mandates that Member State officials give precedence to Community law over national law in the event of a conflict between them. That the drafters failed to include an express Supremacy Clause in the EEC Treaty did not prevent the Court of Justice from inferring one, basing it on the necessity that the Community possess legal unity and that Community law be effective

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<sup>52</sup> I date the existence of the Community from January 1, 1958, when the EEC Treaty came into effect. See Multilateral Treaties: Index and Current Status 215 (M.J. Bowman & D.J. Harris eds., 1984). In fact, the Treaty Establishing the European Coal and Steel Community (ECSC) came into effect in 1952. See id. at 168.

<sup>53</sup> See Weiler, Transformation, supra note 20, at 2405.

<sup>54</sup> See generally Jacques H.J. Bourgeois, Effects of International Agreements in European Community Law: Are the Dice Cast?, 82 Mich. L. Rev. 1250 (1984) (examining the influence of doctrine regarding relations between Community and Member State law on that regarding relations between international and Community law). For analysis of direct applicability and direct effect, see John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int'l L. 310 (1992) (examining the direct applicability of international treaties in national legal systems). On the doctrine of supremacy, see Antonio La Pergola & Patrick Del Duca, Community Law, International Law and the Italian Constitution, 79 Am. J. Int'l L. 578 (1985) (analysis and comparison of the interpretations of the Court of Justice of the European Communities and their application by the Italian Constitutional Court).

<sup>55</sup> See, e.g., Lenaerts, supra note 10, at 20813; Eric Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 Am. J. Int'l L. 1, 910 (1981).

<sup>56</sup> The Court of Justice has in fact ruled that a Member State acts illegally when it incorporates directly applicable Community law in such a way as to conceal its Community origins and character. See T.C. Hartley, The Foundations of European Community Law 19798 (2d ed. 1988) (citing Case 34/73, Fratelli Variola S.p.A. v. Amministrazione Italiana delle Finanze, 1973 E.C.R. 981, [1974 Transfer Binder] Common Mkt. Rep. (CCH) 8226).

throughout the territory of the Member States.<sup>57</sup> In fact, the original Treaties contained no very clear or general statement of any of these three basic doctrines of the Court.

The doctrines of direct applicability, direct effect, and supremacy are by their nature expansive of Community law in relation to national law, and were readily seen as such, particularly as against the background of traditional attitudes toward the force and effect of international law in the national legal orders. Their claims have accordingly been described as "supranationalist."<sup>58</sup> Moreover, these doctrines not only describe legal relationships, but actually demand Member State action. Direct applicability, direct effect, and supremacy essentially require, respectively, that national institutions recognize Community measures as law, effectuate those measures at the request of private parties wherever appropriate, and prefer claims based on Community law to those based on Member State law whenever a choice must be made.

At least as significant as the Court's early espousal of direct applicability, direct effect and supremacy, and the absence of a clearly and generally stated basis for them in the original Treaty texts, has been the Court's subsequent elaboration of these concepts. From the highly generalized notion of direct effect, for example, the Court eventually drew more or less explicitly the following specific corollaries:

- (a) The Court of Justice establishes the general criteria for determining whether or not a Community measure has direct effect in the national legal orders.<sup>59</sup>
- (b) The Court of Justice, applying these criteria, ultimately decides whether a particular Community measure does or does not have direct effect in the national legal orders.<sup>60</sup>
- (c) The Court of Justice establishes the general test for determining whether a Member State, through its agencies or its courts, has given sufficient direct effect to a Community measure by making adequate remedies available to individuals for violation of the rights they derive from Community law.<sup>61</sup>
- (d) If need be, the Court of Justice ultimately decides whether under these criteria a Member State has given adequate effect to Community law in a given case.<sup>62</sup>
- (e) If a Member State court is uncertain whether a Community measure is directly effective, or whether the State has given the measure adequate direct effect, it must seek a preliminary ruling from the Court of Justice on that question and respect the ruling it receives.<sup>63</sup>
- (f) Not only are regulations of the Council and Commission (which EC Treaty Article 189 describes as "directly applicable"<sup>64</sup>) capable of having direct effect, but so are: (i) Treaty articles (which the Treaty does not describe in those terms<sup>65</sup>), (ii) Council and Commission directives (which Article 189 actually implies are not "directly applicable" and which, by definition, would seem to require further Member State implementation<sup>66</sup>), and (iii) Council and Commission decisions (which the Treaty simply calls "binding"<sup>67</sup>). Even a directive which has not been fully implemented by a

<sup>57</sup> The Court justified all three doctrines in terms of their *effet utile*. Unless Community law were directly applicable, directly effective, and supreme, the Community might fail to accomplish its purposes effectively. See *infra* notes 59, 72.

<sup>58</sup> See Robert O. Keohane & Stanley Hoffmann, *Conclusions: Community Politics and Institutional Change*, in *The Dynamics of European Integration* 276, 278-82 (William Wallace ed., 1990).

<sup>59</sup> See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 13, [1963] 2 C.M.L.R. 105, 13031.

<sup>60</sup> See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1342 [1975] 1 C.M.L.R. 1, 16.

<sup>61</sup> See Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 6566 [1982] 1 C.M.L.R. 499, 512.

<sup>62</sup> The Court, it should be made clear, does not actually pass on the validity of any particular Member State measure and certainly never invalidates a Member State measure as such. However, it may determine whether the type of remedy available in the Member States is adequate for Community law purposes.

<sup>63</sup> See Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, [1971] 1 C.M.L.R. 1 (upholding direct applicability of EC law regarding tariff); see also Case 41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337 (directing member state to protect EC laws on freedom of movement for workers); Case 20/70, *Transports Lesage & Cie v. Hauptzollamt Freiburg*, 1970 E.C.R. 861 (directing member states to allow its nationals to invoke rights protected by EC turnover tax).

<sup>64</sup> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." EC Treaty art. 189

<sup>65</sup> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty .... They shall facilitate the achievement of the Community's tasks." *Id.* art. 5.

<sup>66</sup> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* art. 189; see also Case 9/70, *Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, 833, [1971] 1 C.M.L.R. 1, 22.

<sup>67</sup> "A decision shall be binding in its entirety upon those to whom it is addressed." EC Treaty art. 189.

Member State on a timely basis is capable of having direct effect in favor of private parties as of the deadline by which the State should have implemented it.<sup>68</sup>

- (g) Private parties are entitled to assert the rights that Community law measures confer upon them, not only against Member States (via a so-called "vertical direct effect"), but also against other private parties (via a "horizontal direct effect"), whenever those measures are relevant in otherwise purely private litigation taking place in national courts.<sup>69</sup> An exception to the principle of horizontal direct effect only arises in the case of a directive which a Member State has failed to implement by the prescribed deadline; even then, however, a national court is required to interpret national law, whenever it can possibly do so, in such a way as to give horizontal direct effect to unimplemented directives.<sup>70</sup>
- (h) If a Member State fails to implement Community law adequately, a person to whom that failure causes injury is entitled, as a matter of Community law, to recover damages from the State in the courts of that State for the relevant losses.<sup>71</sup>

The Court of Justice has likewise given a maximalist reading to the principle of supremacy, interpreting it in an equally uncompromising spirit. Thus, the Court eventually arrived, in supremacy's name, at the following specific propositions:

- (a) In the event of conflict, Community law measures prevail over national measures irrespective of the sequence in which they were enacted.<sup>72</sup>
- (b) For supremacy purposes, Community law measures include not only the Treaties, but also secondary legislation and individual decisions issued by the Council and Commission.<sup>73</sup> They also include general principles of law, which it is the province of the Court of Justice itself to identify, as well as Court of Justice rulings in individual cases.<sup>74</sup>
- (c) Again for supremacy purposes, national measures are deemed to include not only primary and secondary legislation and administrative acts, but also national constitutional provisions.<sup>75</sup>
- (d) National courts may not examine the validity of Community measures under national law, not even when the claim is that they violate the fundamental civil, political, and human rights enshrined in the national Constitution.<sup>76</sup>
- (e) If a national court believes that a Community measure violates a higher legal norm of the Community (such as the Treaty or a general principle of law recognized by the Court of Justice, including human rights), it may only refer the question of the measure's validity to the Court of Justice for a preliminary ruling, and then follow that ruling. It may not on its own refuse to give effect to the Community measure.<sup>77</sup>
- (f) Although national law may generally deny courts the right to review the legality of certain legal instruments (for example, statutes enacted by the national legislature), the courts must nevertheless entertain legal challenges to the application of those acts where the challenge is based on Community law.<sup>78</sup>
- (g) National courts are required to give immediate effect to Community measures that have direct effect, and they may not postpone doing so on account of special procedures or traditions that they would ordinarily have to follow before denying effect to otherwise analogous national law.<sup>79</sup>

<sup>68</sup> See Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 63, [1982] 1 C.M.L.R. 499, 512.

<sup>69</sup> See Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, 1976 E.C.R. 455, 465, 2 C.M.L.R. 98, 129 [1976]. The Court in *Defrenne* specifically noted the applicability of Article 119 to establishments or services, "whether private or public." *Id.* at 40.

<sup>70</sup> See Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 4160, [1992] 1 C.M.L.R. 305 322.

<sup>71</sup> See Case C-6, 9/90, *Francovich v. Italy*, 1991 E.C.R. - (Nov. 19, 1991), 2 C.M.L.R. 66, 11314 (1993).

<sup>72</sup> See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (II), 1978 E.C.R. 629, 634, [1978] 3 C.M.L.R. 263, 284 (holding EC law invalidates contrary national law); see also Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, 1964 E.C.R. 585, 59394, [1964] 1 C.M.L.R. 425, 436 (Treaty law cannot be overridden by national constitutional or statutory law).

<sup>73</sup> See Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*, 1976 E.C.R. 129, 142, [1976] 2 C.M.L.R. 62, 79.

<sup>74</sup> See Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, 502, [1974] 2 C.M.L.R. 338, 35455.

<sup>75</sup> See Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1131, [1972] 10 C.M.L.R. 255, 282.

<sup>76</sup> See *id.*

<sup>77</sup> See Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4225, 4231 [1988] 3 C.M.L.R. 57, 79.

<sup>78</sup> See Case 213/89, *Regina v. Secretary of State for Transport ex Parte Factortame Ltd.*, 1990 E.C.R. I-2433, 2475, [1990] 3 C.M.L.R. 1.

<sup>79</sup> See Case 314/85, *Firma Foto-Frost*, 1987 E.C.R. 4225; see also Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (II), 1978 E.C.R. 629, 63940, [1978] 3 C.M.L.R. 263, 284.

- (h) National courts must make available to litigants who assert individual claims based on Community law all the legal remedies, including forms of provisional relief, that they ordinarily make available to litigants asserting other legal claims, and those remedies must in any event afford a minimally effective means of asserting those claims.<sup>80</sup>

The Court of Justice has thus taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community law in the national legal orders. The same reasoning that brought the Court to its supranationalist doctrines appears to have caused the Court to apply them expansively. The Court's purpose, as it quite candidly conceded,<sup>81</sup> was to establish all those constitutional premises that it considered necessary in order for Community policy, once made by the Community institutions, to be fully effective in the Member States. Whatever one may think of the Court's pronouncements as readings of the EC Treaty or as federalist policy, they do in fact unmistakably strengthen the force and effect of Community law. It is difficult to find a clearer example of instrumentalist judicial decision-making.

If the Member States largely accepted the Court's supranationalist claims, this is because they originally retained ultimate control over the Community's legislative process.<sup>82</sup> The framers of the EC Treaty had entrusted the Community's legislative powers chiefly to a Council of Ministers in which representatives of the Member States could unapologetically express and vote the political interests of the States they represented.<sup>83</sup> Moreover, by virtue of a combination of Treaty provisions<sup>84</sup> and legislative tradition,<sup>85</sup> the determined opposition of any one Member State to a measure would cause the measure to fail. Thus, while advocates of European integration drew satisfaction from the normative aspects of Community federalism (notably direct applicability, direct effect, and supremacy), advocates of Member State sovereignty took comfort in the special composition and voting procedures of the Council of Ministers. In fact the Court's heightening of the normative stakes of Community action probably caused the States to guard their political prerogatives all the more jealously.

2. New Elements in Community Federalism. - While the Court's federalist doctrines, on the one hand, and the States' preponderance in the Community legislative process, on the other, had produced something of a balance of power, other forces were working to disturb that balance. I have already referred to changes in the legislative process of the Community - notably the shift away from unanimous and toward qualified majority voting - that lessened the States' opportunities to prevent legislation from being adopted over their objections. I describe the political significance of majority voting in greater detail later in this section.<sup>86</sup> However, even before the shift to majority voting, further doctrinal developments - developments that were less visible than the doctrines of direct applicability, direct effect, and supremacy, but were likewise attributable to the Court - had effectively enlarged the arena of Community action. These forces together heightened the political vulnerability of the Member States vis-à-vis the Community and thus helped generate the impetus for subsidiarity.

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<sup>80</sup> See Case 213/89, *Factortame* [1990]; Case 222/86, *UNECTEF v. Heylens*, 1987 E.C.R. 4097, 4117, [1989] 1 C.M.L.R. 901, 913. See generally Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 *U. Chi. Legal F.* 93, 99104.

<sup>81</sup> See generally Lenaerts, *supra* note 80, at 9899 (citing, in particular, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105).

<sup>82</sup> See Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 *Y.B. Eur. L.* 267, 28688 (1982) ("The Court's reasoning that supremacy was enshrined in the Treaty was contested by the governments of Member States.... Acceptance of this view amounts in effect to a quiet revolution in the legal order of the Member States."). The challenges that Member State courts mounted to the Court's claims focused on very particular issues. Thus, for example, the German and Italian Constitutional Courts have not yet categorically abandoned the right to test Community measures by fundamental rights provisions of the national constitutions.

<sup>83</sup> See EC Treaty art. 146.

<sup>84</sup> The Council's use of its most wide-ranging powers (notably harmonization and implied powers) originally required a unanimous vote, rather than either a simple or qualified majority of votes. The Single European Act introduced the possibility of harmonization by qualified majority vote under Article 100a. See EC Treaty art. 100a (as amended 1987).

<sup>85</sup> In 1966, the then six Member State governments issued a statement known as the Luxembourg Accord, dealing with the situation in which a State believes that Community action about to be taken by majority vote would impair its vital interests. Though the Accord was somewhat ambiguous, it was commonly invoked until the 1980s as the basis for a single Member State "political" veto. On the Luxembourg Accord and its apparent demise, see Bermann et al., *supra* note 13, at 5455.

<sup>86</sup> See *infra* notes 123128 and accompanying text.



a. Widening the Community Terrain. - The Court's early preoccupation with the relationship between Community and Member State norms tended to obscure other less obvious and more gradual jurisprudential developments in European federalism, all of which had the effect of expanding the Community's legislative presence. These developments pertained to (1) the enumeration of powers conferred on the Community by the Member States, (2) the extent to which the powers conferred on the Community belonged to it exclusively, and (3) the breadth or narrowness with which grants of power to the Community were to be construed. It is curious but not surprising that questions such as these, which had long dominated U.S. federalism debates familiar both to the Community's founders and the Court of Justice, took an apparent back seat in the Community context to the doctrines of direct applicability, direct effect, and supremacy. The architects of the Community, cognizant of the fact that the Community itself was the product of a treaty, and that the Member States were all mature nation-states in their own right, accepted an international law paradigm as the right one for their purposes. Within such a paradigm, questions of the direct applicability, direct effect, and supremacy of Community law understandably loomed large.

The framers of a federal constitution generally work in a different paradigm. They ask blunt questions about allocations of power, including questions about the enumeration of federal powers, preemption of state law and implied powers. Precisely because the EC Treaty as such was conceived as an international agreement, and only later came to be viewed as a constitutional document, its answers to these central federalism questions proved largely inadequate. The Treaty spoke very imprecisely about the enumeration problem, very puzzlingly about implied powers, and not at all about preemption. As and when the Court of Justice faced these questions, as its own supranationalist jurisprudence ensured it one day would, it brought to bear much the same teleological method of interpretation that it had initially employed in establishing the direct applicability, direct effect, and supremacy doctrines.

i. The Enumeration of Community Powers. - Difficult as it may now be to believe, the founders of the Community appear to have expected the Community institutions to intervene only in very specific ways in the Member State economies. Leaving aside certain spheres that they intended the Community to govern comprehensively (e.g., external commercial relations, interstate tariffs and customs, regulation of agricultural markets, and competition policy), their understanding was that the institutions would legislate only on the matters specifically identified in the Community treaties,<sup>87</sup> and in doing so would be bound by the precise substantive and procedural conditions set out in the relevant Treaty article.<sup>88</sup>

Nevertheless, the EC Treaty contained the seeds of an expansive legislative practice. Legislation on the elimination of non-tariff barriers to the free movement of goods provides a good illustration. The relevant Treaty provisions (Articles 30 through 37) basically require the Member States to refrain from enacting or maintaining unjustifiable trade-impeding restrictions. By attributing direct effect to these provisions, the Court enabled - in fact directed - national courts to deny legal effect to Member State measures containing such restrictions. The negation of impermissible restraints on interstate trade of course powerfully echoes the Supreme Court's dormant commerce clause jurisprudence.<sup>89</sup> At the same time, however, the Treaty also authorized the Commission and Council to enact "positive" legislation to facilitate the removal of non-tariff barriers to trade. This affirmative authority derived chiefly from EC Treaty Article 100: "The Council shall ... issue directives for the approximation of such provisions laid down by law, regulations or administrative action in Member States as directly affect the establishment or functioning of the common market." Article 100 required such "harmonizing" directives to be adopted by

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<sup>87</sup> In its seminal *Van Gend en Loos* judgment, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12, [1963] 2 C.M.L.R. 105, 129, the Court described the States as having ceded sovereignty "albeit in limited fields." *Id.*

<sup>88</sup> See generally Auke Haagsma, *The European Community's Environmental Policy: A Case-Study in Federalism*, 12 *Fordham Int'l L.J.* 311, 35456 (1989); Lenaerts, *supra* note 80, at 12325; see also Dewost, *supra* note 7, at 2.

