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”Federalism” in the European Community and the United States: A Rose by Any Other Name. . . .

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Thomas C. Fischer

Abstract

The general progress of the Community toward increased “federalism” seems as persistent and steady as it once was in the United States. That the Community elected another starting point, and at times seems to travel a far different road, does not mean that the final destination is different as well. Compare, for example, “federalism” in the United States and European Community in just two areas that are hallmarks of central government policy: agriculture and taxation.

“FEDERALISM” IN THE EUROPEAN COMMUNITY AND THE UNITED STATES: A ROSE BY ANY OTHER NAME*

*Thomas C. Fischer***

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INTRODUCTION: HOW IT BEGAN

While on sabbatical in 1991¹ to study the European Communities, I began to query persons connected with, or with

* “What’s in a name? That which we call a rose
By any other name would smell as sweet”

WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2, ll. 43-44.

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1. I spent one term each at Cambridge, Exeter, and Edinburgh Universities. In addition, I affiliated with the Institute of Advanced Legal Studies at the University of London. In 1993, I extended that work through visits to the Universities of Konstanz and Münster, in Germany. Material for the article also derived from an address by the author before the Annual Congress of the Trier Academy of European Law, The Future

knowledge of, the European Community ("EC") about their views and opinions concerning its "federalization." This is perfectly natural, I suppose, for Americans are fond of thinking that if only we could export our form of "democracy" to every point on the globe, the world would be a better place.²

of Europe — Centralized and Decentralized Approaches (Oct. 7-8, 1993) (Trier Academy, forthcoming Spring 1994).

The list of persons to whom I am indebted is too long to recount in full here. However, some individuals figure so strongly in the life of the project that they deserve credit. I begin with my Dean, John F. O'Brien, and Board of Trustees, who gave me the freedom, flexibility and support to pursue this work. At Cambridge, I was befriended by Kurt Lipstein, Emeritus Professor of Law of Clare College. He became my informal mentor and did everything within his power to guide my thinking aright. My College president and University Vice-Chancellor, Sir David Williams, was a stimulating host, and Vaugun Lowe (Corpus Christi) and Christopher Greenwood (Magdelene) were unfailingly generous with their time and thoughts. The Director of the Institute of Advanced Legal Studies, Terence C. Daintith, and his colleague, Francis Snyder, both European scholars, were also quite helpful. At Exeter University, John Usher, John Bridge and David Parrott were accessible and reliable commentators. At Edinburgh, Professors Robert Lane and Willy Patterson were especially helpful. Within the Community institutions, I would especially like to thank Lord Gordon Slynn of the European Court of Justice, Judge Donal Barrington of the Court of First Instance, Francis Jacobs, then Chief Advocate General of the Court, and Alan Dashwood, Director of Legal Services of the European Council. Lawrence Collins, Esquire, of Herbert Smith, Ltd., London, a learned commentator on Community affairs, was also quite generous with his time.

I also thank Professors Werner F. Ebke and Kay Hailbronner of Konstanz and Professors Bernhard Grossfeld and Otto Sandrock, Directors of the Institut für Internationales Wirtschaftsrecht, Münster, for the environment, stimulation and insights they provided.

Finally, I am extremely grateful to two former research associates, Mary Crane and Carol Teigue Thomas, and my current associate, Rachel Kaylie, for their research and editorial assistance leading to this final article.

2. Personally, I am not convinced this is possible, let alone desirable. I am of the opinion that a true democracy (even those of a highly republican form) can only succeed in environments where there are enough resources of every description to allow those who control the resources to share them with others. Put aside "democratic tradition" or "experience." Where resources are scarce, the most "democratic" form of government (instrument of resource-distribution) that is possible is something more autocratic. Under such conditions, that is the most natural form of government, for a true democracy cannot thrive. The truth is, resources are scarce in much of the world, and democracy, even when it has been established, is generally short-lived.

THE FEDERALIST No. 2, at 6 (John Jay) (Goldwin Smith ed., rev. ed., 1901) suggests that the advent of a Federal Union in America might be the result of "Providence," which

blessed it with a variety of soils and productions, and watered it with innumerable streams A succession of navigable waters forms a kind of chain round its borders, as if to bind it together Providence has been pleased to give this one connected country to one united people [So that] it appears as if it was the design of Providence, that an inheritance so proper and convenient

Among the persons I interviewed was a bright legal counsel at the European Commission's headquarters in Brussels. I pressed him as hard as any interviewee about the process of "federalization" in the Community. Eventually, he turned my question against me: he asked "at exactly what point in America's history did it become a federation?" My answer was a little hollow.

It is not easy to pick a precise point in time, because federalization is a process and not an event. Surely, thirty-six years into America's Constitutional history (the current age of the European Community), this country was far from a strong federal union. In some ways, it was not as "federalized" as the Community is today.

So, if we are to judge by the current American model, the present confederal form of Community government is seriously flawed; perhaps hopelessly so. However, if we were to judge the European Community of today by the United States' original form of federal government — not the Articles of Confederation, but the U.S. Constitution of 1789 — then the distinctions are far less clear. When compared to our present, highly-centralized government, that early U.S. federation also was weak, and its eventual success far from clear, as this article shows. What is clear, however, is that other forms of federation or confederation³ than the American form can be highly successful; for example, the successful relationship between the relatively-weak Swiss central government and the cantons.⁴

for a band of brethren . . . should never be split into a number of unsocial, jealous, and alien sovereignties.

THE FEDERALIST No. 2, at 6 (John Jay) (Goldwin Smith ed., rev. ed., 1901).

This caused Professor Epstein to opine that

America's accidental advantages in choosing her own government suggest that America can decide what societies of men are "really capable" of in only a limited way. If we fail despite our very favorable circumstances, the conclusion must be that men cannot establish government by reflection and choice. If we succeed, our reliance on lucky accidents suggests that a similar choice will not always or often be available to other societies of men.

DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 21 (1984).

3. See Alberta M. Sbragia, *Thinking about the European Future: The Uses of Comparison*, in *EUROPOLITICS* 257 (A.M. Sbragia, ed., 1992). Professor Sbragia rather surgically accounts for the differences between "federalism" and "confederalism" in terms of the architecture of the union and the degree of sovereignty surrendered. *Id.* In this article, I have adopted the interpretation that the difference between the two is a matter of degree, not necessarily evidenced by specific requirements or forms.

4. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 311 (Gryphon ed. 1988).

Be that as it may, the European Community's preoccupation with the correlation of its "federal" form to that of the United States has intrigued many scholars,⁵ and continues right up to the present day. Sometimes I think the whole inquiry is entirely too dear.⁶ However, the confederation of the twelve Member States of the European Community, and their zealous pursuit of shared goals, sufficiently resembles the early U.S. experience, that many persons — scholars and world citizens alike — are eager to learn how it will work out. After all, the Community may prove to be the world's second-greatest experiment with federalism.

The best short answer I can offer to the question I asked my European friends is that European "federalism," while not entirely like that of the United States in either conception or form, can, in different instances, be both more and less federal than ours. However, it surely is tending in the same direction as did our "federalization" over the past 200 years, and for similar reasons.⁷

De Tocqueville wrote: "I should regard it as a great misfortune for mankind if liberty were to exist, all over the world, under the same forms." *Id.*

5. See VOL. 1-3 MAURO CAPPELLETTI, MONICA SECCOMBE, AND JOSEPH WEILER, *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (1985). [hereinafter WEILER]. I found the attempted parallels in some of these articles "strained" and not always relevant. See COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA (Mark Tushnet ed., 1990); LUTZ ROEMHELD, *INTEGRAL FEDERALISM: MODEL FOR EUROPE* (1990); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991). The topic is more generally handled in surveys treating the European Community. See, e.g., KURT LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (1974); NICHOLAS GREEN, TREVOR C. HARTLEY, AND JOHN A. USHER, *THE LEGAL FOUNDATIONS OF THE SINGLE EUROPEAN MARKET* (1991).

One quite good, though complex, article on the subject is: Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, 28 *COMMON MKT. L. REV.* 11 (1991).

6. See Lenaerts, *supra* note 5, at 12-13. Lenaerts wrote that "an organic understanding of the separation of powers is not practicable in the European Community." *Id.* There is no "clear-cut line between the legislative and executive branches of the Community government." *Id.* But, he suggests, the comparison can be made if one takes a functional approach. *Id.*

7. See *THE FEDERALIST* No. 10, at 45 (James Madison) (Goldwin Smith ed., rev. ed., 1901). Madison wrote: "There are two methods of curing the mischief of faction: The one, by removing its causes; the other, by controlling (sic) its effects." *Id.* Could the first goal be achieved by setting up a common economic market in Europe? And the second by giving the European Court the exclusive power to interpret its laws?

I. HOW MANY ROUTES TO "FEDERATION?"

A. *The United States*

It is clear that the United States and European "unions" had somewhat different objectives from the start. Because of the consensus failure of the Articles of Confederation⁸ to stabilize and protect the diverse, original thirteen American states, in 1787 their representatives undertook to establish a central government⁹ authorized to perform the functions typical of sovereign, national governments of the time. Those functions included: raising and supporting armies; conducting foreign relations; printing money; regulating commerce; and levying taxes.¹⁰ The latter power was shared with the states (each government in its own sphere), but all of the other powers listed were to be the exclusive province of the central government.

The stimulus to create the U.S. government was different from that which produced the European Communities, for there was external pressure upon the American colonies (now states) to unite. Without unifying, the colonies could not compete, nor effectively negotiate, with their stronger European counterparts. The nation's obligations would find no takers if government lacked authority to raise money to pay them. There was no ability to repel an invasion, should one come, without an army or navy.¹¹ This sense of urgency was dramatically represented in a popular Revolutionary cartoon: "Join or Die."¹²

However, *The Federalist*, which promoted ratification of the new Constitution, with its centralized government, extolled its

8. THE FEDERALIST No. 15 (Alexander Hamilton).

9. See E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 3 (2d ed. 1983). In point of fact, the convention in Philadelphia that eventually produced the Constitution of the United States was originally convened to amend the Articles of Confederation, insofar as they made "no provision for a separate national executive or judiciary" and gave the Confederation no power to tax, nor to regulate commerce or the states. *Id.* However, these representatives had no wish to "[obliterate] the states as constituent, [and] in some respects autonomous, parts of the system." *Id.* Indeed, there was some dispute among the delegates regarding whether they were authorized by their constituencies to draft an entirely new document. *Id.*

10. *Id.* at 4; see also THE FEDERALIST Nos. 42, 44 (James Madison).

11. THE FEDERALIST No. 15 (Alexander Hamilton).

12. See 1 THE ENCYCLOPEDIA AMERICANA 717 (Intl. ed. 1979). The cartoon, depicting a sliced up snake, each section labeled with a state or region, appeared in several versions, including one by Benjamin Franklin. *Id.*

commercial benefits¹³ every bit as much as its security potential. In this respect, the new union had objectives not unlike those of the European Economic Community, some years later.¹⁴

While post-World War II Europeans arguably had a security concern to motivate the formation of the European Coal and Steel Community in 1951 (to forestall war among themselves and as a buffer against the spread of Communism),¹⁵ it was not as immediate or external as that of the fledgling United States; unless it was running a poor third to the United States and Japan in the global economic race. That is a rather abstract "threat" to mobilize countries in such a revolutionary way.

But even America's central government was not immediately effective. Our notions of what the Constitution authorized it to do have changed dramatically over the past 200 years, both in terms of the relationship of the central government to the "united" states and to their citizens.

For the most part, these changes were based on the felt needs and circumstances of the moment. While the current form of U.S. "federal" government resembles, in some respects, the vision that was espoused in *The Federalist*,¹⁶ in other ways it

13. See, e.g., *THE FEDERALIST* Nos. 6, 8, 11 (Alexander Hamilton). The security issue is principally addressed in number 3, while the prospect of avoiding war through central government negotiation with foreign powers is considered mostly in number 4. *THE FEDERALIST* Nos. 3, 4 (John Jay).

14. *THE FEDERALIST* No. 22 at 110-11 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901). "[T]here is no object [than the power to regulate commerce] . . . that more strongly demands a Federal superintendence. The want of it has . . . given occasions of dissatisfaction between the states The interfering and unneighborly regulations of some States [are] contrary to the true spirit of the Union" *Id.*

15. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1957, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

16. See *THE FEDERALIST* No. 2 at 5 (John Jay) (Goldwin Smith ed., rev. ed., 1901). "Nothing is more certain than the indispensable necessity of government . . . that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with [the] requisite powers". *Id.* "Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord." *Id.* No. 6 at 24 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901). "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 Complaints are everywhere heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties" *Id.* No. 10 at 44 (James Madison) (Goldwin Smith ed., rev. ed., 1901). "[A] vigorous National Government . . . directed to a common interest, would baffle all the combinations of European jealousy [B]ut in a state of disunion, these combinations might

now resembles the leviathan that those writings assured would never come into being.¹⁷ As late as the 1830's, the writings of de Tocqueville indicate that it is not entirely clear what powers the central government would exercise vis-a-vis the constituent states, or indeed whether the central government would eventually fulfill its *raison d'être*, and cease to have an important function.¹⁸ De Tocqueville is widely regarded as one of the most in-

exist and might operate with success." *Id.* No. 11 at 55 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901).

An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants [at home], but for exportation to foreign markets When the staple of one fails . . . it can call to its aid the staple of another. The variety . . . of products for exportation, contributes to the activity of foreign commerce. It can be conducted upon much better terms, with a large number of materials [A] unity of commercial, as well as political interests, can only result from [a] unity of government."

Id. at 56-57

17. See THE FEDERALIST No. 44 at 254-56 (James Madison) (Goldwin Smith ed., rev. ed., 1901).

[E]ach of the principal branches of the Federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments, are numerous and indefinite."

Id.

If . . . the people should in future become more partial to the federal than the State Governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities [T]he prepossessions of the people, on whom both [governments] will depend, will be more on the side of State Governments"

Id. No. 45 at 259 (James Madison) (Goldwin Smith ed., rev. ed., 1901). "[T]he States will retain all preexisting authorities which may not be exclusively delegated to the Federal head" *Id.* No. 82 at 454 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901).

18. DE TOCQUEVILLE, *supra* note 4, at 144-148.

As the sovereignty of the Union is limited and incomplete, its exercise is not incompatible with liberty The most prominent evil of all Federal systems is the very complex nature of the means they employ. Two sovereignties are necessarily in [the] presence of each other The Federal system therefore rests upon a theory which is necessarily complicated When once the general theory is comprehended, numerous difficulties remain to be solved in its application; for the sovereignty of the Union is so involved in that of the States, that it is impossible to distinguish its boundaries at the first glance. [T]he most fatal of all the defects I have alluded to . . . inherent in the Federal system, is the relative weakness of the Government of the Union. The principle upon which all confederations rest is that of a divided sovereignty

sightful chroniclers of U.S. life during this period, but we know today that he was quite wrong in this last assessment.

B. *The European Community*

In my meetings with European scholars and government representatives, I am often amazed by their knowledge of U.S. political and legal forms. Hence, I believe it is no mistake that — with the American federal model clearly before them — the original six Member States of the European Community decided to delegate (rather than cede) to a central, supranational set of institutions virtually none of the competencies that late 18th century Americans felt it necessary to cede to a central government, to insure their prosperity, and perhaps their very survival.

