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PREFACE

The European-American Consortium for Legal Education

Mortimer Sellers
University of Baltimore

Volume 9 of *Ius Gentium*, on “Federalism” is a project of the European-American Consortium for Legal Education. Most of the papers contained in this volume were presented at the 2002 EACLE Annual Conference, held at Baltimore in April, 2002, on the topic of “Federalism in Europe and in the United States of America”. The papers have been revised in the light of comments made at that meeting, and during subsequent exchanges of scholars between the European and North American sister universities. They illustrate the many parallels, but also some differences, between the consolidation and division of sovereignty in Europe and North America, as both continents have developed their federal and confederal laws and institutions.

The European-American Consortium for Legal Education (EACLE) was established in November, 2000, as a partnership between American University, the University of Baltimore, Erasmus University Rotterdam, the University of Ghent, Helsinki University, and Hofstra University. The purpose of the consortium is to advance legal education, and legal scholarship in Europe and the United States of America through the exchange of ideas, of students, of faculty members and of publications between sister schools on both continents. The EACLE exchanges rest on the conviction that legal issues in Europe and the United States are usually similar and often, in fact, the same, as law and trade increasingly transcend borders and other traditional divisions between states.

The annual conference of the EACLE is one of four primary programs through which the member institutions have taken the lead in overcoming the traditional insularity of legal scholarship and legal education on both continents. The partnership schools: 1) exchange students every fall, for semester or year-long study in their sister faculties; 2) exchange professors for a week-long visit every October, to lecture in each other's courses; 3) produce common publications, such as this volume; and 4) meet every May for an Annual Conference held alternatively in Europe and in the United States of America. The 2003 conference, held in Rotterdam, was on "Security", and the 2004 conference, to be held at Hofstra University, will consider "Legal Personality".

The contributions to this volume illustrate the value of distinguishing federal from national competencies, and the importance of subsidiarity not only between, but also within states. In general, it seems that human rights and individual liberties are best protected by federal institutions and courts, while social and cultural rights deserve more local attention. Peace and commerce seem to thrive best under federal systems of justice, while family life and land-use planning require regional attention. The growth of federal power has also made regional and minority identities more sustainable, and liberated some citizens from subjugation to local elites.

This volume appears concurrently with the new draft treaty proposing a constitution for Europe, excerpts of which appear as an appendix to these essays. Whatever the final result of the constitutional deliberations, it is clear that in Europe and in North America, law and constitutional structures will play an increasingly important role in maintaining peace and justice between the constituent states. The EACLE has been and will remain at the forefront of this movement.

ARTICLES

Localism, History and The Articles of Confederation: Some Observations about the beginning of U.S. Federalism

James E. Hickey, Jr.
Hofstra University

I. INTRODUCTION.

*There is nothing new in the world except the
history you do not know.*¹

Harry S. Truman 33d President of the United
States.

*All politics is local.*²

Thomas P. A “Tip” O’Neil
Representative of 8th District Massachusetts

Most Europeans, and all Americans are not
fully aware of how much state autonomy remains

¹ Robert Andrews, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 410 (1993), William Hillman, Mr. President, pt. 2, Ch. 1 (1952); quoted in.

² Tip O’Neil, *ALL POLITICS IS LOCAL* (1994).

embedded in the Federal Constitution of the United States of America. The U.S. Constitution preserves the sovereignty of the states, and two reasons for the preservation are localism and the Articles of Confederation.

In U.S. law schools, a course in Constitutional Law is mostly taken up with studying cases of judicial review by the Supreme Court of challenges to the validity of particular exercises of state or federal government power under the Constitution. Broadly, the issue decided, more often than not, is whether the Constitution restrains state or federal government action. The Supreme Court uses several doctrines to decide that issue including substantive and procedural due process, equal protection, preemption, separation of powers, and federalism. These doctrines and the judicial decisions using them form the core of a U.S. Constitutional law course.

The roots of United States federalism in pre-constitutional history are less often discussed. The origin of United States Constitutionalism helps to explain its persistent structure, which rests on the sovereignty of the Union's constituent states. In 1819, Chief Justice Marshall in the famous case of *McCulloch v. Maryland*, which upheld federal law and limited state power, presciently observed the resiliency of debate over powers granted to the federal government in the Constitution (and by implication also of

disagreement concerning powers residing in the states):³

... the question respecting the extent of the powers actually granted, is *perpetually arising*, and will probably continue to arise, as long as our system shall exist. (emphasis added).

More recently, Justice O'Connor confirmed that federalism issues are alive and well in U.S. constitutional law:⁴

The constitutional question [in this case] is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.

II: THE BEGINNING OF U.S. FEDERALISM - LOCALISM AND THE ARTICLES OF CONFEDERATION.

³ 17 U.S. 316, 405 (1819). Here, among other things, the Supreme Court interpreted the Constitution to grant to the federal government *implied* power to establish the Bank of the United States.

⁴ *New York v. United States*, 505 U.S. 144, 149 (1992). The Court concluded that Constitution did not confer on Congress the ability to compel the states to provide for the disposal of the low level radioactive waste generated within their borders.

Localism in pre-constitutional America was embedded into provisions of the Articles of Confederation and ultimately was preserved in the U.S. Constitution. Over the past 220 years, debate has continued, as yet unsettled, about the structure and limits of that preservation.

A. Localism in Pre-constitutional America.

The federal system of the United States has become very centralized. However, that centralization exists in an American tradition of preference for local authority, local autonomy, and distrust of federal power.⁵ The roots of that localism extend back in time to the early seventeenth Century well before the U.S. Constitution was ratified in the 1790s. As Gordon Wood aptly put it:⁶

“The early English migrants to America brought with them strong traditions of local and regional autonomy that conditions in the New World only reinforced and intensified. All the colonies in the seventeenth century experienced an acute localization of authority.”

Colonial central government was largely a product of power exercised at the local level. The

⁵ Gordon S. Wood, *The First National Constitution of the United States* in GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R at 13 (James E. Hickey, JR. and Alexy Ugrinsky eds.) 1996.

⁶ *Id.* at 12.

American colonies essentially governed themselves under royal charters from England. This was a matter of necessity because England, of course, was far away in distance and time and the colonies became accustomed to making decisions and passing laws on their own. This established a pattern of political local autonomy in town and county governments throughout early colonial America.⁷ Central government authority at the colonial level in early America was dependent on the towns and counties and ultimately served at the will of local communities. Local authority in towns and counties was pervasive and was exercised in almost every sphere including criminal and civil law, wills and estates, tax collection, titles to land, militia supervision, and even orphans, taverns and welfare.⁸

Thus, by the time of the Declaration of Independence in 1776, colonial central governments were politically weak and, for the most part, needed local government permission to act effectively. This localism carried over to the Articles of Confederation and later to the Constitution itself.

B. The Articles of Confederation.⁹

⁷ The same could not be said economically because the colonies were almost entirely dependent on trade exclusively with England and they did not trade significantly with one another.

⁸ Wood *supra* note 7 at 13.

⁹ The text of The Articles of Confederation may be found at: <http://www.usconstitution.net/articles.html>.

The intense and comprehensive penchant for localism evident in 17th and 18th Century America translated rather easily into concepts of individual state sovereignty when the Continental Congress drafted and adopted the Articles of Confederation between 1776 and 1781.¹⁰

In 1776, when union became a prime concern, the colonies viewed themselves as 13 independent sovereign nations with strong preferences for local authority. The primary government unit was considered to be the state and not any union or continental government. The newly independent “Americans” thought of their state and identified with their state first and foremost. At the time it would have been odd and uncomfortable for the people of America to say they were “Americans”. Rather, they were “Virginians”, “Marylanders”, and “New Yorkers”. Their country was their state, not the “U.S.A.”. John Adams succinctly summed up the notions of individual state sovereignty when he referred to the Massachusetts delegation to the 1776 meeting of the Continental Congress as “Our Embassy”.

The Articles of Confederation was more of a “compact” or treaty among sovereign states, governed by public international law, than it was a

¹⁰ Prior to 1776 there were two specialized attempts at “union” for specific limited purposes: first, in 1643 the colonies in the northeast unionized to respond to threats from the Dutch, the French, and native Americans; second, in 1754 the Albany Plan of Union was formed for military purposes. Neither attempt at Union was long lasting or significant in the U.S. constitutional history.

constitution. At the time, it was understood and accepted that the sole source of power of the union being formed was the states. It was through the states, as gatekeepers, that the will and consent of the people was channeled to the central government. The *peoples* of the various states were not directly represented in the confederation.

Under the Articles of Confederation, the term “United States” was plural and not singular as a matter of grammar, meaning, and feeling. The U.S. Constitution that replaced the Articles of Confederation converted the plural “peoples of the United States” to the singular.¹¹ The implication of that semantic conversion, of course, is that the *people* are directly represented in the Constitution.

Most analyses of the Articles of Confederation stress the weaknesses that compelled adoption of the United States Constitution to cure. Those weaknesses were: 1) no central government authority to act directly on individuals and the states; 2) no central government authority to enforce treaties and central government laws; 3) no amendment of the Articles of Confederation without the unanimous consent of the states; 4) no proportional representation of the population in the central government; 5) no power in the central

¹¹ The first words of the U.S. Constitution state in the Preamble “We the *People* of the United States, in Order to form a more perfect union...” (emphasis added). JOHNNY H. KILLIAN AND LELAND E. BECK, EDS., THE CONSTITUTION OF THE UNITED STATES OF AMERICA (GPO 1987) at 3.

government to tax; 6) no power in the central government to print money; 7) no central government authority to regulate trade among the states; and 8) no central government courts or executive.

All those weaknesses in the Articles of Confederation were addressed in the Constitution.¹² What is not so often appreciated is that the Constitution did not jettison entirely the principles that had animated The Articles of Confederation.

The state sovereignty and state equality concerns reflected in The Articles of Confederation were carried over in several respects to the Constitution: in guaranteeing survival of the states as discrete sovereign legal personalities; in the scheme of representation; in the doctrine of enumerated powers for the central government; and in the reservation of powers in the states.¹³

The Articles of Confederation preserved the state sovereignty notion of an agreement among states. In addition, the Articles provided a new vehicle through which all the people of the

¹² The Constitution addressed those weaknesses respectively in Article VI, cl. 2; Article I, § 8, cl. 15; Article V; Article I, § 3, cl. 1; Article I, § 8, cl. 1; Article I, § 8, cl. 5; Article I, § 10, cl. 2; Article I, § 8, cl. 3; Article III, § 1; and Article II, § 1, cl. 1.

¹³ See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 San Diego L. Rev. 249, 278-84.

country could agree to bestow certain powers directly on the federal government. Thus, state sovereignty (local power) was preserved in the Constitution and the states did not disappear as a source of power in the new “United States of America.”

1. *Preservation of the states as discrete legal personalities.*

The Articles of Confederation in its form accepted that the states had discrete legal personalities. The Articles of Confederation, after all, were essentially a treaty controlled by public international law. A treaty by definition was an agreement among *states*. In the 18th Century, the only recognized legal personalities with rights and correlative duties as subjects of international law were states.¹⁴

Any doubt about the legal personality of the states was addressed simply and bluntly in Article II: “Each state retains its sovereignty, freedom, and independence.” Sovereignty, of course, is the automatic consequence of statehood and means that states are essentially autonomous in the sense of having a discrete legal personality. Among several states sovereign power is necessarily limited and implies theoretical equality among the states.

¹⁴ Under international law a state is a subject of international law and characterized by a defined territory, a permanent (i.e. stable) population, an effective and functioning government, and a capacity to enter into relations with other states.

The Constitution established a much stronger central government with specific authority over the states and it dropped the language of Article II of the Articles of Confederation about state “sovereignty, freedom and independence.” Nonetheless, the Constitution preserved the discrete legal personality of the states and did not replace the states with a “national” government.

That preservation of state legal personality is addressed in Article IV § 4, Article V, and in the Tenth Amendment to the Constitution.¹⁵ Article IV § 4 (the Guarantee clause) provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V provides in relevant part:

. . . no state, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The Tenth Amendment provides:

¹⁵ A related question regarding the Tenth Amendment is what powers do the states have? This is discussed below.

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.

Under the guarantee clause, of course, a “Republican Form of Government” cannot be assured unless the states have discrete legal personality and sufficient autonomy to make and run their own governments in the first instance.¹⁶

Article V assured external sovereignty and sovereign equality among the states by forbidding the amendment of the Constitution to alter the equal state representation in the Senate. And, the Tenth Amendment assures a reservoir of states rights under the Constitution (see discussion below).

Finally, the overall structure adopted in the Constitution and reflected in Articles IV, V and the Tenth Amendment presupposes independent states with legal personality and sovereignty. The Supreme Court acknowledged the continuing legal personality of states in the Constitution after the Civil War:¹⁷

¹⁶ See generally, Deborah Jones Merrit, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*; 88 Col. L. Rev. 1 (1988).

¹⁷ *Texas v. White*, 74 U.S. 700, 725 (1869) quoted in Smith *supra* note B at 283 n. 111.

[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, ... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

2. Equal State Representation.

Article V of The Articles of Confederation embraced sovereign equality among the states in their votes in the central government Congress by mandating that "each State shall have one vote ... [i]n determining questions in the United States in Congress assembled." Here, no matter the

geographic size, population or economic wealth of each state, the principle of one state, one vote, was adopted in recognition that otherwise state sovereignty equality would be disturbed. In the Constitution, Article I, § 3, cl. 1 carries over that state equality in voting in the Senate:¹⁸

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

3. The doctrine of enumerated powers.

The Articles of Confederation did not bestow on the central government any general, open-ended, legislative authority. It only gave to the Congress certain powers and no more than those that were listed in The Articles.

Article II of The Articles provides that “Each state retains ... every power, jurisdiction, and right ... not ... expressly delegated to the ... Congress.”

For example, Article IX provided in part:

Congress ... shall have the sole and exclusive right and power of

¹⁸ Since the Constitution, unlike the Articles of Confederation also conferred power directly on the people, it added a House of Representatives with proportional representation based on state population in Article 1 Sections 2 and 3.

determining on war and peace ... of
sending and receiving ambassadors
... entering into treaties ... of
establishing rules for [Prize] ... of
granting letters of marque and
reprisal ... [of] appointing courts
for the trial of piracies and felonies
committed on the high seas ... [of]
establishing courts for ... cases of
capture ... [of deciding] all
[boundary and jurisdictional]
disputes between states ... of
regulating ... coin [and] ... weights
and measures ... [and] all affairs
with the Indians ... [of] establishing
... post offices ... of appointing
[army and navy] officers ... [of]
directing ... [land and naval]
operations ... [of] borrow[ing]
money ...

The Constitution adopts completely the approach of enumerated powers for the Federal Government. As a result, like the central government under The Articles, the Federal Government under the Constitution has no general legislative authority. Thus, Article I, § 8 of the Constitution contains a list of enumerated powers that is strikingly similar to the Articles of Confederation.

The Scope of enumerated powers was admittedly broader in the Constitution because Article I, § 8 of the Constitution also added new enumerated powers not in The Articles like the

power to tax, to regulate interstate commerce and to establish inferior federal courts (below the Supreme Court). However, the approach, the structure, is the same: the source of federal power is those powers granted and enumerated by the States (and the people) in the Constitution.

4. Reservation of State Power.

An intimately related but distinctive question to the federal government's legislative power is about the power the states have retained after the grant of central authority power is made.

Article II of The Articles of Confederation provided in this regard that the states have a reservoir of power *vis-à-vis* the Congress:

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

Article II by its words leaves no doubt that the States meant to keep all powers not specifically named as conferred on the Congress.

The Constitution initially did not have this explicit retention of state power. It also did not address the power retained by the people who, under the Constitution, are now directly represented in the federal government. Both

these retention considerations were addressed in 1791 by the Ninth and Tenth Amendments to the Constitution¹⁹ which provide as follows:

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X.

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.

Thus, under both instruments, no general legislative authority over the states was granted to the central government. Additionally, under the Constitution no general legislative authority was conferred over the people either. Thus, the states (and the people of those states) have their local sovereignty, their local autonomy, and their independence, reserved.²⁰

¹⁹ Article V of the Constitution provides that the Constitution may be amended as “necessary” with the approval of 2/3 of Congress and 3/4 of the States.

²⁰ A related concern not addressed by this essay is the scope of enumerated powers which surround the word “expressly” in Article II of The Articles which is omitted from the Tenth Amendment to the Constitution. The omission raises the issue of which additional powers the Federal Government may have that may be fairly *implied* from the enumerated powers even though not expressed.

III. CONCLUSION.

After over 200 years of federalism under the Constitution, the United States has a highly centralized government with enormous power that nevertheless remains a *federal* government and not a consolidated *national* government. The daily lives of most Americans are guided by local governments, local preferences, and local values. Even if one views the Constitution as something more than a treaty, a contract, or a compact among states (in part because it also establishes a direct relationship between the people and the federal government), it remains today something substantially less than the sole source of law for the United States. Part of the explanation for this is the American people's adherence to localism, rooted in our pre-constitutional history, articulated in the Articles of Confederation, and embedded deeply into our Constitution.

Products Liability Harmonization: A Uniform Standard

Rebecca Korzec
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The purpose of products liability laws is to create safer products. In our global economy, a uniform approach to products liability law is the most effective means of fulfilling this purpose. American manufacturers market their products nationally and internationally. Worldwide, consumers buy products marketed through all means of interstate and international commerce, including the Internet. For this reason, any single product may be regulated by a variety of different state or international products liability laws. The application of these inconsistent rules may discourage essential manufacturer decision-making, may have a discriminatory impact upon some product manufacturers and users, and may lead to externalization of accident costs.

Among industrialized nations, the United States is unique in addressing tort law at the state rather than the national level. For example, Australia and Canada, which share a common-law heritage with the United States, have federal tort systems. The United States approach may be

appropriate in some tort settings, such as in the premises liability or motor vehicle accident context (not involving a claim of products liability), where the state rule's impact remains within that state's geographical boundaries. Unlike the simple "fender-bender", which occurs within the borders of one state, the typical product is manufactured and marketed nationally or internationally. Therefore, several factors suggest that uniform federal treatment of product liability laws may be a more desirable means of regulation.

First, conflicting state rules create an absence of predictable standards for manufacturers. For example, while some states may employ the consumer expectations test for determining product defects, others may apply the risk utility test. To be efficient, manufacturers must mass-produce and market their products nationally. However, they may find it cumbersome, if not impossible, to comply with the conflicting rules of the various states in which the product is made or marketed. Manufacturers cannot always redesign their products to meet competing, inconsistent state requirements. Thus, conflicting rules not only discourage essential manufacturer planning and decision-making, they also jeopardize product design and safety. In sum, experimentation by the states in creating their own doctrines and regulations, one of the supposed benefits of decentralization, actually may become a detriment.

Second, state lawmakers may legislate an inherent bias into products liability law, adopting

rules that advance parochial interests, which favor resident product injury victims over national manufacturers.²¹ Conversely, a state may manipulate its product liability rules to advance its political or economic development goals, thereby creating a pro-manufacturer bias. This can be explained, at least in part, by some basic realities of the legislative process. Business or insurance interests, who possess substantial funds to underwrite intensive lobbying campaigns, may influence state legislators to create a more hospitable environment for out-of-state manufacturers. By contrast, product consumers not only underestimate product risks²², they also may underestimate the potential benefits of organized legislative advocacy.²³ As a result, product users may overlook these activities, giving little reward to legislators who adopt a pro-consumer stance.²⁴ Thus, it is not surprising that most legislative tort reform favors insurance companies and sellers.²⁵ The federal government can play an important neutralizing role in preventing such manipulation by states.

²¹ See, e.g. *Blankenship v. Gen. Motors Corp.*, 406 S.E. 2d 781 (W.Va. 1991), in which the Supreme Court of West Virginia stated that, where a split of authority exists about which crashworthiness rule to apply, the court should choose the rule more favorable to the plaintiff.

²² See, e.g. Jon D. Hanson & Douglas A. Kysar, "Taking Behavioralism Seriously: Some Evidence of Market Manipulation," 112 *Harv. L. Rev.* 1420 (1999). See also, Gary T. Schwartz, "Considering the Proper Federal Role in American Tort Law," 38 *Ariz. L. Rev.* 917, 936 (1996).

²³ *Id.*, Schwartz at 937.

²⁴ *Id.*

²⁵ *Id.*

Third, because most products are manufactured and marketed nationally and internationally, the market for many products is sufficiently global to justify federal and international regulation. Congress already has recognized the advantages of uniform federal treatment of products liability issues. Nationally, the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Traffic Safety Administration are current examples of this federal approach.

There may be disadvantages inherent in the imposition of uniform federal products liability laws. State lawmaking is viewed as advancing autonomy, self-reliance, individualism, and independence. To the extent that states are prevented from controlling products liability laws, these goals may not be realized. Moreover, uniform national standards may ignore local voter concerns. Similarly, innovation, economic development, political representation, and voter interests may be burdened by national standards that seem difficult to implement.

Can the obstacles created by non-uniformity be removed through the application of choice-of-law rules? A number of proposals have been advanced, including: 1) applying the state law where the manufacturer has the greatest number of employees; 2) applying the state law where the product is first sold; 3) permitting manufacturers to designate the applicable state law.²⁶

²⁶ Schwartz, *supra* note 2 at 937.

Having seen the existence of non-uniformity and state law bias in American products liability law, it is important to consider these in the global context. The arguments in favor of federalization of products liability apply to globalization, as well. How might international law respond effectively to these concerns? First, a comprehensive code or treaty might internationalize all aspects of global products liability law. One immediate problem with this approach is whether products liability policy concerns would be addressed adequately, or whether they would be subjected to parochial political decisions. Unfortunately, politicization could jeopardize product safety if individual regimes consciously or inadvertently create disincentives to safety and health measures by adopting rules that favor sellers.

Tobacco, as a product, offers a compelling argument for global regulation. The World Health Organization estimates that about 5 million people a year die from tobacco-related disease, including about 400,000 a year in the United States alone. This annual global death count is projected to be more than 8 million by 2020 and 10 million by 2030.²⁷ Seventy percent of these deaths will occur in developing countries.²⁸ As industrialized nations combat the tobacco industry, these international companies focus their marketing efforts on developing nations.

²⁷ Framework Convention Alliance-The Framework Convention on Tobacco Control-FAQ; *available at* http://www.fctc.org/about_FCTC/index.shtml

²⁸ *Id.*

Should the international tobacco problem be controlled by international treaty? In 1999, the World Health Assembly (WHA), the governing body of the World Health Organization, agreed to have the WHO create a tobacco control treaty. The World Health Assembly adopted the Framework Convention on Tobacco Control (FCTC) on May 23, 2003. The FCTC, a legally binding treaty, is the first international public health treaty. It encourages countries to recognize and combat the global hazards presented by tobacco-related disease.²⁹

The WHO justifies the need for an international treaty in several ways. First, “[t]he tobacco epidemic is an international problem.”³⁰ Second, “[t]he tobacco industry is a global industry”.³¹ Third, “[t]obacco industry marketing campaigns executed across a number of different countries simultaneously, including through satellite television;...” require global solutions.³²

The ultimate question is what might such a treaty accomplish? What might collective action by the world’s nations accomplish that the nations cannot achieve by their own initiatives? The treaty addresses measures that require international cooperation, such as regulating international advertising and combating international smuggling. These problems should receive priority in an international treaty because

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

they require collective action and resources. Individual countries would receive benefits that they could not achieve on their own.

Moreover, a treaty focused on truly international issues is more likely to receive support for two reasons. First, individual countries may actually appreciate the benefits they will derive from these cooperative efforts. Second, the requirements imposed upon each individual country may not be burdensome. Nevertheless, countries with strong national tobacco control regimes may reject an international treaty that addresses substantive domestic policy. These nations with existing domestic controls may view their regimes as more effective than they might be under an international agreement. Moreover, they may fear that limited international controls could undercut strong domestic rules already in place.³³

The framework international treaty may be viewed as a significant world health measure, encouraging nations to act collectively against global tobacco companies. Ultimately, tobacco control requires changing the attitudes of masses of people to make smoking unacceptable. Without an international approach to the global tobacco industry, such changes are unlikely to occur. The

³³ Derek Yach and Douglas Bettcher, "Globalisation of tobacco industry influence and new global responses." *Tobacco Control* 2000; 9:206-216.

treaty is a timely and instructive example of global product regulation by a uniform standard.

In sum, a uniform approach to products liability laws is the most effective means of creating safer products. Uniformity diminishes the ability of state lawmakers to advance merely parochial interests, or to favor business interests at the expense of the consumer. Finally, on an international level, uniformity advances global solutions to global problems.