<sup>89</sup> Unlike the United States Supreme Court, however, the Court of Justice does not normally rule directly on the validity of Member State laws. However, it may and often does clearly indicate as a matter of law that State measures of a certain kind or description run afoul of the *EC Treaty*. See *supra* note 62.

the Council of Ministers unanimously, if at all, thus enabling even a single Member State to block a harmonization measure or cause it to be weakened.<sup>90</sup>

The claim that Article 100 established federal legislative jurisdiction over interstate commerce is actually an understatement. The theory behind the harmonization of Member State laws is that even rules purporting to regulate exclusively intrastate trade may nevertheless operate to make the common market less "common" and, to that extent, impede interstate commerce.<sup>91</sup> Rather than rely exclusively on the Court to root out offensive State measures on a case by case basis (or to prompt national courts to do so on their own), the Council of Ministers could bring about a regulatory rapprochement of Member State rules by "directing" the States to modify their laws governing the domestic market in prescribed ways. Events proved that the Council would in fact use its positive harmonization powers liberally to impose certain regulatory minima or maxima on the States on a wide variety of subjects.<sup>92</sup> As a result, once national legislation was modified to bring it into conformity with the relevant Community directive, that legislation reflected policy that had been made in Brussels, and did so even as applied to purely intrastate matters.

A constitution that allows federal authorities to prescribe state policy over purely intrastate trade, on the theory that national disparities may distort patterns of interstate trade, cannot seriously be regarded as "enumerating" the Community's legislative powers.<sup>93</sup> Even a subject plainly reserved as such to the States (e.g., health, education, or public safety) is transformed into a Community matter to whatever extent the federal political branches find that the cross-border mobility of goods (or, by parallel reasoning, workers, services, or capital) would be advanced by bringing the various national rules on the subject into closer alignment with each other. The theory, as one eminent expert pointed out, left "no nucleus of sovereignty that the Member States [could] invoke, as such, against the Community."<sup>94</sup>

A piece of Community legislation that brings the point home particularly forcefully is the 1985 Council Directive on Products Liability.<sup>95</sup> The directive purported to harmonize the different products liability regimes of the Member States chiefly in order to create more uniform regulatory conditions for business and thereby promote "the establishment or functioning of the common market."<sup>96</sup> The Council thereby legislated on the subjects of civil liability and consumer protection, matters thought to lie well within the Member States' reserved powers. By this pattern of reasoning, Member State policies on virtually any subject could be harmonized, if need be even as applied to purely local transactions, on the theory that

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<sup>90</sup> The 1986 Single European Act (SEA) was later to relax the procedural rules for harmonization, by introducing qualified majority voting in the Council and permitting the use of regulations as well as directives. See *infra* notes 123128 and accompanying text. Specifically, the SEA added Article 100a to the EC Treaty: "The Council shall, acting by a qualified majority ... adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." EC Treaty art. 100a (as amended 1987). The introduction of qualified majority voting paved the way for easier passage of legislation because it allowed certain combinations of States to legislate over the others' objections and encouraged the Commission to formulate legislative proposals.

<sup>91</sup> See, e.g., Eurononsense, *The Economist*, Dec. 26, 1992, at 70 (descriptions of several intrastate regulations that suppress interstate commerce); see also David T. Keeling, *The Free Movement of Goods in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities*, 26 *Int'l Law.* 467, 469, 471, 475 (1992); see generally Eric Stein et al., *European Trade, 1992: Fortress or Partnership?*, 83 *Am. Soc'y Int'l L. Proc.* 332, 333 (1989).

<sup>92</sup> See *Pollution Directive Annulled*, *The Times* (London), Aug. 21, 1991, at 31 (transcript of Case 300/89, *Commission v. Council* 1991 E.C.R. I-2867, 3 C.M.L.R. 359 (1993)); see, e.g., Council Directive 92/42, 1992 O.J. (L 167) 17 (on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels); Council Directive 93/15, 1993 O.J. (L 121) 20 (on the harmonization of the provisions relating to the placing on the market and supervision of explosives for civil uses).

<sup>93</sup> An analogous observation could be, and has been, made about Congress' exercise of prescriptive jurisdiction under the Commerce Clause. *ve* proposals that fell short of universal acceptance.

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<sup>95</sup> Council Directive of July 25, 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, Council Directive 85/374, 1985 O.J. (L 210) 29.

<sup>96</sup> Lenaerts, *supra* note 10, at 220. As another commentator has noted:

There is no residue of powers reserved to Member States.... [Moreover], since Community legislation always prevails over national law, Community legislation, once adopted, can be amended only by the Community. So every piece of Community legislation creates *pro tanto* an area of exclusive Community legislative power. This is [especially] important ... because the treaties give the Community such wide (non-exclusive) legislative powers.

John Temple Lang, *The Development of European Community Constitutional Law*, 25 *Int'l Law.* 455, 460 (1991).

one or more of the factors of production would thereby be caused to move more freely across state borders.<sup>97</sup>

ii. Preemption of Member State Law. - Since the treaty drafters were not as attentive to the demarcation of federal and state powers as they might have been had they been drafting a modern federal constitution, it is not surprising that they also did not explicitly address the question of preemption.<sup>98</sup> This too is not because the drafters were unaware that the grant to the Community of legislative power over a certain subject might have the effect of removing altogether state power to legislate on that subject. Even aside from the American experience, which was well known, the German Basic Law, itself less than ten years old at the time the EC Treaty was signed, had designated certain subjects as within the exclusive domain of the federal government of Germany and others as within the concurrent jurisdiction of the federal government and the states.<sup>99</sup> Preemption, however, is a quintessential federalism issue, and it did not fit into the framers' original international law paradigm. The very idea of preemption, in the sense of occupying the field to the exclusion of the States, posed a very basic threat to notions of state sovereignty.

The fact remains, however, that at least some of the Community's objectives simply could not be satisfactorily achieved unless the Community's power to act was exclusive. Thus, the Court of Justice readily concluded that an external tariff or commercial policy by its nature would not be truly common, as planned,<sup>100</sup> unless it were exclusively federal, at least once the transitional period had ended.<sup>101</sup> The case for preemption in these fields was so strong, it was treated as "constitutional" (in that the States were precluded from acting, irrespective of whether the Community institutions had by then taken any action at all),<sup>102</sup> and not merely "legislative" (that is, foreclosing Member State action only insofar as specific Community legislation so stated or implied).

Although the Treaty likewise denominates the Community's agricultural policy as common, the case for constitutional preemption in that area was weaker. It was not reasonable to treat the States as having abandoned regulation of all agricultural sectors merely because they conferred power on the Council and Commission to enact comprehensive rules for the organization of the various markets as, and when, those institutions might choose to do so. The prevailing view, accordingly, is that once the Community adopts a common agricultural policy for a given market, the States lose their authority to regulate that market,<sup>103</sup> but that until such time, they may continue to regulate it, provided of course they do not otherwise infringe upon the free movement of goods or other basic principles of the EC Treaty.<sup>104</sup>

In most other areas,<sup>105</sup> neither the language of the Treaty nor the specific nature of the sector addressed in a given section of the Treaty clearly signals the framers' intention. Under these circumstances, pre-

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<sup>97</sup> For a cogent description of this process of expansion of Community legislative power, see Weiler, *supra* note 20, at 243841. Weiler designates as "absorption" the process by which "the Community legislative authorities, in exercising substantive legislative powers bestowed on the Community, impinge on areas of Member State jurisdiction outside the Community's explicit competences." *Id.* at 2438; see also Everling, *supra* note 2, at 106669.

<sup>98</sup> I am using the term preemption here narrowly to denote a decision by federal authorities to "occupy" a field to the exclusion of the states.

<sup>99</sup> The Grundgesetz went so far as to distinguish between powers that were "permanently" concurrent and others that were concurrent only until the federal government took action of some kind, at which time the matter passed into that government's exclusive domain. See Grundgesetz [Constitution] art. 72 (Germany).

<sup>100</sup> "The activities of the Community shall include ... the establishment of a common customs tariff and of a common commercial policy towards third countries." EC Treaty art. 3(b).

<sup>101</sup> See Case 38/75, *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen*, 1975 E.C.R. 1439, 1449.

<sup>102</sup> See Weiler, *Transformation*, *supra* note 20, at 241617 (using the term "exclusive" to denote competences reserved to the Community *ab initio*).

<sup>103</sup> See Case 29/87, *Dansk Denkavit v. Tuchtgerecht*, Danish Ministry of Agriculture, 1988 E.C.R. 2965, 2988, [1990] 1 C.M.L.R. 203, 214; Case 255/86, *Commission v. Belgium*, 1988 E.C.R. 693, 708 [1989] 3 C.M.L.R. 91, 101; Case 130/85, *Re Wulro BV v. Tuchtgerecht Van de Stichting Scharreleiren-Controle*, 1986 E.C.R. 2035, 2044, [1988] 1 C.M.L.R. 496, 503; see also G. Federico Mancini, *The Making of a Constitution for Europe*, 26 *Common Mkt. L. Rev.* 595, 60304 (1989).

<sup>104</sup> See Weiler, *Transformation*, *supra* note 20, at 2417. Weiler confines use of the term "preemption" to matters not reserved to the Community *ab initio*.

<sup>105</sup> The one other area in which the Court addressed preemption in constitutional terms is competition policy. Here the Court concluded that while the States had to refrain from regulating business in terms of its anticompetitive effects on interstate Community trade, they could continue to regulate purely intrastate trade. See Case 14/68, *Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1, 910, [1969] 1 C.M.L.R. 100, 11820.

emption can realistically only be what it has become in the United States, that is, essentially a question of statutory interpretation.<sup>106</sup> The Court of Justice's "emerging doctrine of [legislative] pre-emption" has been described adequately elsewhere.<sup>107</sup> Suffice it to say that the Court commonly finds that, in enacting a piece of legislation, the Council or Commission meant to regulate a matter comprehensively and to preclude the States from addressing it.<sup>108</sup> Sometimes the Court has done so on a very meager showing of implied preclusion, that is, without much evidence that the Council had produced a comprehensive regulatory scheme whose purposes would be thwarted by continuing Member State interventions.<sup>109</sup>

The Court's hospitality to preemption claims may not always have been welcome in Member State circles, but it is surely not illogical. At least until the Single European Act, the bulk of the Community's legislative initiatives were predicated on the creation of a common market in which the factors of production move freely across state borders; they were not predicated on the necessity of prescribing one or another policy in a substantive field falling specifically within the Community's sphere of competence. Legislative pre-emption by definition favors the establishment of a harmonious regulatory environment throughout the territory of the Member States and therefore indirectly the commonness of the common market. In fact, the Court of Justice eventually ruled that, once the Community adopts a harmonization measure that specifically enough addresses a given public interest - such as environmental or consumer protection - the States may no longer invoke that interest to justify restrictions on trade under Article 36 and other EC Treaty exceptions to the principles of free movement.<sup>110</sup>

Curiously, the case for legislative pre-emption is actually weaker when the Community pursues social and political objectives in their own right, as legitimate matters of Community concern. (This is, of course, more likely to be the case after the Single European Act and the Maastricht Treaty on European Union.) In order for the Community to improve labor standards, or raise the level of environmental or consumer protection, for example, its regulatory demands need not be pre-emptive, though the Community may of course have reasons for choosing to "occupy" one or another specific field. On the contrary, the Community might fully satisfy its regulatory objectives by establishing a minimum level of protection that is mandatory on the States, while leaving the States free to adopt a higher or broader level of protection.<sup>111</sup> In the event the States do so, the Community simply needs to ensure that the added protection does not come at a price that is excessive either in terms of the Community's other policy objectives or in terms of its core commitment to the free movement of goods, persons, services, or capital.

The Court's pre-emption jurisprudence is thus somewhat paradoxical. The Treaty's initial failure to provide the Community institutions with an independent policy basis for legislating on a large number of subject matters caused the institutions to approach those matters indirectly, through harmonization measures ostensibly designed to reduce or eliminate regulatory differences and thereby facilitate the internal market. Thus, although the Member States were not ready to cede prescriptive jurisdiction over these subjects to the Community, they nevertheless found the Community asserting a "common market" interest in them and advancing an even stronger claim to have its legislation interpreted as pre-emptive. It is thus no coincidence that the Single European Act, with its deliberate extension of Community competence to new substantive areas, also brought express language of non-pre-emption into the Treaty for the first time. Unsurprisingly, the SEA's new provisions on the environment included language of this

<sup>106</sup> See *infra* notes 358361 and accompanying text.

<sup>107</sup> See generally Eugene Cross, *Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis*, 30 *Common Mkt. L. Rev.* 447 (1992); M. Waelbroeck, *The Emergent Doctrine of Community Pre-Emption: Consent and Re-Delegation*, in 2 *Courts and Free Markets* 548 (Terence Sandalow & Eric Stein eds., 1982).

<sup>108</sup> See, e.g., Case 111/76, *Officier van Justitie v. Beert van den Hazel*, 1977 E.C.R. 901, 909, [1980] 3 C.M.L.R. 12, 23; Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629, 163637, [1980] 1 C.M.L.R. 96, 11011.

<sup>109</sup> See generally Renaud Dehousse & Joseph H.H. Weiler, *The Legal Dimension*, in *The Dynamics of European Integration*, *supra* note 58, at 242, 255; Lenaerts, *supra* note 10, at 22430.

<sup>110</sup> See, e.g., Case 28/84, *Commission v. Germany*, 1985 E.C.R. 3097, 310607, [1985] 6 *Transfer Binder* Common Mkt. Rep. (CCH) 14,251 (1985); Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), 1979 E.C.R. 649, 65658, [1979] 3 C.M.L.R. 494.

<sup>111</sup> See, e.g., Case 53/86, *Officer van Justitie v. L. Romkes*, 1987 E.C.R. 2691, 2696, 2702, [1988] 3 C.M.L.R. 126 (regarding fishing regulations); Case 4/75, *Rewe Zentralfinanz GmbH v. Landwirtschaftskammer*, 1975 E.C.R. 843, 847, [1977] 1 C.M.L.R. 599 (regarding produce sanitation measures).

sort,<sup>112</sup> as did its provisions on worker health and safety;<sup>113</sup> these are subjects over which certain Member States in negotiating the SEA had insisted on the right to maintain or enact standards more protective than those that the Community might adopt.

By the same token, the Maastricht Treaty on European Union should have attached comparable non-preemption language to its provisions enlarging the Community's competences (to include, for example, consumer protection), or should possibly have raised non-preemption to the level of a general Community law presumption. That the TEU did not do so is probably due to the fact that it did, through its own Article B and the new Article 3b that it added to the EC Treaty,<sup>114</sup> make subsidiarity a general principle of Community law. Under subsidiarity, arguably, the institutions should not preempt (or be deemed to have preempted) Member State action over a subject unless they must do so in order to achieve the Community's objectives.<sup>115</sup>

iii. The Elasticity of Community Powers. - Unlike preemption, the question of implied powers was addressed directly by the Treaty and in early decisions of the Court of Justice. Based on the implied powers language of Article 235,<sup>116</sup> the Court might have been expected to permit the Community institutions to exercise powers not expressly granted them only when the exercise of such powers was shown to be necessary for achieving a stated Community purpose. This would have been consistent not only with the Article's wording, but more generally with the notion that the EC Treaty had effected a carefully limited transfer of sovereignty from the Member States to the Community. In scrutinizing the institutions' every claim to authority not expressly vested in them by the Treaty, the Court might actually have underscored that the Community was to be a polity of limited powers - limited not only because the States made only a "partial" transfer of sovereignty, but also because that transfer took the form of carefully crafted treaty provisions, each with its own very precise combination of substantive and procedural conditions. However, a judicial policy of this sort would have disserved an objective that was ultimately dearer to the Court, namely maximizing the effectiveness of Community law within the Community's emerging political and economic system. The instrumentalist reasoning that drove the Court's more patently federalist doctrines of direct applicability, direct effect, and supremacy also militated in favor of a liberal understanding of implied powers.

In point of fact, while the Court commonly examines whether the EC Treaty independently gives the Community sufficient powers for achieving a stated objective for which the institutions are claiming implied powers under Article 235, it rarely considers whether the powers claimed are in fact ones that are strictly necessary.<sup>117</sup> What is more, the Court frequently finesses altogether the question of whether the textual conditions for implied powers under Article 235 are met, and instead gives the express powers of the institutions under the Treaty a sufficiently broad and liberal reading to meet the Community's needs.

<sup>118</sup> A generous interpretation of the institutions' express powers (or, if one prefers, a readiness to infer powers from express treaty provisions) can obviate the need for recourse to Article 235 as an independent basis for implied powers. It is also a less conspicuous way to resolve jurisdictional doubts in favor of the Community.

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<sup>112</sup> See EC Treaty art. 130t (as amended 1987) ("The protective measures adopted in common pursuant to Article 130S [on the environment] shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.").

<sup>113</sup> See EC Treaty art. 118a(3) (as amended 1987) ("The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.").

<sup>114</sup> See *supra* note 41 and accompanying text.

<sup>115</sup> A presumption of non-preemption is actually more closely akin to the principle of proportionality than the principle of subsidiarity, see *infra* notes 157161 and accompanying text, but it is certainly consistent with both.

<sup>116</sup> EC Treaty article 235 states:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

EC Treaty art. 235.