The Community has no central military force, although the Western European Union might be the “beginning” of one, and most Member States belong to NATO. Both of these organizations lie outside the Community treaties, however. The Community’s “foreign policy” is nominal at best, often confused, and no substitute whatever for the individual Member States’ foreign policy initiatives, which continue today (except for economic

[But, whereas the] sovereignty of the Union is an abstract [thing] . . . the sovereignty of the States is hourly perceptible”

Id.

[But] if the present confederation were dissolved, it appears to me to be incontestable that the States of which it is now composed would not return to their original isolated condition There are some objects [of legislation] which are national by their very nature There are other objects which are provincial by their very nature Lastly, there are certain objects of a mixed nature The Government of the Union watches the general interests of the country”

Id. at 362-65.

“In America the existing Union is advantageous to all the States, but it is not indispensable to any one of them [T]he present Union will only last as long as the States which compose it choose to continue members of the confederation.” *Id.* at 368-69. “The greater the individual weakness of each of the contracting parties, the greater are the chances of the duration of the contract; for their safety is then dependent upon their union.” *Id.* at 376.

“I think that the Federal Government is visibly losing strength Federal power soon reached the maximum of its authority, as is usually the case with a government which triumphs It was [its] very prosperity which made the Americans forget the cause to which it was attributable. *Id.* at 384-86. I am strangely mistaken, if the [U.S.] Federal Government . . . be not constantly losing strength . . . and narrowing its circle of action more and more [The] Government of the Union will grow weaker and weaker every day.” *Id.* at 394.

treaties like GATT,¹⁹ EFTA (now EEA)²⁰ and Lome²¹).²² This is quite unlike the complete cession of foreign policy prerogative by the states to the central government in the U.S. Constitution.²³

The Community has no real authority to raise taxes without the approval of the Member States, and the size of the Community budget is small when compared to that of larger Member States.²⁴ Moreover, the redistributive effect of the dispersal of Community monies is extremely modest.

Hence, of all the hallmarks of American federalism contained in the Constitution, only the regulation of commerce is common to the two experiments in federalism.²⁵ But the power

19. General Agreement on Tariffs and Trade, Oct. 30 1947, 55 U.N.T.S. 194 (1948) [hereinafter GATT].

20. European Economic Area Agreement, [1992] 1 C.M.L.R. 921.

21. Lome Convention and Final Act, Dec. 15, 1989, 29 I.L.M. 783 (1990).

22. See Treaty Establishing the European Economic Community, art. 228, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3, 90 (1958) [hereinafter EEC Treaty]. Article 228 reads, in relevant part:

[1] Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. [Although, depending upon the "powers vested" in it, the agreements must be "concluded" by the Council, after consulting with the European Parliament]. [2] Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States."

Id.; see also *Bresciani v. Amministrazione delle Finanze*, Case 87/75, [1975] E.C.R. 129, [1976] 2 C.M.L.R. 62 (holding state could not impose health inspection fee on importer on ground that inspection cost should be borne by public); *Hamptzollant Mainz v. Kupferberg*, Case 104/81, [1982] E.C.R. 3641, [1983] 1 C.M.L.R. 1 (upholding effect of EEC-Portugal trade agreement provision disallowing discrimination between Community and Portuguese products).

23. See U.S. CONST. art. I, § 10. The U.S. Constitution provides, in relevant part: "No State shall enter into any Treaty, Alliance, or Confederation" and "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." *Id.*

24. See Court of Auditors Annual Report, O.J. C 324/1 (1991). In 1990, the budget for the European Communities was approximately U.S.\$61 billion, and they employed approximately 24,700 persons in the various institutions (conversion used: U.S.\$1.3 = 1 ECU). *Id.* at 48. By contrast, the reunified German government, in 1991, employed about 852,000 civil servants (exclusive of railroad and postal personnel) and had expenditures of DM971 billion (U.S.\$588.5 billion). [I am indebted to Jochen Artzinger-Bolten, a student associated with the Institut für Internationales Wirtschaftsrecht at the University of Münster, Germany, for assisting me with the German research above. Telephone interview with Federal Republic of Germany, Department of Civil Service, Bonn, Germany (July 12, 1993)].

25. See THE FEDERALIST No. 16 at 83 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901). Hamilton suggested that the authority of the central government can-

to regulate commerce is no small power, and in this area the Community often regulates undertakings in ways that are at least as federal as the United States.

II. "FEDERALISM" IN THE EC COMPARED TO THE U.S.

Depending upon the issue, often at least one Member State will demur from any direct or speedy course toward federalism.²⁶ To cite just a few examples: the first Danish referendum rejecting the Maastricht Treaty;²⁷ Italy's reluctant transposition of EC directives;²⁸ the British and Italian withdrawal from the European Exchange Rate Mechanism (ERM);²⁹ and the French insis-

not rest on the whim of its Member States, but must come from "the persons of the citizens," and be directly enforceable. *Id.* But in No. 17, Hamilton writes, in response to those who worry that the Union will be "too powerful," that "[i]t will always be far more easy for the state governments to encroach upon the national authorities, than for the national government to encroach upon the state authorities." *Id.* No. 17 at 86 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901). The reason for this is that "[i]t is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object." *Id.* In the United States this no longer seems to be the case, while in the European Community it still is.

26. See Bernhard Grossfeld, *The Internal Dynamics of the European Community Law*, 26 INT'L LAW. 125, 126 (1992). To one accustomed to the U.S. system of "federal" law, this must seem a terribly slothful manner of proceeding. For the moment, it is probably politically necessary. Professor Grossfeld states that "[h]armonization, not unification, is the aim [of the Community]." *Id.* Yet he allows that Community law "[goes] right into the center of European legal cultures." *Id.*; see also Jean Thieffry, Philip Van Doorn and Simon Lowe, *The Single European Market: A Practitioner's Guide to 1992*, 12 B.C. INT'L & COMP. L. REV. 357, 365 (1989). "Eighteen years of experience showed that the method of attempting harmonization by means of detailed technical specifications [essentially Community regulations] resulted in slow and difficult adoption procedures. For this reason, in 1985 the Commission adopted a new approach . . . [chiefly the use of directives] . . ." *Id.*

[D]irectives . . . set forth the essential norms [to be achieved, while leaving much of the detail to individual Member States' legislation. Even using this approach] . . . competent organs . . . such as the European Normalization Committee, have the task of elaborating the technical specifications which professionals will need to adopt in order to comply with the directive.

Id. at 365-66. These authors admit that progress in many Community market areas remains slow and grudging. One concludes that, at some point in time, the Community will have to resort again to the use of regulations in order to achieve the efficiency that an economy of its magnitude requires to be competitive.

27. See Jonathan Kaufman, *Full of Sound and Fury; But Europe's Currency Crisis May Signify Very Little*, BOSTON GLOBE, Aug. 6, 1993, at 61 (noting Danish rejection of Maastricht Treaty as start of public debate on European unity).

28. See *Privatization Comes to Italy*, WASH. TIMES, July 20, 1992, at E2 (noting Italy's common failure to implement EEC economic directives).

29. See Ray Moseley, *European Unity Loses Currency, Monetary Overhaul May Lift Econo-*

tence on a protective agricultural policy.³⁰

In spite of these problems, however, the general progress of the Community toward increased "federalism" seems as persistent and steady as it once was in the United States. That the Community elected another starting point, and at times seems to travel a far different road, does not mean that the final destination is different as well. Compare, for example, "federalism" in the United States and European Community in just two areas that are hallmarks of central government policy: agriculture and taxation.

A. Agricultural Policy

1. The Community's Common Agricultural Policy

The Community's Common Agricultural Policy ("CAP") was originally seen as one of the principal mechanisms by which Member States could collaborate and benefit one another through a Common (economic) Market.³¹ Long before the European Economic Community was formed in 1957, agriculture played a significant role in the economies of most European states. Hence, each of them had elaborate national measures to manage and support agriculture, and probably to protect it from foreign competition.³² Therefore, Member States (particularly France) did not want to abandon their national support of agriculture without an equally elaborate Community system of agricultural regulation.³³ A common market for agricultural prod-

mies, CHI. TRIB., Aug. 3, 1993, Business Section, at 1 (discussing overhaul of Europe's currency exchange system).

30. William Drozdiak, *France Balks at Trade Compromise; Nation Spurns Farm Deal Reached Earlier in Day*, WASH. POST, Dec. 7, 1993, at D1 (concerning France's block of compromise over agriculture in GATT negotiations).

31. See EEC Treaty, *supra* note 22, arts. 38-47, 298 U.N.T.S. at 30-36 (setting forth Community's Common Agricultural Policy). Of special note are: "The common market shall extend to agriculture and trade in agricultural products." *Id.* at art. 38(1), 298 U.N.T.S. at 30, and; "The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States." *Id.* at art. 38(4), 298 U.N.T.S. at 30.

32. See 1 HANS SMIT, AND PETER HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* at 2-183 (1992). For example, price support schemes often were used to insure that farmers had a reasonably adequate income, to protect the stability of food supplies and to help guard against the negative effects of rapid and substantial changes in price levels. *Id.*

33. FRANCIS G. SNYDER, *LAW OF THE COMMON AGRICULTURAL POLICY* 61 (1985). Even in areas in which Member States have delegated authority to the Community, they

ucts could not be created simply by eliminating customs duties and quantitative restrictions (as was the case for industrial goods). As a result, one common policy, set at the Community level, was viewed as the best way to shield the agricultural sector from extreme price variation, protect farmers' incomes, and yet achieve a broad, interdependent market in agricultural goods. Hence, the adoption of volumes of new "federalistic" regulations (rather than the elimination of national regulations) was the avenue chosen by the Community to achieve a common market in agricultural products.³⁴ So important was this objective that the Treaty of Rome expressly provided that, should there be any discrepancy between the CAP and general common market rules, the CAP would prevail.³⁵

Once the EEC Treaty was ratified by all Member States, the Community convened an agricultural policy conference. Its purpose was to compare the six states' agricultural policies and draft a Community policy that would achieve a balance between supply and demand and a fair income for workers in the agriculture sector,³⁶ just as the United States had once done. What ensued was a highly-complex set of Community directives and regulations, which aimed at properly defining "markets," setting the appropriate market-price at which to intervene with price supports, erecting protections against cheap imports, and insuring

still retain substantial authority. *Id.* For example, even though Member States cannot take unilateral measures that interfere with the Community's price structure at the production and wholesale stages, for products covered by a common market organization, Member States retain the power to intervene at the retail and consumer price stages, so long as the goals and functioning and price system are not affected. *Id.*

34. See, e.g., Council Regulation No. 804/68, O.J. L 148/13 (1968) (organizing common market in milk and milk products); Council Regulation No. 1035/72, O.J. L 118/1 (1972) (organizing common market for fruits and vegetables).

35. See EEC Treaty, *supra* note 22, art. 42, 298 U.N.T.S. at 32. Article 42 provides, in relevant part:

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

Id.

36. See EEC Treaty, *supra* note 22, art. 39, 298 U.N.T.S. at 30-31. Article 39 essentially calls for the maximization of production; a fair standard of living for agricultural workers; stable markets; and the availability of agricultural supplies throughout the Community. *Id.*

uniform purity.³⁷ As a result, EC agricultural regulations seem to be as numerous and detailed as those of the United States, and sometimes more so.³⁸ These are not regulations implemented by a central bureaucracy like the U.S. Department of Agriculture, however, but through the respective agricultural regimes of the various Member States. Thus, in its goals the Community can be every bit as "federal" as the United States; but in their implementation and enforcement perhaps less so.

Quite recently, the Community modified the CAP to pay farmers to keep land out of production, rather than buying their "surplus" products at intervention levels, which would constitute a "subsidy." The change was made chiefly because the subsidization program had not worked, but also partly in response to American political pressure, for the United States alleged that the CAP subsidy violated the General Agreement on Tariffs and Trade ("GATT").³⁹ The apparent willingness of the Community to concede this point precipitated violent, national protests by French farmers,⁴⁰ an event not likely to occur in America's agricultural circles.

2. The U.S. Department of Agriculture

Although America's federal program governing agriculture is far older⁴¹ than the Community's, the goals of the Department of Agriculture, when it was created, were similar to those of the Community: stable and livable farm prices; increased productivity; and consumer protection.⁴² Since the U.S. Supreme Court's

37. SNYDER, *supra* note 33, at 91.

38. See, e.g., Council Directive No. 160/72, O.J. 22/9 (1972) (encouraging farmers between ages of 55 and 65, who had farmed all their lives, to retire from farming in exchange for lump sum payments and annuities); Council Directive 161/72, O.J. 22/10 (1972) (providing for vocational retraining of farmers so that they could enter another occupation); P.S.F.R. MATHJISEN, A GUIDE TO EUROPEAN COMMUNITY LAW 153 (5th ed. 1985).

39. Francis Snyder, *Current Developments/European Community Law*, 42 INT'L & COMP. L.Q. 720, 720-21 (1993).

40. See David Gardner, *Holding the Line on Farm Reform — Tough Challenges Facing the New EC Commissioner*, FIN. TIMES, Feb. 10, 1993, at 28; see also, *Farmers' International Gatherings in Strasbourg for GATT Protest*, AGENCE FRANCE PRESSE, Dec. 1, 1992, at 1.

41. See 7 U.S.C. § 2201 (1988); 7 C.F.R. § 2 (1993). The U.S. agricultural program dates at least from 1892, when the U.S. Department of Agriculture was established. *Id.*

42. See generally 7 C.F.R. §§ 26-201 (1993) (marketing standards, inspections and practices); 7 C.F.R. §§ 300-399 (1993) (animal and plant health); 9 C.F.R. §§ 1-199 (1993) (animal and plant health); 7 C.F.R. §§ 400-499 (1993) (crop insurance); 7 C.F.R. §§ 500-599 (1993) (agricultural research); 7 C.F.R. §§ 600-699 (1993) (soil conserva-

decision in *Wickard v. Filburn*,⁴³ in 1942, it was clear that the U.S. federal government would play a sizable role in setting farm policy.

Despite its significant influence in this sector, however, agricultural regulation plays a relatively small role in federal regulation generally, accounting for only about 4.1% of the federal budget (about U.S.\$54 billion annually),⁴⁴ whereas the agriculture sector is responsible for about 3.3% of U.S. gross domestic product ("GDP").⁴⁵ In other words, the U.S. government invests about 25% more in the agricultural sector than its percentage of national GDP seems to warrant. That is a fairly high degree of regulation, although agriculture is not America's most regulated sector.

The CAP, however, is the Community's principal common policy. In 1993, 48.8% of the Community's budget was spent on some aspect of the CAP,⁴⁶ yet only 2.6% of the Member States' GDP is attributable to agriculture.⁴⁷ The Community investment is small in monetary terms only because the Community budget is small.⁴⁸ But, if the test of "federalism" is preoccupation with

tion); 7 C.F.R. §§ 900-1299 (1993)(marketing agreements and orders); 7 C.F.R. §§ 1800-2099 (1993)(quality standards for commodities, commodity exchanges credit and farm financing); 7 C.F.R. §§ 2800-2899 (1993)(food and safety quality); 9 C.F.R. §§ 200-299 (1993)(livestock and regulation of stockyards). Congress has also directed the Department of Agriculture to regulate standards for boxes and containers, flood control, irrigation, minimum and maximum prices and marketing production quotas. 1 JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, AGRICULTURAL LAW 16 (1982).