The Subsidiarity Principle in European Community Law and the Irish Abortion Issue

Gabriël A Moens
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1. INTRODUCTION

One of the most important issues in a federal system involves the distribution of powers between the federal legislative authorities and the member States of the federation. In Australia, these powers have been divided between the States and the Commonwealth in accordance with s.51 of the Commonwealth Constitution.

However, a liberal interpretation of the Commonwealth's powers by the Australian High Court has significantly increased the powers of the federal authorities, even at the expense of the States' legislative powers. A comparable

development has occurred in the United States where the Constitution contains in Article I, Section 8 a catalogue of matters that come within the legislative competence of Congress.

In contrast, the European Community Treaty does not contain such a catalogue. Nevertheless, despite its absence in the Treaty, there is an irrevocable trend in favour of increasing the legislative powers of the federal authorities at the expense of the legislative powers of the States. This trend will be illustrated by a discussion of the subsidiarity principle, contained in Article 5 of the Treaty. This principle is used in the European Community (EC) to determine whether the federal or State authorities have legislative power over particular subject matters. In particular, I will discuss the operation of this principle in the context of the contentious legislative history of abortion in Ireland by considering possible legislative EC developments and by analysing relevant judgments, decided by the European Court of Justice (ECJ) and other courts. In particular, I argue in this paper that the subsidiarity principle is a potentially potent but specious concept, which is incapable of stemming the uncontrolled growth in the power of the federal authorities of the EC, even if it has not yet been used to deprive Ireland of its legislative power to make its own choices with regard to abortion. In this paper, I do not propose to evaluate the morality or lack of morality of abortion. This is already adequately done in the

rich and engaging literature on the topic.¹ Instead, I will focus on the distribution of power in the EC, which is a federal State, regarding which level of government should make the legal choices in the context of abortion.

2. THE SUBSIDIARITY PRINCIPLE IN EUROPEAN COMMUNITY LAW

One knowledgeable commentator, Hanna Erkko, in an article available on the Internet, has reported the existence of 30 definitions of the subsidiarity principle. Although scholars obviously disagree on the meaning of the principle, they all agree that subsidiarity is vitally important in the law of the European Community. The principle could be clarified by reviewing the purposes for which it has been used.

The principle may be used to determine the relationship between individuals and state authorities. It is in this context that the principle became part of the Roman Catholic Church's

¹ See *Bowman v United Kingdom* (1996) 22 EHRR 13 (Applicant conscientiously believes that abortion and embryo experimentation are morally wrong and that the United Kingdom statute which permits abortion up to 22 weeks and embryo experimentation up to 14 days should be changed by Parliament); *Jamway v Salford Area Health Authority* (1989) AC 537 (The secretary at the health center was asked by the doctor to type a letter referring a pregnant patient for an appointment with a consultant with a view to the latter forming an opinion as to whether the pregnancy should be terminated under the Abortion Act of 1967. The secretary was a Roman Catholic who believed that abortion is morally wrong and refused to type the letter); William Joseph Wagner, "Christianity and the Civil Law: Secularity, Privacy, and the Status of Objective Moral Norms," (1997) 71 *St. John's Law Review* 515-541.

philosophy since the Middle Ages. The natural law of Roman Catholicism envisaged a political order based on timeless, unchangeable moral laws. In practice, the principle of subsidiarity required that the state does not intervene unnecessarily in the private sphere. Thus, the classical definition of the subsidiarity principle by Pope Pius XI concentrates on the relationship between individuals and the state and emphasizes the freedom of action of individuals.² In 1931, he argued in his Encyclical *Quadragesimo Anno* that the modern state performed functions that, traditionally, had been performed by small social groups, especially the family unit. The encyclical warns against the development of absolute state power, which, itself, may be a consequence of elevating the interests of the state over the interests of individuals. John Peterson described this encyclical in his paper *Subsidiarity - A Definition to Suit any Vision?*³ as a social policy that involves a search for a middle way between the centralized solutions of the left and the liberalism of the right. Some libertarians and conservatives conveniently rely on this version of the principle of subsidiarity to attack the welfare state; they favour a liberal philosophy, which stresses the importance of individual freedom and minimal state intervention.

In more recent times, proponents and opponents of the principle of subsidiarity view it mainly as a political and legal principle that is

² Pope Pius XI, *Quadragesimo Anno* (On Reconstruction of the Social Order), 15 May 1931 (<http://www.ewtn.com>).

³ J. Peterson, "Subsidiarity: A Definition to Suit Any Vision," (1994) 47 *Parliamentary Affairs* at 116-132.

used to determine the division of powers between different levels of government. In a federal state, such as the EC, the principle may be used to identify the respective legislative powers of the federal authorities and the authorities of the member States. It is this use of the principle, which is relevant for the purpose of this article. The principle of subsidiarity in the European Community Treaty is used to determine which level of government (either state or federal) has power to adopt laws with respect to various matters.⁴ It is enshrined in Article 5 (ex Article 3b), which reads, in its relevant part, as follows:

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

The principle, by virtue of the specific language of Article 5, does not apply in circumstances involving the exclusive jurisdiction of the European Community. Therefore, the principle presumably only applies to concurrent

⁴ Denis J. Edwards, "Fearing Federalism's Failure: Subsidiarity in the European Union," (1996), 44 *AJCL* 537 at 542-543.

jurisdiction. The problem noted above, however, is that the Treaty, unlike the American and Australian constitutions, does not stipulate which powers exclusively belong to the EC and which belong to the States. But a review of the relevant European Community legislation and jurisprudence certainly reveals that the powers of the EC constantly increase whereas the powers of the States accordingly decrease. This increase in the powers of the EC is, at least in part, a consequence of the implementation by the federal authorities of Article 308 (ex Article 235) of the Treaty, which states:

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

Thus, the EC is competent to act in all those cases where EC action is required for the achievement of the objectives of the Community. However, it is obvious from the language of Article 308 that this power can only be relied upon if it is *necessary* for the achievement of an EC objective. The necessity principle in Article 308 helps to identify those subject matters, which come within the exclusive jurisdiction of the EC because they

are necessary for the achievement by the EC of Community objectives. The EC's objectives are defined in Article 3 of the Treaty. They include the approximation of the laws of the Member States, to the extent required for the proper functioning of the common market.

The operation of Article 308, in enlarging the exclusive jurisdiction of the EC, results in a corresponding decrease in the effectiveness of the subsidiarity principle, which only applies to matters that come within the concurrent jurisdiction of the federation and the Member States. In addition, amendments to the Treaty have made it possible for the EC to legislate with regard to new policy areas, including environmental policy, education, vocational training, youth, culture and public health policies, consumer protection, industry policies, research and technological development cooperation and social policy. It is very much an issue of scholarly interest as to what part, if any, of these new policy areas, comes within the exclusive jurisdiction of the EC and what part is concurrent jurisdiction. However, it can be assumed that if the principle of subsidiarity is to play a role in the EC, it will predominantly be in these policy areas which, at least to some extent, fall within the concurrent legislative powers of the Member States and the federation.

It is clear that in the absence of clarification of the respective powers of the EC and the States, the principle of subsidiarity remains an ineffective

vehicle for determining their respective legislative powers. It could, however, be argued that in most cases *any* arrogation of legislative power of the EC to itself is likely to satisfy Article 5. Such argument is based on an understanding of one of the key words in Article 5: “sufficiently.” This word suggests that even if Member States are authorized to undertake a proposed action or to adopt a law, the subject matter of which is part of concurrent jurisdiction, it should still nevertheless be performed by the EC if it can be more sufficiently performed by the EC than by the States.

Subject to the validity of this argument, in areas that are not within the exclusive jurisdiction of the EC, the principle of subsidiarity becomes a means of dividing competencies between the EC and its member States according to which entity can perform specific proposed actions or functions more sufficiently. The sufficiency principle of Article 5 allows action to be taken at EC level, in areas involving concurrent power, even if the Member States are able to achieve a particular objective, albeit less sufficiently than the EC. Therefore, the subsidiarity principle allows EC involvement even in those circumstances where such involvement is not strictly necessary.

The EC may use the necessity principle in Article 308 to increase the number of matters over which the Community will have exclusive jurisdiction, thereby avoiding the application of the subsidiarity principle. Article 308 increases

significantly the legislative power of the EC especially because the EC authorities themselves usually determine what is necessary in an Article 308 context. In addition, in using the sufficiency principle of Article 5 in cases involving concurrent power, the Community is capable of further restricting the applicability of the principle of subsidiarity by acting in circumstances where the action can be more sufficiently performed by the EC. Similarly, EC officials equally determine whether the EC is able to perform functions more sufficiently than the States, in a matter not coming within its exclusive jurisdiction. Indeed, under the subsidiarity principle, whether a function will be performed more sufficiently by the EC than by the States usually involves the making of a value judgment by the EC itself. There will be arbitrariness unless there is some mechanical procedure enabling us to test the sufficiency of actions in the public policy domain. It is clear, however, that the subsidiarity principle becomes largely meaningless if such determination is made by the EC which itself wants to regulate a relevant matter.

3. THE REGULATION OF ABORTION IN IRELAND: THE STATUTORY FRAMEWORK

Abortion has always been a contentious issue, especially in Catholic countries such as Ireland. Conflicts between right-to-life groups and pro-choice groups have been part of Ireland's

history for a long time. In Ireland, abortion is not only an unconstitutional activity, but it is also a criminal act under Section 58 of the *Offences Against The Person Act* 1861. Although Ireland was keen to avail itself of the new trade opportunities when it joined the EC in 1973, it was concerned about its ability to maintain its longstanding prohibition of abortion.

In 1861, when Ireland was still under British rule, abortion was prohibited in both Britain and Ireland through Section 58 of the *Offences Against The Person Act*. When Ireland became independent in 1922, this law was maintained as a part of Irish criminal law. It reads as follows:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable... to be kept in penal servitude for life.

Article 40.3.2 of the Irish Constitution, enacted in 1937, provides:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The Irish Supreme Court considered Article 40.3.2 in *McGee v. Attorney General*⁵ which dealt with the right of a woman to import contraceptives not legally available in Ireland. The Court ruled against the woman on this issue. However, the Court also ruled in her favour with regard to her right to marital privacy as an enumerated personal right guaranteed under Article 40.3.2. Walsh J. opined that judges are expected to interpret the Constitution and to determine the rights which are superior or antecedent to positive law. He further noted that the terms of Article 40.3.2 clearly subordinate the law to justice, and that judges must interpret natural rights according to the principles of prudence, justice, and charity.

Although abortion still remained illegal after *McGee*, Irish anti-abortion activists feared that this decision would become the stepping-stone for a *Roe v. Wade*⁶ type decision in which the United

⁵ (1974) IR 284.

⁶ 410 US 165 (1973).

States Supreme Court legalised abortion during the first trimester of a woman's pregnancy. These fears led to a campaign to amend the Irish Constitution to protect specifically the right to life of the unborn.⁷ Consequently, Article 40.3.3. (Eighth Amendment of the Constitution Act) was added to the Constitution in 1983, which addresses abortion more specifically. It states:

The State acknowledges the right to life of the unborn and, and with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

The history surrounding the Eighth Amendment of the Constitution Act, 1983 suggests that its wording was intended to correspond to the Catholic natural law framework. Thus, if an interpretation of Section 58 of the *Offences Against The Person Act* 1861 as it relates to the rights of a pregnant woman, were to be incompatible with this Amendment, it would probably be unconstitutional. For the purposes of both Irish criminal law and Irish constitutional law, life begins, and is protected, from the time of conception. This definition of "life" prohibits the use of certain types of birth control methods, including intra-uterine devices (IUD's), the "Morning After" pill, and other various contraceptive pills such as RU 486.⁸ In *East*

⁷ James Casey, *Constitutional Law in Ireland* (3rd ed., 2000) at 442-444.

⁸ James Kingston & Anthony Whelan, *Abortion and the Law* (1997) at 54.

Donegal Co-Operative v. Attorney General,⁹ the Court indicated that a post-Constitution statute is presumed to be in conformity with the Constitution. However, as the *Offences Against The Person Act* 1861 obviously does not enjoy this presumption, it may be argued that the Eighth Amendment does not reach abortions, which might be legal under Section 58. The argument is based on the assumption that the Constitution (and its constitutional amendments) only affects post-Constitution legislation and does not reach prior legislation, which precedes the adoption of the Constitution. This assumption, however, should be discounted because it is incompatible with the principle of the supremacy of the Constitution, which is the fundamental and basic law of Ireland. This principle and the intended natural law character of the Eighth Amendment of the Constitution Act make it illegitimate for Irish courts to recognize a risk of suicide as justifying an abortion. Indeed, the language of the Eighth Amendment implies that the risk to the life of the mother must be imminent in order to allow an abortion. If an abortion were permitted in cases involving other than imminent risk, “the State would be giving far more than due regard to the equal right to life of the mother.”¹⁰

There have been many debates in Ireland on whether there are any exceptions to Section 58 of the *Offences Against The Person Act*. The most

⁹ (1970) IR 317.

¹⁰Amy M. Buckley, “The Primacy of Democracy Over Natural Law in Irish Abortion Law: An Examination of the *C* Case,” (1998) 9 *Duke J. Comp. & Int’l. L.* 275 at 301.

notable and important exception to Section 58 relates to the allowance of abortion where serious injury to health is feared and where the abortion is carried out in good faith for the purpose of preserving the life or health of the woman.¹¹ In the opinion of James Kingston and Anthony Whelan, Section 58 of the *Offences Against The Person Act* does not absolutely prohibit a woman from obtaining an abortion in these circumstances.¹² However, the scope of this exception is not clear. Indeed, the question may be asked whether a woman whose mental (as opposed to physical) health is in danger may also be able to procure an abortion. The equation of mental and physical health for the purposes of deciding the legality of an abortion is discussed in the English case *R. v. Bourne*,¹³ where the court used both a subjective and objective test. The subjective test requires the doctor to believe that the abortion was necessary in order to save the mother's life. The objective test is whether that belief was a reasonable one. Thus, Irish criminal law enables a woman to obtain an abortion when her health is in danger.

4. LEGISLATIVE HARMONIZATION

Legislative harmonization with regard to abortion would require the adoption of EC laws, which are valid throughout the Community. While legislative harmonization is not likely to occur quickly in this area, which traditionally, has been regulated

¹¹Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958) at 154-166.

¹²James Kingston & Anthony Whelan, *Abortion and the Law* (1997) at 73.

¹³(1938) 3 All ER 615.

by domestic criminal statutes, the possibility of EC intervention always concerned Ireland. However, the European Commission, which is the bureaucratic arm of the EC, has long taken the view that abortion is irrelevant to the achievement of the common market and that its regulation falls outside the legislative competence of the Community.¹⁴ Nevertheless, abortion could presumably be brought within the legislative powers of the EC if (i) the regulation of abortion were seen as necessary to the achievement of an EC objective under Article 308, or (ii) the sufficiency principle of Article 5 justifies EC action in this area.

The adoption of European harmonizing legislation with regard to abortion could be based on Article 308 if the legislation is deemed *necessary* for the achievement of an EC objective. One of the most important objectives of the EC is the development of the “internal market”. The internal market “comprises an area without internal frontiers in which the free movement of goods and services ... is ensured in accordance with the provisions of this Treaty.”¹⁵ By virtue of Article 95 (ex Article 100a), “The Council shall, acting in accordance with the procedure referred to in Article 251 (ex Article 189b) and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law,

¹⁴ Diarmuid Rossa Phelan, “Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union,” (1992) 55 *MLR* 670 at 672, n.10.

¹⁵Article 14 (ex Article 7a).

regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.” In accordance with Article 251, the Council can adopt measures by a qualified majority, in co-decision with the European Parliament; these measures may in effect nullify any incompatible law of a Member State. As the free movement of goods and services is essential to the development of the “internal market”, it is not unreasonable to argue that the provision of abortion services and the free movement of abortion-inducing goods come within the exclusive legislative competence of the Community, and therefore, the subsidiarity principle (which otherwise might have provided for State legislative competence) does not apply. Thus, the Council and the European Parliament could presumably contend that harmonization (i.e. the adoption of European legislation) in this area is necessary because such legislation facilitates freedom of movement of goods and services and the achievement of the internal market. Hence, any State legislation that prohibited or restricted the free movement of the RU 486 pill would be illegal under EC law.

However, even if the prohibition of, or restriction on, abortion is deemed to violate EC law, Ireland could still rely on Article 95(4) (ex Article 100a) of the Treaty. This Article stipulates: “If, after the adoption by the Council ... of a harmonization measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30 [ex Article 36], or

relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.” This provision would allow Ireland to apply their national law while ignoring EC law on the ground that the national law is based on a major need of the Member State, listed in Article 30 of the Treaty. Such major needs include public morality, public policy, and the protection of the health and life of humans. Article 30 reads as follows:

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on 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 possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Ireland could rely on a public policy argument as a means of preventing the importation of abortion-inducing drugs. Among the public policy interests that may be protected by non-

discriminatory national measures are “national or regional socio-cultural characteristics”, which in the present state of EC law, are matters for the Member States.¹⁶ In Ireland, the right to life has traditionally been regarded as being a sufficient public policy interest to justify its reliance on Article 30. Mr Walter Van Gerven, the Advocate General in *Society for the Protection of Unborn Children Ireland Ltd. (S.P.U.C.) v. Stephen Grogan and Others*¹⁷ (which will be discussed in part 5 of this article) acknowledged the existence in Ireland of this public interest. In particular, the Advocate General indicated that the prevention of abortion is a national objective inherent in the Irish Constitution’s Eighth Amendment (i.e. Article 40.3.3 of the Constitution):¹⁸

The protection of the unborn enshrined in the national Constitution (and the prohibition of abortion inherent therein) and likewise the resultant need to prevent abortions - naturally only within the jurisdiction of the member-State concerned - by prohibiting the distribution of information thereon in its territory as forming part of the basic principles of society.

¹⁶*Torfaen Borough Council v B & Q* (1990) 1 CMLR 337 at 364.

¹⁷(1991) 3 CMLR 849.

¹⁸*Id.* at 873.

Section 58 of the Irish *Offences Against The Person Act 1861* also provides evidence that Ireland sees abortion as constituting a violation of public morality as understood in that country. He concluded that, as restrictions on abortions in Ireland are not designed to achieve protectionist aims that are inconsistent with fundamental Community policies, the Irish ban on abortions is legal under EC law.

Restrictive national rules may, therefore, continue to apply where they are justified under Article 30 (ex Article 36) or even Article 46 (ex Article 56) of the EC Treaty. These national rules may also survive if they are in accordance with what is termed “the rule of reason”. In the absence of community regulation, the rule of reason permits the maintenance of non-discriminatory national rules, despite the restrictions they may impose on intra-Community trade, if they are necessary for (and proportionate to) the achievement of a legitimate state objective (a “mandatory” requirement).¹⁹

Alternatively, the European harmonization of laws relating to abortion may be deemed necessary (under Article 308) in order to implement Article 137 (ex Article 118) of the EC Treaty. It provides that the Community “shall support and complement the activities of the Member States” with regard to improvement “in particular of the

¹⁹Gabriël Moens & David Flint, *Business Law of the European Community* (1993) at 72-79; Gabriël A. Moens, “Freedom of Movement of Goods in the European Community” (1990) 17 *MULR* 733-743.

working environment to protect workers' health and safety." To this end, "the Council may adopt ... minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States."²⁰ These measures may be adopted in accordance with the co-decision procedure of Article 251, which involves the European Parliament in the legislative process. Thus, Article 137 may provide the basis for the adoption of harmonized European abortion laws, which could very well promote women workers' health and, therefore, would override Irish anti-abortion laws. However, this view would, in effect, constitute an arrogation by the European legislature to itself of the right to adopt laws, which only indirectly and tenuously relate to women workers' health. In effect, it would amount to an emasculation of the subsidiarity principle because concerns about employee safety in the Community would be used to override national anti-abortion laws, which only incidentally pertain to employment issues. The only obvious connection with abortion relates to the fact that pregnant women are part of the job market. According to one point of view, pregnant women may want to seek an abortion in order to be able to continue working. This argument assumes that abortion is likely to facilitate the employability of women, and hence, this service should not be deemed illegal under national law. The Council adopted Directive 89/391/EEC, which provides for the introduction of measures to encourage improvements in the safety and health of workers

²⁰Article 137(2).

at work. Article 15 of this Directive includes pregnant women in a sensitive risk group, thus entitling them to protection against dangers, which would adversely affect them.

The ECJ has also dealt with the issue of equal treatment of pregnant women in *Dekker v. Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus*.²¹ Mrs. Dekker had applied for a job with a Dutch training center. After having submitted her application, she informed the recruiting committee that she was three months pregnant. Nevertheless, the committee recommended her for appointment; however, the management of the employer rejected her application. Mrs. Dekker claimed that she had been denied equal access to a job because of her sex, and that such denial constituted a violation of Article 1 of the European Equal Treatment Directive. Among other things, the employer argued that it could not afford to hire Mrs. Dekker because, under applicable Dutch law, it would be obliged to pay sickness benefits to her at a later stage and that its insurer would not reimburse that amount because she was already pregnant when she applied. The ECJ, in rejecting the employer's arguments, decided that (i) the financial consequences to the employer are no defence to an apparent breach of the Directive, and that (ii) lack of any intention to discriminate is irrelevant under the Directive. The Court's decision is based on the rationale that an acceptance of the employer's argument would

²¹(1990) ECR I-3941.

have undermined the general impact and effectiveness of the Directive. *Dekker* prohibited employers from refusing to hire women based on the fact that the woman was pregnant.

Dekker does not, as such, make any pronouncement about abortion. The ECJ's judgment in *Dekker* probably stands for the proposition that the EC protects women from health hazards and discrimination on account of their pregnancy. However, the Court's decision could be manipulated so as to promote or allow abortion practices throughout the EC on the ground that pro-choice laws and policies are necessary to enable employed women to make sensible choices about their pregnancy. Obviously, a pregnant woman will not be able to do every single job that a non-pregnant woman could do. Nevertheless, it does not follow that, because a pregnant woman cannot perform every professional function, Ireland should be compelled to change its abortion laws.

In summary: it does not appear feasible that European legislative action could be taken to force Ireland to change its domestic law in order to secure its harmonization with the rest of the European Community. With the goals of the EC being founded on the procurement of its economic interests, it has long been the view that abortion is of no concern to the achievement of a common market and that its regulation is outside EC competence and that, in accordance with the subsidiarity principle, it remains a State prerogative.

5. JUDICIAL HARMONIZATION

In the absence of legislative harmonization, harmonization might be achieved by judicial decree. If the Irish constitutional prohibition of abortion were to be deemed incompatible with either EC judicial developments or comparable developments in the European Court of Human Rights, then the Irish legislature might be compelled to relax its anti-abortion stand. If so, the principle of subsidiarity in EC law, which reserves the right to the Irish legislature to make its own laws on abortion, would become illusory. In this context, it is appropriate to discuss a number of relevant cases.

The first case is *Attorney General v. Open Door Counselling and Dublin Well Woman Centre Ltd.*²² The plaintiffs, the Society for the Protection of Unborn Children (S.P.U.C.), were seeking an injunction against the two clinics in order to prevent them from counseling or assisting pregnant women within Ireland who wanted to obtain an abortion or receive relevant advice. S.P.U.C. believed that these actions were unlawful under the Eighth Amendment (i.e. Article 40.3.3 of the Constitution) and amounted to a conspiracy to corrupt public morals. The injunction was granted and an appeal was taken to the Irish Supreme Court. The Irish Supreme Court held that assisting a pregnant woman in

²²(1988) IR 593.

obtaining an abortion violates Article 40.3.3 of the Constitution because an activity, which directly violates the constitutionally guaranteed right to life, is illegal.²³ The Court held that the non-directive counseling offered by the clinic also violated Article 40.3.3 because it assisted in the destruction of the right to life of the unborn, a right found to be fundamental and superior to the rights of privacy, association, and freedom of expression. The Supreme Court, concentrating on fundamental rights, held that the right to life of the unborn was of superior order to that of freedom of expression. Further, the Court found that there was no constitutional right to information about the availability of an abortion service outside Ireland, which would result in the destruction of the expressly guaranteed constitutional right to life of the unborn.

In a subsequent case, the defendant clinics argued in the European Court of Human Rights that the decision of the Irish Supreme Court violated the European Convention of Human Rights. In the case of *Open Door Counselling and Dublin Well Woman v. Ireland*²⁴ the European Court of Human Rights found that the injunction, preventing the clinics from counseling women on obtaining abortions outside of Ireland, breached Article 10 of the Convention to the extent that it prohibited the applicant companies and counselors from providing non-directive pregnancy counseling which included information on how to contact

²³ *Id.* at 625.