<sup>117</sup> See generally Haagsma, *supra* note 88, at 327.

<sup>118</sup> See, e.g., Case 8/55, *Federation Charbonniere de Belgique v. High Authority of the European Coal and Steel Community (Fedechar)*, 19541956 E.C.R. 245, 259 (finding that the High Commission had the authority necessary to establish new pricing schedules for Belgian coal).

b. The Community's New Institutional Dynamics. - The previous section shows that the Community is the product of a succession of distinct constitutional developments. Because the Community grew out of an international agreement that at the time was of less than certain legal force and effect in the Member States, the Court of Justice understandably saw laying the normative foundations of legal integration as a matter of first priority. The result, as we have seen,<sup>119</sup> was a powerful doctrinal edifice based on the direct applicability, but even more so on the direct effect and supremacy of Community law. Intrinsically expansive of Community authority, these principles went on to receive a maximalist construction, thus hastening the EC Treaty's transformation from an international treaty into a political constitution.<sup>120</sup> Furthermore, the Member States accepted this massive dose of supranationalism because the Community's political processes still allowed them to safeguard their vital interests.<sup>121</sup> This balance may have seemed sufficiently stable to permit the Court to address the next generation of more squarely constitutional questions in ways that likewise favored the Community's assertions. The result was a further legal empowerment of the Community through a relaxed attitude toward enumeration, a receptiveness to Community preemption, and a generosity toward implied powers.<sup>122</sup>

The Single European Act (SEA), however, began to loosen the Member States' grip on the Community legislative process. Along with the apparent demise of the Luxembourg Accord,<sup>123</sup> the advent in the SEA of qualified majority voting in the Council of Ministers<sup>124</sup> threatened to deprive Member States of the political and legislative leverage to which they had become accustomed. It is interesting that the impact of qualified majority voting on the Community's federalism balance did not come in for very close examination at the time. Most likely this is because the Commission believed, and very largely succeeded in convincing the Member States, that completion of the internal market by the end of 1992 was the Community's paramount objective and that substituting qualified majority voting for unanimous voting in the Council was vital to achieving it.<sup>125</sup> The 1992 Program in fact offered the Member States and most of their constituencies a goal around which they rallied with an enthusiasm and a degree of consensus that they had not exhibited since the 1950s.

This is not to suggest that the Member States were insensitive to the change in equilibrium. Even under the SEA, they reserved unanimous voting for the matters about which they felt most keenly.<sup>126</sup> The SEA also made provision for a new "derogation" procedure allowing Member States to escape the effects of harmonizing legislation adopted by a qualified majority under Article 100a,<sup>127</sup> if they could show the necessary hardship and the Commission could be convinced of it.<sup>128</sup> In addition, as noted, the language of non-preemption and subsidiarity made its first, though still quite limited, appearance on the face of the Treaty through the SEA.<sup>129</sup> This too was a sure sign of misgivings, at least in some quarters. Nevertheless, the Member States had made easier passage of "single market" legislation their top political priority and accepted voting by qualified majority as a sure and reasonably safe means to that end.

The intergovernmental conferences on economic and monetary union (EMU) and on political union that opened in Rome in 1990 proceeded in a climate of basic satisfaction with the Community's progress toward 1992. With the recently adopted European Social Charter<sup>130</sup> and the detailed Delors Plan on

<sup>119</sup> See supra notes 5681 and accompanying text.

<sup>120</sup> Joseph Weiler's use of the term "transformation" is particularly apt in this context. See *Weiler, Transformation*, supra note 20, at 240507.

<sup>121</sup> See supra notes 8285 and accompanying text.

<sup>122</sup> See supra notes 87118 and accompanying text.

<sup>123</sup> See supra note 85 and accompanying text.

<sup>124</sup> See supra note 38 and accompanying text.

<sup>125</sup> See generally Metcalfe, supra note 2, at 810.

<sup>126</sup> The SEA, for example, left unchanged the rule of unanimity for harmonization of indirect taxation.

<sup>127</sup> See supra note 84 and accompanying text.

<sup>128</sup> See EC Treaty art. 100a(4) (as amended 1987). The provision reads:

If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs ... it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

*Id.*

<sup>129</sup> See supra notes 37, 112, 113.

<sup>130</sup> See supra note 49.

Economic and Monetary Union<sup>131</sup> before them, the Member State representatives were virtually certain to propose extensive Treaty amendments allowing the Community to move aggressively on the social policy front and on economic and monetary union; only the exact terms and modalities needed to be debated and eventually resolved, as in the end they were at Maastricht. At the same time, a large number of other subjects - health, consumer protection, education, culture, tourism, energy, immigration, anti-drug and anti-terrorism programs, among others - were being pressed upon the negotiators as natural "new" chapters in an amended Treaty.<sup>132</sup> In addition, the "completion of the internal market," called for by the SEA, was clearly unfinished business and would still remain so at the end of 1992. The possibilities for harmonizing new and existing regulatory measures in the interest of a more "complete" internal market were, and are of course, endless. All told, the prospects for legislative activism in the post-1992 Community were grand.

The conferees at Rome and Maastricht understandably devoted much of their time to discussing the procedures by which decisions affecting economic union, social policy, and the Community's new competences would be made, which of course also helps explain the enormous bulk of the Maastricht Treaty and its protocols. But though special voting precautions would be taken on the politically most sensitive issues, a broad retreat from qualified majority voting was never in the picture. Thus, whatever the eventual outcome on the many difficult points dividing them, the Member States were poised for a quantum widening of the Community terrain without any significant narrowing of the decisional rules. In fact, the Maastricht Treaty provides still wider scope for qualified majority voting in the Council at the expense of unanimous voting,<sup>133</sup> while at the same time expanding the use of parliamentary cooperation in the legislative process of the Community and introducing a system of parliamentary co-decision in selected areas.<sup>134</sup>

c. The Maastricht Environment. - If further inducements toward subsidiarity were needed, the political and economic climate in which the Member State conferees were gathering in 1990 to discuss further European union supplied them. For the first time since the "Europessimism" of the 1970s and very early 1980s, the Member States governments found themselves in deep anxiety over the condition of their economies and doubtful of the Community's capacity to rescue them from it. In fact, in many circles the Community enterprise itself provided a focus for the kind of scapegoating that national economic downturns can so easily provoke.<sup>135</sup>

In addition to an obstinate economic recession, the Member States also faced the prospect of a significant enlargement of the Community. Although the most imminent widening stood to bring relatively prosperous States - Austria, Finland, Norway, Sweden, and Switzerland - into the Community, the very increase in membership suggested that political agreement on common solutions would in the future only become more difficult to produce. In fact, however, the crumbling of states to the East (and the resulting integration into the Community of the impoverished former East Germany) reminded the Member States that the Community's manifest destiny did not lie only in the direction of the EFTA countries. The upheavals in Central and Eastern Europe augured not only another quantum enlargement of the Community, but eventually a very different mix of Members as well.

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<sup>131</sup> See supra note 39.

<sup>132</sup> On the expansion of Community competences, see Renaud Dehousse, *Integration v. Regulation? On the Dynamics of Regulation in the European Community*, 30 J. Common Mkt. Stud. 383, 38486 (1992).

<sup>133</sup> The Maastricht Treaty, for example, brings environmental and consumer protection, public health, education and social policy under the regime of qualified majority voting. See EC Treaty arts. 118a(2), 126, 129, 129a, 130s (as amended 1992); Agreement on Social Policy, supra note 49.

<sup>134</sup> Parliamentary cooperation, first introduced into the Community under the SEA, gives Parliament the right to propose amendments to legislation provisionally adopted by the Council (in the form of a "common position"). See supra note 34 and accompanying text. It is recodified under the TEU as EC Treaty art. 189c. EC Treaty art. 189b, added by the TEU, provides for a further legislative process called parliamentary co-decision. Parliamentary co-decision is a new and complex legislative procedure whose essential purpose is to give Parliament a kind of legislative veto power. An increase in the European Parliament's legislative powers was among the most prominent agenda items of the Rome intergovernmental conference on political union, just as it had been for the 1985 Luxembourg intergovernmental conference that produced the Single European Act.

<sup>135</sup> See Roland Gribben, *Walters Accepts Some Blame for "Mild" Recession*, The Daily Telegraph (London), Sept. 28, 1990, at 23; see also Enrique Tessieri, *Industry Pride Sinks to an All-Time Low*, Fin. Times, Dec. 18, 1989, at 16.

At a constitutional moment like this - with the supranationalist stakes long since established, the terrain for Community action widened and still widening, and the rules of decision-making relaxed - subsidiarity was at its most beguiling. Other factors - the influx of immigrants, the loss of confidence in an effective common European foreign policy, and regional demands within the Member States themselves - only heightened the subsidiarity impulse. But, although it is the constitution-makers' task to shape political impulses like subsidiarity into workable and durable instruments, the established instruments of federalism all missed the point.

The principle of subsidiarity does not, for example, seek to challenge the direct applicability, direct effect, or supremacy of Community law, or any of the prerogatives of the Court of Justice. It does not quarrel with the notion of implied powers<sup>136</sup> or with Community preemption,<sup>137</sup> provided the use is fair. Since subsidiarity deals with the exercise of legislative self-restraint within the constitutional sphere of federal power, enumerating federal powers as such does not help; the Maastricht Treaty predictably reaffirmed the enumeration principle, requiring the Community to "act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."<sup>138</sup> Subsidiarity asks a quite different question, namely whether the powers that do fall within the Community sphere should in fact be exercised. By the same token, expressly reserving to the States all powers not delegated to the federal government, as does the U.S. Tenth Amendment,<sup>139</sup> simply begs the question. Subsidiarity challenges none of these notions, but it is not satisfied by any of them either. It starts off precisely where the conventional tools of constitutional federalism leave off and where legislative politics is ordinarily thought to begin.

## II. Putting Subsidiarity into Practice

Subsidiarity may function in at least four different ways. Its first and, I would suggest, most important function is legislative. Arguably, each participant in the legislative process of the Community - the Commission in proposing (and in some cases issuing) a rule, the Parliament and other bodies<sup>140</sup> in expressing an opinion on a proposed rule, and the Council in adopting a rule - can determine whether the measure comports with the principle of subsidiarity before, respectively, proposing, commenting on, or adopting it.<sup>141</sup> It can likewise disfavor, oppose, or reject the measure, as the case may be, if the measure fails to do so. Second, any legislative doctrine can also perform an interpretive function. If the Council or Commission may be presumed to observe the principle of subsidiarity in adopting legislation, then those who are called on to interpret that legislation - including the Court of Justice but more commonly the various Member State officials who administer and enforce it - should, in case of doubt, favor the interpretation that most respects that principle. Third, compliance with the principle of subsidiarity may be regarded as an element of the legality of Community action. Thus, any measure infringing upon the principle would be invalid on that ground alone. However, even if subsidiarity is justiciable, its enforcement is reserved to the Community judiciary,<sup>142</sup> since Member State courts cannot themselves rule on the validity of a Community measure.<sup>143</sup>

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<sup>136</sup> The TEU art. F(3) actually provides: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies." The European Council, meeting at Edinburgh, stated that the Community's use of Article 235 powers was itself, however, also subject to the principle of subsidiarity. See Edinburgh Conclusions, *supra* note 11, at 4.

<sup>137</sup> Virtually all "official" definitions of subsidiarity stress that it applies only in areas of concurrent Member State and Community competence. See *supra* notes 9, 35, 41 and accompanying text.

<sup>138</sup> TEU art. G(5).

<sup>139</sup> The Tenth Amendment to the U.S. Constitution reads: "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." U.S. Const. amend. X.

<sup>140</sup> These would include various management, regulatory and advisory committees attached to the Council, as well as the Economic and Social Committee.

<sup>141</sup> See generally *The Principle of Subsidiarity: Communication of the Commission to the Council and the European Parliament*, SEC (92) 1990 final, at 13, IV (Oct. 27, 1992).

<sup>142</sup> The Court of Justice of the European Communities is the Community's principal judicial institution. See *supra* note 13. The only other Community court is a Court of First Instance (CFI), created in 1988 to exercise judicial power over a limited category of cases in first instance, chiefly over staff and competition law cases. The CFI's jurisdiction was extended by the Council in June 1993 to cover all other direct actions (except anti-dumping cases) brought by natural or legal persons. See *Extending the Jurisdiction of the Court of First Instance*, 18 Eur. L. Rev. 270 (1993). It still lacks jurisdiction over actions brought by Member States or by the EC institutions, and it cannot entertain preliminary references.

<sup>143</sup> See Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199, 4220, [1988] 3 C.M.L.R. 57, 71.



Finally, the principle of subsidiarity can perform a confidence-building function by reassuring the constituent states, and notably the regions and other subcommunities within the states, that their distinctiveness will be respected at the European Community level.<sup>144</sup> As shown by the evolution of Community federalism traced in Part I of this Article, subsidiarity is in fact playing, or being asked to play, this role today. Of course, absent some evidence that subsidiarity actually exerts legislative, interpretive, or adjudicatory influence, it cannot credibly perform its confidence-building function either. On the other hand, if subsidiarity does manage to perform this function, it can enhance the legitimacy of all European Community measures and of the Community itself. The difficulty of operationalizing subsidiarity does not in the least lessen its importance.

If, as seems evident, subsidiarity addresses issues that are ordinarily relegated to the political realm, then subsidiarity's central function must be its legislative one. This means in turn that each participant in the Community's legislative process should, on the occasion assigned to it by that process, determine whether the measure under consideration meets the test of subsidiarity, and act on the measure accordingly. What I call the legislative function of subsidiarity in fact figures prominently in the official subsidiarity guidelines adopted by the European Council<sup>145</sup> at its Edinburgh Summit in December 1992.<sup>146</sup>

### A. The European Council Guidelines

The European Council at Edinburgh set for itself the task, among others,<sup>147</sup> of clarifying how subsidiarity would be secured within the Community system. Evoking subsidiarity's legislative function, the Council affirmed that the principle was binding on all of the Community's political institutions, though not meant to alter their respective functions or to affect the institutional balance between them.<sup>148</sup> With respect to its adjudicatory function, the Council specified that subsidiarity was not intended to have direct effect in national courts,<sup>149</sup> but that it furnished a proper ground for a direct challenge to Community measures in the Court of Justice.<sup>150</sup> Finally, the European Council sought by the tenor of its remarks on subsidiarity to reassure the Member States and their various subcommunities that the post-1992 Community would genuinely respect their separate interests and capacities. This seemed especially necessary in light of the Danes' rejection by referendum of the Maastricht Treaty<sup>151</sup> and the closeness of the French vote,<sup>152</sup> and in anticipation of political and judicial challenges in the UK<sup>153</sup> and Germany.<sup>154</sup> The Council thus conspicuously sought to exploit subsidiarity's confidence-building function.

<sup>144</sup> See *supra* notes 2529 and accompanying text.

<sup>145</sup> The European Council (as contrasted with the Council of Ministers of the Community) consists of the heads of state or of government of the Member States when meeting as an intergovernmental political grouping rather than as the Community's chief legislative organ. Its meetings, held at least twice a year, are commonly characterized as "summits." On the European Council generally, see Bermann et al., *supra* note 13, at 1213, 5557.

<sup>146</sup> Two months earlier, the European Council had resolved at its Birmingham Summit that "action at the Community level should happen only when proper and necessary," and that recognition of a principle of subsidiarity "is essential if the Community is to develop with the support of its citizens." European Council in Birmingham, Conclusions of the Presidency, Oct. 16, 1992, *Europe: Agence Internationale d'Information pour la Presse*, Oct. 18, 1992, at 3. The European Council announced at Birmingham its intention to issue guidelines at the Edinburgh Summit on the practice of subsidiarity. See *id.*

<sup>147</sup> Among the European Council's most pressing tasks at Edinburgh was agreeing upon modifications to the Maastricht Treaty or its protocols that would cause the Danish electorate to support ratification of the Treaty in a second referendum following its rejection of the Treaty in a first referendum.

<sup>148</sup> See Edinburgh Conclusions, *supra* note 11, at 3.

<sup>149</sup> See *id.* at 4. The absence of direct effect means that individual litigants do not have the right to invoke the principle of subsidiarity in national court to avoid the application of an otherwise relevant Community law measure on the ground that it violates that principle. See *infra* notes 238241 and accompanying text.

<sup>150</sup> See Edinburgh Conclusions, *supra* note 11, at 4. A direct challenge to a Community measure may be brought in the Court of Justice under EC Treaty Article 173. Article 173 contemplates legal challenges to binding acts of the institutions and confers standing for this purpose on the Member States and the institutions, as well as on private parties seeking to challenge decisions addressed to them or otherwise of direct and individual concern to them. Such actions must in principle be brought within two months of publication of the measure challenged.

<sup>151</sup> Danish voters voted to reject the Maastricht treaty by a vote of 50.7% to 49.3% in June 1992. See Craig R. Whitney, With Denmark, European Ministers Play for Time, *N.Y. Times*, June 5, 1992, at A9.

<sup>152</sup> French approval of the Treaty in September 1992 was achieved with a slim 51% majority. See Alan Riding, French Approve Unity Treaty, but Slim Margin Leaves Doubts, *N.Y. Times*, Sept. 21, 1992, at A1.

<sup>153</sup> See *The Road Ahead for Maastricht*, *The Economist*, July 31, 1993, at 42; see also *The Maastricht Mire*, *The Economist*, Mar. 13, 1993, at 20; *Vote on Maastricht*, *The Economist*, Oct. 31, 1992, at 16.