43. 317 U.S. 111 (1942) (holding that Congressional regulation of intrastate activities in area of agricultural production can be regulated by Congress because of their affect on interstate commerce).

44. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, Table No. 498 - Federal Budget Outlays, by Agency: 1980 to 1992, at 322 (1992), in STATISTICAL ABSTRACT OF THE UNITED STATES 1992, THE NATIONAL DATA BOOK [hereinafter NATIONAL DATA BOOK].

45. Telephone Interview with Dennis Kaplan, Budget Control & Analysis Division Chief, U.S. Department of Agriculture, (Sept. 27, 1993).

46. COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR AUDIOVISUAL, INFORMATION, COMMUNICATION AND CULTURE, THE BUDGET OF THE EUROPEAN COMMUNITY 3 (1993).

47. Address by Mr. Rene Steichen at the 12th Annual European Agricultural Conference of AGRA Europe in THE REUTER EUR. COMM'Y REP., Feb. 24, 1993, available in LEXIS, Nexis Library, CURRNT File.

48. Court of Auditors Report, *supra* note 24, O.J. C 324/1. The Community's 1990 budget was just over U.S.\$61 billion. *Id.* at 48. Between 50-70% of the Community's budget is expended on some aspect of CAP. *Id.* "EC officials say they have reformed the farm program, with subsidies decreasing from more than 70 percent of the Community's total budget in the early 1980s to 56 percent this year." Charles Goldsmith, *Dispute*

the regulation of a particular market sector, then the EC would appear to win the "federalism" race hands down in the field of agriculture.

B. *Taxation*

Another quintessential hallmark of "federalism" is the power of a central government to tax and to distribute the proceeds thereof as it sees fit. If the Community equals or exceeds U.S. federalization in the agricultural sector, it does not begin to approach it in the tax field. The governments of the individual Member States of the Community behave similarly to the united states of the Union, but the Community does not.

1. The United States

The United States Constitution of 1791 gave Congress the "Power To lay and collect . . . Duties, Imposts and Excises . . . [provided they were] uniform throughout the United States."⁴⁹ This is not unlike the Community's possessive external tariff authority to raise its "own resources." The U.S. central government was also given a general power of taxation, but "direct Taxes [had to] be apportioned among the several States . . . according to their respective Numbers (population)"⁵⁰

Taxes on goods or privileges, such as customs duties and excises on specific items, like whiskey and salt, were considered indirect taxes, and therefore did not require apportionment. Hence, most federal government resources derived from customs duties prior to the twentieth century.⁵¹

The apportionment requirement made it difficult for Congress to tap America's expanding wealth for budgetary purposes. Merchants sought to keep tariffs low in order to stimulate trade,

Over European Farm Subsidies not New, UPI, July 10, 1990, available in LEXIS, Nexis Library, UPI File.

49. U.S. CONST. art. I, § 8, cl. 1. The Constitution specified, however, that "No Tax or Duty [should] be laid on Articles [of goods] Exported from any State." U.S. CONST. art. I, § 9, cl. 5. This is not unlike the Community's external tariff authority to raise its "own resources." EEC Treaty, *supra* note 22, arts. 18-29, 298 U.N.T.S. at 22-26.

50. U.S. CONST. art. I, § 2, cl. 3. A similar clause appears at art. I, § 9, cl. 4, extending to "Capitation, or other direct, Tax[es]" U.S. CONST. art. I, § 9, cl. 4.

51. MICHAEL J. GRAETZ, *FEDERAL INCOME TAXATION, PRINCIPLES AND POLICIES* 7 (2d ed., 1988). In 1800, customs revenues accounted for U.S.\$9.1 million (84.3%) of total federal revenue of U.S.\$10.8 million. *Id.* In 1870, U.S.\$194.5 million out of a total federal revenue of U.S.\$411.3 million (47.2%) came from customs. *Id.*

but could not be directly taxed on their property or profits, without apportionment. This contrasted with the expanding role of the central government during the years in question, and was occasionally exacerbated by depression and war. Eventually, the problem was solved by the passage of the Sixteenth Amendment in 1913, unambiguously allowing Congress to tax income directly, without apportionment.⁵² Before that time, however, there were several occasions in the nation's history when a de facto, unapportioned, direct tax was levied by Congress.

Initially, this Congressional legislation was upheld by the U.S. Supreme Court, which rationalized the results vis à vis the Constitution, when the revenue statute was attacked.⁵³ The last attack on such a measure was upheld,⁵⁴ however, probably prompting the passage of the Sixteenth Amendment.⁵⁵ Shortly beforehand, a Supreme Court case did hold, however, that corporations were not protected by the apportionment requirement.⁵⁶

The nation's fiscal "need" during the War of 1812 and the

52. U.S. CONST., amend. XVI.

53. *Hylton v. U.S.*, 3 U.S. (3 Dall.) 171 (1796). In 1791, an unapportioned tax levied by Congress on distilled spirits and carriages was upheld by the U.S. Supreme Court on the ground that it was not a "direct tax." *Id.* Internal taxes, save on salt, were repealed in 1802, briefly reinstated during the War of 1812, but not imposed again until the Civil War. The latter gave rise to a Congressional tax on real property, inheritance, and income in excess of U.S.\$600. *See Springer v. U.S.*, 102 U.S. 586, 602 (1880) (upholding constitutionality of internal taxes). "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty." *Id.* Such taxes were repealed in 1872, but reinstated in 1894.

54. *See Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *reh'g granted*, 158 U.S. 601, 634 (1895) (overturning reinstated taxes). "The power to tax real and personal property, and the income from both . . . is a direct tax in the meaning of the constitution . . ." *Id.* Notwithstanding, a Tariff Act in 1909, taxing corporate net incomes in excess of U.S.\$5000, was upheld in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), on the ground that it was an excise tax on the privilege of doing business, rather than a direct tax on property. *See generally* GRAETZ, *supra* note 51, at 2-3.

It is clear that the Congress and the Supreme Court might have stretched the scope of an ambiguous portion of Article I to meet current needs. *Springer*, 102 U.S. at 597-98. Isn't it possible that a similar concern might motivate the European Court of Justice, when called upon to adjudge the scope of authority needed by Community institutions in order to create a unified Europe?

55. U.S. CONST. amend. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." *Id.*

56. *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

Civil War might have improved the prospect of this tax legislation being upheld by the U.S. Supreme Court. However, these judgments also establish that the important (and not forbidden) objectives of a central government can find support from an apolitical institution, like the judiciary, in a time of crisis, even when clear authority therefor might be questionable.⁵⁷ After all, isn't that the essence of "constitutional" documents, such as those that are the foundation of the United States and European Community?

One might say that these approaches to tax authorization all came in the "nick of time," for it is clear that the evolution of twentieth century America required a broader revenue base than customs alone could provide. By 1920, direct taxes having been legalized by the Sixteenth Amendment, custom duties accounted for only U.S.\$323 million (5%) and income taxes for U.S.\$3.95 billion (58.9%) of a federal budget that had grown from U.S.\$567.2 million in 1900 to U.S.\$6.7 billion in 1920.⁵⁸ By 1965, income taxes produced U.S.\$79.8 billion (85.7%) and customs only U.S.\$1.5 billion (1.6%) of a federal budget of U.S.\$93.1 billion.⁵⁹ Today, federal taxation of personal income yields over 40% of the nation's U.S.\$1.2 trillion annual budget,⁶⁰ and some of the largest budgetary expenditures are for national defense (20.8%), and health and human resources (36.6%), and not structural policies, which involve a mere pittance of the total.⁶¹

2. The European Community

The European Community, by contrast, has not been given the power to raise revenue through direct taxation of Member States' citizens.⁶² Hence, the Community is limited to raising

57. *Springer*, 102 U.S. at 597-98.

58. GRAETZ, *supra* note 51, at 7.

59. *Id.*

60. NATIONAL DATA BOOK, *supra* note 44; Table No. 492 — Federal Receipts, by source: 1980 to 1992, at 316; *Id.*, Table No. 491 — Federal Budget — Summary 1945 to 1992, at 315.

61. *Id.*, Table No. 495 — Federal Outlays, by Detailed Function: 1980 to 1992, at 318, 319.

62. See EEC Treaty, *supra* note 22, art. 99, 298 U.N.T.S. at 53-54. When the Community was conceived, the Member States recognized that harmonious taxation throughout the Community was necessary to establish a common market. Yet they were also conscious of the fact that the power to tax was closely linked with a Member State's

revenue largely from indirect taxes, and then only to the extent and from the sources that the Member States approve, acting as the European Council.⁶³ The Community does have a common customs tariff⁶⁴ (at least on goods that do not "originate" within the Community), similar to the tariff provisions in the U.S. Constitution.⁶⁵ This tariff has replaced and precludes individual Member States' tariffs⁶⁶ and raises "own resources" for the Community. These tariffs, however, are small in amount⁶⁷ and are set by legislation, not "constitutional in nature." It is no surprise then, that the Community budget pales by comparison to the larger Member States in virtually every sector.⁶⁸ Furthermore, the budget does not enjoy an independent, constitutional basis,

sovereignty. The Member States were not willing to delegate the power of direct taxation to a central Community authority. However, to further the common market, Article 99 of the Treaty of Rome directed the Commission to consider how to harmonize the various Member States' legislation concerning indirect taxation. *Id.* art. 99, 298 U.N.T.S. at 53-54. Pursuant to this charge, two directives were enacted instructing the individual Member States to adopt a value added tax (VAT) by January 1, 1970. *See* Council Directive No. 67/227, 10 J.O. 1301 (1967); Council Directive No. 67/228, 10 J.O. 1303 (1967). In January 1968, France enacted a VAT system according to the directives, this VAT replacing a less sophisticated French VAT. Denmark enacted a VAT in July 1967; West Germany in January 1968; Netherlands in January 1969; Luxembourg in January 1970; Belgium in January 1971; Ireland in November 1972; Italy in January 1973; the U.K. in April 1973; Spain and Portugal in January 1986; and Greece in January 1987. ALAN A. TAIT, *VALUE ADDED TAX* 10, 11, tbl. 1-2 (1988).

Article 99 of the Single European Act imposed a further obligation on the Council to harmonize indirect taxes within the EC to the extent harmonization was necessary to ensure the "establishment and function of the common market." Single European Act, art. 99, O.J. L 169/1, at 8 (1987), [1987] 2 C.M.L.R. 741, at 749 (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958)) [hereinafter SEA].

63. *See, e.g.*, From the Single Act to Maastricht and Beyond: The Means to Match Our Ambitions, 25 E.C. BULL., Supp. 1/92, at 33 [hereinafter Single Act] (discussing recent changes in source and amount of EC funding, adopted at Edinburgh Summit, December, 1992).

64. Council Regulation No. 950/68, J.O. L 172/1 (1968), O.J. Eng. Spec. Ed. 1968, at 925.

65. U.S. CONST. art. 1, § 8, cl. 1, and § 9, cl. 2.

66. *Nederlandse Spoorwegen v. Inspecteur*, Case 38/75, [1975] E.C.R. 1439, [1976] 1 C.M.L.R. 167; *Hauptzollamt Bremen-Freihafen v. Waren-Import*, Case 74/69, [1970] E.C.R. 451, 463, [1970] C.M.L.R. 466, 491.

67. COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE-GENERAL FOR BUDGETS, *THE COMMUNITY BUDGET: THE FACTS IN FIGURES* 31, tbl. 4 (1993). EC tariffs amounted to ECU\$9,410 million in 1992, or 18.9% of the Community budget (conversion used: U.S.\$1.3 = 1 ECU). *Id.*

68. *See supra* note 24 and accompanying text (discussing small size of Community budget).

but rather depends, to a large extent, on the legislative action in Council.

The most significant source of revenue for both the Member States and the Community is the value added tax ("VAT").⁶⁹ In 1991, over 60% of the Community's revenue came from Member States' VAT contributions.⁷⁰ The VAT is collected by each individual Member State as part of its internal tax system, and a percentage (currently 1.4%) of the amount collected is contributed to the Community budget. Thereafter, this money becomes the Community's "own resources,"⁷¹ although its distribution is heavily influenced by representatives of the Member States.⁷² Thus, neither the decision to collect taxes; the manner of so doing; nor the pattern of redistribution is left entirely to the Community. The Member States influence each of these decisions.

Any change in the "tax" formula must be unanimously approved by the Member States,⁷³ and is by no means guaranteed.⁷⁴ Unlike a sovereign nation then, the Community is pow-

69. See THE VALUE-ADDED TAX: LESSONS FROM EUROPE 2 (Henry J. Aaron ed., 1981). VAT is the difference between the value of a firm's sales and the value of the material used to produce the goods sold. *Id.* VAT is chargeable within a Member State to "taxable persons," i.e., those persons or bodies who carry out the production, trading or supplying of services such as agriculture, mining and professional activities. See D. Lasok and J.W. Bridge, THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITY 533 (5th ed. 1991).

70. Court of Auditors Report, *supra* note 24, O.J. C 324/1, at 51.

71. THE BUDGET OF THE EUROPEAN COMMUNITY, *supra* note 46, at 6.

72. *Id.* at 8.

73. See Jonathan S. Schwarz, *Survey of the European Single Market*, FIN. TIMES, Jan. 19, 1993, at 9. Recently, the Member States agreed that, as of January 1, 1993, a minimum VAT rate of 15% would be set for all States. *Id.* This regime is intended to produce over time a system whereunder transactions between Member States were taxed at the same rate as those within each State. *Id.*

74. See Single Act, *supra* note 63, at 33

The 1988 European Council wanted the resources paid by each Member State to coincide more closely with its ability to pay. To achieve this, it decided to expand and alter the composition of own resources. The VAT base was capped at 55% of GNP with the maximum call-in rate maintained at 1.4%: an additional own resource based on the aggregate GNP of the Member States was introduced to ensure that revenue and expenditure balanced in the budget.

The new system placed the Community's finances on a sound footing. However, experience shows that, so far, only moderate progress has been made in bringing the structure of resources into line with Member States' ability to pay. As could be expected, VAT has continued to be the main source of the Community's finances and in 1992 still accounts for over 50% of own resources.

erless to pass new taxes, even to cover the cost of its own operations, and may be forced to try to accomplish more in the way of Community programs, with less in Community resources. The Community itself — except for an appeal to the Council — cannot change its circumstances.⁷⁵

Although the Community's structural programs have a redistributive effect,⁷⁶ it is one that the Member States must approve when passing the Community budget. Hence, they have the ability to influence the amount they receive from — as well as contribute to — Community funds.⁷⁷

Proposed changes in the Community's "tax" system were considered and partially adopted at the December, 1992, Edinburgh summit. They would shift emphasis from the VAT, as a

However, the regressive nature of the VAT resource is the main cause of the distortions which affect the financing system, this is because the least prosperous Member States as a rule devote a large proportion of their GNP to consumption. Capping the VAT base at a certain percentage of GNP may help to limit this drawback, but the level at which it is capped at present is not low enough to bring the VAT bases of these countries sufficiently into line with the GNP bases.