²⁴(1993) 15 EHRR 244.

abortion clinics outside of Ireland. Article 10 of the Convention provides:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Although this decision did not overrule Ireland's Supreme Court ruling, it required the State to bring Irish law into line with Article 10 of the Convention. As this necessitated a constitutional change, the Fourteenth Amendment of the Constitution Act, 1992 amended Article 40.3.3 to allow for a limited distribution of abortion information. The Fourteenth Amendment states that:

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

The second case is *Society for the Protection of Unborn Children Ireland Ltd. (S.P.U.C.) v. Stephen Grogan and Others*²⁵. This case arose during proceedings brought by S.P.U.C. against a number of officers of three students' associations in Ireland that had distributed the names and addresses of clinics, which offered abortions in another Member State. The Irish national court referred two questions to the ECJ. The first question asked whether abortion, if performed in accordance with the procedures of the Member State in which it is carried out, constitutes a

²⁵(1991) 3 CMLR 849.

“service” within the meaning of ex Article 60 (now Article 50). Secondly, the national court wanted to know whether it was contrary to EC law for a Member State to prohibit the distribution of the names and addresses of clinics offering abortions lawfully carried out in accordance with the law of another Member State. With regard to the first question, the ECJ held that a medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out constitutes a “service” within ex Article 60 of the EC Treaty:²⁶

services are to be considered to be ‘services’ within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 expressly states that activities of the professions fall within the definition of services.

It must be held that termination of pregnancy, as lawfully practised in several member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity.

²⁶ *Id.* at 890.

The Court reasoned that it could not “substitute its assessment for that of the legislature in those member-States where the activities in question are practiced legally.”²⁷ These remarks might be interpreted to leave the substantive law of each individual Member State undisturbed. This enables each Member State to decide for itself whether to provide abortion services for remuneration.

With regard to the second question, the Court indicated that the relevant literature was not distributed on behalf of an economic operator established in another Member State. Therefore, the link between the students’ activity and the abortion services provided by clinics in another Member State “is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 [now Article 49 of the Treaty].”²⁸ As this prohibition is not a restriction within the meaning of ex Article 59 of the EC Treaty, “the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another member-State.”²⁹

The ECJ’s decision in this case reveals that, if the students had been distributing material on behalf of an economic operator and obtained remuneration for doing it, Community Law would

²⁷ *Ibid.*

²⁸ *Id.* at 891.

²⁹ *Id.* at 891.

have protected their actions. In addition, the abortion clinics themselves could not be prevented from advertising within Ireland. However, Ireland could limit that advertising freedom under Article 46 of the Treaty on grounds of public policy.

The third case is *Attorney General v. X and Others*.³⁰ In this case the plaintiff wanted to prevent a fourteen-year-old girl from obtaining an abortion after becoming pregnant as a result of a rape. The young girl was suicidal as a result of the pregnancy and her doctors believed that she would take her own life if she did not obtain an abortion. Costello J. of the High Court granted the injunction and found that the “the risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made.”³¹ Hence, Costello J. applied the balancing test set forth in Article 40.3.3 of the Irish Constitution and concluded that the risk to the life of the unborn was of a far greater magnitude than the risk to the life of the mother. The High Court also held that a restriction on the EC right to travel was permitted in this case because the EC Treaty permits the exercise of discretion by national governments on moral issues. Costello J. pointed out that Article 40.3.3 of the Irish Constitution is a statement of public policy on the right to life of the unborn and that, accordingly, it

³⁰ (1992) 2 CMLR 277.

³¹ *Id.* at 285.

may be argued that protecting that right engages interests fundamental to Irish society.

On appeal however, the Supreme Court held that an abortion was constitutionally permissible when there was a substantial and real threat to the girl's life.³² Finlay C.J. of the Supreme Court held that, under certain circumstances, suicide qualifies as a risk to the life of the mother. He stated that where there is substantial psychological evidence that the threat of suicide is real, "it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide."³³ Finlay C.J. stated the correct test under the Eighth Amendment of the Constitution Act: "if it is established as a matter of probability that there is a real and substantial risk to the life as distinct from the health of the mother, which can only be avoided by termination of her pregnancy ... such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution."³⁴ The Supreme Court thereby concluded that Article 40.3.3 of the Irish Constitution permits abortions in situations where there was a real and substantial risk to the life of the mother, which could be avoided only by termination of her pregnancy. Thus, the vital difference in the reasoning of the Supreme Court's majority and the High Court's holding related to the classification of suicide as a qualifying medical

³² *Id.* at 289-335.

³³ *Id.* at 301.

³⁴ *Id.* at 300.

risk to the life of the mother under Article 40.3.3 of the Constitution.

As a result of the *X* case the Irish government, in November 1992, presented three different amendments to the Constitution to the citizens of Ireland. The first amendment, which would have been the Twelfth to the Constitution, proposed to disallow suicidal feelings as a ground for an abortion. This amendment was rejected and thus is not part of the current Constitution. The next proposed amendment was the Thirteenth Amendment, which added a second paragraph to Article 40.3.3. This paragraph provides that “This subsection shall not limit freedom to travel between the State and another state.” The third proposed amendment to the Constitution was the Fourteenth Amendment, which added a third paragraph to Article 40.3.3 which states that “This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.”

Following the incorporation of these amendments into the Constitution, the President of Ireland signed the *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5* in 1995. This act regulates the dissemination of information about abortion services available abroad. Section 4 of this Act prohibits the display of public advertisements, and distribution of unsolicited

publications, containing such information. Section 5 prohibits those providing information from advocating or promoting the termination of the pregnancy, and it obliges them to advise women about all courses of action available to them. Section 6 prohibits any economic link between the information giver and those providing abortion services outside the State. Section 7 provides that the information giver may not receive financial benefits by reason of supplying information. Finally, Section 8 prohibits the information giver from making an appointment or any other arrangement on the woman's behalf. The adoption of this Act by the Irish legislature certainly suggests that Catholic natural law principles, which presumably are embedded in Article 40.3.3 of the Constitution, can be eroded, thereby changing the original Catholic understanding of the subsidiarity principle.

6. CONCLUSION

It is unlikely that the harmonization of Irish abortion laws with those of other European countries will be achieved by the EC legislature. However, given the scope for further development of EC fundamental rights by the ECJ, and the continuing development of the case-law of the European Court of Human Rights regarding the respective rights of women and the unborn, it cannot be excluded that Ireland will be compelled to adopt a position that is inconsistent with the degree of protection accorded to unborn life under Irish constitutional law. Such development,

however, would be deplorable because it would involve the emasculation of the principle of subsidiarity in EC law. This principle has traditionally been relied upon to enable Member States of the EC to pursue their own vision of moral excellence. In Ireland, this vision has, at least in the past, been largely consistent with the subsidiarity principle as developed by Pope Pius XI and with natural law principles, which are supported by the Roman Catholic Church. The futility of the principle would certainly facilitate the relentless march toward centralism in the European Community.

Is There a Role for Sub-Federal Governments in International Trade Policy Formation?

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The toppling of national economic borders in the march toward globalization has led to an assumption that sub-national borders must necessarily and completely crumble under the foot of regional and even world economic integration. Indeed, in the modern parlance of globalization, states, provinces, and localities are but outdated colloquialisms. These sub-national governments must of course become altogether irrelevant if nations are to cede their ability to protect domestic markets from international competition, or so the assumption goes.

But is such an assumption correct? Is it necessarily so that sub-national governments can have no role in global village of tomorrow? This question is taking on profound importance today as the European Union admits more and more member-states, professes to speak on trade

matters for all of them, seeks to exercise on their behalf 15 votes (and soon more) in international organizations, and yet struggles to police its members and force them bow to its multinational will. The question becomes even more profound in the context of the World Trade Organization (“WTO”), which has established a new international trade constitution for more than 140 nations and which provides no role for sub-federal governments and holds federal governments strictly accountable for the laws, rules, and regulations of their subordinate bodies.

In considering what role, if any, sub-national governments should play in the new international economic order, it is instructive to consider the American experiment with federalism and globalization. After all, the United States, a leading champion of the WTO and of liberal markets, in general, has based its own system of government on the premise that the federal government should have a limited jurisdiction, with powers derived from its states and its people. This conceptual framework is perhaps best articulated in the Tenth Amendment to the United States Constitution, which provides that “[t]he powers not delegated to the United States . . . are reserved to the States respectively, or to the people.” As one drafter of the United States Constitution, Alexander Hamilton, explained,

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 [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and ... will not depend merely on the comparative ambition ... of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other³⁴

As Hamilton suggested, regardless of whether it is the national government or local government that is in the ascendancy at a given moment in time, each is but a representative organ of the people and the division of responsibilities among them is a bulwark of democracy against an undue encroachment against the freedom of the people by government in general.

Another drafter of the U.S. Constitution, James Madison, explained that this division of

³⁴ *The Federalist*, Nos. 45 and 46. *The Federalist Papers* were a series of essays written between 1787 and 1789 by three of the drafters of the U.S. Constitution – Alexander Hamilton, John Jay, and James Madison – arguing for its approval and adoption. The text of the Constitution was completed in 1787. It was ratified in 1789. Under the new Constitution, Hamilton became the first U.S. Secretary of the Treasury, Jay became the first Chief Justice of the United States, and Madison would serve as the first Speaker of the U.S. House Representatives. Madison authored the U.S. Bill of Rights, which became the first ten amendments to the U.S. Constitution in 1791. He served as the fourth President of the United States from 1809-16.

power among national and sub-national governments lies at the very heart of American democracy. According to Madison, the framers of the U.S. Constitution purposefully (though somewhat paradoxically) created a new government that, on the one hand, divided responsibilities among its constituent elements yet, on the other hand, required these elements to work together in order to take action.³⁵ He argued that these separate and shared powers were intended to act as checks and balances against the dangerous accumulation of power in one person or one part of the government. He said that:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others. The provisions for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.³⁶

Madison and other drafters of the Constitution believed that their system of limited and divided government would guard against abuses because

³⁵ *The Federalist*, No. 51.

³⁶ *Id.*

human nature would compel those in government to seek power and to confine the power of others:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught the necessity of auxiliary precautions.³⁷

Thus, the delicate U.S. federal system put in place in 1789 would rely as much on a shared recognition that government officials should work together as a need for them to work against one another.

The evolution of U.S. constitutional law, however, has shown that this separation of powers

³⁷

Id.

has been vastly diluted in the formation of U.S. foreign policy in general and U.S. international economic policy in particular. As described below, the horizontal checks and balances in the U.S. governmental framework – i.e., the Legislative, Executive, and Judicial Branches vying against each other for power – are greatly diminished in international affairs, with the judiciary according great deference to the political branches and with the Congress delegating a vast array of powers to the President, adding to his already considerable constitutional authority in this area. Moreover, vertical power-sharing in international affairs – that is, the relationship between the federal government, on the one hand, and state and local governments, on the other – seems to barely exist at all, as the states and localities have been gradually dispossessed of the ability to act.

While it may make sense for the federal government to have exclusive dominion over questions of war and peace, is it equally true that such authority ought to be exclusive when it is foreign commerce that is at issue? Unlike foreign affairs in general, which since 1789 have been commonly understood to be the province of the federal government alone, state and local governments have attempted to regulate and influence international commerce since before the adoption of the Constitution. States and localities have attempted to attract foreign investment, promote their own exports, and applied their laws generally and specifically to foreign citizens and commerce.

In considering the role of state and local governments in U.S. international economic relations, it is important to note that much of the state and local action that affects international trade goes unchallenged. After all, who would bring suit to prevent a governor or mayor from traveling overseas to improve relations between, for example, the State of Maryland or the City of Baltimore, on the one hand, and Italy or Rome, on the other? Who would doubt that state and local courts must adjudicate the rights and property of foreign nationals or even construe U.S. treaties where applicable?

As a result, the removal of states and localities from U.S. international trade appears to be a greater legal fiction than an economic reality. And even that legal fiction may be murkier than it might seem at first blush. The U.S. Supreme Court has offered precious little guidance on what state and local officials may or may not do in relation to international economic affairs, and this guidance raises as many questions as it answers.

This paper explores the leading doctrines that set the parameters of U.S. vertical federalism in the area of international economic affairs. It then compares and contrasts the U.S. position with how the WTO treats the issue. It concludes by raising the question of whether the states and localities should be precluded from regulating international trade in general, whether such preclusion ought to be applicable only in selective areas, or whether no preclusion should apply at

all, but rather the matter should be left to the federal government to decide whether and under what circumstances it will exercise its authority to preempt state or local laws that federal officials consider undesirable.

I. THE U.S. CONSTITUTIONAL FRAMEWORK

As a general rule, the U.S. federal-state paradigm allows federal laws to supersede inconsistent state or local laws. This basic construct emanates from Article VI of the U.S. Constitution, which provides that “this Constitution, and all laws and treaties made under it shall be the supreme law of the land.” This so-called Supremacy Clause was included in the Constitution because its predecessor arrangement, the Articles of Confederation, was considered by the framers of the Constitution to be too weak, allowing states to undermine federal laws and policies. As Alexander Hamilton wrote in discussing state regulation of foreign commerce in the *Federalist Papers*, “the interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to the others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious

impediments to intercourse between the different parts of the Confederacy.”³⁸

A. *Shared Powers*

That the Supremacy Clause gives the upper hand to the federal government does not mean that all matters that may be regulated by the federal government are outside the reach of state and local governments. In fact, most areas in which the federal government can act are shared with state and local governments, which have a generalized “police power” to regulate in the interests of the morality, health, and welfare of its people. To the extent that there are two laws, one federal and one state or local, that conflict with one another, there is no question that the Supremacy Clause requires any court within the United States to invalidate the state or local law. The federal government thus may affirmatively choose to preempt a state or local law it does not like. If the contemplated preemptive action is among its enumerated powers, and if it makes its intention to preempt a state or local law explicit, the Supremacy Clause applies and the state or local law must give way.

However, if the federal government is silent regarding its intent to preempt a state or local law, the applicability of the Supremacy Clause becomes hazy. Courts do not lightly infer such an intent. Rather, they will attempt to find a way to harmonize two seemingly overlapping federal and

³⁸ *The Federalist No. 42*, at 192.

state or local laws, and they will avoid a direct conflict wherever possible.

B. Exclusive Powers

There are, however, certain exclusive federal powers, which entirely divest state and local governments of the power to act at all. These most notably include the power to declare war, to coin money, and to determine U.S. citizenship. In addition, there are areas in which the federal, state, and local governments share overlapping powers to some extent, but the federal government's powers generally have some zone in which states or localities may not enter. These zones are often referred to as "dormant powers," i.e., powers that occupy a given field even when the federal government has not acted.

The best known of these relates to Congress's ability to regulate *interstate* commerce under Article I, section 8 of the Constitution. It is in this area where Congress and the states most often come into conflict. The reasons for this are not hard to understand. States typically regard the regulation of their workers, businesses, and other aspects of their economies as among their chief responsibilities. This regulatory activity generally extends to any persons or property that come within a state's borders or jurisdiction. Considerable complexities arise, however, when a state regulation can be said directly or indirectly to have effects that extend to commerce outside the state. Courts have relied on a balancing test

to fashion rather slippery lines as to where state authority ends and federal authority – even if unexercised – begins. In recent years, these lines have blurred considerably as the U.S. Supreme Court has signaled a willingness to restrain congressional authority where it is used to regulate the states themselves and not just private actors.

C. The Power to Regulate Foreign Commerce

Congress has a similar, but separate power under Article I, section 8 to regulate *foreign* commerce. Unlike its interstate commerce power, Congress’s foreign commerce authority has received less attention from the courts. Its full shape and contours are thus even less well defined. Nonetheless, the Supreme Court has made clear that state laws that touch upon foreign commerce are to receive a greater degree of scrutiny than state laws that affect only domestic commerce.³⁹ It is not altogether surprising that the states should have less freedom to act with respect to foreign commerce than interstate commerce. As the Supreme Court has explained, “there is evidence that the Founders intended the scope of the [federal government’s] foreign commerce power to be . . . greater.”⁴⁰

While the scope of the foreign commerce clause may be broader, it does not go so far as to

³⁹ *South-Central Timber Development, Inc. v. Wunicke*, 467 U.S. 82, 96 (1984); *Reeves*, 447 U.S. at 437 n. 9.

⁴⁰ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

strip states and localities of all ability to touch upon international economic affairs. The Supreme Court has held that a state law is impermissible only “if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive.”⁴¹

II. THE DISPOSSESSION OF STATE POWER IN FOREIGN COMMERCIAL AFFAIRS: A THEORETICAL AND REALITY DICHOTOMY

Despite the Supreme Court’s suggestion – or perhaps acknowledgement – that there remains a role for the states and localities in the realm of international economic affairs, there are countervailing considerations suggesting that the field is totally occupied by the federal government. The section that immediately follows explores these considerations. The section that follows thereafter explains why it simply cannot be correct that states are completely dispossessed of the ability to regulate foreign commerce.

A. Considerations Suggesting the Exclusion of States from Regulating Foreign Commerce

In addition to granting Congress the explicit power to regulate foreign commerce, noted above, the Constitution contains other provisions that seem to suggest exclusive federal

⁴¹ *Container Corp.*, 463 U.S. 159, 194 (1983).

authority in this area. Article I, section 8 of the Constitution accords to Congress the power to lay and collect tariffs. Article I, section 10, clause 2 of the Constitution bars state from imposing duties on imports or exports without the consent of Congress. These two provisions make clear that Congress has full control over tariffs. Given the historical centrality of tariffs in international trade, it could be argued that this exclusive power, coupled with a general power to regulate foreign commerce, would be enough to remove states and localities from international economic affairs.

In addition, the regulation of U.S. foreign commerce is a subset of foreign affairs and as such may fall under the doctrine that, where foreign policy is concerned, the United States speaks with one voice – i.e., the President acting alone (where he may do so) or the President and Congress acting in unison. In this regard, Congress’s foreign commerce power is buttressed by its powers to raise revenue (including tariffs) and appropriate funds, as well as the President’s Article II powers to make treaties with the advice and consent of two thirds of senators present, his ability to receive ambassadors and consuls, and his role as commander-in-chief of the armed forces. Based on these provisions, the Supreme Court has long held that “power over external affairs is not shared by the States; it is vested in the national government exclusively.”⁴²

⁴² *United States v. Pink*, 315 U.S. 203, 233 (1942). See also *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation,

The extraordinary reach of the federal government in regulating international commerce was perhaps most broadly recognized in the U.S. Supreme Court's *Curtiss Wright* decision,⁴³ in which Justice Sutherland, speaking for the majority, said that unlike in domestic affairs, the federal government's powers in international affairs are not limited to those granted to the federal government by the states through the Constitution. Rather, the United States Government has all the powers of sovereignty bestowed upon a nation under international law, and these powers include not only those enumerated in the Constitution, but also those transferred to the United States from England after the United States became independent. As Justice Sutherland explained, "the broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."⁴⁴ This conceptual notion underlies Justice Holmes' decision in *Missouri v. Holland*, in which the

imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324 (1937) ("In respect our foreign relations generally, state lines disappear."); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("for local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nationals, we are but one people, one nation, one power").

⁴³*United States v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936).

⁴⁴*Id.*, at 315-16.

Supreme Court held that, in exercising the foreign affairs powers of a sovereign nation, the federal government may regulate through a treaty matters that would be beyond its reach in domestic affairs.⁴⁵

Based on these considerations, the Supreme Court held in *Zschernig v. Miller* that there is an implied foreign affairs power – i.e., a power that does not emanate directly from any particular constitutional provision – that belongs solely to the federal government.⁴⁶ In so ruling, the Supreme Court explained that state laws “must give way if they impair the effective exercise of the Nation’s foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State’s policy may disturb foreign relations.”⁴⁷

Although this exclusive power is an implied one, it is not clear to what extent it is a dormant one. There is no doubt that that a state law that runs counter to a federal policy is unconstitutional, but it also may be true that a state law will be struck down only if it can in some way be said to be inconsistent or incompatible with the federal policy. If state action affects foreign affairs to a significant degree, that alone may be enough to raise constitutional issues.

⁴⁵ *State of Missouri v. Holland*, 252 U.S. 416 (1920).

⁴⁶ *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

⁴⁷ *Id.*

It is telling that no U.S. Supreme Court decision has struck down a federal action in foreign affairs because it conflicts with a state law (provided that the federal action was otherwise in conformity with the Constitution), and this is especially true where the laws in question concern international affairs. To the contrary, the courts have signaled that, absent a clear violation of a constitutional provision, they are loath to interfere in foreign commercial affairs. Courts have elected not to review actions taken by the political branches where foreign affairs are concerned,⁴⁸ and have even been willing to supply justifications for actions taken by the political branches that may not have been readily apparent.⁴⁹

That the exclusive federal foreign affairs power should apply with equal vigor to international economic affairs seems obvious. A distinguishing characteristic of foreign commerce is the extent to which it is controlled by the use of treaties and other international agreements. Dating back to the first days of the United States as an independent nation, the federal government entered into Treaties of Friendship, Commerce, and Navigation, which extend national and most-

⁴⁸ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

⁴⁹ See, e.g., *Haig v. Agee*, 453 U.S. 280, 290-92 (1981) (*Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (finding congressional silence in the face of President Carter's transfer of Iranian assets and nullification of attachment orders regarding such assets in connection with an international agreement to release U.S. citizens held hostage in Iran to be a form of congressional acquiescence justifying such action)).

favoured-nation treatment (i.e., non-discriminatory treatment) to the goods or nationals of the partners. Despite these treaties, tariff rates remained a congressional prerogative, as Congress painstakingly set and revised thousands of tariff line items for essentially all goods entering the United States. Treaties of Friendship, Commerce, and Navigation gave way in the 20th century to reciprocal tariff reduction agreements, first bilateral and later regional and multilateral ones, in which tariffs and a broad range of U.S. laws relating to international trade were revised. In short, the federal government has over time increasingly and ever more expansively attempted to occupy the field of foreign commerce.

B. The Muddled Reality

In view of the foregoing, it would seem that the ability to regulate foreign commerce should be as exclusive a federal power as the ability to declare war. Indeed, the Supreme Court's pronouncements to the effect that power over foreign affairs is an exclusively federal one would seem to resolve the matter with a bright line. Yet the states have always played, and continue to this day to play, a role in international issues.

As the Restatement (Third) of the Foreign Relations Law of the United States provides, "under the United States Constitution, a State of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, section 10, clause 2), but such agreements are limited in scope and subject

matter.” Furthermore, “[a] State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority or the foreign relations of the United States.” As Professor Louis Henkin has pointed out, “in the governance of their affairs, states have variously and inevitably impinged on U.S. foreign relations.”⁵⁰

Two areas of state regulation of foreign commerce have been the subject of court decisions: state taxation of foreign-owned property and state governments doing business with foreign persons or purchasing foreign goods or services. Both have led to doctrines under which the states have considerable room in which to regulate foreign commerce, albeit with restrictions.

With regard to taxation, states have broad latitude to tax goods within their borders. Despite the dormant commerce clause, noted above, states may tax goods in interstate commerce, provided that the state tax “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned [in relation to taxes imposed on the same item by other states], and is fairly related to the services provided by the State.”⁵¹ Where the goods subject to taxation involve foreign commerce, the same analysis applies, with two additional considerations: the

⁵⁰ L. Henkin, *Foreign Affairs and the United States Constitution* 162 (2d ed. 1996).

⁵¹ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

state may not subject foreign commerce “to the risk of a double tax burden to which [domestic] commerce is not exposed” and “a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential.”⁵²

Similarly, courts have drawn fine lines in examining state “Buy American” provisions. Some courts have struck down these laws as an impermissible interference with the federal government’s exclusive authority to regulate foreign affairs.⁵³ But others have upheld such laws where they are non-discriminatory (i.e., they treat all foreign countries the same and do not require state officials to distinguish between foreign countries or their policies) have reasonable exceptions built into them (i.e., allowing for the purchase of foreign goods if the cost of domestic goods is unreasonable or it would be impractical or not in the public interest to buy only domestic items).⁵⁴ The Supreme Court has recognized in the context of interstate commerce that, if a state is acting as a “market participant,” and not as a regulator, then the dormant commerce clause places no restrictions on it.⁵⁵

The Supreme Court recently had an opportunity to clean up this muddled picture. In

⁵² *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979).

⁵³ See, e.g., *Bethlehem Steel Corp. v. Bd. of Comm'ers*, 276 Cal. App. 2d 221 (1969).

⁵⁴ See, e.g., *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Comm'n*, 75 N. J. 272 (1977).

⁵⁵ *South-Central Timber Development, Inc. v. Wunicke*, 467 U.S. 82 (1984).