In order to achieve this purpose, however, the Edinburgh Summit had to demonstrate that the concept of subsidiarity has meaning and that its meaning is intelligible. The European Council thus defined subsidiarity as permitting the Community to act only if its objectives "cannot be sufficiently achieved by Member State action" and "can ... be better achieved by action on the part of the Community."<sup>155</sup> According to the European Council - and this is strictly a matter of definition - subsidiarity does not ask questions about "the intensity or nature of the Community's action."<sup>156</sup> Such questions are addressed instead by the principle of proportionality, long since established by the Court of Justice<sup>157</sup> and recently affirmed by the Maastricht Treaty.<sup>158</sup> As presented by the European Council, the principle of proportionality bars the Community from selecting a measure that imposes burdens disproportionate to the objective sought to be served.<sup>159</sup> I shall argue in section C below that, although the European Council's distinction between subsidiarity and proportionality is analytically useful in defining the relevant questions for the political branches and in channeling the Court of Justice's interventions, it is also inherently and deeply problematic.<sup>160</sup>

Turning to the subsidiarity principle proper, the European Council set out in its Edinburgh Conclusions a number of so-called subsidiarity "guidelines,"<sup>161</sup> each of which, for different reasons, is disappointing in its usefulness to the institutions. The first guideline counsels the institutions to consider whether the problem addressed by a proposed Community measure "has transnational aspects which cannot be satisfactorily regulated by action by Member States."<sup>162</sup> Unfortunately, problems that are truly transnational in character, and readily identifiable as such, are not the ones over which the institutions are likely to entertain serious subsidiarity doubts. With respect to such problems, the institutions might well wonder to what extent and in what form to intervene, but these questions, as the European Council itself insists, go to the issue of proportionality, not subsidiarity.<sup>163</sup>

The second guideline calls attention to whether a failure by the Community to act "would conflict with the requirements of the Treaty (such as the need to correct distortion of competition, or avoid disguised restrictions on trade, or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests."<sup>164</sup> In a sense this guideline also addresses the easy cases, since the Commission and Council presumably will act whenever they deem it necessary to correct distortions of competition or avoid restrictions on trade, or to accomplish some other compelling Community objective. In other words, this guideline indicates where subsidiarity should stop, but not where it should start.

Unlike the European Council's first two guidelines, its third one addresses the hard cases. Unfortunately, however, it does so in an entirely conclusory fashion. This guideline requires the Council of Ministers, before acting, to find that the Community measure that is contemplated "would produce clear benefits by

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<sup>154</sup> A German poll in late September 1992 reported that "only one voter in three would support the Maastricht treaty, and almost three-quarters object to giving up the rock-hard deutschmark in favor of a new and untested Euro-currency." Andrew Phillips, *Europe in Crisis*, Maclean's, Oct. 5, 1992, at 34. Constitutional challenges brought against the Maastricht Treaty were rejected by the German Constitutional Court on October 12, 1993. See German Constitutional Court Maastricht Decision, *supra* note 20; see also Last Harrumph for Maastricht, *The Economist*, Oct. 16, 1993, at 52.

<sup>155</sup> Edinburgh Conclusions, *supra* note 11, at 6.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> See, e.g., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125, 1130, 1972 C.M.L.R. 255.

<sup>158</sup> Article 3b, which the Maastricht Treaty adds to the EC Treaty, recognizes in its final paragraph the principle of proportionality: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." EC Treaty art. 3b (as amended 1992). The Maastricht Treaty and the European Council alike thus treat subsidiarity and proportionality as separate though related concepts. More recently, the Commission suggested that subsidiarity is the broader concept, consisting of two branches, one being the showing of a "need-for-action" and the other being the requirement of proportionality proper. See *infra* note 200.

<sup>159</sup> "Any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be minimized and should be proportionate to the objective to be achieved." Edinburgh Conclusions, *supra* note 20, at 8. The term proportionality also figures in United States constitutional and administrative law. The principle, according to Sunstein, requires that "statutes should be construed so that the aggregate social benefits are proportionate to the aggregate social costs." Sunstein, *supra* note 22, at 181.

<sup>160</sup> See *infra* notes 227-236 and accompanying text.

<sup>161</sup> See Edinburgh Conclusions, *supra* note 11, at 8.

<sup>162</sup> *Id.* at 7.

<sup>163</sup> See *id.* at 2.

<sup>164</sup> *Id.* at 7.

reason of its scale or effects compared with action at the level of the Member States." <sup>165</sup> This simply restates the principle of subsidiarity, <sup>166</sup> though it perhaps has the merit of specifying that the comparative advantage of Community over Member State action must be "clear"; in other words, the proposed measure must be markedly superior to the Member State alternative, and not merely as good or slightly better. The Council also states that subsidiarity "must be substantiated by qualitative or, wherever possible, quantitative indicators," <sup>167</sup> which expresses a slightly different theme, namely that the subsidiarity principle imposes something in the nature of a burden of proof. The Council says nothing more about how such a burden might be met, except to dispel the idea that "presenting a single position of the Member States [on a given matter] vis-à-vis third countries" by itself justifies "internal" Community action on the matter. <sup>168</sup>

In my view, none of these admonitions meaningfully advances the political decision whether a proposed measure meets the test of subsidiarity. In section C below, <sup>169</sup> I suggest that determining whether the Community's objectives can or cannot be sufficiently achieved by Member State action requires a substantially more searching inquiry than those implied by the Edinburgh guidelines' shortcut formulations. Although the Edinburgh exercise underscored in reassuringly simple "summit" language the European Council's attachment to the subsidiarity principle, it left the operational aspects of the principle largely unexplored.

## **B. Subsidiarity in the Community Tradition**

Equally problematic, particularly from a confidence-building point of view, was the European Council's attempt to depict subsidiarity both as comfortably within the Community tradition and at the same time reflective of a new sensitivity to localism. In aid of the first proposition, the European Council asserted that "the principle of attribution of powers" has always dictated that "national powers are the rule and the Community's the exception." <sup>170</sup> As might be expected - and as this Article's earlier discussion of enumeration, preemption, and implied powers shows <sup>171</sup> - matters are not quite so simple. In this section, I take up the question of subsidiarity's novelty in the Community context.

The claim that the Community practiced subsidiarity well before the Maastricht Treaty proclaimed it to be a general Community law principle is not entirely without substance. From the outset, the EC Treaty suggested that Member State laws should be harmonized only "to the extent required for the proper functioning of the common market." <sup>172</sup> The legal form that the Treaty drafters initially envisioned as the main harmonization instrument was the directive, which itself reflects subsidiarity thinking. <sup>173</sup> The use of directives, as compared to regulations, presupposes that the Member States can safely be relied upon to select the appropriate "form and methods" for implementing Community policy. <sup>174</sup> In the final analysis, of course, it is impossible to tell from the form of a Community measure whether its content is respectful of subsidiarity. The Council may easily enact legislation that, while taking the form of a directive, dictates policy on matters that the States acting alone could have done a perfectly good job of regulating, in breach of the subsidiarity principle. Conversely, the Council may adopt a regulation (i.e., a directly

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<sup>165</sup> Id.

<sup>166</sup> The European Council also reiterated the principle of subsidiarity by urging that the Community "only take action involving harmonization of national legislation, norms or standards where this is necessary to achieve the objectives of the Treaty." Id. at 7.

<sup>167</sup> Id.

<sup>168</sup> Id.

<sup>169</sup> See infra notes 206-236 and accompanying text.

<sup>170</sup> Edinburgh Conclusions, supra note 11, at 2. On the Commission's claim that subsidiarity has always been part of the Community treaty structure, see Gretschnann, supra note 27, at 45, 5357; Daniel G. Partan, Subsidiarity in EC Environmental Regulation, paper delivered at Symposium on Subsidiarity and Harmonization: *Defining European Federalism*, supra note 4 (on file with the Columbia Law Review).

<sup>171</sup> See supra notes 87-118 and accompanying text.

<sup>172</sup> EC Treaty art. 3(h).

<sup>173</sup> Article 189 of the EC Treaty reads: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." "Regulations" by contrast are defined in Article 189 as "binding in [their] entirety and directly applicable in all Member States." EC Treaty art. 189.

<sup>174</sup> Id. However, EC Treaty Article 100a, added by the 1986 Single European Act, deliberately invited harmonization through means other than directives, notably through directly applicable regulations. It authorized the use of "measures," not merely "directives," as under the original harmonization provision, Article 100. See EC Treaty art. 100 (as in effect in 1985).

applicable instrument) and still take all due account of the States' willingness and capacity to act on the matter at hand.

More indicative of subsidiarity than the institutions' choice of legislative form is their choice of legislative approach. In fact, the Commission and Council commonly use legislative instruments that are specifically designed to avoid unnecessary Community interventions. One such instrument is the mutual recognition of national standards. If the Community can afford to achieve its objectives by ensuring that the regulatory regime of each Member State meets certain minimum Community criteria, then it can leave the Member State regimes in place, and simply require each to give full faith and credit to the certifications made by the others. The Community thereby advances the free movement principle, without displacing Member State law or exacting an unnecessary degree of uniformity. While the Council may of course fail on any given occasion to show adequate self-restraint in defining the minimum criteria, the technique of mutual recognition acknowledges in principle the States' capacity to regulate their economies separately, and still not jeopardize the Community's essential regulatory goals.<sup>175</sup>

A second legislative technique - or set of techniques - redolent of subsidiarity is the Council of Ministers' "new approach to technical harmonization," first announced in those terms in 1985.<sup>176</sup> The Council sought through this approach to streamline the harmonization process, chiefly by limiting the quantity and detail of issues that any given directive needed to address. The mutual recognition of standards mentioned above plainly serves the same goal. But the "new approach" counselled in more general terms against the adoption of detailed and comprehensive directives, urging the Community instead to limit harmonization to those aspects of a regulatory problem deemed to be "essential," and to leave aside all others. Whether the issues left over are eventually regulated separately by the Member States or by private or government-supported standards bodies, or left unregulated altogether, is presumably not a matter of Community concern, provided the "essentials" contained in the directive are respected and significant barriers to intra-Community trade are not reintroduced.<sup>177</sup> The Council's chief purpose in adopting a more streamlined approach to harmonization may have been to lighten its legislative burden, particularly with the 1992 single market program on the horizon; but this preference necessarily also conveyed a sense of confidence in the States' ability to address matters within their legislative sphere without causing undue detriment to Community policy.

Similarly suggestive of subsidiarity is the Council of Ministers' practice of using legislative language that expressly allows the Member States to adopt a still higher level of protection should they so choose.<sup>178</sup> This is not to say that the use of non-preemption language guarantees subsidiarity; even a non-preemptive Community measure may not have been necessary for achieving the objective sought, or if necessary, might have been made less far-reaching. Nevertheless, the practice of expressly allowing more protective Member State legislation shows a healthy appreciation for the States' capacity to govern a matter that the Community could constitutionally regulate, and it should remove any doubt about their entitlement in principle to do so.<sup>179</sup>

Under the definitions adopted by the European Council at Edinburgh,<sup>180</sup> these three instruments - the preference for directives,<sup>181</sup> the "new approach to harmonization"<sup>182</sup> and express legislative non-

<sup>175</sup> For an example of Community legislation employing the technique of mutual recognition of national standards, see Council Directive 75/363 In Respect of Activities of Doctors, 1975 O.J. (L 167) 14.

<sup>176</sup> Council Resolution of May 7, 1985 on a New Approach to Technical Harmonization and Standards, 1985 O.J. (C 136) 1.

<sup>177</sup> The idea is that once the Commission certifies a national standard as meeting a directive's minimum standards, all other Member States would be required to treat goods manufactured under those standards as in conformity with the directive. See, for example, Council Directive 88/378 on the Safety of Toys, 1988 O.J. (L 187) 1.

<sup>178</sup> For an example of such permissive language, see Article 5 of Council Directive 75/129 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, 1975 O.J. (L 48) 29 ("This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favorable to workers."). For further examples, see Articles 9, 10, 13, and 15 of Council Directive 85/374 Concerning Liability for Defective Products, 1985 O.J. (L 210) 29.

<sup>179</sup> Non-preemption does not, of course, leave Member States entirely free in their protective efforts. Even if not preempted as such, Member State legislation may not contravene any Community law principles, such as free movement or non-discrimination based on nationality.

<sup>180</sup> See *supra* notes 156159 and accompanying text.

<sup>181</sup> At the Edinburgh Summit, the Council urged that:

preemption<sup>183</sup> - more closely serve the purposes of proportionality than subsidiarity. Nevertheless, each of them received the Council's specific endorsement at Edinburgh. The Council also urged the Community institutions, in the interest of proportionality, to favor interventions that facilitate and coordinate Member State actions rather than compel them, whenever the institutions could still thereby achieve their purposes.<sup>184</sup> Since the distinction between whether the Community should act in place of the States and how far it should go in doing so is artificial at best, the Council's injunctions about proportionality can scarcely help but serve subsidiarity's purposes as well.

The foregoing discussion shows that while the rhetoric of subsidiarity is unprecedented in the Community, the practice of subsidiarity is not. It is nevertheless difficult to tell just how deliberately and systematically the institutions have practiced subsidiarity in their conduct of policy analysis or in their design of legislation. Rightly or wrongly, it remains a widely-held impression that the Community commonly legislates on matters bearing a tenuous or strained connection with the internal market, that it often acts not because acting has been shown to be necessary but simply because it might be useful, and that even when it legislates on a proper subject, it often does so in unnecessary detail and in search of unnecessarily standardized results.<sup>185</sup> Even if this impression is no longer accurate (if it ever was), it is nevertheless a fact of which the architects of European integration need to be aware.

One way for the Community to acknowledge that it may not always have practiced subsidiarity as seriously as it might have would be to reconsider existing legislation from a subsidiarity point of view. Interestingly, although the subsidiarity provision of the Maastricht Treaty requires only prospective application of the principle,<sup>186</sup> the consensus in political and academic quarters alike is that the institutions should also reexamine legislation already on the books,<sup>187</sup> as they have in fact begun to do.<sup>188</sup> It is unlikely that at the time they enacted such legislation, the institutions asked the precise questions that subsidiarity now seems to require. It is also possible that existing legislation was adopted in accordance with the principle of subsidiarity, but that circumstances have since changed in ways which suggest that

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The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate.

Consideration should also be given where appropriate to the use of voluntary codes of conduct.

Edinburgh Conclusions, *supra* note 11, at 9.

<sup>182</sup> Reinforcing the "new approach to harmonization," the Council insisted that:

Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organization and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

*Id.* at 8.

n183.

*Id.*

<sup>183</sup> With regard to express legislative non-preemption, the Council announced that:

Where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards, not only in the areas where the treaty so requires (118a, 130t) but also in other areas where this would not conflict with the objectives of the proposed measure or with the Treaty.

<sup>184</sup> "Where appropriate under the Treaty, and provided this is sufficient to achieve its objectives, preference in choosing the type of Community action should be given to encouraging cooperation between Member States, [to] coordinating national action or to complementing, supplementing or supporting such action." *Id.* at 9. The Council also urged, by way of proportionality, that Community legislation target particular States and omit others, where appropriate: "Where difficulties are localised and only certain Member States are affected, any necessary Community action should not be extended to other Member States unless this is necessary to achieve an objective of the Treaty." *Id.*

<sup>185</sup> See David Buchan, *Biotech Groups Find Bright New World Slow to Dawn - Europe's Patent Legislation and Regulations Have Caused Frustration in the Sector*, *Fin. Times*, Apr. 27, 1992, at 2; see also Charles Batchelor, *Owners Driven Up the Wall*, *Fin. Times*, Dec. 15, 1992, at 10; Roland Gribben, *CBI Calls for Speed in Paper Mountain War red tape Government Urged to Act on De-Regulation*, *The Daily Telegraph* (London), June 7, 1993, at 29.

<sup>186</sup> Article 3b of the EC Treaty allows the Community to act "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States." EC Treaty art. 3b (emphasis added).

<sup>187</sup> See generally Alistair Alcock, *Subsidiarity and Adverse Possession*, 142 *New L.J.* 1386 (1992). Following the 1992 European Council meeting at Edinburgh, France and the United Kingdom drew up a list of specific Community legislation in force - mostly on environmental protection, consumer protection and social affairs - that they believed needed to be repealed or amended in light of the subsidiarity principle. These included, for example, directives on the safety of drinking and bathing water, driving speed limits, blood alcohol tests for drunken driving, pharmaceutical pricing, indirect taxation of securities, and the protection of wild birds. See Brian Love, *Britain and France Team Up to Seek Repeal of EC Laws*, *Reuters News Service - Western Europe*, June 29, 1993, available in LEXIS, Reuters Textline. On the Commission's November 1993 report to the European Council proposing the repeal of certain legislation in the interest of subsidiarity, see *infra* notes 199205.

<sup>188</sup> See *infra* notes 192198 and accompanying text.

the legislation be repealed or amended,<sup>189</sup> or that the institutions simply erred in their judgment that they needed to act in place of the States. Another way in which the Community might hasten the process of eliminating unnecessary legislation is by providing for its automatic expiration after a certain period, unless specifically renewed.<sup>190</sup> Such so-called "sunset" provisions are not, however, in the tradition of European legislative practice.