For some Member States, on the other hand, the present system is particularly advantageous, since the VAT base accounts for a distinctly small proportion of GNP.

The rapid growth of the GNP-based resource may well attenuate this situation. But this resource still accounts for only 20% of Community resources.

Id.

75. See The Commission's Programme for 1992, 25 E.C. BULL., Supp. 1/92, at 44-45 (1992) [hereinafter Commission's 1992 Programme]. In its annual programme statement to the European Parliament in 1992, the Commission envisioned a wider role for the Community in Eastern Europe, specifically mentioning Poland, Hungary, Czechoslovakia, Bulgaria, Romania and Yugoslavia, in which the Commission estimates they have already invested ECU 2.6 billion, but without purporting where the aid is to come from. *Id.* The program also mentions "new responsibilities abroad"; the "Cohesion Fund approved at Maastricht"; and "increasing the resources available for the operation of the Structural Funds", but then acknowledges that "its proposal for the new financial perspective for 1993-1997 [its funding proposal to the Edinburgh Summit, being only partially successful] . . . will have to incorporate Member States' determination to contain public expenditure and the need to make more allowance for Member States' ability to pay." *Id.* at 43-44.

At another point, the report reads: "A special effort will be required of all Commission staff in 1992 . . . [C]onsolidation of its human potential (precarious balance between in-house and external staff) must be pursued, and programming and priority-setting still need to be improved." *Id.* at 45.

76. *Fixing the EC Budget*, FIN. TIMES, Dec. 4, 1992, at 20.

77. *Id.* The Common Agricultural Policy, which accounts for the lion's share of Community redistribution, often ends up benefitting wealthier Member States such as Denmark, Belgium and Luxembourg, which has been called "Robin Hood in reverse". *Id.*

source of Community funding (lowering Member States' contributions from 1.4% to 1.0%), to a percentage of Community's GNP⁷⁸ (a requested rise in the Community's "own resources" ceiling from 1.2% to 1.37% by 1997).⁷⁹ This would make the European "tax" system more fair, but it would continue to be operated in a most "un-federal" way.

C. *Economic Cohesion in the EC and U.S.*

Hence, the Community's income and expenditure is easily traceable to individual Member States, quite unlike the United States.⁸⁰ In the United States, citizens and businesses contribute directly to the central government's tax coffers. State payments are modest, at best. By and large, this tax revenue is commingled in such a way that none of it is "earmarked" for any particular state, region or purpose. By that yardstick of federalism, the Community might strain to lay claim to "con-federalism."

On the other hand, the goal of a single European Currency (ECU) and greater cohesion in monetary policy, which have not been abandoned despite recent setbacks,⁸¹ do at least lay a foundation for what may become a more-centralized Community tax policy.⁸² Moreover, Mr. Jacques Delors, the Commission Presi-

78. See Single Act, *supra* note 63, at 33.

79. *Id.* at 32. The U.S. budget in 1990 was approximately U.S.\$1.2 trillion. NATIONAL DATA BOOK, *supra* note 44, Table No. 495 — Federal Outlays, by Detailed Function: 1980 to 1992, at 318-319. The Community budget was just over U.S.\$61 billion. Court of Auditors Report, *supra* note 24, O.J. C 324/1 at 48.

80. THE FEDERALIST No. 21, at 108-09 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901)

Let Virginia be contrasted with North Carolina, Pennsylvania with Connecticut, or Maryland with New Jersey, and we shall be convinced that the respective abilities of those States, in relation to revenue, bear little or no analogy to their comparative stock in lands or to their comparative population [C]learly . . . there can be no common measure of national wealth, and of course no general or stationary rule, by which the ability of a State to pay taxes can be determined. The attempt . . . to regulate the contributions of the members of a confederacy by any such rule cannot fail to [produce] glaring inequality The suffering States would not long consent to remain associated There is no method of steering clear of this inconvenience but by authorizing the national government to raise its own revenues

Id.

81. See Laurent Belsie, *Europe Slogs Ahead in Melding Economies*, CHRISTIAN SCI. MONITOR, Dec. 1, 1993, at 10 (discussing recent difficulties encountered by EEC's attempt to move to single European currency).

82. See DE TOCQUEVILLE, *supra* note 4, at 388-89.

The slightest observation in the United States enables one to appreciate the

dent,⁸³ has been able to get the Member States to commit to a more stable and long-term Community funding policy, in place of the annual budget imbroglio that once obtained.⁸⁴ However, the present economic downturn has placed extreme pressure on the Community's progress toward a unified future.⁸⁵

Clearly, a "central" government cannot function if it does not have sufficient resources for its operations. In its 1992 presentation to the European Parliament, the Commission expressed a need for greater "own resources" to finance the Com-

advantage which the country derives from the bank. [Its] bank-notes . . . are taken upon the borders of the desert for the same value as at Philadelphia, where the Bank conducts its operations The Bank may be regarded as the great monetary tie of the Union, just as Congress is the great Legislative tie

Id.

Compare id. with Address by Jacques Delors, President of the Commission, to the European Parliament on the Occasion of the Investiture Debate of the New Commission, in *E.C BULL.*, Supp. 1/93 at 8 [hereinafter *Delors Address*]. Commission President Jacques Delors', in a speech to the European Parliament in February of 1993 said:

[C]ompetitive devaluation is not the answer to the problems facing [the Community] today [T]he timetable for economic and monetary union may not be met, with the result that we will lose the hard-won gains of 1985 to 1990 [W]e must consolidate, not merely defend, the European Monetary System [P]ussyfooting [has] cost us dearly We must persevere, we must confirm our political determination in the face of speculation, we must strengthen economic and monetary cooperation to make our stance credible.

Id.

83. EEC Treaty, *supra* note 22, arts. 155-163, 298 U.N.T.S. at 71-73.

84. Single Act, *supra* note 63, at 22.

The Interinstitutional Agreement [by which budgetary procedures were changed and outcomes made more certain] has undoubtedly contributed to a smoother budgetary procedure and helped see that budgets were adopted on time. There were no more of the minor conflicts which so often in the past had opposed [the] Council and [the] Parliament, the two arms of the budgetary authority.

Id.

85. Delors Address, *supra* note 82, at 7. In his address to the European Parliament on February 10, 1993, President Delors said:

Economic convergence, a stronger European Monetary System, job creation — these priorities . . . formed a whole. But they were put in jeopardy by a number of factors. Chief among these was the renationalization of economic policies . . . [including] the European Council's refusal to give the Community the means . . . to encourage European companies to cooperate to become more competitive in a world dominated by economic war.

Id. at 7. President Delors also warned that because of these difficult times, and the lack of agreement about what the Community should do and how quickly, "[t]he very idea of a united Europe could be in peril." *Id.*

munity program it envisioned.⁸⁶ Specifically, the Commission sought an increase in its own resources ceiling from 1.2% to 1.37% of Community GNP through 1997.⁸⁷ This was, it said, a "cautious estimate of the financial implications of the decisions taken at Maastricht."⁸⁸ To cushion the impact this would have on Member State resources, the Commission suggested that, "in some sectors Community expenditure will replace some national expenditure."⁸⁹ This is not the news the Eurocautious wanted to hear. What the Commission got in Edinburgh, therefore, was an increase to only 1.27%, not to begin until 1994.⁹⁰ In other words, almost no "real" growth in Commission financing will occur through 1997, unless the European economy picks up significantly.⁹¹

The extra money sought was needed, the Commission said, to fund the "cohesion program" (ECU11 billion — essentially to strengthen the economies of Greece, Ireland, Portugal, and Spain); to increase "external action" (foreign aid); and to improve European "competitiveness" (ECU3.5 billion).⁹² The latter is essentially an economic stimulus program, run by the Community rather than the Member States. But, as late as mid-1993, President Delors was complaining that the ECU20 billion (U.S.\$24 billion) economic growth initiative announced at the Edinburgh summit, was not being addressed by the European Council.⁹³ He suggested that, for lack of an adequate program to deal with high unemployment and "non-competitiveness," Europe was falling even farther behind the United States and Japan.⁹⁴

86. Single Act, *supra* note 63, at 32.

87. *Id.* The increase would be approximately ECU20 billion, based on projected economic growth of 2.5% a year. *Id.*

88. *Id.*

89. *Id.*

90. THE BUDGET OF THE EUROPEAN COMMUNITY, *supra* note 46, at 6; see Conclusions of the Presidency, Conference of the European Council, Edinburgh, Scotland, Dec. 11-12, 1992, pt. C, Annex 1, Financial Perspectives Table [hereinafter Conclusions of the Presidency] [on file with *The Fordham International Law Journal*].

91. Single Act, *supra* note 77, at 32.

92. Delors Address, *supra* note 82, at 10.

93. *EC Faces its Worst Growth Prospects Since the War, Says Delors*, AGENCE FRANCE PRESSE, May 26, 1993.

94. *Id.*; see Andrew Marshall, *Delors Says EC is Falling Behind*, THE INDEPENDENT, May 27, 1993, at 13. According to Mr. Delors, the U.S. and Japanese economies "had created 20 million and 11 million new jobs, respectively, between 1970 and 1990, [while]

Clearly, the Member States of the Community regard the world economic downturn — both politically and economically — as a “crisis” that each should confront individually; even at the risk of some chaos, inefficiency and possibly wasteful competition. Their actions suggest that they do not see the Community as playing a major role in this process.⁹⁵ And, frankly, it would be difficult (if not impossible) to accomplish the broad (and expanding) goals of the Community if the Commission must always ask permission to take the necessary action or cannot command the resources to do so.⁹⁶ In the United States, the situation is reversed. All or most states have undertaken an economic stimulus or recovery program of some sort, but the principal focus of state leaders, and especially citizens, is on the federal recovery plan, proposed by President Clinton.

Faced with this paradox of expectation versus resources and authority, the Commission’s only option is to restructure; to compress work within its static or shrinking workforce and to practice the tightest budget discipline.⁹⁷ Neither of these traits is particularly a hallmark of central governments. As one might expect, therefore, the Commission made a “federalistic” budget-

the EC had created only 8.8 million.” *Id.* He said that “the EC’s share of world trade had slipped from 21 per cent in 1981 to 16 per cent [today].” *Id.*

95. Delors Address, *supra* note 82, at 10. The Community’s research and education programs, aimed at improving its economic competitiveness in world markets, “represent a mere 4% of the training and employment budgets of the Member States” *Id.*

96. The Commission’s work programme for 1993-94, in E.C. BULL., Supp. 1/93 at 18 [hereinafter Commission’s 1993-94 programme].

The Community must use all the means at its disposal to counter the significant slowdown in economic activity. Its credibility and its very future are at stake The growth initiative approved by the European Council should promote economic recovery in Europe. For the first time ever, concerted action by the Member States is to be matched by Community action to stimulate growth. The Commission has made its contribution A raft of measures will have to be adopted without delay [The Commission] will use all its powers and every opportunity for international dialogue to lead its partners along a road to economic recovery, in the light inter alia of the approach adopted by the new US [Clinton] Administration.

Id. The European Council, however, has been slow to fund these initiatives, and they are modest in any event.

97. Single Act, *supra* note 63, at 35. “[T]he 1992 budget . . . makes the normal administrative operation of the institutions and in particular the Commission impossible. [It] . . . must no longer be forced to make do with the leftovers.” *Id.*; see Commission’s 1993-94 programme, *supra* note 96, at 16.

ary proposal in its 1992 program presentation.⁹⁸ It proposed: "improvements" in the 1988 Interinstitutional Agreement; a "financial framework" running from 1993-1997; and the hope that "any revision of the ceilings set . . . should be agreed by the Council acting simply by a qualified majority." The proposal concluded that "[e]xperience over the last three years indicates [that] . . . the Commission must be able to mobilize resources and react quickly . . ." ⁹⁹ In other words, act more like a central government institution.¹⁰⁰ But, in the area of "taxation" and tax-resource allocation, the Community has a long way to go.

Of course, these last few estimates regarding "federalism" may depend too heavily on stop-action pictures of the Community's present stance, mired as it is in a stubborn recession. This jaundiced assessment may not give the Community sufficient credit for its evolution to this point.¹⁰¹ Mr. Delors, the Commission's President since 1985, is fond of reminding Euro-sceptics that, if you were asked at any point in time whether the Community could meet a particular goal, you would think it could not; and then be surprised, five years later, when it had met or surpassed it.¹⁰²

98. See Grossfeld, *supra* note 26, at 126 (asserting that "[i]t was the Commission that pushed the European idea ahead with relentless vigor").

99. Single Act, *supra* note 63, at 35-36.

100. Delors Address, *supra* note 82, at 7-8.

[W]e need a medium-term perspective too. This implies turning a deaf ear to the siren voices that tempt us to go it alone, to look after number one, all too often the attitude of governments in times of crisis. If we [in the Community] fail to reverse this trend, our countries will suffer individually, because competitive devaluation is not the answer to the problems facing us today.

Id.

101. See Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 *NEW EUR. L. REV.* 129 (Spring 1993). In an extremely thoughtful piece that was part of a symposium on "Federalism for the New Europe", Professor Wiessner writes: "The concept of federalism itself eludes easy delimitation . . . [W]ithout further reflection, [it] is simply equated with the particular shape it has found in the constitutional system of the United States." *Id.* at 132. But what is really "critical [is] that federalism as a particular form of territorial political organization actually foster the variety of values it is said to promote . . . [T]he words federal, confederal, region, alliance, and coalition are primarily meaningful in their suggestion of the infinite variety of potential modalities in organization . . . [F]ederalism [simply] denotes [a] vertical allocation [of power] among a variety of territorially-based communities." *Id.* at 138-40.

102. See Delors Address, *supra* note 82, at 6-7.

[W]ith the world-wide economic crisis, Europeans have forgotten the truly impressive advances that flowed from revitalization of the European venture thanks to Parliament's draft Constitution, the 1992 target, the boost provided

III. THE GROWTH OF FEDERAL AUTHORITY

A. "Constitutional" Powers

Although it is not fair to compare institutional "growth" in the 1990's with that of the 1790's, in chronological years the Community, when compared to the fledgling United States, has just arrived in 1827. At about that time in U.S. history, the Supreme Court was just deciding what authority states had to tax federal entities doing business within their borders.¹⁰³ Twenty-

by the Single Act and the 1988 consensus on policy and financial priorities Despite progress since 1985, the Community . . . has been clogged by . . . collective amnesia about past achievements.

Id.; see also Isobel Hilton, Remarks at the University of Edinburgh, in BEYOND THE INTER-GOVERNMENTAL CONFERENCES: EUROPEAN UNION IN THE 1990's, at 18 (Europa Institute, William E. Patterson ed., 1991). "[M]y general law of Community development [is that]: at any point in the EC's history you could argue, looking back, that if you wanted to get here, ideally you wouldn't have started from there. And, looking forward, that trying to get there is clearly impossible starting from here. Nevertheless, onward it goes." *Id.*

103. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the state of Maryland sought to tax (on the same terms applied to state banks), and to penalize for the non-payment of taxes, a federal bank operating in Maryland. Part of Maryland's argument was that the states had created the federal government and it was the former that were "truly sovereign." *Id.* at 402. Hence, exercises of federal authority must be subordinated to the states, "who alone possess supreme domination." *Id.* Justice Marshall, in what may be his greatest opinion among many, wrote for the court majority that it was the people and not the states who approved the Constitution. *Id.* at 403. It was from them that the federal government "derives its whole authority. *Id.* The government proceeds directly from the people." *Id.*

The European Community clearly derives its authority from the assent of the Member State governments, although it is not clear what prerogatives they have to dissent from Community action when it is taken within delegated or transferred competencies. See EEC Treaty, *supra* note 22, pmb., 298 U.N.T.S. at 14.