Crosby v. Natsios, the First Circuit struck down a Massachusetts law penalizing companies bidding on Massachusetts state contracts that did business with the Government of Myanmar or traders in that country.⁵⁶ The First Circuit found the Massachusetts law to be infirm for three reasons. First, it violated the exclusive foreign affairs power of the federal government. Second, it violated the foreign commerce clause. And third, it was preempted by a federal law authorizing the President to impose sanctions against Myanmar, although none of the contemplated sanctions included restrictions on state procurement. The Supreme Court affirmed the First Circuit's decision, but did so on preemption grounds alone.⁵⁷ Thus, the Court had an opportunity to clarify the scope of the exclusive foreign affairs power as well as the foreign commerce clause, but did not.

Perhaps the most glaring omission in the Supreme Court's *Crosby* decision was its refusal to consider the extent to which its prior ruling in *Clark v. Allen* circumscribes the federal foreign affairs power and preserves for the states the ability to regulate interstate commerce. In *Clark v. Allen*,⁵⁸ the Court upheld the constitutionality of a California statute which conditioned the right of aliens to inherit property in that state on the granting by the alien's own country of similar

⁵⁶ *National Foreign Trade Council v. Natsios*, F.3d 38 (1st Cir. 1999).

⁵⁷ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

⁵⁸ *Clark v. Allen*, 331 US 503.

rights to U.S. citizens to inherit property there. The Court in *Clark* dismissed as “farfetched” the contention that the statute unconstitutionally infringed upon the federal foreign relations power.⁵⁹ The Court noted that California had not violated any express command of the Constitution by entering into a treaty, agreement, or compact with foreign countries. It said that “what California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.”⁶⁰ Thus, the line between an unconstitutional state intrusion into the exclusive federal foreign affairs zone under *Zschernig* and a state action that has a mere

⁵⁹ See 331 U.S. at 517.

⁶⁰ In *Zschernig*, the Supreme Court distinguished *Clark* on the grounds that the Oregon statute in question contained a reciprocity requirement similar to the California law involved in *Clark*, but the Oregon law also required conditioned the right of an alien to inherit property upon the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of Oregon estates “without confiscation.” The Court also noted that, in application, the Oregon law mandated scrutiny by state judges of foreign government practices, actions which more directly and immediately carried foreign affairs implications:

At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations -- whether aliens under their law have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. 389 U.S. 429, at 432.

“incidental or indirect effect in foreign countries” remains quite blurry.

III. THE WTO AND SUB-FEDERAL GOVERNMENTS

While the U.S. Supreme Court has thus far failed to excise entirely sub-federal governments from international economic affairs, the WTO has been more aggressive in attempting to do just that. Article XVI:4 of the WTO Agreement provides that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” This provision makes clear that it is the national government of a country alone that has standing as a member of the WTO and as such it is national governments alone that will be held accountable for complying with the WTO’s various rules. It suggests quite strongly that a government may not claim that it is unable to comply with its WTO obligations because its domestic laws do not allow it to do so. Such an argument would not only be inconsistent with Article XVI:4, it also would contravene Article 27 of the Vienna Convention on the Law of Treaties, which states that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶¹

⁶¹ The Convention distinguishes between a country relying on its own law as a reason not to comply with a given treaty obligation, on the one hand, with an inability to honor the treaty at all due to a lack of domestic authority to have entered into the treat in the first place, on the other hand. See Article 46 of the

In addition, during the eight-year Uruguay Round negotiations leading to the establishment of the WTO on January 1, 1995, the parties reached an Understanding on GATT Article XXIV:12, which it makes clear that WTO members are responsible for state or local actions in relation to the General Agreement on Tariffs and Trade (“GATT”), the central agreement of the WTO governing trade in goods. This understanding provides as follows:

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.
14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement

Convention (“1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”).

Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

The understanding places an explicit burden on national governments that are members of the WTO to ensure that their sub-national governments also comply with the GATT 1994. As paragraph 14 of the understanding states, a failure to do so could result in formal dispute-settlement proceedings being initiated against the member in question and that member being required to bring the sub-national measure into compliance with WTO norms or face trade sanctions.

The understanding was deemed necessary by Uruguay Round negotiators because prior history with the GATT demonstrated that Article XXIV:12 allowed for a number of instances in which national governments were not held responsible for actions by their sub-national governments. This result emanated from the ambiguous language of Article XXIV:12 itself. It provides that:

Each contracting party shall take such *reasonable* measures as may be *available* to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.⁶²

While this language was ostensibly included in the original GATT to make it clear that national governments have an affirmative obligation to rein in rogue states and localities, it was interpreted

⁶² Emphasis added.

over time to require corrective action only where such action would be “reasonable” and “available.”⁶³

This language also paved the way for the argument that the GATT is not necessarily intended to have direct application vis-à-vis sub-national laws, but rather leaves to the national governments that are parties to the GATT the determination of whether and how to negate state and local actions that are inconsistent with that agreement. As Herman Phlegler, the State Department Legal Advisor explained,

This provision . . . has always been interpreted as preventing the General Agreement from overriding legislation of a political subdivision of contracting parties inconsistent with the provisions of the Agreement; by placing upon contracting parties the obligation to take reasonable measures to obtain observance of the Agreement by such subdivisions, the parties indicated as a matter of law the General Agreement did not override such laws.⁶⁴

⁶³ See John H. Jackson, “The General Agreement of Tariffs and Trade in United States Domestic Law,” 66 *Mich. L. Rev.* 249 (1967).

⁶⁴ As quoted in Jackson, “The General Agreement of Tariffs and Trade in United States Domestic Law,” 66 *Mich. L. Rev.* at XX.

This construction of Article XXIV:12 and its treatment of federal/sub-federal relations is consistent with the notion that the GATT did not automatically trump inconsistent state or local laws and that national governments must take action to bring non-conforming sub-national measures into conformity with international trade obligations.

In this way, the WTO has placed a heavy burden on national governments to ensure the consistency of their measures with WTO rules, regardless of whether it is a national or sub-national authority that has promulgated the measures in question. It has been the case since the initial adoption of the GATT in 1947 that provinces, states, and localities have no seat at the GATT table, and their sphere of influence, limited as it was, has eroded substantially with the establishment of the WTO in 1995.

The major exception in the WTO that continues to recognize a role for sub-federal governments is in the area of services. The trade liberalizing commitments embodied in the WTO's General Agreement on Trade in Services ("GATS") apply only to service sectors that a given WTO member affirmatively identifies in its schedule of service commitments. In other words, if a service sector is not so identified, WTO members may continue to protect that sector from foreign competition, including through state or local barriers. Moreover, even where a member identifies a service sector in its schedule of commitments, that member is free to condition its

concessions on various factors, including the perpetuation of trade foreclosing state or local laws.

Thus, to preserve these localized regulations, many WTO members either choose not to list such sectors in their GATS schedule of commitments or they condition their commitments on the preservation of state regulation. Although the role of states and localities in this area is quite important,⁶⁵ and has been accorded a measure of deference through the GATS, this agreement, like all others in the WTO, looks to national governments for ensuring compliance and will aim its enforcement mechanisms – e.g., dispute-settlement procedures, authorized trade retaliation – not against scofflaw states and localities, but the national governments that are members of the WTO.

IV. AN APPROPRIATE MIDDLE GROUND: A NATIONAL GOVERNMENT VETO

In implementing the WTO agreements, the United States may have found not only an efficient method to meet its international obligations, but it also may have taken an important step toward finding a better general approach to federal/sub-federal relations where international economic affairs are concerned.

⁶⁵ For example, a number of service sectors in the United States and other countries – i.e., banking, health care, and insurance – are heavily regulated at the sub-federal level.

A. The Uruguay Round Agreements Act

In approving the WTO agreements, the U.S. Government reserved for itself the exclusive authority to nullify non-conforming U.S. state or local laws. It did so through the 1994 Uruguay Round Agreements Act. Under that act, the WTO agreements have no direct effect in U.S. law and inconsistent sub-federal laws remain in full force and effect unless the federal government takes action to set them aside. Under this paradigm, the federal government has full power to upend state or local laws inconsistent with the WTO agreements and to ensure U.S. compliance with its international obligations. At the same time, absent federal action, state or local laws touching upon issues relevant to the WTO may be enacted and implemented.

Section 102(b)(2) of the Uruguay Round Agreements Act states that the WTO agreements prevail over inconsistent state laws, but no person, except the United States Government, may challenge such laws (nor may they challenge a federal law) on the basis that it is inconsistent with a WTO rule.⁶⁶ In this way, the Uruguay Round Agreements Act impels states and localities to act consistently with the WTO agreements in two ways. First, it imposes a moral or political obligation on states and localities to conform their

⁶⁶ Section 102(a) of the Uruguay Round Agreements Act provides that U.S. federal law prevails in the case of a conflict with a WTO agreement and no party may challenge a federal law on the basis that it does not conform to WTO rules.

laws to the WTO agreements since, as a matter of U.S. federal law and policy, those agreements prevail over conflicting state and local laws.⁶⁷ Second, it grants the U.S. Government express authority to the judicial nullification of a non-conforming sub-federal law.

In this way, the United States Government retains complete control over whether to require a state or locality to comply with WTO obligations or to allow an offending sub-federal action to continue to apply. If the United States refuses to challenge a non-complying state or local law, it may suffer whatever consequences such non-compliance brings in the WTO – i.e., international pressure, dispute-settlement proceedings, or possibly even trade sanctions. But, that is a question left exclusively to the discretion of the national government, one that will no doubt be resolved through a mixture of diplomatic, political, and policy considerations. In the meanwhile, the states and localities are left free to regulate in areas covered by WTO agreements, subject to possible corrective action by the federal government.

B. Augmenting the Model

⁶⁷ Court decisions make clear that U.S. international agreements take precedence over state laws if the agreements were entered into in a manner consistent with the Constitution and if a conflict with state law is unavoidable (i.e., cannot be avoided through a harmonizing construction). Moreover, the President may enter into international agreements under his own constitutional authority that cannot modify or contradict existing acts of Congress, but such sole presidential agreements trump state law wherever there is a conflict. See *Pink* and *Belmont*, cited in note 4 *supra*.

It is possible that the approach to federal/sub-federal relations taken in the Uruguay Round Agreements Act may in fact be the best course for determining what role, if any, states and localities may play not only in relation to WTO matters, but also foreign commerce in general. That is, federal governments should retain the ability to reverse sub-federal actions as necessary to carry out treaty obligations or to implement foreign affairs policies; but there ought not to be an *a fortiori* presumption against state or local action that results in the judiciary striking down sub-federal laws where the federal government does not take the position that such laws are inconsistent with the foreign policy of the nation.

The Uruguay Round Agreements Act model, though, suffers from two deficiencies. First, it requires the federal government to sue states or localities in court in order to have a particular non-federal measure set aside. Certainly a judicial challenge may be an appropriate avenue for achieving this end. Indeed, there may be instances in which courts are best suited to determine whether a given state or local law is inconsistent with a treaty, for example.

But judicial intervention is not always needed, especially where a state or local law undisputedly affects international economic relations with a foreign government and the only issue is whether that law is consistent or

inconsistent with federal policy. Under such a circumstance, it would seem that the federal government is in the best position to decide what actions might advance or thwart its aims, tactics, or strategies. Where there is no question that the state or local law has an effect on commerce with a foreign government, the only question should be whether the federal government objects. If there is a question as to germaneness – i.e., does the non-federal action have an effect on trade with a foreign nation – then judicial intervention might be necessary.

Efficiency would thus seem to call for something short of lengthy, expensive litigation to resolve many of these questions. A simple, clear declaration of federal policy (whether preexisting or not) with respect to an intermeddling state or local law should suffice. Such a statement could simply come from the President, or a subordinate official designated to speak on the President's behalf. In many instances, a declaration of federal policy could resolve the matter without the need for litigation at all.

Such a practice would not remove the courts from such issues, but rather would simplify their role. As is the case today, courts would continue to have jurisdiction to rule on whether a state or local law is preempted by a treaty or other international obligation or a federal law or regulation. Where there is no such preemption, but a state or local law nonetheless is alleged to affect international economic relations, a court

would need only determine whether the challenged measure does in fact affect foreign trade with the United States (or the relevant country). If so, then the court could certify the question of whether the measure is inconsistent or otherwise harmful to federal policies to federal policy-makers. If the federal government answers in the affirmative, the law is struck down. If the federal government answers in the negative (or takes no position), the law stays in force.

Another way the Uruguay Round Agreements Act falls short is its preclusion of a challenge to state or local action by any party other than the federal government. There are beneficial effects to allowing private parties to challenge allegedly improper state or local laws. Such actions not only allow for a greater array of voices and a more inclusive legal system, but they also augment the ability of the federal government to monitor and address state or local laws that may be inconsistent with international agreements or federal government policies. There may well be a great many state or local laws that the federal government is unaware of that could cause international friction at a later time. Even a government as large as the U.S. Government simply does not have the resources to monitor every state or local law that may be inconsistent with all federal international trade policies.

C. The Federal Veto: Striking a Balance Between International Chaos and Plurilateralism

Perhaps the most salutary result of the foregoing approach would be that it would dispense with the need for courts to wrestle with whether there ought to be a dormant foreign affairs power that applies in connection with U.S. international trade policies. As noted above, the scope of the dormant power established in *Zschernig* is unclear, and the Supreme Court has offered little guidance on how to decide what state or local actions have more than an “incidental or indirect effect in foreign countries.” This is the kind of line-drawing that necessarily leads to imprecise doctrine and muddled case law. Far better to limit courts either to cases of direct preemption or, failing that, determinations of whether state or local laws affect U.S. international economic affairs. In the former case, if the law is preempted, it must fall. In the latter case, if it affects areas of national policy, it should be left to the federal government to take a position as to whether the law is helpful (or innocuous) and should remain on the books or is harmful (at least potentially so) and should be dispensed with. This determination likely would be issued by the Executive Branch in most cases, but there may be occasions where the President, for political or policy reasons, may feel a resolution of Congress is needed. Which route to be relied upon should be left to the Executive.⁶⁸

⁶⁸ It may be that Congress acts too slowly to give its views in a great number of instances, but that too may be a political judgment best left to the President or the political branches. Congress, however, could employ fast-track procedures to reach a decision, which could cut down delays considerably.

If the United States or other countries were to head down such a path, what would come of the notion that in foreign affairs, a nation must speak with one voice, a maxim that has been an unquestioned part of U.S. constitutional law for more than a century? Wouldn't allowing states and localities a role in international economic relations send mixed messages to other nations and risk undermining the federal government, as occurred under the Articles of Confederation prompting calls for a new constitutional order in the United States?

The answer to these questions is two-fold. First, while the above maxim, like most maxims, is pithy and sounds good, it is not entirely true. As previously noted, states and localities do play a role, in some instances a powerful role, in international economic affairs. The United States simply does not perform alone in this arena, but rather conducts a large orchestra.

Second, it is one thing to give almost unfettered power to states and localities in the context of foreign affairs, commercial or otherwise, an arrangement that led to the downfall of the Articles of Confederation. It is an altogether different matter to allow states and localities to take actions affecting international trade while giving the federal government the clear authority to negate any sub-federal laws that are inconsistent with federal policies. This latter arrangement would fuse together the Supremacy Clause and the dormant foreign affairs power, but

would not leave to courts the determination of where a federal foreign policy has been unduly violated. It would fall to those entrusted to make and administer such policies to give a clear and unequivocal statement as to the effects of state or local law on U.S. international economic relations.

Finally, it could be argued that federal governments often lack the political will to strike down popular state or local laws that harm trading partners or violate international agreements. Supporters of this argument could point out that the U.S. Government has yet to invoke its authority under Section 102(b)(2) of the Uruguay Round Agreements Act to seek the judicial nullification of a state or local law that is inconsistent with the WTO agreements.

The above proposed new approach to federal/sub-federal relations in the context of foreign commerce admittedly does rely on the federal government to decide what is or is not the right course of action – weighing not just foreign commercial policy but also domestic politics.

But making such decisions is what leaders are elected and paid to do. They are best positioned to consider all factors that bear on the question of whether to allow a state or local law to continue in effect even though it affects foreign nations and trade with those nations. Indeed, the use of a dormant foreign affairs power could have an undue chilling effect on state or local actions in relation to foreign commerce, just as the

President and Congress may give too much weight to the concerns of foreign governments and international institutions (such as the WTO) and not enough to the concerns of states and localities.

V. CONCLUSION

The federalism principles that underlie the U.S. Constitution, are entirely consistent with allowing states and localities to play a role in the international economic order, subject to a federal veto, creating a limited counter-balance to the great weight of the federal government in regulating foreign commerce. It would help avoid what Madison referred to as “a gradual concentration of the several powers in the same department” by allowing the “ambition” of the states and localities to “counteract” the “ambition” of the federal government. Affording states and localities even this modest role in international economic affairs would provide a limited “auxiliary precaution” against the potential of a federal government run amok.

Because Madison was right in observing that men are not angels and that government is “but the greatest of all reflections on human nature,” it would seem prudent to bear in mind that the ability to speak with one voice is not the hallmark of democracy but tyranny. The exigencies and demands of foreign affairs may justify a diminution in the role of the states and localities, but experience and case law show that a

total abolition of federalism is not warranted or demanded. This is especially true with regard to international economic affairs, which in the era of globalization are inextricably linked to the ability of states and localities to regulate their own economic affairs.

Aspects of the Reform of Higher Education in Belgium: the case of Flanders

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I. INTRODUCTION - CONSTITUTIONAL ASPECTS

Belgium is a federal sovereign monarchy with a parliamentary regime, the foundations of which derive from the Constitution of 1831, promulgated less than one year after the revolt of the Belgians against the King of the Netherlands. In its own time the Belgian Constitution was considered to be an exemplary piece of fundamental legislation built on foundations that reflected the principles of the French Revolution, and the Revolutions's guiding concept of the sovereignty of the Nation. This Constitution worked well for a very long time. Modest revisions took place in 1893 and again in 1921, to adapt the election system in accordance with prevailing contemporary principles, but it was not until 1970 that fundamental changes became unavoidable. The Napoleonic idea of centralisation no longer fit Belgian reality.

It was actually the Constituent Assembly of 1970 that started the regionalisation process

which would lead to Belgium's new federal institutions. This first wave of regionalisation acknowledged the existence of three cultural communities in Belgium: the Dutch, the French and the German. Each community enjoyed its own cultural and linguistic competences.⁶⁹ As a basic general rule these communities comprised the Dutch, French and German speaking areas⁷⁰. The existing cultural communities were transformed into integral communities in the full sense of the word in 1980 including additional competences in the sphere of health, welfare and family policy⁷¹. Since 1989 following the Constitutional revision of 1988, the Communities are empowered with educational matters with the exception of the determination of the beginning and the end of compulsory education, the minimum conditions to issuing diplomas and the pension schemes (art. 127 § 1, 2 Constitution). Broadly speaking competences falling under the aegis of the Communities refer to the population.⁷²

⁶⁹ These competences were broadly defined in art. 4 of the Special Institutional Reform Act 1980 comprising a.o.: defence and promotion of language, libraries, permanent education, further education, youth policy, leisure and tourism, artistic training etc.

⁷⁰ For the Dutch and French Communities exceptions were made for certain municipalities where special facilities were created for minority linguistic groups and for the bilingual area of Brussels - Capital.

⁷¹ The so-called personalised matters which are different from the regional matters within the competence of the regions, art. 5 Special Institutional Reform Act 1980.

⁷² The Communities are furthermore empowered as to the cooperation between themselves and as to international cooperation within the scope of their competences, including treaty - making power.

Furthermore the territory of the country is divided into four language areas: the Dutch language area⁷³, the French language area⁷⁴, the German language area⁷⁵ and the bilingual area of Brussels, the capital⁷⁶. Every municipality in the country belongs to one of these language areas (art. 4 Constitution). It will not come as a surprise that the importance of the language areas lies basically with the application of the legislation concerning the use of languages. Implicitly it introduces the principle of territoriality, since public authorities are only allowed to use the language of the language area where they are residing (with exception of the so-called “facilities” municipalities). In addition to the Communities and the language areas three “Regions” were also established: the Flemish Region, the Walloon Region and the Brussels - Capital Region. Their competences extend to the respective language areas with the exception of the territory of the German language area which comes under the competence of the Walloon Region. The concept of region in this specific context refers to a territory and the competences bestowed upon them deal with territorially linked matters (e.g. environment, economy, transport, public works, energy, housing, urbanisation...).

⁷³ Comprised of the provinces of Antwerp, Limburg, East and West Flanders and Flemish Brabant.

⁷⁴ Comprised of the provinces of Hainaut, Luxembourg, Liège, Namur and Brabant Wallon.

⁷⁵ Comprised of a number of municipalities from the province of Liège (the area of Eupen and Malmédy).

⁷⁶ Comprised of the so-called 19 municipalities.

1. Regional institutions

For both Communities and Regions legislative as well as executive institutions have been established. In Flanders there is only one legislative organ, i.e. the Flemish Parliament and one executive organ, i.e. the Flemish Government notwithstanding the fact that the Flemish Community and the Flemish Region form constitutionally separate entities.⁷⁷ For the German Community there is a Council (legislative) and a Government (executive) of the German Community. The territorial (regional) competences with respect to the German language area come under the Walloon Regional Council and Government. They naturally exercise similar competences within the Walloon Region. But in Wallonia the institutions of the Region and the Community have not been merged. Therefore the French Community Council and the French Community Government deal with personalised matters for the population of the French language area. Finally there is a Council and a Government for the Region Brussels-Capital, the territory of which is limited to the bilingual area of Brussels - Capital (the 19 municipalities). Personalised matters of the population in the bilingual Brussels-Capital area come under the competence of either the Flemish Community or of the French Community depending on whether they are dealing with services exclusively for the Dutch-

⁷⁷ Cf. Special Institutional Reform Act 1980.

speaking or the French-speaking part of the population of that Region.

2. The organisation of education

As mentioned before, competences for the organisation of education have been transferred to the Communities (art. 127 § 1, 2 Constitution). Therefore the Flemish education policy is determined by the Flemish Parliament, the Flemish Government and the Flemish minister of education. The minister heads the department of education of the Ministry of the Flemish Community and is responsible for nearly all aspects of education policy, from pre-primary education to university education. Art. 24 of the Constitution guarantees freedom of education, implying the parents' freedom of choice of the school they want for their children (community schools, subsidised public - authority or subsidised private - authority schools) as well as the freedom to organise education. This means that educational institutions may not be subjected to preventive or restrictive measures in providing education.⁷⁸ Organisation, recognition or subsidisation of education by the Communities is regulated by statute or decree (art. 24 § 5 Constitution). With respect to the quality of the education, the Flemish Community sets a number of standards to be met.

Besides the Department of Education of the Ministry of the Flemish Community certain

⁷⁸ *The Development of Education*, Ministry of the Flemish Community, Brussels 2001, 15.

advisory bodies can be mentioned that are involved in the management of the education system in Flanders. The Flemish Education Council (VLOR) was founded by the Flemish Parliament in 1991. It has to be consulted about drafts of decrees, policy documents and policy statements with respect to education.⁷⁹

Concerning higher education two different advisory bodies have been established. The Flemish Inter-University Council (VLIR) consists of the rectors of the Flemish universities and is intended to advise the minister for education and to make proposals on university policy. The Flemish Council for the polytechnics (“*hogescholen*”) consists of the heads of all polytechnics. Its competences are similar to those of the VLIR but of course with respect to education in the polytechnics.

II. THE ORGANISATION OF HIGHER EDUCATION

Higher education comprises university education and non-university higher education (polytechnics). Concerning non-university higher education there are now 24 polytechnics of either one cycle (three years) and/or two cycles (at least twice two years). One-cycle polytechnics aim at providing a vocational proficiency, based on scientific knowledge to their students so that they can practice a profession after their studies. Two-cycle education is at an academic level and also based on scientific knowledge. It is not academic

⁷⁹ *Ibidem*, 18-19.

education since it is not based on scientific research, only on scientific knowledge. The distinctions made might seem a trifle strange for outsiders but there is a basic difference between this sort of non-university higher education and university education. The latter is based on scientific research and not merely on scientific knowledge. The polytechnics offer a broad spectrum of study areas such as architecture, health care, industrial sciences and technology, music and drama, product development etc.

With respect to university education in Flanders the decree of June 12, 1991 brought about a fundamental reform of organisational structures. It defined the mission of the universities in art. 4 Universities are, in the interests of society, at the same time actively engaged at the level of academic education, scientific research and the provision of scientific services. The decree also gave universities more autonomy and financial responsibility.⁸⁰ Eighteen different study areas have been identified ranging from philosophy and moral sciences, history, law, notary, criminological sciences, applied sciences, medicine, veterinary medicine etc. The curriculum of these study areas is spread over four, five (law), six (veterinary science) or seven (medicine) years. Different types of courses exist e.g. academic courses following on secondary education and made up of two cycles.