The Commission's willingness to reexamine existing legislation under a subsidiarity principle not recognized or enforced when the legislation was passed has obvious political advantages. It demonstrates with some clarity that subsidiarity has meaning and will make a difference. If subsidiarity is the promise on the basis of which the States and their various subcommunities are supposed to accept the accretions in Community power under Maastricht, and to continue on the path toward European political union, this is an important showing indeed. But the principle of subsidiarity may demand retroactive application for consistency's sake too. The Community may find it awkward to enforce existing legislation when analogous proposals for future legislation are being amended, withdrawn or defeated (or new legislation possibly even invalidated) on subsidiarity grounds.<sup>191</sup>

During ratification of the Maastricht Treaty, the Commission reexamined the legislative proposals then pending before the Council and Parliament, and began the much more daunting task of reviewing existing legislation for its continuing conformity with subsidiarity.<sup>192</sup> The Commission quite properly also reconsidered legislative initiatives that were still in the planning stage.<sup>193</sup> Indications are that the reassessment produced results. By the time of the Edinburgh Summit, the Commission had decided to withdraw three proposed directives<sup>194</sup> and to revise six more;<sup>195</sup> it also announced its intention to consider withdrawing or revising a number of others.<sup>196</sup> Finally, certain initiatives still in the planning stage were abandoned, ostensibly on subsidiarity grounds.<sup>197</sup> The Commission subsequently withdrew a still much larger number of pending legislative proposals.<sup>198</sup> The Commission, with the European Council's obvious blessing, evidently proceeded in the sensible belief that, particularly in matters of politics, actions speak louder than words.

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<sup>189</sup> The Edinburgh European Council concluded that subsidiarity "allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified." Edinburgh Conclusions, *supra* note 11, at 4.

<sup>190</sup> See Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* 160 (1991) ("The solution [to the problem of shifting the burden of reviewing and adjusting statutes] is the incorporation of a 'sunset' provision in each preemptive statute."). An advantage of such a mechanism is that it addresses the problem of legislative "entrenchment." Particularly in a system of super-majority voting, it may be difficult to amass the political support needed to pass new legislation that "positively" repeals existing legislation. Automatic expiry of legislation would place the burden of collecting super-majority support on those who would have legislation continue in force beyond its term.

<sup>191</sup> Alcock claims that the Commission will find it difficult to maintain enforcement actions against Member States under Article 169 of the EC Treaty for their failure to implement Community rules that, under the principle of subsidiarity, should never have been adopted. See Alcock, *supra* note 187, at 1386.

<sup>192</sup> See Edinburgh Conclusions, *supra* note 11, at 1.

<sup>193</sup> See *id.* One legislative project that France and the United Kingdom have jointly urged the Commission to abandon on subsidiarity grounds is a directive establishing Community-wide hygiene standards for zoos. See Love, *supra* note 187.

<sup>194</sup> The proposals withdrawn concerned: 1) compulsory labeling of the nutritional value of foodstuffs, 2) radio frequencies for land-based telecommunications with aircraft, and 3) radio frequencies for remote-processing in road transport. See Edinburgh Conclusions, *supra* note 11, at 2.

<sup>195</sup> Revisions will be made to proposals on 1) public takeover bids, 2) a common definition of a Community shipowner, 3) comparative advertising, 4) shoe labeling, 5) liability of suppliers of services, and 6) protection of persons regarding data processed digitally. In each case, the Commission plans to further reduce the proposal to general principles and to allow the Member States to provide greater detail. See *id.* at 8.

<sup>196</sup> These proposals dealt with a wide range of matters, including animal conditions in zoos, indirect taxation of securities transactions and capital accumulation, value added taxation of ships' supplies, the temporary importation of motor vehicles, and classification of documents of Community institutions. See *id.*

<sup>197</sup> Among initiatives dropped were those relating: to 1) harmonization of vehicle number plates, 2) the regulation of gambling, and 3) harmonization of technical standards for diet foods, second-hand machinery, and theme park equipment. See *id.*

<sup>198</sup> See Commission Withdraws "Superfluous" Proposals, Reuters News Service - Western Europe, July 29, 1993, available in LEXIS, Reuters Textline. At the European Council's June 1993 summit in Copenhagen (its first summit meeting following the Edinburgh Summit of December 1992), the heads of state and government "noted with satisfaction that the Commission is now submitting proposals only when it considers that they fulfil the subsidiarity criteria, and welcomed in general the substantial reduction in the volume of Community legislation foreseen in the Commission's legislative programme for 1993 compared to earlier years." European Council in Copenhagen, Conclusions of the Presidency, June 21-22, 1993, available in LEXIS, Reuters Textline, European Commission Press Releases, June 22, 1993 15. At Copenhagen, the European Council concluded that the Commission and the Council alike "are now applying the principles, guidelines, and procedures on subsidiarity decided at Edinburgh as an integral part of the decision making procedure" and urged the European Parliament to do likewise. *Id.*

In November 1993, at the request of the European Council at Edinburgh, the Commission produced a report on the Adaptation of Community Legislation to the Subsidiarity Principle (Adaptation Report).<sup>199</sup> The report identified the existing Community legislation in all areas that the Commission had determined to revise, either in the interest of subsidiarity or proportionality.<sup>200</sup> Revision would take one of three forms: recasting, simplification, or repeal. Recasting means reordering in a more consistent and coherent fashion; simplification refers to the elimination of unnecessary detail; and repeal consists of eliminating legislation that is no longer needed.<sup>201</sup> While promising that the process would not degenerate into a "free-for-all, in which ... various parties ... propose the revision or repeal of legislation for reasons of expediency,"<sup>202</sup> the Commission cited hundreds of enactments that it would seek to recast,<sup>203</sup> simplify,<sup>204</sup> or repeal<sup>205</sup> in the near term. The sheer number of changes projected in the Adaptation Report is of course very impressive. However, the report's clear emphasis on recasting and simplification suggests that the operation may end up streamlining many specific Community enactments, and thus pruning the corpus of EC legislation, but still failing to return very many matters to governance by the Member States. In this respect, the Adaptation Report only points up the importance of asking and answering the right questions in subsidiarity's name. It is to this aspect of the problem that I now turn.

### C. Subsidiarity as a Mode of Legislative Analysis

Having examined how the Community has defined the principle of subsidiarity and thus far sought to implement it, I now look more closely at what it will mean in the future to treat subsidiarity essentially as a legislative precept. This entails, first, clarifying the nature of the legislative inquiry and its institutional implications. I trace these aspects of subsidiarity in the first part of this section. However, understanding the legislative practice of subsidiarity also entails acknowledging the complex analytic and policy questions that application of the principle will inevitably raise. In the second and third parts of this section, I attempt to show that taking subsidiarity seriously as a legislative norm requires confronting both the difficult distinction between policy measures and harmonization measures and the necessity of making conscious tradeoffs between subsidiarity and other legislative principles, notably proportionality, that are also deemed to be fundamental in the Community legal order.

1. Institutional Aspects of Subsidiarity. - The burden of respecting subsidiarity in the exercise of Community power would seem to lie initially with the Commission, which enjoys a virtual monopoly over conceiving and drafting legislative proposals. The European Council at Edinburgh suggested that the Commission should consult with the Member States at an early stage on "the subsidiarity aspects of a proposal," and include in the explanatory memorandum accompanying any proposal made to the Council

<sup>199</sup> Commission of the European Communities, Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM(93)545 final (Nov. 24, 1993) [hereinafter Adaptation Report]. The European Council commented favorably on the report and urged early Commission action pursuant to it. European Council in Brussels, Conclusions of the Presidency, Dec. 1011, 1993, at 2223. The Council, Commission, and Parliament had previously agreed that the Commission should prepare an annual report for the Parliament and the Council on compliance with the principle of subsidiarity, and that the report should occasion a public debate in the Parliament, with the participation of the other two institutions. See Interinstitutional Agreement on Procedures for Implementing the Principle of Subsidiarity, Doc. 9510/93 (Luxembourg, Oct. 25, 1993) (Annex) [hereinafter Interinstitutional Agreement]. See *infra* notes 206, 213, 217.

<sup>200</sup> In fact, the Report restates somewhat the relationship between the subsidiarity and proportionality principles set out by the European Council at Edinburgh. See *supra* notes 155169 and accompanying text. According to the Commission, subsidiarity is the larger concept, having two distinct branches. One branch - the one by now more closely identified with subsidiarity - is "the need-for-action" test; the other is "proportionality." Adaptation Report, *supra* note 199, at 5. Under this analysis, proportionality is merely a species of subsidiarity.

<sup>201</sup> See Adaptation Report, *supra* note 199, at 6. The goal of simplification is to be advanced through wider use of certain legislative techniques - notably the new approach to harmonization and the mutual recognition of certificates - described above. See *id.* at 1314; *supra* notes 174177 and accompanying text.

<sup>202</sup> Adaptation Report, *supra* note 199, at 7.

<sup>203</sup> n203. Notably, the Community customs code is slated to be recast, as are directives and regulations on rights of residence of Community nationals, pharmaceutical products, competition policy, and trade mechanisms for agricultural products (e.g., production licenses, refunds, levies, guarantees). *Id.* at 1012.

<sup>204</sup> The Commission is exploring simplification in many important fields: technical standards (particularly in relation to foodstuffs and machinery), professional qualifications, the environment, animal welfare, and social policy (i.e., workers' rights). Areas in which the Commission is also exploring possibilities for simplification are indirect taxation, company law, agricultural markets, transport, fisheries, energy, and consumer protection. See *id.* at 1222.

<sup>205</sup> According to the Commission, the recasting and simplification of legislation will inevitably entail the repeal in whole or in part of existing legislation. See *id.* at 23. However, the Commission has identified areas in which legislation might be repealed outright because it no longer appears justifiable in terms of subsidiarity. See *id.* at 2324.

of Ministers a statement "justif[ying the] initiative with regard to the principle of subsidiarity."<sup>206</sup> One can readily imagine a reasoned Commission forecast of (1) the actions, if any, that the Member States could plausibly be expected to take to accomplish the purposes underlying the proposed Community measure, (2) the respective likelihood of those actions occurring, (3) the probable consequences of the actions, and (4) a comparison of their probable effectiveness with that of the Community measure under consideration. Presumably, consideration would also be given to leaving the matter unregulated at all levels of government.

A "subsidiarity impact analysis," to coin a not altogether original description of such reasoning, might cause the Commission to conclude either that no alternative measures the Member States could reasonably be expected to take would adequately serve the Community's purposes and that the Commission proposal should go forward, or that adequate Member State alternatives in fact exist and that the Commission proposal should not proceed.<sup>207</sup> The analysis might of course produce much less conclusive results. In any event, the Commission's impact analysis could constitute the record on which the other institutions (notably the European Parliament, the Economic and Social Committee and the Council of Ministers) base their own initial assessments of any Commission proposal. On the other hand, the Commission's analysis obviously should not in any way limit those institutions' right to make their own factual inquiries, perform their own political and economic analyses, and reach their own ultimate conclusions.

The Commission took its November 1993 Adaptation Report<sup>208</sup> as a further occasion to describe the type of analysis that subsidiarity entails. While depicting subsidiarity more as "a state of mind" than "a set of procedural rules,"<sup>209</sup> the Commission nevertheless affirmed that subsidiarity required it to answer in the form of an explanatory memorandum a prescribed set of questions before proposing a new measure within the Community's and Member States' shared competence. Among the issues to be addressed in any such "justification" are:

- (a) What are the aims of the proposed action in terms of the Community's obligations? ...
- (b) What is the Community dimension of the problem (in other words, how many Member States are involved and what solution has been applied to date)?

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<sup>206</sup> Edinburgh Conclusions, *supra* note 11, at 10. Since the Edinburgh Summit, Commission proposals for legislation have been required to be accompanied by an explanation of why measures at the EC level are necessary. See Upsizing: The Difficulty of Growing Bigger Gracefully, *The Economist*, July 3, 1993, at 1819. The Community institutions formally agreed at Luxembourg in October 1993 that "in exercising its right of initiative, the Commission shall take into account the principle of subsidiarity and show that it has been observed" and that "the explanatory memorandum for any Commission proposal shall include a justification of the proposal under the principle of subsidiarity." *Interinstitutional Agreement*, *supra* note 199.

<sup>207</sup> President Delors has instructed civil servants of the Community not to propose measures that would be incompatible with the principle of subsidiarity. See Dictionary Time, *The Economist*, Dec. 9, 1989, at 52. Following the Edinburgh Summit, the Assembly of Regions of Europe drew up a detailed "questionnaire" on subsidiarity for any body proposing Community action to complete and to attach to any such proposal, accompanied by an explanatory memorandum. The questionnaire covers the following issues:

1. The basis of competence in the Treaty on European Union: (a) The planned measure is based on which article? (b) Does the article contain conditions limiting recourse to Community competence? 2. The objectives sought by the Treaty: (a) What concrete objectives are sought by the planned action? (b) What reasons justify the need to take action? (c) Is the action related to any previous Community action? 3. The need for the Community action in question: (a) Which Member States are concerned by the problem? Does the problem appear the same way everywhere? (b) Which Member States have dealt with this problem to date? How did the states in question solve the problem? (c) Are there alternative solutions at lower echelons at Community level? If yes, what are they? (d) Why can't the objectives in question be attained at Member State level? (e) What would be the disadvantages and costs if the Community failed to intervene? (f) What arguments can be used to prove that EC goals would be more easily attained by the measure in question than by measures at Member State level? 4. Implementing Community action: (a) Would coordination between Member States or Community support for national measures be enough to attain the objectives? If no, why not? (b) Has the Community already made a recommendation that has not been followed by the Member States? (c) Is mutual recognition of different regulations possible? If no, why not? (d) Is complete harmonisation necessary or is it enough to enact minimum provisions? (e) Would it be sufficient to adopt a regulatory framework? If no, why not? (f) Is a uniform and directly applicable regulation (order) necessary or would the adoption of a directive be sufficient? (g) Would a regulation of limited duration suffice? 5. Extending Community actions: (a) Is the adoption of implementing regulations necessary? If necessary, at what level will they be adopted? (b) If implementation of Community action is limited to Community level, on an exceptional basis, why is implementation at Member State or regional level insufficient? (c) If verification of implementation is incumbent upon the Community, why can this responsibility not be carried out by the Member States? (d) Who controls the attainment of the objectives of Community actions and on what criteria?

EC: Subsidiarity - Possible Reassignment of Powers to States and Regions, available in LEXIS, Reuters Textline, Agence Europe, Mar. 3, 1993.

<sup>208</sup> See Adaptation Report, *supra* note 199.

<sup>209</sup> *Id.* at 2.



- (c) What is the most effective solution, given the means available to the Community and to Member States?
- (d) What is the specific added value of the proposed Community action and the cost of failing to act?

The Commission also undertook to publish its explanatory memoranda in the Official Journal together with the proposals to which they relate, thus enabling interested parties to comment on the subsidiarity aspects of the proposals before their adoption.<sup>211</sup> According to the Commission, these procedures - which it had already begun to follow - had caused it to put forward fewer legislative proposals in 1993 than in prior years.<sup>212</sup>

Although the Commission is the right body to make the initial investigative and analytic investment into the subsidiarity aspects of legislation, the European Council at Edinburgh nevertheless placed greater emphasis on the Council of Ministers' role in guaranteeing subsidiarity, presumably because of its greater decisional authority as an institution.

The examination of the compliance of a measure, with the provisions of Article 3b [i.e. subsidiarity] ... should become an integral part of the overall examination of any Commission proposal and be based on the substance of the proposal... This examination includes the Council's own evaluation of whether the Commission proposal is totally or partially in conformity with the provisions of Article 3b (taking as a starting point for the examination the Commission's recital and explanatory memorandum) and whether any change in the proposal envisaged by the Council is in conformity with those provisions. The Council decision on the subsidiarity aspects shall be taken at the same time as the decision on substance and according to the voting requirements set out in the Treaty.<sup>213</sup>

Since the Council is itself composed of Member State representatives, the Member State governments are themselves primarily responsible for making subsidiarity work.<sup>214</sup> However, the Edinburgh Conclusions also specifically urged the Council's various working groups and its Committee of Permanent Representatives to include subsidiarity considerations in their own reports on any Commission proposal, and asked that the Council report to the European Parliament (in those cases in which the Parliament has a distinct legislative voice) on whether the Commission proposal does or does not comport with the principle of subsidiarity, and why.<sup>215</sup> Although the European Council said nothing at Edinburgh about how subsidiarity should specifically figure into Parliament's legislative opinions under the parliamentary consultation, cooperation, and co-decision procedures,<sup>216</sup> it seems evident that Parliament also should

<sup>210</sup> Id. at 3.

<sup>211</sup> See id. at 34.

<sup>212</sup> See id. at 4. The Commission specifically undertook in its November 1993 Adaptation Report to notify the Council and Parliament, and through the Official Journal all interested parties, of its reasons for not pursuing proposals initially included in its legislative program for a given year. See id.

<sup>213</sup> Edinburgh Conclusions, *supra* note 11, at 11. The last quoted sentence is meant to ensure that the Council considers subsidiarity as an integral part of its legislative inquiry and legislative judgment. The European Council underscored the point by urging the Council of Ministers not to create "a system of preliminary or parallel decision-making" on the subsidiarity issue. Id. The Interinstitutional Agreement signed at Luxembourg in October 1993 requires the Council, in exercising its legislative powers under the EC Treaty, to demonstrate its observance of the principle of subsidiarity. More specifically, it requires the Council to justify in terms of subsidiarity any amendment that it makes to a Commission proposal if the amendment "entails more extensive or intensive intervention by the Community." See *Interinstitutional Agreement*, *supra* note 199. The October 1993 ruling of the German Constitutional Court upholding the constitutionality of Germany's ratification of the Maastricht Treaty placed considerable emphasis on subsidiarity as a check on the Community's exercise of powers. It also underscored the Council's special obligation in this regard:

If the Community legislator wants to exercise a legislative competence attributed to it, it must first satisfy itself - and clearly establish in conformity with Article 190 of the EEC Treaty [requiring a statement of reasons] - that the objectives of the action envisaged cannot be adequately accomplished at the national level through action of the Member States.

German Constitutional Court Maastricht Decision, *supra* note 20, at 82. According to the Court, "the extent to which the principle of subsidiarity will prevent the erosion of the competence of the Member States ... depends ... above all on the practice of the Council, which is the Community's veritable legislature." Id. at 83.