More important in the *McCulloch* case, however (at least at this point in the evolution of U.S. "federalism"), was Justice Marshall's opinion to the effect that, although the government was one of "enumerated powers," and although "we do not find that of establishing a bank or creating a corporation [among them] . . . there is no phrase . . . [excluding the exercise of] incidental or implied powers." *Id.* at 406.

Congress is given the authority in the U.S. Constitution to exercise those legislative prerogatives that are "necessary and proper" to achieve the goals assigned to it. U.S. CONST., art. I, § 8, cl. 18. But the arrogation to the central government of "incidental or implied powers" was a significant increase of authority, to which the state delegates to the "Constitutional Convention" (and perhaps the people themselves) would possibly not have agreed in 1789.

In the European Economic Community, the European Court of Justice still narrowly insists that all Community legislation clearly and accurately identify its source of competence in the Treaties. See *Meroni v. ECSC High Authority*, Case 9/56, [1957-58] E.C.R. 133; *United Kingdom v. EC Council*, Case 68/86, [1988] E.C.R. 855, [1988] 2 C.M.L.R. 543.

eight years after the federal government was formed, this principle was still being disputed.

In 1824, the right of various governments to license the use of navigable waterways within their borders was finally settled in favor of the preeminent right of Congress (the federal government).¹⁰⁴ In 1851, the Supreme Court returned some of this power to the states, however, holding that the authority was shared by the state and federal governments, so long as the state's regulation did not unnecessarily interfere with interstate commerce.¹⁰⁵ Hence, sixty years after the establishment of the U.S. federal government, the sphere of authority exclusively occupied by the state or national governments, and that shared, was still being questioned.

In 1857, a divided U.S. Supreme Court held (in the infamous "Dred Scott decision"), that other states and the federal government were powerless to interfere with the so-called "property" rights to a Black slave granted a person under the law of his native state.¹⁰⁶ The Supreme Court majority was sensitive to the legal/political prerogatives claimed — and exercised — by the various state governments over the slavery issue, and it was not eager to exacerbate these differences, which later erupted into civil war.¹⁰⁷ By a strict reading of the U.S. Constitution, a position later abandoned, the federal government was held to have no competence in this matter.¹⁰⁸ Such disputes, on a considerably more modest scale, continue in Constitutional litigation to the present day.¹⁰⁹

104. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

105. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). In *Cooley*, the U.S. Supreme Court held it possible for the Constitution's interstate commerce clause to leave room for states to specify that local pilots be used as an aid to navigation in local waters. *Id.* *Gibbons* left the issue of concurrent authority in the state and federal governments somewhat open. *Gibbons*, 22 U.S. (9 Wheat.) 1.

106. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The Supreme Court, in *Dred Scott*, held that the so-called "Missouri Compromise" of 1820 (concerning the admission to the Federal Union of "free" and "slave" states in equal numbers) was beyond Congress' substantive due process powers. *Id.* Because of its concern about federal/state friction in this area, the Court was rather insistent that Congress identify its source of authority in the Constitution. *Id.*

107. *Id.*

108. *Id.*

109. *DeBoer v. Schmidt*, 502 N.W.2d 649 (1993) (concerning whether Iowa or Michigan courts should enjoy exclusive custody jurisdiction under the federal Parental Kidnapping Prevention Act of 1980).

If the U.S. struggled under its Articles of Confederation and early Constitution, the Community had its inception in the relatively-modest European Coal and Steel Community (ECSC).¹¹⁰ It aimed at nothing more than controlling coal and steel production among six nations, chiefly France and Germany.¹¹¹ The more-ambitious, Common Market goal, set forth in the Treaty of Rome,¹¹² is a little more like our federal Constitution, with its allegedly limited, "enumerated powers"¹¹³ and economic and security objectives. Both "unions" shared a concern that traditionally-competitive states somehow get along with one another.¹¹⁴

110. ECSC Treaty, *supra* note 15, 261 U.N.T.S. 140.

111. *Id.* The ECSC was formed in 1952 among six nations: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. It was quite limited in scope, indeed, it was limited to 50-years duration, whereas the EEC Treaty is for an "unlimited duration". *Id.*, art. 97, 261 U.N.T.S. at 227; EEC Treaty, *supra* note 22, art. 240, 298 U.N.T.S. at 92.

112. *See* EEC Treaty, *supra* note 22, art. 2, 298 U.N.T.S. at 15. "The Community [established by Article 1] shall have as its task, by establishing a common market and progressively approximating the economic policies of [the] Member States, to promote throughout the Community [economic expansion, stability, higher living standards] and closer relations between the States belonging to it." *Id.*; *cf.* U.S. CONST., pmbl.

113. *See* THE FEDERALIST No. 44, at 256 (James Madison) (Goldwin Smith ed., rev. ed., 1901). "The powers delegated by the proposed Constitution to the federal Government, are few and defined." *Id.* *Cf.* THE FEDERALIST No. 23, at 122 (Alexander Hamilton), "[I]t is both unwise and dangerous to deny the Federal Government an unconfined authority, in respect to all those objects which are entrusted to its management." *Id.*; *see* *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819). "This government is acknowledged by all to be one of enumerated powers . . ." *Id.*

114. *See* EEC Treaty, *supra* note 22, pmbl., 298 U.N.T.S. at 14 ("[r]ecognizing that the removal of existing [trade barriers] calls for concerted action"); *Id.*, art. 169, 298 U.N.T.S. at 75 (giving Commission the authority to bring complaint "before the [European] Court of Justice" if "the Commission considers that a Member State has failed to fulfill an obligation under [the] Treaty (following a reasoned opinion to that effect)); *Id.* art. 170, 298 U.N.T.S. at 75 (giving same authority to other Member States (without a reasoned opinion)).

See also Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 388/1 (1982), amended by O.J. L 285/1 (1989). All current Member States are signatories to the Convention, but it does not cover all judgements, and is technically outside the Community treaties. *Id.* There is good reason to believe that the Community will work hard to assure that all future members become signatories at the time of their accession to the Community. In due course, this principle of mutual recognition of jurisdiction and judgements (with the usual jurisprudential exceptions) is likely to be written into the treaties as a basic tenant of a single commercial market. This step was probably impossible in 1957, but accomplished in 1968 only because it was optional for each state to sign the Brussels Convention.

In the U.S. Constitution, the same latitude was not given. The so-called "full faith and credit" clause of Article IV, Section 1, affirmatively declares that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. CONST. art IV, § 1. As interpreted by the U.S. Supreme

But the Community achieved this by coopting the Member States and requiring them, under the EEC Treaty, to enforce valid Community law, even without a large central bureaucracy or uniform approach to legislation.¹¹⁵

The Community's other significant steps toward a more "federalized" union were the Single European Act of 1986 (probably the most successful treaty venture to date, albeit one aided by a period of extraordinary economic expansion) and, just three years later, the almost dangerously-ambitious Maastricht agreement.¹¹⁶ Reinforcing these developments were the direct election of Members of the European Parliament in 1979 (akin to the direct election of Senators in the U.S.),¹¹⁷ "qualified majority" voting in the Council (versus unanimous voting, or the

Court, the Clause is applied much more strictly to judicial decisions than public acts and records. *See, e.g.*, *Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939). Moreover, the duty of states to recognize "sister" states' actions continues to be tested in the U.S. Supreme Court. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Similarly, equivalent obligations are tested in the European Court of Justice. *See, e.g.*, *France v. United Kingdom*, Case 141/78, [1979 E.C.R. 2923, [1980] 1 C.M.L.R. 6.

There are also significant parallels between the "interstate commerce" authority of Congress in the U.S. Constitution and the agreement among the Community's Member States to forswear and dismantle protective tariffs and quantitative restrictions. "The Congress shall have Power To . . . regulate Commerce . . . among the several States . . ." U.S. CONST., art. 1, § 8, cl. 1-3. "The Community shall be based upon a customs union . . . which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect." EEC Treaty, *supra* note 22, art. 9, 298 U.N.T.S. at 18-19; "Member States shall refrain from introducing between themselves any new customs duties . . . or . . . charges having equivalent effect, and from increasing those which they already apply . . ." *Id.*, art. 12, 298 U.N.T.S. at 19-20; "Customs duties on imports in force between Member States shall be progressively abolished . . ." *Id.*, art. 13, 298 U.N.T.S. at 20; "Quantitative restrictions on imports and all measures having equivalent effect shall [with limited exceptions contained in the Treaty] . . . be prohibited between Member States." *Id.*, art. 30, 298 U.N.T.S. at 26.

115. *Lenaerts*, *supra* note 5, at 15-16 n.23, 17-18, 29-30.

116. SEA, *supra* note 62, O.J. L 169/1, [1987] 2 C.M.L.R. 741; Treaty on European Union, [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247 (1992) (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958)) [hereinafter Maastricht Treaty].

117. *See* U.S. CONST. art. I, § 3, cl. 1. Although it now seems like a long-forgotten aspect of the United States' democratic evolution, the original Constitution provided that members of the least numerous and, arguably, most powerful House of Congress (the Senate), meant to represent the states, or citizens thereof, would be "chosen by the Legislature thereof . . ." *Id.* It was not until the Seventeenth Amendment was passed in 1913 — over 120 years later — that the original Constitution was amended to provide that the "Senators from each State, [should be] elected by the people thereof . . ." U.S. CONST. amend. XVII.

stagnating Luxembourg accords)¹¹⁸ and a cooperation process (with Maastricht, an alleged co-decisional process) between the Parliament and Council.¹¹⁹ But for the British objection, the Luxembourg non-paper might already have inserted the term "federal" into the Community lexicon. But then, what's in a name? As I said before, "federalism" (at least in the United States) was not an event but a process.¹²⁰

Before I continue to the last topic, which is whether and how "creeping federalism" can be slowed or stopped, I want to mention one other interesting — perhaps inevitable — parallel between the United States and the European Community. That is the role played by their high courts during their respective formative periods.

B. *The High Courts' Influence on "Federalism"*¹²¹

One difference in the two Courts' powers is clear. The U.S. Constitution addresses the three interdependent branches of the federal government in apparent order of importance. The Supreme Court is established by the Third Article.¹²² This has led some commentators to suggest that the judiciary is the "least dangerous" branch of the U.S. government.¹²³ The European

118. See Henry G. Schermer, *Comment on Weiler's The Transformation of Europe*, 100 *YALE L.J.* 2525, 2534; see also LASOK AND BRIDGE, *supra* note 69, at 237-40. Also compare the so-called "Missouri Compromise" of 1820, in the U.S., which allowed the entrance into the Federal Union of one "slave" state only if matched by one "free" state.

119. *Id.* at 257; see Maastricht Treaty, *supra* note 116, art. 189(b) & (c), [1992] 1 *C.M.L.R.* at 694-97; Trevor Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 *INT'L AND COMP. L.Q.* 213, 222-26 (1993).

120. See Delors Address, *supra* note 82, at 10, 12-13. Although Commission President Delors professes to be less than "happy with the foreign policy provisions of the [Maastricht] Treaty . . .," he says, in the same speech, that 62% of the aid pledged, including loans, to Central and Eastern Europe under the Phare program, two-thirds of foreign aid to the former Soviet Union, and 31% of world aid to the Mediterranean region is attributable to the Member States of the Community, or to the Community itself. *Id.*

121. DE TOCQUEVILLE, *supra* note 4, at 119-20. "A Federal Government stands in greater need of the support of judicial institutions than any other, because it is naturally weak, and exposed to formidable opposition." *Id.*

122. See U.S. CONST. art. III § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

123. See THE FEDERALIST No. 78, at 428 (Alexander Hamilton) (Goldwin Smith ed., rev. ed., 1901). Hamilton calls the judiciary the "least dangerous" branch of government, at least when compared to the executive and legislative. *Id.*; see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, (2d ed. 1986); THE FEDERALIST No. 39 (James

Community, by contrast, appears to have placed its greatest confidence in the European Court of Justice ("ECJ");¹²⁴ although it too is listed as the last of the Community's major institutions in the Treaty of Rome.¹²⁵

The reason I say this is that the ECJ is given the ultimate and exclusive power (and obligation) to "ensure that in the interpretation and application of [the EC] Treaty the law is observed."¹²⁶ This makes sense, for the ECJ is to be composed of persons of learning and impartiality,¹²⁷ hopefully above the politics that might influence the decisions of the Council, Parliament, and possibly even the Commission.¹²⁸

In at least one sense, the ECJ did not disappoint.¹²⁹ The judges did their best to make certain that the individual Member States' commitment to union was enforced (as against parochial interests), and the States in return (if grudgingly) accepted the Courts' judgments.¹³⁰ This is well, for the Court and Commis-

Madison); cf. DE TOCQUEVILLE, *supra* note 4, at 82: "The political power which the Americans have entrusted to their courts of justice is . . . immense . . ." *Id.* "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . ." *Id.* at 261.

124. EEC Treaty, *supra* note 22, arts. 164-88, 298 U.N.T.S. at 73-78.

125. *Id.*, 298 U.N.T.S. at 73-78.

126. *Id.* art. 164, 298 U.N.T.S. at 73. This is especially important as regards disputes between or among the Community institutions and/or Member States. *See id.* arts. 169, 170, 173, 175 and 177-182, 298 U.N.T.S. at 75-78 (outlining jurisdiction of European Court of Justice). Note also that Member States' national courts "may" (if not courts of last resort) and "shall" (if they are a court without recourse), seek a "preliminary ruling" from the European Court if "a question is raised [before the Member State court or tribunal that] . . . it considers [must be answered in order] . . . to enable it to give judgement . . ." *Id.* art. 177, 298 U.N.T.S. at 76-77.

127. *See id.* art. 167, 298 U.N.T.S. at 74 (regarding qualifications to be a Judge or Advocate-General of Court: "persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries . . ."); *see also* Maastricht Treaty, *supra* note 116, art 168a, [1992] 1 C.M.L.R. at 685-86 (concerning similar, but slightly lower, standards set for judges of European Court of First Instance, which has no Advocate-Generals to assist it).

128. *Commission's 1992 Programme*, *supra* note 75, at 45, "Lobbies are likely to proliferate once the single market is in place. Relations between the Community's institutions and interest groups, useful though they may be, must be more clearly defined." *Id.*

129. *See* Grossfeld, *supra* note 26, at 127. The European Court of Justice is "a silent powerhouse in the [Community's] backyard." *See generally* WEILER, *supra* note 5.