⁸⁰ For both Ghent University and the University Centre Antwerp (originally being State institutions) the decree of June 26, 1991 provides a separate legal personality. It furthermore defines the organisation of the administration and the controlling authority.

These courses lead to a basic⁸¹ university qualification of “*licentiaat*” (after four or five years of study) or civil engineer, pharmacist, veterinary surgeon or medical doctor. After these basic qualifications postgraduate courses can be followed. These are either supplementary studies, the purpose of which is to extend the knowledge obtained in basic academic courses or specialised studies, aiming at specialisation in a given study area. The highest academic degree is that of doctor which requires the public defence of an original doctoral dissertation. This degree is a prerequisite for a university career as lecturer or professor.

For some six million inhabitants, Flanders offers university education in six universities. These are: the Catholic University of Brussels (KUB - courses restricted to the first cycle), the Catholic University of Leuven (KUL- with a first cycle base in Kortrijk), the Limburg University Centre(LUC), the University of Antwerp (UA), the Ghent University(RUG) and the Free University of Brussels (VUB). The University of Antwerp has a confederated structure⁸²; it is an association of the University Centre Antwerp (RUCA), the University Institution Antwerp (UIA) and the University Faculties of St. Ignatius Antwerp (UFSIA). The governments of Flanders and the Netherlands established the Transnational

⁸¹ The first academic degree that can be obtained is that of candidate after two or in some faculties three years of study. It is in reality the basis for further university education.

⁸² Introduced by the decree of September 22, 1995.

University of Limburg together with the Limburg University Centre and the (Dutch) University of Maastricht. The two largest universities are the KUL and the RUG. They account for approximately 70% of the Flemish university student population.

III. THE BOLOGNA DECLARATION

The Sorbonne declaration of the 25th of May 1998 of the ministers of education of France, Germany, Italy and the UK urged for the development of a European higher education space that would match and support the economic, commercial and financial market launched by the European Union over the last forty years. It emphasised the central role of universities in developing European cultural dimensions and in the creation of a European area of higher education as a key way to promote mobility and employability and contribute to the overall development of the European Continent. Following the Sorbonne declaration the broader group of European ministers of education jointly agreed to the Bologna declaration of June 19, 1999. In this document specific objectives were put forward such as the adoption of a higher education system essentially based on two main cycles, undergraduate and graduate where access to the second cycle shall require successful completion of first cycle studies, lasting a minimum of three years. The degree awarded after the first cycle shall also be relevant to the European labour market as an appropriate level of

qualification. The Bologna declaration furthermore stressed upon the necessity of developing a full fledged credit system in order to promote wide spread student mobility in Europe. The main thrust of the Declaration lies in proposing the creation of a European space for higher education (to be realised by 2010). This is not supposed to be done within the framework of EU institutions (even though they participate in the elaboration process) but via an autonomous effort of the participating countries represented by their Ministers of Education and by the Rectors of universities. According to its wording, the Bologna Declaration does not aim at harmonisation of higher education in Europe but at more transparency to increase mobility of students and professors.⁸³

IV. THE HIGHER EDUCATION REFORM

The Flemish minister of education has taken the recommendations contained in the Bologna declaration very seriously and introduced what are probably the most reformatory changes in higher education in Flanders since the 19th century. On May 17, 2002 the Flemish Council of Ministers approved a pre-draft decree on the restructuring of higher education in Flanders which was passed by the Flemish Parliament on 4 April 2003 (*Belgisch Staatsblad* 14 August 2003). At the same time the Government announced that

⁸³ In May 2001 the ministers of education released a communiqué after their follow up meeting in Prague focussing primarily on accreditation and quality assurance.

more initiatives will follow specifically with respect to teachers training, a credit system, appropriate arrangements for social facilities pertaining to students of higher education, a uniform legal position of the members of staff in higher education and a reform of study financing. The aim is to produce decrees in these matters by the beginning of the academic year 2004-2005. Whether this time trajectory is realistic is in no way certain.

As far as the decree on the restructuring of higher education is concerned the text provides several innovations in order to implement the principles of the Bologna Declaration such as the introduction of the degree of bachelor and master, a system of accreditation and the possibility of creating associations⁸⁴ between one university and several polytechnics. It seems evident that the Flemish Government intends over the years to abolish the existing dual structure between universities and polytechnics in order to provide one single structure for higher education.⁸⁵ The rather ambiguous binary system with polytechnics organising courses of an academic

⁸⁴ To be established as a separate legal person taking the form of private law non-profit association. At present the association of universities with polytechnics is effectuated primarily on the basis of ideological foundations. The Catholic University of Leuven for instance gathered virtually all catholic polytechnics around it from all over the territory of Flanders. Needless to say that this will unavoidably create problems in the future.

⁸⁵ The decree regulates the financing of polytechnics and universities in the second and third headings of the text. I will not deal with this here since it is basically of internal importance and an entire new financing system is under development to be implemented by 2006.

level and at the same time not being academic courses is in this decree being abandoned.

It is true that in Europe varying academic qualifications exist making it rather difficult for students to compare the exact situations in different countries. In order to avoid this confusing situation it will be necessary to introduce much more transparency and equality in the definition of these academic qualifications, to support better monitoring systems and accreditation mechanisms. These will concentrate more on the courses provided and less on the institutions (polytechnics or universities) organising them.

The decree makes a difference between professional and academic courses. The former are those that aim at the general development of the students and at acquiring professional (or artistic) capabilities based on the application of scientific (or artistic) knowledge and on practical knowledge. Therefore professional bachelors degrees tend to give students a certain level of general and specific knowledge necessary for independently practising a profession. On the other hand academic bachelors degrees have the objective of giving their students a certain level of knowledge and capability inherent to a scientific (or artistic) functioning in a specific area of science (or arts), leading directly into a masters course or onto the labour market. Masters courses are always academic courses and intend to upgrade students to a more advanced level of

knowledge and capabilities allowing them to function autonomously in a profession. The fact that masters courses are fundamentally academic courses does not preclude them from preparing students for a profession, but that is not the primary objective. A masters course has to culminate in a master test (thesis) which will count for at least one third of the study points of an academic year, i.e. a minimum of 20 study points. The minimum number of study points for a bachelors degree is 180 and for a masters degree it is 60.

The new decree makes a valuable contribution by identifying specific institutions as polytechnics or as universities. This will put an end to the unfortunate practice by which institutions gradually assumed the status of a university without in fact being one and thus deliberately misleading potential students. An educational institution can only call itself university when it figures in the corresponding list in the decree and the same goes for polytechnics. The list can only be changed by the Flemish Government, which will prevent any undue expansion of institutions. On the other hand institutions which are not listed in the decree can have themselves registered by the Flemish Government under certain conditions, e.g. by giving proof of financial solvency and concluding a cooperation agreement with a listed university or polytechnic.

The decree also clarifies the actual educational track for all institutions. Polytechnics

can offer professional bachelors courses and/or academic bachelor and masters courses in the framework of an association with a university. Universities can organise academic bachelors and masters courses as well as offering programs leading to the degree of doctor. Successfully finishing a course will lead to the corresponding degree. The decree allows the addition of the phrase “of arts” or “of science”, to facilitate international transparency. The Flemish Government decides to which degrees the specifications “of arts” or “of science” can be added. Rather astonishingly, the specification “of laws” is not mentioned at all⁸⁶. Finally universities and polytechnics can deliver postgraduate certificates for courses that follow the basic bachelors or masters courses but without necessarily fitting into the tight bachelors and masters structures.

Access to masters courses is limited to those having obtained a corresponding bachelors degree but some masters courses will be reserved for those having another masters degree (masters after bachelor and masters after master). The possibility remains that holders of a professional bachelors degree may be allowed entrance into a masters course after completing a preliminary

⁸⁶ At the initiative of the Ghent Law Faculty an amendment to the decree is in preparation so that the specification “of laws” can be used in future. Due to an actual non-agreement between universities and polytechnics the Government has not yet decided upon the use of the specifications. Since this provision of the decree has therefore not been enforced at the moment, faculties can decide so far more or less for themselves.

programme of at least 45 and maximum 90 study points (a full academic year has 60 study points).

Legal education is currently limited to universities⁸⁷ and is organised around a two-year candidate cycle and a three-year “*licentiaat*” cycle. The final degree is therefore obtained after a minimum of five years’ study (300 study points) and it is a general law degree. Law students can specialise in the latter part of their studies by following certain options, e.g. civil and criminal law, social and economic law or national and international public law. But whatever options they have chosen they will receive the same degree of “*licentiaat*” in law allowing them access to the bar or to the bench. They will also have to complete additional professional exams or even entrance exams for the bench, followed by a training period. Access to the legal profession is organised in the Judicial Code which is coming under the federal authority of the Minister of Justice. This implies that any changes made to the law degree by the Community decree on higher education has to be “translated” into the federal legislation whenever necessary.

At present all Flemish law schools have agreed that the law degree within the new system of the Flemish decree needs to be a general one. Therefore the basic law degree should not be in fiscal law or social law or economic law etc. but

⁸⁷ With the exception of a course of three years (one cycle) study in polytechnics leading to a degree in law practice. The value of this diploma is rather limited. It does not give access to legal professions such as advocate, judge or bailiff. Basically these students end up in the private sector as para legals.

simply in law. From the academic year 2004-2005 onwards the students finishing their law studies will be given the degree of master of laws, although the new masters structure is intended to start from the academic year 2007-2008, whilst the new bachelors structure will be initiated as from 1 October 2004.

Discussions have been going on focusing on the total time required for law studies. Since the bachelors degree requires at least 180 study points and the masters at least 60, several possibilities arise. A bachelors law degree after three years (180 study points) or after four years (240 study points) and a corresponding masters degree after two years (120 study points) or after one year (60 study points). A three plus two or a four plus one or even a three plus one year system becomes possible. If there is one thing that the law schools must agree on, it is the duration of the law studies. It cannot be that one law school is using a three plus one system and another a three plus two system. This would not enhance the idea of transparency embodied in the Bologna Declaration. In practice, however, the consensus at the level of the deans of the different law schools for a three plus two system was adopted in the new decree. It could well be however that in the future the legal profession might demand that the total length of the studies might be shorter. The law schools are not convinced that this would be advisable. Indeed a more professional training of law students in the law school would lead to decreasing the number of academic non-law

subjects, such as philosophy, sociology, psychology, ethics that law students could take as part of their studies. Law schools want to maintain the basic academic qualifications of law students and are not aiming at producing merely professional lawyers.

Since the decree is requiring that bachelors need to have some access to the labour market, law schools will have to take care that law bachelors can also use their degrees in a working environment. This cannot be the legal profession, however, since federal legislation requires a higher qualification (“*licentiaat*”) as a condition for access.⁸⁸ So again it seems that law bachelors will end up in some paralegal activities. This is not necessarily a bad thing. It will allow private industries, such as the bank sector and insurance sectors, to provide on-the-job training to people with sufficient - although limited - academic qualification. It might well be that after a while a substantial number of law bachelors will leave the university in order to look for jobs. After all, only some 25% of all law graduates currently end up in a legal profession, and for those that do not have ambitions in that direction there might definitely be a future in just finishing the bachelors course. They can later on still resume their studies and take on a masters course not necessarily in the university they originally attended.

One of the objectives of the Bologna Declaration is to realise a wider European space

⁸⁸ For notaries an additional *licentiaat* in notary is obligatory taking one academic year (60 study points).

for higher education. The bachelors-masters structure of higher education clearly allows for international student (and staff) mobility and once the credit system is installed nothing but practical considerations will stop students from continuing their studies abroad. Although this seems particularly feasible in most of the academic disciplines, law finds itself rather on the edge. Indeed, a considerable amount of the effort of studying law is devoted to aspects of a national legal system. First and foremost, lawyers need to be fully acquainted with their own national legal system. It is therefore not so self-evident that law students from one country will be able to continue their study in another country, at least not a very substantial part of it. Notwithstanding certain developments towards a European *ius commune*, a considerable part of the law studies will necessarily deal with national law so long as the European States cling to their own legal systems. Ideally of course law students would take their bachelors degree in their home country and then go out for a masters in another country and be allowed access to the legal profession at least in the two countries concerned. For the moment that is not the situation yet. And moreover this would require a well thought-out balance between the bachelors and masters curriculum. For now there is no deliberate harmonisation of the different law curricula between European universities. Each and every one of the universities in Europe organises its curriculum by itself responding merely to legal requirements imposed on them by their national legislation. To

a certain extent there are large parallels because most of the European continental states apply the same educational philosophy aiming at the production of a general lawyer with broad intellectual capacities going beyond mere professional requirements. But of course the United Kingdom has a fundamentally different approach since law studies there are directed towards the production of professional lawyers as required by the legal professional societies. So it appears that uniformity within Europe is not yet at hand.

Another aspect that needs to be taken into consideration in the light of student mobility is the use of another language than the national language for teaching purposes. Particularly in countries where European minority languages are spoken, such as Dutch, Greek, Portuguese and the Scandinavian or Eastern European languages. It is common now that in most of those countries English has become the *lingua franca* for teaching foreign students. A number of universities make tremendous efforts to please their guest students by providing entire courses in English. In other countries the use of languages creates difficulties. Particularly in Belgium, the language legislation is rather strict and based on the territoriality principle. Accordingly, universities and other institutions of higher education encounter problems in teaching of sufficient number of subjects in English. Of course there can be no doubt whatsoever that it remains of the highest importance that the local language be used for purposes of higher education. This is a

normal aspect of the cultural development of a given society. Specifically in Flanders due to historical circumstances the use of Dutch in teaching cannot be put aside without betraying the Flemish emancipation process since the 19th century. It goes without saying that the use of languages in Flanders is a politically sensitive problem. Therefore the decree declares that the teaching language in Flemish universities and polytechnics will in principle be Dutch. Nevertheless, exceptions are possible e.g. for subjects relating to the study of a foreign language and subjects taught by foreign visiting professors. In cases where the use of a foreign language for teaching provides an added value to the course, subjects can be taught in this foreign language. On the bachelors level however this is limited to 20% of the subjects of a given course per academic year. Whenever institutions of higher education intend to organise courses specifically offered for foreign students in a foreign language, they will have to duplicate them in Dutch, with the exception of courses offered in development cooperation programmes. Fortunately, for masters courses building upon other masters courses, the institutions themselves are allowed to decide on the language used for teaching purposes. So basic higher education will continue to be taught in Dutch, but there will be the limited option of doing some teaching in a foreign language.

V. CONCLUSION

The organisation of (higher) education is a fundamental aspect of the cultural identity of a society. It reflects how this society deals with the need to provide sufficient intellectual foundations for its public and cultural life. Since the federalisation of Belgium through the successive revisions of the Constitution starting in 1970, has become a *fait accompli*, education is a primary responsibility of the Communities. From the early 1990s the Flemish Community has shown remarkable initiative in reforming higher education, both in the universities and in the polytechnics. These institutions have been given far-reaching autonomy to determine their own missions. Under the impulse of the European ministers for education, the Flemish Community again has unreservedly sought to change fundamentally the structure of higher education in Flanders. This was in its inception a political decision, which none of the universities really sought. University education and in particular legal education in Flanders has already enjoyed a strong reputation for quality and efficiency. So most faculties were in the beginning not at all enthusiastic about these potential reforms. Nevertheless, having been confronted with a new political reality, the universities accepted the challenge and undertook the process of reforming along the lines designated by the politicians. In any case, many universities came to value the potential for internationalisation inherent in the proposed reforms. The creation of a wider European space for higher legal education is a tremendous challenge facing formidable obstacles arising from the diverse cultural characteristics of

the European States. It is to be hoped that the reforms in Flanders will pave the way for the development of a new truly European *homo academicus* who will find him-herself as much at ease in Gent as in Paris, Bologna, Cologne, Prague or anywhere else in Europe.

The Enlargement of the European Union and the IGC-2004

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1. INTRODUCTION

In March 1998 the European Union (EU) formally launched a process that will lead to the largest expansion in its history. Thirteen applicant countries stand ready to join the federation: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia and Turkey.⁸⁹

The EU has had to deal with enlargements before. The Treaties of Paris (1951), establishing the European Coal and Steel Community (ECSC), and Rome (1957), establishing the European Economic Community (EEC) and EURATOM, were signed by six founding members: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. But although the EU then underwent four successive enlargements,⁹⁰ the institutional structure of the EU has remained

⁸⁹ For more background information see the homepage of the European Commission at <http://europa.eu.int/comm/enlargement>.

⁹⁰ Denmark, Ireland and the United Kingdom (1973), Greece (1981), Portugal and Spain (1986) and finally Austria, Finland and Sweden (1995).

almost unchanged. For this reason it is has become clear (and widely known) that the system is no longer working well, despite three intergovernmental conferences (IGC's).⁹¹

The goal of the last IGC 2000 negotiations was to prepare the EU for enlargement and to make the Union more democratic, transparent and efficient. In December 2000 the Conference concluded the Treaty of Nice. However, the Treaty of Nice scarcely achieved these goals.⁹² Instead, the Treaty announced another IGC, to take place in 2004. Declaration No. 23, attached to the Treaty of Nice stated that:

Following a report to be drawn up for the European Council in Göteborg in June 2001, the European Council, at its meeting in Laeken/Brussels in December 2001, will agree on a declaration containing appropriate initiatives for the continuation of this process.

⁹¹ Starting with the Single European Act in 1987, followed by the Maastricht and Amsterdam negotiations in 1993 and 1996. Only through an IGC the Treaties can be amended. In an IGC are represented the Heads of State of the participating Member States. For this reason, Member States are called the "Herren der Verträge." The amendments of the IGC shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. See article 48 TEU.

⁹² See for a commentary of the Nice Treaty. X.A. Yatağan, The Treaty of Nice. The Sharing of Power and the Institutional Balance in the European Union B A Continental Perspective. Cambridge: Harvard Jean Monnet Working Paper, 01/01).

The process should address, *inter alia*, the following questions:

- how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne;
- the role of national parliaments in the European architecture;
- a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning.

A so called 'Convention' prepared the IGC. The task of the Convention was to pave the way for the next Intergovernmental Conference.⁹³ Contrary to most expectations, the Convention designed a true Draft-Constitution for the

⁹³ The Convention was an innovation. It brought together a wide range of governmental, parliamentary and other representatives. Available at: <http://european-convention.eu.int/>.

European Union⁹⁴ and the IGC was, contrary to the above mentioned declaration, held in Rome in 2003. The heads of State of the Member States could however not reach consensus over the Draft-Constitution. The next IGC will probably be held in the second half of 2004, under the Dutch presidency.

This discussion will concentrate on the first two issues to be faced at IGC-2004. To what extent can these issues turn the Union into a more democratic, efficient⁹⁵ and transparent organisation?

2. THE FIRST ISSUE: A CLEARER DIVISION OF POWERS BETWEEN THE EU AND THE MEMBER STATES

Declaration 23 makes clear that the more precise delimitation of powers should reflect the principle of subsidiarity. Before turning to the desirability of a more precise division of powers for the European Union, some remarks should be made about the principle of subsidiarity.

What does this principle mean? In the Treaty on European Union (TEU) the principle is mentioned in Article 2 and in the EC Treaty (TEC) in Article 5. According to this last article

⁹⁴CONV 850/03. At the time of writing of this article, the results of the Convention were not known. Therefore they will not be discussed here.

⁹⁵Efficiency means that decisions should be taken as quickly as possible.

the Community shall only act within the limits of the powers conferred upon it by this Treaty, in pursuit of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

In European literature no consensus exists over the precise meaning of the principle. In global terms one can only say that it means that (I) the Community shall not act when and if it is better for the action to be taken by the Member States and *vice versa*, and (II) if action by the Community is warranted the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.⁹⁶ It is clear that the opinions often differ between the Community and Member States over the question: when is it “better” for the action to be taken by the Member States? The European Court of Justice (ECJ) has no competence over this question.⁹⁷

⁹⁶ See P. Craig, G. de Búrca, *EU Law, text, cases, and materials*. Oxford University Press, 1999.

⁹⁷ This does not mean that the principle of subsidiarity is not justiciable. The point of illegality is reached when the acting institution was obviously mistaken or abused its discretion when considering the principle. See: A. von Bogdandy, J. Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, *CMLrev.* 39, 2002, p. 227-268.

Furthermore, in European politics practically no one seems to be willing to recognize that theoretically the principle of subsidiarity says nothing about the division of competences between the EU and the Member States.⁹⁸ This division is already laid down in the TEC. Article 7 of the TEC states that “each institution shall act within its limits of powers conferred upon it by this Treaty”. Determining which institution has which powers and how they must be exercised, is governed by the requirement that all Community measures must be adopted on the basis of an identifiable legal power or basis.⁹⁹ In other words, if there is no legal basis, the Community institutions have no legal power to adopt a measure.

Why then does the EU want to change the current division of powers? There is an official and an unofficial motive. The unofficial motive is that the German *Länder* were responsible for making the *Kompetenzabgrenzung* (as the Germans call it) an official IGC agenda issue. German *Länder* repeatedly told the President of the European Commission (Prodi) that ratification of the revised treaty will be difficult if their powers were not preserved.¹⁰⁰ The official reading

⁹⁸ Theoretically, because if the Commission submits a proposal to the European Parliament and the Council, that presupposes that the Commission thinks that action can better be taken by the EU. In those cases a legal basis is quickly found.

⁹⁹ *Opinion 2/94* ('competences d'attribution').

¹⁰⁰ *Agence Europe* (No 7726), May 27th 2000. The current discussion concerning the introduction of a “Kompetenz-Katalog,” shows resemblance with the debate in the US in the

is that the current system is not transparent and understandable enough. This is deceptive, but partly true. The current delimitation of powers does not excel in clarity, to put it kindly.¹⁰¹ An understandable enumeration of Community powers could contribute to more acceptance and legitimacy of the EU by the European citizen, more transparency and efficiency. The question however is how to understandably write down something so complex?

From the perspective of efficiency the following remarks can be made. To enable the Union (with 27 or more Member States) to make decisions as quickly as possible, it seems unavoidable that certain competences cannot remain the domain of the EU.¹⁰² The German

days of Madison. Also there the question was: how powerful should the future Union be? The call from the influential German *Länder* is an effort to preserve and even extend their powers.

¹⁰¹ The system can be *grosso modo* described as follows. The EC has so called “exclusive competences”. This means that the Member States cannot take action. These competences are only fisheries and the common commercial policy. Furthermore, there are “concurrent” and “parallel” competences; Member States remain competent as long as the EC has not taken action in this field. For example agriculture (art. 37 EC): “In order to evolve the broad lines. Has the EC, in the case of a ‘concurrent’ or ‘parallel’ competence (also termed ‘cumulative-concurrent’ or ‘shared’ competence) not taken all the “necessary measures”, the Member States remain competent. Within the parallel powers, one can conceive non-regulatory powers, e.g. Article 149 EC, as a particular subgroup. Under these competences the Union is prevented from regulating. See: Von Bogdandy, Bast, *op. cit.*

¹⁰² “For example, if the number of Member States rises from 15 to 27, the conciliation committees involved in the co-decision procedure, which currently require 40 people to meet, would then require about 70 people. It is inevitable that the time taken up by each of these procedures will increase and the time available to members of the European Parliament, the Council and the Deputy Permanent Representatives, who usually

Minister of Foreign Affairs, Joschka Fischer, initiated this discussion. He stated in his famous speech at the Humboldt University in Berlin in 2000 that:

“there should be a clear definition of the competences of the Union and the nation-states respectively in a European constituent treaty, with core sovereignties and matters which absolutely have to be regulated at the European level being the domain of the Federation, whereas everything else would remain the responsibility of the nation-states.”¹⁰³

The core sovereignties of the EU can be readily discerned. The exclusive competences of the EU, those are fisheries¹⁰⁴, the external trade in goods¹⁰⁵ and the common commercial policies.¹⁰⁶

represent members of the Council on the conciliation committees, will be reduced, while the number of procedures will proliferate. As a result, less attention will of necessity be paid to the quality of the most important legislative acts.” This quote was taken from: SN 3068/00, “The concept of a legislative act adopted by the co-decision procedure within the framework of the hierarchy of Community legal acts and in the context of the forthcoming enlargement of the Union,” Brussels, 30 May 2000.

¹⁰³ “From Confederacy to Federation - Thoughts on the finality of European integration.” Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000.

¹⁰⁴ According to the ECJ in C-804/79.

¹⁰⁵ According to the ECJ in Opinion 1/75 and C-41/76.