<sup>214</sup> For an admonition by the German Constitutional Court to the German government to use its influence in the Council in favor of subsidiarity, and to the German Parliament to pressure the government to do so, see German Constitutional Court Maastricht Decision, *supra* note 20, at 83.

<sup>215</sup> See Edinburgh Conclusions, *supra* note 11, at 12.

<sup>216</sup> See *supra* note 134 and accompanying text.

evaluate the proposals before it from a subsidiarity point of view, and do so with full freedom of inquiry and judgment.<sup>217</sup>

Subsidiarity thus essentially describes a method of policy analysis that each participant in the Community's legislative process should follow in deciding whether to propose, endorse, or enact a given measure.<sup>218</sup> The European Council's apparent emphasis at Edinburgh on the Council of Ministers is accordingly misleading. As the Community's legislative processes become more varied and complex, with different institutions playing different roles (proposing, voicing opinions on, suggesting amendments to, requiring or performing second readings of, and finally adopting measures),<sup>219</sup> each of the institutions will inevitably be drawn into incorporating the reasoning of subsidiarity into its decisional processes. The European Council's request at Edinburgh that the Commission review all proposed and existing legislation in preparation for the European Council's December 1993 Brussels Summit reflects partial recognition of this fact.<sup>220</sup>

2. Distinguishing Policy Measures and Harmonization Measures. - My discussion of subsidiarity as a set of procedural instructions to the institutions has thus far proceeded as if all Community legislation were basically alike. In formulating more precisely the legislative inquiry that subsidiarity entails, it is actually crucial to distinguish between legislation that aims at establishing substantive regulatory policy, on the one hand, and legislation that aims at promoting the establishment and functioning of the internal market, on the other. However awkward, this is a distinction that the structure of the EC Treaty imposes on us. Much Community legislation falls squarely within substantive policy areas - e.g., environmental protection, occupational safety, research and technological development, and the newer program areas provided for by the Maastricht Treaty<sup>221</sup> - for which the Treaty expressly confers legislative competence on the Community institutions. The operation of subsidiarity in the analysis of what we may thus conveniently characterize as "policy measures" is not particularly difficult to describe. Essentially, subsidiarity entails defining as precisely as possible the objectives meant to be accomplished, and comparing the Community measure proposed to the measures that could be taken independently by the Member States - or to no governmental intervention at all - in terms of its effectiveness in achieving those objectives.

Subsidiarity operates rather differently for what may be called "harmonization measures," by which I mean measures whose stated rationale is to reduce or eliminate non-tariff barriers to trade resulting from regulatory action that the Member States have otherwise properly taken on matters within their jurisdiction. In this case, the proverbial Community measure is not a piece of legislation that advances a particular policy for which the Community bears legislative responsibility under the Treaty, but rather a directive requiring the harmonization of Member State policies on matters for which the Member States remain at least nominally responsible. In order to respect subsidiarity in the adoption of harmonization measures, the Community presumably should intervene only where necessary for the internal market to work effectively, and even then only to the extent necessary.<sup>222</sup> Pursuing subsidiarity in the design of harmonization measures can, however, be highly problematic, not only in practice but also in theory. Generally speaking, the regulatory environment can always be made more uniform. If one were to consult

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<sup>217</sup> In November 1992, the major parties in the European Parliament adopted a joint resolution to the effect that a measure's respect for subsidiarity should be determined through consultation among the political organs of the Community and not through judicial review in the Court of Justice. See *Parliament Wants a Say in Checking Up on Subsidiarity*, European Report No. 1814 (Nov. 21, 1992). See generally Panayotis Roumeliotis, *The Subsidiarity Principle: The View of the European Parliament*, in *Subsidiarity: The Challenge of Change*, supra note 6, at 31. In the Interinstitutional Agreement signed at Luxembourg in *October 1993*, see supra note 199, the institutions required Parliament to demonstrate its observance of the principle of subsidiarity and, more particularly, to justify in terms of that principle any amendment to a Commission proposal that would produce more significant intervention by the Community. See *Interinstitutional Agreement*, supra note 199, at II(3), III(2).

<sup>218</sup> Representatives of the Benelux countries described subsidiarity as "foremost a state of mind made up of moderation in the exercise of power and reciprocal trust in the elaboration and execution of Community decisions and legislation." Birmingham Summit: Memorandum by the Benelux Countries, Europe, Agence Internationale d'Information pour la Presse, Oct. 1213, 1992, at 5.

<sup>219</sup> See supra note 134 and accompanying text.

<sup>220</sup> See supra note 187 and accompanying text.

<sup>221</sup> See supra notes 4249 and accompanying text.

<sup>222</sup> Questions about the extent of Community intervention may more properly be considered questions of proportionality than subsidiarity. See supra notes 156159 and accompanying text. The "new approach to technical harmonization," discussed supra notes 176177 and accompanying text, was thus at least as much an instrument of proportionality as subsidiarity. For a discussion of the interrelationship between subsidiarity and proportionality, see infra notes 227236 and accompanying text.

common market criteria alone, disregarding other values such as diversity among the goods and services available in the market, one would opt for maximum regulatory uniformity.

Accordingly, the only way to make room for subsidiarity in designing harmonization measures is consciously to curtail them so that they are not enacted unless they make significant and justifiable internal market gains, and so that they in any event go no further than reasonably necessary in order to achieve those gains. Such a harmonization strategy would in effect advance subsidiarity at the same time as it advances proportionality, as if conflating the two. In theory, the Community institutions would seek to reduce or eliminate disparities among Member State regulations only to the extent that those disparities substantially impede the free movement of one or more of the factors of production (thereby impairing the commonness of the market) and the gains in market integration outweigh the specific loss of Member State autonomy that results. Determinations of this sort are of course profoundly political in that they entail judgments about how much each incremental gain in economic integration is worth in costs to certain other values, notably the values (for example, diversity) underlying subsidiarity itself.<sup>223</sup> One supposes that the Commission and Council were in the habit of asking themselves precisely these questions long before they talked about subsidiarity, which may help explain why subsidiarity already had a familiar ring to it when it was first proclaimed in the Maastricht Treaty to be a fundamental Community law principle. Still, if subsidiarity is to be taken seriously in the years ahead, and to be applied to harmonization measures as well as policy measures, these questions will have to be asked more explicitly and systematically than ever before.

It should now be clear why the practice of subsidiarity in the adoption of policy measures can by contrast be relatively straightforward. When the Community legislates directly on subjects falling within its sphere under the Treaties, subsidiarity requires it to ascertain that the Member States, left to their own devices, could not do an adequate job of furthering the Community's basic policy objectives. This too is obviously a political call, but in a quite different sense. As applied to these measures, subsidiarity does not require deciding how much each incremental gain in market integration is worth in terms of sacrifice to the political autonomy of the Member States and their various subcommunities. It does not pit two opposing values - integration and localism - against one another, but demands, in the acknowledged interest of one of them - namely localism - that Member State action be preferred if it would effectively accomplish the Community's purposes. The somewhat greater ease of applying subsidiarity to policy measures than to harmonization measures may help explain why subsidiarity figures so much more prominently in connection with the former (notably environmental and consumer protection, social policy, and economic and monetary union) than with the latter.

Notwithstanding my claim that subsidiarity is analytically more manageable when the Community makes policy directly than when it makes policy indirectly, the analysis can in either case be exceedingly complex. Let us take the seemingly simpler case of policy measures. Comparing the efficacy of a Community proposal, on the one hand, with action that might be taken separately or jointly by the Member States, on the other, sounds deceptively easy, familiar as we now are with the practice and theory of cost-benefit analysis. Assessments of comparative utility are difficult to conduct under ordinary circumstances, but they are substantially more difficult to conduct when one of the measures to be compared - in this case action at the Member State level - may itself be entirely hypothetical. In order to practice subsidiarity, the institutions need to forecast a whole range of actions or inactions in which the Member States might engage in relation to a given Community goal, if the Community institutions allowed them to, and make a utility assessment of each. Moreover, each Member State "option" has to be discounted for the possibility that not all of the Member States may take the action contemplated on a timely or adequate basis or indeed at all.<sup>224</sup> It is only after some generalized assessment of Member State potential emerges from this enormously contingent and variable analysis that its overall "adequacy" in achieving Community objectives can then be compared with that of the proposed Community measure, as the principle of subsidiarity requires.<sup>225</sup> Subsidiarity plainly calls for predictions and therefore for the

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<sup>223</sup> See *supra* notes 2029 and accompanying text.

<sup>224</sup> Non-implementation of Community directives by the Member States has been a longstanding problem in the Community.

<sup>225</sup> It is obvious that terms like "adequacy" (or "efficacy," "sufficiency" or "necessity"), in which the definition of subsidiarity is invariably couched, tend to mask the elements of subjectivity and judgment entailed in a decision by the Community to take action in place of the Member

exercise of judgment on matters that may be at best the subject of ignorance and conjecture, and at worst the subject of bitter dispute.

The fact that subsidiarity calls for judgments that are invariably political and often immensely speculative is not, however, an argument against requiring the institutions to observe it. Neither is the fact that the analysis may rarely yield obvious results. As I argue in greater detail in a later section on the Court of Justice,<sup>226</sup> the essential question is whether such a requirement will help the institutions to reach politically sound decisions, while avoiding the imposition on them of undue procedural costs.

3. Subsidiarity and Proportionality. - As noted earlier,<sup>227</sup> the European Council at Edinburgh underscored the close affinity between the Community law principles of subsidiarity and proportionality. It regarded the former as dealing with the question whether the Community should take action, and the latter as dealing with the Community's choice of means when it does act. In this section, I argue that the relationship between the two concepts is not as simple as the European Council suggests. I shall attempt to show that proportionality does not simply "pick up" where subsidiarity "leaves off," and that this in turn has serious implications for the political branches and the Court of Justice alike.

The doctrine of proportionality, which the Court of Justice largely derived from continental principles of constitutional and administrative law,<sup>228</sup> is said to require that every Community measure satisfy three related criteria. First, the measure must bear a reasonable relationship to the objective - presumably a legitimate one - that the measure is intended to serve.<sup>229</sup> This may be regarded as the doctrine's "rationality" component. Second, the costs of the measure must not manifestly outweigh its benefits.<sup>230</sup> This may in turn be regarded as the doctrine's "utility" component. Finally, the measure chosen must represent the solution, among the various alternatives that were available for achieving the prescribed objective, that is least burdensome.<sup>231</sup> This requirement to use the "least restrictive" or "least drastic" means is one that the Court of Justice has typically justified in terms of minimizing the burdens imposed by the Community on the private sector, but it can readily be used to minimize the Community's intrusions on the Member States and their subcommunities as well. Each of the three elements of proportionality has at least some resonance among levels of judicial scrutiny recognized in U.S. constitutional review.

Proportionality in fact has chiefly been regarded in the European Community, and in European public law more generally, as a principle of judicial review. Within the Community, it is the Court of Justice that has developed and enforced the notion that Community measures must bear a reasonable relation to the end sought to be achieved, must produce a net benefit, and must represent the least burdensome means available, and that they will in principle be annulled if they fail to do so.<sup>232</sup> This is not to say that the political branches - notably the Commission, Parliament, and Council - do not consider proportionality in making their legislative judgments; it is to be hoped and possibly even assumed that they do, as an integral part of their deliberative processes.

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States. "As with ... other reform initiatives [like decentralization, delegation and deregulation], real difficulties arise in interpreting and applying the general principle in practice. The definition [of subsidiarity] begs the important questions about what is 'appropriate' and what is 'unnecessary.'" Metcalfe, *supra* note 2, at 1415.

<sup>226</sup> See *infra* notes 237255 and accompanying text.

<sup>227</sup> See *supra* notes 155159 and accompanying text.

<sup>228</sup> See Jochen Abr. Frowein, *The European Community and the Requirement of a Republican Form of Government*, 82 *Mich. L. Rev.* 1311, 1322 (1984) (view of the doctrine of proportionality as having been influenced by German constitutional practice); see also Stein, *supra* note 55, at 14 & n.48 (general principles of Community law [including proportionality] were derived from the general principles of law in force in the Member States).

<sup>229</sup> See, e.g., *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Series A, No. 6), 1 *Eur. H.R. Rep.* 252, 254, 293 (1968); see also *Philis v. Greece* (series A, No. 209), 13 *Eur. H.R. Rep.* 741, 765 (1991).

<sup>230</sup> See *Case C-331/88, Regina v. Minister of Agriculture, Fisheries and Food, ex parte Federation Europeenne de la Sante Animale (FEDESA)*, [1991] 1 *C.M.L.R.* 507, 53233.

<sup>231</sup> See *Case 31/59, Acciaieria e Tubificio di Brescia v. High Authority of the European Coal and Steel Community*, 1960 *E.C.R.* 71; see also *Case 255/84, Nachi Fujikoshi Corp. v. Council*, 1987 *E.C.R.* 1861, 187172, 189395, [1989] 2 *C.M.L.R.* 76, 105.

<sup>232</sup> See, e.g., *Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel*, 1970 *E.C.R.* 1125, 113538 [1972] 10 *C.M.L.R.* 255, 28487.

Nevertheless, the Maastricht Treaty<sup>233</sup> and, even more explicitly, the guidelines of the 1992 Edinburgh Council<sup>234</sup> have the distinct merit of clarifying that proportionality is not only a judicial doctrine for the Court of Justice to apply in reviewing the legality of Community action, but also a legislative doctrine for the political branches to follow in their policymaking. Because the Community institutions are thus duty bound to observe both proportionality and subsidiarity as general principles of decision-making, they have an interest in knowing whether and to what extent the two are consistent. The Maastricht Treaty suggests that they are of a piece.<sup>235</sup> The Edinburgh guidelines go further, implying that once subsidiarity determines that the Community should take action, proportionality then dictates the action it should take.<sup>236</sup> The suggestion is that the two naturally function in concert, even in logical sequence. These assumptions about subsidiarity's natural relationship with proportionality bear closer scrutiny.

It seems reasonably clear that a measure may satisfy the first two criteria of proportionality and nevertheless run afoul of subsidiarity. In other words, a Community measure, while reasonably related to its stated purpose and productive of net benefits, may nevertheless not have been necessary, in the sense that action taken at the Member State level, or perhaps non-regulation altogether, would have been quite effective in achieving the Community's goals. The relationship between subsidiarity and the "least drastic means" aspect of proportionality is thus potentially problematic. Suppose, for example, that the least burdensome approach to accomplishing a given objective would be through Community action rather than through some alternative action at or below the Member State level. In this event, subsidiarity and proportionality would in a sense work at cross-purposes, with subsidiarity dictating a disproportionate remedy (assuming the objective could be achieved at or below the Member State level) and proportionality in turn dictating a remedy that fails the test of subsidiarity. It is difficult to say, as an abstract matter, whether proportionality or subsidiarity should carry the day.

One way of dealing with this tension would be for the institutions to take the European Council rigorously at its word and not entertain the proportionality question until the subsidiarity question is settled. Under this strategy, the Community institutions would refrain from adopting any measure whenever their objectives could adequately be met through action taken at or below the Member State level. The fact that a Community-level measure might impose fewer burdens, and thus constitute a less drastic means to the same end, might never enter into consideration. Such a solution may justly be criticized as sacrificing proportionality on the altar of subsidiarity and, in the process, forsaking many of the efficiency advantages of Community-level action.

An obvious alternative would be to posit that subsidiarity requires resort to Member State (or more local) action over Community action only when it would be just as effective. If action at or below the Member

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<sup>233</sup> See *supra* notes 41, 158.

<sup>234</sup> According to the European Council at Edinburgh, Article 3b of the Maastricht Treaty incorporates the principle of proportionality, defined as requiring "that the means to be employed by the Community should be proportional to the objective pursued." Edinburgh Conclusions, *supra* note 11, at 2. The Edinburgh guidelines specific to proportionality include the following:

- ii) Any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be minimised and should be proportionate to the objective to be achieved.
- iii) Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.
- iv) Where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards ... where this would not conflict with the objectives of the proposed measure or with the Treaty.
- v) The form of action should be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct.
- vi) Where appropriate under the Treaty, and provided this is sufficient to achieve its objectives, preference in choosing the type of Community action should be given to encouraging cooperation between Member States, coordinating national action or to complementing, supplementing or supporting such action.
- vii) Where difficulties are localized and only certain Member States are affected, any necessary Community action should not be extended to other Member States unless this is necessary to achieve an objective of the Treaty.

*Id.* at 89.

<sup>235</sup> See *supra* notes 155-159, 234 and accompanying text.

<sup>236</sup> See Edinburgh Conclusions, *supra* note 11, at 89.

State level would impose greater burdens than Community action, and to that extent fail the test of proportionality, then by definition it is not equally effective. By this reasoning, strictly applied, subsidiarity would simply not require that the Community refrain from acting, and proportionality considerations alone would in effect have dictated the result. Of course, if subsidiarity never deters the Community in such situations from taking the action that proportionality favors, it is then the principle of subsidiarity that will find itself systematically sacrificed.

It thus seems clear that at least under some circumstances subsidiarity and proportionality, strictly applied, will point in opposite directions. Realistically, the political branches of the Community have a means of escape from the apparent dilemma. They can relax the proportionality test so as to accept Member State action in lieu of Community action, even if the former is more burdensome, provided it is not manifestly so (i.e., does not impose unreasonably excessive additional burdens); this opens up the possibility of scoring large subsidiarity gains for a small proportionality price. Conversely, they can relax the subsidiarity test; if the proportionality advantages of Community action over Member State action are substantial enough, subsidiarity's preference for localism arguably should not be allowed to stand in the way.