130. *See* van Gend en Loos v. Nederlandse administratie der belastingen, Case 26/62, [1963] E.C.R. 1, 12, [1963] 2 C.M.L.R. 105, 129. "The Conclusion to be drawn . . . is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their rights . . . [comprising] not only [the] Member States but also their nationals." *Id.*; Defrenne v. Sabena, Case 43/75, [1976] E.C.R. 455, [1976]

sion have no police power to enforce Community law in the Member States.¹³¹

One oddity between the United States and the European Community is that the right "to say what the law is," that is the right of ultimate review, was clearly given to the ECJ by the EEC treaty,¹³² whereas the U.S. Supreme Court had to arrogate this power to itself.¹³³ Conversely, the U.S. Constitution expressly gives federal law "supremacy" over conflicting state law,¹³⁴ whereas the ECJ had to announce the principle of the "precedence" (supremacy) of Community law in a decision.¹³⁵ Both approaches probably reflect the political realities of the time; fear of a central government that could override the states (in the United States); and concern about residual nationalism, on the part of the Community's Member States (in Europe). Upon reflection, it seems the outcome could not have been otherwise in either case, if there was to be any true United States or a European Community.

This "unification" is further cemented by the fact that both the EC Member States and the subdivisions of the United States, are committed to the notion that the judgments of their respective courts should be recognized and enforced in sister state's courts. This was accomplished in the European Community by the Member States' uniform assent to the Brussels Convention

2 C.M.L.R. 98. In *Defrenne*, the European Court held not only that some Community law was directly effective in Member States, (without transposition into national law) but that it was also binding upon natural and legal persons and corporations. *Id.* In *Defrenne*, it was equal pay for equal work as between the sexes pursuant to Article 119 of the EEC Treaty. *Id.*

131. Grossfeld, *supra* note 26, at 127.

132. EEC Treaty, *supra* note 22, art. 164, 298 U.N.T.S. at 66; Professor Grossfeld suggests that, with the decision in *van Gend en Loos*, this created a "preemption-like principle of law." Grossfeld, *supra* note 26, at 127-128.

133. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). A decision of the U.S. Supreme Court, not the Constitution, established the Court's right of judicial review. *Id.*

134. See U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." *Id.*

135. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, [1964] 3 C.M.L.R. 425. According to Professor Grossfeld, "[t]he tremendous importance of the supremacy of Community law in terms of . . . economic consequences cannot be overestimated." Grossfeld, *supra* note 26, at 129 (citing *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, Case 213/89, [1990] 1 E.C.R. 2433, [1990] 3 C.M.L.R. 1).

on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (1968), although technically this agreement lies outside the Community treaties.¹³⁶ In the United States, a similar result was sought through the so-called "Full Faith and Credit" clause (Article IV, Section 1) of the U.S. Constitution.¹³⁷ These were significant concessions made by the sovereign states, and profoundly effected the "federalization" of their laws, at least when they are incorporated in judicial opinions. But these concessions were necessary if the states wanted their transactions and interpretations thereof to have life beyond their borders. Such a mutual recognition is the very essence of common market legal regime.

IV. A BRAKE ON FEDERALISM? "NULLIFICATION" IN THE UNITED STATES AND "SUBSIDIARITY" IN EUROPE

To conclude, let us look at the obverse of "federalism"; namely, the legal prerogatives that might remain with the institution's constituent states or their citizens. It is true of most federal unions that their members "federalize" for some purposes, but not all.

In the case of the United States, the Constitution declared that the government was formed for certain purposes, albeit broad ones.¹³⁸ If that was not clear enough in the Constitution's original text, its so-called "reservation amendments" made those

136. See Thieffry, Van Doorn and Lowe, *supra* note 26, 377; Lenaerts, *supra* note 5, at 34. Article 220 of the Treaty of Rome takes a similar, although less certain, approach to the cross-border recognition of certain laws of the Member States by calling for the "mutual recognition" of companies established under the law of any Member State. EEC Treaty, *supra* note 22, art. 22, 298 U.N.T.S. at 24. The Article also contains a passage approximating "equal protection", in each Member State, for persons who are non-nationals, but members of the Community. *Id.* The Article states that "Member States shall . . . enter into negotiations with each other . . . so far as is necessary [to achieve these ends] . . ." *Id.* Finally, Article 220 calls for "the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards [of sister states]" *Id.* Thus, the passage implicitly accepts, in treaty language, that there is mutual duty of respect among the EC Member States for adjudicatory determinations.

137. 28 U.S.C. §§ 1738-1739 (1988). The U.S. approach, in the constitutional article and the code, is far more direct than the EC approach.

138. See U.S. CONST., pmb. (stating some general goals of U.S. government). Other goals of the U.S. Constitution are scattered throughout the its text and some of its Amendments, but the most exact list of federal government "objectives" is found in Article I, Section 8, describing the legislative powers of Congress. *Id.* art. I, § 8.

limits more precise.¹³⁹ The same notion was advanced by the authors of *The Federalist*.¹⁴⁰ Thus, it was contemplated from the outset in both the European Community and the United States that there would be a coexistence of state and central governments.¹⁴¹ However, as the difficulties involved in the ratification of the Maastricht Treaty reveal, people are (and have reason to be) suspicious of a seemingly open-ended delegation of authority to an ill-defined "central" government. In the United States, this spawned questions about a state's prerogative to "nullify" federal legislation that the state felt threatened its well-being, and whether (in extreme cases) the state could secede from the Union. The latter issue was one that helped precipitate the American Civil War.

139. *Id.* amends. IX, X and XI. The Tenth Amendment is the operative one in this context. It provides that: "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." *Id.* amend. X. The Eleventh Amendment amends Article III, Section [2], by providing that a state may not be sued by a citizen of another state in a federal court (a concession of federal authority back to the states). *Id.* amend. XI.

140. See *THE FEDERALIST* No. 45, at 256 (James Madison) (Goldwin Smith ed., rev. ed., 1901). "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, [foreign and interstate] negotiation, and foreign commerce . . ." *Id.* In No. 12, Alexander Hamilton observes: "[O]ne national government would be able, at much less expense, to extend the duties on imports . . . further than would be practicable to the States separately . . .", implying a benefit for all through cooperative action. *Id.* No. 12 at 62 (Alexander Hamilton). Finally, a bizarre passage in No. 39 begins: "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both." *Id.* No. 38 at 211 (James Madison).

All these positions were stated, however, before a broad interpretation was given to the "necessary and proper" clause. U.S. CONST., art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

The Community Treaties also give its institutions the authority to act in such a way as to carry into force the goals of the Communities. See EEC Treaty, *supra* note 22, art. 4, 298 U.N.T.S. at 16 ("The tasks entrusted to the Community shall be carried out by the . . . institutions"); *Id.* art. 5, 298 U.N.T.S. at 17 ("Member states shall take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this Treaty"); *Id.* art. 235, 298 U.N.T.S. at 91 ("If action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council ('legislature') shall [by a process described] . . . take the appropriate measures.") However, the European Court of Justice — unlike the U.S. Supreme Court — has not been generous in interpreting this clause. See *Simmenthal v. Commission*, Case 92/78, [1979] E.C.R. 777, [1980] 1 C.M.L.R. 25; *Meroni Co. v. High Authority of the ECSC*, Case 9/56, [1957-58] E.C.R. 133; *Cf. Commission v. Council*, Case 22/70, [1971] E.C.R. 263, [1971] C.M.L.R. 335.

141. Grossfeld, *supra* note 26, at 143; Thieffry, Van Doorn and Lowe, *supra* note 26, at 359.

A. *Subsidiarity in the European Community*

In Europe, similar reservations about the extent of Member States' delegation of authority to the Community resulted in persistent — if largely unanswered — questions about “subsidiarity.” This term, and the principle it involves, was finally incorporated into the “constitutional law” of the Community with the Maastricht Treaty.¹⁴² Subsequently, attempts to give it definition were undertaken at meetings in Birmingham and Edinburgh in late 1992. The “understanding” agreed to at the Edinburgh summit, kept reluctant constituencies in line, and eventually led to the ratification of Maastricht's adjusted goals by all Twelve States.

It seems that “nullification” and “subsidiarity,” albeit different, clearly have a common parent. In extreme circumstances, both would seem to result in the withdrawal of the offended state from the union (or secession). The attempt by the confederation of Southern states to secede was punished in the American Civil War; but it seems possible, although unlikely, under the Community Treaties.

This division of prerogative between state and federal organs of government played a substantial role in U.S. history, and promises to do so in Europe as well. But that does not mean that the eventual resolution will be different. In the United States, the notion manifested itself in the so-called “nullification” debates in the Senate. In Europe, it is exemplified by the principle of subsidiarity.

Both share a common thesis about the relationship of the constituent governments to the central government. The essential difference is that the U.S. central government was allegedly formed by the people, and given the prerogative to do whatever was “necessary and proper” to secure its objectives. The Community institutions were, by contrast, given more limited authority by the constituent Member States,¹⁴³ and they must vote again to expand it, as they have done with virtually every new treaty. The reason must be that the Member States have come to realize that there is no “bright line” between Community policy and national policy. Furthermore, they are learning daily that action taken at the Community (versus the national) level is often more

142. Maastricht Treaty, *supra* note 116, art. 3b, [1992] 1 C.M.L.R. at 590.

143. See Sbragia, *supra* note 3, at 257. Professor Sbragia compares the “territorial politics” of the United States and European Community. *Id.*

efficient, and has a greater likelihood of success in international economic circles.

Personally, I do not regard the principle of "subsidiarity" as originating with the Maastricht agreement.¹⁴⁴ After all, the Community's Member States, in creating a supranational organization, did not transfer all of their sovereign powers to it. Rather, they gave it only the authority to act on their collective behalf to achieve a narrow set of goals — chiefly economic in nature.¹⁴⁵ Hence, the Treaty of Rome transferred some power to Brussels, but reserved much to the Member States. It is no forced analysis to suggest that this was nearly identical to the notion (expressed in *The Federalist*) that the U.S. central government was one of "limited" and "enumerated" powers.

Member State concern about subsidiarity is likewise evident in the Single European Act ("SEA"). The SEA is more focused in its goals than the EEC Treaty. Article 130r clearly states a subsidiarity limitation on "Community . . . action relating to the environment . . ." ¹⁴⁶ Finally, in response to growing political pressure in some Member States — notably the United Kingdom — the principle was made express, ironically, in the Maastricht Treaty.

144. Maastricht Treaty, *supra* note 116, art. 3b, [1992] 1 C.M.L.R. at 590. Article 3b provides:

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 in so far 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.

Id. [1992] 1 C.M.L.R. at 590.

145. See EEC Treaty, *supra* note 22, art. 2, 298 U.N.T.S. at 15.

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Id.

146. SEA, *supra* note 62, art. 130r, O.J. L 169/1, at 11-12, [1987] 2 C.M.L.R. at 754-55. The Article states, in relevant part: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."

Id.

If the debate over this principle of reserved rights was not quite as clear in America, the concept was just as certainly a part of the establishment of the United States. I suspect it infuses any federation or confederation of states or governments. It was surely evident in what we call our "early federal" period.

That was a time during which this country was sorting out what it really meant to do when setting up a "federal" government. What were the somewhat-separate, but coexistent, powers granted to or retained by citizens, the states, and the central government? This process of definition and redefinition was not an easy or painless task. Establishing central institutions to advance certain collective goals of its members is conceptually easy, but the difficulty is surely in the details.

The European Community is also in a state of flux some thirty years after its formation. What responsibility for decision-making was retained by Member States, what delegated to Community institutions? This tension is inherent in a situation in which Member States are asked to allow a supranational organization to aggrandize its power, potentially at their expense.

The subsidiarity concept is easily defined, although potentially difficult to apply. Simply put, it requires that regulatory decisions be taken at the lowest effective level. Goals that cannot be achieved by Member States, acting on their own, should be handled by the Community. The concept was particularly promoted by the United Kingdom and Denmark, nations that have been openly critical of European unification in general.¹⁴⁷ Thus, the "subsidiarity" principle would preserve the decision-making integrity of the Member States, with regard to their own local affairs, and prevent the Community from encroaching on areas more properly the prerogative of the constituent states.

There should be little problem with this division of labor when the authority to regulate has been delegated exclusively to the Community (for example, cross-border restrictions on trade); or clearly remains within the sovereign prerogatives of the states, albeit narrowly construed.¹⁴⁸ But in areas in which

147. *EUROPEAN UNITY; Passport Deadline Highlights Political Differences*, DALL. MORN. NEWS, Nov. 26, 1992, at 30A.

148. Maastricht Treaty, *supra* note 116, art. 3b, [1992] 1 C.M.L.R. at 590. Article 3b expressly excepts from the subsidiarity principle "areas which . . . fall within the [Community's] exclusive competence . . ." *Id.* [1992] 1 C.M.L.R. at 590. However, Member States are given the specific right to derogate from Community "law" if "justified on

there appears to be a shared authority to regulate, the application of the principle of subsidiarity becomes diffuse and hotly debated.

It is also in these situations that the choice made — whatever it maybe — is essentially political; there being no clear legal guidelines (at least not in the treaty) to inform the decisionmaker, or whomever reviews the decision, regarding its legality.¹⁴⁹ Thus, although the British Prime Minister, John Major, presiding as Council President during the last six-months preceding December 31, 1992, wrangled some concessions from Brussels at the intergovernmental conference at Birmingham and summit at Edinburgh, what after all did he win?¹⁵⁰ The subsidiarity “agreement” merely provided that the Community “would only act when its member states agreed that it should do so.”¹⁵¹ This decision is to be made, initially, by the Council, which, in effect, has made the decision all along.

There are some vague standards by which to evaluate the Council’s judgment. “[T]he Community shall take action . . . only if . . . the proposed action cannot be . . . achieved by the

grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures . . . or the protection of industrial and commercial property.” EEC Treaty, *supra* note 22, art. 36, 298 U.N.T.S. at 29; *see, e.g.*, Regina v. Thompson, Case 7/78, [1978] E.C.R. 2247, [1979] 1 C.M.L.R. 47; *cf.* Luisi and Carbone v. Ministero del Tesoro, Joined Cases 286/82 and 26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 57. Similar, more limited, derogations are addressed in EEC Articles 56, 73 and 226, in situations where the issue is of such importance to the state, or so immediate, or threatens such serious disruption, that Community interests must give way (at least temporarily) to an individual Member State’s interest. EEC Treaty, *supra* note 22, arts. 56, 73, and 226, 298 U.N.T.S. at 39, 44, 89.

149. Hartley, *supra* note 119, 214-18.

150. Andrew Hill, *The Edinburgh Summit: The S Word: Teach Yourself Summit-Speak*, FIN. TIMES, Dec. 10, 1992, at 3.

151. John Roberts, *Europe: Subsidiarity Issue Settled at Last, Or Is It?*, INTER PRESS SERVICE, Dec. 12, 1992, available in LEXIS, Nexis Library, CURRNT File; *see* Maastricht Treaty, *supra* note 116, art 3b, [1992] 1 C.M.L.R. at 590 (defining subsidiarity); *see also*, Simon Alterman, *Summit Eases EC Crisis, but Major’s Agony Centre Stage*, THE REUTER EUR. COMM’Y REP., Oct. 17, 1992, available in LEXIS, Nexis Library, CURRNT File; Michael White, *UK: Major - Little Joy for Wary Tory Rightwingers in Declaration*, REUTER TEXTLINE GUARDIAN, Oct. 17, 1992, available in LEXIS, Nexis Library, WORLD File.