¹⁰⁶ However, the Treaties themselves explicitly confer competences only in the Monetary Policy field (e.g. Art. 106 EC). The qualification of other competences as exclusive is controversial, in particular since the introduction of Article 3b(2)

Trying to define “matters which absolutely have to be regulated at European level” is more difficult. It depends on one’s perspective.¹⁰⁷ Where the European Community under the current arrangement shares its powers with the Member States, the Community will in the future be responsible for formulating basic policies, of which the Member States will be the executives (in managing the environment, public health, social policy, employment, research and technological development, and development co-operation).¹⁰⁸ Member States could be fully responsible for activities where the Community only has limited competence or where the Community has supplementary powers (e.g. education, culture, vocational training , youth and industry). Moreover, Foreign Policy and the Justice and Police cooperation (the so-called second and third pillars) should belong to the core activities of the Union. These reflections lead to the following proposals:

[1] As provided by the Treaties upon which the Union is founded, the Union shall have the following competences: ¹⁰⁹

- (1) Exclusive competences*
a) External trade in goods
b) Sea Fisheries

EC (now Art. 5(2) EC). See: Von Bogdandy, Bast, *op. cit.*

¹⁰⁷ Those who support a “federal” Union will have different views than adherents of a “confederal” Europe.

¹⁰⁸ In this system, there would be no longer be a distinction between “concurrent” and “parallel” competences.

¹⁰⁹ Von Bogdandy and Bast, *op. cit.*, have developed a similar model, albeit without mentioning the specific competences.

- c) *Monetary policy*
- d) *Foreign Policy*
- e) *Justice and Home Affairs*

(2) *Concurrent competences*

- a) *Environment*
- b) *Public health*
- c) *Social policy*
- d) *Employment*
- e) *Research and technological development*
- f) *Development co-operation*

(3) *Non-regulatory competences*

- a) *education*
- b) *culture,*
- c) *vocational training*
- d) *youth and industry*

Could the transparency of the Union also be advanced by a competence-catalogue?

Theoretically, an enumeration of powers makes clear at a glance what the Union should or should not do. In practice, however, things are much more complicated. Here we can learn from the German and American experiences. Both legal systems have a very clear enumeration of powers. But because of the wide interpretation by the Supreme Court in the United States and the *Bundesverfassungsgericht* in Germany, examination of Art. I, § 8 and Chapter VII of the German *Grundgesetz* tells us very little about the actual division of powers between the Union and

the States. If one wants to avoid a similar evolution in the EU, the European Court of Justice should be sharply restricted in the scope of its power to interpret enumerated powers.

Another possible criticism of creating an enumerated *Kompetenz-Katalog* for the EU, would be that it would inhibit the so-called “community method” by which much European integration has taken place.¹¹⁰ This method has proven to be quite successful. Too strict a delimitation of powers could endanger this method, causing further integration to stagnate.¹¹¹

3. THE SECOND ISSUE: THE STATUS OF THE CHARTER.

At the end of the IGC in Nice an “EU Charter of fundamental rights” was “solemnly proclaimed”. This document contains about 50 articles, containing a wider variety of fundamental rights. Why was such an exercise needed? After

¹¹⁰ “The Community method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union’s legislature,” according to the European Commission in its White paper on European Governance, Brussels, 25.7.2001, COM(2001), 428, final. It also means that whenever harmonisation or further integration was needed, new powers for the Union were created. This step-by-step approach has proven its value.

¹¹¹ See, e.g., the view of the European Commission: “(h)owever, codifying in the Treaty a catalogue of this kind would have the disadvantage of artificially straitjacketing the Union’s capacity for action, which would be particularly inappropriate in a rapidly changing global context.” A project for the European Union, COM(2002), 427, Brussels, 22 May 2002.

all, the ECJ had already recognised in its jurisprudence practically every fundamental right as now laid down in the Charter. The conclusions of the European summit in Cologne (1999) were that: “[t]he European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.” The Presidency perceived “a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens.”

The Charter has raised several complicated questions and problems. Two stand out. First, the new ability that European citizens will have to invoke rights as laid down in the Charter before a national or European judge and second, the relationship between the Charter and the European Convention on Human Rights (hereafter: the Convention).

IV. THE CHARTER AND INDIVIDUALS

Article 230 (4) EC reads as follows: “[t]he Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.” Article 230 (4)

states that: “[a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

This article thus grants individuals a right to a so-called direct appeal before the European Court of Justice (ECJ). But only if the act of the EC¹¹² is of a “direct and individual concern” to them. The Court of Justice has interpreted this demand very strictly. In the well-known Plaumann case¹¹³ the court stated that: “Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.” This case-law, which was upheld until very recently, made it very difficult for individuals to contest an act of the EC.¹¹⁴ This situation will probably come to an end. In the case of T-177/01¹¹⁵, the Court of First Instance (CFI)¹¹⁶ made a remarkable innovation:

“ ... une personne physique ou morale doit être considérée comme

¹¹² Acts taken within the field of the second and first pillar are only insignificantly open for review. I shall not discuss this further.

¹¹³ C-25/62.

¹¹⁴ Some writers called this “an insult to democracy.”

¹¹⁵ 3 May 2002.

¹¹⁶ Which is a part of the Court of Justice.

individuellement concernée par une disposition communautaire de portée générale qui la concerne directement, si la disposition en question affecte, d'une manière certaine et actuelle, sa situation juridique en restreignant ses droits ou en lui imposant des obligations. Le nombre ou la situation d'autres personnes également affectées par la disposition ou susceptibles de l'être ne sont pas à cet égard des considérations pertinentes."¹¹⁷ If this judgment is being upheld by the ECJ, the position of individuals to initiate a direct appeal would improve considerably.

This raises the question whether individuals can invoke rights under the Charter. That was certainly not the intention of the Member States when they concluded the Treaty of Nice. According to them the Charter was only "politically" (not legally) binding.¹¹⁸ Here they overlooked the significance of Article 6 EU that reads that the Union shall respect *inter alia* fundamental rights as they result from the

¹¹⁷ The English version of the judgement is not available yet.

¹¹⁸ See article 51 of the Charter: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

constitutional traditions common to the Member States, as general principles of Community law. One could easily argue that the Charter is a part of these constitutional traditions. If that is the case, the Union would have to respect Article 47 of the Charter: “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

The ECJ, however, has until recently made no reference to the Charter.¹¹⁹ That situation changed in case T-54/99:

“[s]uch judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.”

¹¹⁹ Advocate-Generals of the Court, on the other hand, did. The first was A-G Tizzano: “I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context.” C-173/9, BECTU, 8 February 2001.

This observation was repeated in the above mentioned case T-177/01. But here too it remains to be seen whether the ECJ will uphold a judgment which, if it is allowed to stand, will have enormous consequences.

V. THE CHARTER AND THE CONVENTION

The strange situation has now arisen in which Europe had two different charters of fundamental rights: the European Convention on Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms. The former, falls under the jurisdiction of the European Court of Human Rights, located in Strasbourg. The latter falls within the jurisdiction of the ECJ in Luxembourg. Most of the rights laid down in the Charter are similar to those of the Convention. Even the way the rights are formulated is much the same. The Convention however entered into force in 1950 and has therefore a rich store of accumulated jurisprudence. Formally and legally the ECJ is bound by this.¹²⁰ Practise however has shown that it is not. The possibility of diverging jurisprudence on the highest European level is far from ideal. When the ECJ offers equal¹²¹ or more¹²² protection than the ECHR, there wouldn't be a problem. The Charter stresses in Article 52 (3): " ... [i]n so far as this Charter contains rights which correspond

¹²⁰ Under article 6 EU.

¹²¹ An example is C-185/95.

¹²² An example is C-340/97.

to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

But what if the rights in the two catalogues do not correspond? In those cases Article 52(3) seems not applicable. It is therefore possible that the ECJ offers less protection than the ECHR.¹²³ Since, the ECJ decides whether the rights correspond or not, it can easily conclude that they do not.

The only possible solution to prevent diverging jurisprudence is accession of the Union to the European Convention on Human Rights. In its Opinion 2/94, however, the Court held that the EC has no competence to accede to the Convention.¹²⁴ Because of the recent

¹²³ For example, in case T-305/94 the CFI rejected the wide interpretation of article 8 of the Convention. In case C-17/98, the ECJ ruled that parties cannot react on the conclusions of the Advocate-General. This is possible under the Convention.

¹²⁴ “The Court stated that respect for human rights was a condition for the lawfulness of Community acts. However, accession to the Convention would entail a substantial change in the present Community system for the protection of human rights in that it would involve the Community entering into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. The Court took the view that such a modification of the system for the protection of human rights in the EC, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore go beyond the scope of the dispositive powers provided for in Article 308 of the EC Treaty.”

Available at

http://europa.eu.int/eurlex/en/about/abc/abc_10.html.

developments concerning the Charter, the issue is a pressing one. In light of the current political debate in Europe it seems unlikely that the EU will ever accede to the Convention. There are several reasons for this. First, the EU has no legal personality. Legal personality is a condition *sine qua non* for accession to the Convention. Second, besides the EU-Treaty, the (statute of the) ECHR requires amendment. Under the current system only states can join the Convention. The EU is, of course, not a state. Amending the Convention has to be approved by all 41 members of the Council of Europe. It is not unthinkable that some (non EU) members will not cooperate.

VI. CONCLUSION

The IGC-2004 has to tackle some very complicated and politically delicate issues. The discussion is mostly about power. Member States want to secure their influence in the enlarged Union. The delimitation of powers is probably the most complex issue. When it comes to renegotiating the current order of competences, the EU-Member States are hardly going to follow expert legal advice or (technical) legal considerations.¹²⁵ There is however a need for revising the current system. It must be made more transparent. Moreover, to keep the EU efficient in the future, the powers of the Union must be “few and defined”.¹²⁶

¹²⁵ Von Bogdandy, Bast, *op. cit.*

¹²⁶ As Madison, Hamilton and Jay stated in *The Federalist Papers*, No. 45, “The Alleged Danger From the Powers of the Union to the State Governments Considered.”

Determining the Status of the Charter has become yesterday's question. The status is already clear: it has legal effect and citizens can invoke the rights as laid down in the Charter. The democracy in the Union will be served by this development. On the other hand, a solution must be found for the problems concerning the relationship of the Charter and the Convention on Human Rights. Legal certainty could be endangered when there is a risk of diverging jurisprudence. Accession of the EU to the Convention is the only possible solution.

Conflicts in the Regulation of Hostile Business Takeovers in the United States and the European Union

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I. INTRODUCTION

It is striking how the efforts of the European Union to harmonize the laws of its different member nations in order to create uniform European Union laws repeat the struggles of the United States to do the same, in the early years of the American union. There were a number of iterations of “harmonization” 200 years ago¹²⁷ in the course of founding the U.S. and a civil war was fought 150 years ago over what Europeans today would call the subsidiarity issue. The American federal power sought to dominate areas which seemed to states to be of more local concern. Though the Civil War itself ended nearly 150 years ago, the tension between Federal control and States’ rights has never truly disappeared.

¹²⁷

Articles of Federation and US constitution.

Today in the United States, individual views about subsidiarity or “states’ rights” often reflect attitudes towards those currently in power at the federal level. For example, many who in the U.S. would be characterized as politically “conservative” were, for years, the strongest advocates of states’ rights, at a time when the federal government was dominated by individuals with more progressive (“liberal”¹²⁸) political orientation and agenda. When, however, conservatives achieved federal power during the Reagan-Bush years, the conservatives felt no restraint in applying federal force to assert their own political perspectives over states with differing opinions.

These experiences suggest that efforts to develop a European Union might glean some lessons from the U.S. experience. It is important to make note, however, of one dimension of European nations that makes their circumstances different and therefore might lead to different results. European nations have deeper separate histories than the American states, and therefore more profoundly different cultures.

This essay will focus on hostile business takeovers to illustrate the significance that cultural differences among nations can play in developing a harmonized European Union law. The European Union has made several (so far unsuccessful) efforts to develop a uniform

¹²⁸ “Liberal” in the United States sense, i.e., more to the political left as opposed to Liberal in the European sense, i.e., more to the political right.

regulation of these activities. Cultural differences among the several Union nations may have helped to thwart those efforts.

Hostile takeover regulation can serve as an interesting example of the impact of cultural diversity, illustrating the differences and similarities between U.S. Federal and State laws (both statutory and judicial) and the struggles that the current European Community now faces in developing its own rules and regulations. It is generally believed among scholars and policy-makers that as nations increase their economic participation internationally, so will their economic laws and policies take on an international scope. The received view is that those internationalizing nations' laws will each evolve and in so doing, will naturally gravitate towards one another and result in uniform international standards.¹²⁹ The reasoning is that economic forces will cause each nation to develop laws along efficient lines and as a result each nation's laws will ultimately meet each other with the same (efficient) standards. Furthermore, not only will these separate efficiency processes generate uniform legal standards across those nations, but the standards evolved will be also the ones that are the most efficient for the international context. As significant attention already has been given academically, judicially and legislatively to the subject of hostile takeovers in the U.S. in the 1980's and the results are now

¹²⁹ Roberta S. Karmel, "Is it Time for a Federal Corporation Law?", 57 *Brooklyn Law Review* 55, 90 (1991).

viewed as essentially settled law, it seems quite natural for current European analysts to look to U.S. conclusions when considering the EU's and its member nations' efforts to address the matter for themselves.¹³⁰ Indeed many European scholars and policy-makers have done so.

In the summer of 2001, however, a Hostile Takeover Directive was put before the EU's European Parliament for approval, a proposal that was widely regarded as the successful culmination of a 12-year collaborative effort to effectuate a common ground on the regulatory treatment of hostile takeovers within the EU countries, based on principles similar to the United States. The Directive was defeated, which was the first time since the EU's inception that a Directive of this magnitude did not succeed. It was defeated in a deadlock tie, in large part because of the influence of Germany. One of Germany's major companies had fallen victim to an international hostile takeover by a British company less than two years earlier. The economic importance of the two companies was so great that the takeover itself was the largest in history. Some of the German company's vulnerability was due to differences in Germany's "economic structure" and "social contract" and lack of takeover regulations as compared with Britain, the home of the hostile raider. Clearly finding common ground among 15 nations (which are now expanding to 25, with

¹³⁰ Guido Ferrarini, "Share Ownership, Takeover Law and the Contestability of Corporate Control," *Company Law Reform in OECD Countries. A Comparative Outlook of Current Trends*, Conference Proceedings (forthcoming 2001).

perhaps more to join¹³¹), even regarding a well-defined topic such as hostile takeover regulation, is difficult to achieve and even more difficult to sustain.

The purpose of this essay is to raise a number of questions about “received theory” regarding the evolution of transnational uniform business law. First, a closer look at history will challenge the view that nations will naturally gravitate towards a uniform law. Second, review of the practicalities will question whether a transnational uniform law in all its aspects is indeed necessary to have efficiency. Third, a look at actual cases suggests that the experience of the United States has not always yielded the most “efficient” solutions, at least with regard to economic matters, when applied to European circumstances.

II. HOSTILE TAKEOVERS - THE UNITED STATES' EXPERIENCE

A. Evolution of Hostile Takeover Regulation

A hostile takeover occurs when an individual or corporation - the raider - seeks to obtain ownership of enough shares to control another corporation - the target (*Revlon v. McAndrews*, 1986). What renders the activity hostile is when the target's management (and perhaps some of the current owners) resist the

¹³¹ Frank Bruni, “A10 Countries Sign to Join European Union,” *N.Y. Times*, April 17th 2003

raiders' efforts to acquire the firm. For what purpose the raider plans to apply his control of the target company will vary but it is almost always motivated by the raider's financial gain.¹³² Some goals have been to break-up a conglomerate target to sell its component parts at a profit, to streamline and run a more profitable component, to replace an inefficient management or, more prevalently recently, to incorporate the target's complementary assets into the raider's own for greater productivity and future profits. Though the purpose may vary, the method is the same. The raider announces publicly an offer to buy shares from current shareholders at a price greater than the share's current stock market price (the tender offer or bid). The method of payment may vary: cash, stock in the raider's company, bonds, etc., and the terms of the tender may vary: for example, purchase will be exercised only on the condition that enough of the outstanding shares are offered to the raider to give it majority control in the target company. Each of the current shareholders then must decide whether to tender his or her particular shares to this bid offer.¹³³

What makes the situation "hostile" is not the bid for the shares, but whether the management (and perhaps significant minority shareholders) of the target company is against this change in control. In the U.S., the Board of Directors has sole power to run the corporation.

¹³² Jack B. Jacobs, "Comments on Contestability," 54 *University of Miami Law Review* 847 (2000).

¹³³ Ronald J. Gilson & Bernard S. Black, *The Law and Finance of Corporate Acquisitions*, (2d ed. 1995).

The shareholders' power is in their right to determine the members of the Board through voting-rights based on shares owned. A typical target company, however, is a stock exchange-listed firm whose owners by and large constitute a diffuse number of shareholders who are mostly inattentive to issues of management and unlikely to act concertedly if bothering to vote at all. As a result, the current incumbent management usually has default control over the Board's membership and has had so for some time. Sometimes the management in such situations is referred to as the "entrenched" management. Unless the articles of incorporation or bylaws preclude otherwise, if a majority shareholder (one who owns over 50% of the voting shares) now emerges from the takeover efforts, then that shareholder can choose at least the majority, if not all, of the members of the Board and through them control the firm.

It is most likely that the raider, upon successful acquisition of above 50% of the voting shares, will replace the incumbent Board with members of the raider's choosing to pursue the raider's plans for the company. Thus an incentive arises for the incumbent Board to use its powers to thwart the success of the raider's tender offer. Though this is not always the reason for management's resistance to external acquisition of its firm, it is one that is often proffered, at least by the acquiring raider. Other arguments the defending management often gives for resisting the takeover is that the company will be more

profitable remaining with the incumbent management or that the raider is not offering sufficient money for the shares. Though the arguments vary on both sides, the arguments begin when the attempt at acquisition becomes hostile rather than friendly.

With the rise in the number of takeovers in the United States came a greater interest in the legal question of whether it was lawful for the Board to prevent its company's shareholders from accepting a tender offer bid at a premium price. Early on, the courts concluded that despite the possible entrenchment incentives of management, if their predominant motive was in the best interest of the company, the management's action would be upheld.¹³⁴ Of course this raised the legal and economic question of what constituted acting in the best interest of the company and what was persuasive evidence of it.

As hostile takeover attempts increased, the question of permissible activity intensified. Both raiders and incumbent managements developed techniques and strategies to thwart each other, many of which ended up in court for review when the affected party complained. Some strategies used by management were "shark repellants" (rendering the company preemptively undesirable to some potential raider, e.g., by selling off valuable assets or putting in place some restrictive voting requirements), "white knights" (finding another company to outbid the raider but who

¹³⁴ *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964).

was friendly to the incumbent management) and “greenmail” (authorizing the use of company assets to buy the raider’s stakehold of target’s shares at a significant premium on the condition of the raider’s withdrawal.) Some techniques used by raiders were pre-emptive announcements of offers (to prevent management time to react), short time frames for bid offers (to force current shareholders to decide quickly) and two-tiered offers (giving a high price to the first shares tendered and a sub-par price for the last shares in a subsequent forced sale after the takeover’s success and merger with target).

The thrusts and parries of strategies were tested over time in the courts, forcing the courts to define more clearly what was in the best interest of the corporation. The “best interests of the corporation” evolved into the “maximization of (current) shareholder value” and the courts’ subsequent evaluations of actions were based on that criteria: (Did the nature of the offer coercively force the shareholder to sell or to sell prematurely against his or her best long term interests? Was the management defense unwarrantedly preclusive of the shareholder’s opportunity to exercise his or her own judgment as to what was the most valuable course of action?) Statutes at both federal and state levels imposed rules and regulations to affect the course of a hostile takeover effort in order to maximize current shareholder value (disclosure rules, mandatory minimum durations of offers, withdrawal of tenders by shareholders permitted

(so as to accept better offers elsewhere)) and the “best price rule” (all shareholders receive the same best price regardless of changes in bid price to solicit more tenders).) (Williams Act and various state takeover statutes.)

The denouement was the development of rights plans (“the poison pill”) which were amendments to corporate charters that automatically triggered a dilution of a company’s shares if a prelude to a hostile effort occurred. The effect was to make any hostile attempt prohibitively expensive but also gave control to management to revoke “the pill” before it was triggered. This forced any prospective raider to negotiate directly with the target’s management and reach a settlement before making any tender offer could begin. Tested in the courts, “the poison pill” was found lawful as long as the management used it to maximize shareholder value (*Moran v. Household Int’l*, 1985), for example, to secure a better bid from another company. These poison pills have sometimes been seen as contributing to the slowdown in hostile takeovers in the early 1990’s though studies have indicated otherwise (Coates IV, 2000).¹³⁵ Today approximately 85% of the companies listed on exchanges have adopted some form of rights plan. Though it is often suggested that managements have used the pill to extract some protection or compensations for themselves once a takeover is proposed,

¹³⁵ John C. Coates IV, “Empirical Evidence on Structural Takeover Defenses: Where Do We Stand?,” 54 *University of Miami Law Review* 783 (2000).

numerous studies indicate that regardless, the rights plans have increased significantly the premium the departing shareholders receive.¹³⁶

B. Hostile Takeover Regulation in the United States Today

The issues debated in the U. S. today revolve around whether current regulations, statutes and court rulings adequately insure maximization of shareholder wealth while permitting the market forces to discipline firms into maintaining economic efficiency.¹³⁷ Generally, hostile takeovers are viewed as playing an important role in disciplining the participants in the marketplace to be efficient. The underlying thread of all the hostile takeover debates is that given its expense and the offer of above-market-price premium to current shareholders, a hostile takeover effort would not arise if there were not significant economic efficiency gains (and therefore profits) to be made by the acquirer which are not being exploited by current management. Particular attention is paid to the impediments of the poison pill towards that end and how the courts permit its use.¹³⁸ Additional questions are whether the current statutory regulations unduly burden potential acquirers,

¹³⁶ *Id.*; R. Comment & G. Schwert, "Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures," 39 *Journal of Financial Economics* 1 (1995).

¹³⁷ Stephen Choi, "Regulating Investors Not Issuers: a Market-based Proposal," 88 *California Law Review* 279 (2000).

¹³⁸ *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995).

inhibiting their ability to move efficiently in taking over a firm when indeed it is economically warranted.¹³⁹

C. Federal vs. State Control

In effect - legislatively and jurisprudentially - the United States has evolved a standard for the regulation and review of hostile take-over activity that is largely uniform across the states, though the impact of the variations that do exist among the states' takeover statutes are still the subject of debate. At the federal level, the Williams Act of 1968 amended the Securities Exchange Act of 1934, creating federal regulation of hostile takeover activity by both the acquiring and the target firms. The Act focuses on maximizing the information to and the ability of the current shareholders faced with tender offers to make the best decisions with regard to the value of their shares. Subsequent to the passage of the Williams Act, a wave of state level statutes were passed to give directors of target companies powers of resistance to hostile bids beyond the Williams Act. After those statutes were declared by various courts to be unconstitutional on the grounds that they interfered either with interstate commerce or with the federal supremacy of the Williams Act,¹⁴⁰ the U.S. Supreme Court¹⁴¹ nevertheless paved the way for a second wave of state statutes

¹³⁹ Lucian Arye Bebchuk & Allen Ferrell, "A New Approach to Takeover Law and Regulatory Competition," 87 *Virginia Law Review* 111(2001).

¹⁴⁰ See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982).

¹⁴¹ *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 86-87 (1987).

to achieve similar results, by allowing states to couch the provisions empowering target managers in terms of the states' powers to regulate corporate governance. It is these variations among the states and their regulatory impact that remain the subject of debate as to whether there is a need for more circumscribing federal regulation.¹⁴²

More notably, for the concerns of the European Union, regardless of the extent that there are explicit federal rules and jurisprudence as compared with state laws and court decisions, the issue of the impact of hostile takeovers on a particular state's well-being in the U.S. has played little role in any legislation or court opinions. Significant court decisions at the state level, (most notably Delaware) have had a persuasive impact on other state courts' decisions with regard to business law matters, and the conclusions of these courts emphasized maximizing the current shareholders' wealth, whether or not the shareholders were residents of the state. Little concern was given to the impact that a takeover may have on the welfare of the community in which the business resides. Takeovers can sometimes lead to the closure of local plants and layoffs, thereby altering the daily life of the community. Though some court decisions stated that Boards of Directors could consider as a factor the impact on the community in its decision to as

¹⁴² See generally, William C. Tyson, "The Proper Relationship Between Federal and State Law in the Regulation of Tender Offers," 66 *Notre Dame Law Review* 241 (1990).

whether to forestall a takeover offer (sometimes referred to as “stakeholder rights”), the effect of such statements was relatively small. Ultimately, the maximization of the wealth of the current shareholders was the standard that held primacy in the evaluation any of the players’ activities in takeover struggles.