What I am here describing, and what seems to me to make a good deal of sense if both subsidiarity and proportionality are to be taken seriously, is of course the possibility of making different tradeoffs between the two. Analysis and reflection may show that a Member State course of action does far more harm from a proportionality point of view than it does good from a subsidiarity point of view or, conversely, that a Community measure does far more harm from a subsidiarity point of view than it does good from a proportionality point of view. Only some kind of "comparative impairment" analysis will reveal how much is being paid in proportionality terms for subsidiarity gains, or vice versa. Resolving the tension between subsidiarity and proportionality, when the two are in competition with each other and when each may plausibly be applied to the matter at hand, can only be described as an acutely political judgment to be made by the political institutions themselves. They are the ones best situated to determine whether, in light of all the interests at stake in the matter at hand, it is more important to promote the values of localism or to deploy the least drastic means.

## **D. Subsidiarity and the Court of Justice**

My discussion of subsidiarity thus far has proceeded with its implications for judicial review still very largely in the background. Given subsidiarity's fundamentally political character, this is appropriate. In fact, the drafters at Maastricht sidestepped the question of whether and to what extent the principle of subsidiarity would be justiciable.<sup>237</sup> When the European Council finally addressed the question at Edinburgh in 1992, it displayed deep ambivalence, declaring, on the one hand, that subsidiarity "cannot be regarded as having direct effect," but, on the other, that "compliance with it by the Community institutions [is] subject to control by the Court of Justice."<sup>238</sup> Under this view, while individual litigants in national courts might not be permitted to invoke the principle of subsidiarity to avoid the application of otherwise valid Community measures, legal challenges to Community measures could be brought on subsidiarity grounds directly in the Court of Justice. Because standing to sue in the Court of Justice is

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<sup>237</sup> The European Parliament, and more particularly its Committee on Institutional Affairs chaired by Giscard d'Estaing, concluded that the Court of Justice should consider the principle of subsidiarity to be justiciable. See European Parliament Committee on Institutional Affairs, Interim Report on the Principle of Subsidiarity, Eur. Parl. Doc. A3-163/90 (June 22, 1990), discussed in Cass, *supra* note 2, at 1133; European Parliament Committee on Institutional Affairs, Report on the Principle of Subsidiarity, Eur. Parl. Doc. A3-267/90. Some academic commentators agree. See, e.g., Lenaerts, *supra* note 80, at 133; Reimut Jochimsen, Subsidiarity in the Area of Economic and Monetary Union, in Subsidiarity: The Challenge of Change, *supra* note 6, at 73, 76. Others, including a former president of the Court of Justice, consider the principle of subsidiarity to be nonjusticiable. See, e.g., Lord Mackenzie-Stuart, Assessment of the Views Expressed and Introduction to a Panel Discussion, in Subsidiarity: The Challenge of Change, *supra* note 6, at 37, 41. For a similar expression of views, see Gretschmann, *supra* note 27, at 5859.

<sup>238</sup> Edinburgh Conclusions, *supra* note 11, at 4; see also *supra* notes 149150 and accompanying text. The institutions were equally tentative on the subject in the interinstitutional agreement they signed at Luxembourg in October 1993. See *Interinstitutional Agreement*, *supra* note 199. They agreed that compliance with the subsidiarity principle "shall be reviewed under the normal Community process, in accordance with the rules laid down by the Treaties." *Id.* at III(1). In its recent ruling affirming the constitutionality of Germany's ratification of the Maastricht Treaty, the German Constitutional Court likewise assumed that the Court of Justice would enforce the principle of subsidiarity and suggested that subsidiarity's success in preserving the authority of the Member States would very largely depend on the Court of Justice's subsidiarity case law. See German Constitutional Court Maastricht Decision, *supra* note 20, at 8283.

highly restrictive,<sup>239</sup> and because the statute of limitations on such actions is in any event extremely short,<sup>240</sup> the Council's solution appears to make the principle of subsidiarity justiciable without at the same time opening the floodgates. The fact remains, however, that even under the Court of Justice's strict standing and limitations rules, every Community measure would be subject to attack in the Court of Justice on subsidiarity grounds by a Community institution or by one or more of the Member States politically opposed to it.<sup>241</sup>

1. Subsidiarity as a Procedural and Substantive Norm. - Assuming justiciability, the principal question of judicial review is whether the Court of Justice should treat subsidiarity primarily as a substantive or a procedural requirement. I suggest that casting subsidiarity in procedural rather than substantive terms will best allow the Court of Justice to promote respect for the values of localism without enmeshing itself in profoundly political judgments that it is ill-equipped to make and ultimately not responsible for making. The same characteristics that make the inquiry difficult for the political branches to conduct - namely, uncertainty about how much localism really matters on a given issue, the heavy reliance on prediction and the probabilities of competing scenarios, the possibility of discretionary tradeoffs between subsidiarity and proportionality, and the sheer exercise of political judgment entailed - make the inquiry even more problematic for the Court. Even without inserting itself unduly into those matters, however, the Court can seek to verify whether the institutions themselves examined the possibility of alternative remedies at or below the Member State level. That very inquiry should encourage the political institutions to structure their discussion and focus their debate on the most central legislative task, namely identifying the measures, if any, that will appropriately address the problems worth addressing, and suggesting the level of government at which (and ultimately the form in which) those measures should be taken. This in turn should promote a realistic assessment by the political branches of the costs and benefits of Community action and inaction alike. Moreover, a decisional process which demonstrates that the institutions genuinely considered the available Member State alternatives before resolving to act is likely to win measurably greater trust and thus enjoy greater support among the Member States and European public opinion than one that does not. What little evidence we have suggests that the institutions can meaningfully address the questions that subsidiarity raises,<sup>242</sup> and that addressing those questions influences outcomes.<sup>243</sup>

The efficacy of a procedural review of this sort should not, of course, be exaggerated, particularly since there are limits to the resources that the Court of Justice can or should expend in verifying whether the political branches actually inquired into subsidiarity and whether the inquiry was a genuine one. Determining the minimal adequacy of a "subsidiarity impact analysis" is inherently problematic, but the Court's performance in enforcing the rather elusive proportionality principle<sup>244</sup> suggests that it may be capable of drawing the necessary lines. The Court should not attempt to police closely the performance of such analyses; one can hope that the mere prospect of the Court policing their performance will cause

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<sup>239</sup> See supra note 150.

<sup>240</sup> See supra note 150.

<sup>241</sup> The notion that subsidiarity might be enforceable by the Court of Justice in direct actions challenging Community measures but not enforceable via direct effect in national courts is an awkward and unprecedented one. Even critics of subsidiarity assume that, under Maastricht, challenges to such measures on subsidiarity grounds will be the proper subject of preliminary references to the Court of Justice and preliminary rulings by the Court. See, e.g., Toth, supra note 5, at 110102.

<sup>242</sup> Once subsidiarity gained political prominence during the discussions leading up to the latest reform of the Community treaties, it apparently began to influence the institutions' legislative action. "Anticipating the future, the principle has already made its appearance in the preparation of new policy programmes and legislation in the Community ... There is scarcely a proposal by the Commission or other groups ... which is not tested against the principle of subsidiarity." P.J.C. Kapteyn, *Community Law and the Principle of Subsidiarity*, *Revue des Affaires Europeennes* 35, 35 (1991).

<sup>243</sup> See supra notes 192198 and accompanying text. Efficacy of a procedural review of this sort should not, of course, be exaggerated, particularly since there are limits to the resources that the Court of Justice can or should expend in verifying whether the political branches actually inquired into subsidiarity and whether the inquiry was a genuine one. Determining the minimal adequacy of a "subsidiarity impact analysis" is inherently problematic, but the Court's performance in enforcing the rather elusive proportionality principle<sup>244</sup> suggests that it may be capable of drawing the necessary lines. The Court should not attempt to police closely the performance of such analyses; one can hope that the mere prospect of the Court policing their performance will cause the political branches to perform the required examinations more seriously. If the values that the subsidiarity inquiry can be expected to serve - self-determination and accountability, personal liberty, flexibility, preservation of local identities, diversity, and respect for the internal divisions of component states - are important enough (as I believe they are), and if the costs of the inquiry are not too great (as I believe they are not), then the Court of Justice should require that it be made.

<sup>244</sup> See Case 47/86, *Roquette Freres SA v. Office National Interprofessionnel des Cereales*, 1987 E.C.R. 2889; see also Case 122/78, *S.A. Buitoni v. Fonds d'Orientation et de Regularisation des Marches Agricoles*, 1978 E.C.R. 677.

the political branches to perform the required examinations more seriously. If the values that the subsidiarity inquiry can be expected to serve - self-determination and accountability, personal liberty, flexibility, preservation of local identities, diversity, and respect for the internal divisions of component states - are important enough (as I believe they are), and if the costs of the inquiry are not too great (as I believe they are not), then the Court of Justice should require that it be made.

It is easy in conceiving of subsidiarity as a procedural principle to envisage the Community institutions satisfying themselves that Community action is necessary and then proceeding to act. However, in order to assess fully the merits of subsidiarity, it is also important to contemplate the situation in which the institutions ultimately refrain from action because they conclude that the Member States, left to their own devices, can effectively accomplish the Community's purposes, and to assess the risks of the institutions acting on that belief.<sup>245</sup> More specifically, the institutions may decline to act, but later be shown to have erred in their judgments about the Member States' willingness or capacity to address the problem at hand. The Member States may turn out not to have acted as expected, or their actions may turn out not to have produced the desired consequences. In theory, at least, the institutions' subsidiarity analyses should furnish a basis for the Commission to compare what actually happened in the wake of the Community's decision not to act with what the institutions thought would happen. If the Commission decides that the Community should intervene after all, it may even find that the existing record assists it in determining the specific measures to propose.

Permitting judicial challenges to Community measures on substantive subsidiarity grounds would certainly raise at least as many difficulties as permitting them on procedural grounds. It is clear that the Court should not in any event conduct a *de novo* inquiry into the comparative efficacy of Community and Member State action in achieving the Community's objectives. The Court should not even conduct a *de novo* review of the existing legislative "record." As we have seen, the probabilities to be assigned to the various Member State alternatives, the assessment of their utility in achieving Community goals, and a comparison with them of the Community measure in question are matters of political judgment, precisely the kind on which the Court should show the utmost deference to the political branches. The case for deference becomes positively overwhelming when it appears that the institutions may also have had to balance subsidiarity and proportionality considerations - each with its own separate complexities - against one other.<sup>246</sup>

Imagine for example a situation in which the Council of Ministers, facing a problem within the Community's sphere of competence, determines upon study that each plausible option at the Member State level presents certain inconveniences and disadvantages significant enough to justify the Community acting in their stead. A considered judgment that the Member State alternatives are deficient, and that Community action is therefore necessary, will hardly be easy to refute. To refute it might require gauging everything from the technical and policy bases of the institutions' assumptions to the inherent logic and persuasiveness of their analysis, not to mention the importance of vindicating the subsidiarity principle (and thereby the values of localism) on the particular issue at hand. If, as I urge, subsidiarity is in fact taken seriously as a tool of legislative analysis, the Council's conclusion that Member State action would not adequately achieve Community goals should scarcely ever be so conclusory or unconvincing as to invite disbelief by the Court.

It has been argued that if the prospect of successfully challenging a Community measure on subsidiarity grounds is indeed so slim, then the subsidiarity principle may just as well be considered categorically

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<sup>245</sup> For example, the Commission recently observed that the existing differences among national laws governing the illegal possession and use of drugs, though real, were "grossly exaggerated and overestimated":

The national laws of the Twelve are consistent with regard to drug trafficking, which is prohibited in all of the Member States. A few minor differences exist with regard to the possession of drugs: in Spain, Italy and the Netherlands [for example], this is tolerated for strictly personal use as part of policy to reintegrate drug addicts.

The Commission thus concluded that "There is ... no need for harmonization of the national laws [on the subject], this being governed by the principle of subsidiarity." National Implementing Measures; Removal of Tax Frontiers; Narcotic Drugs and Psychotropic Substances; Do National Laws on Drugs Differ? (Commission of the European Communities INFO-92) (July 13, 1993).

<sup>246</sup> See the discussion of subsidiarity and proportionality, *supra* notes 227236 and accompanying text.



nonjusticiable, and the Court spared the agony of dealing with it.<sup>247</sup> The German Constitutional Court has in effect determined that the largely comparable provisions on federal subsidiarity in the German Constitution<sup>248</sup> are nonjusticiable, with the result that the "necessity" for federal government legislation in areas of concurrent competence is essentially a political question to be decided by the political branches without judicial interference.<sup>249</sup> But deference to the political branches on subsidiarity does not require that the principle be made wholly nonjusticiable, any more than deference on proportionality requires that result. The mere possibility that the Court will find the Community to have egregiously overstated the risks of leaving a matter in Member State hands,<sup>250</sup> and will annul its exercise of power, should induce the Community's political branches to exercise sound judgment in this respect.<sup>251</sup>

Treating subsidiarity as a justiciable principle, whether procedural or substantive, will admittedly require the Court of Justice to play a role to which it is not accustomed, namely restraining Community action in the interests of localism.<sup>252</sup> Nevertheless, the Court has shown itself to be capable of reviewing the legality of Community measures by reference to other constitutional values that could equally be described as "vague but not intelligible,"<sup>253</sup> and for which precise criteria of judgment do not exist. One could cite the Court's jurisprudence on fundamental rights,<sup>254</sup> though that is a somewhat different case, since courts tend to regard protecting such rights as their special calling. The Court of Justice's proportionality jurisprudence - marked by a high degree of deference to the political branches, but also by an occasional annulment of one of their decisions - provides a closer analogy.<sup>255</sup> The fact remains that the Community simply cannot afford to ignore the political impulses that fueled the demand for subsidiarity in connection with the Treaty on European Union and that the Community's prospective enlargements will only heighten. In this context, the Court of Justice has a crucial symbolic and educational - albeit operationally limited - role to play.

2. The Strength of the Political Safeguards of Subsidiarity. - The decision whether to assign the judiciary a role in policing legislative respect for subsidiarity, and if so what role, is evidently a highly problematic one. In Part III of this Article, I examine prevailing attitudes toward the problem in the United States. A factor that has seemingly influenced the outcome in the United States is the strength of the theory that the structure and composition of the federal government itself furnish adequate political safeguards for federalism. As we shall see,<sup>256</sup> confidence in the adequacy of these safeguards has come under increasing pressure in the United States, with the result that the Supreme Court has only recently shown a revived interest in judicially enforcing the Tenth Amendment. It may therefore be useful in confronting the uneasy prospect of making subsidiarity justiciable in the Community to try to assess the political

<sup>247</sup> See, e.g., Kapteyn, *supra* note 242, at 5142.

<sup>248</sup> See Grundgesetz [Constitution], art. 72 (Germany).

<sup>249</sup> The German Constitutional Court has ruled that "the question whether there exists a necessity for federal legislation is a question of due judgment on the part of the federal legislature, which is by its very nature nonjusticiable and therefore fundamentally removed from examination by the Court." Judgment of Apr. 22, 1953, 2 BVerfGE 213, 224; see also Judgment of July 15, 1969, 26 BVerfGE 338, 38283; Judgment of Nov. 22, 1983, 65 BVerfGE 283, 289; Judgment of Oct. 9, 1984, 67 BVerfGE 299, 327; Judgment of June 8, 1988, 78 BVerfGE 249, 270; see generally Emiliou, *supra* note 17, at 404; *Everling*, *supra* note 2, at 107071; Eric J. Finseth, "Subsidiarity" and the Future of European Federalism (Feb. 12, 1993) (unpublished manuscript, on file with the Columbia Law Review).

<sup>250</sup> I do not deal here with the opposite situation, in which the institutions allow the states to act in aid of a Community objective when the institutions could have achieved that objective more effectively themselves. See George A. Bermann, Subsidiarity and the European Community, 17 *Hastings Int'l & Comp. L. Rev.* 97, 10708 (1993).

<sup>251</sup> See Emiliou, *supra* note 17. Emiliou urges the Court to restrict itself to a "'marginal review'" of subsidiarity, that is review for "'a patent error or ... a misuse of powers.'" *Id.* at 405 (footnotes omitted). For a parallel argument in favor of "marginal" judicial review of Congress' respect for the Tenth Amendment, see Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 *Yale L.J.* 1196, 127172 (1977).

<sup>252</sup> Weiler observes that, while the Court not infrequently has struck down measures of the Council or Commission, "[it has never] in its entire history ... struck down a Council or Commission measure on grounds of Community lack of competence." See *Weiler, Transformation*, *supra* note 20, at 2447.

<sup>253</sup> See *supra* note 2 and accompanying text.

<sup>254</sup> See generally Bermann et al., *supra* note 13, at 12949; Koen Lenaerts, Fundamental Rights to be Included in a Community Catalogue, 16 *Eur. L. Rev.* 367, 372 (1991) (citing cases).

<sup>255</sup> See *supra* note 244 and accompanying text.

<sup>256</sup> See *infra* notes 334351 and accompanying text.

safeguards of federalism in the EC institutional setting.<sup>257</sup> My conclusion is that, whatever the strengths of the theory of political safeguards in the United States, the theory fits the Community rather poorly.

Superficially, the Council of Ministers exhibits precisely the kind of structure that should enable it to safeguard the political interests of the States.<sup>258</sup> Each Member State is separately represented in the Council by the government minister responsible for the field in which the Council is considering action. The minister's acknowledged responsibility is to look after the State's interests in the matter before the Council and to cast a vote accordingly.