See Sir Leon Brittan, *EC: Europe Documents; No 1786 - Subsidiarity in the Constitution of the European Community*, REUTER TEXTLINE AGENCE EUROPE, June 18, 1992, available in LEXIS, Nexis Library, WORLD File. Speaking at the European University Institute in Florence, Italy on November 6, 1992, Vice-President of the European Commission, Sir Leon Brittan, described the “proposed” Article 3b of the Maastricht Treaty in virtually the identical terms that were contained in the original draft, signed in Maastricht in February, 1992. *Id.*

Member States [acting individually] . . . by reason of [its] scale or effects”¹⁵² This section also states that “[t]he Community shall act within the limits of the powers conferred upon it” But there is nothing “new” about the latter, and the former only suggests that the Community ought not to exercise its shared authority if there is no need for a common policy. This seems implicit — if not explicit — in the Treaty of Rome. Moreover, an Advocate General of the ECJ expressed his belief that the Treaty provided enough guidance to enable the Court to apply the subsidiarity principle in cases that will inevitably come before it.¹⁵³ If the standard proves too vague, the issue will be non-justiciable, of course, and the Member States’ Council representatives will have to give the subsidiarity principle a more comprehensive legal definition. I doubt that this will happen. First, those representatives have probably given the best definition possible at this point in time, and the ECJ has successfully helped the Community to bridge its differences many times in the past.

So what was gained by all of the hesitation and hand wringing seems to be process, and not necessarily substance; simply an increased “sensitivity” to Member States’ economic and political interests.¹⁵⁴ Perhaps it will slow the pace of European integration, which may be all the Euro-sceptics expected anyway.¹⁵⁵

Hence, whether overt recognition of the subsidiarity principle ultimately acts as a “brake” on the pace of Community “federalization” (as the wording of Maastricht Article 3b implies,¹⁵⁶ and its proponents intend), or whether the perceived need for Community action will turn it into an “accelerator” instead (which seems to be an entirely permissible interpretation of the

152. Maastricht Treaty, *supra* note 116, art. 3b, [1992] 1 C.M.L.R. at 590.

153. Claus Gulmann, Advocate-General of the Court of Justice of the European Communities, in remarks to the Trier Academy of European Law’s Conference, *The Future of Europe — Centralized and Decentralized Approaches*, October 7, 1993, Trier, Germany (Trier Academy, forthcoming Spring 1994) (notes on file with author).

154. Hartley, *supra* note 119, at 216-17.

155. See Commission’s 1992 Programme, *supra* note 75, at 39. Although I have not made a careful study of it, the term “subsidiarity” is not one that occurs very frequently, if at all, in the speeches of Jacques Delors or the Commission’s Programme presentations to the European Parliament from the latter 1980’s through 1991. However, these presentations in February 1992, are replete with mention of the term (e.g., “In accordance with the subsidiarity principle, strongly endorsed by the Heads of State or Government and by the Commission itself”). *Id.*

156. Maastricht Treaty, *supra* note 116, art. 3b, [1992] 1 C.M.L.R. at 590.

article), can only be imagined. In the short term, I think it will probably act as a brake. In the longer term, however, it could just as easily act as an accelerator, for the reasons discussed below.

B. *Nullification in the United States*

A similar debate took place in the United States. It began before the ratification of the Constitution and lasted at least until the end of the American Civil War, although in minor ways it continues today.¹⁵⁷ The early debate (concerning the principles of "nullification" and "secession"), often focused on the federal role, if any, in abolishing slavery; the admission to the Union of so-called "free" and "slave" states in equal numbers (in order to maintain the voting balance in the Senate); and the imposition of federal taxes, the revenue from which might be used to impose federal law in the slave states or even to subdue them.¹⁵⁸ Euro-sceptics can find some parallels, but given the outcome, not much solace, in the American experience.

The "nullification" position of South Carolina (and certain other southern states), was advocated by Senator Hayne.¹⁵⁹ In his view,

the powers of the federal government . . . resulting from the compact to which the States are parties (the Constitution) [is] limited by the plain sense and intention of the instrument . . . [and is] no farther valid than . . . authorized by the grants enumerated in that compact [I]n case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto have the right . . . to interpose [in order to maintain their] authorities, rights, and liberties¹⁶⁰

This sounds familiar, if a bit extreme, to students of the "subsidiarity" principle.

Senator Daniel Webster's (MA) rejoinder was sometimes responsive, but not always so. In Webster's view,

The great question is, Whose prerogative is it to decide the

157. *See, e.g.*, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990); *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791 (1992).

158. MAURICE G. BAXTER, *DANIEL WEBSTER & THE SUPREME COURT* 239-40 (1966).

159. EDWIN P. WHIPPLE, *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 256 (Gryphon 1989) (1894).

160. *Id.*

constitutionality or unconstitutionality of the laws? . . . I do not admit, that, under the Constitution and in conformity with it, there is any mode in which a State government, as a member of the Union, can interfere and stop the progress of the general government, by force of [the State's] own laws, under any circumstances whatever. This leads us to inquire into the origin of [the federal] government and the source of its power. Whose agent is it? . . . The people of the United States have declared that [the] Constitution shall be the supreme law. We must either admit [this] proposition, or dispute their authority. The States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law . . . [T]he general government and the State governments derive their authority from the same source [the people].¹⁶¹

It is fairly odd that this debate should have occurred at all in 1830, eleven years after a U.S. Supreme Court opinion appeared to have settled the issue in favor of the people.¹⁶²

Even if the people (and not the states) formed the U.S. Constitution and union, however, this is not true of the European Community. In the Community, the individual Member States, and not their peoples, are the "high contracting parties."¹⁶³ Nonetheless, in both situations it is evident that, if the legislative authority (or the requisite majority of it) could muster the will, then an Amendment could be adopted, or a Treaty signed and ratified, or legislation passed, that would allow more authority to pass to the central government; or possibly flow back to the people and/or the states.¹⁶⁴ In general, the latter did not happen in the United States, although the exact line between state and federal prerogative is constantly being redrawn in our courts and legislatures. Neither has this happened for the most part in the European Community — despite the conciliatory language in various "subsidiarity" pronouncements — except at the very margins of authority.¹⁶⁵

161. *Id.* at 256-57.

162. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that federal government may have implied authority to act where "necessary and proper" to achieve goals assigned it in the U.S. Constitution). BAXTER, *supra* note 158, at 240; THE FEDERALIST No. 31 (Alexander Hamilton).

163. Compare U.S. CONST., pmbl. with EEC Treaty, *supra* note 22, pmbl., 298 U.N.T.S. at 14.

164. See *supra* notes 138-41 and accompanying text (discussing recognition that U.S. government was formed for certain broad, but limited purposes).

165. See Written Question O.J. C/261 (1991) (concerning zoo directive). The

Ambiguity about these matters cannot persist forever. According to Senator Webster, "[o]ne of two things is true; either the laws of the Union are beyond the discretion and . . . control of the States; or else we have no constitution of general government, and are thrust back again to the days of the [Articles of] Confederation."¹⁶⁶ Senator Webster further stated, "[t]he people had . . . quite enough of that kind of Government Under that system, the legal action . . . belonged exclusively to the States. [Congress'] . . . acts were not of binding force, till the States had adopted and sanctioned them."¹⁶⁷

To correct this lack of inertia, the Constitution took two definitive steps, Webster said. First, it declared "the Constitution, and the laws of the United States . . . [to] be the Supreme law of the land"¹⁶⁸ Second, it declared "that the [federal] judicial power shall extend to all cases arising under the Constitution and laws of the United States."¹⁶⁹ These principles, he said, "cover the whole ground. They are . . . the keystone of the arch!"¹⁷⁰ The situation is really not so different in the Community.

Thus, as early as 1830, Senator Webster concluded that the federal government "is as popular, just as truly emanating from the people, as the State governments. It is created for one purpose; the State governments for another. It has its own powers; they have theirs."¹⁷¹ The principles emphasized by Senator Webster in this statement should sound familiar to students of the subsidiarity.

Commission's proposed zoo directive, was probably an overreaching attempt to uniformize Community law. It has since been reconsidered. See *EP Debates Maastricht Provisions*, THE REUTER EUR. COMM'Y REP., Sept. 16, 1993.

166. See WHIPPLE, *supra* note 159, at 263.

167. *Id.* at 265.

168. *Id.* at 265 (referencing U.S. CONST., art. VI § 2); cf. *van Gend & Loos*, [1963] E.C.R. 1, 2, [1963] C.M.L.R. 105 ("the European Economic Community constitutes a new legal order . . . for the benefit of which the [Member] states have limited their sovereign rights"); *Costa v. ENEL*, [1964] E.C.R. 585, 586, [1964] C.M.L.R. 425 ("[t]he law stemming from the [EEC] Treaty . . . could not . . . be overridden by domestic legal provisions (member state law), however framed").

169. WHIPPLE, *supra* note 159, at 265 (referring to U.S. CONST., art III § 2[1]); cf. EEC Treaty, *supra* note 22, art. 164, 298 U.N.T.S. at 73 ("[t]he [European] Court of Justice [apparently has the exclusive power (when read together with Article 177) to] ensure that in the interpretation and application of this Treaty the law is observed.").

170. WHIPPLE, *supra* note 159, at 265.

171. *Id.* at 264.

Webster claimed that his interpretation concerning the allocation to the central government of "strictly limited powers; of enumerated, specified, and particularized powers" had to be the proper one. He asked, "could anything . . . [be] more preposterous, than to make a government for the whole Union, and yet leave its powers subject, not to one interpretation, but to thirteen or twenty-four interpretations?" Webster called this not a Constitution, or government, but a "[topic] for everlasting controversy."¹⁷²

In the nullification debates a wide range of views was expressed concerning the boundary between state and federal powers. Senator Calhoun (KY) went so far as to espouse a principle of "concurrent (state and federal) majority,"¹⁷³ which distantly resembles the Luxembourg Accords,¹⁷⁴ or the treaty concessions granted to Denmark and the United Kingdom at Edinburgh.¹⁷⁵ Senator Webster rejoined that, since the States did not form the union, they did not possess the authority to nullify federal acts or to secede. If the states sought to do so, it would be revolution (robbing the central government of its authority, granted to it by the people), and the states would have to be forcibly restrained.¹⁷⁶

There is some historical support for both Webster's and Hayne's points of view. At the time of the debate, the American states were used to doing a considerable amount of the work of government, when compared to the present. Moreover, the Constitution's Tenth Amendment reserved "undelegated powers" to the States (or people), and Article IV, section 2 spoke in terms of "Citizens of each State." But, in the end, Webster's posi-

172. *Id.* at 266. There were 24 States in the Union at the time of the speech. *Cf. Costa v. ENEL*, [1964] E.C.R. 585, 594, [1964] C.M.L.R. 425, 455 ("The executive force of the Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty . . .").

173. WHIPPLE, *supra* note 159, at 266.

174. Luxembourg Accords, 3 E.C. BULL., at 8 (1966).

175. Alan Riding, *Europeans Try to Revive a Faded Dream of Unity*, N.Y. TIMES, June 20, 1993, at 8. Denmark was allowed to opt-out of the provisions for a single currency, European citizenship and common defense policy. Marc Fisher, *Now Europe Faces Toughest Test: Unifying Amid Hard Times*, WASH. POST, May 20, 1993, at A26. The UK was granted the option of opting-out of the single currency provision as well. Riding, *supra*, at 8.

176. See MAURICE G. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 209-13 (1984) (discussing nullification).

tion triumphed, for it was the only practical approach.¹⁷⁷ It is worth noting, however, that Calhoun gained some "concrete concessions" on the tariff bill that precipitated the debate.¹⁷⁸ Perhaps the Euro-sceptics have something similar in mind.

Ultimately, the Fourteenth Amendment to the U.S. Constitution clarified the relationship of persons to both the state and federal governments, and gave the people substantial protections and entitlements vis à vis both governments.¹⁷⁹ But this was not until 1868, nearly eighty years after the Constitution was drafted. Today the U.S. Constitution and the state constitutions are important sources of rights and guarantees for Americans, the latter being subordinate to the former.

Hence, there are important similarities between the United States and the European Communities, but they should not be drawn too tightly. As previously stated, the Community was formed by the constituent Member States and not by their citizens (although this distinction may blur somewhat if the European Parliament becomes more democratic and is given a larger — perhaps decisive — role in Community legislation). President Delors has suggested that the Community will not be complete until there is a "European citizens' charter."¹⁸⁰ His prescription suggests "rights" that come more or less directly from the Community, rather than from the constituent Member States; rights that are based on EC "citizenship," not national citizenship.

However, the Community treaties do confer important "rights" on Community "citizens."¹⁸¹ But most Europeans do not regard these "Community" guarantees quite as seriously as their

177. *Id.* at 214-17.

178. *Id.* at 218-20.

179. See U.S. CONST., amend. XIV § 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." *Id.*

180. Commission's 1992 Programme, *supra* note 75, at 42. "The set of proposals forming the action programme to implement the Community Charter of the Fundamental Social Rights of Workers is almost complete. Rapid adoption will make it possible to lay the foundations for the social dimension of the single market . . ." *Id.* at 42. "In the social field, the Maastricht agreement opens up the way to an enhancement of the Community's social dimension involving consolidation of the foundation formed by the Charter of the Fundamental Social Rights of Workers . . ." *Id.* at 30.

181. See, e.g., EEC Treaty, *supra* note 22, art. 48, 298 U.N.T.S. at 36 (guaranteeing free movement of workers).

national guarantees, which seem closer at hand and easier to influence politically.

A similar attitude once prevailed in the United States, but dissipated over time. The European attitude is already softening (at least during prosperous times), and the process may be advanced by formal agreements such as one contained in the Maastricht Treaty. That section provides that "the protection of the rights and interests of the nationals of [EC] Member States" will be strengthened and protected "through the introduction of [the concept of] . . . citizenship of the Union."¹⁸²

Second, while it seems evident that a Member State can leave the Community (Greenland did so, amicably, in 1979),¹⁸³ it does not seem likely that any additional states will do so. Indeed, present members are likely to be placed under enormous political (and litigation) pressure, to remain within the Community and conform to its rules.¹⁸⁴ Concessions, such as those sought and obtained by Denmark and the United Kingdom in order to expedite ratification of the Maastricht agreement, may be the short-term price the Community has to pay to keep its "ever closer union" progressing on track.¹⁸⁵ Commission President Delors suggested that these concessions were made because of

182. See Maastricht Treaty, *supra* note 116, art. B, [1992] 1 C.M.L.R. at 727 (setting out third "objective" of European Union); see *id.* art. G, [1992] 1 C.M.L.R. at 729 (amending Article 8 of EEC Treaty). The amended version of Article B states:

1. Citizenship of the Union is hereby established.
Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Maastricht Treaty, *supra* note 116, art. 8, [1992] 1 C.M.L.R. at 593.

183. Werner F. Ebke, *Enforcement Techniques within the European Communities: Flying Close to the Sun with Waxen Wings*, 50 J. AIR L. & COM. 685, 686 n.2 (1985).

184. See EEC Treaty, *supra* note 22, art. 5, 298 U.N.T.S. at 17. "Member States shall take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." *Id.* Article 169 provides, in relevant part: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it . . . may bring the matter before the [European] Court of Justice." (after certain procedures are followed). *Id.* art. 169, 298 U.N.T.S. at 75. Article 170 provides a similar course of action for fellow Member States. *Id.* art. 170, 298 U.N.T.S. at 75. There is at least "moral" force here, if the precise remedy is left intentionally vague. See *id.* arts. 187, 192, 298 U.N.T.S. at 78-79.