Since maximizing current shareholders’ value in the corporation disregards any community impact and there is no causal or economic link between the shareholders’ welfare and the community’s welfare (except to the extent, in the rare event, that the shareholders themselves are residents), when shareholders decide and are able to accept (if the withdrawal of a poison pill is required) an acquirer’s offer to purchase their shares at a premium above the market price, the struggle is finished. The current shareholders walk away with the proceeds from their sale, the acquirer takes over the firm to its own advantage and the consequences to the employees and community in which the firm resides fall where they might.

During the 80’s, in the heyday of the hostile takeovers in the U.S., news organizations and show business media spotlighted attention on the community fallouts from the waves of mergers and acquisitions. Acquirers were often portrayed as voracious greedy vultures picking on firms in a manner that destroyed a valuable company and/or valued ways of community life and doing so solely for the purpose of making money. One merely needs to think of popular movies on the subject

produced at the time to have a sense of public perception: *Big Business* (1988, Comedy, Lily Tomlin, Bette Midler - a corporate struggle over whether to close down a factory that will also destroy a southern town's way of life); *Other People's Money* (1991, Comedy, Danny DeVito - corporate raider's efforts to acquire a local company that is the lifeblood of a New England community); and the most notorious, *Wall Street* (1987, Drama, Michael Douglas, Charlie Sheen, Martin Sheen - young ambitious stock broker learns that his idol, a major corporate raider, is really and can only be greedy and unscrupulous in order to be successful.) Even in *Pretty Woman* (1990, Julia Roberts, Richard Gere), the hero, a successful, albeit ethically questionable, corporate raider, is psychologically redeemed when he decides to keep one corporate acquisition intact and build it up further instead of selling off its component parts for profit. These movies and others like them mirrored the sentiments held by the United States public at large regarding the disruption to corporations' and people's lives that the waves of corporate acquisitions and mergers had caused. News media gave similarly heart-rendering stories of families' and communities' lives in upheaval as a result of shifts in corporate winds.

Despite the popular sentiment of hostility towards (and fascination with) the corporate raiders and the concern for the disruption that such activities were perceived to cause, court decisions and legislative efforts to regulate hostile

takeover activity did very little to address them. Roberta Romano, a leading U.S. scholar in takeover activity, found little or no evidence that state lobbyists or legislators were ever concerned for the negative impact on their communities or employment as a result of takeover activity. Indeed, their focus seemed to be solely on empowering the incumbent management with the capacity to forestall the success of tender-offer bids, a move she notes has the potential to benefit the incumbent management, who are local and operate in concert, at the expense of shareholders who tend to be dispersed and loosely if at all organized.¹⁴³ Ultimately, the poison pill and similar impediments to shareholder acceptance force the potential acquirer to negotiate with management as to the terms of the acquisition. Management usually suggests that this secures the best price for shareholders, but there is also suspicion that management uses these tools to extract benefits for itself (for example, lucrative severance benefits or promises to keep the management on). It is the extent to which the various state statutes regulating hostile takeovers empowers the incumbent management to thwart shareholders from accepting tender offer bids and effectively extracting compensation for

¹⁴³ Roberta Romano, "Competition for Corporate Charters and the Lesson of Takeover Statutes," 61 *Fordham L. Rev.* 843, 854-56 (1993). She suggests that most state takeover statutes were lobbied for by the management of firms who were either the target or potentially a target for an acquisition bid. She also noted that the local bar (of attorneys) of each state typically supported such legislation as well and she makes the point that once a takeover occurs, the acquirer continues to rely on its own legal counsel and not the ones of the target.

themselves that are the subject of scholarly and policy debates.¹⁴⁴

Nevertheless, but for the issue of management compensation, it is the use of the maximization of current shareholder value as the benchmark for review that renders regulation of takeover activity essentially uniform across the United States, regardless of whether one looks at federal or state regulation.

III. THE EUROPEAN EXPERIENCE

A. The Advent of Cross-Border Hostile Takeovers

Hostile takeovers were not a focus in Europe until 1987 when the Italian entrepreneur Carlo De Benedetti sought to acquire Belgium's crown jewel of business: Société Générale de Belgique. Since then, the incidents of takeovers have increased dramatically¹⁴⁵ not only in crossing

¹⁴⁴ For example, see the articles presented at the University of Chicago 2002 Symposium on Executive Compensation and Takeover which continue the discussion. See, in particular: Jennifer Arlen, "Designing Mechanisms to Govern Takeover Defenses: Private Contracting, Legal Intervention, and Unforeseen Contingencies," 69 *U. Chi. L. Rev.* 917; Lucian Bebchuk, "The Case Against Board Veto in Corporate Takeovers," 69 *U. Chi. L. Rev.* 973; Marcel Kahan & Edward B. Rock, "How I Learned to Stop Worrying and Love The Pill: Adaptive Responses to Takeover Law," 69 *U. Chi. L. Rev.* 871; and Martin Lipton, "Pills, Polls, and Professors Redux," 69 *U. Chi. L. Rev.* 1037

¹⁴⁵ Yvette Merchiers, "De bescherming van minderheden in rechtspersonen" (Protection of the Rights of Minority Shareholders) in X., *Rechtspersonenrecht, Postuniversitaire cyclus Willy Delva* 1998-1999, Gent, Mys & Breesch, 1999, 259-307.

national boundaries but in increasing in financial significance as well. The largest takeover in history was the acquisition by UK's Vodafone of Germany's Mannesmann in 1999. Interestingly, the rise of hostile takeovers in Europe coincides with the EU's effort to harmonize company law throughout its member nations. As a result, considerable attention has focused on hostile takeover regulation not only by scholars but by legislators and policy-makers among the European nations and within the European Union itself. As noted earlier, despite efforts from many quarters, the EU's Takeover Directive was voted down after 12 years of what appeared to be extremely successful negotiations among member nations, reflecting the divergence of opinion among the nations as to how they want to protect and facilitate their companies' activities. As already stated, it was clear that Germany's experience of the takeover of Mannesman by British Vodaphone had a major impact on the vote on the EU directive.

What is important to appreciate is that when a company is taken over by another in an international context, the new owners of the target company are usually not natives of the country of residence of the acquired company. So now Mannesmann, a German company, is no longer German owned, it is owned by a British company. It still employs Germans, it still resides in Germany, but it is now owned by foreigners. Société Generale de Belgique was not only one of the most significant companies in the Belgium economy but it was also a source of national

pride. Though De Benedetti's efforts were thwarted, ultimately Société Générale through the defensive tactic of finding a White Knight now has French owners.

B. The Economic Goals of the EU and Takeover Regulation

1. The Goals in General

One of the oldest economic theories that has driven most modernizations of economies is that freedom of trade produces economic gains for all participants, whether they are individuals, companies, or nations; that each participant to a freely negotiated transaction comes away better off than before.¹⁴⁶ Furthermore, the enhancement of the well-being of some ultimately translates into the enhancement of well-being of many as the increases in income increases purchases from others thereby increasing their income.¹⁴⁷ This leads to economic growth and is considered a hallmark of the benefits of economic efficiency.

One of the underlying motives of the EU has been to create a larger union consisting of member nations, so they can take advantage of the economic power and growth this could generate and improve all member nations'

¹⁴⁶ This goes back as far as Adam Smith's invisible hand theory in his "Wealth of Nations" (Modern Library Edition, 1937).

¹⁴⁷ This is the famous "multiplier effect" first promulgated by John Maynard Keynes in GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936).

economies and well-being. The founders of the EU recognized from the beginning that in order to be successful in their goals, they would need a free flow of capital, goods, services and people among the member nation states, and they included these principles in the agreements signed.¹⁴⁸ The European nations have long been the subject of criticism for their legal and structural impediments to the free movement of economic forces that would take advantage of these potential economic gains.¹⁴⁹ The European nations each had their own restrictions on the flow of resources, goods and services through tariffs, import-export quotas, rules on the structures of companies and immigration laws among other aspects. To overcome the effect of these obstacles, efforts to harmonize of laws among the several nations of the EU also included the goal of reducing the barriers to trade among the member nations.

2. The Takeover Friction

Along with the reduction in barriers to trade also came the reduction in impediments to hostile takeovers that crossed national boundaries. The effect of this on national psychology may not have been adequately anticipated. Different nations now within the EU, as a result of feeling “invaded” by other countries’

¹⁴⁸ Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome], Art. 3.

¹⁴⁹ See generally, Jonathan S. Chester, *The Proposed Regulation of Corporate Tender Offers in the European Community*, 12 N.Y.L. Sch. J. Int'l & Comp. L. 481 (1991).

corporate entrepreneurs, have taken to questioning whether indeed they want to remove all barriers to the free flow of productive resources. Part of what enabled Société Generale de Belgique to fend off the Italian entrepreneur De Benedetti's efforts to acquire shareholder control was the willingness of French executives and officials to join forces with Société Generale because of their own anger at Italian in-roads into ownership of French companies. In the end, \$3 billion was spent collectively by all sides in this takeover war, resulting in De Benedetti's defeat and French ownership of the company. Société Generale itself was only worth about half that amount according to share market prices.

Though the effect of the hostile takeover efforts regarding Société Generale made it clear that the European nations needed to put in place rules and regulations regarding such activities (the UK was at the time the only nation that had any effective regulation of takeover activity), it also made clear that the inherent structure of companies themselves needed to be re-examined, nation by nation, because the structures themselves often prohibited free movements of resources that would serve to "discipline" existing corporations into becoming more efficient.¹⁵⁰ Issues such as the percentage of company ownership that is closed and not publically traded,

¹⁵⁰ The prevailing view as to why Société Generale became a target to a hostile take-over is that it was poorly run with inefficient management. See Jonathan Kapstein et al., How Di Benedetti Botched the "Battle of Belgium", *Bus. Wk.*, Mar. 7, 1988, at 44-46.

the degree of leverage (i.e., the extent the corporation is financed through loans rather than equity), the extent to which large institutional banks finance companies giving them tremendous control over market forces, and regulations limiting shareholders' right to vote, are among the many factors of company structure that are seen to limit the free flow of trade and the concomitant forces of market-induced efficiency in inducing companies to be more productive.

But what is also clear is that national pride has served to introduce new factors for consideration in addition to the goal of achieving unfettered (or at least "less fettered") market dynamics. Making the company structure more liquid and more mobile also introduced it to vulnerability to hostile takeovers. Examining Germany's actions prior to the European Parliament's vote on the EU Directive for regulating Hostile takeovers and Germany's decisions after the vote failed to adopt the directive are instructive, particularly when compared to United States state takeover statutes in conjunction with the United States Williams Act.

3. The Case of Germany and the Failure of EU Takeover Directive

Upon the aftermath of the Vodaphone takeover of Mannesman in 1999, Germany decided to implement mandatory takeover regulation which had not been in place before. Most of the proposed law had goals similar to the

Williams Act in the United States. It sought to make information available to shareholders, to give them reasonable time to decide and other measures. Most of the design was to follow the principle of maximizing current shareholder value. However, one area that was in controversy was the extent to which the target boards could adopt defensive measures in face of a hostile bid. Though the German advisory commission for the act leaned heavily towards restricting board actions to maintaining positions of neutrality during a takeover bid, German politicians, trade associations and members of industry objected fairly strenuously and wanted the scope of the board's powers greatly enlarged to enable them to resist hostile bids. Ultimately a compromise position was adopted which enabled target boards to adopt defensive measures under some limited restrictions and with the caveat that if the measures fell within the scope of authority of the shareholders, the measures had to be approved by the current shareholders. However, these measures could be adopted in advance of any particular bid, allowing the board to take pre-emptive defensive actions and outside the context of an potentially attractive tender offer.

Simultaneously, Germany also focused on what was transpiring regarding takeovers at the level of the European Union. Germany proposed a measure to be included in the discussions forming the European Union's own Takeover Directive. Like Germany's statute, the EU's Takeover Directive was also developing along

United States lines in that the provisions were oriented towards the maximizing of shareholder value. The measure Germany proposed was to permit target boards broad latitude in adopting defensive measures. The proposal was introduced in the latter stages of the EU Conciliation Proceedings but was ultimately rejected. Even though the EU draft had adopted 15 amendments to allow for national differences, it maintained its strongly held position that target boards behave neutrally in the face of a hostile bid. Hence while Germany was developing its own takeover statute that granted powers to target boards to take defensive measures in the face of a hostile bid, the EU was developing a takeover directive under the principle of board neutrality, rejecting suggestions of giving boards more latitude.

Ultimately when the EU Takeover Directive was put before the European Parliament on July 4 2001, the Parliament came to a deadlock decision, Germany being one of the negative votes cast. In the meantime Germany's own Takeover Act, which allowed for defensive tactics by target boards, was passed in the German legislature on November 2001 and came into force in January, 2002.

Currently, there is no EU Takeover Directive in force and a new proposal for the EU is being developed. This proposal still maintains the same basic approach of constraining the target board to neutrality. The one exception to the rule of neutrality the new proposal introduces is that target boards can take defensive measures but

only upon shareholder approval and only after a bid has been made and the shareholders are fully apprised of its nature. This gives little teeth to the power of the board to resist offers. It basically rests on whether the shareholders as a voting group want to reject the current offer and believe that the current board can somehow do better for them, either in securing a better offer or managing the company to yield greater profits. Whether this revised proposal will succeed remains to be seen. It will probably not be put before a formal vote until the year 2005.¹⁵¹

IV. EU'S HARMONIZATION VS. SUBSIDIARITY CONTRA U.S. FEDERAL VS. STATES RIGHTS: TAKEOVER REGULATION

Ironically, the direction of the EU Takeover Directive is precisely consistent with the preferences of the American critics of the current U. S. system. Many U.S. scholars feel the state-level takeover statutes that empower boards of directors to resist offers are not only self-serving for the board at the cost of shareholder wealth but also economically inefficient for the economy as a whole. Such board powers interfere with the market discipline of corporate management: the threat of hostile takeovers induce management to run the company more efficiently or face the possibility of being pushed out. This is at the heart of the criticism of the state takeover statutes

¹⁵¹ For an overview comparison of the German Takeover Statute with the EU Takeover Directive and their respective histories, see Daniela Favoccia, *Recent Developments in German M&A Transactions*, 1347 PLI/Corp 955 (2002).

among the states of the United States and it is the heart of the orientation of the EU Directives in favor of board neutrality.

However, as noted in the beginning of this essay, when the criticism is raised with regard to the United States and the various states' takeover statutes, any concern for protection from owners of another state does not loom very large on the radar screen of considerations. Though some bemoan the loss of a way of life, the concerns for the lost culture or community, seem to fade rather easily. In the United States, these cultures and communities do not have centuries of history behind them. On the other hand, among the European nations, the free flow of resources, services and people often means an invasion by peoples from one culture by ownership of enterprises in another culture. And in this instance the cultures are identities that go back very far.

It is not clear what the fallout of a potential melting pot of such diverse and longstanding cultures will be. Based on economic efficiency arguments, the members of the EU may have to make a choice in the trade-off between more economic well-being and the preservation of national and cultural identity. There is some evidence that countries are indeed willing to sacrifice some economic gains for the preservation of a way of life. Certainly Germany's current takeover regulations empowering the boards of directors to resist hostile bids reflect that choice. But in doing so, they not only risk

some loss of economic advances but also the potential for boards to use these powers for their own economic gain.¹⁵²

IV. HOSTILE TAKEOVER LAW IN THE FUTURE

A. Varying perspectives

Although shareholder wealth maximization is the most widely held paradigm for promoting maximum economic growth and efficiency, it is not altogether clear that it is the only one that will achieve economic ends. Certainly the underlying principle of unfettered markets has over time been modified with constraints to deal with a number of social values such as: preventing pollution, preserving natural habitats, avoiding destructive goods such as (now illegal) drugs, providing health care, a high level research, education, armed services, regulation of communications, securities, private property, public goods, and criminal activity. Though the criticisms of interference in the market-place tend to hold up the paradigm of unfettered markets in the abstract, it is clear that in the reality, no one believes in truly unregulated market places. Which constraints one might support may vary

¹⁵² Despite Mannesmann's strenuous fight against Vodaphone's takeover, ultimately its CEO, Klaus Esser, recommended that the shareholders accept Vodaphone's increased offer. However, Esser was promised 30 million Euros from the new combined entity (1 Euro is roughly \$1 depending on the exchange rates of the moment.) Charles M. Nathan & Michael R. Fischer, "An Overview of Takeover Regimes in the United Kingdom, France And Germany," 1347 *PLI/Corp* 1163, 1195 (2002).

with the political perspective of the individual, but perfect unregulated markets are not in fact held as the ideal path to the best social and economic welfare. This probably holds, in particular, for optimal takeover regulation.

Certainly, there is still enough support for deviations from the perfect shareholder maximization model.¹⁵³ Various analyses focusing on global aspects of takeover regulation span the spectrum of whether the shareholder maximization model will naturally predominate an ultimate universal mode¹⁵⁴ or whether structural and political differences will determine different (sub-optimal) outcomes.¹⁵⁵ Some assert that Europe (and the world) will inevitably gravitate to the U.S. model,¹⁵⁶ while others assert that the initial differences in different economies will perpetuate differences even as nations evolve globally.¹⁵⁷ A number of studies have examined differences in economic structure: the degree of shareholder diffusion compared with concentrated

¹⁵³ In addition to some of the articles mentioned in footnote 8, see also Mark J. Roe, "Can Culture Constrain the Economic Model of Corporate Law?," 69 *U. Chi. L. Rev.* 1251(2002); Mark J. Loewenstein, "Stakeholder Protection in Germany and Japan", 76 *Tul. L. Rev.* 1673 (2002); and Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law", 89 *Geo. L. J.* 439, 458 (2001).

¹⁵⁴ Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law", 89 *Georgetown Law Journal* 439 (2001).

¹⁵⁵ Mark J. Roe, "Chaos and Evolution in Law and Economics," 109 *Harvard Law Review* 641 (1996).

¹⁵⁶ Roberta S. Karmel, "Is it Time for a Federal Corporation Law?," 57 *Brooklyn Law Review* 55, 90 (1991).

¹⁵⁷ Lucian Arye Bebchuk & Mark J. Roe, "A Theory of Path Dependence in Corporate Ownership and Governance," 52 *Stanford Law Review* 127 (1999).

blocks of controlling coalitions¹⁵⁸ or the liquidity of a nation's securities markets and its relationship to concentration of ownership.¹⁵⁹ Some examine the differences in corporate governance: the role shareholders play in direct decision making,¹⁶⁰ the role financial intermediaries play¹⁶¹ and the role unions play.¹⁶² Some look at political and governmental institutions: the impact of EU activities,¹⁶³ the reach of U.S. laws abroad¹⁶⁴ and

¹⁵⁸ William Bratton & Joseph McCahery, "Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference," 38 *Columbia Journal of Transnational Law* 213 (1999); European Corporate Governance Network, "The Separation of Ownership and Control: A Survey of Seven European Countries," (1997).

¹⁵⁹ R. La Porta, F. Lopez-de-Silanes, A. Shleifer, and R. Vishny, "Legal Determinants of External Finance," 52 *Journal of Finance*, 1131 (1997); R. La Porta, F. Lopez-de-Silanes, A. Shleifer, and R. W. Vishny, "Law and Finance," *Journal of Political Economy*, 106 (1998); Jonathan R. Macey, "Measuring the Effectiveness of Different Corporate Governance Systems: Toward a More Scientific Approach," 10 *Journal of Applied Corporate Finance* 16 (1998); Bernard S. Black & John C. Coffee, Jr., "Hail Britannia?: Institutional Investor Behavior Under Limited Regulation," 92 *Mich. L. Rev.* 1997 (1994).

¹⁶⁰ Jeffrey N. Gordon, "Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany," 5 *Columbia Journal of European Law* 219 (1999).

¹⁶¹ Ronald J. Gilson, "Corporate Governance and Economic Efficiency: When Do Institutions Matter?," 74 *Washington University Law Quarterly* 327 (1996).

¹⁶² Guido Ferrarini, "Share Ownership, Takeover Law and the Contestability of Corporate Control," *Company Law Reform in OECD Countries. A Comparative Outlook of Current Trends*, Conference Proceedings (forthcoming 2001).

¹⁶³ Nihat Aktas, Eric de Bodt, & Michel Levasseur, "The Information Impact of the European Commission Interventions In the Field of Merger and Acquisition Monitoring: The Economics Behind Information Flow Coming to the Market," Institut d'Administration et de Gestion, Université Catholique de Louvain, (2001).

¹⁶⁴ Merritt B. Fox, "Securities Disclosure in a Globalizing Market: Who Should Regulate Whom," 95 *Michigan Law Review* 2498 (1997); Merritt B. Fox, "The Political Economy of Statutory

comparisons of different nations' regulations of takeovers¹⁶⁵ or the impact of law itself¹⁶⁶ in providing protection and disruptions. Some analyses consider the transportability of statutory regulation across nations and whether transplants of legal and structural features from one political and economic culture to another will yield success.¹⁶⁷

Debates range over which industrial regimes are superior to others, strong financial intermediaries versus liquid stock market, high concentration versus diffuse ownership, protection of management versus facilitation of raiders.¹⁶⁸ The views as to what forms and contexts are superior have changed over time as once flourishing countries such as Japan and Germany, whose corporate regime was far more institutionally controlled than the U.S., have subsequently fallen are harder times while the

Reach: U.S. Disclosure Rules in a Globalizing Market for Securities," 97 *Michigan Law Review* 696 (1998).

¹⁶⁵ Edward F. Greene, Andrew Curran, & David A. Christman, "Toward a Cohesive International Approach to Cross-border Takeover Regulation," 51 *University of Miami Law Review* 823 (1997).

¹⁶⁶ John C. Coffee, Jr., "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications," 93 *Northwestern Law Review* 641 (1999).

¹⁶⁷ William Bratton & Joseph McCahery, "Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference," 38 *Columbia Journal of Transnational Law* 213 (1999); Roberta Romano, "A Cautionary Note on Drawing Lessons from Comparative Corporate Law," 102 *Yale Law Journal* 2021 (1993).

¹⁶⁸ Geoffrey Miller, "Political Structure and Corporate Governance: Some Points of Contrast between the United States and England," 1998 *Columbia Business Law Review* 52.

U.S.'s economy began to bloom again.¹⁶⁹ With the economic rise and fall and rise again of different countries' economies, each under a different regulatory and structural environment, it is now clear that it is not unambiguous that one model of corporate governance and economic structural environment is superior to another. Furthermore, this conclusive non-conclusion arises especially in the context of evaluating success in purely economic wealth-maximizing terms.

B. The questions that need to be asked

It is important to recognize the possibility that a multiplicity of economic contexts can co-exist internationally¹⁷⁰ without interfering with overall global efficiency. Furthermore it is quite plausible that this co-existing multiplicity of economic regimes may also possess the flexibility to incorporate other social values in conjunction with economic measures of the nation's welfare and to do so without compromising its economy's efficiency to compete internationally. Certainly the suggestions of a number of authors at the very least do not preclude that possibility.¹⁷¹ On a

¹⁶⁹ John C. Coffee, Jr., "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications," 93 *Northwestern Law Review* 641 (1999).

¹⁷⁰ Edward F. Greene, Andrew Curran, & David A. Christman, "Toward a Cohesive International Approach to Cross-border Takeover Regulation," 51 *University of Miami Law Review* 823 (1997).

¹⁷¹ Roberta Romano, "Empowering Investors: a Market Approach to Securities Regulation," 107 *Yale Law Journal* 2359 (1998); Frank J. Garcia, "Protecting Nonshareholder Interest in the Market for Corporate Control: A Role for State Takeover

practical level, it is evident that these other social values play a significant role in determining policy, not only among the several nations of the EU but within the EU itself. Global economic policy considering hostile takeovers will have to take European sensibilities into account.

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The Vicissitudes of Federalist Visions

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There is no doubt that when it comes to European integration, Europe may well benefit from the experiences of others. By the same token, there is no doubt that when it comes to European integration, Europe can learn much from the experiences of the United States. But two preliminary questions might (and perhaps must) be asked: What exactly is it that we want to learn? And why precisely these lessons and not other possible lessons?