The fact that a minister represents the interests of a Member State does not, however, mean that he or she will necessarily vote in a manner consistent with the principle of subsidiarity or the purposes underlying it, that is, the notion that policymaking discretion should be left in the most local hands possible. The more common assumption is that Member State representatives will vote in the Council in accordance with their State's economic and political advantage as they see it in the context of the issue at hand.<sup>259</sup> A particular policy may be so economically or politically favorable to a Member State that it wins the State's support in the Council, despite the fact that the policy's underlying objective could adequately be accomplished by action taken at or below the Member State level. In this respect, subnational regions may be among those most disadvantaged by the transfer of national regulatory authority to the Community institutions.<sup>260</sup> Even if authority over a matter could perfectly well be left in Member State hands, a State may support action at the Community level simply in order not to be seen as voting on subsidiarity grounds against a measure that it basically favors. A State may also support the adoption of a Community measure precisely to avoid suffering the competitive disadvantages that would result from taking an equally appropriate measure on its own or in the company of a minority of States. Shifting decisional authority to Brussels may even enable a national government to escape political responsibility for a necessary but highly unpopular measure; political accountability will certainly not thereby be served.

Under each of these hypotheses, a representative's vote in the Council, though in a sense dictated by the Member State's interest, will fail to reflect the various political advantages of localism - self-determination and accountability, personal liberty, flexibility, preservation of identities, diversity and respect for internal divisions of component States - that are associated with subsidiarity.<sup>261</sup> Moreover, the intergovernmental flavor of Council decision-making, even under qualified majority voting, should never be underestimated. Wherever a Member State's narrow political interests in a given matter may lie, its representative may readily decide that the overriding interest of another State (or, to put the matter more squarely, the desirability of serving another State's interests in exchange for its political favor on some other issue) requires that he or she vote otherwise. In a decisional setting so clearly marked by interstate political negotiation, the abstract advantages of reserving political choice to local communities may well be overlooked. For all these reasons, a Member State's representative in the Council of Ministers may simply not cast his or her vote in keeping with the notion that power should be exercised at the lowest political level at which the objective of the exercise can be accomplished, and possibly not even in keeping with the political interests of the populations and subpopulations within his or her State.

The weakness of the Council in terms of domestic political accountability has in fact become a preoccupation in certain Member States, particularly as the Community's powers of governance have grown. Denmark, for example, has pioneered techniques of national parliamentary oversight of the

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<sup>257</sup> For an interesting comparative discussion of the United States and European Community with respect to the political safeguards of federalism, see Lenaerts, *supra* note 10, at 25862. Lenaerts cites "the political reality that decision-making within the American Union is organically independent from the States, whereas in the European Community the Member States themselves play the double role of participants in the Community decision-making and of antipodes to the legal order of the Community as such." *Id.* at 262.

<sup>258</sup> See *supra* note 15. On the "central role of the Member States in the Community system," see Dehousse, *supra* note 132, at 39092. Furthermore, the Community has many fewer financial resources in relation to the Member States than the federal government in the United States has in relation to the American States. The relative lack of Community resources naturally limits the Community's activities, notably its ability to implement Community law and policy without the aid of the Member States. See *id.* at 38889.

<sup>259</sup> See, e.g., Gretschnann, *supra* note 27, at 45, 57.

<sup>260</sup> "The regions now increasingly see Europe as a threat to their autonomy. They try to devise methods for participating more effectively in the Community decision making process, but the central State apparatus is reluctant to give up its privileged position in this respect." *De Witte, supra* note 28, at 13 (citing Germany, Belgium, Spain, Italy and prospective Member States like Austria and Switzerland).

<sup>261</sup> See generally *Making Sense*, *supra* note 21, at 53.

Government's voting patterns in the Council of Ministers.<sup>262</sup> The French Constitution was amended in 1992 in contemplation of the Maastricht Treaty to ensure that the French Parliament would be consulted on the exercise of legislative powers by the Council.<sup>263</sup> As a federal state itself, Germany recently amended its Constitution to guarantee that the Lander would actually have a decisive role in at least some of the votes that Germany casts in the Council;<sup>264</sup> and the German Constitutional Court's recent affirmance of the constitutionality of the Maastricht Treaty seems to be conditional on the Lander having effective opportunities to participate in Council decision-making.<sup>265</sup> These various strategies for heightening the responsiveness and accountability of Member State representatives in the Council, however, are still poorly developed<sup>266</sup> and have yet to prove their efficacy.<sup>267</sup>

The claim that the structure and composition of the Community institutions guarantee respect for subsidiarity is not much stronger in the case of the Commission or the European Parliament. The Commission, whose role in drafting and proposing Community legislation is paramount, does not even purport to act in the interests of the States, much less in the interest of the political autonomy of their subcommunities. Commissioners are in fact expressly barred by the Treaty from doing so.<sup>268</sup> In short, the Commission may choose to design legislation in the spirit of subsidiarity, but nothing in its structure or composition so dictates.

The European Parliament offers greater institutional promise in this respect. Its members are popularly elected by territorially-defined constituencies from among the Member States. As such, they are or should be in closer touch with the local populations and their aspirations for self-governance. Judging by the broad subsidiarity language that Parliament included in its 1984 Draft Treaty on European Union,<sup>269</sup> subsidiarity indeed has some resonance in that institution. On the other hand, seats in the European Parliament have chiefly attracted persons in search of a platform for the advancement of more or less well-defined political views or philosophies rather than the representation of local interests as such.<sup>270</sup> Significantly, parliamentarians sit, and vote, according to broad cross-national party affiliations, not according to national or subnational geographic criteria. The notion that a politically neutral value<sup>271</sup> like subsidiarity would play a determining role in the votes cast by members of Parliament elected and organized in this fashion is not a very realistic one. Finally, Parliament's legislative functions are still quite limited. On some subjects, its voice is consultative or advisory only; on others its opposition to a bill simply requires that the Council pass the measure by unanimity rather than qualified majority, or forces a "second reading."<sup>272</sup> Only under the Maastricht Treaty, and even then only on matters that are expressly made subject to "parliamentary co-decision,"<sup>273</sup> does Parliament enjoy something in the nature of a legislative veto.

<sup>262</sup> The Danish government, as part of Denmark's constitutional monarchy, is answerable generally to its national parliament, the Folketing. Because Danish governments are typically minority governments, dependent on the cooperation of rival parties, it is often necessary to put politically volatile issues to the Folketing for approval before taking action.

<sup>263</sup> See Dehousse & Weiler, *supra* note 109, at 294. On the need for more creative use of "networks" between Member State constituencies and the Community institutions, see generally Metcalfe, *supra* note 2. On the increasing burdens on the Commission in particular, and on the Commission's "management deficit," see Les Metcalfe, *After 1992: Can the Commission Manage Europe?*, 51 *Aust. J. Pub. Admin.* 117 (1992).

<sup>264</sup> Subsidiarity is assumed to be neutral from a policy point of view. It is obviously not neutral from a federalism point of view.

<sup>265</sup> German Constitutional Court Maastricht Decision, *supra* note 20.

<sup>266</sup> See generally *De Witte*, *supra* note 28, at 8 ("While governments have been able to compensate some of the powers they lost by their participation in the Community decision-making process through the Council, national parliaments appear as the net losers in the new institutional equilibrium."); see also *The European Community: Upsizing: The Difficulty of Growing Bigger Gracefully*, *The Economist*, July 3, 1993, at 1819 (describing national parliamentary scrutiny of proposed EC laws as traditionally "cursory"). The European Council urged at its Lisbon Summit of June 1992 that the "dialogue" between the national parliaments and the European Parliament be "strengthened." See European Council in Lisbon, *Conclusions of the Presidency*, June 26/27, 1992.

<sup>267</sup> See Dehousse & Weiler, *supra* note 109, at 294. On the need for more creative use of "networks" between Member State constituencies and the Community institutions, see generally Metcalfe, *supra* note 2. On the increasing burdens on the Commission in particular, and on the Commission's "management deficit," see Les Metcalfe, *After 1992: Can the Commission Manage Europe?*, 51 *Aust. J. Pub. Admin.* 117 (1992).

<sup>268</sup> See EC Treaty art. 157.

<sup>269</sup> See *supra* note 35 and accompanying text.

<sup>270</sup> See Alberta M. Sbragia, *The European Community: A Balancing Act*, 23 *Publius* 23, 33 (1993); Alberta M. Sbragia, *From "Nation State" to "Member State": The Evolution of the European Community* (Oct. 1993) (unpublished manuscript, on file with the Columbia Law Review).

<sup>271</sup> Subsidiarity is assumed to be neutral from a policy point of view. It is obviously not neutral from a federalism point of view.

<sup>272</sup> I refer to the so-called "parliamentary cooperation procedure." See *supra* note 134.

<sup>273</sup> See *supra* note 134.

All in all, the institutional support for a theory of political safeguards of subsidiarity in the European Community is not very impressive.<sup>274</sup> Despite appearances, neither the Council of Ministers nor the Parliament is structured to ensure that political decisions on any given issue are made at the lowest level of government possible; the Commission is certainly not so structured. Arguably, the real institutional safeguard of subsidiarity in the Community is that, in most areas, the implementation of Community policy ultimately lies in the hands of Member State and local officials.<sup>275</sup> Thus, states and localities have it within their power to influence the ways in which, and the efficacy with which, Community policy is actually administered. Unless the Community acquires much greater fiscal independence from the Member States than it now has, which is not in the offing, this situation is unlikely to change.

The argument that the decentralized administration of Community law favors subsidiarity is, however, deeply flawed. Besides confusing the notions of making and executing policy, the argument only suggests that States and localities may weaken the enforcement of policies made at an inappropriately high level of government, not that they will do so, and certainly not that they will do so with any consistency. In fact, the whole sale reliance on Member State resources for the implementation of Community policy may raise more subsidiarity doubts than it allays. As we shall see in Part III,<sup>276</sup> the U.S. Supreme Court has come to view federalism as being ultimately impaired when the public cannot hold its elected officials politically responsible for the policy decisions they carry out, or even determine the priorities according to which public resources are spent. Yet this is precisely the situation in the Community law system: Member State officials regularly implement policies they had little or no role in making.

3. Subsidiarity and the Direct Effect of the EC Treaty. - Most discussions of subsidiarity - and this Article thus far is no exception - treat the Court of Justice's interest in the principle as limited to deciding whether and to what extent to police the political institutions' respect for subsidiarity. My view on this question is clear; I believe the Court should treat the principle as a legally enforceable procedural mandate to the institutions, while at the same time paying pronounced deference to their judgments on the substance of the matter. But the Court should not consider that it discharges its responsibilities with respect to subsidiarity simply by conducting this limited monitoring of the Community's political branches. The demand for subsidiarity among Europeans has been fueled not only by the perception of legislative excess on the part of the Commission and Council, but also by the perception, at least among those aware of the Court of Justice's role in legal integration, of judicial excess on the Court's own part.<sup>277</sup>

The question, put bluntly, is whether the Court of Justice, through its own understandably vigorous demands for legal integration over the years, has contributed to a sense of erosion of local political autonomy, and possibly violated the principle of subsidiarity itself. This question is worth raising if only because the Court may have difficulty pressing subsidiarity on the political branches, either as a procedural or a substantive requirement, unless it shows a willingness to examine its own jurisprudence from a subsidiarity point of view. Consider, for example, the question of the direct effect of Article 30 of the EC Treaty concerning the free movement of goods. Surely when the Court rules that a Member State may not, in conformity with the principle of free movement, regulate the intrastate marketing of a particular good in the interest of consumer or environmental protection, public health, public morality and the like, it is itself in effect taking action at the Community level and preventing action at the Member State level, albeit in the name of the Treaty. But for the fact that the intervention is judicial rather than legislative, and is alleged to flow directly from the Treaty rather than from a grant of authority by the Treaty, the conditions for application of the principle of subsidiarity would seem to be present.

If the Court of Justice were determined to play by the rules of subsidiarity in its own direct effects jurisprudence, would its case law be different than it has been up until now? Arguably, some of that case law would be due for rethinking, and some of it has in fact been rethought. In *Procureur du Roi v. Dassonville*, for example, the Court held that "all trading rules enacted by member-States which are

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<sup>274</sup> See Haagsma, *supra* note 88, at 35859.

<sup>275</sup> T. Koopmans, *Federalism: The Wrong Debate*, 29 *Common Mkt. L. Rev.* 1047, 1048 (1992). This reliance is due at least in part to the Community's severely limited resources in comparison with those of the *Member States*. See *supra* note 258.

<sup>276</sup> See *infra* notes 346350 and accompanying text.

<sup>277</sup> See generally Dehousse & Weiler, *supra* note 109, at 247.

capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."<sup>278</sup> Although it addresses the limits on intervention by the Court, rather than the Council or Commission, this principle poses an obvious threat to subsidiarity. The Court of Justice later modified its position in the *Cassis de Dijon* case, indicating a willingness to accept certain trade obstacles resulting from disparities among national marketing rules insofar as the latter are necessary in order to satisfy the "mandatory" requirements of Member States,<sup>279</sup> and also respect the Court's own overriding principle of proportionality. From a subsidiarity point of view, this was a positive doctrinal development. It would certainly seem to be in keeping with subsidiarity and proportionality alike for the Court to ask itself more regularly whether the incremental gains in free movement that result from the Court's rejection of a particular Member State marketing rule are substantial enough to justify the Member State's loss of freedom to govern subjects that lie squarely within its sphere of competence.

Comparing the gains in economic integration with the loss of Member State autonomy is an inescapably difficult and once again deeply political operation, but it is also a good way for the Court of Justice to demonstrate its own belief that subsidiarity matters. The Court may find analogous ways to introduce such thinking into its case law regarding free movement of the various factors of production and the other directly effective provisions of the EC Treaty and the Community's secondary legislation. Some of the Court's more recent rulings suggest that it is indeed prepared to accept certain bona fide national marketing rules, despite their possibly disparate impact on non-nationals, when those rules seek to protect important non-economic interests of a local character and do not unreasonably burden interstate commerce in doing so.<sup>280</sup>

The Court has actually gone further than that to curb the erosion of Member State authority, in particular under Article 30. In its recent ruling in *Criminal Proceedings against Keck and Mithouard*,<sup>281</sup> the Court cast into doubt the very premises of *Cassis de Dijon*; it held in general terms that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.<sup>282</sup>

According to the Court, when these conditions are met, the application of national law to the sale of products from another Member State "is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products" and "therefore falls outside the scope of Article 30."<sup>283</sup> Whatever may have been the Court's purposes in retreating from well-established Article 30 case law, the *Keck* ruling demonstrates the Court's willingness to leave Member States the kind of regulatory scope that the principle of subsidiarity requires of the Community's political branches.<sup>284</sup>

My suggestion does not of course entail reopening the doctrines of direct applicability, direct effect, or supremacy. Nor does it require reexamining the Court's positions on enumeration, preemption, or implied

<sup>278</sup> Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 852, [1974] 2 C.M.L.R. 436, 45354

<sup>279</sup> See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494.

<sup>280</sup> See, e.g., Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607, [1989] 1 C.M.L.R. 619; Case 286/81, *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV*, 1982 E.C.R. 4575, [1983] 3 C.M.L.R. 428.

<sup>281</sup> Cases C-267, 268/91, 1993 E.C.R. - (Nov. 24, 1993).

<sup>282</sup> *Id.* at 16.

<sup>283</sup> *Id.* 17.

<sup>284</sup> For a similar retreat by the Court of Justice, see the Court's recent preliminary ruling in *Stoke-on-Trent City Council v. B & Q PLC*, 1992 E.C.R. - (Dec. 16, 1992), [1993] 1 C.M.L.R. 426, holding, in apparent contradiction of its earlier ruling in *Torfaen Borough Council v. B & Q PLC*, 1989 E.C.R. 3851, [1990] 1 C.M.L.R. 337, that "Article 30 ... does not apply to national legislation prohibiting retailers from opening their premises on Sundays." In *Torfaen*, the Court had made the exemption of Sunday trading laws from Article 30 conditional on a showing of proportionality, meaning that the "restrictive effects [of the laws] on Community trade ... do not exceed the effects intrinsic to rules of that kind." *Id.* at 3889. Upon receipt of the Court's preliminary ruling in *Stoke-on-Trent*, the House of Lords immediately dismissed a company's appeal from a lower court injunction barring it from operating on Sunday. *Stoke-on-Trent City Council v. B & Q PLC*, [1993] 2 C.M.L.R. 509 (H.L. 1993).

powers, though doing so would not necessarily shake the legal foundations of the Community. My suggestion is two-fold: first, that the Court acknowledge more frankly than it has in the past that its judicial rulings (particularly on the direct effect of treaty and legislative norms) can have as erosive an effect on the right of Member State populations to govern matters of local concern as does the passage of unnecessary or unduly intrusive Community legislation; and, second, that the Court pay more attention in particular cases to whether the exercise of regulatory authority by a Member State or its subcommunities sufficiently impairs cross-border mobility to justify suppression of the relevant measure in the interest of the common market. Unless the Court of Justice gives evidence that it takes both subsidiarity and proportionality seriously in its own conduct of business, it may not readily persuade the political institutions to do the same. It may thus have difficulty helping to quiet the political fears that fueled the impulse toward subsidiarity in the first place.

[...]

*[the article continues with a study on what subsidiarity means in American constitutional law]*

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## 8 FURTHER READING

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- Hartley. The foundations of European Community Law, 5<sup>th</sup> ed., OUP, 2003. pp. 114-118, 135-146, 151-153.
- Steiner and Woods. Textbook on EC Law. 8<sup>th</sup> ed., OUP, 2003. pp. 46-50, 160-166.
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- Wyatt and Dashwood, European Union law, 4<sup>th</sup> ed., Sweet and Maxwell, 2000. pp. 132-134 for subsidiarity as a general principle of law; pp. 156-163.

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