185. See Commission's 1993-94 programme, *supra* note 96, at 16. According to the Commission's work programme for 1993-94, the disagreements surrounding the ratification of the Maastricht Treaty resulted in the Community's image being "tarnished in 1992." *Id.*

these two countries' long service to the Community. He said that the Community would not make similar concessions to new members, over whom the Community will enjoy greater initial leverage.¹⁸⁶ Indeed, it would seem progressively more difficult for any individual Member State to get concessions if the Community becomes more unified and increases in size. At some point, such a "variable-geometry Europe,"¹⁸⁷ if it ever happens, will be no "Community" at all.

Finally, it is clear that, whereas the nullification and secession doctrines were to be exercised by individual States acting unilaterally (according to their perceived self-interest), a judgment about subsidiarity is, at present, a collective one made by the Community itself. While concern about the subsidiarity principle will undoubtedly influence the Commission's legislative initiative,¹⁸⁸ the limits on Community or Member State prerogative are chiefly set by the Council, together with the Commission and Parliament. Thus, they are beyond the authority of a single Member State to declare, except where unanimous action is required, or secession is the route pursued. The very institutions charged with making certain the Community achieves its collective goals, are charged with making the final "call" with regard to what lies within the Community authority, and what falls to the Member States. It is a little like the "necessary and proper" prerogative of Congress,¹⁸⁹ if approved by the President and upheld by the courts. Of course, an individual Member State may claim a derogation from Community legislation, rather than seeking a concession from other Member States or seceding, but derogations are not easy to obtain and are narrowly construed by the European Court.¹⁹⁰

186. David Gardner, *Difficult Recipe for a Bigger Cake: The First Round of EC Enlargement Talks Was Successful, but the Hard Bargaining is Just Beginning*, *FIN. TIMES*, June 11, 1993, at 13.

187. Delors Address, *supra* note 82, at 10.

188. Commission's 1992 Programme, *supra* note 75, at 39. "In accordance with the subsidiarity principle, strongly endorsed by the . . . Commission itself at Maastricht, the Commission will continue to resist over-legislation and intervention in areas which can be properly dealt with at [the] national, regional or local level . . ." *Id.*; see Conclusions of the Presidency, *supra* note 90, Annex 2 to Part A, at 4-5 (concerning withdrawal of Commission proposals regarding "conditions in which animals are kept in zoos" and "labeling of shoes").

189. U.S. CONST. art. I, § 8, cl. 18.

190. See, e.g. EEC Treaty, *supra* note 22, art. 36, 298 U.N.T.S. at 29. Article 36 contains the terms of derogation from Community "legislation" covering quantitative

It is quite evident to the Member States, I suspect, that the ultimate consequence of a "single" market in, for example, utilities or transport or telecommunications (put aside military procurement), is the standardization of demand behind the most cost-effective products or services. In the short term, this means an inevitable loss of businesses and jobs in some Member States, as the market gravitates toward the best supplier or suppliers. On the other hand, this shake-out is likely to produce better market competitors, and greater cost-efficiency, in the longer term. The largest single concern is whether the States can adjust to the standardization (and possible loss) of what are frequently considered indispensable national services — telecommunications, power and transport — to another Member-State supplier. It will not be an easy adjustment, but no doubt the American colonies once had similar concerns, before they overcame them in the interest of greater security, including a diverse national market. Of course, this assumes that European companies can capitalize on that market, and not lose significant portions of it to U.S. and Japanese competitors.¹⁹¹ However, a nationalistic approach to the management of the European market will do little to forestall this.

C. *A Two-Edged Sword*

Hence, it should be obvious that "subsidiarity" is a two-edged sword. It can cut against Community action, but can also cut against state prerogatives. There is no "bright line" of demarcation between the two. It is as true of Community law as it is of U.S. "federal" law that one area of regulatory concern merges almost imperceptively into another.¹⁹² How, for example, would one describe the scope of "Commerce . . . among the several States," that Congress has a right to "regulate?"¹⁹³

restrictions on trade between Member States. *Id.*; see *Yvonne van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1; *Roland Rutili v. Minister of the Interior*, Case 36/75, [1975] E.C.R. 1219, [1976] 1 C.M.L.R. 140.

191. *U.S. in Surprise [Telecommunications] Deal with Germany*, BOSTON GLOBE, June 11, 1993, at 60.

192. See Thieffry, Van Doorn and Lowe, *supra* note 26, at 374. "The area of social law [not far advanced in the Community] . . . has important implications for business [the Community's main thrust] . . ." *Id.*

193. U.S. CONST. art. I, § 8, cl. 3.

Historically, the "commerce power"¹⁹⁴ has been a very fluid one, which grew and shrank (mostly grew) with the felt needs of the times. So too in the European Community, where the free movement of workers and the right of establishment gradually merge into the right to equal treatment within a workforce, then into unemployment entitlements, and finally welfare rights.¹⁹⁵ The line that delimits the Community's authority as policy-maker and regulator may be drawn at different points with regard to different policy areas (for example, cross-border transit of commercial goods versus social policy), or it may be drawn at different places within the same regime of regulation (as for example, Community authority to set pollution standards for bathing beaches, but not to select the beaches to which the standard is applied).¹⁹⁶ When compared to the United States, the social program of the Community is very much in its infancy.¹⁹⁷ But the program in the United States is largely a product of the twentieth century.

It is clear from the wording of Article 189(c) of the Maastricht Treaty¹⁹⁸ that the European Council (or, in most cases, a qualified majority of it) generally sets the Community's legislative limits, based on material put before it by the Commission,

194. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (interpreting, expansively, Congress' right to regulate commerce).

195. *Burton v. British Railways Board*, Case. 19/81, [1982] E.C.R. 555, [1982] 2 C.M.L.R. 136; *Francovich & Bonafaci v. Italy*, Cases 6/90 & 9/90, [1991] E.C.R. I-5357, [1991] 2 C.M.L.R. 66.

196. Europe Information Service, *Subsidiarity: Commission Report Due Out Soon*, in *EUR. ENV'T*, July 28, 1992, at § 392.

197. Delors Address, *supra* note 82, at 9.

[W]orkers have the impression that 'social Europe' is a mirage. I sympathize with them, as redundancies multiply and the Social Charter remains a pious aspiration. But the Commission is not discouraged For the Commission . . . the issue is not an ideological one. The social dimension is . . . an integral part of the European venture [T]here will be a credibility problem until the Council stops prevaricating and gives concrete expression to the spirit of the Social Charter.

Id.

But see Hartley, *supra* note 119, at 218-20 (noting that EEC Treaty and Community legislation only grant right of free movement to specific groups of people, impeding peoples self-identification as citizens of the EEC); Hilton, *supra* note 102, at 24 (noting that EEC has not created a body of rights to serve as a "foundation of loyalty to, and identification with, the EC by its citizens.").

198. Maastricht Treaty, *supra* note 116, art. 189(c), [1992] 1 C.M.L.R. at 696 (amending Community "procedure" governing "the adoption of a [Community] act" under the Treaty).

after obtaining the opinion of the European Parliament. The Commission and/or Parliament may take a conservative posture with regard to the subsidiarity principle, but that seems unlikely. They are, with the Court, the most "Europeanized" of the Community institutions. Thus, the "subsidiarity" judgment is ultimately left to a qualified majority of the Council, under substantial pressure from the Commission and Parliament, in a new "co-decisional" process,¹⁹⁹ to support Community legislation, whenever the legislative prerogative has proceeded this far.

The Court of Justice is empowered to review the Council's decision, based on a "lack of competence" or "infringement" of the Treaty or Community law.²⁰⁰ However, this is not materially different from the system that existed before the Birmingham agreement and Edinburgh summit. The ECJ has always held the Commission and Council to a fairly-high standard with regard to treaty competencies.²⁰¹ Thus, the principle of "subsidiarity" has always implied a limit on Community power; just as the "necessary and proper" clause of the U.S. Constitution constitutes a flexible restraint on legislative prerogative.²⁰² In the same way, Article 235 of the Treaty of Rome implies a reservoir of "necessary" power "to attain . . . the objectives of the Community"²⁰³ All that is needed is the cooperation of the institutions, the same as in the United States.²⁰⁴

199. See *id.* art. 189(c), (d), [1992] 1 C.M.L.R. at 696; see also Hartley, *supra* note 119, at 221-26 (explaining differences between older "cooperation" procedure, and new "co-decision" processes); Delors Address, *supra* note 82, at 11 (recognizing the importance of this institutional "breakthrough" and its likely impact on democratization of the Community); Commission's 1993-94 programme, *supra* note 96, at 22-23.

200. See generally EEC Treaty, *supra* note 22, art. 173, 298 U.N.T.S. at 75-76 (concerning bases for European Court review of Commission or Council action based on Member State action).

201. See generally *Meroni v. ECSC High Authority*, Case 9/56, [1957-58] E.C.R. 133; *Cf. Commission v. Council*, Case 45/86, [1987] E.C.R. 1493, [1988] 2 C.M.L.R. 131 (regarding generalized tariff preferences); *cf. Commission v. Council*, Case 22/70, [1971] E.C.R. 263, [1971] C.M.L.R. 335 (regarding European Road Transport Agreement).

202. U.S. CONST. art. I, § 8, cl. 18. That passage of the Constitution gives Congress "Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [conferred on Congress by the Section], and all other Powers vested by this Constitution in the Government of the United States" *Id.*

Does this passage suggest to you where the "line be drawn" between the prerogatives of the central government and those "reserved" to the States of people? See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

203. EEC Treaty, *supra* note 22, art. 235, 298 U.N.T.S. at 91.

204. See Hartley, *supra* note 119, 214-18 (discussing principle of subsidiarity in EC law).

At bottom, then, the subsidiarity principle is as much a political doctrine as it is a legal or legislative one. In the past, the ECJ has insisted that the Community demonstrate a precise competency in order to act. But it could, in the future, conclude that action is best taken at the Community level, according to the principle of subsidiarity, whenever the Commission, Parliament, and Council so agree. That is to say, except in obvious cases, the judgment of the Council on this largely-political issue, is as good as the judgment of the Court. Unless "subsidiarity" advocates achieve critical mass in Council deliberations, the remaining representatives are free to favor Community action. The ECJ is not likely to object frequently to what will often be a largely-standardless choice.

The Maastricht Treaty, and current political and economic events in Europe, have focused a spotlight on the principle of subsidiarity. In its glare, some concessions have been wrung from the Commission in particular. In the near term at least, it is likely to be quite circumspect about the proposals it puts before the Council, and to be well-prepared to defend its suggestion that the Community act collectively. This might throttle some marginal regulations or directives, and delay others. But, at the end of the day, it amounts chiefly to process, not substance.

If, in the longer term, an economic upturn in Europe and the transparency of the subsidiarity process convinces Community citizens that they have more to hope for — and less to fear — from Brussels than they think, then subsidiarity will have cut in just the opposite direction that its advocates hoped.

CONCLUSION: IT TAKES TIME

My point here is that cooperation in the world economic environment, with the goal of greater competitive success, leads economic units toward a greater degree of union. The persistent myth that America's federal "union" sprang full blown from the Constitution, like Athena from the head of Zeus, is not accurate.²⁰⁵ It took a Civil War, an industrial revolution, a severe de-

205. See generally MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at 125-28, 194-233 (reviewing economic and trading relationships of American colonies with European nations and among themselves).

pression, two World Wars, and much more for true "federalism" to creep thoroughly into the fabric of American Constitutional government.

By that yardstick, the European Community is very young indeed. Moreover, the "federalizing" process in America is still not complete. It goes on daily in small ways. As it flows, so can it ebb, but the general tendency is toward the former. As the economy grows, a closer union seems inevitable and inexorable.

The sheer inefficiency of having to produce a near-uniform "Community" law by means of directives that, in most cases, must be transposed into national law, is daunting when compared to the effective fiat of federal law in the United States. There is the delay involved in the transposition of Community directives; the need for the Commission to track the progress thereof; the possible need to prod — even sue — Member States to insure that the process is complete, accurate, and timely; and private suits may follow thereafter. Meanwhile, there exists political, economic, and legal "wobble room" that the States may favor, but the Community can ill afford.

This approach suggests that Member States have not yet reached a "comfort level" that will allow for a greater degree of direct regulation from Brussels (essentially by returning to regulations as a legislative device).²⁰⁶ That time, however, must eventually come. And there is no doubt whatever that the Member States have already accepted the "principle of federal law, uniformly imposed, for that is the impact of any Treaty passage or directive that has "direct effect,"²⁰⁷ and of the decisions of the ECJ. So we are not debating here the principle of a loss of sovereignty, but only about the degree thereof. As was the case in the United States, it takes a little time to get used to it.

As one newspaper reported during the Maastricht Treaty negotiations: "The [Intergovernmental Conference] on political union represents a great opportunity not so much to turn the EC into a federation as to give the present [one] a satisfactory constitution."²⁰⁸ Another article commented on the British insis-

206. See Sbragia, *supra* note 3, at 257 (discussing future of "federalism" in EEC).

207. See *van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105 (stating that Treaty provisions that are clear and unconditional have direct effect and create "individual rights which national courts must protect").

208. *A Vision of Europe*, FIN. TIMES, June 19, 1991, at 20. "Notwithstanding Mr. Douglas Hurd's protestations and Mrs. Margaret Thatcher's wailing, the European

tence that references to “federalism” be removed from the draft. It read: “For most EC [Member State] governments . . . the word ‘federalism’ has become a routine, almost banal, part of their Euro-rhetoric.”²⁰⁹ Indeed, a new generation of “Europeans,” far less national in its outlook than prior generations, is already poised to assume a larger leadership role in the respective states. When they do, federalization might move forward quite quickly indeed.²¹⁰

As Justice Oliver Wendell Holmes, Jr., of the U.S. Supreme Court, put it:

The life of the law has not been logic: it has been experience. The felt necessities of the time . . . have . . . a good deal more to do than . . . syllogism in determining the rules by which men should be governed. The law embodies the story of a [political unit’s] development [over time] In order to know what it is, we must know what it has been, and what it tends to become The substance of the law at any given time pretty nearly corresponds . . . [to] what is then understood to be convenient²¹¹

I do not think there is much doubt — for those who look back objectively over the history of the Communities — about what they were and what they are tending to become. A growing degree of “federalism” — if not “sweet” — may be inevitable; indeed necessary, if the Community is to succeed.

Community is already a federation. Unfortunately, it is one with an unsatisfactory constitution.” *Id.*

209. David Buchan, *Federalism May Become the Non-Word of Euro-rhetoric*, *FIN. TIMES*, June 19, 1991, at 2.

210. Grossfeld, *supra* note 26, at 144. “We do not have to worry about how all this will happen. Young lawyers trained with and in European norms will see their chances They will stream to the European sources as eagerly as their predecessors streamed to Bologna and Padua Europe is our only chance for a stable peace.” *Id.*

211. OLIVER W. HOLMES, JR., *THE COMMON LAW* 1-2 (Leslie B. Adams, Jr., 1982) (1881).