In the fifty-odd years of conscious and voluntary European integration, the main way in which Community lawyers have tried to make use of the US experience has been through the importation or transplantation of legal concepts. Yet, the main

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lesson we have learned (if we have learned it to begin with, Which is perhaps not altogether clear) is that whenever we borrow notions from the US, those concepts or doctrines somehow seem either not to work in Europe, or turn out to work quite differently. Our European doctrine of implied powers, e.g., somehow bears little resemblance with its US counterpart. The European version of the doctrine does not insist on implying things from express power grants¹⁷²; nor does it satisfy itself with the already broader international law concept of implying a power from its general

¹⁷²As James Madison famously put it: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it, is included." See James Madison, 'The Federalist No. 44', in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York 1982, first published 1787-1788). International lawyers may recognize the same construction in the dissenting opinion of Judge Hackworth in *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174, at 198.

necessity in light of the purposes of an entity;¹⁷³ far more ambitiously, the European version of the implied powers doctrine calls everything implied that might somehow benefit the integration process. The classic illustration is the *ERTA* case, where the Court derived an implied power from the mere possibility that without it, other powers might possibly at some point in the future be circumvented.¹⁷⁴ While it has, on occasion, settled for a more limited 'American' version (in those cases where a broader concept was not required¹⁷⁵), nonetheless the upshot is that the

¹⁷³This was the version endorsed by the International Court of Justice in *Reparation for Injuries*, *supra* note 2. A slightly more limited version (or so it seems) prevails in US constitutional law: implied powers can be derived from ends and means, but "within the compass of constitutionally enumerated national powers." See Laurence H. Tribe, *American Constitutional Law* (Mineola NY 1988, 2d ed.), at 303.

¹⁷⁴Case 22/70, *Commission v. Council*, [1971] ECR 273, paras. 17, 22.

¹⁷⁵See, e.g., the classic decision in Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, [1954-56] ECR 292; see also joined cases 281, 283-285 and 287/85, *Germany and others v. Commission*, [1987] ECR 3203.

version as internalized by the ECJ is, in essence, different from that developed in the US, so much so that various observers have doubted whether the label "implied powers doctrine" can still meaningfully be applied.¹⁷⁶

The implied powers doctrine then is a doctrine which is given radically different contents in Europe. An example of a doctrine which does not seem to work at all when transplanted is that of pre-emption, perhaps, as has been suggested, due to the Community's heterogeneity.¹⁷⁷ When the

¹⁷⁶So, e.g., Christine Denys, *Impliciete bevoegdheden in de Europese Economische Gemeenschap: een onderzoek naar de betekenis van 'implied powers'* (Antwerp 1990), esp. at 131; Alan Dashwood & Joni Heliskoski, 'The Classic Authorities Revisited', in Alan Dashwood & Christophe Hillion (eds.), *The General Law of EC External Relations* (London 2000), 3-19; also Jan Klabbers, 'Over het leerstuk van de impliciete bevoegdheden in het recht der internationale organisaties', in Hanneke Steenbergen (ed.), *Ongebogen recht: opstellen aangeboden aan prof. dr. H. Meijers* (The Hague 1998), 1-11.

¹⁷⁷See Stephen Weatherill, 'Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community', in David O'Keefe & Patrick

doctrine burst on the academic scene in the 1980s,¹⁷⁸ it was thought useful as a means of describing the power relations between the centre and periphery. Yet, it has all but vanished by now¹⁷⁹: we rarely use the term pre-emption in Community law, and when we do, it is usually as

Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London 1994), 13-33, esp. at 19.

¹⁷⁸The seminal contribution perhaps is Michel Waelbroeck, 'The Emergent Doctrine of Community Pre-emption - Consent and Re-delegation', in Terence Sandalow & Eric Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe, vol. II* (Oxford 1982), 548-580. See also Eugene D. Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis', 29 *Common Market Law Review* (1992), 447-472, and Jan H. Jans, 'National Legislative Autonomy? The Procedural Constraints of European Law', 25 *Legal Issues of European Integration* (1998/I), 25-58.

¹⁷⁹Arguably, the Court of Justice has itself been keen to avoid any rigid doctrine of pre-emption, given judgments such as case 174/84, *Bulk Oil (Zug) AG v. Sun International Limited and Sun Oil Trading Company*, [1986] ECR 559, para. 33: ambiguous legislative silence was construed to form a specific authorization for member states to act.

more or less synonymous to exclusivity.¹⁸⁰ Somehow, we have come to think that the doctrine of pre-emption lacks explanatory power in the EC context; somehow, it has not survived the transplantation to a different setting.¹⁸¹

The reason why US federal notions might not quite work in Europe, or why they become transmogrified beyond recognition, is perhaps obvious, but well worth stating: the US is a federal system; the EC is not. The EC is, to use a tired label, *sui generis*, and is likely to remain an "unprecedented polity."¹⁸² Usually, the label *sui*

¹⁸⁰So, e.g., Jans, *supra* note 8.

¹⁸¹Not surprisingly perhaps; Bermann already observed that the doctrine was so typically federal as to be virtually useless in a different setting. See George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia Law Review* (1994), 331-456, at 358.

¹⁸²See Christian Joerges & Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 *European Law Journal* (1997), 273-299, at 294.

generis is seen as something to be proud of ("we're unique; we're not like anything else") but without practical consequences. Yet, being *sui generis* has of course one important practical consequence: if we are truly *sui generis*, then it follows that the educational value of any model, federal or otherwise, is bound to be limited.

The federal principle has been described, and rather cogently so, as having one overriding characteristic: power is divided between centre and periphery: "... general and regional governments are each, within a sphere, co-ordinate and independent."¹⁸³ While there may be conflicts at the fringes, the basic principle is clear enough and accepted by all participants. In theory, if not necessarily in practice, there are no instances of overlapping powers, or none that cannot be settled through the intervention of a federal supreme court.

¹⁸³K.C. Wheare, *Federal Government* (Oxford 1947), at 11.

There are good grounds to believe that the founding fathers of the Community had something similar in mind,¹⁸⁴ yet practice proved too resilient: the situation in the Community is not so much characterized by a clear division of powers, but rather by an unclear labyrinth of powers,¹⁸⁵ the effects of which are aggravated by the circumstance that even where a power division is relatively clear, it is none the less possible,

¹⁸⁴Note the ease with which Monnet's biographer can casually remark that federation must have seemed "the natural response of former great powers to a catastrophic decline in fortune." See Francois Duchêne, *Jean Monnet: The First Statesman of Interdependence* (New York 1994), at 181.

¹⁸⁵See Weatherill, *supra* note 7; with respect to the EC's external relations, see Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law* (Oxford 1999), 137-175. Scharpf observes that the Community and its members share powers at least when exercising those powers, and suggests that this is closer to the German federal model than to the US model. See Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', 66 *Public Administration* (1988), 239-278.

perhaps even likely, that in exercising a power, the member state may end up frustrating Community action or, conversely, that by exercising a Community power, the Community may unwittingly (or wittingly) step on the toes of the member states.¹⁸⁶ Perhaps the best example thereof resides in the circumstances giving rise to the Court's decision in *SPUC v. Grogan*¹⁸⁷: in exercising its right to regulate abortion, Ireland nonetheless had to recognize the possibility that its regulation of abortion (clearly a member state power) might affect the free movement of services and thus violate Community law.¹⁸⁸ In other words: the Community system is characterized by

¹⁸⁶This is further explored in Jan Klabbers, 'Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis', in Enzo Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague 2002), 151-175.

¹⁸⁷Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and others*, [1991] ECR I-4685.

¹⁸⁸See Gráinne de Búrca, 'Fundamental Human Rights and the Reach of EC Law', 13 *Oxford Journal of Legal Studies* (1993), 283-319.

intertwining and interlocking powers, rights and privileges, rather than by any transparent division of power.

With this in mind, it might be the case that there is not a whole lot to be gained from looking at the US experience. If the EC is indeed, as the Court so proudly proclaimed in *Van Gend & Loos*¹⁸⁹ and *Costa v. ENEL*,¹⁹⁰ a new legal order, unlike any other, then perhaps Community law should try to create new legal concepts and doctrines for this new legal order. One contribution to the legal vocabulary has already been made: the phenomenon of mixity.¹⁹¹ Where federations typically centralize foreign affairs and provide for some input for their constituent parts either *ex*

¹⁸⁹Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Fiscal Administration*, [1963] ECR 1.

¹⁹⁰Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

¹⁹¹See generally Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (The Hague 2001)

ante or *ex post*, the Community has developed an entirely different model, in which the constituent parts play as prominent a role as the Community itself.¹⁹² While mixed agreements may create problems of a different nature,¹⁹³ at least politically they seem to work.

In short, we should be careful in borrowing legal concepts and institutions from other legal systems, and might well consider Michael Ignatieff's penetrating observation made a few years ago that most federations seem to be in serious trouble: and this even includes relatively stable democracies such as Canada.¹⁹⁴

¹⁹²As recognized by Joseph H.H. Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle', reproduced in J.H.H. Weiler, *The Constitution of Europe* (Cambridge 1999), 130-187.

¹⁹³For instance when it comes to international responsibility. For a discussion, see Martin Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?', 70 *Nordic Journal of International Law* (2001), 373-402.

¹⁹⁴Michael Ignatieff, *Blood and Belonging* (London 1994), at 110.

Now if we should indeed be careful in borrowing legal concepts, is there then nothing relating to the constitution of the political order of the US which can be instructive?¹⁹⁵ I would like to suggest that there is one level of thought where the American experience can be very relevant, and that is the level which ought to precede legal transplantations: the level of political theory or, if you will, constitutional theory.

The political theorist Larry Siedentop suggested recently that our current attempt to look for guidance to the US is not the first, but actually the second time we have ogled and admired the US experience as something which could serve as a model for Europe. The first time occurred almost two centuries ago, when Alexis de Tocqueville investigated US federalism "as a model for reforming one nation-state [France - JK] which

¹⁹⁵Of course, all this leaves unaffected the possibilities of drawing wise and important lessons from, say, US criminal law, or US tax law, or US intellectual property law.

had taken the despotic form of a continental empire."¹⁹⁶ And inspired by this guidance, he reached the conclusion that the proper recipe for France was not to re-invigorate a decaying aristocracy (as Montesquieu had advocated), but to somehow change the entire structure of governance in an attempt to balance central power and local autonomy. In Siedentop's words: "American federalism seemed to offer a new means of combining central government and local autonomy in a levelled or democratic society."¹⁹⁷

In De Tocqueville's wake, perhaps the most extensive work in political theory on the virtues of American federalism can be found in the writings of Hannah Arendt, in her usual somewhat roundabout manner. For Arendt, the overriding characteristic of US politics was the separation between 'the political' and 'the social'. Arendt observed that already the American revolution had one rather peculiar feature when compared to

¹⁹⁶Larry Siedentop, *Democracy in Europe* (London 2000), at 7.

¹⁹⁷*Ibid.*

the French revolution or pretty much any other revolution. The problem at issue in the American revolution was not the eradication of poverty or some suchlike problem, but was a political problem: the American revolution "concerned not the order of society but the form of government."¹⁹⁸ Indeed, the American revolution, to Arendt, was "the only revolution in which compassion played no role in the motivation of the actors."¹⁹⁹

The US was to retain this peculiar quality of a society where the political sphere was largely isolated from the social sphere for quite some time. Where elsewhere (and not least in Europe) the conduct of politics had become tainted by all sorts of mundane concerns (clashes of interests more than anything else), US politics retained a form of purity in its concept of politics. In the US, according to Arendt, politics was still what it should be: a continuous debate, necessitated by

¹⁹⁸Hannah Arendt, *On Revolution* (London 1990, first published 1963), at 68.

¹⁹⁹*Ibid.*, at 71.

the plurality of human existence, on how best to organize our lives together. Indeed, in 1946, she could still approve of Karl Jaspers referring to the US as "lucky America": the US was still a place "where, because of a basically sound political structure, so-called society has still not become so powerful that it cannot tolerate exceptions to the rules."²⁰⁰

Arendt's distinction between 'the social' and 'the political' has met with some criticism²⁰¹, and may have occasionally inspired her to write pieces which would provoke debate and criticism almost regardless of their contents²⁰², but may

²⁰⁰Lotte Kohler & Hans Saner (eds.), *Hannah Arendt - Karl Jaspers: Correspondence 1926-1969* (San Diego 1992, Kimber & Kimber trans., first published 1985), at 30: letter to Jaspers, 29 January 1946.

²⁰¹See, e.g., Hanna Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt's Concept of the Social* (Chicago 1998).

²⁰²So, e.g., her well-known 'Reflections on Little Rock', first written in 1959 and reproduced, with a reply to critics, in Peter Baehr (ed.), *The Portable Hannah Arendt* (New York 2000), 231-246. For a charitable interpretation, see Julia Kristeva, *Hannah Arendt* (Princeton 2001, Guberman trans.), at 114.

nonetheless prove instructive. The one thing Arendt admired about US politics (and thus, by extension, about US federalism), was its capacity to think strictly in terms of public life, and to keep public life separate from private life.²⁰³ This was, to her, the hallmark of politics: to retain a public space, an *agora* if you will,²⁰⁴ in which people are free and equal and can together decide on their common futures.²⁰⁵ In their economic and social

²⁰³How strict exactly this separation was historically may be a matter of taste and personal judgment. It has been suggested, e.g., that early American discussions on the abolition of slave trade and slavery were influenced in no small measure by the interests of participants. See Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York 2000), ch. 3.

²⁰⁴A different, but sufficiently similar concept was launched recently by Zygmunt Bauman, *In search of politics* (Cambridge 1999).

²⁰⁵Note also her characterization of international politics: "Only foreign affairs, because the relationships between nations still harbor hostilities and sympathies which cannot be reduced to economic factors, seem to be left as a purely political domain." See Hannah Arendt, 'What is Freedom?', reproduced in her *Between Past and Future* (New York 1977, first published 1961), 143-171, at 155.

lives, people are neither free nor equal: some are rich, some are poor, some own factories in which others have to work, and some are hugely talented whereas others are not. Still, at least in the public sphere freedom and equality could be guaranteed, but on one condition: and that is that the political process remain shut off from social and economic concerns, that the world of politics remains separated "from the life-world of labor and subsistence."²⁰⁶ As soon as those concerns enter the political process, then freedom and equality will "be surrendered to necessity."²⁰⁷ The needs or interests of one or another group will take over. As one observer summarizes: "It is in the public space in which we enter as equals under the rule of law that the space is created for politics and a form of power based on plurality rather than sameness, on common citizenship rather than particular identity."²⁰⁸

²⁰⁶Jeremy Waldron, 'Arendt's Constitutional Politics', in Dana Villa (ed.), *The Cambridge Companion to Hannah Arendt* (Cambridge 2000), 201-219, at 206.

²⁰⁷Arendt, *supra* note 28, at 60.

²⁰⁸James Bohman, 'The Moral Costs of Political Pluralism', in Larry May & Jerome Kohn (eds.),

An inherent element in the success of US politics, to Arendt, was its federal structure: it was only the federal structure which allowed the founding fathers to retain their *pouvoir constituant*.²⁰⁹ Without the federal structure, the connection between the grass-roots level and the nationwide level would have been lost; what federalism stands for is "a new type of republican government which would rest on 'elementary republics' in such a way that its own central power did not deprive the constituent bodies of their original power to constitute."²¹⁰

There is, then, an intimate connection in Arendt's work between politics proper, and federalism.²¹¹

Hannah Arendt Twenty Years Later (Cambridge MA 1996), 53-80, at 67.

²⁰⁹Arendt, *supra* note 28, at 166.

²¹⁰*Ibid.*, at 267.

²¹¹Indeed, so much so that she has been criticized for not showing enough awareness of the parochialism which might accompany federal divisions. So, e.g., John McGowan, *Hannah Arendt: An Introduction* (Minneapolis 1998), at 93.

Politics proper presupposes relatively small units, where those interested in the public realm, in "public happiness", can come together and be noticed. Those small units can then be brought together in a federal structure.²¹²

Where now does all this lead us? After all, Arendt herself has never explicitly devoted much time and attention to European integration, except for the odd exhortation. Thus, she wrote to Karl Jaspers in 1954 that she'd be "very pleased" with the creation of a European Defence Community,²¹³ and had indeed earlier confessed to Jaspers to "cling fanatically to hope for a united Europe."²¹⁴ But she never specifically addressed the question

²¹²Siedentop, *supra* note 26, argues along similar lines, observing that federalism facilitates the bringing together of the public and private realms (at 63) and "makes it possible to combine the advantages of small states and of large states, without at least some of the disadvantages attaching to each." (at 26).

²¹³Arendt - Jaspers Correspondence, *supra* note 30, at 237: letter to Jaspers, 7 February 1954.

²¹⁴*Ibid.*, at 168, letter to Jaspers, 4 March 1951.

what this united Europe might look like, or how it might work.

Still, her writings do contain a few useful insights. An obvious one is about the value of federalism: for Arendt, it is only a federal structure which might facilitate the proper conduct of politics, yet, with respect to Europe, she could remark with some justification that the federal principle was "practically unknown in Europe and, if known, nearly unanimously rejected."²¹⁵

That raises an awkward question: in western Europe, only the Germans and the Belgians have embraced federalism,²¹⁶ and it would seem plausible to explain at least the German case in

²¹⁵Arendt, *supra* note 28, at 246.

²¹⁶Lenaerts adds Spain, while realizing the unorthodoxy of doing so. See Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990), 205-263, esp. at 251. At any rate, the Spanish version of federalism is, not unlike the Belgian version, an attempt to prevent the state from falling apart.

light of the particular circumstances in which Germany found itself after 1945; indeed, the present German federation owes much to post-war Allied plans.²¹⁷ The Belgians, in turn, while arguably still fragmenting, have adopted federalism only as a means of last resort, as a type of band-aid to keep the nation together and hope that the wounds don't start to fester or get worse.

This concentrates attention on the question whether Europeans are temperamentally and culturally inclined or capable to think in terms of federalism as a model to be followed, and perhaps the conclusion must be reached that such is not lightly to be presumed. Both the German and Belgian experiences seem to suggest that federalism is regarded not so much as something positive, something to strive for, but rather as something to fall back on if all else fails. And

²¹⁷Then again, Germany has had a relatively long decentralized history, albeit one with occasionally 'strong unitary characteristics'. See Hans-Jochen Vogel, 'Die bundesstaatliche Ordnung des Grundgesetzes', in Ernst Benda, Werner Maihofer & Hans-Jochen Vogel (eds.), *Handbuch des Verfassungsrechts* (Berlin 1983), 809-862, at 812.

recent experiences elsewhere in Europe (Czechoslovakia, Yugoslavia, the USSR) will not have done much to improve the image of federalism.

The curious thing is that Europeans generally do not seem to realize the double-edged nature of federalism. They usually regard it, exemplified by speaking in terms of the "f-word", as something which stands for centralization, something which can be applauded, as the Dutch used to do, or rejected, as the English do. Occasionally, but rarely in public debate, might people suggest that federalism is not about centralization but rather about firmly locking a decentralized structure into place. Thus, Siedentop asserts rather venomously that the tradition

"which once inspired Montesquieu and the American federalists today produces spokesmen who seem not to understand that federalism seeks to disperse authority and power between the centre and periphery, creating a political system which protects

local autonomy in the absence of
aristocracy.²¹⁸

But the tricky thing is, of course, that federalism can be regarded as both, can be regarded as centralizing as well as decentralizing.²¹⁹ It is this decentralizing aspect which both the Germans and Belgians have seized on domestically; whereas it is federalism's centralizing potential which scares so many Europeans when thinking of the European Union.

²¹⁸Siedentop, *supra* note 26, at 79. Empirical support for Siedentop's position can be found in Herbert Wechsler, 'The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government', in Mark V. Tushnet (ed.), *Constitutional Law* (Aldershot 1992), 397-414; first published in *54 Columbia Law Review* (1954), 543-560.

²¹⁹Which is related, but not quite identical to the distinction Lenaerts (*supra*, note 46) makes between integrative and devolutionary federalism. For him, the two seem mutually exclusive, and the main ground for distinction is that they seek different goals. I would argue, rather, that my point is descriptive rather than normative and, more importantly, that the two are intimately related.

If the federal principle is something the Europeans have a hard time embracing wholeheartedly, it is also doubtful whether the second insight Arendt offers will be warmly welcomed in Europe or, indeed, has any chance to begin with. To create Europe as a body politic (whether organized along federal lines or differently) would seem to presuppose two related things, if we follow Arendt's line of thought. One is, that people have a certain engagement with the public realm; that people feel a certain responsibility for the common wealth. Second, and related, is that they try to isolate considerations relating to everyday life and subsistence, or relating more plainly to their own interests, as much as possible.

For Arendt, a proper political solution is not one that combines all contending interests, but rather one that combines contending opinions. Yet, the European political tradition has generally been interest-based. Traditionally, Europeans are brought up with stories about clashes between various estates (nobility, clergy, burghers), which

presupposes that politics is a matter of interests not opinions.

Less traditional, but perhaps equally forceful, it was particularly in Europe that the concept of the Marxian class struggle has gained any popularity, and it is still taken seriously in some European academic circles. Again, the very idea presupposes that politics is a matter of interests; the very structure of Marxism holds that politics is a mere reflection of economic power relations.

Other leftist conceptions of politics do away with the cherished distinction between the public and the private realm: the feminist battle-cry that the personal is political may, ironically, have resulted in a fading of the public realm into the private realm with the eventual result that nothing is really 'political' anymore.

And even liberalism, so ostensibly value-neutral, still regards politics as something inherently tied-up with economics, with its more extreme versions advocating that decision-making is best left to the market. In short, where Arendt's

concept of politics is radically non-interest-based, if there is one thing characterizing European politics throughout the centuries it is precisely the interest-based nature of politics in Europe.²²⁰

This again raises a similar question to the one raised by the federal principle: are the Europeans capable of developing and creating the type of public spirit which Arendt, at least, would insist on as a precondition for successful politics? At the least, such Arendtian thinking seems to go against our cultural grain. We may be so used to thinking of politics as having to do with our interests that it does not even occur to us to think in other terms.²²¹

²²⁰Similarly, Siedentop (*supra* note 26) observes a "legacy of class-consciousness and of class conflict" (at 230), and contrasts this with the US political scene, dominated from the beginning by a middle-class and thus largely devoid of status differences (at 228).

²²¹Grimm also questions the possibility of there being a European public space; for him, though, this would predominantly be due to Europe's linguistic diversity which renders political communication unlikely. In these circumstances, so he cautions, federalism is not an "immediately desirable goal". See Dieter Grimm, "Does

Both these Arendtian considerations seem to lead inexorably to the conclusion that there is little chance that Europe will somehow follow the federal American model: the federal principle is deemed too scary, and the type of public spirit which, at least following Arendt, characterized American politics for so long, is rather alien to European conceptions of politics. If that's the case, then it follows that there is little to learn from the American experience. Or is there?

Obviously, if we accept that Europe is not likely to follow the US model lock, stock and barrel, there is little point in importing legal notions lock, stock and barrel. As already noted, federal doctrines will either develop their own distinct meaning in Community law (as with the implied powers doctrine), or simply have a problem fitting the Community's peculiar structure (as with the doctrine of pre-emption).

Europe Need a Constitution?', 1 *European Law Journal* (1995), 282-302, at 296, 297.

But there are none the less two important potential lessons (courses, perhaps). One is more or less policy oriented: in systems where government is somehow divided, similar problems may occur, despite the fact that the precise division of powers between those systems may be quite different. Thus, even though the EC is not a federation and might not develop into one, and even though the way in which powers between centre and periphery are divided is unclear at best and downright messy at worst, it may none the less be possible to draw practical lessons from comparisons with other systems of divided government, such as the US but also a host of other examples. Why not study Canadian or Australian federalism, or even the Austrian-Hungarian monarchy?²²² It is not always necessary to look only toward the US: a good example is the powerful phenomenon of the "joint-decision trap" which came up by looking at the EC and the German federal system.²²³

²²²A fine but rare example of what I have in mind is Weiler, *supra* note 22.

²²³Scharpf, *supra* note 15.

The second broad lesson is this, and goes back to my earlier characterization of the difference between a federal system and the EC. A federal system, as noted, is typically (idealtypically perhaps) characterized by divided authority, whereas in the Community, authority is rather shared. What might be useful to find out is the extent to which federal systems develop (or may develop) into similar power-sharing entities. I could very well imagine that in the US, Indiana say, or Maryland, might discover that when legislating within their proper powers, they might nonetheless frustrate the exercise of central authority: how, then, is such a situation handled in the US?

In short, the main lessons to learn have to do with the workings of the legal or constitutional order, rather than with federalist legal doctrines or concepts. Indeed, importing the latter may well run the risk of being mistaken for political arrogance on the part of Europe's political elites. After all, the conscious borrowing of notions from federal legal systems presupposes that the

borrower either considers itself a federation or aspires to become one. Yet, Europe is not a federation, and might not become one anytime soon (or at all).²²⁴ With this in mind, it might be more useful to try and develop uniquely European legal concepts worthy of a new legal order, and humbly accept that the gaze across the Atlantic ought not to be over-ambitious.

²²⁴Siedentop, *supra* note 26, at 231, is somewhat more optimistic when he concludes his study by saying: "Federalism is the right goal for Europe. But Europe is not yet ready for federalism."